IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DANIEL M. SCHWARTZ, Petitioner, v. CHARLIE CHASE and CONQUEST FLIGHT, LLC, Respondents.	)	Civil Action No. 4274-VCP

MEMORANDUM OPINION

Submitted: March 17, 2010
Decided: June 29, 2010

John G. Harris, Esquire, BERGER HARRIS, LLC, Wilmington, Delaware; *Attorneys for Petitioner*

Jennifer R. Hoover, Esquire, BENESCH, FRIEDLANDER, COPLAN & ARONOFF, LLP, Wilmington, Delaware; Lane J. Fisher, Esquire, FISHERZUCKER, LLC, Philadelphia, PA; *Attorneys for Respondent*

PARSONS, Vice Chancellor.

This Memorandum Opinion addresses a motion by Respondent Charlie Chase to enforce a settlement agreement he allegedly entered into with Petitioner, Daniel M. Schwartz. The question in this fact-sensitive context is whether settlement negotiations between Bradford J. Sandler, then-counsel for Chase, and Adam L. Balick, counsel for Schwartz at all times relevant to this motion, resulted in a binding settlement agreement. The burden of showing that a binding contract arose is on Chase, the party seeking to enforce that contract. In answering this question, I rely largely on email correspondence between Balick and Sandler leading up to the alleged contract as well as testimony given by several witnesses at an evidentiary hearing held on December 21, 2009.

Based on my review of the evidence, briefs, and argument, I deny Chase's motion. The oral and written communications between Balick and Sandler show that Sandler reasonably understood that Balick had authority to engage in the settlement negotiations with Sandler and that many, if not most, of the material terms of the putative settlement were memorialized in the Settlement Agreement and Agreement for Redemption of Membership Interest (the "Settlement Agreement" or "Agreement"), which Chase signed. Nevertheless, at least two conditions precedent to the formation of a binding contract remained unfulfilled as of May 11, 2009, the date Chase claims the Agreement became binding, namely, (1) Schwartz's express confirmation of the representations and warranties in the Agreement and (2) Schwartz's signature. Additionally, although Schwartz, through counsel, arguably confirmed the accuracy of the representations and warranties on May 13, 2009, he did not sign the Agreement on that date (or any time thereafter) and sought confirmation regarding certain terms in the Agreement to which

Chase failed to respond. Thus, Chase did not satisfy his burden of showing that the parties agreed to all material terms and intended to be bound by the Settlement Agreement, and I deny his motion to enforce that Agreement.

I. BACKGROUND

Schwartz and Chase each possess a 50% membership interest in Conquest Flight, LLC (the "Company"), which was formed in 2004 to purchase and operate a 1977 Cessna 441 Conquest II Twin turboprop airplane (the "Turboprop").[1] The Company pledged the Turboprop as collateral on a commercial loan used to purchase it. The balance of the loan currently exceeds the value of the Turboprop.[2] Additionally, "[t]he [Turboprop] is in the possession of [Chase]," and "[t]he [Company's] bank accounts are in the possession of [Schwartz]."[3]

On January 9, 2009, Schwartz filed a complaint seeking dissolution of the Company, to which Chase responded on March 5, 2009. Balick and Lane Fisher, who represented Chase before Sandler entered the fray, began negotiations regarding a possible settlement. Those negotiations ceased, however, in approximately March 2009 when Schwartz told Balick to stop settlement talks. By that time, Schwartz had come to

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1 PX 1; Tr. 96 (Schwartz). Where the identity of the witness whose trial testimony is cited is not clear from the text, it is indicated parenthetically, as done here.

2 Tr. 88-89 (Balick), 113, 121 (Schwartz).

3 Tr. 71 (Balick).

seriously distrust Chase and called off negotiations because he felt they were unlikely to "result in a final disposition of th[e] dispute."[4]

After Sandler replaced Fisher as Chase's counsel, he sought and received authorization from Chase to revive settlement discussions.[5] Sandler then called Balick sometime in early April 2009 and suggested that they reexamine the most recent version of the Settlement Agreement.[6] Balick expressed doubt that Schwartz could be convinced to settle, but on or about April 16 he agreed to reopen negotiations after seeking and receiving authorization from Schwartz's in-house counsel, Mary Gallagher.[7] Over the

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4 DX A at 4-5; Tr. 13-14 (Sandler). During the initial negotiations between Balick and Fisher, Schwartz began to view Chase as a manipulator who scuttled potential agreements late in the process by injecting new terms and conditions. PX 5; Tr. 48 (Sandler), 68, 81, 83 (Balick) ("[T]here was always another thing coming from [Chase] in these settlement discussions . . . over the year and a half that I was involved in this case, [Chase] always had one thing that scuttled our negotiations. It was just a pattern that developed over a year and a half."), 112-13 (Schwartz).

5 DX A at 4; Tr. 59 (Chase).

6 Tr. 13-14 (Sandler). After reviewing the version of the Agreement Balick emailed to him, Sandler indicated that Chase "would like to close on the transaction contemplated by" that version of the Agreement. DX A at 4.

7 DX A at 4; Tr. 65, 68-69 (Balick). Gallagher served as counsel to Surgical Monitoring Associates, a company controlled by Schwartz. Tr. 176-77 (Gallagher). Balick testified that he "was authorized [to engage in Settlement negotiations] or at least that was my impression. I wouldn't ever communicate a settlement offer, and I would never communicate acceptance of a settlement without having expressed [sic] authority from someone representing my client." Tr. 69. When asked what authority he had given Balick to pursue settlement discussions with Chase's counsel, however, Schwartz responded, "[a]bsolutely none." Tr. 99 (Schwartz).

As discussed *infra* Part II.A, I find that, because Schwartz effectively delegated all duties involving settlement to his daughter (Melissa Maffettone), Gallagher, and

next three weeks, Balick and Sandler negotiated the terms of a possible settlement through a series of phone calls and emails.[8] As these emails form an important part of the factual predicate for my decision, I quote the most pertinent language from that correspondence below:

> **Balick**: I have reviewed your modified agreement with Dr. Schwartz' in-house counsel. She has asked me to wait to discuss with Dr. Schwartz until we are sure Mr. Chase is willing to sign the document. But we have no reason to believe that Dr. Schwartz will object to your suggestions. (4-21-09, 8:01 p.m.).[9]
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> **Sandler**: Mr. Chase has approved the agreement. Please let me know about your client. (04-23-09, 2:51 p.m.).[10]
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> **Balick**: As to the Settlement Agreement, assuming no new issues, I will print out a couple of clean copies and have my client sign them. Any reason why I should not remove the paragraphs marked "reserved"? (04-23-09, 3:00 p.m.).[11]
>
> **Sandler**: No issues with removing the reserved paragraphs. (04-23-09, 3:48 p.m.).[12]

Balick, he created a situation where Balick reasonably believed he had authority to engage in settlement negotiations and enter into a binding settlement agreement, and Balick indicated as much to Sandler. As such, whether intentionally or not, Schwartz effectively delegated authority to Balick to discuss and finalize the terms of settlement with Sandler.

8 The parties stipulated to the authenticity of all emails. Tr. 11.

9 DX A at 3.

10 *Id.*

11 *Id.* at 2; PX 10.

12 DX A at 2; PX 10.

Balick: I just heard back from my client's in-house counsel. Their preference would be to have Mr. Chase sign the document and forward to us for signatures. Still a lot of distrust on my end. (04-23-09, 4:12 p.m.).[13]

Sandler: Is Dr. Schwartz ok with the agreement? (04-23-09, 5:07 p.m.).[14]

Balick: . . . I have now heard back from my client and he is comfortable with the changes you made to the Settlement Agreement. Please remove the reserved paragraphs and accept the remaining changes you made. Please deliver two signed copies to me. I will have Dr. Schwartz sign both copies and I will return a fully executed copy to you. (04-29-09, 4:04 p.m.).[15]

Sandler: I will try to get the [Settlement Agreement] to you tomorrow, but it may be Friday. (04-29-09, 4:11 p.m.).[16]

Balick: Anticipating the resolution of this matter, I have prepared a stipulation of dismissal for your review. (05-04-09, 4:45 p.m.).[17]

Sandler: Attached is the initial redline I sent to you, a modified redline cleaning up the document . . . and a clean version incorporating all of the changes. If the document is acceptable to you as is in the clean version, please let me know and I will forward to Mr. Chase. (05-05-09, 9:20 a.m.).[18]

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13 *Id.*

14 DX A at 2.

15 *Id.* at 1.

16 *Id.*

17 *Id.*; *see also* DX B.

18 DX C.

Balick: Your revisions are fine. I found three additional small revisions. . . . With those minor revisions, we are comfortable with the document. (05-05-09, 12:20 p.m.).[19]

Sandler: Mr. Chase asked me to inquire as to the amount of money in the company's bank account. Would you please let me know ASAP? He is under the impression that $60k should be in the bank account. (05-10-09, 10:57 a.m.).[20]

Balick: This settlement is more tenuous than perhaps you may realize. My client has absolutely no faith that your client will sign the settlement agreement. . . . I was told unequivocally on Friday that if we do not have a signed agreement in hand today that discovery is due. . . . If I now go back to my client to ask how much money is in the checking account, I will get an answer, but I am absolutely confident that they will instruct me to rescind the offer and push forward for a court-mandated resolution. (05-11-09, 10:15 a.m.).[21]

Sandler: Attached is a copy of the agreement signed by Mr. Chase. . . . Mr. Chase has signed the agreement. Assuming the reps and warrants in para 6B are true and correct, please ask Mr. Schwartz to sign the agreement, and we can exchange counterparts. (05-11-09, 12:03 p.m.).[22]

Balick: . . . I want to be clear . . . that your client cannot rely on my comments about how the Conquest Flight bank account has been used. . . . Having said that is your client still committed to this agreement? (05-11-09, 12:20 p.m.).[23]

Sandler: My client certainly is committed as long as the reps and warrants are true and correct, which I assume they are. I respectfully ask that you ask Mr. Schwartz to confirm that the

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19 DX D.

20 DX E.

21 *Id.*

22 DX F; PX 12.

23 DX G; PX 13.

> reps and warrants are true and correct, and assuming they are, he can sign the agreement and we can schedule closing. (05-11-09, 12:22 p.m.).[24]

In his last substantive email to Sandler, sent on May 13, Balick memorialized a telephone conversation he had with Sandler earlier that day. In that call, Balick confirmed that Schwartz was willing to make the representations and warranties contained in the Agreement but apparently only after Balick confirmed that Chase did not interpret Section 6(b) of the Agreement in a manner contrary to Schwartz.[25] Balick's May 13 email asked Sandler, at least implicitly, to confirm the parties' mutual

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[24] *Id.*

[25] PX 16. On the subject of the representations and warranties, Balick wrote:

> As to your question whether Dr. Schwartz can still make the representations and warranties contained in Section 6, he is comfortable that he can. However, I noted that Section 6(b) contains a modifying phrase that gave me some concern. The Section refers to transactions that have been reflected in the company's books and records 'and which were approved of in writing by Chase.' I reminded you that throughout this venture, and as contemplated in the Operating Agreement, Dr. Schwartz regularly made certain routine expenditures that were never approved in writing by Mr. Chase. I wanted to confirm that you and your client did not interpret this provision as meaning that any expenditure not approved of in writing by Mr. Chase would be the basis for challenging the accuracy of Dr. Schwartz [sic] representations.
>
> Your response was that any routine expenses typically paid by Schwartz without written approval by Mr. Schwartz or any expenses paid in the ordinary course of business would not give rise to a breach of this provision.

Id.

interpretation of this and other provisions in the Agreement, including a provision dealing with tax liability issues. Balick also told Sandler that Schwartz wanted to see a copy of a personal guarantee he allegedly had signed.[26] This last concern arose after Maffettone, Schwartz's daughter, asked Gallagher to have Balick confirm whether Schwartz was indeed a guarantor.[27] Chase never responded to the substance of Balick's May 13 email or provided Schwartz with a copy of his purported guarantee.[28]

On June 26, 2009, Chase filed a motion to enforce the terms of the Settlement Agreement, which he claims became effective when he signed that document on May 11.[29] I held an evidentiary hearing on the motion on December 21, 2009 and later received the parties' post-hearing briefs. A post-hearing argument was held on March 17, 2010.

This Memorandum Opinion constitutes my findings of fact and conclusions of law on the pending motion to enforce the Settlement Agreement.

II. ANALYSIS

To resolve Chase's motion to enforce the purported Settlement Agreement, I must grapple with factual questions on several issues, including whether Balick had authority

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26 *Id*.

27 PX 14. Maffettone was appointed by Schwartz to be his "eyes and ears" in the pending litigation and worked "hand in hand" with Gallagher during the settlement negotiations. PX 5; Tr. 172-73 (Maffettone), 182, 199 (Gallagher).

28 PX 20, Balick Aff., ¶ 20.

29 Docket Item ("D.I.") 20.

to negotiate the Agreement, whether Chase returned the signed Agreement free from conditions, whether Schwartz made full execution of the Agreement a condition precedent to enforcement, and whether the parties, at any time, agreed to all material terms and intended to be bound by the Agreement. On the first issue, I find that Schwartz did not overcome the presumption that Balick possessed authority to negotiate the terms of the Settlement Agreement on his behalf.

As to the other issues, for the reasons stated below, I conclude that Chase failed to meet his burden of showing that (1) the parties agreed to all material terms, (2) all preconditions were satisfied, and (3) the parties intended to be bound when Chase signed the Agreement on May 11 or at any time subsequent to that date. Thus, while Balick and Sandler had completed negotiations on many, if not most, of the terms of a settlement, the parties did not reach the point that they both intended to be bound by the Agreement on May 11 or thereafter. As a result, Schwartz is not bound by that Agreement.

"A party seeking to enforce [a] settlement agreement has the burden of proving the existence of [a] contract by a preponderance of the evidence."[30] "Delaware law favors the voluntary settlement of contested suits,"[31] and such arrangements will bind the parties

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[30] *Heiman Aber & Goldlust v. Ingram*, 1998 WL 442691, at *2 (Del. May 14, 1998) (citing *Knowles v. Massey,* 81 A. 470 (Del. Super. 1908)). But, because Balick believed he had authority to negotiate a settlement and intimated as much to Sandler, it is Schwartz, not Chase, who has the burden of proving that Balick did not possess that authority. *See infra* note 43 and accompanying text.

[31] *Clark v. Ryan*, 1992 WL 163443, at *5 (Del. Ch. June 17, 1992) (citing *Neponsit Inv. Co. v. Abramson,* 405 A.2d 97 (Del. 1979)).

where they agree to all material terms and intend to be bound by that contract, "whether or not [the contract is] made in the presence of the court, and even in the absence of a writing."[32] When dealing with a motion to enforce a settlement agreement, the Court generally determines whether a binding settlement agreement arose by asking

> whether a reasonable negotiator in the position of one asserting the existence of a contract would have concluded, in that setting, that the agreement reached constituted agreement on all of the terms that the parties themselves regarded as essential and thus that that agreement concluded the negotiations and formed a contract.[33]

Settlement Agreements are contracts and Delaware courts examine them under well-established law surrounding contract interpretation.[34] "The primary goal in contract interpretation is to fulfill, as nearly as possible, the reasonable shared expectations of the parties at the time they contracted."[35] Nevertheless, Delaware adheres to the objective theory of contracts and, "[a]lthough the law . . . generally strives to enforce agreements in accord with their makers' intent, [this theory] considers 'objective acts (words, acts and

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32 *Rohm & Haas Elec. Materials, LLC v. Honeywell Int'l, Inc.*, 2009 WL 1033651, at *4 (D. Del. Apr. 16, 2009) (quoting *Read v. Baker,* 438 F. Supp. 732, 735 (D. Del. 1977)); *Transamerican S.S. Corp. v. Murphy*, 1989 WL 12181 (Del. Ch. Feb. 14, 1989).

33 *Leeds v. First Allied Conn. Corp.*, 521 A.2d 1095, 1097 (Del. Ch. 1986).

34 *Clark*, 1992 WL 163443, at *5 ("Viewed as a contract, [an oral agreement to compromise and settle a lawsuit] is construed by the legal principals [sic] applicable to contracts generally."); *see also Heiman*, 1998 WL 442691, at *2; *Fox v. Paine*, 2009 WL 147813, at *5 (Del. Ch. Jan. 22, 2009).

35 *Fox*, 2009 WL 147813, at *5 (citing *Bell Atl. Meridian Sys. v. Octel Commc'ns Corp.,* 1995 WL 707916, at *5 (Del. Ch. Nov. 28, 1995)).

context)' the best evidence of that intent."[36] Under this theory, determining whether the parties reached a binding contract to settle requires an examination of the "objective, overt manifestations of the parties, rather than their subjective intent."[37]

Chase argues that the parties entered an enforceable Settlement Agreement on May 11, 2009. Chase bases that contention on his allegations that after Balick and Sandler had negotiated a form of Settlement Agreement and represented to each other that their respective clients were agreeable to that form, Schwartz's team demanded that Chase execute the Agreement by the end of the day on May 11 and Chase executed the Agreement and forwarded it to Balick on that day without condition or modification.

In response, Schwartz claims that he never agreed to be bound by the Settlement Agreement. Schwartz advances four reasons for his assertion that a binding Agreement never arose: first, Balick lacked the authority to bind Schwartz to the Settlement Agreement; second, Sandler's statement that Chase was willing to commit to the Agreement "as long as the reps and warrants are true and correct" constituted a counteroffer that was never accepted by Schwartz; third, Schwartz made it clear that his

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[36] *MBIA Ins. Corp. v. Royal Indem. Co.*, 426 F.3d 204, 210 (3d Cir. 2005) (quoting *Haft v. Haft*, 671 A.2d 413, 417 (Del. Ch. 1997)); *see also NBC Universal, Inc. v. Paxson Commc'ns Corp.,* 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005).

[37] *Del. Dept. of Educ. v. Doe*, 2008 WL 5101623, at *1 (Del. Ch. Nov. 21, 2008) ("The overt manifestations of agreement must be viewed from the perspective of a 'reasonable negotiator' who must conclude that the agreement contained all terms essential to the parties and that the agreement concluded the negotiations.") (citing *Loppert v. WindsorTech, Inc.*, 865 A.2d 1282, 1287 (Del. Ch. 2004)); *see also Indus. Am., Inc. v. Fulton Indus., Inc.*, 285 A.2d 412, 415 (Del. 1971); *Leeds*, 521 A.2d at 1097.

signing of the Agreement was a condition precedent to being bound and he never signed the Agreement; and fourth, the parties never agreed to all material terms or intended to be bound by the Agreement.

I begin by addressing Schwartz's claim that Balick lacked authority to engage in settlement negotiations or bind Schwartz to the terms of the Settlement Agreement. I then examine all the other issues Schwartz raised as to whether or not a binding contract between the parties arose on May 11, 2010 or thereafter.

A. Did Balick Have Authority to Bind Schwartz to a Settlement Agreement?

Although Schwartz may not have intended to grant Balick authority to engage in settlement negotiations or bind him to any contract resulting from those negotiations, Schwartz failed to rebut the presumption of authority that arose when his litigation counsel, Balick, entered settlement talks with Sandler. Indeed, though Schwartz denied ever authorizing Balick to negotiate a settlement, the litigation decision-making hierarchy Schwartz set up created a situation where Balick either received or reasonably believed he received such authority. Even if Balick assumed that authority erroneously, Schwartz did nothing to correct that error when he learned that Balick was negotiating a settlement with Sandler. As such, I find that Balick did have the authority to negotiate the terms of the Settlement Agreement with Sandler.

Attorneys or other agents appointed to engage in settlement negotiations must possess express, implied, or apparent authority to act on behalf of their clients; otherwise

a contract arising from those negotiations will not bind the parties.[38] Express authority is a form of actual authority and must be apparent from an oral or written contract.[39] Implied authority, which is derived from actual authority, "allows an agent to act 'based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent.'"[40] Lastly, "[a]pparent authority is that authority which, though not actually granted, the principal knowingly or negligently permits an agent to exercise, or which he holds him out as possessing."[41] "An attorney of record in a pending action who agrees to a compromise of a case is presumed to have lawful authority to make such an arrangement."[42] "A client

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38 *See Del. Dep't of Educ.*, 2008 WL 5101623, at *1; *Aiken v. Nat'l Fire Safety Counsellors*, 127 A.2d 473, 475 (Del. Ch. 1956).

39 *Del. Dep't of Educ.*, 2008 WL 5101623, at *1 (citing *Dweck v. Nasser*, 2008 WL 4809031, at *7 (Del. Ch. July 2, 2008)).

40 *Id.*; *see also B.A.S.S. Gp., LLC v. Coastal Supply Co.*, 2009 WL 1743730, at *4 (Del. Ch. June 19, 2009) ("Actual authority is that authority which a principal expressly or implicitly grants to an agent.") (quoting *Albert v. Alex Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *10 (Del. Ch. Aug. 26, 2005)).

41 *B.A.S.S. Gp.*, 2009 WL 1743730, at *5 (quoting *Alex Brown*, 2005 WL 2130607, at *10; *Old Guard Ins. Co. v. Jimmy's Grille, Inc.*, 860 A.2d 811 (TABLE), 2004 WL 2154286, at *3 (Del. Sept. 21, 2004)) ("To find apparent authority, the party seeking to show the existence of such authority must 'show reliance on indicia of authority originated by the principal, and such reliance must have been reasonable.' Where a 'third party relies on the agent's apparent authority in good faith and is justified in doing so by the surrounding circumstances, the principal is bound to the same extent as if actual authority had existed.'").

42 *Clark*, 1992 WL 163443, at *5 (quoting *Aiken*, 127 A.2d at 475).

challenging the authority of the attorney after settlement has the burden to overcome the presumption of authority."[43]

From the perspective of Sandler, and that of any reasonable negotiator, Balick possessed authority to negotiate the terms of the Settlement Agreement.[44] As Sandler posited, "[i]f [Balick] wasn't truly authorized and never [received] authority to continue discussions, why did [the two parties] have discussions" that lasted more than three weeks?[45] Defendants, however, dispute Balick's testimony that he considered himself fully authorized to engage in settlement talks. Instead, they rely on Schwartz's claim that he never gave Balick authority to entertain any such discussions with Chase's counsel.[46]

The disparity between the testimony of Balick and Schwartz is understandable in light of the way Schwartz organized his litigation chain of command. From the outset, Schwartz took only a limited role in the litigation.[47] Indeed, by the time Sandler entered

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43 *Nagyiski v. Smick*, 2009 WL 5511159, at *1 (Del. Ct. Com. Pl. Dec. 9, 2009) (citing *Shields v. Keystone Cogeneration Sys., Inc.,* 620 A.2d 1331, 1335 (Del. Super. 1992)); *see also Moyer v. Moyer*, 602 A.2d 68, 73 (Del. 1992) (citing *Aiken,* 127 A.2d at 475); *Annand v. Brookmeade, Inc.*, 1979 WL 4640, at *5 (Del. Ch. Sept. 18, 1979).

44 Tr. 17, 18, 42 (Sandler) ("[C]ertainly I understand that he ran it by in-house counsel . . . . And ultimately . . . [t]hey ran the agreement by [Schwartz]—at least I presume they did because I received an email saying that [Schwartz] is now comfortable with the agreement.").

45 Tr. 42 (Sandler).

46 *See supra* note 7.

47 Tr. 101-03, 107-09 (Schwartz). At the December 21, 2009 hearing, Schwartz admitted, for example, that he did not know whether he or his company paid Balick's legal fees, nor how much Balick charged. Tr. 117 (Schwartz)

the fray and sought to revive settlement talks with Balick, Schwartz had left the country and effectively removed himself from the decision-making process.[48] In his absence, Schwartz delegated control of the litigation to Maffettone,[49] who, in turn, left the day-to-day decisions to Gallagher,[50] and Gallagher expressly allowed Balick to seek "some sort of an agreement [with Sandler] that would be better for all parties involved."[51] Essentially, Schwartz delegated authority to settle the case to Maffettone, who worked "hand in hand" with Gallagher, who, in the end, delegated that authority to Balick. As in the children's game of Whisper Down the Lane, it was all too predictable that the communications regarding Balick's authority to negotiate a settlement might become garbled somewhere along the way. It was the responsibility of Schwartz and his agents, however, to take appropriate measure to minimize that risk.

("Q: [D]oes Mr. Balick bill you, Dr. Schwartz? A: No, he doesn't. Q: He does not? A: Yes, of course he bills. But he bills the company. Yes, he does. Q: And the company, not you? A: I really don't know. I think he probably bills the company.").

48 PX 5; Tr. 65 (Balick), 99 (Schwartz) ("I came very late to find out about any settlement discussions, and they were not on my radar."), 146-48, 172-73 (Maffettone), 179, 182, 194, 199 (Gallagher).

49 Tr. 101 (Schwartz), 146-48 (Maffettone) ("[Schwartz] has other things. He runs a company. He publishes papers. And he needed to focus on those things only. And he said, 'I need to go do those. I need to know that you can see this through and come to me when we get to a point where there's something acceptable.'").

50 Tr. 179, 182-84 (Gallagher) ("I was giving information back to [Maffettone], as I saw fit to give information back to her.").

51 Tr. 183 (Gallagher); *see also* Tr. 68-71, 85-87, 92-93 (Balick), 180, 183-84 (Gallagher).

Schwartz, Maffettone, and Gallagher may have believed that Schwartz retained sole power to accept the Settlement Agreement despite this multi-tier delegation of authority.[52] Nevertheless, such subjective belief does not overcome the fact that even though Schwartz may not have intended to give Balick authority to engage in settlement talks, he effectively removed himself from the litigation decision-making process and negligently allowed Gallagher, at least, to authorize Balick to pursue such negotiations.[53] Having considered the relevant evidence, I find that, even if communication broke down somewhere along the chain of command, Balick either actually received authorization or reasonably concluded he had authorization to work with Gallagher to settle the case with Sandler on Schwartz's behalf. In that regard, I find Balick's testimony credible and accept it.

Based on these findings, I hold that Schwartz has not overcome the presumption that Balick possessed the authority to negotiate settlement terms with Sandler.

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[52] *See* Tr. 107-08 (Schwartz) ("But it was made very, very clear, 'I'm the boss. I own the company. I'm the decision maker. Nobody else is the decision maker.'").

[53] Schwartz's negligence is manifest, for example, in the fact that, despite becoming aware that Balick was working with Sandler to modify the terms of the Settlement Agreement, he did not attempt to stop Balick. Tr. 138 (Schwartz) ("I probably heard at one point that [Balick] was [engaged in settlement negotiations with Sandler] and just laughed, as I laughed the whole way through and said, 'You're going in a circle.'"). Schwartz's failure to stop the settlement talks after learning of Balick's actions severely undercuts his claim that he never authorized such talks and that Balick negotiated with Sandler against his express instructions.

B. Was There was a Meeting of the Minds as to All Material Terms?

Even though Balick possessed authority to negotiate on Schwartz's behalf, three questions still remain as to whether Balick and Sandler entered a binding settlement agreement on May 11, or thereafter. The first is whether Chase executed and delivered the Settlement Agreement to Schwartz free from conditions. The second is whether the parties made full execution of the Agreement by both parties a precondition to formation of a binding contract. And the third is whether the parties at any time agreed to all material terms of the Settlement Agreement. For the reasons discussed below, I hold that no binding contract arose on May 11, May 13, or thereafter and, therefore, Schwartz is not bound by the terms of the Settlement Agreement.

1. Did Chase deliver the Agreement free from conditions?

As to the first question, it is a basic matter of contract law that, to be binding, an acceptance of an offer "must be identical with the offer and *unconditional*."[54] A contract arises only when "it is reasonable to conclude, in light of all surrounding circumstances, that all of the points that the parties themselves regard as essential have been expressly or . . . implicitly resolved."[55] Thus, if a reply to an offer purports to accept that offer but

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54 *Friel v. Jones*, 206 A.2d 232, 233-34 (Del. Ch. 1964), *aff'd*, 212 A.2d 609 (Del. 1965) (emphasis added).

55 *Id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 59 (1981) ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.").

attaches conditions or qualifications that require additional performance by the offeror, such a reply is not an acceptance but is, instead, a counteroffer.[56]

After informing Balick that Chase had signed the Settlement Agreement, Sandler brought up two issues, one regarding the amount of money in the Conquest Flight bank account and the other asking Schwartz to confirm a portion of the Agreement. With regard to this latter issue, Sandler wrote, "[a]ssuming the reps and warrants in para 6B are true and correct, please ask Mr. Schwartz to sign the agreement, and we can exchange counterparts."[57] In his reply, Balick responded to the first issue by writing that Chase could not rely on Balick's "comments about how the Conquest Flight bank account has been used" and then asked, "[h]aving said that is your client still committed to this agreement?"[58] Sandler responded that Chase was committed, but added the proviso, "as long as the reps and warrants are true and correct."[59] Later in the same email, Sandler again requested that Balick have Schwartz "confirm that the reps and warrants are true and correct, and assuming they are, [have him] sign the agreement" so that Sandler and Balick could schedule closing.[60]

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56 *Wilson v. Wilson*, 633 A.2d 372, 372 (Del. 1993); *see also* E. ALLAN FARNSWORTH, CONTRACTS (3d ed.) § 3.13 ("Since an acceptance is the ultimate step in making a contract, the commitment [of acceptance] cannot be conditional on some final step to be taken by the offeror.").

57 DX F; PX 12.

58 DX G; PX 13.

59 *Id.*

60 *Id.*

Sandler claims he made these requests because he "wanted to make sure that nothing happened to the agreement because of the distrust on either side. . . . [and to] make sure that everybody was on the same page."[61] Even Sandler acknowledged, however, that his request that Schwartz confirm the representations and warranties in the Agreement could be characterized as a "proviso."[62] Indeed, based on Sandler's emails, Balick considered Schwartz's confirmation of Section 6(b) of the Agreement, presumably by signing it, a condition precedent to the parties reaching a deal.[63] I agree with Balick's assessment.

A party seeking confirmation of terms memorialized in a written agreement often cannot be said to be making a counteroffer—especially where all substantial terms previously have been agreed on. Chase's stubborn insistence that Schwartz confirm the accuracy of Section 6(b), however, was such that a reasonable negotiator likely would consider Schwartz's signed confirmation of the reps and warranties contained in that

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61 Tr. 35.

62 Tr. 47.

63 Balick testified that "[b]ut for the fact that the Chase camp came back with those two follow-up questions, [*i.e.*, questions about the representations and warranties and the amount of money in the Conquest Flight bank account], I believe we had a deal. And the fact that they came back with these two questions I believe scuttled the deal." Tr. 79. While it is probably overstatement to say that Chase's follow-up questions actually "scuttled" the negotiations (after all, Balick continued to pursue settlement actively at least through May 13), it appears that Balick believed that if he took those questions to Schwartz, Schwartz would terminate the negotiations.

Section a condition precedent to the formation of a binding contract.[64] Chase did not ask Schwartz to confirm the validity of any other term in the Agreement. Additionally, Chase maintained his request for Schwartz's confirmation of the reps and warranties even after Balick informed Sandler that "[t]he settlement [was] more tenuous" than Sandler realized.[65] Schwartz's specific confirmation of the terms contained in Section 6(b) of the Agreement was, thus, important enough to Chase that, for whatever reason, he was willing to risk disrupting tenuous settlement talks to obtain it. Chase's insistence on this point also evinces an intent that until the parties both signed the Agreement, they would not yet have agreed on all of its material terms.

Putting these facts in perspective and in context, it appears that, from Chase's viewpoint, if Schwartz had examined the Settlement Agreement and decided not to specifically confirm the reps and warranties, either through Balick or by signing that Agreement, the deal would not have gone through. Therefore, I find that Chase's May 11 communication at best attached a condition precedent to formation of a contract and, at worst, constituted a counteroffer. Because Schwartz did not confirm the terms contained in Section 6(b) on May 11, I hold that no binding contract arose on that date.

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64 Under Section 6(b) of the Settlement Agreement, Schwartz, as the seller, was to represent and warrant that he had not incurred liabilities, engaged in transactions, maintained bank accounts, or used corporate funds except those liabilities, transactions, bank accounts, and funds reflected in the normally maintained books and records of the Company and approved in writing by Chase. *See* DX F.

65 DX E.

2. Was full execution a precondition to formation of a binding contract?

Even if Chase had signed and returned the Settlement Agreement free from conditions or provisos, however, I still would find that no binding contract arose on May 11, 2010 because the parties affirmatively designated full execution of a writing reflecting the terms of the settlement as a precondition to formation of a binding contract. That is, a reasonable negotiator reading all of the statements made by Balick and Sandler during the negotiations in light of the significant mistrust that existed between the parties would have understood that neither party intended to be bound by the Settlement Agreement until it was signed by both Chase and Schwartz.

Generally, when parties to a contract have agreed on all substantial terms of the contract and intend to be bound, the fact that one of the parties understood "that the contract should be formally drawn up and put in writing [does] not leave the transaction incomplete . . . in the absence of *a positive agreement* that it should not be binding until so reduced in writing and formally executed."[66] Thus, "[t]he question is whether the

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[66] *Loppert v. WindsorTech, Inc.*, 865 A.2d 1282, 1287-88 (Del. Ch. 2004) (emphasis added) ("[T]he fact that the parties . . . manifest an intention to prepare and adopt a written memorial will not prevent contract formation if the evidence reveals '[m]anifestations of assent that are in themselves sufficient to conclude a contract.'") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 27 (1981)); *see also Rohm & Haas Elec. Materials, LLC v. Honeywell Int'l, Inc.*, 2009 WL 1033651, *6 n.10 (D. Del. Apr. 16, 2009); *Recreation Ctrs. of Am., Inc. v. Sheppard*, 1974 WL 6345, at *5 (Del. Ch. Oct. 21, 1974) ("Where it is dearly [sic] understood that the terms of a proposed contract, though tentatively agreed on, shall be reduced to writing and signed before it shall be considered as complete and binding on the parties, there is no final contract until that is done.") (quoting *Universal Prods. Co. v. Emerson*, 179 A. 387, 394 (Del. 1935)).

parties positively agreed that there will be no binding contract until the formal document is executed."[67] It is not essential, however, that both parties require execution before a binding contract arises. In at least one case, this Court has held that, if "one of the contracting parties states that he will not be bound until" he signs the document, explicitly making that signing a condition precedent, then an agreement to settle will not be binding until that condition is met.[68] The ability of a party unilaterally to require execution of a contract before it will become binding makes sense in light of the principle

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67 *Anchor Motor Freight v. Ciabatoni*, 716 A.2d 154, 156 (Del. 1998); *Loppert*, 865 A.2d at 1287 n.33 ("'Positive' is defined as follows: 'Laid down, enacted, or prescribed. Express or affirmative. Direct, absolute, explicit.' The fact that *Universal Prods. Co.* . . . and *Anchor Motor Freight* . . . use the term 'positive' is not lost on the Court."); *but see Annand v. Brookmeade, Inc.*, 1979 WL 4640, at *4 (Del. Ch. Sept. 18, 1979) (holding that, when parties to a contract have agreed on all substantial terms of a contract and intend to be bound, a contract will be found prior to the signing of a document, "unless the parties *pretty clearly show* that such signing is a condition precedent to legal obligation.") (quoting *Smith v. Onyx Oil & Chem. Co.,* 218 F.2d 104, 108 (3d Cir. 1954) (emphasis modified)).

68 *Transamerican S.S. Corp. v. Murphy*, 1989 WL 12181, at *1 (Del. Ch. Feb. 14, 1989) ("It is everywhere agreed that if the parties contemplate a reduction to writing of their oral agreement before it can be considered complete, there is no contract until the writing is signed.") (quoting WILLISTON ON CONTRACTS § 28, pp. 66-67); *Siegman v. Columbia Pictures Ent., Inc.*, 576 A.2d 625, 631 (Del. Ch. 1989); *RGC Int'l Investors, LDC v. Greka Energy Corp.*, 2000 WL 1706728, at *12 n.44 (Del. Ch. Nov. 8, 2000) ("Because the parties had conditioned the Note Exchange on final documentation, the defendants reasonably argue that the parties had not yet contracted for the Note Exchange."); *Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1187 (Del. Ch. 2009) ("A contract or term sheet will not be binding when it reflects the parties' 'positive agreement' that it should not be binding until formally drawn up and executed.") (citing *Universal Prods. Co.,* 179 A. at 394).

that a settlement agreement will only become binding if all material terms have been negotiated and *all* parties intend to be bound by them.[69]

Near the outset of negotiations, Balick indicated to Sandler that Schwartz would not even consider whether to accept the terms of the Settlement Agreement until after Chase had signed that document.[70] At no time did Schwartz or Balick remove this condition or take any actions inconsistent with it.[71] To the contrary, at least three times during the course of these negotiations, Balick reiterated Schwartz's position that Chase had to sign the document before Schwartz would sign it, indicating that both signatures were required for the Agreement to become binding: First, after noting Schwartz's distrust of Chase, Balick told Sandler on April 23 that Schwartz preferred "to have Mr.

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69 If one of the parties expressly states that no contract will exist until both parties have signed the settlement agreement, then that party clearly does not intend to be bound until the document is fully executed.

70 DX A at 3 ("[Gallagher] has asked me to *wait to discuss with Dr. Schwartz* until we are sure Mr. Chase is willing to sign the document. But we have no reason to believe that Dr. Schwartz will object to your suggestions.") (Emphasis added).

71 On April 29, 2009, Balick did tell Sandler that Schwartz was "comfortable" with certain changes Sandler made to the Settlement Agreement. DX A at 1. Also, on May 5, Balick informed Sandler that the Schwartz camp was "comfortable with the document." DX D. When viewed in the context of the settlement negotiations as a whole, however, I find that a reasonable negotiator would not have considered such statements as indicating that Schwartz intended to be bound by the Settlement Agreement or that the parties had agreed to all material terms on either April 29 or May 5. *See* Balick Aff. ¶¶ 14-21. Notably, Chase does not argue that a definitive Settlement Agreement was reached on either of those dates.

Chase sign the document and forward to us for signatures;"[72] second, on April 29, Balick asked Sandler to first deliver two copies of the Agreement signed by Chase, which he would then deliver to Schwartz to sign;[73] and third, on May 11, Balick reiterated the tenuous nature of the settlement and told Sandler that if Schwartz did not have "a signed agreement [from Chase] in hand" by the end of that day, discovery was due.[74]

Chase argues that in each of the latter three emails, Balick's phrasing indicates that only Chase's signature was required to accept Schwartz's "offer." That argument rings hollow as to both the April 23 and 29 emails, which clearly mention the necessity of both Chase and Schwartz's signatures. And, while the May 11 email does not explicitly mention Schwartz's signature, it also does not indicate that Schwartz changed his earlier, explicit position as to the necessity of both parties' signatures. Balick's emphasis on promptly receiving the Agreement signed by Chase is consistent with his and Schwartz's position that Chase's signature was a necessary first step in making the Settlement Agreement final and binding. Furthermore, Balick stated that if he did not receive that signed Agreement on May 11, all settlement negotiations would end. Thus, I disagree with Chase's argument that only his signature was required.

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72 DX A at 2 ("I heard back from my client's in-house counsel. Their preference would be to have Mr. Chase sign the document and forward to us for signatures. Still a lot of distrust on my end.")

73 *Id.* at 1 ("Please deliver two signed copies [from Chase] to me. I will have Dr. Schwartz sign both copies and I will return a fully executed copy to you.").

74 DX E.

Chase also makes much of Balick's May 11 statement indicating that if Sandler insisted he go back and ask his client how much money was in the Conquest Flight checking account, Schwartz would "*rescind the offer* and push forward for a court-mandated resolution."[75] Essentially, Chase claims that, by signing the Agreement, he accepted Schwartz's offer—memorialized in the Agreement—and, thus, created a binding contract with Schwartz. Because I must consider this sentence from Balick's May 11 email in the context of the surrounding circumstances and not in a vacuum,[76] however, I am not persuaded by Chase's contention.

As with all settlement talks, statements made by counsel in the course of negotiations must be interpreted in the context in which they are made. Balick's isolated use of the term "offer" did not suddenly turn the Agreement, which had been carefully drafted and edited heavily by both parties over the course of several weeks, into a document that Chase unilaterally could accept or reject. To the contrary, in the framework of this case—one where the parties "distrusted [each other] to such an extent that, until the parties had both signed this agreement, . . . neither one of them would have

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75 *Id*. (emphasis added).

76 *See Leeds v. First Allied Conn. Corp.*, 521 A.2d 1095, 1096-97 (Del. Ch. 1986) (noting that the Court must consider whether a reasonable negotiator would have concluded, in "the factual setting in which the document . . . claimed to constitute a contract was negotiated," that a binding settlement agreement arose).

felt like the issue was resolved"[77]—I find that a reasonable negotiator would not believe that either Schwartz or Chase intended to be bound by the terms of the Settlement Agreement until both parties had signed it. At no time during the course of the negotiations did Balick indicate to Sandler or Chase that Schwartz intended to be bound upon Chase's signing of the Agreement, nor did he remove the condition imposed at the beginning of the settlement discussions that Schwartz would not consider whether to be bound by the terms of the Agreement until after Chase had signed the Agreement.[78]

Additionally, Sandler's instructions to Balick that Schwartz should confirm Section 6(b) of the Settlement Agreement by signing that Agreement shows that Chase, too, did not intend to be bound until both he and Schwartz had actually signed. As noted *supra* Part II.B.1, Sandler repeatedly asked Balick to have Schwartz confirm the reps and warranties in Section 6(b) of the Agreement and "sign the Agreement" only if Schwartz stood behind those reps and warranties. Based on the significant distrust between the parties, Chase's imposition of that requirement supports the view that the parties intended that a binding contract would not arise until both he and Schwartz had signed the

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[77] Tr. 92 (Balick); *see also id.* at 48 (Sandler) ("You really have to put this in the perspective . . . that these two parties . . . don't trust each other at all, and which, you know, in a business divorce is often the case.").

[78] Schwartz's demand becomes understandable in light of the fact that, from his perspective, Chase already had derailed a number of previous attempts to achieve a negotiated settlement. Tr. 68 (Balick) ("As Mr. Sandler . . . has said very accurately, there was an extraordinary level of distrust between these two individuals. Dr. Schwartz thought for at least a year and a half preceding these events that Mr. Chase was basically dragging him on, that Mr. Chase had no interest in settling . . . .").

Agreement.[79] As such, I find that Schwartz and Chase mutually recognized that there would be no binding contract until the full execution of the Settlement Agreement.

Therefore, because Chase's demand that Schwartz verify the representations and warranties contained in the Agreement had not yet been satisfied and the Agreement had not been fully executed, I hold that, as of May 11, 2009, the parties neither agreed to all material terms of the Settlement Agreement nor intended to be bound by it.

3. Did the parties ever agree to all material terms and intend to be bound?

The question remains, however, whether the parties agreed to all material terms of the Settlement Agreement and intended to be bound by it at any time after May 11. In this regard, the only other possible date when a contract may have been formed, based on the evidence presented, is May 13.

On that day, Balick wrote an email to Sandler purporting to confirm several points that the two apparently had discussed over the phone earlier that day. In the email, Balick wrote that Schwartz felt comfortable that he could make the representations and warranties contained in Section 6(b) of the Agreement. But, Balick also noted that any confirmation from Schwartz was implicitly conditioned on the understanding that Chase "did not interpret [Section 6(b)] as meaning that any routine expenditure not approved of

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[79] Sandler subjectively may have "believed that [the parties] had [agreed to] a settlement" on May 11 when he forwarded Balick a copy of the Agreement signed by Chase, but even he recognized that both parties needed to sign that Agreement before any binding contract arose. Tr. 44, 49 (Sandler) ("Q: In light of that deep distrust, it was important that any settlement agreement between these parties would be signed by both sides; right? A: Well, that's right.").

in writing by Mr. Chase, would be the basis for challenging the accuracy of Dr. Schwartz [sic] representations."[80] Balick's email stated that, based on their earlier conversation, he was confirming Sandler's agreement with that interpretation. I infer from the email, therefore, that Schwartz was ready and willing to make the reps and warranties, provided Section 6(b) was construed as Balick indicated.

Additionally, in the May 13 email Balick confirmed his and Sandler's interpretation of several other provisions of the Settlement Agreement and requested that Sandler send him a copy of a personal guarantee referenced in the Agreement, which Schwartz allegedly had signed.[81] Finally, the email—sent on Wednesday—noted that Sandler and Balick had agreed that both sides would "shoot for a Friday closing," but, if that failed, they would try to close "on a rolling basis or early next week," if necessary.[82]

The content of Balick's email and the context in which it was sent suggests that Balick expected a response from Sandler. Such a response could have come by Sandler (1) explicitly confirming the substance of the May 13 email and providing a copy of the personal guarantee, (2) remaining silent as to the substance of the email, which likely would have had the same effect as an explicit confirmation, and providing a copy of the personal guarantee, or (3) communicating his disagreement with Balick's characterization of part or all of their prior conversation.

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80 PX 16.

81 DX F; PX 17.

82 DX H; PX 16.

Sandler, however, never responded to the substance of the May 13 email.[83] In fact, Balick heard nothing from Sandler until May 22, a full nine days later, at which time Sandler sent an email inquiring about a closing date.[84] Sandler's silence seems highly inconsistent with the position of a litigant who believed that the parties had entered a binding Settlement Agreement on May 11 and expected to close on May 15. But, more importantly, because Sandler did not provide Schwartz with a copy of his purported guarantee or respond to the substance of Balick's May 13 email, I find the parties had not agreed to all material terms with an intent to be bound as of May 13. As such, I hold that the parties did not enter a binding contract on or after that date.

In this case, like Chancellor Allen in *Transamerican*, I too "regret that I am forced to conclude that a contract was not formed here" because "[i]t would be greatly preferable to enforce the [Settlement Agreement] that these parties negotiated,"[85] rather than watch their deep animosity and distrust—which can only have increased as a result of Chase's motion—play out in this Court. Nevertheless, because Chase has not met his burden of proof, his motion must be denied.

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83 Balick Aff. ¶ 20.

84 DX I.

85 *Transamerican S.S. Corp. v. Murphy*, 1989 WL 12181, at *4 (Del. Ch. Feb. 14, 1989).

III. CONCLUSION

For the foregoing reasons, I find that the parties did not agree on all material terms or intend to be bound by the Settlement Agreement on May 11 or May 13, 2009, or any time thereafter. Thus, I deny Chase's motion to enforce the terms of that Agreement.

IT IS SO ORDERED.