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13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE DISTRICT OF ARIZONA

15 Equal Employment Opportunity
16 Commission,

17 Plaintiff,

18 and

19 Doretta Benally, Roxanne Cahoon,
20 Freda Douglas, and Elva Begay,

21 Plaintiff-Intervenors,

22 vs.

23 Richard O. Kidman and Shauna
24 Kidman, d/b/a RD's Drive In/Exxon,

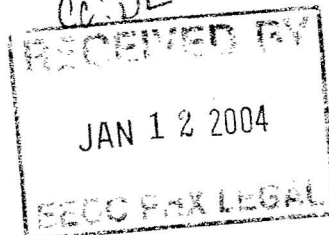
25 Defendants.

CIV 02-1911 PCT SMM

**PLAINTIFF AND INTERVENORS'
MOTION TO ENFORCE
SETTLEMENT AGREEMENT AND
MEMORANDUM OF POINTS AND
AUTHORITIES**

26 Plaintiff-Intervenors, Doretta Benally, Elva Begay, Roxanne Cahoon, and
27 Freda Douglas, and Plaintiff, the Equal Employment Opportunity Commission
28 ("EEOC" or "Commission"), move this Court for an Order (1) enforcing a settlement
of this litigation reached at the September 3, 2003 settlement conference before
Magistrate Judge Stephen L. Verkamp and (2) requiring the Defendants to take all

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DISTRICT OF ARIZONA



1 necessary and proper steps to effect and comply with that compromise agreement.
2 If the Court is unable to make the decision to enforce the settlement on the
3 pleadings, the Plaintiffs respectfully request that the Court set an evidentiary hearing
4 to resolve this matter. See *Callie v. Near*, 829 F.2d 888 (9th Cir. 1987).

5 Although no disputed issues of material fact exist regarding the material terms
6 and conditions of the settlement agreement, Defendants have indicated that they
7 now desire to back out of that agreement. Consequently, Plaintiffs seek
8 enforcement of the parties' settlement agreement. This Motion is supported by the
9 Memorandum of Points and Authorities set forth below.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. Statement of Facts**

12 On September 3, 2003, a settlement conference in this action was held before
13 Magistrate Verkamp in Flagstaff, Arizona. (Min. Order, Dkt. No. 106). In attendance
14 were Defendants Richard Kidman and Shauna Kidman; their son Stephen Kidman;
15 Defendants' counsel, David Selden; Pro-English official Robert Park; Intervenor
16 Doretta Benally, Elva Begay, Freda Douglas, and Roxanne Cahoon; Intervenor's
17 counsel, Franklin Hoover; and EEOC counsel Mary Jo O'Neill and David Lopez.
18 (Declaration of Mary Jo O'Neill ("O'Neill Decl."), attached as Exhibit A, ¶ 5).

19 By the end of the day, on September 3rd, the parties had agreed to the
20 following material terms:

- 21 1) The matter would resolved with a Consent Decree filed in court;
- 22 2) The Kidmans would pay Doretta Benally, Elva Begay, Freda Douglas,
23 and Roxanne Cahoon a total of \$7,400 in cash over the course of
24 sixteen months to resolve their claims;
- 25 3) The Kidmans would receive training on Navajo culture, language and
26 tradition or "paragraph 10";
- 27 4) The parties agreed to a general injunctive paragraph or "paragraph 2";
- 28 5) The Kidmans agreed to discontinue the English-only policy, as hand

1 drafted by Mr. Selden and Mr. Lopez, which is also know as
2 "paragraph 15";

3 6) The Kidmans and EEOC agreed to sponsor a community symposium
4 in Page, Arizona on community race relations;

5 7) The parties agreed to execute a "Joint Statement" signed by all parties,
6 which was handwritten by all counsel on September 3rd;

7 8) The parties agreed not to condition monetary amount on waiver of
8 rights other than those at issue in this lawsuit;

9 9) All parties agreed that each would assume responsibility for their own
10 attorneys' fees;

11 10) The Kidmans agreed to the posting of a Notice at RD's Drive-In; and

12 11) The Kidmans agreed to hold quarterly staff meetings with all staff.

13 (O'Neill Decl. ¶ 10.)

14 The following facts reflect the negotiations that resulted in an enforceable
15 settlement agreement.

16 At the beginning of the settlement conference, the Commission presented a
17 proposed Consent Decree for discussion. (O'Neill Decl. ¶ 6.) Following the morning
18 of negotiations, Ms. O'Neill revised the agreement during the lunch hour, based
19 upon the negotiations, and recirculated it. The parties used this revised draft to
20 continue their negotiations. (O'Neill Decl. ¶ 6.)

21 During the negotiations, the Commission drafted a provision to discontinue
22 the Defendants' English-only policy but would permit a different policy to be
23 reinstated, provided certain conditions were met; this provision was known as
24 "paragraph 15." Mr. Selden made some revisions to Mr. Lopez's draft of paragraph
25 15 and drafted an insert. This hand-written paragraph was finalized and agreed
26 upon by all parties and included Mr. Selden's and Mr. Lopez's handwriting. (O'Neill
27 Decl. ¶ 7, and Attach. 2).

28 During the negotiations, Mr. Lopez drafted and circulated a letter of apology

1 to be signed by the Kidmans. Defendants revised the "letter of apology" and restyled
2 it as a "joint statement" to be signed by Defendants and Intervenor's. The revised
3 joint statement was circulated to all parties and attorneys. Plaintiff, Plaintiff-
4 Intervenor's, and Defendants made additional revisions and, by the late afternoon,
5 the parties had agreed upon a final, mutually-acceptable, handwritten joint
6 statement. (O'Neill Decl. ¶ 8, and Attach. 3).

7 The final stage of negotiations concerned monetary compensation. At the end
8 of the day, with the assistance of Judge Verkamp, and a commitment by Intervenor's
9 counsel to not seek attorney's fees, the Kidmans agreed to pay the four women a
10 total of \$7,400 over the course of sixteen months. Once this final issue was
11 resolved, the parties informed Magistrate Verkamp that they had reached an
12 agreement. (O'Neill Decl. ¶ 9).

13 Late in the afternoon, toward the end of the settlement conference, together,
14 Ms. O'Neill and Mr. Selden reviewed each paragraph of the Consent Decree, the
15 handwritten inserts, and the exhibits. Ms. O'Neill then photocopied the Decree, the
16 hand-written inserts, and the exhibits, and provided copies to Mr. Selden and Mr.
17 Hoover. (O'Neill Decl. ¶ 10). At that point, the parties shook hands and
18 photographs were taken of the Intervenor's and the Kidmans, reflecting the parties'
19 resolution of the case. There was also a photograph taken of all the parties and
20 Magistrate Verkamp. (O'Neill Decl. ¶ 11, and Attach. 4). It was clear to everyone
21 present that the case was settled.

22 On September 4, 2003, Magistrate Verkamp entered a minute order indicating
23 the case had settled. (Dkt. No. 106). That same day, Mr. Selden sent the EEOC an
24 e-mail stating "we have a settlement" and suggesting that the parties advise this
25 Court of that fact and vacate the status conference scheduled for September 22,
26 2003. (O'Neill Decl. ¶ 12, and Attach. 5).

27 On September 4, 2003, the Commission sent Defendants a typed "clean"
28 Consent Decree reflecting the content of the Consent Decree, incorporating

1 handwritten inserts, which had been copied and circulated at the end of the
2 settlement conference on September 3rd. (O'Neill Decl. ¶ 13, and Attach. 6). After
3 receiving the typed Consent Decree on September 4th, Mr. Selden spoke with Ms.
4 O'Neill and Mr. Lopez on the telephone about the Consent Decree and the process
5 for getting the agreement signed. Mr. Selden indicated that he would send the
6 Decree to his clients for signature and said he would try to get back to the
7 Commission before he left on vacation. Ms. O'Neill gave Mr. Selden her home
8 phone number in case he had any questions. Mr. Selden further indicated that,
9 although he was scheduled to leave on vacation, he would remain in contact with his
10 office for the first week of vacation and confirmed that he expected to get the Decree
11 signed and finalized. During that conversation, the only issue Mr. Selden raised
12 about the Consent Decree was the separate paragraph concerning the Navajo
13 language class.¹ (O'Neill Decl. ¶13). Although he had read the Consent Decree, Mr.
14 Selden did not raise any other issue about the Decree sent to him on September
15 3rd. (O'Neill Decl. ¶ 13).

16 On September 16, 2003, Defendants once again confirmed that the case had
17 been settled. Christine Bailey, an attorney with Defendants' law firm, stated in an
18 e-mail: What "I can assure you of is that Defendants agree that a settlement was
19 reached before Judge Verkamp" and ..."it appears that there is no disagreement that
20 a settlement had been reached before Judge Verkamp." (O'Neill Decl. ¶ 15, and
21 Attach. 8).

22 On September 22, 2003, a status conference was held before this Court.
23 During the conference, Mr. Selden stated that a "settlement conference was held
24 under the supervision of Judge Vercamp [sic] on Wednesday September 3, 2003,
25

26
27 ¹ The Commission did not pursue this issue because it was not material as
28 there was another provision covering Navajo culture and language. See Attachment
1, ¶10

1 and at that point I think the parties reached what they believed to be a settlement.”
2 (Transcript of Hearing, September 22, 2003, attached as Exhibit C) Mr. Selden
3 added only that the parties may have a “misunderstanding” regarding whether
4 Defendants agreed to take Navajo language classes at the local community college.²
5 (Ex. D) No other concerns about the Decree were expressed by Defendants’
6 counsel at the hearing, even though he had the Decree since September 3rd. (See
7 Tr. of Hr’g before Judge Stephen G. McNamee, Sept. 22, 2003, pp Ex. C).

8 Despite Mr. Selden’s statements at the September 22, 2003 Status
9 Conference, Defendants sent the Commission a draft Decree on September 24th,
10 substantially revising the agreement the parties reached at the settlement
11 conference, which had been memorialized in the Consent Decree, typed by the
12 Commission the day after the conference, and given to Defendants for signature.
13 (O’Neill Decl. ¶17 and Attach. 9). The Defendants’ new draft included substantial
14 changes to material terms of the parties’ agreement and the addition of an
15 attachment expressly rejected during the settlement negotiations and inconsistent
16 with agreed-upon Paragraph 15, the provision which discontinued the English-only
17 policy. (O’Neill Decl. ¶ 18). Defendants’ counsel did not raise any concerns about
18 the Commission’s Decree not reflecting the agreement reached; he merely indicated
19 that he had made changes. According to Mr. Selden, “[t]he reasons for some of the
20 revisions are based in part on both the substance and tone of Franklin’s
21 communications with my office during my recent vacation out of the country.”
22 (O’Neill Decl. ¶ 19). He added, “[t]he objective is to reduce the opportunities for
23 future misunderstandings and conflict.” (*Id.*). Mr. Selden also requested that the
24 EEOC share the text of any intended press release prior to the execution of the
25

26
27 ² The Commission, in its October 23rd version of the Consent Decree, made
28 the modification to the Decree requested by Defendants on September 24th. See
O’Neill Decl. 27 ; Attach.17).

1 Decree, a requirement not raised nor negotiated during the September 3, 2003
2 Settlement Conference. (O'Neill Decl. ¶¶ 19, Attach. 11). Thus, this issue was
3 raised for the first time on September 24.

4 On September 25, 2003, Mr. Lopez sent Mr. Selden an e-mail message noting
5 that Mr. Selden had made material changes to the Decree and inquiring as to
6 whether Defendants intended to honor the agreement reached on September 3,
7 2003. O'Neill Decl. ¶ 20, Attach. 12).

8 On September 30, 2003, Mr. Selden wrote a letter to the Commission and
9 characterized the Commission's e-mail message as a "material breach by the EEOC
10 and by the plaintiffs of the purported agreement that you allege to have been
11 reached in Flagstaff." (O'Neill Decl. ¶ 21, Attach. 13). Without any factual specifics,
12 Mr. Selden alleged that "plaintiffs" personally engaged in conduct that is inconsistent
13 with the "settlement concepts" before Judge Verkamp and that "[t]heir failure to
14 exercise judgment and restraint . . . does not bode well for any resolution. " (*Id.*)
15 O'Neill Decl. ¶ 22, and Attach. 13).

16 On October 6, 2003, counsel for the parties met at Mr. Selden's office. At that
17 meeting, Mr. Selden twice said that Defendants "did not intend to honor the
18 agreement reached on September 3, 2003." (O'Neill Decl. ¶ 23). When pressed
19 about why the Defendant's had changed their mind about settling the case, Mr.
20 Selden, for the first time, raised the issue of how to phrase the paragraph in which
21 the Kidmans promised to pay the Plaintiff-Intervenors \$7,400. The original Decree
22 had contained "judgment" language in. Ms. O'Neill responded to Mr. Selden at the
23 October 6th meeting that the Commission did not regard the judgment language as
24 a material provision of the agreement and, consequently, the Commission was
25 willing to reword those paragraphs. (O'Neill Decl. ¶ 23). The Commission and
26 Intervenors suggested scheduling a conference with Magistrate Verkamp to assist
27 with the after-the-fact issues raised by Mr. Selden. Mr. Selden agreed to seek
28 assistance from Magistrate Verkamp and recommended that Mr. Kidman participate

1 also. Mr. Selden subsequently arranged a conference call with Magistrate Verkamp
2 for October 22, 2003. (O'Neill Decl. ¶ 23).

3 On October 9, 2003, Mountain States Legal Foundation³ announced in a press
4 release that it was going to represent Defendants in this action. (O'Neill Decl. ¶ 24,
5 Attach. 14).

6 On October 15, 2003, the Commission wrote a letter to confirm that
7 Defendants did not intend to honor the September 3, 2003 agreement. O'Neill Decl.
8 ¶ 25, Attach. 15).

9 On October 20, 2003, a second status conference was held before this Court.
10 Defendants were represented by new counsel, the Mountain States Legal
11 Foundation ("Mountain States"). (See Tr. October 20th of status conf. before Judge
12 McNamee, Ex. D). At the conference, this Court ordered that a further conference
13 be held before Magistrate Verkamp. Pursuant to the Court's order, a telephonic
14 conference was held on October 22, 2003. After the conference, Magistrate
15 Verkamp issued a minute entry on October 29, 2003, declining to set another
16 settlement conference. (Minute Entry, Dkt. No. 121).

17 On October 23, 2003, the Commission sent Defendants a letter, indicating a
18 willingness to consider reasonable modifications to the Decree in order to avoid filing
19 an enforcement action, and attached a modified Decree. (O'Neill Decl. ¶27, and
20 Attach. 16). On November 7, 2003, Mountain States, not Mr. Selden, responded to
21 the Commission's proposal on Defendant's behalf. In this response, Defendants
22 indicated their unwillingness to agree to any of the previously agreed-upon injunctive
23 and monetary relief. Defendants also proposed terms unequivocally rejected during
24

25 ³ Mountain States Legal Foundation describes themselves a "nonprofit, public
26 interest legal center dedicated to individual liberty, the right to own and use property,
27 limited and ethical government and the free enterprise system."
28 www.mountainstateslegal.com. In a press release dated November 21, 2003, the
Foundation announced the "MSLF Prepares for Trial in Arizona Drive-In Case."
(O'Neill Decl. ¶ 24 ; Attach. 14).

1 the settlement conference, including a term that the Commission pay all of
2 Defendants' attorneys' fees, dismiss the action, and apologize for bringing this
3 action. O'Neill Decl. ¶ 28, and Attach. 17).

4 Due to the dramatic changes Defendants proposed, changes that would
5 render the prior agreement a nullity, the Commission advised Defendants they were
6 not going to reopen negotiations, by letter dated November 24, 2003. (O'Neill Decl.
7 ¶ 29, and Attach. 18).

8 **II. Memorandum Of Law**

9 The settlement reached by the parties in this case should be enforced. Not
10 only does this Court have the authority to do so, the relevant law, including Federal
11 common law, general principles of contract interpretation, and parallel Arizona state
12 law require enforcement. There is undisputed evidence that all parties arrived at a
13 settlement in this case at the conclusion of the September 3, 2003 settlement
14 conference. Moreover, all material terms were agreed to at that time as reflected in
15 the draft document and the parties' actions.

16 **A. The Court Has the Authority to Enforce Settlement Agreements**

17 Because the law favors settlement of disputes, courts possess the power to
18 enforce an agreement to settle a case pending before it. *Callie v. Near*, 829 F.2d
19 888, 890 (9th Cir. 1987). Where the material facts are undisputed, a trial court has
20 authority to summarily enforce a settlement agreement entered into while the suit is
21 pending before it. *Id.* Even if material facts concerning the existence or terms of
22 an agreement are disputed the parties must be allowed an evidentiary hearing to
23 determine the enforcement of the agreement. *Id.*

24 In enforcing an agreement, there are two relevant inquiries: 1) whether the
25 parties intended to be bound by the negotiations or whether the agreement was
26 contingent on an executed agreement, and 2) whether there was agreement on
27 material terms. *Id.* at 890-891.

28 Federal common law governs the interpretation of contracts involving the

1 government and federal rights. *United States v. M.O. Seckinger*, 397 U.S. 203, 209,
2 90 S.Ct. 880, 884 (1970); *Kennewick Irrigation District v. United States*, 880 F.2d
3 1018, 1032 (9th Cir. 1989). Obviously, where, as in Title VII cases, the rights of the
4 litigants and legal policies derive from a federal source, there is an overriding federal
5 interest. *Fulgence v. J. Ray McDermott & Co.* 662 F.2d 1207 (5th Cir. 1981).
6 Congress has mandated a policy of encouraging voluntary settlements of Title VII
7 claims. *Id.* at 1209. In interpreting an oral agreement the courts will look to general
8 principles for interpreting contracts. *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th
9 Cir. 1983).

10 Although federal law is controlling, state law can be instructive when it does
11 not conflict. In developing federal common law rules of contract, a federal court
12 takes direction from state law along with general contract law principles. *Perez v.*
13 *Aetna Life Ins. Co.*, 150 F.3d 550 (6th Cir. 1998). Where state law is not inconsistent
14 with the federal law, it may be applicable. *Karnes v. SCI Colorado Funeral Services,*
15 *Inc.*, 162 F.3d 1077 (10th Cir. 1998). As noted below, Arizona law is consistent with
16 the federal common law and the *Restatement of Contracts* in interpreting oral
17 agreements and supports the enforcement of this Settlement Agreement.

18 **B. Oral Agreements Are Binding**

19 Oral agreements are enforceable even if, as here, there is an intent to later
20 execute the agreement with a written document. This applies to Title VII lawsuits
21 as well as other oral agreements. Failure to complete the paperwork or “second
22 thoughts” by a party does not mean that a settlement was not reached.

23 An oral agreement to settle a Title VII lawsuit is enforceable against a party
24 who knowingly and voluntarily agreed to terms or settlement or authorized his
25 attorney to settle the dispute. *Fulgence v. J. Ray McDermott & Co.* 662 F.2d 1207,
26 1209 (5th Cir. 1981). If a party to a Title VII lawsuit who has previously authorized
27 a settlement changes his mind after being presented with settlement documents,
28 that party remains bound by the terms of the agreement. *Id.* As one District Court

1 stated when a party no longer wanted to honor an oral settlement agreement,
2 "[a]bsent any hint that, e.g., the parties mutually agreed to rescind the agreement,
3 these arguments merely suggest that the defendants got 'cold feet,' a condition for
4 which the law provides no warming remedy." *Reich v. Best Built Homes, Inc.*, 895
5 F. Supp. 47, 50 (W.D.N.Y. 1995). Afterthoughts cannot be brought into the contract
6 except by mutual assent. *Pyle v. Wold Corp.*, 354 F. Supp. 346, 353 (D. Or. 1972)
7 (quoting 1 Arthur Corbin, Contracts 30, at 110).

8 Here, it is clear the Kidmans knowingly and voluntarily agreed to the material
9 terms of the settlement on September 3, 2003.

10 The failure to complete and execute the formal Consent Decree does not
11 mean a settlement was not reached. See *Restatement (Second) of Contracts* § 27
12 (1981). "Manifestations of assent that are in themselves sufficient to conclude a
13 contract will not be prevented from so operating by the fact that the parties also
14 manifested an intention to prepare and adopt a written memorial thereof. When
15 parties have discussed the settlement and agreed on the terms to be incorporated,
16 it is not necessary to have executed the final document. *Id.* at comt a. The Kidmans
17 and their counsel knew the parties' drafts would be incorporated into a "clean"
18 Consent Decree for their signatures.

19 Where there is no statutory requirement that a settlement agreement be in
20 writing, Arizona law also recognizes that an oral agreement is binding when the
21 parties intend to be bound. See *Tabler v. Indus. Comm.*, 47 P.2d 1156 (Ariz. App.
22 2002) (oral settlement of a workers' compensation claim can bind parties). Extrinsic
23 evidence, in the form of the course of dealing between the parties is admissible to
24 interpret the contract and supply any missing terms. *AROK Const. Co. v. Indian*
25 *Const. Services*, 174 Arizona. 291 (1993), When the parties' conduct "show[s]
26 conclusively that they have intended to conclude a binding agreement, even though
27 one or more terms are missing or are left to be agreed upon," a court should
28 "endeavor, if possible, to attach a sufficiently definite meaning to the bargain" and

1 enforce it. *Shade v. Dietbrich*, 158 Ariz. 1, 9, 760 P.2d. 1050 (1988) (quoting
2 *Restatement (Second) of Contracts*, §33(3) (1981).

3 In addition to the course of action set forth in this motion, Defendants also
4 represented to the Court, on at least two occasions, that the case was settled. These
5 admissions have critical importance. Where the parties have made representations
6 to the Court that agreement has been reached, there can be no factual dispute that
7 a settlement has been consummated. *Doi v. Halekulani Corp.*, 276 F.3d 1131 (9th
8 Cir. 2002) (where party represented in open court that settlement was reached, the
9 court properly enforced the agreement)⁴; see also, *Vari-o-Matic Corp. v. New York*
10 *Sewing Machine Attachment Corp.*, 629 F. Supp. 257, 259 (S.D. N. Y. 1986) ("both
11 parties made representations to the court that agreement had been reached, there
12 can be no factual dispute that a settlement had been consummated, and the court
13 is empowered summarily to require the parties to comply with their representations
14 without holding a hearing.").

15 Even if the Kidmans had not assented to the terms, counsel's actions bind
16 them. An attorney's actions can also bind the party. In Arizona "where express
17 authority is given, the attorney may compromise any matter, and his action in so
18 doing is binding upon his principal."⁵ *Smith v. Washburn & Condon*, 38 Ariz. 149,
19 153, 297 P2d. 879 (1931) (client bound by settlement made "by his attorney on
20 occurrence of the condition specified by the client"); *United Liquor Co. v.*
21 *Steithenson*, 84 Ariz. 1, 3-4, 322 P.2d. 886 (1958) (client not permitted to repudiate
22 settlement to which his attorney agreed). Throughout the settlement conference on
23

24 ⁴ Although *Doi* dealt with a settlement where the terms were stated in
25 open court, this settlement was reached and acknowledged in the presence of Judge
26 Verkamp by all parties.

27 ⁵ Arizona law will govern whether an attorney can bind the client. See
28 *Doi v. Halekulani Corp.* 276 F.3d 1131 (9th Cir. 2002)(Citing that Hawaii law
governs whether attorney can bind the client in a settlement.)

1 September 3, 2003, the parties' attorneys and parties worked diligently to reach
2 agreement. The parties were present for almost all of the negotiations. (O'Neill Decl.
3 ¶ 5). The Defendants' acceptance and concurrence with the agreement, actively
4 negotiated by their counsel, at the end of the day is unambiguous evidence that Mr.
5 Selden was authorized to effect the settlement. Being bound by their own and their
6 attorneys' acts, Defendants cannot now repudiate them.

7 **C. The Parties Reached an Enforceable Settlement Agreement**

8 At the end of the day on September 3rd, the parties confirmed their agreement
9 after Ms. O'Neill and Mr. Selden together had reviewed the draft Consent Decree
10 paragraph by paragraph, including counsels' handwritten notes. At this point, Ms.
11 O'Neill, with Magistrate Verkamp's permission, made several copies of the Decree,
12 including the monetary amount and the attached joint statement and paragraph
13 regarding the English-Only policy. All counsel, including Mr. Selden, received
14 copies. This was the agreed to Decree and it contained all of the material terms to
15 which the parties agreed. (O'Neill Decl. ¶10 , and Attach. 1). Nothing said or done
16 suggested anything other than a settlement. In fact, after the final Decree was
17 circulated, the parties shook each other's hands and the Defendants, the Plaintiff-
18 Intervenors, and Magistrate Verkamp were photographed together. (O'Neill Decl.
19 ¶11, and Attach. 4). The parties agreed that the Commission would incorporate the
20 handwritten changes into a typed, clean document and to circulate it to Defendants
21 for signature the following day. (O'Neill Decl ¶ 13).

22 Other evidence reflects settlement. On September 4, 2003, Magistrate
23 Verkamp issued a minute Order indicating that a settlement had been reached.
24 (Docket No. 106). The same day, the Commission provided Defendants a typed
25 Decree reflecting the terms of the agreement as copied and circulated by Ms. O'Neill
26 at the end of the conference the previous day. Defendants' counsel have repeatedly
27 assured EEOC counsel and the Court that the parties had reached a settlement.

28 Consequently the EEOC seeks enforcement of the material terms of the

1 Consent Decree as itemized, *supra*, p. 3.

2 At no time during post-settlement communications have Defendants
3 maintained, nor could they maintain, that the parties failed to agree to material
4 terms. In fact, two of the most critical terms of the agreement - the provision setting
5 forth the discontinuation of the English-only policy, and the joint statement - were
6 jointly hand drafted by attorneys for both parties during the settlement conference.

7 Moreover, Defendants' failure to indicate prior to the completion of the
8 Settlement Conference or shortly thereafter that any additional condition needed to
9 be satisfied is particularly telling. Likewise, at no point prior to the first status
10 conference before this Court on September 22, 2003 did Defendants' counsel
11 communicate Defendants' position that additional terms had to be added.

12 In fact, as discussed *supra*, on at least four occasions, Defendants, through
13 counsel, consistently confirmed that a settlement had been reached. First, at the
14 close of a day of negotiations, Defendants and Plaintiffs advised Magistrate
15 Verkamp that a settlement had been reached. Second, on September 4, 2003, the
16 day after the settlement conference, Defendants' counsel stated: "I think we should
17 notify Judge McNamee's chambers that we have a settlement and finalize the
18 settlement when we get back on the 22nd." (Ex. C) Third, Christine Bailey, an
19 attorney for the law firm representing Defendants, stated, "What I can assure of is
20 that Defendants agree that a settlement was reached before Judge Verkamp "...
21 and "it appears that there is no disagreement that settlement was reached before
22 Judge Verkamp." (O'Neill Decl. ¶ 16, Attach. 8). Finally, at the September 22, 2003
23 status conference, Mr. Selden told this Court that a "settlement conference was held
24 under the supervision of Judge Vercamp [sic] on Wednesday September 3, 2003,
25 and at that point I think the parties reached what they believed to be a settlement."
26 Mr. Selden also said that all the parties had to do was to "dot the i's and cross the
27 T's".. (Ex. C at pp 4-5).

28 Inexplicably, Defendants have now indicated that they do not intend to honor

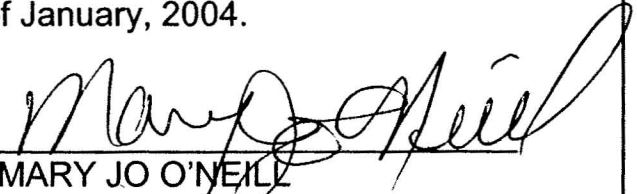
1 the settlement agreement, which they negotiated and agreed to.

2 The settlement agreement reached by the parties on September 3, 2003, is
3 enforceable. All the critical elements of a contract exist in this case – offer,
4 acceptance, consideration, and terms sufficiently specific to permit judicial
5 enforcement. At the end of the Settlement Conference, no material terms remained
6 to be negotiated. Moreover, Defendants, through counsel, admitted several times
7 that the parties reached an agreement.

8 **CONCLUSION**

9 Defendants' conduct and statements by their counsel unequivocally
10 establish that the parties reached a settlement at the end of the Settlement
11 Conference. No material terms remained to be negotiated. Subsequently,
12 Defendants accepted representation by an advocacy group, which has issued a
13 press release announcing that it is preparing to try this matter and now repudiate
14 the agreement Defendants negotiated. Under both federal and state law, a
15 change in representation and apparent "cold feet" are insufficient grounds for the
16 renunciation of a settlement agreement. Consequently, the Plaintiff Intervenors
17 and the EEOC respectfully request the Court to grant the Plaintiffs' Motion to
18 Enforce the Settlement Agreement. In the alternative, if the Court cannot resolve
19 this matter on the pleadings, the Plaintiffs respectfully request that the Court set
20 an evidentiary hearing in this matter.

21 Respectfully submitted this 9th day of January, 2004.

22
23 
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25 Regional Attorney
26
27
28

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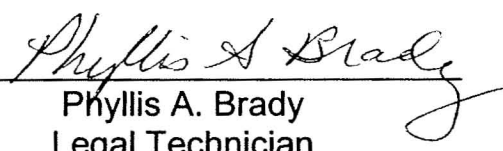
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2 CERTIFICATE OF SERVICE

3 I certify that on this 9th day of January, 2004, a copy of the foregoing
4 Plaintiff and Intervenor's Motion to Enforce Settlement Agreement and
5 Memorandum of Points and Authorities was mailed first class, postage prepaid,
6 to:

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