IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ARLYN J. EASTMAN, Personal Representative of the Estate of LINO LOWELL SPOTTED ELK, JR., Deceased, Plaintiff, vs. COUNTY OF SHERIDAN, a Nebraska Political Subdivision,; LEVI MCKILLIP, in his individual and official capacities; and DOES 1 - 5, in their individual and official capacities, Defendant.	)	Case No. 7:07-cv-5004 **BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT**

Arlyn J. Eastman, Personal Representative of the Estate of Lino Lowell Spotted Elk, Jr., Deceased, Plaintiff in the above-captioned matter, by and through her counsel of record,

ARGUMENT

I.

Standard of Review

One who attacks a settlement agreement must ear the burden of showing that the contract he made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted. ***Brown v. Nationscredit Commercial***, 2000 WL 888507 (D. Conn. 2000).

II.

THE PARTIES HAD MUTUALLY ASSENTED TO ALL TERMS AND CONDITIONS BY 12:05 P.M., LEAVING NOTHING REMAINING EXCEPT PHRASING

It is well-established that parties are bound to the terms of a contract even though it is not

signed (or even written). ***Main Line Theatres, Inc. v. Paramount Film Dist. Corp.***, 298 F.2d 801, 802-04 (3d Cir. 1962). The only essential prerequisite for a valid settlement agreement is that the parties mutually assent to the terms and conditions of the settlement. ***Pugh v. Super Fresh Food Mkts., Inc.***, 640 F. Supp. 1306, 1308 (E.D. Pa. 1986). Moreover, a settlement is still binding even if a party has a change of heart between the time of the settlement ot the terms of the settlement and the time that those terms are reduced to writing. ***Brown v. Nationscredit Commercial, supra***, 2000 WL 888507 at *2. Once a settlement is reached, the agreement may not be repudiated by either party. ***V'Soske v. Barwick***, 404 F.2d 492 (2d Cir. 1968) (agreement enforced against defendant despite failure to agree on several significant terms). Rather, such an agreement will be summarily enforced by the court.

In ***Omega Engineering, Inc. v. Omega, SA***, 2004 WL 2191588 (D. Conn. 2004), the United States District Court for the District of Connecticut reviewed a motion to enforce a settlement agreement from a trademark dispute: it was presented with the question of whether the parties had reached any agreement in the first place.

Several days before a court-ordered settlement conference, the parties had engaged in settlement discussions between themselves. The plaintiff had proposed language for a settlement agreement on a specific point, that being that the plaintiff would include a reference on its shipping boxes and its products to its corporation, for clarity of identification. The defense counsel had responded that the were "generally in accord on this point," but suggested an alternative that the plaintiff declined to accept. ***Id.*** at *2. Later in the same day, the defense reformulated its proposal to more closely mirror what the plaintiff had originally suggested. As the court observed, no further

discussions regarding the identification of the "Omega" mark on the plaintiff's products occurred until the settlement conference.

At the settlement conference, counsel for both sides were accompanied by representatives with authority to settle the case. The parties came to an agreement that included all material terms, and specifically included a provision that related to how the plaintiff would identify itself on its products. The language was essentially the same as the language in the defendant's second written proposal. The parties did not sign the agreement prepared during the settlement conference. ***Id.*** at *3. They did, however, agree that the case had been settled.

One day following the settlement conference, the plaintiff signed the settlement agreement. The defense counsel refused to sign it, and sent an e-mail to the plaintiff's counsel, stating that the defendant wanted the parties to enter into a "side letter" which materially changed the provision of the agreement relating to how the plaintiff would identify its product – the same provision that had been successfully addressed in the parties' pre-settlement conference discussions. ***Id.*** The plaintiff refused to agree to this change, and filed a motion to enforce the settlement.

The defense first claimed that the court did not even have jurisdiction to enforce any agreement – an argument that the court rejected: "One cannot dispute that the court retains jurisdiction, prior to the dismissal of a case, to enforce a settlement agreement in a case over which it provided." ***Id.*** at *4. The court observed that the policy favoring the settlement of disputes, and the avoidance of costs and time-consuming trials, "preserves the integrity of settlement as a meaningful way to resolve legal disputes." ***Id.***

The defense then argued that there was no settlement because no stipulation of dismissal had

been entered. The court dismissed this argument as well:

> [T]hat a party files a motion to enforce a settlement agreement means *precisely* that it believes an agreement has been reached and the other party seeks to renege on that agreement.

Id. at *5. The court observed that the plaintiff had sought a continuance to extend the dismissal case originally ordered under the local rules for submitting closing papers – which was more evidence to support a finding that the case had settled.[1]

The defense next argued that there was no settlement because the parties were not bound by an agreement that had not been signed by both parties. The court rejected defense's characterization of the settlement as "hastily thrown together," and observed that the parties had spent a day in chambers "meticulously working out the details of the agreement" (just as in this case, in which counsel spent two days "meticulously working out the details of [this] agreement"). ***Id.*** at *7. The defense had had "more than a reasonable opportunity" to review the terms – consistent with this case, in which Sheriff Robbins was actually in Mrs. Cecava's office during a portion of the negotiations over language. (***Evidence Index***, Exhibit "N.")

Finally, the defense argued that the motion to enforce the settlement should be denied because it had "identified and conveyed its disapproval of the agreement almost immediately." On this point, the court observed that "the client was present during the negotiations" – as in this case – "and participated in the agreement's development and reduction to writing." ***Id.*** at *7. The fact

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[1]Plaintiff herein would have filed a similar motion had things not "blown up" as quickly as they did. In fact, the undersigned proposed exactly that type of motion to Mrs. Cecava in her May 6, 2010 e-mail sent at 7:55 a.m. (***Evidence Index***, Exhibit "R"), another provision to which Mrs. Cecava never registered any objection.

that the agreement now contained disputed terms was "not persuasive at all" – the court found that the parties had manifested their mutual assent to the terms and conditions of the agreement; and that the agreement was binding and enforceable.

The ***Omega*** court noted authority for the proposition that a court should refuse to enforce a settlement agreement if a party fails to show that the parties "mutually assented to all of the essential terms and conditions of settlement." ***Id.*** at *6. That would apply here, if we failed to show that Defendants and Mrs. Eastman "mutually assented to all of the essential terms and conditions of settlement." We have not so failed, however.

By 12:05 on May 6, the parties had mutually assented to these essential terms and conditions:

* That COUNTY would perform annual training, and after any future suicide attempt in the jail would debrief, investigate and document findings, and review suicide prevention policies with its employees. That provision was offered by the defense on May 5, 2010 at 10:51 a.m. (***Evidence Index***, Exhibit "N.") and accepted by the undersigned on May 6, 2010 at 11:45 a.m. (***Evidence Index***, Exhibit "U," attachment to e-mail.)

* That COUNTY would agree to communicate with the Pine Ridge Oglala and Rosebud tribal Suicide Prevention Programs, rather than just calling a 1-800 national hotline. That provision was offered by the defense on May 5, 2010 at 10:51 a.m. (***Evidence Index***, Exhibit "N") and accepted by the undersigned on May 5, 2010 at 11:27 a.m. (***Evidence Index***, Exhibit "P.")

* That COUNTY would agree to an enforcement provision that would include providing an annual compliance report to Mrs. Eastman. That provision was offered on May 6, 2010 at 11:37 a.m. (***Evidence Index,*** Exhibit "T") and accepted by the undersigned on May 6, 2010 at 12:06 p.m. (***Evidence Index***, Exhibit "V.")

The parties had, many days before, agreed to other monetary (payment of $100,000.00) and nonmonetary (return of Jay Spotted Elk's belongings, permission for Mrs. Eastman to pray in the "drunk tank") provisions of settlement; these provisions came into agreement over the course of the

e-mails submitted in the Evidence Index.

If defense counsel had made these offers without authority from her client, that is not grounds for reneging on the agreement and, at 5:15 (***Evidence Index***, Exhibit "W"), removing the enforcement provision and substituting "call an 800 number" for the requirement of contacting the local tribes. The finding of this Court should follow the ***Omega*** court's finding:

> Having taken itself out from "under the gun" of imminent trial, [the defense] broke its word, reneged on the contract and now attempts to use the contract it broke as a springboard from which to negotiate an even better deal. This is what happened here. It should not be countenanced by a United States court. Judges must not be blind to what others see.

See, e.g., Omega Engineering, *10.

CONCLUSION

For the above-stated reasons, Plaintiff asks this Court to enforce the settlement as offered in these particulars:

a. Changes to the Sheridan County Department of Corrections Policy & Procedure Manual as set forth in the attachment to the undersigned's 11:45 a.m. e-mail of May 6, 2010 (***Evidence Index***, Exhibit "U");

b. Payment of $100,000.00;

c. Permission for Mrs. Eastman and a Lakota medicine man to pray in the "drunk tank" of the Sheridan County jail; and

d. Return of any belongings retained by Sheridan County after Jay Spotted Elk's death, to include his belt and any other personal property not yet returned to Mrs. Eastman.

ARLYN J. EASTMAN, Personal Representative of the Estate of LINO LOWELL SPOTTED ELK, JR., Deceased, Plaintiff,

By: /s/ Maren Lynn Chaloupka

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served via facsimile and CM/ECF filing on the 7th day of May, 2010 to the following:

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/s/ Maren Lynn Chaloupka