IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Bruce J. Chasan, Esq. 1500 JFK Boulevard, Suite 312 Philadelphia, Pa 19102	:	Case No. 2:18-CV-05399-AB
Plaintiffs, -vs-	:	
Pierce Bainbridge Beck Price & Hecht LLP 600 Wilshire Boulevard, Suite 500 Los Angeles, Ca 90017	:	
John M. Pierce, Esq. c/o Pierce Bainbridge Trial Lawyers 600 Wilshire Boulevard, Suite 500 Los Angeles, Ca 90017	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS PIERCE BAINBRIDGE BECK PRICE & HECHT LLP AND JOHN M. PIERCE'S MOTION TO DISMISS THE COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(6)

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We respectfully submit this memorandum of law in support of Defendants Pierce Bainbridge Beck Price & Hecht LLP and John M. Pierce's ("Defendants") motion to dismiss the Complaint (Dkt. No. 1) under Rule 12(b)(6) of the Federal Rules of Civil Procedure. This lawsuit is based on a purported settlement agreement which does not exist. As there is no enforceable contract between the parties, Plaintiffs' claims fail as a matter of law.

I. PRELIMINARY STATEMENT

In 2016, non-party Lenwood "Skip" Hamilton engaged Plaintiff Bruce Chasen of the Law Offices of Bruce J. Chasen, LLC ("BJC Law", collectively with Chasen, "Plaintiffs") to represent him in a civil action against various entities arising from, in part, those entities' misappropriation of Hamilton's likeness and voice in the popular Gears of War videogame series ("Gears of War Litigation.") (Compl. ¶6)[1] In 2018, Mr. Hamilton terminated Plaintiffs and engaged Defendants Pierce and Pierce Bainbridge Beck Price & Hecht LLP to represent him in the same litigation. Plaintiffs, unhappy with the termination, demanded that *Defendants* compensate Plaintiffs for *quantum meruit* fees Plaintiffs believed they were owed by Mr. Hamilton. Defendants refused the demand, asserted that no valid claim for fees existed, and responded that, in turn, Mr. Hamilton had malpractice claims against Plaintiffs based on their substandard representation of Mr. Hamilton in the Gears of War Litigation.

Thereafter, Plaintiffs and Defendants engaged in settlement negotiations regarding these claims on-and-off for a period of seven months, and even exchanged proposed drafts of settlement documents. However, as the allegations of the Complaint make clear, the parties never actually reached an enforceable settlement agreement.

[1] That action is currently pending before this same court as *Hamilton v. Speight*, No. 17-cv-0169-AB (E.D. Pa. filed Nov. 11, 2017).

Despite the fact that no agreement was reached, Plaintiffs still filed this lawsuit alleging claims for breach of contract and specific performance, seeking to enforce a non-existent contract. As explained in further detail below, the lack of an actual enforceable agreement is fatal to Plaintiffs' claims. And any further amendment would be futile as the Complaint makes clear no agreement between the parties exists. Accordingly, Defendants respectfully request that the Court dismiss Plaintiffs' complaint in full and with prejudice.

II. FACTUAL BACKGROUND[2]

On or about December 31, 2016, Mr. Hamilton engaged Plaintiffs to represent him in the Gears of War Litigation. (Compl. ¶6). Plaintiffs allege that by the terms of the engagement, Plaintiffs would represent Mr. Hamilton on a contingency basis but if Mr. Hamilton terminated the representation, he would be liable to Plaintiffs for attorney's hourly fees on a *quantum meruit* basis. (*Id.* ¶ 7) Mr. Hamilton also provided Plaintiffs with a small, unspecified amount of money to pay for initial litigation expenses. (*Id.* ¶ 15) Thereafter, Plaintiffs represented Mr. Hamilton for some matter of months in the Gears of War Litigation. (*Id.* ¶¶ 8-13) However, there came a time when Mr. Hamilton lacked resources to pay further litigation expenses, and Plaintiffs thereafter began soliciting third-party litigation funding on Mr. Hamilton's behalf for the Gears of War Litigation. (*Id.* ¶¶ 14-16)

In mid-March 2018, Plaintiffs were introduced to Defendant Pierce as an individual who may be able to assist Mr. Hamilton and Plaintiffs to secure litigation funding. (*Id.* ¶ 17) On March 20, 2018, Plaintiff Chasan and Mr. Hamilton met with Defendant Pierce in Philadelphia to discuss possible joint representation and litigation funding. (*Id.* ¶ 18) On March 27, 2018, Mr. Hamilton

[2] While Defendants dispute the veracity of the allegations of the Complaint, Defendants acknowledge that the Court's consideration of this motion is based on those allegations. Accordingly, this brief draws these facts from the allegations of the Complaint and the documents attached thereto.

terminated Plaintiff's representation in connection with the Gears of War Litigation and retained Defendants instead. (*Id.* ¶ 21)

On March 28, 2018, Plaintiff Chasan contacted Defendant Pierce to advise that Mr. Hamilton owed Plaintiffs hourly attorney's fees as per the terms of the engagement between Mr. Hamilton and Plaintiffs. (Compl. ¶ 23) Plaintiffs subsequently threated Defendants that they would file a lawsuit against *Defendants* (but not Mr. Hamilton) as recompense for Mr. Hamilton's allegedly unpaid hourly fees. (*Id.* ¶ 24) Defendants rejected Plaintiffs' claim for fees and advised Plaintiffs that Mr. Hamilton had the basis to filing a malpractice action against Plaintiffs based on Plaintiffs' substandard representation of Mr. Hamilton in the Gears of War Litigation. (*Id.* ¶ 25)

Over the next seven months, the parties engaged in negotiations of a potential settlement of all possible claims between the parties and Mr. Hamilton. (*Id.* ¶¶ 26-54) Those negotiations included the following communications pertinent to Plaintiffs' claims:

- September 10, 2018: Defendant Pierce, via email, proposed two different settlement payment structures, each of which was expressly conditioned on Mr. Hamilton's approval. (*Id.* ¶ 30)
- September 15, 2018: Plaintiff Chasan replied via email to assent to the first payment proposal – a flat payment of $160,000 – and to propose terms of a mutual release of all claims in exchange for the payment. (*Id.* ¶ 31)
- September 20, 2018: Plaintiff Chasan sent a draft settlement agreement and proposal to Defendants. (*Id.* ¶ 33 & Ex. A) Jim Bainbridge, an attorney with Defendant Pierce Bainbridge Beck Price & Hecht LLP, responded with "initial comments" noting that "there are a few points of clarification that will be needed"

and suggesting as an "example" modification to the provision relating to mutual releases. (*Id.* ¶ 35)

- October 17, 2018: Plaintiff Chasan sent a revised draft settlement agreement to Plaintiffs with modifications to the prior draft he prepared. (Compl. ¶ 38 & Ex. B)
- October 30, 2018: Mr. Bainbridge sent via email to Plaintiff Chasan a revised, proposed settlement agreement ("October 30th Proposal") with numerous material modifications to Plaintiffs' proposed drafts. (*Id.* ¶ 39 & Ex. C) Plaintiff Chasan responded via email the same day that he could not accept the "material modifications" contained in the Proposal. (*Id.* ¶¶ 40, 44-45)
- October 30 through November 16, 2018: Plaintiff Chasan and Mr. Bainbridge engaged in numerous email exchanges discussing possible changes to the proposed terms of an agreement. (*Id.* ¶ 47)
- November 8, 2018: Mr. Bainbridge emailed Plaintiff Chasan a further revised version of a proposed settlement agreement which included new revisions to previously disputed language. (*Id.* ¶ 48 & Ex. D)
- November 15, 2018: Defendant Pierce advised Plaintiffs that Mr. Hamilton would not sign a mutual release and indicated that the settlement negotiations had fallen through. (*Id.* ¶ 49)
- November 16, 2018: As a last-ditch effort to revive the negotiations, Plaintiff Chasan sent Defendants a revised version of the October 30th Proposal ("November 16th Counterproposal"). The November 16th Counterproposal modified the October 30th Proposal, including to remove all references to Mr. Hamilton,

including removing his signature block and changing the language regarding governing law, venue, and jurisdiction. (*Id.* ¶ 5 & Ex. E)

Despite the prolonged negotiations, the parties never reached an agreement. Defendants never accepted the November 16th Counterproposal, the last-in-time offer alleged in the Complaint. (Compl. ¶ 54)

Apparently undaunted by the lack of

actual enforceable agreement, on December 14, 2018, Plaintiffs filed this lawsuit, bringing claims against Defendants for specific performance (Count I) and breach of contract (Count II). (*Id.* ¶¶ 58-68) Plaintiffs claim that the November 16th Counterproposal sets forth the terms of the parties' agreement. (*Id.* ¶¶ 59, 67). Defendants now move to dismiss the Complaint in its entirety and with prejudice.

III. ARGUMENT

In order to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 57 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While factual allegations should be construed in the light most favorable to the plaintiff, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* In construing a motion to dismiss, the court may also address documents attached to or referenced in the complaint. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).

The Complaint must be dismissed because it fails to state a claim for either specific performance or breach of contract. Under Pennsylvania law, a plaintiff must allege "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages." *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003). Elements of a valid contract are "offer, acceptance, and consideration or a mutual meeting of the minds." *Ribarchak v. Mun. Auth. of City of Monongahela*, 44 A.3d 706, 708 (Pa. Commw. Ct. 2012).

As detailed below, no valid contract exists between the parties to this lawsuit because:

(1) Plaintiffs never accepted the October 30th Proposal;

(2) Even if Plaintiffs had, the October 30th Proposal and each of Defendants' prior proposals was contingent on Mr. Hamilton's approval, a condition which was never met; and

(3) The parties did not otherwise enter into an enforceable agreement.

Accordingly, Plaintiffs fail to state a claim upon which relief may be granted, and the Complaint should be dismissed. Because Plaintiffs cannot conjure an agreement that does not exist through further pleading, the dismissal should be with prejudice.

A. Plaintiffs Never Accepted the October 30th Proposal

The Pennsylvania Supreme Court has "long adhered to the position of 1 Restatement, Contracts, § 60 (1932), that 'a reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer.'" *Hedden v. Lupinsky*, 405 Pa. 609, 612, 176 A.2d 406, 408 (1962); *Spinola v. Kelley*, No. 2120 C.D. 2015, 2016 WL 5172670, at *4 (Pa. Commw. Ct. Sept. 21, 2016). "Nothing is better settled than that in order to constitute a contract there must be an offer on one side and an *unconditional acceptance* on the other. So long as any condition is not acceded to by both parties to the contract,

the dealings are mere negotiations and may be terminated at any time by either party while they are pending." *Cohn v. Penn Beverage Co.*, 313 Pa. 349, 351, 169 A. 768, 768-69 (1934) (emphasis added).

The law does not require an explicit termination or withdrawal of an offer in response to a counteroffer in order to negate the formation of a contract. Rather, "a counter-offer operates as a rejection, terminating the original offer." *Webb v. City of Phila.*, 2000 WL 502711, at *2 n.4 (E.D. Pa. Apr. 27, 2000), *aff'd*, 275 F.3d 40 (3d Cir. 2001). *See also Yarnall v. Almy*, 703 A.2d 535, 539 (Pa. Super. Ct. 1997) ("A reply [to an offer] which purports to accept an offer, but instead changes the terms of the offer, is not an acceptance, but, rather, is a counter-offer, which has the effect of terminating the offer. . . . [I]t is well established that the acceptance of any offer or counter-offer must be unconditional and absolute") (citations and internal quotations omitted); *Bair v. Purcell*, 500 F. Supp. 2d 468, 478 (M.D. Pa. 2007) (same); *Mazzella v. Koken*, 559 Pa. 216, 224, 739 A.2d 531, 536 (1999) (same); *Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alternatives, Inc.*, 764 A.2d 587, 593 (Pa. Super. Ct. 2000) (same).

Plaintiffs rejected the October 30th Proposal on the same day it was sent. As alleged plainly in the Complaint, Plaintiffs "sent a reply email to Bainbridge on 10/30/2018 stating that the unsigned Settlement Agreement that Bainbridge had sent (Ex. C) *included material modifications that Chasan could not accept*" including modification of crucial language regarding the scope of the releases the parties were offering. (Compl. ¶ 40) (emphasis added). Plaintiffs also indicated by email the various other provisions of the October 30th Proposal that were unacceptable. (*Id.* ¶¶ 44-45). Thereafter, the parties engaged in additional negotiations, with Defendants even proposing a new, different draft agreement for consideration on November 8, 2018. (*Id.* ¶¶ 46-48 & Ex. D). As Plaintiffs acknowledge in the Complaint, it "was still in flux and

it was uncertain whether changes pertaining to a release by Hamilton could or would be finalized." (*Id.* ¶ 48.) And, in fact, Defendants subsequently indicated on November 15, 2018 – the day before Plaintiffs attempted to accept the October 30th Proposal – that settlement negotiations had fallen through. (*Id.* ¶ 49.)

Plaintiffs' rejection of the October 30th Proposal and the parties' subsequent negotiations and communications operated as a termination of the October 30th Proposal, rendering it no longer valid. Therefore, it was impossible for Plaintiffs to subsequently accept the October 30th Proposal on November 16, 2018, as claimed in the Complaint. *Yarnall,* 703 A.2d at 539.

Furthermore, even if the October 30th Proposal *was* still open on November 16, 2018, Plaintiffs did not accept it *unconditionally*. "To constitute a contract, the acceptance of the offer must be absolute and *identical to the terms of the offer*." *Neshaminy Constructors, Inc. v. Concrete Bldg. Sys., Inc.*, No. CIV. A. 06-1489, 2007 WL 2728870, at *15 (E.D. Pa. Sept. 18, 2007) (emphasis added) (quotation marks omitted). The November 16th Counterproposal contained substantive, material revisions to the October 30th Proposal, (Compl. ¶ 51 & Ex. E.), as even a cursory review reveals. The very first page bears the handwritten phrase "BJC Suggestions 11/16/18". Plaintiffs struck every reference to Mr. Hamilton throughout the draft agreement, substantively modified the provisions regarding venue and jurisdiction, and removed Mr. Hamilton as a signatory. Plaintiffs' concurrent communications similarly acknowledged that the November 16th Counterproposal was in fact a counter-offer and not an unconditional acceptance: "For reasons that I will elaborate on below, I am proposing a *modification* to the 'Settlement Agreement' you sent me on October 30, 2018." (*Id.* ¶ 52 & Ex. E) (emphasis added).[3]

[3] Defendants never accepted the November 16th Counterproposal. (Compl. ¶ 54) ("Pierce and PBBPH Law have not accepted the proposed amended Settlement Agreement that Chasan sent on 11/16/2018 . . . [.]").

Accordingly, no contract was formed, and dismissal of the Complaint is appropriate. *Neshaminy Constructors, Inc.*, 2007 WL 2728870, at *15 ("[N]o contract was formed between the parties. The parties exchanged a series of offers and counter-offers. Each counter-offer served to reject any outstanding offer. Plaintiff's claim for breach of contract must fail"); *Zamos v. McNeil-PPC, Inc.*, No. CV 16-5038, 2017 WL 68577, at *3–4 (E.D. Pa. Jan. 5, 2017), *aff'd*, 713 F. App'x 133 (3d Cir. 2017) (dismissing breach of contract claim where Plaintiff failed to adequately allege that he accepted the proposed agreement); *see also Spinola*, 2016 WL 5172670, at *4 (dismissing complaint because response to offer with proposed changes was properly considered a counteroffer).

B. Each Proposal Was Conditioned on Mr. Hamilton's Approval, a Condition Which Was Never Met

It is elementary that when an offer is expressly conditioned on a circumstance, the offer is valid only when the condition is met. *Jones v. United States*, 96 U.S. 24, 28 (1877); *Keystone Tech. Grp. v. Kerr Grp.*, 824 A.2d 1223, 1227 (Pa. Super. Ct. 2003) ("it is well settled that if a contract contains a condition precedent, the condition must be met before a duty to perform the contract arises.") A condition that others sign an agreement has been recognized as a condition precedent to a valid agreement. *Brady v. Eliot*, 181 Pa. 259, 264, 37 A. 343, 343-44 (1897); *Franklin Interiors v. Wall of Fame Mgmt. Co.*, 510 Pa. 597, 600, 511 A.2d 761, 762 (1986)("the formation of a valid contract was expressly conditioned upon the written approval of [the company officer].")

As the Complaint acknowledges, every single proposal made by Defendants regarding a potential settlement agreement was explicitly conditioned on Mr. Hamilton's approval. (*See* Compl. ¶¶ 30, 31, 38-39.) That is true even of Defendants' September 10, 2018 email communication expressing two proposed payment terms that could form the basis of a potential

settlement. (*Id.* ¶ 30) Each of the draft settlement agreement documents exchanged between the parties, including the October 30th Proposal, also required Mr. Hamilton's signature and contained a signature block specifically for him (*See id.*, Ex. A at 8, Ex. B at 8, Ex. C at 9).[4] The Complaint further acknowledges that the condition of Mr. Hamilton's approval was never met with respect to any of the proposals. (*Id.* ¶ 49).

Because each settlement proposal was explicitly conditioned on Mr. Hamilton's approval, and such approval was never obtained, no offer can be considered a binding offer, and Plaintiffs' claims for specific performance and breach of contract must fail. *Parisi v. Wells Fargo Home Mortg., Inc.*, No. 3:CV-09-2399, 2011 WL 6339835, at *11 (M.D. Pa. Oct. 31, 2011), *report & recommendation adopted*, 2011 WL 6370060 (M.D. Pa. Dec. 19, 2011) (evidence showed intent not to be bound by unless the conditions were met).

C. The Parties Did Not Otherwise Enter into an Agreement

As expressed by Pennsylvania's Supreme Court:

> [I]t is understandable [that] when, after a prolonged period of negotiations, parties appear to reach agreement on the essential terms of an important transaction, one of them might believe that a contract had been made. However, before preliminary negotiations ripen into contractual obligations, there must be manifested mutual assent to the terms of a bargain.

Essner v. Shoemaker, 393 Pa. 422, 425, 143 A.2d 364, 366 (1958); *Mazella*, 559 Pa. at 225.

A meeting of the minds requires the concurrence of both parties to all the terms of the agreement; anything less will result in a failure to execute an enforceable contract. *City of Erie v. Fraternal Order of Police, Lodge* 7, 977 A.2d 3, 12 (Pa. Commw. Ct. 2009). Pennsylvania courts and courts in this district routinely dismiss contract claims where the pleadings make clear that

[4] The lone exception being Plaintiffs' modified counterproposal sent on November 16, 2018, which the Complaint acknowledges that Defendants never accepted and which was sent after the negotiations had allegedly failed. (Compl. ¶¶ 49, 54.)

there was no meeting of the minds. *See, e.g. Spinola*, 2016 WL 5172670, at *4 (dismissing complaint because parties "were never in agreement on all terms of the agreement such that there could have been a meeting of the minds"); *Schreiber v. Mills*, 426 Pa. Super. 537, 542, 627 A.2d 806, 808 (1993); *Erbe v. Billeter*, No. CIV.A. 06-113, 2007 WL 2905890, at *10-11 (W.D. Pa. Sept. 28, 2007); *Boyd v. Cambridge Speakers Series, Inc.*, No. CIV. A. 09-4921, 2010 WL 2545541, at *7 (E.D. Pa. June 18, 2010); *See also Hall v. Revolt Media & TV, LLC*, No. 17-2217(JMV)(MF), 2018 WL 3201795, at *2 (D.N.J. June 29, 2018)(dismissing claim, after review of complaint and integral documents supplied in Defendant's motion to dismiss, finding that complaint merely alleged contract negotiations rather than a final agreement).

The parties in this case consistently behaved as if they were engaged in negotiations and not as if an agreement had been finalized. The entire character of the exchanges between the parties was one of unfinished negotiation, and the parties never acted as if an agreement had been reached. Because the informal exchange of drafts cannot rise to the level of contractual obligation, none of the proposed, unexecuted drafts created a contract. *Spinola v. Kelly* is particularly on point. In that case, the parties exchanged a series of proposed agreements. The court evaluated these drafts, and determined that because each proposal altered the terms of the previous proposal, there was no acceptance. "[I]t was apparent that [the parties] were never in agreement on all terms of the agreement such there could have been a meeting of the minds." 2016 WL 5172670, at *4. The allegations here compel the same result.

D. The Court Should Dismiss the Complaint with Prejudice

Where the pleadings make clear that no agreement between the parties exists, dismissal with prejudice is appropriate. *See Zamos*, 2017 WL 68577, at *6 ("Regarding Plaintiff's breach of contract claim in Count I, we find that it would be futile to permit leave to amend since no

amendment to the Complaint would change the fact that no valid contract existed between Plaintiff and Defendants. Plaintiff admittedly only 'conditionally accepted' Defendants' offer, which does not create a binding contract between the parties under Pennsylvania law."); *See also Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 253 (3d Cir. 2007) (no error in dismissing breach of contract claim with prejudice, where district court determined there was no offer and no acceptance). As explained in detail above, it is apparent on the face of the Complaint that there was no valid contract between the parties. Plaintiffs cannot draft around this fundamental defect in their pleadings and create an enforceable agreement where one clearly does not exist. Defendants thus respectfully request that the Court dismiss the Complaint with prejudice.

IV. CONCLUSION

For the foregoing reasons, Defendants request that the Court grant their motion and dismiss Plaintiffs' Complaint with prejudice.

Dated: January 22, 2019

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Timothy J. O'Driscoll, hereby certify that on January 22, 2019, I caused a true and correct copy of the foregoing to be filed via the Court's electronic filing system, which constitutes service upon all counsel of record.

/s/ *Timothy J. O'Driscoll*
Timothy J. O'Driscoll