STATE OF NORTH CAROLINA ONSLOW COUNTY MICHAEL EGAN, Plaintiff, v. BUENA VISTA, INC. d/b/a Saltwater Grill, and TIMOTHY W. ANDERSON, Defendants.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24 CVS 2547 **ORDER AND OPINION ON DEFENDANTS' MOTION FOR ENFORCEMENT OF SETTLEMENT AGREEMENT, TO STRIKE COMPLAINT, AND FOR SANCTIONS**

1. This is the second time this case has been in this Court. The individual parties are both shareholders in Buena Vista, Inc., which does business as a restaurant known as Saltwater Grill. After the parties reported the case settled in Spring 2023, Plaintiff filed a voluntary dismissal without prejudice. He now brings suit a second time, within a year of his dismissal, pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure (the "Rule[s]"). In response, Defendants have jointly filed a Motion for Enforcement of Settlement Agreement, to Strike Complaint, and for Sanctions (the "Motion"), (ECF No. 15).[1]

2. Having considered the Motion, the related briefing, the arguments of counsel at a hearing on the Motion held 23 September 2024, and other relevant

[1] The Court observes that the Motion is in fact three motions. Pursuant to Business Court Rule 7.2, "[e]ach motion must be set out in a separate document" and "[a]ll motions must be accompanied by a brief[.]" Given the Court's determination below, it has considered Defendants request for sanctions. However, the Court cautions counsel to adhere to this rule in future filings.

matters of record, the Court hereby **GRANTS in part** and **DENIES in part** the Motion.

Harvell and Collins, P.A., by Wesley A. Collins, for Plaintiff Michael Egan.

Brooks, Pierce, McLendon, Humphrey & Leonard LLP, by Andrew L. Rodenbough, Graham Whittington, and Thomas Glenn Varnum, for Defendant Buena Vista, Inc. d/b/a Saltwater Grill.

Mewborn & DeSelms, Attorneys at Law, by Brett Joseph DeSelms, for Defendant Timothy Anderson.

Earp, Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

3. Plaintiff Michael Egan and Defendant Timothy W. Anderson are shareholders of Defendant Buena Vista, Inc. d/b/a Saltwater Grill ("Buena Vista"). (Compl. ¶¶ 8-9, ECF No. 3.) On 14 September 2022, Mr. Egan was arrested and charged with multiple counts of embezzlement from Buena Vista. (*See* Aff. of Brett J. DeSelms ["DeSelms Aff."] Ex. A, ECF No. 17.1.)

4. Two days after his arrest, Mr. Egan sued both Mr. Anderson and Buena Vista alleging that he had been excluded from Buena Vista's business and that Mr. Anderson failed to cause Buena Vista to make distributions to Mr. Egan. *See Egan v. Buena Vista, Inc.*, 2022-CVS-828 (the "Original Suit"). The Complaint in the Original Suit contained claims for fraud, breach of by-laws, conversion, breach of fiduciary duty, aiding and abetting, unfair and deceptive trade acts and practices, constructive trust, accounting, appointment of referee and receiver and distribution

of corporate assets, and piercing the corporate veil. (*See generally*, Original Suit, ECF No. 3.)

5. On 12 December 2022, Mr. Anderson and Buena Vista separately moved to dismiss the Original Complaint. (Original Suit, ECF Nos. 13, 15.) On 24 January 2023, while the motions to dismiss were pending, Mr. Egan's counsel ("Mr. Collins") emailed Defendants' counsel stating:

> My client is willing to settle all matters upon receipt of $25,000.00 conditioned upon all criminal charges being dismissal [sic] with prejudice. Obviously, your client only has but so much control over what the DA will do, but I would expect that if he informs the DA that he wants all charged dropped, that they will agree.

(DeSelms Aff. Ex. C at 4, ECF No. 17.3.) On 27 January 2023, Mr. Anderson's counsel ("Mr. DeSelms") responded:

> [I]t sounds like we have a deal. Our client is willing to pay $25k in exchange for Egan relinquishing any and all ownership/positions in the company, and all parties executing a global mutual release. I called Walter Rodriguez (Egan's criminal attorney) and he is going to check with the DA's office to see if they will dismiss the charges if our client advises that he is no longer interested in pursuing the charges (or something to that effect).

(DeSelms Aff. Ex. C at 3.)

6. Ultimately, the DA was unwilling to dismiss the charges against Mr. Egan, but he was willing to allow Mr. Egan to enter into a deferred prosecution agreement that provided for dismissal after Mr. Egan's completion of community service and a probationary period. (DeSelms Aff. Ex. C. at 3.) Mr. Collins did not object to a resolution on this basis, as long as Mr. Egan agreed to it after consulting

with his criminal defense attorney, Mr. Rodriguez. (Aff. of Wesley A. Collins ["Collins Aff."] ¶ 21, ECF No. 38.1.)

7. On 9 February 2023, Mr. DeSelms emailed Mr. Collins asking whether Mr. Egan had agreed to settle with deferred prosecution rather than dismissal. Mr. DeSelms stated that Defendants "would certainly agree to deferred prosecution and seek no restitution as part of that arrangement[,]" if it would settle the case. (DeSelms Aff. Ex. D at 2, ECF No. 17.4.) The same day, Mr. Collins responded: "I think we are settled. [Mr. Rodriguez] is supposed to be calling me about this[.]" (DeSelms Aff. Ex. D at 1.)

8. Accordingly, on 10 February 2023, Mr. DeSelms emailed the Court's law clerk stating: "I happy [sic] to report that the parties have reached a settlement in principle. We will need to draft the settlement agreement and circulate it before the settlement is final. I imagine we can accomplish this in the next two weeks." (DeSelms Aff. Ex. E at 3, ECF No. 17.5.) Mr. Collins then responded: "This is correct . . . [w]e will file the dismissal once the settlement is finalized." (DeSelms Aff. Ex. E at 1.) Mr. Collins then texted Mr. DeSelms on 11 February 2023 to confirm that the case was settled "at 25k paid to Egan along with the other elements we have discussed and emailed about." (DeSelms Aff. Ex. B, ECF No. 17.2.)

9. Mr. DeSelms sent a proposed settlement agreement to Mr. Collins on 20 February 2023. (*See* DeSelms Aff. Ex. F, ECF No. 17.6; DeSelms Aff. Ex. G ["Settlement Agreement"], ECF No. 17.7.) With respect to the civil suit, the Settlement Agreement provided, among other things, that Buena Vista would pay

Mr. Egan a lump sum of $25,000 and that within five days of receiving the funds, Mr. Egan would voluntarily dismiss the lawsuit with prejudice. (Settlement Agreement §§ 3-4.) With respect to Mr. Egan's criminal charges, the Settlement Agreement provided:

> [Buena Vista] and Anderson consent to Egan participating in a deferred prosecution with respect to those certain criminal charges pending against Egan . . . in the District Court Division of Onslow County, North Carolina. [Buena Vista] and Anderson further warrant that . . . they will not seek restitution from Egan as part of any such deferred prosecution. Neither Anderson nor [Buena Vista] make any representation that they have the power or ability to bind or influence the Onslow County District Attorney to take any particular action, or impose or not impose any particular requirement, with respect to any prosecution of Egan.

(Settlement Agreement § 7(e).)

10. On 28 February 2023, Mr. Collins contacted ethics counsel at the State Bar seeking to confirm that the Settlement Agreement referencing both the civil and criminal claims was ethically proper. Ethics counsel responded that the settlement agreement was proper "provided everyone understands that only the DA can decide whether criminal charges will be dropped." (DeSelms Aff. Ex. I at 4-5, ECF No. 17.9.) After receiving confirmation from the State Bar, Mr. Collins emailed Mr. DeSelms: "We . . . were able to determine that there were no changes needed to the proposed settlement agreement. So, I think we are good to go. [Mr. Rodriguez] just needs to review it and then I think we are ready to execute after his approval and discussion with the DA." (DeSelms Aff. Ex. H, ECF No. 17.8.) Mr. DeSelms then sent the proposed Settlement Agreement to Mr. Rodriguez for his review. (DeSelms Aff. Ex. H.)

11. On 1 March 2023, Mr. Rodriquez emailed Mr. DeSelms stating:

> **I cannot involve myself in the civil aspect of this matter**. The agreement made between the State and my client for deferred prosecution is irrespective of the pending civil matter. Crossing over lines of criminal and civil with what can be construed as potential leverage of one case for another make [sic] us all very uncomfortable.

(Aff. of Wesley A. Collins ["Collins Aff."] Ex. 14, ECF No. 38.2 (emphasis added).) Mr. Collins was copied on the email and responded by forwarding the response he had received from the State Bar. Mr. Collins stated: "See below from ethics counsel at the State Bar. This should resolve any concerns." (DeSelms Aff. Ex. I at 3.) Mr. DeSelms then emailed Mr. Collins stating:

> I am going to go ahead and have [Mr. Anderson] come in and review/execute the settlement documents. I am not sure I understand fully the reason [Mr. Rodriguez] is so concerned with reviewing the settlement document, but with that said, I think your client has already initiated the deferred prosecution process. I would encourage you to discuss this matter with [Mr. Rodriquez] if you have any lingering concerns on that issue . . . I would hope we could have signatures this week.

(Collins Aff. Ex. 16, ECF No. 38.2.) Mr. Collins responded: "OK. Send over [the executed Settlement Agreement] with the check." (DeSelms Aff. Ex. I at 1.)

12. The executed Settlement Agreement as well as the check were sent to Mr. Collins on 3 March 2023. (DeSelms Aff. Ex. I at 1; DeSelms Aff. Ex. J, ECF No. 17.10.) Mr. Collins deposited the settlement funds in the firm trust account pending final execution of the Settlement Agreement and directed his paralegal, Ms. Turner, to communicate with Mr. Egan regarding execution of the Settlement Agreement and to confirm through Mr. Egan that Mr. Rodriguez had approved the settlement. (Collins Aff. ¶¶ 35, 37.)

13. On 13 March 2023, the Court's law clerk emailed counsel for the parties requesting an update on the status of the settlement. (DeSelms Aff. Ex. K at 4, ECF No. 17.11.) Mr. Collins responded the next day: "**The case is settled**. I believe the settlement agreement is fully executed." (DeSelms Aff. Ex. K at 3 (emphasis added).) On 16 March 2023, Mr. DeSelms responded: "I wanted to confirm that this matter is settled. The defendants have performed all of their obligations in accordance with the settlement terms, and therefore agree that a dismissal with prejudice should be forthcoming from the Plaintiff." (DeSelms Aff. Ex. K at 2.) The Court requested that the dismissal be filed on or before 6 April 2023. (DeSelms Aff. Ex. K. at 1.)

14. Despite Mr. Collins' representation to the Court on 14 March 2023 that he believed the Settlement Agreement was fully executed, Mr. Collins later learned that Mr. Egan had not responded to Ms. Turner's attempts to contact him, and that the Settlement Agreement had not been executed. (Collins Aff. ¶ 39, Ex. 19.) On 15 March 2023, Mr. Collins emailed Mr. Egan stating: "The court keeps asking for the status of the settlement **and I keep telling them it is settled**. Therefore, the court wants the dismissal filed. I cannot file the dismissal until you sign the agreement." (Second Aff. Wesley A. Collins ["Second Collins Aff."] Ex 2, ECF No. 44.1 (emphasis added).)

15. By 27 March 2023, Mr. Egan still had not executed the Settlement Agreement. (Collins Aff. Ex. 21, ECF No. 38.2.) Accordingly, on 28 March 2023, Mr. Collins again contacted Mr. Egan stating:

> I am happy to answer any questions you may have, but you told me specifically that you wanted the criminal matter to be resolved and you

> did not care if you got any money out of the civil matter and directed me to try to make that happen. **We agreed that I would offer the $25K paid to you on the civil matter along with the victim doing all he could do to drop all charges, with the understanding that the final decision is with the DA. I did as you said and reached that settlement.**
>
> The settlement agreement and $25K is here at my office and has been for weeks.
>
> Can you come see me at 3:00 today?

(Second Collins Aff. Ex. 2, ECF No. 44.1 (emphasis added).) Mr. Egan responded: "[W]hen is a good time to set up a conference call so I can set some time aside. I'm not able to come in at 3pm today. Yes the criminal matter was my main concern and the agreement was based on that being dismissed." (Second Collins Aff. Ex. 2, ECF No. 44.1.)

16. On 29 March 2023, Mr. Collins then emailed both Mr. Egan and Mr. Rodriguez:

> The court is very concerned that the settlement agreement has not yet been signed and the dismissal filed. **I understand that the case is settled** but you have questions about the terms of the settlement agreement. I have been trying to reach you about this but have not been able to get through to you. I need you to call me immediately.
>
> [Mr. Rodriguez], do you know what is going on here? What concerns [Mr. Egan] has?

(Second Collins Aff. Ex. 2, ECF No. 44.1 (emphasis added).) Mr. Rodriguez responded:

> I have attempted to remain out of the civil matter for the very issues I discussed with you and [Mr. DeSelms]. I advised both of you as well as Mr. Egan that both the DA and I were uncomfortable with moving forward on a leveraged civil v criminal issue. The DA was very clear. They would not enter into any agreement for dismissal for the

> criminal charge in relation to the civil matter. After speaking to the DA, he agreed, irrespective of the civil matter, that they would treat this case no different than they would treat any other criminal case similarly situated. The disposition of the charges has not been by dismissal as contemplated by the agreement tendered by opposing counsel. The charges were disposed of in accordance with the conversations I had with the prosecutor and the chief ADA by deferred prosecution. Mr. Egan has relayed to me that he is unhappy with the resolution of this case as the agreement was that the charges be dismissed. These charges have not been dismissed. This is an ethical line the prosecutor indicated he was not willing to cross. That said, I am not sure the agreement as contemplated has been fulfilled by the opposing counsel. Moreover, and on a personal note, I am surprised with a settlement that leaves Mr. Egan with over $80,000 in business credit card bills, attorney fees for the criminal charges and the majority of the settlement proposed going to civil attorney fees. I have relayed this concern to Mr. Egan. I am further concerned that if opposing counsel or his client made statements that if Mr. Egan dismissed the civil suit, they would not pursue criminal charges, that there has been no investigation into potential felonious activity by the other side under [N.C.G.S.] 14-118.4 and State v Greenspan, 29 N.C. App. 583. If, as you and Mr. Egan have relayed to me, this statement did occur, I believe it would be prudent to have an investigation addressed under this or one of the lesser included felony charges.

(Collins Aff. Ex. 22, ECF No. 38.2; *see also* Tr. of Walter Rodriquez Dep. ["Rodriguez Dep."] 16:14-17:8, 24:10-13, 25:5-13, ECF No. 43.) Mr. Rodriguez also represented that he "explicitly explained" to Mr. DeSelms "that the state (Chief ADA) refused to address anything related or seeming to look like a quid pro quo regarding the civil case[]" and "that the DA was providing deferred prosecution for the purpose of disposing of the criminal case irrespective of the civil action pending." (Collins Aff. Ex. 24, ECF No. 38.2.)

17. Mr. Collins asserts that the above email from Mr. Rodriquez on 29 March 2023 was the first time he learned "that the proposed civil resolution did not improve the criminal matter." (Collins Aff. Ex. 25, ECF No. 38.2.) Instead, Mr.

Collins "understood that the resolution of the criminal matter was in part based on the fact that the victim would not further 'press charges' and that there would be no restitution required through the criminal matter." (Second Collins Aff. Ex. 2, ECF No. 44.1.)

18. Mr. Rodriguez testified that the DA's office consistently offers deferred prosecution "provided that there are not excessive restitution matters and provided that the victim is on board." (Rodriguez Dep. 19:18-22.) Mr. Rodriguez further testified that it is standard for these judgments to include restitution if the victim is seeking restitution. (Rodriguez Dep. 40:8-11.) However, no restitution was ordered in this case. (Rodriguez Dep. 36:14-16, 37:1-4.) According to Mr. Rodriguez, the prosecutor "made it very clear that with the civil things going on, he was not entering a request for restitution because that was going to have to be settled by the civil case." (Rodriguez Dep. 37:16-21.)

19. After learning that Messrs. Egan and Rodriguez did not, in fact, approve the terms of the Settlement Agreement, Mr. Collins advised Mr. Egan that if he wanted to "back out of the settlement," that could be accomplished. (Second Collins Aff. Ex. 2, ECF No. 44.1.) A notice of voluntary dismissal *without* prejudice was then filed on 5 April 2023. (*See* Original Suit, ECF No. 22 ["Voluntary Dismissal"].) The Voluntary Dismissal provided:

> The undersigned counsel believed that Plaintiff and Plaintiff's criminal defense counsel approved the terms of the settlement and were waiving the condition that the district attorney dismiss the criminal charges outright and understood that a deferred prosecution program may be required. The undersigned, mistakenly believing that the instant case was resolved, emailed to the Court that the case is settled. On March

> 29, 2023, the undersigned counsel contacted Plaintiff's criminal defense counsel and inquired as to why Plaintiff had not yet signed the settlement agreement. On that same day, for the first time, Plaintiff's criminal defense counsel advised the undersigned that the Plaintiff did not agree with the terms of the settlement because the district attorney was unwilling to dismiss the criminal charges with prejudice. In other words, Plaintiff and Plaintiff's criminal defense attorney had not, in fact, agreed to waive the condition that the criminal charges be dismissed for the settlement to be binding on all parties. For a period of time prior to March 29, 2023, the undersigned counsel believed that the instant case was settled, but has since learned that this was never the case.

Mr. Egan formally entered into a deferred prosecution agreement on 15 May 2023. (DeSelms Aff. Ex. A.)

20. Subsequently, Mr. Egan initiated this action by filing the Complaint on 5 April 2024. The Complaint alleges the same central facts as the complaint in the Original Suit. (*Compare* Compl., ECF No. 3, *with* Original Suit, ECF No. 3.)

21. The case was designated as a mandatory complex business case on 8 May 2024 and assigned to the undersigned the same day. (ECF Nos. 1, 2.)

22. Defendants filed the Motion on 17 June 2024. After full briefing, the Court held a hearing on the Motion on 23 September 2024, at which all parties were represented by counsel. (*See* Not. Hr'g., ECF No. 48.)

23. The Motion is now ripe for disposition.

II. LEGAL STANDARD

24. A party seeking to enforce a settlement agreement may either file a motion in the pending action or bring a separate proceeding to enforce the agreement. *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 694 (2009). When enforcement is sought by motion in a pending action, "the summary judgment standard of review applies."

McCarthy v. Hampton, 2015 NCBC LEXIS 70, at *9 (N.C. Super. Ct. July 1, 2015) (citing *Hardin*, 199 N.C. App. at 695).

25. "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Da Silva v. WakeMed*, 375 N.C. 1, 10 (2020) (quoting N.C. R. Civ. P. 56(c)). "A genuine issue of material fact 'is one that can be maintained by substantial evidence.' " *Curlee v. Johnson*, 377 N.C. 97, 101 (2021) (quoting *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 335 (2015)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (cleaned up).

26. The party moving for summary judgment "bears the burden of establishing that there is no triable issue of material fact[.]" *Cummings v. Carroll*, 379 N.C. 347, 358 (2021) (citation and quotation marks omitted). "[T]he trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Belmont Ass'n v. Farwig*, 381 N.C. 306, 310 (2022) (quoting *Dalton v. Camp*, 353 N.C. 647, 651 (2001)).

III. ANALYSIS

27. Defendants ask the Court to "hold Egan and his counsel to the deal they negotiated and accepted, and from which they have already received the benefit of the bargain, by enforcing the settlement agreement, striking Egan's Complaint, and

entering sanctions against Egan and his counsel pursuant to Rule 11 and the Court's inherent authority." (Br. Supp. Mot. Enforcement Settlement Agreement, to Strike Compl., and for Sanctions ["Defs.' Br. Supp."] 2, ECF No. 16.)

28. Plaintiff responds that a settlement was always dependent on his criminal attorney (Mr. Rodriquez) agreeing to its terms and, because that condition was never satisfied, no settlement agreement was reached. Therefore, Plaintiff concludes there is no agreement to enforce, and this Motion should be denied. (Pl.'s Mem. Opp. Defs.' Mot. Enforcement of Settlement Agreement, to Strike Compl., and for Sanctions ["Pl.'s Br. Opp."] 9, ECF No. 38.)

A. Existence of a Settlement Agreement

29. Defendants argue that the Court should enforce the Settlement Agreement because: (1) the parties' correspondence proves that a settlement was reached; (2) Mr. Egan is bound by his counsel's representations to Defendants and to the Court, and (3) Mr. Egan ratified the terms of the settlement. (Defs.' Br. Supp. 11-18.) In response, Mr. Egan asserts that there are genuine issues of material fact that preclude the Court from determining that a settlement agreement exists. (Pl.'s Br. Opp. 2-13.)

30. "A compromise and settlement agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts." *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829 (2000). A valid contract requires assent, mutuality of obligation, and definite

terms. *Charlotte Motor Speedway, LLC v. Cnty. of Cabarrus*, 230 N.C. App. 1, 7 (2013).

31. In addition, "[f]or an agreement to constitute a valid contract, the parties' minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." *Chappell v. Roth*, 353 N.C. 690, 692 (2001) (quoting *Boyce v. McMahan*, 285 N.C. 730, 734 (1974)); *see also Snyder v. Freeman*, 300 N.C. 204, 218 (1980) ("The essence of any contract is the mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds."). In determining whether mutual assent exists, the Court considers the parties' words and acts from the perspective of a reasonable person. *Howell v. Smith*, 258 N.C. 150, 153 (1962).

32. Here, Mr. Egan argues that there is a genuine issue of material fact regarding his agreement to deferred prosecution, rather than dismissal, of the criminal charges brought against him. The Voluntary Dismissal states that "[Mr. Egan] did not agree with the terms of the settlement because the district attorney was unwilling to dismiss the criminal charges with prejudice." (*See* Voluntary Dismissal at 2.)

33. It is undisputed that Mr. Egan's initial offer to settle all claims in the civil suit was conditioned upon the criminal charges against him being dismissed with prejudice. (*See* DeSelms Aff. Ex. C at 4 ("My client is willing to settle all matters upon receipt of $25,000 conditioned upon all criminal charges being dismissal [sic] with prejudice."). However, by 30 January 2023, after it was apparent that the DA

was not willing to dismiss the charges, the evidence is undisputed that "the parties never again discussed . . . the dismissal of criminal charges as part of any settlement." (DeSelms Aff. Ex. C at 3; Defs.' Br. Supp. 11.)

34. Nevertheless, Mr. Egan contends that once the deferred prosecution term was proposed, Mr. Rodriguez's consent was a condition precedent to an agreement. (Pl.'s Br. Opp. 7.) He argues that his counsel, Mr. Collins, mistakenly believed that Defendants' counsel had secured Mr. Rodriguez's approval but later learned "in hindsight" that he did not. Mr. Egan maintains that his counsel never agreed that Mr. Rodriguez's approval was *not* a condition precedent to a settlement. (Pl.'s Br. Opp. 9.)

35. The Court concludes that the parties reached a settlement agreement. There is no dispute that Mr. Egan hired Mr. Collins and vested Mr. Collins with authority to negotiate a settlement on his behalf. On 14 March 2023, Mr. Collins unequivocally represented to both the Court and Defendants' counsel that the case was settled. (DeSelms Aff. Ex. K at 3.) Importantly, this statement was made after Mr. Rodriguez made it clear in his 1 March 2023 email that he could not involve himself in the civil aspect of this case. (*See* Collins Aff. Ex. 14, ECF No. 38.2.) Nothing about Mr. Collins' statement to the Court and Defendants on 14 March signaled that the settlement was still conditioned on Mr. Rodriguez's approval.[2]

[2] To the extent Mr. Egan argues that there was no consideration for the Settlement Agreement because he had already agreed with the DA to enter a deferred prosecution agreement by 1 March 2023, (*see* Collins Aff. Ex. 14, ECF No. 38.2), Mr. Egan fails to understand the nature of the consideration Defendants agreed to provide. Defendants agreed that they would consent to deferred prosecution and would not seek restitution, both of which they did. (Settlement Agreement § 7(e).) They also agreed to pay Egan $25,000.

36. As the Voluntary Dismissal reflects, any misunderstanding regarding the settlement was unilateral, occurring only between Plaintiff and his own counsel, and not between the parties. (*See* Voluntary Dismissal at 2 ("The undersigned, mistakenly believing that the instant case was resolved, emailed to the Court that the case is settled.").)

37. There is other evidence of a misunderstanding between Mr. Collins and Mr. Egan in the record. (*See* Collins Aff. Ex. 25, ECF No. 38.2 (29 March 2023 email from Mr. Collins to Mr. Rodriguez stating, "I was under the impression that you were ok with the agreement[.]"); Second Collins Aff. Ex. 2, ECF No. 44.1 (29 March 2023 email from Mr. Collins to Messrs. Rodriguez and Egan stating, "I thought we were settled."); Collins Aff. Ex. 26, ECF No. 38.2 (30 March 2023 email from Mr. Collins to Mr. Rodriguez stating, "I thought we were all on the same page, but apparently, we were not."); Second Collins Aff. Ex. 2, ECF No. 44.1 (29 March 2023 email from Mr. Collins advising Mr. Egan that he could "back out of the settlement.").) Unfortunately for Plaintiff, however, a misunderstanding between a client and his counsel does not prevent the formation of a contract between Plaintiff and Defendants when, after receiving the draft Settlement Agreement, Mr. Collins unequivocally told both Defendants and the Court, "the case is settled."

38. "[T]here is a presumption in North Carolina in favor of an attorney's authority to act for the client he professes to represent." *Smith v. Young Moving & Storage, Inc.*, 167 N.C. App. 487, 493 (2004) (citation and quotation marks omitted). Unless Plaintiff meets his burden of rebutting this presumption, Defendants are

entitled to rely on it. Here, as in *Smith*, Plaintiff does not argue that his attorney was without authority to settle his claim. *Id.* Consequently, when Mr. Collins told Defendants and the Court, "the case is settled," it was.

39. In *Harris v. Ray Johnson Constr. Co.,* 139 N.C. App. 827 (2000), the plaintiff argued that she was not bound by a settlement agreement because, although she authorized her attorney to negotiate on her behalf, there was a misunderstanding between them as to the amount she was to receive from the settlement. Specifically, the plaintiff intended to *net* $2,000, and her attorney thought she meant he could settle for the *gross* amount of $2,000. The Court of Appeals held:

> Plaintiff's evidence here establishes Mr. Adams had actual authority to settle her claim for an amount of $ 2000. Plaintiff retained Mr. Adams as her counsel in this matter and expressly authorized him to settle the claim for an amount in which plaintiff and her counsel thought they had agreed on at the time . . . . Mr. Adams "understood" that he was to settle the claim for $ 2000. Only in hindsight did it become clear that Mr. Adams and his client had not reached a clear agreement as to the proper amount. From this evidence we conclude that Mr. Adams reasonably believed at the time of negotiation that he could settle the case for $ 2,000. Thus, he possessed actual authority to settle in that amount, though it was unfortunately conferred by want of ordinary care. Plaintiff has failed to meet her burden of proving Mr. Adams lacked authority and she is bound by his acceptance of defendant's settlement offer[.]

Id. at 830.

40. Similarly, in *Purcell Int'l Textile Grp., Inc. v. Algemene AFW N.V.*, 185 N.C. App. 135 (2007), the defendants' counsel agreed to the terms of a settlement in which the defendants would pay the plaintiff $ 850,000.00 in three payments over a six-month period. While the defendants' counsel represented to the plaintiff that he had obtained his clients' approval, the total amount ($ 850,000.00) exceeded the

authority the defendants had given him. To make matters worse, the defendants' counsel never informed the defendants of the agreement, never sent the defendants the written agreement, forged the signatures of the defendants on the agreement, and did not obtain a signed confession of judgment. Nevertheless, the trial court enforced the settlement over the defendants' objections, and the defendants appealed. 185 N.C. App. at 137-38. In upholding the trial court's decision, the Court of Appeals held:

> Hinnant's actions were binding on defendants, who hired him to act as their agent in handling the case and negotiating a settlement**.** Defendants granted Hinnant the authority to settle the case and never stripped him of that authority. Based on his actual authority, Hinnant engaged in negotiations offering settlement figures of $ 400,000.00 and $ 500,000.00, and plaintiff declined both offers. Each time plaintiff declined a settlement offer, Hinnant established a pattern of following up with a new offer featuring a larger amount of money. Thus, when Hinnant offered a settlement of $ 850,000, which exceeded his actual authority, **plaintiff could have reasonably assumed that offer was within Hinnant's authority and had no reason to know that Hinnant had exceeded his limits**. Thus, the agreement negotiated by Hinnant bound defendants despite the fact that Hinnant exceeded his authority and violated his duty to defendants.

Id. at 139.

41. The record in this case shows that Mr. Egan authorized his counsel to negotiate a settlement on his behalf. On 14 March 2023, Mr. Collins unequivocally represented to both Defendants' counsel and the Court that the case was settled. As in *Harris* and *Purcell*, the fact that Mr. Collins learned *in hindsight* that Mr. Egan did not approve the settlement because it did not include a dismissal of the criminal

charges against him does not change the fact that a settlement was reached when Mr. Collins, acting as Mr. Egan's agent, said so.[3]

42. Accordingly, the Court determines that a settlement was reached in this matter. Remaining to be determined are the terms of that settlement.[4] The undisputed facts establish them, as well.

B. Terms of the Settlement Agreement

43. On 20 February 2023, Defendants' counsel forwarded a draft Settlement Agreement to Mr. Collins for review. (Settlement Agreement, ECF No. 17.7.) The draft Settlement Agreement included a release providing that Mr. Egan would:

> release[] and forever discharge[] Anderson and [Buena Vista] . . . from any and all actions, suits, charges, claims, appeals, damages, liabilities, and complaints that Egan has or may have . . . relating to or resulting from any acts, occurrences, omissions, or events arising on or before the date of this Agreement, including without limitation, all claims relating to or arising out of: (1) Egan's acts or involvement as a shareholder, director, officer, and/or employee of [Buena Vista]; (2) any tax liabilities related to the Redemption and Settlement Funds and/or Egan's prior status as a shareholder of [Buena Vista]; and/or (3) those claims that are asserted, or could have been asserted, and all claims involving the continuing effects of such acts, occurrences, or events, whether known or unknown, asserted or unasserted, and including but not limited to any and all claims made or which could have been made in the [Original Suit], as well as any other claims based on constitutional, statutory, common law, or regulatory grounds, which Egan now has, owns, or holds, or claims to have, own or hold, or which he had, owned, or held or claimed to own at any time before execution of this Agreement, against any and all of the Buena Vista Released Parties.

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[3] To be sure, dismissal of the criminal charges was a term over which Defendants had no control and which Defendants could not provide, as they made clear in the draft settlement agreement they prepared and sent to Mr. Collins.

[4] Given the Court's determination that a settlement was reached based on Mr. Collins' statement to the Court and Defendants' counsel on 14 March 2023, the Court does not consider Defendants' argument that Plaintiff ratified an agreement or that Plaintiff is judicially estopped from arguing the absence of an agreement.

(Settlement Agreement § 6(e).)

44. A few days later, on 1 March 2023, Mr. Rodriquez made it clear that he would not be involved with the civil settlement. And on 3 March 2023, Defendants' counsel, at Mr. Collins' request, transmitted the Settlement Agreement, executed by his clients, along with a $25,000 check to Mr. Collins. (DeSelms Aff. Exs. I-J.) It was only after all of this had occurred that Mr. Collins emailed the Court and Defendants' counsel on 14 March 2023 agreeing that the case was settled. He did not communicate any remaining precondition.

45. After Mr. Collins sent his 14 March 2023 email, he continued in his belief that the draft Settlement Agreement was final. Over the next two days, he sent multiple emails to Mr. Egan instructing him to sign the Settlement Agreement that Defendants' counsel had prepared. (Second Collins Aff. Ex. 2, ECF No. 44.1.) On 28 March 2023, Mr. Collins emailed his client: "We agreed that I would offer the $25K paid to you on the civil matter along with the victim doing all he could do to drop all charges, with the understanding that the final decision is with the DA. **I did as you said and reached that settlement."** (Second Collins Aff. Ex. 2, ECF No. 44.1, emphasis added.)

46. The undisputed evidence presented establishes that the terms of the parties' settlement are as stated in the document prepared by Defendants' counsel and forwarded to Mr. Collins on 20 February 2023. Section 6(e) of the Settlement Agreement bars the claims in this action. Mr. Egan has released Defendants "from any and all actions, suits, charges, claims, appeals, damages, liabilities, and

complaints . . . relating to or resulting from any acts, occurrences, omissions, or events arising on or before the date of this Agreement."

47. The allegations in the Complaint describe events that took place well before the Settlement Agreement was reached. The claims attempted arise from Mr. Egan's involvement with Saltwater Grill (Buena Vista, Inc.), a relationship that ended in March 2020. Because Mr. Egan's claims are barred by the terms of the Settlement Agreement, they are hereby **DISMISSED** with prejudice.

C. Sanctions

48. Given this outcome, Defendants assert that the Court should sanction Mr. Egan and his counsel under Rule 11 of the North Carolina Rules of Civil Procedure (the "Rule(s)"). Defendants argue that both Mr. Collins (who signed the Complaint) and Mr. Egan (who verified the Complaint) should be sanctioned under Rule 11 for signing a pleading without a good-faith basis for believing it was valid. (Defs.' Br. Supp. 20-23.)

49. Further, Defendants assert that both Plaintiff and his counsel should be sanctioned pursuant to the Court's inherent authority "for their manipulation and abuse of the legal process." (Defs.' Br. Supp. 23.) Defendants contend that Plaintiff and his counsel failed to brief motions to dismiss filed in the earlier action and, in an effort to avoid the Court's ruling on those uncontested motions, Plaintiff said the case was settled, and then dismissed and refiled his claims. (Defs.' Br. Supp. 25.) In addition, Defendants maintain that they have been prejudiced by Plaintiff's action

because they gave up the right to seek restitution by relying on the representations of Plaintiff's counsel that doing so would settle the case. (Defs.' Br. Supp. 26.)

50. Mr. Egan responds that he had a "good faith and honest belief that no settlement agreement was reached such that it is proper to bring the suit again pursuant to Rule 41." (Pl.'s Br. Opp. 14.)

Findings of Fact[5]

51. Based on the record before it, the Court finds that a lapse in communication occurred between Plaintiff and his counsel. That lapse, combined with Mr. Collins' confusion regarding the state of affairs with respect to the criminal charges, Mr. Rodriquez's hesitance to clarify matters for Mr. Collins out of concern that linking resolution of the civil and criminal matters could lead to ethical violations,[6] and Mr. Collins' assumption that Mr. DeSelms was aware of Mr.

[5] To the extent any finding of fact is more appropriately characterized as a conclusion of law or vice-versa, it should be reclassified. *See N.C. State Bar v. Key*, 189 N.C. App. 80, 88 (2008) ("[C]lassification of an item within [an] order is not determinative[.]").

[6] For example, 2008 Formal Ethics Opinion 15 cautions:

> [A] lawyer must be careful to avoid the criminal offense of compounding a crime, which in turn would violate the prohibition in Rule 8.4(b) against "criminal act[s] that reflect adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." This means that the amount paid to settle the civil claim may not exceed the amount to which the plaintiff would be entitled under applicable law; in other words, no compensation may be paid to the plaintiff for the plaintiff's silence. Moreover, the lawyers for both the plaintiff and the defendant must also be careful to avoid any implication that the settlement includes the client's agreement to testify falsely or to evade a subpoena in a criminal proceeding should criminal charges subsequently be brought by the authorities. Such conduct clearly violates the prohibitions in Rule 3.4(a) and (b) on counseling or assisting another to destroy or hide evidence, testify falsely, or avoid serving as a witness. Finally, if there is a legal requirement to report certain conduct to the authorities, as, for example, there is with child abuse and neglect, a lawyer may not participate in a settlement

Rodriquez's position with respect to the terms of the settlement, all led Mr. Collins to represent to Defendants and the Court that the case was settled when, in fact, he did not have his client's approval to settle the case.

52. The Court further finds that it was important to Mr. Collins that Mr. Rodriquez review and approve the Settlement Agreement before it was final, that he communicated this condition to Mr. DeSelms, and that on 14 March 2023, when he said that the case was settled, Mr. Collins genuinely believed that Mr. Rodriquez had approved – or at least had no objection to – the settlement.

53. The Court finds that Mr. Collins did not discover his mistake until 29 March 2023, at which time he concluded that he was the only one not "in the know"

> agreement that includes a non-reporting provision that is illegal. *See, e.g,* N.C.G.S. 7B-301.

(08 FEO 15, www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-15/.)

Likewise, 98 Formal Ethics Opinion 19 provides:

> Although the rule prohibiting threats of criminal prosecution to gain an advantage in a civil matter was omitted from the Revised Rules of Professional Conduct, a lawyer representing a client with a civil claim that also constitutes a crime should adhere to the following guidelines: (1) a threat to present criminal charges or the presentation of criminal charges may only be made if the lawyer reasonably believes that both the civil claim and the criminal charges are well-grounded in fact and warranted by law and the client's objective is not wrongful; (2) the proposed settlement of the civil claim may not exceed the amount to which the victim may be entitled under applicable law; (3) the lawyer may not imply an ability to influence the district attorney, the judge, or the criminal justice system improperly; and (4) the lawyer may not imply that the lawyer has the ability to interfere with the due administration of justice and the criminal proceedings or that the client will enter into any agreement to falsify evidence.

(98 FEO 19, www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-19/.)

regarding Mr. Rodriquez's position. The Court finds that Mr. Collins assumed incorrectly that Mr. DeSelms knew that Mr. Rodriquez had not approved the terms and, therefore, knew that the condition Mr. Collins had established had yet to be met. Once aware of his mistake, the Court finds that Mr. Collins advised Mr. Egan to take a voluntary dismissal without prejudice and to start anew by refiling his case.

54. The Court finds that the Voluntary Dismissal Without Prejudice filed in the initial action reflects Plaintiff's belief that no settlement was reached but that a dismissal was being taken to allow Plaintiff time to reevaluate his claims. The Court further finds that this action was brought within the one–year savings provision prescribed by Rule 41(a).

55. Finally, the Court finds that when Mr. Collins reported to the Court and Defendants' counsel that the case was settled, he believed that he was doing as his client had instructed, that Mr. Rodriquez was in agreement, that Mr. DeSelms was aware of the circumstances, and that he had secured a settlement that was in his client's best interests.

Conclusions of Law

56. Rule 11 provides:

> **(a) Signing by Attorney. —** Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated . . . . **The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose,** such as to harass or to

> cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

N.C. R. Civ. P. 11(a).

57. Thus, by signing a pleading, a person certifies that three things are true: the pleading is (1) well-grounded in fact (factual sufficiency); (2) warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law (legal sufficiency); and (3) not interposed for any improper purpose. *Bryson v. Sullivan*, 330 N.C. 644, 655 (1992). Subjective bad faith is unnecessary; instead, the standard is one of "objective reasonableness under the circumstances." *Turner v. Duke University*, 325 N.C. 152, 164 (1989). "A breach of the certification as to any one of these three prongs is a violation of the Rule." *Bryson*, 330 N.C. at 655.

58. Defendants argue that the Complaint is legally insufficient because a settlement agreement releasing the claims in this action was reached in March 2023. As this Court has observed, "[a] two-prong analysis is . . . used to determine whether a complaint is well-grounded in law. This approach looks first to the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issues of whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by existing law." *NC Bioremediation, LLC v. Sea Winds, LLC*, 2015 NCBC LEXIS 97, at *12 (N.C. Super. Ct. Oct. 15, 2015) (cleaned up).

59. When deciding whether a pleading is facially plausible, "reference should be made to the document itself, and the reasonableness of the belief that it is warranted by existing law should be judged as of the time the document was signed. Responsive pleadings are not to be considered." *Bryson*, 330 N.C. at 656 (citing *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 874 (5th Cir. 1988) ("Like a snapshot, Rule 11 review focuses upon the instant when the picture is taken -- when the signature is placed on the document.")). *Cf. Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 258 (1991) (N.C.G.S. § 6-21.5 permits the trial court to look at responsive pleadings).

60. Further, the Court recognizes the importance of proceeding with care. "In determining compliance with Rule 11, courts should avoid hindsight and resolve all doubts in favor of the signer." *Twaddell v. Anderson*, 136 N.C. App. 56, 70 (1999) (cleaned up).

61. The Court concludes that the Complaint itself is facially plausible. Nothing on the face of that pleading speaks to a release of the claims.

62. The Court further concludes that, in bringing this action, neither Plaintiff nor his counsel acted in bad faith or with an intent to manipulate the legal process.

63. The Court concludes that this is not a case in which the imposition of Rule 11 sanctions would further the Rule's purpose of "prevent[ing] abuse of the legal system[.]" *Grover v. Norris*, 137 N.C. App. 487, 495 (2000). It likewise declines to exercise its inherent authority to impose sanctions. *Window World of Baton Rouge,*

LLC v. Window World, Inc., 2019 NCBC LEXIS 54, at *94 (N.C. Super. Ct. Aug. 16, 2019), *aff'd*, 377 N.C. 551 (2021) ("The imposition of sanctions . . . pursuant to a court's inherent authority is in the sound discretion of the trial judge[.]"); *see also Beard v. N.C. State Bar*, 320 N.C. 126, 129 (1987) (Trial courts retain inherent authority "to do all things that are reasonably necessary for the proper administration of justice.").

64. Dismissal of the action brings it to an end. Defendants' motion for sanctions is **DENIED**.

IV. CONCLUSION

65. **WHEREFORE,** Defendants' Motion for Enforcement of Settlement Agreement, to Strike Complaint, and for Sanctions is **GRANTED in part** and **DENIED in part** as follows:

a. Defendants' motion to enforce the settlement agreement that is included in the record at ECF No. 17.7 is **GRANTED**, and this case is **DISMISSED with prejudice**.

b. Defendants' motion to strike the Complaint is **DENIED as Moot**.

c. Defendants' motion for sanctions is **DENIED.**

d. Defendant Anderson's Motion to Dismiss, (ECF No. 11), and Defendant Buena Vista, Inc.'s Motion to Dismiss, (ECF No. 13), are both **DENIED as Moot**.

SO ORDERED, this 9th day of October, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases