

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

BRIAN KOLFAGE, et al., )  
 )  
 Plaintiffs, )  
 vs. )  
 )  
 LOUIS ANTHONY CAPONECCHIA, et al., )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

No. 2:14-cv-1638-HRH

ORDER

Motion to Enforce Settlement Agreement with Loebe<sup>1</sup>

Plaintiffs move for an order enforcing a settlement agreement between them and defendant Loebe. The motion is opposed. Oral argument has not been requested and is not deemed necessary.

A settlement conference was conducted by Magistrate Judge Duncan on February 9, 2015, as between plaintiffs and a number of the defendants, including Loebe. Excerpts from a transcript of proceedings at the conclusion of the settlement conference are appended to plaintiffs’ motion as Exhibit A. A complete transcript of the conclusion of the settlement conference has been made a part of the record.<sup>2</sup> After the settlement conference, counsel for plaintiffs’ tendered a lawyerly looking and sounding, proposed, written settlement agreement to Loebe. Plaintiffs and Loebe were unable to agree on a written rendition of the results of the settlement conference between them.

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<sup>1</sup>Docket No. 100.

<sup>2</sup>Docket No. 81.

Prior to the settlement conference, Loebe had moved for summary judgment.<sup>3</sup> In the belief that a settlement had been reached, the court denied Loebe's motion for summary judgment as moot.<sup>4</sup> Thereafter, when the court became aware of the disagreement over a written settlement agreement, the court received and considered motions for reconsideration by Loebe and others with respect to its denial of motions for summary judgment. The court granted Loebe's motion for reconsideration, ruling, however, that whether or not the Loebe motion for summary judgment would be reinstated must await a decision on the instant motion to enforce the settlement agreement.<sup>5</sup>

In their motion to enforce settlement agreement, the plaintiffs take the position that the case is settled as between them and Loebe despite the fact that no written settlement agreement was agreed upon. In responding to the instant motion, Loebe comments upon a substantial number of matters not relevant to the question: did plaintiffs and Loebe settle this case? In doing so, Loebe repeatedly acknowledges that an agreement was reached at the settlement conference.<sup>6</sup> In the end, Loebe suggests that plaintiffs' attorney is "operating under the mistaken assumption that the [written] agreement is required for conclusion of the case."<sup>7</sup> Indeed, Loebe asserts that plaintiffs needed "only ... to submit

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<sup>3</sup>Docket No. 51.

<sup>4</sup>See Order (Case Status), Docket No. 68.

<sup>5</sup>Docket No. 96.

<sup>6</sup>See Loebe's Opposition to Motion to Enforce Settlement Agreement at 2, 3, 4, and 5, Docket No. 105.

<sup>7</sup>Id. at 5.

their Motion to Dismiss, as the settlement agreement in court was entered under penalty of Perjury, and is fully enforceable.”<sup>8</sup>

The court agrees that a settlement was reached before Magistrate Judge Duncan as between plaintiffs and defendant Loebe.<sup>9</sup>

The settlement terms as recited by Magistrate Duncan were as follows:

- (1) That the agreement was to reach a complete [peace] of the lawsuit that is presently pending and that the lawsuit would be dismissed, each side bearing its own costs and fees.<sup>10</sup> The court construes this term to be the equivalent of an agreement that plaintiffs’ claims against Loebe should be dismissed with prejudice, each party bearing their own attorney fees and costs.
- (2) That the agreement included any claim that could have been brought in the lawsuit.<sup>11</sup> The court construes this term to mean that plaintiffs and Loebe give up all claims they have or may have arising out of the facts alleged in plaintiffs’ complaint.
- (3) That the parties agreed that “they won’t disparage one another going forward in the future and that they won’t take action through third parties to disparage one another.”<sup>12</sup>

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<sup>8</sup>Id.

<sup>9</sup>Transcript of Proceedings (Settlement Conference) at 7-9, Docket No. 81.

<sup>10</sup>Id. at 6.

<sup>11</sup>Id.

<sup>12</sup>Id.

- (4) That “to the extent that they have the power to affect, they [plaintiffs and Loebe] will, in good faith, attempt to remove anything that is disparaging that’s within their control that is publicly posted that is the disparaging material.”<sup>13</sup> The court construes this provision to require that plaintiffs and Loebe expend reasonable efforts to remove content that disparages any party to the agreement and which they themselves posted publicly.
- (5) Finally, the settlement between plaintiffs and Loebe contemplated a “signed document” with respect to certain statements made with respect to a third party not in the case. That person was identified as Jan Virtros. Initially there was some question whether the plaintiffs and Loebe were in agreement with respect to the foregoing. Later, however, in a colloquy between the court and parties, it became clear that “the real key point is that my client [Brian Kolfage] will say that he published Jan’s public information on his public Facebook page and that he regrets anything that was later done to Jan as a result of that.”<sup>14</sup> In response to plaintiffs’ counsel’s foregoing recitation of the “key point,” Loebe responded, “Yes. That sounds about right.”<sup>15</sup> Magistrate Judge Duncan further inquired as to whether there was

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<sup>13</sup>Id. at 6-7.

<sup>14</sup>Id. at 8.

<sup>15</sup>Id. at 9.

“general agreement about this?” And Loebe responded, “Yes, in general agreement.”<sup>16</sup>

Thus, to complete the agreement, Brian Kolfage must sign a written statement admitting that he published Jan Virtros’ public information on his public Facebook page and that he regrets anything that was later done to Jan Virtros as a result of that publication.

Plaintiffs’ motion for enforcement of settlement agreement<sup>17</sup> is granted. The terms of the agreement are those set out as the court’s construction of Magistrate Judge Duncan’s verbal recitation of the settlement agreement. The enforcement of the settlement agreement necessary at this time is that Brian Kolfage, on or before June 30, 2015, sign and deliver to Loebe the above statement with respect to Jan Virtros and the agreed dismissal of this case as between plaintiffs and Loebe.

In accordance with the foregoing settlement agreement, the clerk of court shall enter judgment dismissing plaintiffs’ complaint as between plaintiffs and defendant Loebe, with prejudice, each party to bear their own costs and attorney fees. Loebe’s motion for summary judgment is not reinstated, and Brian Kolfage shall deliver the foregoing statement on or before June 30, 2015.

DATED at Anchorage, Alaska, this 29th day of May, 2015.

/s/ H. Russel Holland  
United States District Judge

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<sup>16</sup>Id.

<sup>17</sup>Docket No. 100.