NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 9, 2019

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Re: ***David M. Cully v. Todd Smith***
Case No. CL–2017–9142

OPINION LETTER

Dear Counsel:

This matter is before the Court to determine the enforceability of a purported settlement agreement in this personal injury negligence litigation. The pivotal issue is whether the term "settlement," as used in an email exchange reflecting the purported settlement agreement, is ambiguous. The Court holds that "settlement" is unambiguous within the context of the email exchange. The email exchange reflects a legally binding settlement agreement that unambiguously provides for Defendant's insurers to pay Plaintiff $610,000 in exchange for dismissal of this lawsuit. Accordingly, the Court avouches the rationale of its order dated June 14, 2019 enforcing the settlement agreement pursuant to these terms.[1]

I. BACKGROUND

David Cully filed a complaint seeking judgment against Todd Smith for damages arising from a December 3, 2014 automobile collision. Prior to trial, counsel for Cully and counsel for Smith's insurers, Travelers Property Casualty Company of America ("Travelers") and State Farm Insurance Company ("State Farm") (collectively, the "Insurers"), engaged in settlement negotiations. On May 6, 2019, at 6:09 pm, Scott Snyder, counsel for Travelers, sent the following email:

> *Subject: RE: [External] CULLY V. SMITH -- SETTLEMENT*
>
> Our last and final offer is $610,000. If not accepted before the settlement deadline of May 7 at noon, that offer is withdrawn and no further settlement will be considered.

On May 7, 2019, at 11:36 am, Douglas Wessel, counsel for Cully, replied:

> *Subject: CULLY V. SMITH -- SETTLEMENT*
>
> Gentlemen:
> A few minutes ago, after consultation with his family, Mr. Cully accepted your below offer of $610,000 in full and final settlement of this case.
> I am also faxing a copy of this e-mail to both of you.

Thereafter, counsel failed to finalize a settlement. Snyder informed Wessel that he had received a settlement check for $510,000 from Travelers and would forward it upon receipt of a release form executed by Cully. Execution of the release would discharge Smith, Salesforce.com,[2] State Farm, and Travelers from liability in relation to any claims against them

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[1] On June 14, 2019, the Court ordered the enforcement of the settlement agreement. On June 18, 2019, the Court suspended that order *sua sponte* to reconsider its judgment. Satisfied with the initial ruling for the reasons stated herein, the Court now vacates the June 18 suspending order.

[2] Wessel represented that Smith was driving while in the scope of his employ with Salesforce.com and therefore he had filed suit against Salesforce.com in the Loudoun Circuit Court on Cully's behalf.

by Cully arising out of the December 3, 2014 automobile collision. Independently, Brendan J. Mullarkey, counsel for State Farm, sent Wessel a letter enclosing a $100,000 check. Mullarkey's letter instructed Cully to execute the release prior to depositing the check.

In response, Wessel emailed Snyder and Mullarkey, wherein he opined that "[t]his settlement [] consisted of only the following two terms: [(1)] payment of $610,000 in exchange for [(2)] settlement of this case" and that "[t]he parties did not discuss or agree to the signing or embracing of any Release, or any terms in any Release, as a part or condition of the settlement." Wessel also expressed that his understanding of the parties' settlement agreement did not include a settlement as against Salesforce.com.[3]

At a stalemate, the parties filed cross-motions to enforce the settlement, seeking to enforce the email exchange as a settlement agreement pursuant to each's respective understanding of the terms. Cully argued that the email exchange created a "clear and unambiguous" contract—Smith's payment of $610,000 in exchange for settlement of this case. Therefore, he advanced, this Court's analysis should be limited to the "four corners" of the email exchange without reference to any extrinsic or parol evidence to ascertain the parties' intent.

Smith argued that the email exchange merely reflected an "agreement in principle," but concluded that "it is clear that the parties entered into the customary [agreement of] payment of the settlement amount upon the exchange of an endorsed release and dismissal order." Smith represented that the customary practice in the area of personal injury law is for execution of a release by the plaintiff and execution of a dismissal order by both parties prior to the disbursement of the settlement funds. In the alternative, Smith asked the Court to set aside the agreement for lack of mutual assent.

II. ANALYSIS

A. Contracts Must Reflect Mutual Assent to Disclosed Terms

A settlement agreement is a contract. *See Bangor-Punta Ops., Inc. v. Atl. Leasing, Ltd.*, 215 Va. 180, 183 (1974) ("[T]he essentials of a valid contract must be present to support a compromise settlement."). Generally speaking, there are two predicates to the formation of a legally binding contract: (1) consideration and (2) mutual assent. *See Dean v. Morris*, 287 Va. 531, 536 (2014) (citation omitted). Consideration is "the price bargained for and paid for a promise[;] . . . a benefit to the party promising or a detriment to the party to whom the promise is made." *Smith v. Mountjoy*, 280 Va. 46, 53 (2010) (citations omitted).

Mutual assent is a distinct intention common to the parties to a contract to create enforceable, reciprocal obligations governing their relationship as determined from the

[3] In neither the email exchange nor at oral arguments did the parties discuss whether a release of Smith in and of itself operates as a release of Salesforce.com. *Cf. Fed. Land Bank of Balt. v. Birchfield*, 173 Va. 200, 225 (1939) ("While plaintiff has a right to maintain this action, or rather to institute it, against the master without joining the servant, a release of the servant, from responsibility for the tort actually committed by him, releases the master." (citation omitted)).

interaction between, and manifested intention of, the parties. *See CGI Fed. Inc. v. FCi Fed., Inc.*, 295 Va. 506, 520 (2018); *Spectra-4, LLP v. Uniwest Commercial Realty, Inc.*, 290 Va. 36, 46 (2015); *Moorman v. Blackstock, Inc.*, 276 Va. 64, 75 (2008). Mutual assent is determined from the reasonable meaning of a party's expressions—his words and acts—*actually communicated* to the other party to the purported contract. *Moorman*, 276 Va. at 75 (citation omitted). "[I]t is immaterial what may be the real but unexpressed state of his mind." *Lucy v. Zehmer*, 196 Va. 493, 503 (1954) (citations omitted). As with all contracts, "[u]ltimate resolution of the question whether there has been a binding settlement involves a determination of the parties' intention, as *objectively manifested*." *Snyder-Falkinham v. Stockburger*, 249 Va. 376, 381 (1995) (emphasis added) (citations omitted).

"Until the parties have a distinct intention common to both . . . there is a lack of mutual assent and, therefore, no contract." *Moorman*, 276 Va. at 75 (citation omitted). Typically, for an express contract, mutuality of assent is demonstrated by proof of an offer and an acceptance. *See Spectra-4*, 290 Va. at 46. "It is crucial . . . that the minds of the parties have met on every material phase of the alleged agreement." *Chittum v. Potter*, 216 Va. 463, 467 (1975). "The most basic principle of contract law is that when one party makes an offer that is clear, definite, and explicit, and leaves nothing open for negotiation, acceptance of that offer by the other party will complete the contract." *Judicial Inquiry & Review Comm'n of Va. v. Elliott*, 272 Va. 97, 119 (2006) (citation omitted). Where parties are engaged in settlement negotiations, the question is "whether negotiations upon a disputed claim have culminated in an agreement so final that no action may be brought on the antecedent claim, but only upon the later agreement." *Montagna v. Holiday Inns, Inc.*, 221 Va. 336, 346 (1980).

The parties in this case do not dispute the facts surrounding the email exchange. Therefore, the question of whether the email exchange created a legally binding contract between the parties occasions a question of law. *Valjar, Inc. v. Mar. Terminals, Inc.*, 220 Va. 1015, 1019 (1980) (citation omitted).[4] An exchange of emails is a form of correspondence, *cf. Beck v. Shelton*, 267 Va. 482, 491–92 (2004), and may result in a binding contract if the emails "fairly construed, correctly express all of the terms to which the parties agree." *Chittum*, 216 Va. at 467 (citation omitted).

Snyder's email constituted an offer—he manifested Smith's willingness to bargain with Cully to settle this lawsuit, thereby creating a power of acceptance. *Cf. Chang v. First Colonial Sav. Bank*, 242 Va. 388, 392 (1991) (defining "offer"). The terms of Snyder's offer were "clear, definite, and explicit, and le[ft] nothing open for negotiation." *Elliott*, 272 Va. at 119 (citation omitted).

Wessel's email in response, that "accepted [Snyder's] below offer," constituted an acceptance. *Cf. Marefield Meadows, Inc. v. Lorenz*, 245 Va. 255, 258, 260 (1993) (holding that a letter accepting an offer to purchase a stallion "as indicated in your letters" met "the legal

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[4] *But cf. Jessee v. Smith*, 222 Va. 15, 18 (1981) ("Where, [] 'doubt exists as to the character, or, indeed, the presence or lack of representations, the determination of the precise nature and extent of the representations is a question for the jury.'" (citation omitted)).

requirements for the creation of a contract"). Upon Wessel's acceptance of Snyder's offer email, "the minds of the parties [] met on every material phase of the alleged agreement." *Chittum*, 216 Va. at 467. Put differently, the parties "reached a mutual agreement on every essential element of the proposed settlement" as objectively manifested by the parties. *Montagna*, 221 Va. at 347; *see also Snyder-Falkinham*, 249 Va. at 381.

"Once a competent party makes a settlement and acts affirmatively to enter into such settlement, [his] second thoughts at a later time upon the wisdom of the settlement do not constitute good cause for setting it aside.'" *Alexakis v. Mallios*, 261 Va. 425, 429 (2001) (citation omitted). This Court looks only "to the outward expression of a person as manifesting his intention" before the contract was made "rather than to his secret and unexpressed intention." *Lucy*, 196 Va. at 502 (citation omitted).

As applied here, whether or not Cully's execution of a release was a material term to the Insurers or Smith is irrelevant to this Court's inquiry because the intent that such a term be included in the settlement agreement was not actually communicated to Cully or his counsel until after the email exchange. *Moorman*, 276 Va. at 75; *Lucy*, 196 Va. at 503; *Snyder-Falkinham*, 249 Va. at 381. Moreover, there is nothing to indicate that Snyder was "unable to comprehend the nature and consequences of" the email offer he sent without provision for the execution of a release. *Lucy*, 196 Va. at 500. Accordingly, because Snyder's offer email was clear, definite and explicit, leaving nothing open for further negotiations, and because the desire for Cully to execute a release was not actually communicated to Cully or his counsel until after Wessel sent the acceptance email is irrelevant to this Court's analysis, the Court concludes that the interaction of the parties manifests their mutual assent to contract together according to the terms of the email exchange.

Finally, via these two emails, the parties exchanged mutual promises: (1) the Insurers' payment of $610,000 in exchange for (2) settlement. This mutual exchange constituted valuable consideration. *Cf. Price v. Taylor*, 251 Va. 82, 85 (1996) ("[I]t is well established that mutual promises in a contract constitute valuable consideration." (collecting cases)). Finding the existence of mutuality of assent a valuable consideration, the Court holds that the email exchange created a contract between the parties.

B. Virginia Courts Are Loath to Set Aside Contracts

A basic policy of contract law is that competent parties be accorded the liberty to freely contract on whatever lawful terms they wish. *See Wallihan v. Hughes*, 196 Va. 117, 125 (1954); *Atl. Greyhound Lines v. Skinner*, 172 Va. 428, 439 (1939) (citation omitted). More succinctly, "Virginia law favors the making of contracts between competent parties for a valid purpose." *Farmers Ins. Exch. v. Enter. Leasing Co.*, 281 Va. 612, 619 (2011) (citation omitted). Virginia's "common-law tradition counsels that courts 'are not lightly to interfere' with lawful exercises of the freedom of contract.'" *Commonwealth Div. of Risk Mgmt. v. Va. Ass'n of Ctys. Grp. Self Ins. Risk Pool*, 292 Va. 133, 143 (2016) (citations omitted). Consequently, if a party makes a deliberate and valid settlement agreement "with his eyes wide open," courts are loath to set aside the agreement. *Cary v. Harris*, 120 Va. 252, 91 S.E. 166, 168 (1917).

For a contract to be enforceable by a court, "[r]easonable certainty as to the contractual obligations is all that is required." *Allen v. Aetna Cas. & Sur. Co.*, 222 Va. 361, 363 (1981) (citations omitted). That is, "the character of the obligation . . . must be definite and certain as to its terms and requirements; . . . spell[ing] out the essential commitments and agreements" of the parties. *Dodge v. Tr. of Randolph-Macon Women's Coll.*, 276 Va. 1, 5 (2008) (citation omitted). The court must be able to definitively ascertain the obligations of the parties and give the terms exact meaning. *Id.* at 5–6.

"The law does not favor declaring contracts void for indefiniteness and uncertainty, and leans against a construction which has that tendency." *Jiminez v. Corr*, 288 Va. 395, 415 (2014) (citation omitted). Declaring a contract void "should be 'a last resort.'" *Longview Int'l Tech. Sols., Inc. v. Lin*, No. 160228, 2017 WL 1396062, 3 (Va. Apr. 13, 2017) (unpublished order). "The indefiniteness 'must reach the point where construction becomes futile' for a court to declare the contract 'meaningless' and to 'justify the conclusion that in reality it accomplished nothing.'" *Id.*

In *Allen v. Aetna Casualty & Surety Co.*, 222 Va. 361, 363 (1981), the Supreme Court of Virginia ruled that "an agreement to make a settlement, without specifying more, constitutes only an agreement to negotiate at a later date." In that case, the complaint alleged that an insurer "did bargain for and obtain plaintiff's agreement not to retain counsel to prosecute his claim in exchange for [the insurer's] promise to effect full and final settlement with him." *Id.* at 362. On appeal, the court found the purported contract was "too vague and indefinite to be enforced" because "[n]o sum was specified in the agreement, nor was any method or formula alleged for determining the amount payable in settlement." *Id.* at 364.

"An uncertain contract is one which may, indeed, embrace all the material terms, but one of them is expressed in so inexact, indefinite or obscure language, that the intent of the parties cannot be sufficiently ascertained to enable the court to carry it into effect." *Parker v. Murphy*, 152 Va. 173, 183 (1929). The *Allen* court held that the omission of a term concerning settlement amount or formula to calculate that amount rendered the contract uncertain and too vague to be enforced, not that the term "settlement" was uncertain. 222 Va. at 364.

By contrast, the email exchange in this case expressly provides for a settlement amount. The parties agreed that the Insurers would pay $610,000. Therefore, although *Allen* provides useful guiding principles of law, its application of those principles is inapposite to the present case. The settlement agreement here is not too vague and indefinite to be enforced. From the expressed terms of the settlement agreement, it is possible to definitely ascertain the obligations of the parties. *Cf. Longview Tech.*, 2017 WL 1396062 at 3 (despite observing that what precisely constitutes a sale of a closely held corporation presents a "difficult question," ruling that the provision in question was "not so fatally indefinite as to be unenforceable").

C. The Term "Settlement" Is Unambiguous

The Insurers contend the term "settlement" is ambiguous, and actually means settlement of the lawsuits against Smith and Salesforce.com as well as Cully's execution of the release forwarded by Snyder. Irrefutably, the payment term of the purported settlement agreement is unambiguous. It clearly provides for the payment of $610,000 to Cully. Thus, the key question to resolve is whether the term "settlement" is ambiguous.

Whether terms of a contract are ambiguous presents a question of law. *Plunkett v. Plunkett*, 271 Va. 162, 166–67 (2006) (citation omitted). If the term "settlement" is unambiguous, the settlement agreement as a whole is unambiguous and must be construed according to its plain meaning as a matter of law, without recourse to parol evidence. *City of Chesapeake v. States Self-Ins. Risk Retention Grp., Inc.*, 271 Va. 574, 578 (2006); *Galloway Corp. v. S.B. Ballard Constr. Co.*, 250 Va. 493, 502 (1995). However, if "settlement" is ambiguous, construction of the settlement agreement is a question of fact and parol evidence may be necessary to ascertain the term's meaning. *Online Res. Corp. v. Lawlor*, 285 Va. 40, 54 (2013).

Simply because the parties attribute different meanings to "settlement" does not mean the term is ambiguous. *James River Ins. Co. v. Doswell Truck Stop, LLC*, 827 S.E.2d 374, 376 (Va. 2019). "[C]onflicting interpretations reveal an ambiguity only when they are reasonable." *Erie Ins. Exch. V. EPC MD 15, LLC*, 297 Va. 21, 29 (2019) (citations omitted). When a term is clear and unambiguous, it must be interpreted according to its plain—its usual, ordinary, and popular—meaning. *RECP IV WG Land Inv'rs LLC v. Capitol One Bank (USA), N.A.*, 295 Va. 268, 284 (2018) (citations omitted). The plain meaning is the meaning "that reasonable [persons] likely would have attributed to [it]." *Erie Ins.*, 297 Va. at 28 (footnote omitted). The inquiry into a particular term's meaning does not depend on mere semantics. *Id.* Rather, the semantics must be counterbalanced against the syntax of the term and its context within the entire agreement. *Id.*

In *Williams v. Capital Hospice & Companion Property & Casualty Insurance Co.*, 66 Va. App. 161, 172 (2016), the Court of Appeals of Virginia defined the term "compromise settlement" as used in the Virginia Workers Compensation Act. In defining that term, the court opined that "'[s]ettlement' means 'satisfaction of a claim by agreement often with less than full payment.'" *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2079 (1993)). That definition makes sense in the context of the Virginia Worker's Compensation Act, but is not conclusive within the context of the email exchange. *Cf. Schuiling v. Harris*, 286 Va. 187, 193 (2013) ("[Courts] giv[e] terms their ordinary meaning unless some other meaning is apparent from the context." (citation omitted)).

Black's Law Dictionary defines "settlement" as "[a]n agreement ending a dispute or lawsuit." *Settlement*, BLACK'S LAW DICTIONARY (2014 ed.) (definition 2). Of course, "[c]ommon sense is as much a part of contract interpretation as is the dictionary or the arsenal of canons." *Mount Aldie, LLC v. Land Tr. of Va., Inc.*, 293 Va. 190, 200 (2017) (citation omitted). "Release" and "settlement" have well-established, but different, meanings. As distinguished from a settlement, "a release is an immediate relinquishment or discharge of the covenantor's right of

action." *Shortt v. Hudson Supply & Equip. Co.*, 191 Va. 306, 310 (1950). In contrast, when a plaintiff enters into a settlement agreement, he receives compensation in exchange for no further pursuit, or dismissal, of his claim. A release is a surrender of a right to sue while a settlement is a compromise of a right to sue. Both operate as *res judicata* on a future claim based on that compromised or discharged right of action, albeit in different ways.

The fact that counsel for the Insurers tendered a release to Cully is itself an implicit recognition of this distinction. Given the legal distinction between a release and a settlement, common sense dictates that where a party agrees to the "settlement" of a claim, he merely agrees to the dismissal of that particular claim. Execution of a release is not a necessary predicate to a settlement agreement, nor is it necessarily encompassed by use of the term "settlement" within a settlement agreement.[5] If an insurer wishes for a release to be executed as part of a settlement agreement, it must provide a term concerning execution of a release in addition to providing for "settlement" of a particular claim.

Accordingly, the Court holds that the only reasonable interpretation of "settlement" in the context of the parties' email exchange is the ending of the dispute between these parties—the dismissal of this lawsuit. The Court concludes Smith's interpretation of the term "settlement" within the email exchange as including execution of a release is unreasonable.[6] Furthermore, the Court finds that Smith's interpretation of "settlement" as including settlement of the pending Loudoun Circuit Court lawsuit against Smith's employer, Salesforce.com, is also unreasonable. Counsel for the parties represented at oral argument that Snyder, who tendered the release, did not represent Salesforce.com at the time of the email exchange. Moreover, the email exchange featured the subject line reading, "CULLY V. SMITH -- SETTLEMENT" and contained no reference to Cully's lawsuit against Salesforce.com. Snyder seeks to contractually bind Cully into a settlement and a release with a party he did not represent in a lawsuit he never referenced. This the Court cannot do. The Court rules that the email exchange reflects an unambiguous contract for the payment of $610,000 to Cully in exchange for dismissal of the lawsuit before this Court.

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[5] This Court's review of national jurisprudence concerning whether a release is a necessary requisite to the entry of a valid settlement agreement found that the majority position is that it is not. *See, e.g., In re Deepwater Horizon*, 786 F.3d 344 (5th Cir. 2015); *Campbell v. Adkisson, Sherbert & Assocs.*, 546 Fed. Appx. 146 (4th Cir. 2013); *Parsons v. Orthalliance, Inc.*, 130 Fed. Appx. 353 (11th Cir. 2005); *United States v. Orr Constr. Co.*, 560 F.2d 765 (7th Cir. 1977); *Brown v. Transurban USA, Inc.*, 144 F. Supp. 3d 809 (E.D. Va. 2015); *Berardi v. Meadowbrook Mall Co.*, 572 S.E.2d 900 (W. Va. 2002); *Fishburn v. Barker*, 518 N.E.2d 1054 (Mem) (Ill. 1988); *Pacheco v. Gonzalez*, 254 So. 3d 527 (Fla. Dist. Ct. App. 2018); *Bridge City Family Med. Clinic, P.C. v. Kent & Johnson, LLP*, 346 P.3d 658 (Or. Ct. App. 2015); *Tillman v. Mejabi*, 711 S.E.2d 110 (Ga. Ct. App. 2015); *Feingerts v. State Farm Mut. Auto. Ins. Co.*, 117 So. 3d 1294 (La. Ct. App. 2013); *Mastroni-Mucker v. Allstate Ins. Co.*, 976 A.2d 510 (Pa. Super. Ct. 2009); *Jennings v. Reed*, 885 A.2d 482 (N.J. Super. Ct. App. Div. 2005); *Parmley v. 84 Lumber Co.*, 911 So. 2d 569 (Miss. Ct. App. 2005); *Tooker v. Castille*, 689 N.Y.S.2d 56 (N.Y. App. Div. 1999).

[6] *Contra Shahin v. Progressive Cas. Ins. Co.*, 673 Fed. Appx. 481, 486 (6th Cir. 2016) ("Typically, a settlement results in the resolution and release of claims against a party."); *Higbee v. Sentry Ins. Co.*, 253 F.3d 994, 997–98 (7th Cir. 2001) ("[M]any defendants would agree that the *most* material term in any settlement agreement is the release, and, in a case involving multiple claims, which of those claims are covered by the release." (citation omitted)). However, although a settlement agreement may *typically* include a release of claims, it does not always. And, although most defendants and insurers would agree that a release of liability term is the most important term of a settlement agreement, this Court concludes that the release must be included in the settlement agreement itself.

D. Treatment of Similar Settlement Agreements in Prior Case Law

Two Supreme Court of Virginia cases with analogous settlement agreements are informative to the Court's analysis here. In one case, *Montagna v. Holiday Inns, Inc.*, 221 Va. 336, 338–39 (1980), a couple sought to recover travel and living expenses from a motel where their son had been murdered in an armed robbery. A lawyer for the couple wrote a representative of the motel seeking recovery of these expenses. *Id.* at 339. The motel representative forwarded the letter to the motel's insurance carrier. *Id.* After some correspondence between the couple's attorney and a representative for the insurer, the representative wrote:

> Please be advised that we have investigated this claim and do not feel that our insured is legally liable. However, to bring this claim to an amicable conclusion we would be willing to settle the claim for $2500.00. *Please instruct our company how you wish the draft to be made payable.*

Id. at 340 (emphasis added).

The couple's attorney wrote in reply:

> Thank you very much for your letter . . . with reference to your offer of settlement of the above claim . . .
>
> On behalf of [the couple], as their attorney in this matter, I accept your offer of settlement of $2500.00 in the above claim. . . .
>
> Please make the draft of $2500.00 payable to Theodore Bliss, Attorney, as [the couple is] in England at the present time.

Id. at 340–41.

Thereafter, the insurer's representative wrote:

> This is to thank you for your letter. . . .
>
> However, we would like to know the Executor of this estate and also provide our company a copy of the Legal Document with respect to the Executor of the estate. Any payment that would be made would be made payable to you and the Executor of [the decedent son's] estate.

Id. at 341.

Faced with complications in qualifying a personal representative, the couple's attorney sent a release executed by the couple that released the motel only as to the couple's travel expenses. *Id.* When the insurer failed to respond, a second attorney for the couple wrote the

insurer, relaying that the settlement was rejected and requesting return of the release. *Id*. at 343–44. Subsequently, the executor of the decedent son's estate filed suit against the motel for wrongful death. *Id.* at 337, 344. The motel filed a "special plea of release," alleging the claim was previously settled for $2,500 pursuant to the letter exchange. *Id.* at 337.

On appeal, the court observed that the facts were not in dispute. *Id.* at 338. The court ruled that the correspondence did not reflect a meeting of the minds between the insurer and the couple. *Id.* at 347. Rather, the court explained, the couple intended to settle their personal expenses claim without court intervention, while the insurer did not intend to reach any compromise unless court approval was obtained and a personal representative was appointed to whom payment could be directed. *Id.* at 347–48. As to the personal representative term, the court found that the couple "not only did not agree to this condition, they were never advised of it." *Id.* Since the insurer tried "to impose an undisclosed condition upon the settlement," the court reasoned that the couple had a right to repudiate the purported compromise. *Id.* at 348.

Two points distinguish *Montagna* from the present case. First, the issue of ambiguity was never addressed in *Montagna* as it is here.[7] Second, the court determined that the insurer's purported offer letter left open a material term[8] for further negotiation; namely, the identity of the party or parties settling with the insurer. The purported settlement offer contained an important qualification—by asking the couple's attorney to "instruct [the insurer] how [they] wish[ed] the draft to be made payable," the insurer left the settlement agreement open for further negotiations. *Id.* at 340.

Seemingly innocuous, this equivocation in the offer left unsettled as to whether the "parties" were the couple, or the couple's deceased son's estate, or both. Accordingly, the court concluded that the parties had not reached a final agreement but were still engaged in negotiations. *Id.* at 348. Therefore, even though the parties had reached an agreement as to the settlement amount, because "the parties never reached a mutual agreement on every essential element of the proposed settlement," the court held that there was no meeting of the minds. *Id.* at 347.

By contrast, Snyder's offer email was explicit and unequivocal, leaving nothing open for further negotiation. *See Elliott*, 272 Va. at 119. The Supreme Court of Virginia made a similar distinction in *Alexakis v. Mallios*, 261 Va. 425 (2001). There, the parties informed a trial judge that they had resolved all disputed claims and then recited a settlement agreement into the record. *Id.* at 427. As part of the settlement, the parties agreed to the sale of a parcel of real property and to execute purchase contracts and an addendum identical to those executed in a prior transaction for the same parcel to consummate the transaction. *Id.*

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[7] Indeed, secreted in a footnote, the court noted that "[b]ecause we decide that at the threshold there was no mutual assent, we need not consider the substance of the purported agreement. . ." *Montagna*, 221 Va. at 347 n.4.

[8] Generally defined, a term is "material" to a contract where it is fundamental to an essential purpose of the contract. *Cf. Parr v. Alderwoods Grp., Inc.*, 268 Va. 461, 467 (2004) ("A breach is material if it is 'a failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract.'" (citations omitted)).

When the estate submitted an order of settlement and dismissal, the purchaser objected, arguing that, like in *Montagna*, the parties had not agreed on the terms of the settlement because each side had drafted a different contract for the purchase of the property. *Id.* at 428. On appeal, the Supreme Court of Virginia distinguished *Montagna*, concluding that "[u]nlike the circumstances presented in the *Montagna* case . . . there were no undisclosed provisions to which the parties had not consented." *Id.* at 428–29. The court noted that the purchase contracts and addendum from the prior transaction were available to all parties when the settlement was reached and that there was "nothing ambiguous or technical about the terms of the settlement." *Id.* For that reason, the court concluded that the purchaser's undisclosed interpretation cannot defeat the unambiguous terms of the settlement agreement. *Id.* The court further noted that if the purchaser's concerns arose after the oration of the agreement into the record, they came too late. *Id.* at 429.

In the present case, as in *Alexakis*, the Insurers seek to fabricate ambiguity into an unambiguous settlement agreement by injecting terms not disclosed to Cully or his counsel until after the formation of the contract—the addition of a release and the dismissal of claims against Salesforce.com. The sanctity afforded to a contract has little meaning if one party can unilaterally alter its terms by injecting undisclosed terms under the guise of a plea of ambiguity. If the Insurers wanted a release and a dismissal of the claim against Smith's employer, that term should have been expressed in their negotiations with Cully prior to proffering terms of a settlement agreement.[9]

E. Customary Practice Does Not Supersede Contracts

Both counsel in this case, during oral argument, discussed their understanding of the custom of settling personal injury litigation. Snyder asserted that plaintiffs customarily execute a release in conjunction with a settlement agreement. Wessel conceded this was customary practice, but advanced it was the mere result of plaintiffs routinely waiving prerogatives. Any "evidence of custom and usage" in the area of tort litigation settlement agreements does not and cannot displace the objective manifestations of the parties forming the mutual assent underlying this specific settlement agreement. *Cf. Flowers Baking Co. v. R-P Packaging, Inc.*, 229 Va. 370, 375 (1985) (citation omitted). As Snyder himself admitted, both counsel "are veterans of personal injury law." A sophisticated party negotiating a contract is bound by the terms they agree to in the field(s) of their expertise.

III. CONCLUSION

The Court holds that the email exchange created a legally binding contract between the parties. Their settlement agreement is quite simple; there is nothing technical about it. The term "settlement" as used in this exchange is unambiguous, and means "dismissal of this lawsuit."

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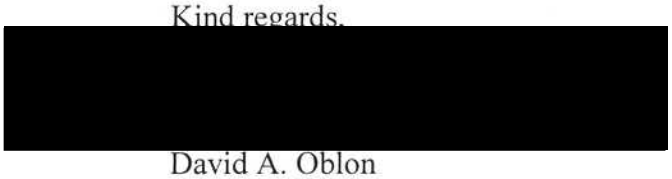
[9] Had Smith or the Insurers sought to require execution of a release prior to disbursement of the funds, rather than keep this condition a secret, the settlement offer should have stated so. Smith or the Insurers could have conditioned the offer by providing: "our last and final offer is $610,000, subject to our standard release," or "our last and final offer is $610,000, subject to our standard release and the release of Smith's employer," and not simply "our last and final offer is $610,000."

The settlement agreement is set forth in clear and explicit terms: (1) the Insurers' payment of $610,000 in exchange for (2) Cully's dismissal of his lawsuit against Smith. Under the circumstances of these parties' negotiations, no reasonable person would have attributed execution of a release to the term "settlement." Accordingly, the Court hereby affirms its original order dated June 14, 2019.

An appropriate order vacating the suspending order dated June 18, 2019 is attached.

Kind regards,



David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

DAVID M. CULLY,	)	
	)	
Plaintiff,	)	
v.	)	CL–2017–9142
	)	
TODD SMITH,	)	
	)	
Defendant.	)	

ORDER

THIS MATTER comes before the Court *sua sponte* to reconsider its order dated June 14, 2019; and

UPON RECONSIDERATION of the cross-motions to enforce the settlement agreement; it is hereby

ORDERED and DECREED that the June 14, 2019 order is AFFIRMED;

ORDERED and DECREED that the Opinion Letter dated July 9, 2019 is hereby adopted by reference into this Order as though it were fully restated herein; and

ORDERED and DECREED this Court's order entered June 18, 2019 is VACATED.

JUL 09 2019

[redacted]

Dated

[redacted]

Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.