Ramirez v. DeCoster

United States District Court for the District of Maine
September 18, 2000, Decided
Docket No. 98-186-P-H

Reporter: 2000 U.S. Dist. LEXIS 21946
LUIS RAMIREZ, et al., Plaintiffs v. AUSTIN J. DeCOSTER, d/b/a DeCOSTER EGG FARM, et al., Defendants

Subsequent History: Accepted by Ramirez v. DeCoster, 142 F. Supp. 2d 104, 2001 U.S. Dist. LEXIS 7259 (D. Me. 2001)

Disposition: [*1] Magistrate recommended that plaintiffs' motion to enforce settlement be granted.

Counsel: For LUIS RAMIREZ, ISIDRO PORTALES, GENARO ROMO RODRIGUEZ, JOSE R HERNANDEZ, ESTHER HERNANDEZ, EDGAR ELIZONDO, MARIA ELIZONDO, LAURO GARCIA, DORA GARCIA, plaintiffs: HAROLD J. FRIEDMAN, SALLY MORRIS, ESQ., FRIEDMAN, GAYTHWAITE, WOLF & LEAVITT, PORTLAND, ME.

For AUSTIN J DECOSTER, dba DECOSTER EGG FARM, dba AUSTIN J. DECOSTER COMPANY, MAINE CONTRACT FARMING, LLC, defendants: WILLIAM C. KNOWLES, TIMOTHY J. O'BRIEN, ESQ., VERRILL & DANA, PORTLAND, ME.

For AUSTIN J DECOSTER, dba DECOSTER EGG FARM, dba AUSTIN J. DECOSTER COMPANY, MAINE CONTRACT FARMING, LLC, defendants: JEFFREY A. SCHREIBER, ESQ., SCHREIBER & ASSOCIATES, P.C., DANVERS, MA.

For AUSTIN J DECOSTER, dba DECOSTER EGG FARM, dba AUSTIN J. DECOSTER COMPANY, MAINE CONTRACT FARMING, LLC, defendants: JOHN J. MCGIVNEY, ESQ., RUBIN & RUDMAN, LLP, BOSTON, MA.

For L&L CLEANING INC, defendant: THOMAS H. SOMERS, HOFF, CURTIS, PACHT, CASSIDY & FRAME, PORTLAND, ME.

Judges: David M. Cohen, United States Magistrate Judge.

Opinion by: David M. Cohen

Opinion

RECOMMENDED DECISION ON PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT

The plaintiffs, current and former employees of DeCoster [*2] Egg Farm ("DeCoster"), seek by an *in camera* motion enforcement of an alleged settlement agreement reached with the defendants. The defendants contend that nothing more than an agreement to agree existed. Oral argument was held before me on September 13, 2000. I recommend that the court grant the motion.

I. Background

The plaintiffs, twelve individuals who allege that they were at all relevant times employees of the ten named defendants, whom they jointly term "DeCoster," [1] asserted causes of action under *42 U.S.C. § 1981* (discrimination based on race or national origin) and 29 U.S.C. §§ 1821 and 1823 (the Migrant and Seasonal Agricultural Worker Protection Act or "AWPA") and common-law claims of fraud and breach of contract. First Amended Class Action Complaint, etc. ("Complaint") (Docket No. 51) PP 10, 24, 31, 57-58, 88-92, 125. The initial complaint in this action was filed on May 18, 1998. Docket. Numerous motions have been filed by the parties, resulting, *inter alia*, in the dismissal of the country of Mexico as a plaintiff, Docket No. 76, denial of the plaintiffs' motion for class certification, and the entry of summary [*3] judgment in favor of defendants on portions of Count I and all of Counts II-IV, Order on Plaintiffs' Motion for Class Certification and Defendants' Motions for Summary Judgment (Docket No. 117) at 2, 45 n.39. The claims that remain active are set forth in footnote 39 to that order.

On January 10, 2000, before the court had acted on the motions for class certification and summary judgment, the parties filed a joint motion to stay action in the case pending mediation until March 1, 2000. Joint Motion to Stay Any Further Action on the Case Pending the Mediation of This Matter by the Parties [*4] (Docket No.

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[1] Austin J. DeCoster is named as an individual defendant doing business under two business names. The other defendants are Maine AG, LLC; Quality Egg of New England, LLC; Maine Contract Farming, LLC; Northern Transport, LLC; Turner Maintenance and Service, Inc.; Turner Properties, Inc.; PFS Loading Services, Inc.; L & L Cleaning, Inc.; and Nezinscot Properties, Inc. First Amended Class Action Complaint (Docket No. 51) at 1.

116) (mistakenly seeking stay until March 1, 1999). The motion was granted, with the proviso that the court would rule on the pending motions if the matter were not resolved by March 1. *Id.*, endorsement. On February 21, 2000 the parties met for mediation before former United States Senator Warren B. Rudman. Affidavit of Karen Frink Wolf ("First Wolf Aff.") (Docket No. 139) P 3. At the end of the mediation session counsel for the parties signed a handwritten document ("Mediation Agreement"), which states, in its entirety:

> In the matter of Estados Unidos Mexicanos, et al. v. Austin J. DeCoster, et al.
>
> Agreement reached under the auspices of mediation by Senator Warren B. Rudman on February 21st, 2000 in Portland, Maine.
>
> 1. Plaintiffs agree to settle this matter against all Defendants for the sum of $ 6 million dollars.
>
> 2. Payment shall be as follows:
>
> $ 1.5 million upon approval of the Court
>
> $ 4.5 million over a period of 24 months
>
> 3. The Plaintiffs agree to use their best efforts to help lift the boycott of DeCoster with the various retail establishments.
>
> 4. Consideration will be given to rehiring certain former employees of DeCoster. [*5]
>
> 5. Parties agree to make a good faith effort to deal with other collateral but not financial issues with the Court.
>
> 6. This mediation agreement contemplates that a written Settlement Agreement will be executed upon agreement to all material terms.Exh. A to First Wolf Affidavit. The mediator wrote the first five paragraphs of this document. The sixth paragraph was written by a lawyer for the defendants. Affidavit of John J. McGivney, Exh A. to Defendants' Opposition to Plaintiffs' In Camera Motion to Enforce Settlement, etc. ("Defendants' Opposition") (Docket No. 152), P 10. The document was signed by the mediator and by attorneys for the plaintiffs and the defendants. Mediation Agreement at 2.

On March 3, 2000 counsel for the defendants provided counsel for the plaintiffs with the first comprehensive draft of a formal written agreement. First Wolf Aff. P 10. On March 10, 2000 counsel for all parties attended a status conference with the court. *Id.* P 12. At the conference, counsel advised the court that the case had settled, [2] that the settlement would be submitted to the court for approval, and that the parties had not yet completed the task of finalizing the [*6] formal written settlement agreement. *Id.* The court informed counsel that it would not extend the stay of the case beyond March 27, 2000. *Id.*

On March 22, 2000 counsel for the plaintiffs returned a draft settlement agreement to counsel for the defendants which requested that the defendants obtain a bond to secure their future payments. *Id.* P 17. On March 27, 2000 counsel for the defendants responded by fax that the defendants would not post a bond but that DeCoster would "meet his prior commitment to post adequate collateral" and that "more information on the collateral . . . will be posted later this week." *Id.* P 19. The parties inquired whether the court would meet with them to assist in resolving the remaining [*7] details of the settlement agreement; the court declined to do so. *Id.* P 23. By letter dated March 29, 2000 counsel for the plaintiffs informed the court that "the parties have not been able to reach final agreement on the terms of the settlement." *Id.* Exh. F.

On March 30, 2000 counsel for the defendant proposed further intervention by the mediator. *Id.* Exh. G. On that day and the next day, counsel for the plaintiffs proposed that their clients would pay some portion of the cost of the bond they had requested. *Id.* P 27. On March 31, 2000 this court issued its ruling on the pending motions for class certification and summary judgment. Docket No. 117. Thereafter, the defendants refused to finalize the formal settlement agreement. First Wolf Aff. P 31. On May 22, 2000 counsel for the plaintiffs advised counsel for the defendants that the plaintiffs would drop any request for a bond. *Id.* P 32. The plaintiffs filed this motion to enforce the settlement on July 7, 2000. Docket.

In addition to the nature of the collateral to be provided by the defendants, the parties sought after the mediation to work out the details of the format and substance of anticipated future press [*8] conferences at which the settlement would be announced. First Wolf Aff. P 8. Correspondence authored by the attorneys for the parties during the period between February 21 and May 22, 2000 that has been submitted by the parties in connection with the pending motion will be discussed below where relevant.

II. Discussion

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[2] At oral argument, counsel for the defendants contended that a representation in this form was not made at the status conference. However, they also agreed that the defendants had not disputed the sworn affidavit of the plaintiffs' counsel on this point in any of their opposition papers.

While it is not explicit in their submissions, counsel for the parties agreed at oral argument that Maine law applies to the resolution of the question whether the parties entered into an enforceable settlement of this action. [3] Federal common law applies when a federal court is asked to enforce the alleged settlement of a case pending before it "at least when the underlying cause of action is federal in nature." *Malave v. Carney Hosp.*, 170 F.3d 217, 220 (1st Cir. 1999). Because the amended complaint raises claims sounding both in state and in federal law, I will review both in considering this motion.

[*9] At oral argument, and following extensive questioning from the bench which noted the absence of certain evidence in the defendants' submissions, counsel for the defendants took the position that this court could deny the pending motion without holding an evidentiary hearing but must hold an evidentiary hearing "if it is inclined to grant the motion." That is an incorrect statement of applicable law. The First Circuit has stated the governing principle as follows:

> As a general rule, a trial court may not summarily enforce a purported settlement agreement if there is a genuinely disputed question of material fact regarding the existence or terms of that agreement. In such circumstances, the cases consentingly hold that the court instead must take evidence to resolve the contested issues of fact.*Id.* (citations omitted). Here, the papers submitted by the parties in connection with the motion do not present any disputed question of material fact. The only disputed question of material fact identified at oral argument by the defendants was the nature of counsels' representations to the court concerning settlement at the March 10 status conference. Because the defendants [*10] did not establish the existence of such a dispute in any of their counter-affidavits or any other material of evidentiary quality submitted with their opposition papers, no evidentiary hearing need be held. In this court, oral argument on motions is the exception rather than the rule. Local Rule 7(f). The defendants requested neither oral argument nor an evidentiary hearing and conceded at oral argument that they well understood that they might have received the court's decision on the plaintiffs' motion to enforce without more once all papers had been filed. Based on their submissions, the defendants must be deemed to have waived any allegation that there is a factual dispute on this point. *See Ammex, Inc. v. United States*, 23 C.I.T. 549, 62 F. Supp.2d 1148, 1169 n.17 (C.I.T. 1999); *Evans v. Visual Tech. Inc.*, 953 F. Supp. 453, 458 n.5 (N.D.N.Y. 1997). *See generally United States v. Nueva*, 979 F.2d 880, 885 n.8 (1st Cir. 1992).

The question whether a binding settlement agreement exists is determined pursuant to the law of contracts. *Warner v. Rossignol*, 513 F.2d 678, 682 (1st Cir. 1975) (settlement "is an enforceable [*11] contract both under Maine law and general doctrine"). Under Maine law, when a contract has been made and the parties agree that a written contract memorializing that agreement should be drafted, the parties are bound by the contract even if the written draft is never signed. *Clements v. Murphy*, 125 Me. 105, 107, 131 A. 136 (1925). "An agreement, in order to be binding, must be sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liability of the parties." *Ault v. Pakulski*, 520 A.2d 703, 704 (Me. 1987), quoting *Corthell v. Summit Thread Co.*, 132 Me. 94, 99, 167 A. 79 (1933). "To establish a legally binding agreement the parties must have mutually assented to be bound by all material terms; the assent must be manifested in the contract, either expressly or impliedly." *Searles v. Trustees of St. Joseph's College*, 1997 ME 128, 695 A.2d 1206, 1211 (Me. 1997). Under federal law, "both parties must have a clear understanding of the terms of an agreement and an intention to be bound by its terms before an enforceable contract is created." *Arnold Palmer Golf Co. v. Fuqua Indus., Inc.*, 541 F.2d 584, 587 (6th Cir. 1976). [*12] The fact that the parties also manifest an intention to prepare and adopt a written memorial of their agreement does not necessarily mean that no contract has been created. *Id.* at 587 n.2; *Sadighi v. Daghighfekr*, 66 F. Supp.2d 752, 763 (D.S.C. 1999) (citing cases).

There can be no question that the February 21 handwritten agreement contains ambiguities. "Whether a term in a contract is ambiguous is an issue of law. A contract is ambiguous if it is reasonably susceptible to more than one interpretation." *Hilltop Community Sports Ctr., Inc. v. Hoffman*, 2000 ME 130, 755 A.2d 1058, , 2000 Me. LEXIS 138, * 11 (Me. 2000) (citation omitted). Counsel for the parties agreed at oral argument that the word "plaintiffs" in the first paragraph of that agreement -- latently ambiguous because there were named plaintiffs as well as a pending motion seeking certification of a

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[3] The parties do not contend that this court lacks the power to enforce a settlement if it finds that a binding agreement was reached. The case law on this point uniformly holds that it is within the power of federal courts to enforce settlements reached in cases pending before them. *E.g., Mathewson Corp. v. Allied Marine Indus., Inc.*, 827 F.2d 850, 852-53 (1st Cir. 1987) (citing cases).

proposed class of plaintiffs at the time the agreement was executed -- was understood by all to mean a class of plaintiffs. However, the words "collateral" in the fifth paragraph and "material" in the sixth paragraph are, when read together, patently ambiguous. Counsel [*13] for the plaintiffs contended to the contrary at oral argument, but the submission by the plaintiffs of evidentiary material in addition to the agreement itself in support of their motion suggests that they at least acknowledge the possibility of ambiguity in the terms of the document. To aid the court in construing an ambiguous agreement, the court may "entertain extrinsic evidence casting light upon the intention of the parties with respect to the meaning of the unclear language." *Bangor Pub'g Co. v. Union St. Market*, 1998 ME 37, 706 A.2d 595, 597 (Me. 1998). [4] Because it is not possible to determine whether a meeting of the minds occurred with respect to the February 21 agreement in the absence of the extrinsic evidence offered by the parties in their submissions concerning the pending motion, I will consider that evidence.

[*14] The defendants offer several arguments in support of their contention that no contract was formed when the agreement was signed at the end of the mediation session. First, they assert that paragraph 6 of that document shows that there were material terms yet to be agreed upon and that the parties intended not to be bound until a written settlement agreement was executed. Defendants' Opposition at 9. To the contrary, paragraph 6 does not establish that only the written agreement to which it refers was to have binding effect. As noted above, applicable case law allows the enforcement of oral and written contracts that expressly provide for a subsequent written agreement memorializing the contract, even one that specifies details not included in the initial agreement, *Worthy v. McKesson Corp.*, 756 F.2d 1370, 1373 (8th Cir. 1985) (federal law), so long as the other indicia of contract formation are present. Accordingly, it is necessary to consider the argument that terms material to the contract remained to be agreed upon at the relevant time. The mere fact that counsel for the defendants inserted the word "material" in paragraph 6, while the mediator used the word "collateral" [*15] in paragraph 5, both to refer to unresolved issues, cannot be determinative under the circumstances. [5] There must in fact have been issues material to resolution of the case that remained unresolved as of the time when the motion to enforce was filed in order for the court to find that no binding settlement existed.

In addition to the issues of public disclosure and security for future payment [6] identified by the plaintiffs as the subjects of negotiation between the parties after the mediation session, the defendants offer the following as material issues not mentioned in the handwritten agreement: (i) composition of the settlement class; (ii) how the class settlement fund would be administered and when and to whom class claims would be submitted; (iii) who would [*16] be required to make the agreed-upon payments; (iv) apportionment of payments among the defendants; and (v) to whom the payments were to be made. [7] Defendants' Opposition at 11-12. The defendants also contend that the absence of any such provisions makes the handwritten agreement too indefinite to be enforced. *Id.* at 12. The defendants offer no citations to authority to support their assertions that each of these terms is material to the settlement of the claims made by the plaintiffs and only cite one Maine case with respect to their argument that the agreement is too indefinite to be binding.

[*17] The defendants cite *Ault* in connection with the latter contention. However, that case is easily distinguishable from the circumstances present here. In *Ault*, the parties had executed a property settlement agreement in connection with their divorce. 520 A.2d at

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4 The principles governing review of ambiguous contract language include the stricture that "in case of doubt, an instrument is to be taken against the party that drew it." *Rams v. Royal Caribbean Cruise Lines, Inc.*, 17 F.3d 11, 12 (1st Cir. 1994), quoting *Chelsea Indus., Inc. v. Accuray Leasing Corp.*, 699 F.2d 58, 61 (1st Cir. 1983). The only portion of the handwritten agreement at issue here that would be subject to this rule of construction is the sixth paragraph, which was drafted by counsel for the defendants.

5 The fact that paragraph 5 distinguishes "collateral" issues, which the parties agree to deal with in good faith "with the Court," from "financial" issues, strongly suggests that the parties had reached agreement on any and all financial issues.

6 When asked at oral argument to specify all contractual terms which the defendants contend were material that remained outstanding at the time the handwritten agreement was signed, counsel for the defendants did not mention the question of security for future payments.

7 At oral argument, counsel for the defendants added to this list asserted ambiguities in paragraphs 3 and 4 of the handwritten agreement. Even if these newly-identified allegedly material terms had been properly raised in the defendants' written opposition to the motion, I would not find that they were material. As discussed below, there is no need to set forth in writing every detail of the parties' obligations in order for a contract to be binding. In this case, the questions whether a party has in fact used its "best efforts" and given "consideration" to a course of action may be addressed in a separate proceeding alleging breach of the contract, rather than presenting grounds for concluding that no contract was formed. The undertakings described in paragraphs 3 and 4 are not themselves ambiguous.

703-04. Almost nine years after the divorce was granted, the former wife brought an action against the former husband to enforce the following paragraph of the property settlement agreement:

> The Husband and Wife agree to establish a trust for the education of the children. This trust is to be executed within one year from the date of the divorce judgment, and the cost is to be borne on a percentage basis based on the respective incomes of the Husband and Wife.*Id.* at 704. The Law Court characterized this term as expressing "a generalized, ill-formed desire . . . to make in the future some provision for jointly paying in some amount for some education for some or all of their four children," and held that the trial court "could order specific performance of [the paragraph] only by supplying, on its own, critical contractual terms as to which the parties never had a meeting of [*18] the minds." *Id.* at 705. Here, the handwritten agreement specifies the amount to be paid, when payment is due and the consideration for that payment. As discussed below, the critical contractual terms are present. This court could order specific performance of the agreement at issue without supplying any additional terms.

Turning to the defendants' alleged missing material terms, my research has located no case law, either in Maine or from the federal courts, in which the word "material" is defined or explicated in the context of a dispute over contract formation. Black's Law Dictionary defines "material terms" as "contractual provisions dealing with significant issues such as subject matter, price, payment terms, quantity, quality, duration, or the work to be done." *Black's Law Dictionary* (7th ed. 1999), at 991-92. I have no trouble in concluding that the public statements to be made by the parties to a settlement at a press conference or in a press release about that settlement are not material terms of that settlement, particularly under the circumstances of this case. This simply is not an issue significant enough to prevent enforcement of an agreement or to [*19] prevent a meeting of the minds of the parties on the essential substance of a settlement. *See Sheng v. Starkey Labs, Inc.*, 117 F.3d 1081, 1083 (8th Cir. 1997) (confidentiality not an essential term of a settlement agreement; Minnesota and federal law); *United States v. Centex-Simpson Constr. Co.*, 34 F. Supp.2d 397, 398, 400 (N.D.W.Va. 1999) (same; federal law).

Similarly, the defendants' contention that the handwritten agreement cannot be considered binding because it does not specify who would pay the $ 6 million is disingenuous at best. It cannot reasonably be suggested that any person or entity other than the defendants would be required to pay the amount that the plaintiffs agreed to accept in settlement of their claims "against all Defendants." The same is true of the defendants' argument that the handwritten agreement does not specify to whom the money would be paid. The plaintiffs agreed to settle their claims for this sum; there is no reason to speculate that the payments were to be made to anyone other than the plaintiffs. This "issue" as posited by the defendants is at best redundant in light of their identification of the composition of [*20] the plaintiff class and the administration of payments as unresolved material issues.

Apportionment of the total payment among the defendants cannot be considered a material term. The defendants offer nothing to indicate that it made any difference whatsoever to the plaintiffs which of the defendants actually made the payments or how much each defendant contributed to the total due. While this question may have been significant to the defendants, it is not integral to the subject matter of the settlement. Indeed, the only draft of the proposed settlement agreement provided to the court, First Wolf Aff. Exh. E, [8] makes no reference at all to such apportionment, and nothing submitted by the defendants even suggests that this was to be addressed in the final written document. *See Pyle v. Wolf Corp.*, 354 F. Supp. 346, 355 (D. Or. 1972) (most significant evidence of agreement on term identified by party against whom settlement was sought to be enforced as material is absence of any reference to it in draft settlement agreement). For all that appears, the defendants themselves did not consider apportionment of their payments to be an issue material to the settlement.

[*21] With respect to the questions of composition of the plaintiff class and administration of the payments to the class, the fact that the defendants have presented no evidence that there was any disagreement about the provisions dealing with those questions in the draft settlement agreement strongly suggests that, if these terms were material, the parties had reached a meeting of the minds concerning them when they executed the handwritten agreement. Even if that were not the case, I conclude that such terms were not material to settlement of the lawsuit. While I have been unable to locate case law directly on point, the opinion in *Pyle* is instructive on this issue as well. In that case, the plaintiffs sued several related corporations and individuals when they became dissatisfied with their investments in an oil exploration partnership. 354 F. Supp. at 349-50. While discovery was proceeding, the plaintiffs agreed after a two-hour discussion to dismiss the suit in exchange for payment in

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[8] This draft is dated March 27, 2000 and accordingly cannot be the first draft, which was provided by counsel for the defendants on March 3, 2000. First Wolf Aff. P 10.

cash and shares of stock, in installments. *Id.* at 350. It was agreed that attorneys for the parties would draw up a written settlement agreement. *Id.* One week later, [*22] it was reported to the court that the case had settled. *Id.* Two draft agreements were exchanged and discussions continued, but no written agreement was ever signed. *Id.* at 351. Three months later, an attorney for the defendants informed the court that the case had been settled. *Id.* Shortly thereafter, the chief executive officer of the primary defendant informed the plaintiffs that he wanted to renegotiate the terms of the settlement and negotiations broke off. *Id.* In response to the plaintiffs' motion for summary judgment to enforce the settlement, the defendants contended that the settlement was contingent upon further agreement on other material issues. *Id.* at 351-52.

The court held that the following issues, identified by the defendants as unresolved material terms making the agreement unenforceable, were not in fact material: rights of the plaintiffs with respect to registration of the stock they were to receive, whether the defendants would be required to give the plaintiffs investment letters covering the stock, the nature of anti-dilution provisions concerning the stock, inclusion of a hold-harmless provision protecting the plaintiffs [*23] from claims by third parties, use of an acceleration clause in the promissory notes that were to secure the installment payments, designation of an escrow agent, and whether to refer to the plaintiffs as "limited partners." *Id.* at 354-57. These are administrative issues analogous to any possible questions about the administration of the class settlement fund in the instant case and are no more significant or critical to the settlement in this case than were the issues listed in *Pyle*, which the court in that case characterized as "minor details" and "technical problems of draftsmanship." *Id.* at 357.

Contrary to the defendants' conclusory argument, the composition of the settlement class was not a material term the absence of which in the handwritten agreement renders it unenforceable under the circumstances of this case. [9] A court may certify a class for settlement purposes only. *E.g., Handschu v. Special Servs. Div.*, 605 F. Supp. 1384, 1394-95 (S.D.N.Y. 1985). Here, the class definition included in the only draft of the final settlement agreement submitted to the court does not appear to be unclear or open to differing interpretations. [*24] Draft Settlement Agreement, Exh. D to First Wolf Aff., at 1(7) & (18). [10] While there may be administrative difficulties in locating the members of the class, their identity has never really been an issue in this case. A potential definition is included in the amended complaint, Complaint PP 7 & 11 ("all former and current migrant farm workers of Mexican race and descent . . . who were employed at DeCoster at any time during or after 1988," "all former and current DeCoster Mexican workers aggrieved by DeCoster's intentional violations of *42 U.S.C. § 1981*"), and the defendants offer no evidence to suggest that composition of the class was an issue at the time of the mediation. [11] [*25]

The final unresolved issue, discussed by the plaintiffs although apparently abandoned by the defendants, is the question of security for the $ 4.5 million to be paid within 24 months. This issue is not mentioned [*26] in the handwritten agreement. Counsel for the defendants conceded at oral argument that the defendants agreed to provide security for this obligation. *See also* First Wolf Aff. P 9 and Letter from Jeffrey A. Schreiber, Esq. to Harold Friedman, Esq., dated March 27, 2000, Exh. D thereto. Assuming *arguendo* that the provision of security for future payments may be material to the settlement, *but see Jenson v. Continental Fin. Corp.*, 591 F.2d 477, 480, 482 (8th Cir. 1979) (settlement giving defendants one year in which to make required payments was secured by mortgage and security agreement; security agreement held to be separate and distinct from settlement agreement and not an integral part of settlement agreement), the nature of

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[9] The court is, however, faced with a practical problem as a result of the parties' delay in resolving the ancillary settlement issues, despite the court's repeated indications that it would comply with the directive of *Fed. R. Civ. P. 23(c)(1)* that the court determine "as soon as practicable after the commencement of an action brought as a class action" whether it is to be so maintained. As a result, Judge Hornby's order denying class certification (Docket No. 117) issued before the parties had agreed on a final written settlement agreement to be presented to the court. I nevertheless conclude that the defendants' agreement to settle this action by making payment to a plaintiff class may be enforced, provided that the final written settlement agreement is otherwise acceptable to the court, a matter to be determined at a later time.

[10] However, the draft defines only the term "plaintiff class" while using both that term and "settlement class" in its substantive provisions. *E.g., id.* at II.A. I, II.C.2-4, V.C.

[11] At oral argument, counsel for the defendants suggested for the first time that the parties disagreed about this issue until March 20, 2000, as shown by the first two drafts of the formal settlement agreement, neither of which has been provided to the court. This factual representation is not properly before the court, but, even if it were, the outcome would not change. If this were a material term of the parties' contract that was not resolved at the time of the signing of the handwritten agreement, it was resolved before Judge Hornby issued his ruling on the motion for class certification on March 31, 2000, and accordingly there is no reason to deny enforcement of the agreement reached by the parties.

that security cannot be. Such a concern is precisely the sort of technical or administrative detail that cautious litigants and their lawyers will attempt to include in a formal settlement agreement, but it is not integral to the settlement itself. *See Pyle*, 354 F. Supp. at 357 (issues not discussed at meeting which resulted in settlement are irrelevant for purpose of deciding whether a contract existed because they "either [*27] represented efforts to renegotiate additional terms into the contractor else were attempts inspired by lawyer-like caution to draft a memorial covering all contingencies").

With respect to all of these allegedly material terms, the Seventh Circuit's opinion in *Wilson v. Wilson*, 46 F.3d 660 (7th Cir. 1995), is also instructive. Construing Illinois law, which provides, in relevant part that "[a] contract is sufficiently definite and certain to be enforceable if the court is enabled from the terms and provisions thereof, under proper rules of construction and applicable principles of equity, to ascertain what the parties have agreed to," the court held that an oral settlement agreement in which the plaintiff agreed to be barred from bringing any claims against the defendants for any acts that gave rise to the suit in return for a combination of cash and property totaling $ 1.2 million was enforceable in the face of the defendants' contention that the failure to specify the legal form of the plaintiff's promise was an unresolved material term rendering the settlement unenforceable. *Id.* at 662, 664, 667. Illinois law on this point is sufficiently similar [*28] to Maine law to endow the Seventh Circuit's opinion with persuasive force.

Finally, the defendants contend that the certain actions and statements of counsel for the plaintiffs after the mediation session demonstrate that no contract existed. Defendants' Opposition at 12-16. I will address each of the incidents identified in this regard by the defendants, but begin by pointing out the most telling evidence on this point: the defendants do not dispute in their written submissions the sworn statement of one of the attorneys for the plaintiffs that all counsel informed this court at a status conference on March 10, 2000 "that the case had settled." First Wolf Aff. P 12. Counsel for the defendants are officers of the court; they and their clients are bound by the representations they make to this court. "A party who knowingly and voluntarily settled all claims before the court cannot later avoid the agreement by contesting ancillary terms of the agreement." *Centex-Simpson,* 34 F. Supp.2d at 400. Evidence that counsel for either the plaintiffs or the defendants misrepresented to the court the intentions of the parties with respect to settlement must be clear and unequivocal [*29] in order to overcome the representation made at the conference. *See Masselli v. Fenton*, 157 Me. 330, 335, 172 A.2d 728 (1961) ("If the party sought to be charged . . . signified . . . an [intention to close a contract prior to the formal signing of a written draft] to the other party, he will be bound by the contract actually made, though the signing of the draft be omitted," quoting *Mississippi and Dominion Steamship Co. v. Swift*, 86 Me. 248-58, 29 A. 1063 (1894)); *see also Vari-o-Matic Mach. Corp. v. New York Sewing Mach. Attachment Corp.*, 629 F. Supp. 257, 259 (S.D.N.Y. 1986) ("since both parties made representations to the court that agreement had been reached, there can be no factual dispute that a settlement had been consummated"). In addition, letters sent by attorneys after a settlement is reached allegedly repudiating the settlement are not effective. *Wilson*, 46 F.3d at 667.

In addition to the points already discussed, the defendants offer the following as evidence that the plaintiffs "demonstrated a clear recognition and understanding . . . that the mediation agreement did not include all the material [*30] terms and was not a binding agreement." Defendants' Opposition at 13.

First is the letter dated four days after the mediation from the plaintiffs' counsel to the defendants' counsel stating, *inter alia*, "While the mediation has the potential to result in this case being finally resolved, we will not have a resolution of the matter until such time as all of the parties agree on all of the terms and it is reduced to writing and approved by the court" and "I know the proper announcement of this is also crucial for your clients. . . . This is all the more reason why we should move forward on, at least, the material terms in the hope that we can speed up the announcement process." Letter dated February 25, 2000 from Harold J. Friedman to John J. McGivney, Esq, Exh. 1 to Affidavit of John J. McGivney ("McGivney Aff."), Exh. A to Defendants.' Opposition, at 1. This language, although hyperbolic in advocating the plaintiffs' position, correctly refers to the need for presentation of a formal written settlement agreement to the court and the need for court approval of such an agreement before the court proceeding could be concluded. The fact that the parties needed to agree on the language [*31] in which the material terms of their agreement would be expressed does not necessarily mean that those terms were unresolved. The language of this letter, while somewhat inartful, does not overcome the legal principles already cited.

Second is a request filed on or about March 16, 2000 with the First Circuit Court of Appeals to enlarge the time in which the plaintiffs were required to file their brief in connection with an appeal of the dismissal of the country of Mexico as a plaintiff in the case, in which the following language appears: "The parties . . . jointly . . . request that the Court enlarge the time . . . in order to provide the parties with the opportunity to complete the process they

have begun toward an out-of-court resolution of the entire case," "As a result of that mediation, the parties have made significant progress toward a mutual resolution of the case. The parties are continuing to work toward an out of court resolution of the entire litigation," and "In order to allow the parties to complete their efforts toward an out of court resolution of this entire class action litigation, the parties jointly request" additional time. Joint Motion to Enlarge the Time for [*32] the Plaintiff-Appellant to File its Brief, *Estados Unidos Mexicanos v. DeCoster*, United States Court of Appeals for the First Circuit, Docket No. 99-2170, Exh. 1 to Declaration of Timothy J. O'Brien ("O'Brien Aff."), Exh. C to Defendants' Opposition, at 1-2. None of this language, which cannot be ascribed solely to the plaintiffs in any event, is inconsistent with the existence of an enforceable settlement, should either party to that settlement choose to enforce it rather than continuing with negotiation on ancillary terms in the hope of avoiding further court action.

Third is a letter from the plaintiffs' counsel to counsel for the defendants stating, *inter alia*, that "it is imperative that the Plaintiffs have complete security for the $ 6,000,000 settlement in this case" and that "we must insist that the current security be in the form of a bond." Letter dated March 27, 2000 from Harold J. Friedman to John J. McGivney, Esq. and Jeffery Schreiber, Esq., Exh. C to First Wolf Aff. The first quoted reference is not inconsistent with the terms of the handwritten agreement nor with a position that an enforceable settlement has been achieved. Indeed, it is consistent with the [*33] defendants' position that they agreed to "post adequate collateral" for the payments due under that agreement. Exh. D to First Wolf. Aff. "Insisting" that the security be, at least initially, in the form of a bond is a negotiating position not necessarily inconsistent with a position that the material terms of a settlement have been resolved. I have already concluded that the form of the security to be posted by the defendants was not a material term of the settlement. This posturing by the plaintiffs' attorney represents, at most, an "effort[] to renegotiate additional terms into the contract or else . . . [an] attempt[] inspired by lawyer-like caution to draft a memorial covering all contingencies," *Pyle*, 354 F. Supp. at 357, neither of which may invalidate an otherwise binding settlement agreement.

Fourth is a letter from an attorney for the plaintiffs to counsel for the defendants stating, *inter alia*, that "at 8:00 a.m., I spoke with Marie Cross, Judge Hornby's case manager, and advised her that we were close to a settlement agreement but there were still some issues that required resolution," and "Until we have discussed these changes with you, and [*34] reached at least an agreement in principle, we do not have a settlement." Letter dated March 28, 2000 from Karen Frink Wolf to John McGivney, Esq. and others, Exh. 2 to McGivney Aff. The first quoted statement in this letter merely refers to the written memorial of the settlement upon which the parties were attempting to agree at the time; the "settlement agreement" is the written settlement agreement to which the handwritten agreement refers. In no sense does this sentence demonstrate that counsel for the plaintiffs took the position that no binding settlement of any sort was yet in place. The second quoted sentence is more concerning. It refers to a settlement rather than a settlement agreement and does appear to be inconsistent with a position that a binding settlement already existed. However, as I have already noted, one party to a binding settlement agreement may not unilaterally repudiate that agreement by a letter from counsel, or by other means. The attorney's choice of words in support of her clients' negotiation position with respect to the language of the formal settlement agreement was unfortunate in this instance but not sufficient to void the settlement already reached.

[*35] Fifth is the defendants' contention that on March 28, 2000 counsel for the plaintiffs "dramatically terminated [a] telephone call among counsel on settlement issues and hung up." Defendants' Opposition at 14. [12] One of the attorneys for the defendant who was involved in this telephone conversation swears that "it was my indelible impression that Mr. Friedman broke off settlement negotiations" by so doing. McGivney Aff. P 6 (emphasis in original). Any attempt by the defendants to use this event as evidence that the plaintiffs did not believe that a binding settlement was in place or that the plaintiffs had withdrawn from such an agreement would be severely undermined by the facts that the telephone conversation, which took place in the "late afternoon," *id.*, was followed by discussions "between 4:00 and 5:00 p.m." that day between another attorney for the plaintiffs, from the same law firm as the attorney who had terminated the telephone conversation, and Mr. Schreiber, one of the attorneys for the defendants, on the subject of collateral for the agreed payment; by another conversation at 6:00 p.m. that day between two lawyers for the plaintiffs and Mr. Schreiber on this [*36] subject; by a telephone conversation later that day between one of these lawyers for the plaintiffs and Mr. McGivney, who also represented the defendants; and a final conversation even later that evening between the same plaintiffs' attorney and Mr. Schreiber. Second Wolf Aff. P 7; Affidavit of Jeffrey A. Schreiber, Exh. B to Defendants' Opposition, P 5. Counsel for the defendants also proposed further resort to the mediator on March 30, 2000, hardly

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[12] Counsel for the plaintiffs, not surprisingly, characterizes this event somewhat differently. Supplemental Affidavit of Karen Frink Wolf ("Second Wolf Aff.") (Docket No. 161), P 6.

the offer of an experienced attorney who takes the position that settlement negotiations have been irrevocably terminated by the opposing party. The reported actions of counsel for the plaintiffs were consistent with an attempt to reach a formal settlement agreement upon which all parties could agree without the need to turn to the court to enforce the existing settlement agreement.

[*37] Sixth is a letter to the court in which counsel for the plaintiffs stated "I am sorry to report that the parties have not been able to reach final agreement on the terms of the settlement." Letter dated March 29, 2000 from Harold J. Friedman to Marie Cross, Deputy Clerk, Exh. F to First Wolf Aff. This letter was sent because the court had informed the parties that it would not stay the case beyond March 27, 2000. First Wolf Aff. PP 12, 24. Again, this letter is not inconsistent with the plaintiffs' position that a binding settlement was already in place. It merely reported the fact that the parties had not yet been able to agree on all of the terms of a formal written settlement agreement that could be signed and submitted to the court for approval. As with all of the other purported evidence offered by the defendants on this point, the parties could have agreed at any time to void the existing settlement agreement, but neither side could unilaterally withdraw from the settlement without the other's consent. *See generally* Teachers Ins. & Annuity Ass'n of Am v. Tribune Co., 670 F. Supp. 491, 498 (S.D.N.Y. 1987) (party obligated by agreement to negotiate open issues [*38] in good faith may not renounce deal, abandon negotiations, or insist on conditions that do not conform to preliminary agreement).

Seventh is a letter from counsel for the plaintiffs to counsel for the defendants stating, *inter alia*, "in order to make progress toward a final resolution, what we really need is for the defendants to respond to the proposal I made to [Mr. Schreiber] on Tuesday night." Letter dated March 30, 2000 from Karen Frink Wolf to John McGivney, Esq., and others, Exh. 5 to McGivney Aff. This sentence is not inconsistent with the plaintiffs' position that a binding settlement existed. Again, it represents an attempt to find agreement on language so that a formal settlement agreement memorializing the settlement could be signed.

Eighth is the following statements by counsel for the plaintiffs in a motion submitted to the First Circuit Court of Appeals:

> The parties continued to work toward an out of court resolution of the entire litigation to and including March 31, 2000, when the settlement discussions unfortunately could not resolve the matter prior to the deadline set by the District Court and prior to the District Court's issuance of its decision [*39] on pending motions for summary judgment and class certification.
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> The parties must now refocus their efforts toward litigation of this appeal and the underlying matter.Motion of Plaintiff-Appellant to Enlarge the Time for Filing Its Brief [dated April 6, 2000], *Estados Unidos Mexicanos v. DeCoster*, Docket No. 99-2170, First Circuit Court of Appeals, Exh. 2 to O'Brien Aff., at 2. At this point, less than a week after this court issued its decision on the motions for summary judgment and class certification, counsel for the plaintiffs could not know whether the court would enforce the settlement reached at mediation; indeed, the motion to enforce the settlement had not yet been filed. The only prudent course, with the expanded deadline earlier requested from the First Circuit approaching, was to request additional time if needed and to file a brief in that appeal, so that the plaintiffs would be protected in the event that the settlement was not enforced. If, as counsel for the plaintiffs reports, the defendants "flatly refused either to honor the settlement that was reached on February 21, 2000 at mediation or to finalize the formal settlement agreement" after this court [*40] issued its ruling, which clearly favored the defendants, on March 31, 2000, First Wolf Aff. P 31, counsel for the plaintiffs had no choice but to pursue the appeal and discovery in the underlying action, Defendants' Opposition at 15-16, in order to protect the interests of their clients. The same is true of the alleged action of counsel for the plaintiffs in filing another case, *Cepeda et al. v. DeCoster et al.*, Docket No. 00-145-P-H, in this court on May 12, 2000, seeking relief similar to that sought in the instant case on behalf of eight additional named plaintiffs. Defendants' Opposition at 16. In light of the court's ruling on the motion for class certification and the defendants' refusal to continue to work toward a formal settlement agreement, counsel for the plaintiffs acted reasonably to protect the interests of the named plaintiffs in the second action. Under the circumstances, that action cannot be taken as evidence that the plaintiffs in the instant action did not believe that the handwritten agreement signed at the end of the mediation session was binding.

Two final points require mention. First, the plaintiffs' delay in bringing this motion to enforce the settlement, [*41] from the unknown date after March 31, 2000 when the defendants manifested their refusal to implement a

settlement to July 7, 2000, while regrettable and not to be condoned, is insufficient to require its denial under the circumstances of this case, in which most of the named plaintiffs are residents of Mexico and one is the government of Mexico itself. "The policy of favoring settlement agreements as a means of avoiding costly and time consuming litigation would scarcely be furthered by leaving a party without recourse when the other party fails to perform according to the terms of the agreement." *Dankese v. Defense Logistics Agency*, 693 F.2d 13, 16 (1982).

Second, counsel for the non-DeCoster defendants contended for the first time at oral argument that the fact that the plaintiffs seek attachment against his clients in connection with the motion to enforce the settlement, Plaintiffs' Motion *In Camera* for Attachment, etc. (Docket No. 140), is evidence that the issue of security for the defendants' settlement payments was material. This issue is not properly before the court, having been raised for the first time at oral argument. Even if it were, counsel conceded [*42] that no demand was made on his clients at any time for such security. An issue never discussed by the parties could not possibly be material to a contract between them. In addition, as noted above, the nature of the collateral to be provided as security was not a material term in any event. Further, the request for security in the form of an attachment given the defendants' position on this motion is not unexpected and is an entirely separate matter from the question whether a binding settlement agreement existed. Such a request, under the circumstances, cannot serve as evidence of the parties' intent on February 21.

III. Conclusion

Clearly, the court's March 31 ruling on the motions for class certification and summary judgment made the settlement reached at the February 21 mediation unattractive to the defendants. As time continues to pass, the terms of that settlement become even less attractive to the defendants. Those facts do not justify their refusal to abide by the settlement. Here, the parties' assent to be bound by all material terms of the February agreement was manifested impliedly in that contract and in their ensuing actions, and the contract was sufficiently definite [*43] to enable this court to determine its exact meaning and fix any legal liability of the parties. *Smile, Inc. v. Moosehead Sanitary Dist.*, 649 A.2d 1103, 1105 (Me. 1994). Particularly in light of the strong public policy encouraging settlement of employment discrimination cases, *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744 (1st Cir. 1996), nothing further need be shown.

Accordingly, I recommend that the plaintiffs' motion to enforce the settlement be **GRANTED**. [13]

This recommended decision shall be docketed under seal pending further order of the court.

NOTICE

[*44] ***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 18th day of September, 2000.

David M. Cohen

United States Magistrate Judge

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[13] Should my recommended decision be adopted by the court, counsel for the parties must present to the court for approval a written settlement agreement implementing the enforceable February agreement and containing whatever additional terms they may wish to include. In the unlikely event that any party refuses or fails to participate in this endeavor, the court may order the preparation of such a document.