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

Law Offices of Bruce J. Chasan, LLC and Bruce J. Chasan, Esq. Plaintiffs vs. Pierce Bainbridge Beck Price & Hecht, LLP, and John M. Pierce, Esq. Defendants	Civ. Action No. 2:18-cv-5399-AB

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINT

Plaintiffs, by the undersigned, submit this Memorandum of Law in Opposition to Defendants' Motion to Dismiss (ECF 4, 4-1, 4-2) under F. R. Civ. P. 12(b)(6) for failure to state a claim.

SUMMARY AND OVERVIEW

Defendants' brief (ECF 4-2) erroneously disregards that the settlement agreement was forged in the exchange of emails between Attorneys Pierce and Chasan on September 10 and 15, 2018. All later negotiations over the form of the mutual release did not alter the settlement and are not obstacles to specific performance. Plaintiffs' refusal to accept the proposed changes to the draft mutual release put forth by PBBPH Law on October 30, 2018 (Complaint, Exh. C, ECF 1-3) was not a repudiation of a counter-offer that abrogated the settlement struck on September 15, 2018.

Defendants fail to accept the allegations of the Complaint as true and fail to afford Plaintiffs (the non-movants) the benefit of all favorable inferences. In

particular: (1) Defendants ignore the averments in the Complaint that Lenwood Hamilton's approval of the settlement was non-essential and non-material, and thus not an obstacle to specific performance; and (2) Defendants ignore the averments in the Complaint that their reliance on the "need" for Hamilton's assent was a pretext that afforded them "cover" for their action in withdrawing from the terms of a settlement they so clearly proposed.

This case illustrates a situation where Defendants simply changed their mind and decided to use the $160,000 reserved for the settlement for other purposes. All their arguments about "the condition of Hamilton's approval" are just an excuse for their breach of contract.

ARGUMENT

I. STANDARD OF REVIEW APPLICABLE TO A MOTION TO DISMISS

Plaintiffs do not disagree with the brief recital of the *Twombly-Iqbal* criteria outlined in Defendants' brief (ECF 4-2 at 5). This Court is well-acquainted with those criteria. *E.g., see Plumbers' Local Union No. 690 Health Plan v. Apotex Corp., et al.*, Civ. No. 16-665 (E.D. Pa. Sept. 25, 2017) (Brody, J.). But as stated in the *Plumbers' Union* case, the Court may properly take judicial notice of matters whose accuracy cannot reasonably be questioned:

> "As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings. However, an exception to the general rule is that a 'document integral to or explicitly relied upon in the complaint' may be considered . . . ." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (citation omitted) (quoting *Shaw v. Digital Equip Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996)). Thus, a court may consider "the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010).

> "To resolve a 12(b)(6) motion, a court may properly look at public records, including judicial proceedings, in addition to the allegations in the complaint." *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999). "Under Federal Rule of Evidence 201, [a court] may take judicial notice at any stage of the proceeding of a fact not subject to reasonable dispute that is capable of accurate and ready determination by resort to a source whose accuracy cannot be reasonably questioned." *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 600 n.3 (3d Cir. 2000). Accordingly, a district [court] may take judicial notice at the motion to dismiss stage. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (stating that "sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss," include "matters of a which a court may take judicial notice").

Plumbers Local Union No. 690 Health Plan, supra, Sl. Op. at 9-10. Thus, from time to time in this Opposition, Plaintiffs will refer to docketed matters in the case of *Hamilton v. Speight, et al.*, No. 17-cv-0169-AB, and other public documents the accuracy of which cannot reasonably be questioned.

II. THE CONTRACT WAS FORMED ON SEPTEMBER 15, 2018.

The settlement agreement was struck in the exchange of emails between Pierce and Chasan on September 10 and 15, 2018, after several months of exchanging proposals. *See* Complaint, ECF 1 at ¶¶ 30-31. The contract was very simple: A $160,000 payment to Plaintiffs by Defendants, with "no further payment to [Plaintiffs] of any kind for any reason from [Pierce or PBBPH Law] or Skip [Hamilton] regardless of the outcome of the [right of publicity] case."

As Defendants point out, elements of a valid contract are "offer, acceptance, and consideration or a mutual meeting of the minds," citing *Ribarchak v. Mun. Authority of City of Monongahela*, 44 A.3d 706, 708 (Pa. Cmwlth. 2012) (citing *Yarnall v. Almy*, 703 A.2d 535, 538 (Pa. Super. 1997)). *See* ECF 4-2 at 6. Pierce clearly made an offer, and Chasan clearly made an acceptance. There was consideration on all sides: The Chasan parties agreed to settle for $160,000 out of

at least $319,000 owed and agreed to forego any further claim or lawsuit for attorney's fees from Pierce, PBBPH Law[1] and Hamilton. Pierce and PBBPH Law agreed to pay the $160,000, for their own benefit and for Hamilton's.

The payment of $160,000 would be the only payment to Plaintiffs regardless of the outcome of Hamilton's right of publicity case, regardless of whether Hamilton's eventual settlement or judgment was $100,000,000[2] or zero.

Chasan's 9/15/2018 email mentioned crafting a mutual release. Complaint, ECF 1, ¶ 31. But this was not a "new" term. Pierce himself had mentioned "mutual releases" in his 5/1/2018 email. Complaint, ¶ 26. Mutual releases are implicit in virtually all settlements (except to the extent the parties have an express, mutually agreed "carve out" for a foreseeable contingency), and of course Pierce and PBBPH Law would want a release for themselves and for Hamilton from any future claim by the Chasan parties for additional legal fees.

The condition of Hamilton's approval was to remain under the radar for more than six weeks, until October 30, 2018. Initially there was no hint that it would be

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[1] Although not expressly spelled out in the Complaint, the lawsuit against Pierce and PBBPH Law that Plaintiffs refrained from filing while settlement negotiations were on-going would have been based on alleged tortious interference with contractual relations, pursuant to Sec. 766 of the Restatement (Second) of Torts, adopted by the Pennsylvania Supreme Court in *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175 (Pa. 1978), *cert. den.*, 442 U.S. 907 (1979), and on unjust enrichment, whereby a predecessor law firm is entitled to *quantum meruit* from a successor law firm, as recently established in *Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C.*, 179 A.2d 1093 (Pa. Mar. 6, 2018). It was this proposed lawsuit that Pierce so assiduously sought to avoid by initiating settlement discussions. *See* Complaint, ¶¶ 25-27.

[2] Hamilton's memorandum of law in support of his discovery motion in his right of publicity case, filed on 8/31/2018 by Pierce and PBBPH Law, asserted that "the damages in this matter are therefore in the nine figures." (ECF 77-16 at 15).

an obstacle. Pierce, on 9/15/2018, responding to Chasan's email, and copied his partners Carolynn Beck and Jim Bainbridge: "Carolynn/Jim, please work with Bruce to wrap this up swiftly." Complaint, ¶ 32. This outward assurance by Pierce was a reaffirmation that a contract had been made. *American Eagle Outfitters v. Lyle & Scott, Ltd.*, 584 F.3d 575, 581-582 (3d Cir. 2009) ("In assessing intent, the object of inquiry is not the inner, subjective intent of the parties, but rather the intent a reasonable person would apprehend in considering the parties' behavior. *Ingrassia Constr. Co. v. Walsh*, 337 Pa. Super. 58, 486 A.2d 478, 483 (1984).")

Chasan drafted a proposed "Settlement Agreement and Mutual Release" with standard terms and emailed it to Pierce, Bainbridge and Beck on 9/20/2018. Complaint, ¶¶ 33-34, and Exh. A, ECF 1-1. Later that day, Bainbridge emailed Chasan with some wordsmithing suggestions for paragraph 1 of the draft agreement "to provide the normal protections that are afforded in a settlement agreement that contains mutual releases." Complaint, ¶ 35. Chasan emailed Messrs. Bainbridge and Pierce and Ms. Beck on 9/22/2018 stating that he was "okay" with Bainbridge's modification of paragraph 1. Complaint, ¶ 36.

More than three weeks went by without further comment by PBBPH Law on the proposed draft "Settlement Agreement and Mutual Release." On 10/17/2018, Chasan revised the draft to include Jim Bainbridge's proposed modification to paragraph 1 of the Agreement, signed it before a notary, and emailed it to Pierce, Bainbridge and Beck, with a request that it be countersigned by all, and that the settlement funds be paid by October 31, 2018. Complaint, ¶¶ 37-38, and Exh. B, ECF 1-2.

Bainbridge sent Chasan an email on 10/30/2018, stating: "I am attaching a draft of the final copy of the Settlement Agreement that John [Pierce] has given the green light on for execution by Skip, him and you. If you have any changes on this, it will require going back to John and Skip." Complaint, ¶ 39. The unsigned Settlement Agreement forwarded by Bainbridge is attached to the Complaint as Exh. C, ECF 1-3.

Here is what the 10/30/2018 draft "Settlement Agreement" (Exh. C, ECF 1-3) sent by Jim Bainbridge provided in its important terms:

- Pierce and PBBPH Law[3] would pay the Chasan parties $160,000 within 7 days of receipt of all signatures;
- Pierce and PBBPH Law would release the Chasan parties;
- The Chasan parties would release Pierce, PBBPH Law, and Hamilton;
- Hamilton, one of the signatories, would not release the Chasan parties;
- Hamilton was removed from the non-disparagement and warranties obligations, while the Chasan parties, Pierce and PBBPH Law all remained bound by those terms;
- Venue for a collection suit if Pierce and PBBPH Law did not pay the $160,000 would be in Los Angeles, California.

The provision about venue in Los Angeles for the Chasan parties to bring a collection suit for the $160,000 consideration was quickly resolved, as Bainbridge

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[3] Technically, the payment was by Hamilton, Pierce and PBBPH Law, but Hamilton was impecunious and had no funds. Complaint, ¶ 14. So it was understood that all the funds were coming from Pierce and/or PBBPH Law. Hamilton was not to be a party in the suit that the Chasan parties contemplated but refrained from filing during the on-going settlement negotiations.

agreed to re-write that term to provide that the Chasan parties could bring any collection suit in Philadelphia, and Bainbridge's revised draft sent on 11/8/2018 reflected this. Complaint, ¶¶ 45, 46 and 48, and Exh. D (ECF-1-4).

Thus, the settlement agreement envisioned by Pierce and Chasan on 9/15/2018 was intact except for one thing: Hamilton would not give the Chasan parties a release, but otherwise Pierce and PBBPH Law would go ahead with it. Hamilton would get the benefit of the Chasan parties' release from any claim for additional attorney's fees (above the $160,000), but he would not release the Chasan parties for any claim he had against them for legal malpractice or breach of fiduciary duty. Complaint, ¶¶ 41, 43. Chasan had an understanding of what the "legal malpractice" claims were, and believed they were meritless (*Id.*), but as of 10/30/2018, Chasan did not know the specifics of the so-called "breach of fiduciary duty" claim and was not informed about those specifics until receipt of Banbridge's 11/15/2018 email. Complaint, ¶ 50. Without knowledge of the specifics regarding the "breach of fiduciary duty" claim, Chasan was reluctant and unwilling to accept the 10/30/2018 draft Settlement Agreement sent by Bainbridge, as the risk could not be evaluated. Complaint, ¶¶ 43, 47, 50, 51, 52, 53. But this changed after Bainbridge's 11/15/2018 email explained and elaborated on the "breach of fiduciary duty" claim.

This case comes down to one finite issue: Is the September 15, 2018 settlement enforceable via a decree for specific performance when the conditional approval of Lenwood Hamilton will not be given, but is nonetheless non-essential and immaterial to the settlement?

III. THE SETTLEMENT SHOULD BE ENFORCED BECAUSE HAMILTON'S APPROVAL IS NON-ESSENTIAL AND NON-MATERIAL.

The Complaint alleges that Hamilton's approval is non-essential. Complaint, ¶ 52. This is not just a "legal conclusion." Pierce himself, in threatening Chasan with a malpractice lawsuit on behalf of Hamilton, expressly stated that the malpractice threat was "outside" of the settlement negotiations, and Chasan should put his insurance carrier on notice. Complaint, ¶ 28. Further, notwithstanding that Pierce and Bainbridge had led Chasan to believe they desired mutual releases, on 10/30/2018 they presented a draft "Settlement Agreement" (Exh. C, ECF 1-3) which removed Hamilton as a releasing party, and they were otherwise content to proceed with the settlement. Complaint, ¶¶ 60, 61, 65, 66, 68. In effect, Pierce and PBBPH Law expressly exhibited an intent to be bound even if Hamilton did not agree to release the Chasan parties.

All of the this leads to the query: Why was Hamilton's signature needed at all? What did the 10/30/2018 "Settlement Agreement" bind Hamilton to? Nothing! He was to be a third-party beneficiary in that his liability for Plaintiffs' legal fees would be extinguished by virtue of the $160,000 payment by Pierce and PBBPH Law to the Chasan parties, but he was not obligated to do or to refrain from doing anything.

It is well-settled in Pennsylvania that for one to be bound by a written agreement, he/she must sign it. *Frantz Tractor Co., Inc. v. Wyoming Valley Nursery*, 120 A.2d 303, 305, 306 (Pa. 1956) (the instrument must be "signed by the person to be bound by it"). However, if a person is merely a beneficiary of an instrument, his/her signature is not required because it is presumed he/she consents to it. *McCalmont v. Peters*, 13 Serge & Rawle 196, 1825 WL 1979, *2

(Pa. 1825). *See also*, *Franklin Interiors v. Wall of Fame Management Co.*, 511 A.2d 761, 763 (Pa. 1986) (citing in dictum, *inter alia*, *Frantz Tractor Co.*, *supra*, and *McCalmont*, *supra*).

It is commonplace for parties in disputes to reach terms of a settlement which they intend to formalize in a later written instrument. *Melo-Sonics Corp. v. Cropp*, 342 F.2d 856, 859-860 (3d Cir. 1964) (reversing district court's dismissal of complaint to enforce agreement, and remanding for trial); *Goldman v. McShain*, 247 A.2d 455, 459 & n.1 (Pa. 1968) (quoting Restatement of Contracts, § 26, and citing the comment to § 26 that evidence is needed to determine whether the original terms were intended to be a binding contract; trial court holding of judgment for defendant on the pleadings reversed; remanded for trial); *American Eagle Outfitters v. Lyle & Scott, supra*, 584 F.3d at 582-585 (affirming that the parties intended to make a deal, and citing *Goldman v. McShain*, *supra*, and Restatement of Contracts, § 26). *See also*, *Field v. Golden Triangle Broadcasting, Inc.*, 305 A.2d 689, 693 (Pa. 1973) (citing *Melo-Sonics* and *Goldman v. McShain*); *Krause v. Great Lakes Holdings, Inc.*, 563 A.2d 1182, 1185 (Pa. Super. 1989) ("[P]arties may bind themselves contractually prior to the execution of a written document through mutual manifestation of assent, even where a later formal document is contemplated."), *app. denied*, *Krause v. Penn Pocahontas Coal Co.*, 574 A.2d 70 (Pa. 1990).

In *Compu Forms Control, Inc. v. Altus Group, Inc.*, 574 A.2d 618, 623 (Pa. Super. 1990), the court stated:

> Altus makes much of the fact that the parties spent three months trying to execute a written settlement agreement, arguing that this proves that no agreement was reached on May 6, 1988. This claim is meritless. Our Supreme Court, in *Woodbridge v. Hall*, 366 Pa. 46, 76

> A.2d 205 (1950), held that an oral agreement to settle, which included the essential terms of the agreement between the parties, was enforceable, even though the parties were unable to agree, despite numerous drafts, to the terms of a written settlement agreement.

Also, a court can order specific performance (or even contempt) if a party unreasonably attempts to thwart fulfillment of a settlement agreement where a later, formal document is intended to be signed. *Century Inn, Inc. v. Century Inn Realty, Inc.*, 516 A.2d 765, 769 & n.6 (Pa. Super. 1986).

Settlement can be enforced via specific enforcement without regard to non-essential, non-material terms. *Teva Pharmaceutical Industries, Inc. v. United HealthCare Services, Inc.*, No. 16-cv-4870, 2018 WL 1898911 at *11-15 (E.D. Pa. April 20, 2018) (Goldberg, J.) (ordering enforcement, disregarding non-essential terms, and citing authorities including, *inter alia*, *American Eagle Outfitters*, *supra*, 584 F.3d at 585).[4] *See also*, *Field v. Golden Triangle, Broadcasting, Inc.*, *supra*, 305 A.2d at 694-695 (settlement enforced as to its essential terms; purchase of 50 kilowatt transmitter was collateral and non-essential to the parties' agreement); *McDonnell v. Ford Motor Co.*, 643 A.2d 1102, 1105-1107 (Pa. Super. 1984) (court will enforce settlement agreement if all material terms of the bargain are agreed upon, but evidentiary hearing is required).

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[4] *See also* the non-precedential decision in *Shell's Disposal and Recycling, Inc. v. City of Lancaster*, 504 Fed. Appx. 194, 202-203 (3d Cir. 2012) (enforcing settlement agreement, disregarding non-material, non-essential terms, and citing *American Eagle Outfitters*, *supra*). Plaintiffs surmise *Shell's Disposal* is non-precedential because it follows *American Eagle Outfitters*, and its author, Judge Jordan, was on the panel that decided *American Eagle Outfitters*.

Defendants' reliance (in their brief at 9) on *Brady v. Eliot*, 37 A. 343 (Pa. 1897) and *Franklin Interiors v. Wall of Fame Management Co., Inc.*, 511 A.2d 761 (Pa. 1986), is misplaced. In *Brady*, all of the solvent stockholders were required to sign the agreement, but two of them declined. Hamilton is not an attorney at PBBPH Law, let alone an employee. He has no ownership of or involvement in PBBPH Law other than being a client. The Chasan parties' potential lawsuit for attorney's fees (which they refrained from filing because of the settlement negotiations requested by Pierce) did not target Hamilton, just Pierce and PBBPH Law. There is no "privity" of any type between Hamilton and PBBPH Law, unlike the joint interest of the solvent stockholders in *Brady*.[5]

In *Franklin Interiors*, the agreement was to be between Franklin Interiors and Wall of Fame Management Company. Franklin Interiors inserted a term in the instrument stating, "This document does not become a contract until approved by an officer of Franklin Interiors." It was never signed by an officer of Franklin Interiors, and the court held that a condition that Franklin Interiors itself requested was not complied with, and hence no contract was formed. But in this case, there were no communications whatsoever between the Chasan parties and Hamilton about Hamilton's supposed malpractice claims (which Pierce expressly characterized as outside the settlement negotiations between the Chasan parties and PBBPH Law).[6] Further, there is no evidence that Hamilton himself wanted to make his

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[5] In Hamilton's deposition in his right of publicity case, he stated he moved to Los Angeles and is on disability, but he drives for Attorney Pierce "every now and then" and Pierce pays him a thousand dollars "every two or three weeks." (ECF 110-6, Hamilton Dep. at 30, 38-40). He stated he is not an employee of PBBPH Law. (*Id.*)

[6] The last communication between Hamilton and Chasan was on 3/27/2018 when PBBPH Law emailed to Chasan a letter by Hamilton terminating the engagement.

signature a condition of the settlement between the Chasan parties and PBBPH Law.[7]

The condition for Hamilton's consent seems to be a unilateral invention of Pierce to provide himself and PBBPH Law an escape hatch in the event they had a change of mind.

IV. THE REFUSAL OF PIERCE AND PBBPH LAW TO GO THROUGH WITH THE SETTLEMENT IN RELIANCE UPON HAMILTON'S PURPORTED WITHHOLDING OF CONSENT WAS A PRETEXT BECAUSE HAMILTON'S MALPRACTICE AND BREACH OF FIDUCIARY DUTY CLAIMS ARE MERITLESS.

In drafting the Complaint, Plaintiffs were deliberately circumspect in not disclosing the nature of Hamilton's supposed malpractice claims. The reason for this circumspection was that when the Chasan parties filed their Complaint on 12/14/2018, Hamilton had a motion pending for leave to amend to file a Third Amendment Complaint in his right of publicity case to add an additional count for "intentional nondisclosure" (see ECF 95 filed by Pierce and PBBPH Law on behalf of Hamilton on 10/25/2018), and the Chasan parties did not want to put anything in their Complaint that could impact the Court's thinking with regard to Hamilton's motion for leave to amend. However, on 1/10/2019, the Court (Hon. Anita B. Brody) denied Hamilton's motion for leave to amend because the new cause of action was futile, as Hamilton did not have evidence to support the elements of the

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[7] Even more misplaced is Defendants' reliance (in their brief at 10) on *Parisi v. Wells Fargo Home Mortgage, Inc.*, 2011 WL 6339835 at *11 (M.D. Pa. Oct. 31, 2011). The "condition" there was that the borrower had to be free of any felony convictions, and when the bank found out the would-be borrower was indeed a convicted felon, it withdrew the loan commitment. *Parisi* is not at all parallel to anything in this case.

claim. (ECF 105, 106). In light of the Court's decision, it is now "safe" to discuss the so-called malpractice claims that Hamilton and Pierce threatened Chasan with.

Early in the exchange of settlement communications between Pierce and Chasan, Pierce sent Chasan a lengthy letter via email on 5/21/2018 full of arguments in support of his bargaining position. Page 3 of the letter recited the following regarding Chasan's alleged malpractice:

> "....[W]e will likely defend against you by filing a cross-complaint, claiming, among other things, that your failure to bring the critical causes of action for fraud, intentional concealment, and negligent misrepresentation with a concomitant demand for disgorgement of unjust enrichment (profits), plus pre-judgment interest – all based on these three new causes of action – combined with your failure to discover critical information through the discovery process, in a timely fashion, prior to the discovery cut-off date, has seriously harmed the [right of publicity] case and the overall recovery. *If we do not enter into a settlement, we will likely argue, among onther things, that you are not entitled to the full quantum meruit payment, but you are instead (1) entitled to nothing and are liable for the losses that our client has suffered as a direct and proximate cause of your malpractice, (2) entitled to nothing, and / or entitled to the quantum meruit payment less appropriate offsets.*"

Excerpt of Pierce's 5/21/2018 Letter to Chasan (italics and underlining in the original). Chasan responded to Pierce via email also on 5/21/2018 (Exh. F hereto)[8], as follows:

> However, if you and Hamilton believe that Epic Games, Microsoft and/or Speight are guilty of fraud, intentional concealment, and/or negligent misrepresentation, you are welcome to serve discovery to them now to obtain evidence (and take depositions) to support those theories of recovery, and you are welcome to file a motion for leave to amend the Second Amended Complaint once again. I am not stopping you. Discovery is still open. Good luck with those far-fetched theories.

[8] Plaintiffs begin with Exh. F to distinguish from Exhs. A – E in the Complaint.

Soon after, Pierce did as Chasan suggested. He filed a motion on 6/15/2018 for an extension of discovery deadlines, with a supporting Declaration and brief, stating Hamilton needed additional discovery to gather evidence to support the proposed new causes of action for fraud, intentional concealment and negligent misrepresentation. (ECF 63, 63-1, 63-2). The Court granted the motion, extending the discovery deadline by three months to September 28, 2018. (ECF 66). Then PBBPH Law (through nine attorneys admitted *pro hac vice*) then pursued additional discovery from Epic Games, Microsoft and Speight, including voluminous document requests and approximately nine depositions.

When Pierce got around to filing Hamilton's motion for leave to amend on 10/25/2018, the only new cause of action presented was for "intentional nondisclosure," apparently the same thing as "intentional concealment." Pierce, PBBPH Law and Hamilton did not seek leave to amend to add claims for "fraud" and "negligent misrepresentation." Presumably Pierce concluded the discovery did not elicit evidence to support claims for "fraud" and "negligent misrepresentation."

When the court denied leave to amend on 1/10/2019, refusing leave to add a count for "intentional nondisclosure" as a futility, it was the end of Pierce's vaunted three new causes of action. Since the three claims were all meritless, Chasan can hardly be accused of malpractice for not pleading them on Hamilton's behalf.

As Chasan rightly regarded as meritless Pierce's threat to pursue malpractice claims on Hamilton's behalf, Chasan was willing to go ahead with the $160,000 settlement and take the risk that Hamilton would pursue his malpractice claims. Complaint, ECF 1 at ¶¶ 51, 52.

It would not have been any different if Judge Brody had ruled in Hamilton's favor and allowed leave to amend to add an "intentional nondisclosure" claim. That is because Pierce and PBBPH Law had completed the discovery, and the evidence was in their hands. They could prove the claim (or fail to prove the claim) without any help or hindrance from Chasan. If they couldn't prove it, they were a superseding cause of the "harm," as Chasan was long out of Hamilton's right of publicity case.

As to the "breach of fiduciary" claim, this cannot be fully discussed at this point because of the potential for impact on the pending summary judgment motion filed by Speight, Epic Games and Microsoft on 2/1/2019 (ECF 109, 110). In due course, at the trial of *this* case, it is very likely that it will fully aired (or it could be discussed at a confidential mediation if the Court directs some sort of ADR).

However, part of it can be disclosed. That part is that Attorney Chasan was allegedly not diligent in prosecuting Hamilton's case. This is utter nonsense. As the Complaint in this case sets forth, Hamilton engaged Chasan on 12/31/2016, and Chasan filed Hamilton's original complaint less than two weeks later, on 1/11/2017. Complaint, ECF 1 at ¶¶ 6, 8. Importantly, 1/11/2017 was exactly two years after Hamilton first learned about the alleged use of his likeness in the Gears of War (GOW) video games. Thus, the filing of the original complaint was within the applicable limitations period for certain of Hamilton's tort claims, *i.e.*, his statutory and common law right of publicity claims.[9]

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[9] In the summary judgment motion filed by Epic Games, Microsoft and Speight in the right of publicity case, those defendants do *not* rely on any statute of limitations or laches. (ECF 109). When Hamilton was asked in his deposition why there was a delay from 2015 to 2017 in the filing of his case, he said: "I was looking for an attorney to take the case." (ECF 110-6 at 143-144). He did not say how many

Chasan did homework on the GOW video games, and amended Hamilton's complaint twice, which strengthened the potential value of the lawsuit (especially the claim for bundled sales with the Xbox One console). Complaint, ECF 1, ¶ 9. He responded to and defeated the defendants' motion to dismiss, framed and served discovery, worked with opposing counsel to complete a protective order,[10] and responded to discovery served by the defendants. Complaint, ECF 1, ¶¶ 10-13. As this Court knows, discovery was stayed from 3/29/2017 to 12/18/2017 during the pendency of the defendants' motion to dismiss.

Hamilton was contractually responsible for funding litigation expenses, but he lacked funds and could not afford depositions or expert witnesses. Complaint, ECF 1, ¶¶ 7, 14, 15. Thus, Chasan pursued numerous third-party funders in search of funding for Hamilton's case. Complaint, ECF 1, ¶ 16. He finally succeeded when he located Pierce, Complaint, ECF 1, ¶¶ 17-20, which was an enormous benefit.

In light of the history of Hamilton's case, Chasan was not concerned about any claim for "breach of fiduciary duty" in allegedly not prosecuting Hamilton's case with sufficient professional diligence.

Regardless, and whatever the full scope of the "breach of fiduciary duty claim" is, Hamilton has not suffered any damages on account of anything Chasan

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attorneys he contacted. Later, he testified: "I wouldn't have had anything filed without Mr. Chasan." (ECF 110-6 at 254).

[10] The Confidentiality Order was entered on 2/20/2018 (ECF 50). Only after that did the parties actually produce their confidential documents as requested in discovery. It would have been useless to schedule depositions before that time, as all counsel needed time to review and analyze the document productions. At the parties' request, the Court entered an amended scheduling order on 2/28/2018 (ECF 53) which extended the fact discovery deadline to June 29, 2018. Hamilton terminated Chasan on 3/27/2018 and hired Pierce and PBBPH Law. Complaint, ECF 1, ¶ 27.

did or failed to do. That is because PBBPH Law took over the case, got an extension of discovery deadlines, completed discovery, and provided expert reports to support Hamilton's claims. Pierce and PBBPH Law either have the evidence to prove Hamilton's claims, or they do not. Chasan has done nothing to hinder the presentation of Hamilton's case. Further, it is highly doubtful that anything Chasan did or failed to do will have any evidentiary value in Hamilton's case or otherwise be admissible for any purpose.

In light of all above, the Complaint alleges, and the evidence will show, that Hamilton's claims against Chasan for malpractice and "breach of fiduciary duty" were and are meritless and serve only as a pretext for Pierce and PBBPH Law to withdraw from the settlement they made with Plaintiffs. Complaint, ¶¶ 53, 62, 68.

V. THE REFUSAL OF PIERCE AND PBBPH LAW TO GO THROUGH WITH THE SETTLEMENT IN RELIANCE UPON HAMILTON'S PURPORTED WITHHOLDING OF CONSENT WAS A PRETEXT BECAUSE PBBPH LAW DECIDED IT HAD OTHER USES FOR THE $160,000, AND DEFENDANTS USED HAMILTON TO COVER THEIR CHANGE OF MIND.

Absent fraud, duress, accident or mutual mistake, a settlement is binding and a settling party cannot simply change his/her/their mind simply because the deal turned out to be improvident or the settling party simply had a change of mind. *Pennsbury Village Associates, LLC v. McIntyre*, 11 A.3d 906, 914-915 (Pa. 2011), quoting *Buttermore v. Aliquippa Hospital*, 561 A.2d 733, 735 (Pa. 1989). But a change of mind by Defendants is what happened here.

On 10/30/2018, Pierce and PBBPH Law were willing to proceed with the settlement and pay the $160,000 within seven days, provided Hamilton was not signing the parties' release. Complaint, ECF 1, ¶ 46 and Exh. C, ECF 1-3. Nine days later, on 11/8/2019, Pierce and PBBPH Law were still willing to proceed with

the settlement and pay the funds within seven days, albeit Hamilton's status was in flux. Complaint, ECF 1, ¶ 48 and Exh. D, ECF 1-4. But a week later, on 11/15/2018, Pierce and Bainbridge advised the settlement was off the table, citing Hamilton's "breach of fiduciary duty" claim. Complaint, ECF 1, ¶¶ 50-51.

The abrupt break-off of discussions about getting Hamilton to sign a mutual release was perplexing at first, but news events made public just two weeks later, on 11/29/2018, and during the month of December 2018, overwhelmingly suggested that PBBPH Law simply changed its mind about the settlement because it needed the $160,000 for other purposes.

On 11/29/2018, PBBPH Law issued a press release published on *Business Wire* (Exh. G) entitled: "Rapper 2 Milly Hires Pierce Bainbridge's David L. Hecht to Pursue Claims against Fortnite and Epic Games." The news release quotes Mr. Hecht: "This isn't the first time that Epic Games has brazenly misappropriated the likeness of African-American talent. Our client Lenwood 'Skip' Hamilton is pursuing similar claims against Epic for use of his likeness in the popular 'Cole Train' character in the Gears of War video game franchise."

An article appeared on the legal wire service Law360.com, published 12/5/2018 (Exh. H) entitled "'Milly Rock' Rapper Says 'Fortnite' Video Game Swiped Dance," and refers to a lawsuit filed by PBBPH Law in Los Angeles, *Terence Ferguson v. Epic Games, Inc., et al.*, No. 2:18-cv-10110.

Another article appeared on Law360.com, published 12/17/2018 (Exh. I) entitled "'Fresh Prince' Actor Sues Game Makers over 'Carlton' Dance." This article refers to six cases filed by PBBPH Law in Los Angeles against Epic Games and

another video game company, Take-Two Interactive Software, Inc., and lists the docket numbers of the six cases.

Another article appeared on Law360.com, published 12/18/2018 (Exh. J) entitled "Rapper Sues NBA 2K Game Makers Over Dance Moves." The article refers to a case filed by PBBPH Law in Los Angeles styled *Ferguson v. Take-Two Interactive Software, Inc., et al.*, No. 2:18-cv-10425.

Another article appeared on Law360.com, published 1/23/2018 (Exh. K) entitled "Blocboy JB Hits 'Fortnite' With New Suit Over Dance Rights." The article refers to a case filed by PBBPH Law in Los Angeles styled *Baker et al. v. Epic Games, Inc., et al.*, No. 2:19-cv-00505.

Without certainty that all of the lawsuits filed by PBBPH Law against video game producers have been assembled here, Plaintiffs also attach an article from the *New York Times*, by Elizabeth Harris (Exh. L) published on-line on 1/11/2019, entitled: "A Real-World Battle Over Dancing Avatars: Did Fortnite Steal the Floss?" This article states in part:

> The plaintiffs' lawyer, David L Hecht, said that his firm [PBBPH Law] has spoken with a "significant number" of people about bringing similar claims and that he has hired a team of people, mostly in their 20s, to play video games for him as research.
>
> Mr. Hecht said more suits are in the works, and a quick internet search suggests he could easily fill a courtroom with clients.

See Exh. L, second sheet. So it appears that the $160,000 set aside for the settlement with Plaintiffs in September 2018 is instead being used by PBBPH Law as seed money to pay numerous 20-something video game players to launch and accelerate a cottage industry of multiple lawsuits against the video game industry.

Pierce and PBBPH Law simply changed their minds about settling with the Chasan parties because they wanted to use the money for other purposes. The references to the required "conditional" approval by Hamilton were merely a pretext or excuse for ditching the settlement. A court of equity should compel specific performance of the settlement.

VI. ON WHETHER AN AMENDED COMPLAINT IS NEEDED.

Plaintiffs have not invoked Fed. R. Civ. P. 15(a) which affords a plaintiff a one-time opportunity to amend his/her complaint without leave of court or consent of the defendant(s). This is because in Plaintiffs' view, the Complaint here adequately sets forth two claims for relief under applicable pleading criteria, notwithstanding that Defendants disagree.

While it is true that this brief goes into expanded detail regarding the contentions about pretext, Plaintiffs regard the expanded detail as evidentiary material that would come in at trial in support of Plaintiffs' adequately-pled averments set forth in the Complaint. Thus, Plaintiffs' thinking is that an amended complaint is not necessary.

But should the Court have a different view, Plaintiffs should still be permitted leave to amend. "[E]ven when a plaintiff does not seek leave to amend, if a complaint is vulnerable to 12(b)(6) dismissal, a District Court must permit a curative amendment, unless an amendment would be inequitable or futile.... Dismissal without leave to amend is justified only on the grounds of bad faith, undue delay, prejudice, or futility." *Alston v. Parker*, 363 F.3d 229, 235-36 (3d Cir. 2004) (citing *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002).

VII. ATTORNEY'S FEES.

The Complaint requests specific relief and adds a catch-all in the *ad damnum*: "costs and expenses, and any other appropriate relief." Plaintiffs have not identified any specific statutory or contractual fee-shifting provision, but the Court has inherent power to award fees in egregious situations, such as a party's bad faith or use of vexatious or oppressive tactics. *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). Plaintiffs contend this is such a case.

The evidence will show that before Pierce made his "final" alternative offers on 9/10/2018, he was informed and knew that Chasan's "bottom number" in compromise was $160,000. Pierce met the bottom number. That is what the Chasan parties expected to net when the settlement was completed, albeit this was only about half the full *quantum meruit* damages.

The settlement negotiations in this matter extended over six months. An agreement was struck on September 15, 2018, but two months later the Defendants abrogated it on the basis of pretext. This was bad faith.

The Chasan parties are not only delayed in getting the settlement funds, but of necessity they must employ outside counsel because Chasan is a material witness and will need to testify. Thus, the outlay of legal fees to outside counsel is an expense that further diminishes the Chasan parties' net recovery.

Also, throughout the negotiations, Pierce made repeated threats to pursue an eight-figure malpractice case against Chasan. This was vexatious in the extreme. Sledgehammer tactics. Complaint, ECF 1, ¶ 25. There is no basis for a malpractice case against Chasan. Nevertheless, Pierce (as managing partner of PBBPH Law) knew and intended that Chasan would have to report the threat to his

malpractice carrier, and Chasan, being prudent, did so. That has consequences. Insurers often spend enormous amounts in the defense of malpractice lawsuits, even if the lawsuits have no merit. Claims against attorneys affect the underwriting process. The result for Chasan is an increase in premiums and a shrinking of the market of carriers willing to insure Chasan. If malpractice premiums become ultra-expensive, it could force Chasan to abandon law practice.

The Defendants' tactics in this case afford ample grounds for the Court to invoke its inherent powers and award counsel fees to Plaintiffs.

CONCLUSION

The Complaint adequately states two counts upon which relief can be granted. The Motion to Dismiss should be denied.

Dated: February 8, 2019

Respectfully submitted,

/s/ Bruce J. Chasan

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CERTIFICATE OF SERVICE

I, Bruce J. Chasan, hereby certify that on February 8, 2019, I caused a true and correct copy of the foregoing Memorandum of Law in Opposition to Defendant's Motion to Dismiss, with exhibits, to be filed via the Court's electronic filing system, which constitutes service upon all counsel of record.

/S/ Bruce J. Chasan

Bruce J. Chasan