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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE STATE OF UTAH, CENTRAL DIVISION

SEAN KENDALL, Plaintiff/Counterclaim Defendant, v. BRETT OLSEN, LT. BRIAN PURVIS, JOSEPH ALLEN EVERETT, TOM EDMUNDSON, GEORGE S. PREGMAN, and SALT LAKE CITY CORPORATION, Defendants/Counterclaim Plaintiffs.	**MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS AND MEMORANDUM IN SUPPORT** Case No. 2:15-cv-00862 Judge Robert J. Shelby Magistrate Judge Dustin B. Pead

Defendants Brett Olsen, Brian Purvis, Joseph Allen Everett, Tom Edmundson, George S. Pregman and Salt Lake City Corporation (collectively the "City"), hereby file their Motion for Summary Judgment on Defendants' Counterclaims and Memorandum in Support.

INTRODUCTION AND BACKGROUND FACTS

On June 18, 2014, the Salt Lake City Police department responded to a call that a three year old child was missing from his home. The child had been missing for approximately forty-five minutes by the time the family called the police. The family had searched the home several times by the time police responded and had also searched the yard and checked at the home of a

relative that lived next door because the family believed the boy may have gone there. The initial responding officer spoke with the family and conducted a search of the home. The boy was not located. The second and third officers to respond to the scene also searched parts of the home and also checked the home of the relative that lived next door. Additional officers responded to the scene and began to canvas the neighborhood. A canvas involves knocking on doors and talking to neighbors to see if anyone has seen the boy and looking in places where a child might have gone, including parks, swimming pools, or a neighbor's backyard.

Officer Olsen was one of the officers that participated in the neighborhood canvas. Pursuant to this canvas, Officer Olsen entered the backyard at 2465 South 1500 East and encountered Kendall's 110 pound Weimaraner, named Geist. Geist acted in an extremely aggressive fashion, charging at Officer Olsen, growling, barking and baring his teeth. Unable to retreat from the yard, or prevent the attack by other means, Officer Olsen used his service weapon and shot Geist.

Shortly thereafter, Kendall hired a lawyer to pursue potential legal claims against Salt Lake City and its police officers arising from the events of June 18, 2014. The City (acting on behalf of itself and its police officers) entered into settlement negotiations with Kendall and the parties exchanged several offers and counter-offers. On July 15, 2014, Kendall (through his attorney) made an offer to resolve all claims against Salt Lake City and its employees arising from the events of June 18, 2014 for $10,000.00. The City accepted the offer. A settlement agreement was drafted to memorialize the terms of the parties' agreement. Six days later, Kendall announced to the media that he no longer intended to honor the agreement, and refused to execute the settlement agreement.

Kendall retained new counsel and filed this action asserting numerous claims against Salt Lake City and several of its police officers arising from the events of June 18, 2014. Salt Lake City and the police officers responded and asserted a counterclaim for breach of the settlement agreement. They now seek enforcement of that agreement.

Judgment should be entered enforcing the terms of the settlement agreement and dismissing Kendall's complaint with prejudice because the undisputed material facts demonstrate that: (1) Kendall offered to release all of his claims against Salt Lake City and any of its employees arising from the events of June 18, 2014 in exchange for $10,000.00, and (2) the City accepted that offer.

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

I. BREACH OF ENFORCEABLE SETTLEMENT AGREEMENT.

A. Elements and Legal Authority.

"Settlement agreements are governed by the rules applied to general contract actions." *Sackler v. Savin*, 897 P.2d 1217, 1220 (Utah 1995). Formation of a contract "requires an offer, an acceptance, and consideration." *Cea v. Hoffman*, 2012 UT App 101, ¶ 24, 276 P.3d 1178, 1185. If the acceptance occurs before an offer is withdrawn, a binding contract is created. *See Cal Wadsworth Const. v. City of St. George*, 898 P.2d 1372, 1378 (Utah 1995). "The mere intention to reduce an oral or informal agreement to writing, or to a more formal writing, is not of itself sufficient to show that parties intended that until such formal writing was executed, the parol or informal contract should be without binding force." *Miller v. Basic Research, LLC*, No. 2:07-CV-871 TS, 2013 WL 1194721, at *5 (D. Utah Mar. 22, 2013) (citation and quotation omitted).

Under Utah law, courts will compel the enforcement of settlement agreements "if the record establishes a binding agreement and the excuse for nonperformance is comparatively unsubstantial." *Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc.*, 781 P.2d 478, 479 (Utah Ct.App.1989) (quotation omitted). "The trial court has the power to enter a judgment enforcing a settlement agreement if it is an enforceable contract." *Badger v. MacGillivray*, 2016 UT App 109, ¶2, ___ P.3d ___ (*citing Tracy-Collins Bank and Trust Co. v. Travelstead*, 592 P.2d 605, 607 (Utah 1979)).

B. Undisputed Material Facts.

1. Plaintiff Sean Kendall retained attorney Brett Boulton to pursue potential legal claims against Salt Lake City and its police officers arising from the events of June 18, 2014. (Declaration of Mark E. Kittrell ("Kittrell Decl."), ¶¶ 3-4, July 7, 2016.)

2. In early July of 2014, Brett Boulton and Mark Kittrell, the attorney for Salt Lake City and its police officers, entered into settlement negotiations. (Kittrell Decl. ¶¶ 3-4 & Exhibit 1 thereto.)

3. Through counsel, the parties exchanged several offers and counter-offers. (Kittrell Decl. ¶ 4 & Exhibit 1 thereto.)

4. On Tuesday, July 15, 2014, Mr. Boulton communicated an offer to Mr. Kittrell from Sean Kendall to resolve all Kendall's claims against Salt Lake City and its employees arising from the events of June 18, 2014 in exchange for payment of $10,000.00. (Kittrell Decl. ¶ 5 & Exhibits 2 & 3 thereto.)

5. Kendall admits he made this offer and that it was conveyed to the City. (*See* Counterclaim, Dkt. 4, ¶ 8 ("On or about July 15, 2014, counsel for Kendall communicated an offer from Kendall to resolve all claims arising out of this incident in exchange for a payment of

$10,000.00"); Answer to Counterclaim, Dkt. 7, ¶ 8 ("Kendall admits the allegations set forth in paragraph 8 of the Counterclaim.")

6. Over the next few days Mr. Kittrell exchanged emails with Mr. Boulton stating the City would likely accept Kendall's offer. (Kittrell Decl. ¶ 6 & Exhibit 4 thereto.)

7. On Monday, July 21, 2014, the City accepted Kendall's offer. (Kittrell Decl. ¶ 7 & Exhibit 2 thereto.)

8. Two days later, on Wednesday, July 23, 2014, Mr. Kittrell forwarded a draft settlement and release agreement to Mr. Boulton via email. (Kittrell Decl. ¶ 8 & Exhibit 5 thereto.)

9. The draft settlement and release called for payment to Kendall of $10,000.00 in exchange for a complete release of all claims against Salt Lake City and its employees arising from the events of June 18, 2014. Exhibit 5 to Kittrell Decl.)

10. Later that day, Mr. Boulton sent an email indicating his approval of the draft form of agreement and representing Sean Kendall would sign it. (Kittrell Decl. ¶ 9 & Exhibit 6 thereto.)

11. The next day Mr. Kittrell forwarded a final form of the agreement with non-material changes to Mr. Boulton for Kendall's signature. (Kittrell Decl. ¶ 10 & Exhibit 7 thereto.)

12. Mr. Boulton did not express any reservations or objections to the final settlement documents. (Kittrell Decl. ¶ 11.)

13. Mr. Boulton and Kendall then went silent. (Kittrell Decl. ¶ 12 & Exhibit 8 thereto.)

14. On Tuesday, July 29, 2014, Kendall posted the following statement on his "Justice For Geist" Facebook page:

> *After speaking with people whom I trust the most and my legal council [sic]; I have decided to accept the settlement offer.*

(Kittrell Decl. ¶ 13 & Exhibit 9 thereto.)

15. A short time later, Kendall removed the Facebook post and announced to the media that he had turned down "the City's $10,000 offer." (Kittrell Decl. ¶ 14.)

16. The media stories are how the City and Mr. Kittrell first learned that Kendall did not intend to fulfill his obligations under the settlement agreement. (Kittrell Decl. ¶ 15.)

17. Mr. Kittrell contacted Mr. Boulton via email, informed him of Kendall's actions, and reminded him that it was Kendall that made the offer to settle this matter and that the City had accepted the offer. (Kittrell Decl. ¶ 16 & Exhibit 10 thereto.)

18. Mr. Boulton immediately emailed Kendall and instructed him to "send me a signed release as soon as you can." (Kittrell Decl. ¶ 17 & Exhibit 11 thereto.)

19. Mr. Boulton then replied to Mr. Kittrell implying this was the first he had heard of Kendall's actions stating "[t]he first I heard of the Trib article was your email" and "I will see what I can do." (Kittrell Decl. ¶ 18 & Exhibit 12 thereto.)

20. Mr. Boulton did not dispute there was a binding agreement or that the City had accepted Kendall's offer. (Kittrell Decl. ¶ 19 & Exhibit 12 thereto.)

21. The parties then engaged in further negotiations in an attempt to resolve the situation, but shortly after 5:00 p.m. on July 29, 2014, Mr. Boulton informed Mr. Kittrell by email that he no longer represented Kendall and would "forward a lien against [Kendall's] claim for my fees and costs to your attention." (Kittrell Decl. ¶ 20 & Exhibit 13 thereto.)

22. Kendall has produced in discovery in this matter email communications with Mr. Boulton that occurred after the City accepted Kendall's offer to settle this matter for $10,000 in which Kendall informs his attorney he is not going to honor his agreement. (Kittrell Decl. ¶ 21 & Exhibit 14 thereto.)

23. After Kendall's relationship with Mr. Boulton ended, Kendall retained new counsel and filed this action asserting numerous claims against Salt Lake City and several of its police officers arising from the events of June 18, 2014. (*See generally* Amended Compl., Dkt. 2.)

24. Kendall claims damages of $1.5M. (*See* Amended Notice of Claim, Exhibit B to Amended Complaint, Dkt. 2.)

25. The City responded asserting a counterclaim for breach of the parties' settlement agreement. (*See* Answer & Counterclaim, Dkt. 4.)

ARGUMENT

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). Although the court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party, "the mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient" to overcome a summary judgment motion. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). Based on the undisputed material facts, Defendants are entitled to summary judgment compelling the enforcement of the parties' binding settlement agreement and to dismissal of Kendall's complaint with prejudice.

I. THE COURT SHOULD ENFORCE THE PARTIES' SETTLEMENT AGREEMENT.

A. The Court Should Enforce the Parties' Settlement Agreement Because the Parties Agreed To The Material Terms.

The Court should enforce the terms of the parties settlement agreement because the parties agreed to the material terms of the settlement. "[A] trial court has the power to enter a judgment enforcing a settlement agreement if it is an enforceable contract." *Badger v.*

MacGillivray, 2016 UT App 109, ¶ 2, ___ P.3d ___ (citation and quotation omitted). "Settlement agreements are governed by the rules applied to general contract actions." *Sackler v. Savin*, 897 P.2d 1217, 1220 (Utah 1995). Under Utah law,[1] formation of a contract "requires an offer, an acceptance, and consideration." *Cea v. Hoffman*, 2012 UT App 101, ¶ 24, 276 P.3d 1178, 1185. If the acceptance occurs before an offer is withdrawn, a binding contract is created. *See Cal Wadsworth Const. v. City of St. George*, 898 P.2d 1372, 1378 (Utah 1995).

In this case, Kendall admits he made an offer on July 15, 2014 to the City to release all claims against Salt Lake City and its employees arising from the events of June 18, 2014 in exchange for payment of $10,000.00. (*See supra* Material Facts ¶¶ 4-5.) It is undisputed that on July 21 the City accepted that offer. (*Id.* ¶¶ 4-7, 10 & 17-20.) Indeed, Kendall's attorney specifically acknowledged the City's acceptance in his July 23 email approving the form of the written settlement agreement and release and again in his email communications with Mr. Kittrell on July 29. (*Id.* ¶¶ 10 & 17-20.) Unquestionably, the parties reached agreement on all material terms and a binding settlement agreement was formed.

B. The Agreement Is Binding Even Though Kendall Did Not Sign A Written Document.

Although Kendall later balked and refused to sign the written settlement agreement, the agreement is still valid and enforceable. A settlement agreement reached through attorneys acting as agents for the parties is binding. *See Hunt v. Schauerhamer*, No. 2:15-CV-1-TC-PMW, 2016 WL 715797, at *7 (D. Utah Feb. 22, 2016) (citations omitted).[2] An agreement is binding when the parties agree on all material terms. *Id.* at **6-7.

[1] The court must apply Utah contract law to determine whether the settlement agreement is valid and enforceable. *Shoels v. Klebold*, 375 F.3d 1054, 1060 (10th Cir. 2004).

[2] Plaintiff Hunt has appealed the decision to the Tenth Circuit.

Oral agreement on the material terms is sufficient. *See e.g. Zions First Nat. Bank v. Barbara Jensen Interiors, Inc.*, 781 P.2d 478, 480 (Utah Ct. App. 1989) (finding the defendants orally agreed to settlement of lawsuit, entitling plaintiff to summary enforcement of that agreement); *Murray v. Stat*e, 737 P.2d 1000 (Utah 1987) (enforcing oral acceptance of settlement offer). For example, in *Murray*, the Utah Supreme Court enforced the parties' settlement agreement where the plaintiff's attorney represented in a phone conversation with the attorney for the State that the plaintiff accepted the State's written offer. *Murray*, 737 P.2d at 1000. The State subsequently forwarded a release of claim, but was informed that the plaintiff had changed her mind and would not sign the release. *Id.* The court enforced the settlement agreement, finding "no reason for noncompliance with the settlement other than [plaintiff's] change of mind." *Id*. at 1001.

Courts also enforce settlement agreements based on email communications between counsel, finding the emails are evidence the parties reached a meeting of the minds. *See e.g.*, *Hunt*, 2016 WL 715797, *7; *LD III, LLC v. BBRD, LC*, 2009 UT App 301, ¶ 16, 221 P.3d 867, 872; *Nature's Sunshine Products v. Sunrider Corp*., 511 F. App'x 710, 716 (10th Cir. 2013); *see also*, *Badger*, 2016 UT App 109, ¶ 2, ___ P.3d ___ (enforcing settlement agreement communicated and memorialized in text messages delivered via the parties' cell phones). Whether or not Kendall ultimately signed a written document "is of no legal consequence." *See Hunt*, 2016 WL 715797, at *7 (*citing Murray v. State*, 737 P.2d 1000, 1001 (Utah 1987)). "The mere intention to reduce an oral or informal agreement to writing, or to a more formal writing, is not of itself sufficient to show that parties intended that until such formal writing was executed, the parol or informal contract should be without binding force." *Miller v. Basic Research, LLC*,

No. 2:07-CV-871 TS, 2013 WL 1194721, at *5 (D. Utah Mar. 22, 2013) (citation and quotation omitted).

The facts of *Hunt* are remarkably similar. Plaintiff Susan Hunt filed a civil rights action against the City of Saratoga Springs and two of its police officers arising from the 2013 shooting death of her son. *See Hunt*, 2016 WL 715797, at *1. The parties engaged in settlement negotiations and drafted a settlement agreement in which the Defendants agreed to pay the Plaintiffs $900,000.00 in exchange for a release of liability. *Id.* The parties also exchanged drafts of a joint press release and a non-disparagement clause. *Id.* By email exchange, counsel for the parties indicated their agreement to the terms and the wording of the settlement agreement, including the non-disparagement clause and the press release. *Id*. at *6. Several weeks later, Ms. Hunt announced to the media that she had turned down the $900,000.00 settlement offer and fired her attorney. *Id*. at *6. She then contended the settlement agreement was not binding because she had not signed it. *Id*. at *6. The Court rejected this argument, finding that an email from Ms. Hunt's counsel stating "Yes, this is OK" in response to a red-line edit of the settlement documents sufficient to form a binding agreement, even without Ms. Hunt's signature on any written documents. *Id.* at *6-7. As the Court noted, "Utah law simply does not require settlement agreements to be written to be enforceable." *Id.* at *7 (citation omitted).

This case is simpler than *Hunt.* A binding agreement was reached on all material terms on July 21, 2014 when the City accepted Kendall's offer to settle all potential claims against Salt Lake City and its employees for $10,000. Like *Hunt*, the email exchange between attorneys for Kendall and the City, while not necessary, provides further evidence there was a binding

agreement, despite Kendall's failure to sign the written settlement agreement. *See id.* ("The parties' email exchanges, all of which are part of the record, satisfy any writing requirement that may exist. But in the case of a settlement, no writing is required. So even if the agreement were not in writing, Ms. Hunt is still bound by the documented terms because an oral settlement agreement is enforceable.")

Even though Kendall may have subsequently had reservations, refused to sign the release, and fired his attorney, just as in *Hunt*, he cannot "undo" the binding settlement agreement created by the City's acceptance of his offer on July 21, 2014. *See id.* As courts have repeatedly noted, parties have "no right to welch on a settlement deal during the sometimes substantial period between when the deal is struck and when all necessary signatures can be garnered on a stipulation." *Private Capital Grp., Inc. v. Dareus*, No. 2:13-CV-18 TS, 2016 WL 199427, at *2 (D. Utah Jan. 15, 2016) (*quoting Goodmansen v. Liberty Vending Sys., Inc.*, 866 P.2d 581, 585 (Utah Ct. App. 1993)); *see also, Miller,* 2013 WL 1194721, at *6 (concluding that the parties' negotiations that occurred after Defendants experienced a change of heart regarding their earlier agreement did not render the earlier agreement unenforceable).

C. Enforcing the Parties' Settlement Agreement is Consistent with Policy that Favors the Settlement of Disputes by Compromise.

Utah law favors the settlement of disputes by compromise. *Murray*, 737 P.2d at 1000 ("It has been stated by this Court that '[s]ettlements are favored in the law, and should be encouraged, because of the obvious benefits accruing not only to the parties, but also to the judicial system.'"); *Utah Dep't of Admin. Servs. v. Pub. Serv. Comm'n*, 658 P.2d 601, 613 (Utah 1983) ("The law has no interest in compelling all disputes to be resolved by litigation . . . One reason public policy favors the settlement of disputes by compromise is that this avoids the delay

and the public and private expense of litigation."); *Zions First Nat'l Bank*, 781 P.2d at 479 (stating that courts will compel the enforcement of settlement agreements "if the record establishes a binding agreement and the excuse for nonperformance is comparatively unsubstantial.") Enforcing the parties' settlement agreement is consistent with this well-recognized policy.

CONCLUSION

Based on the foregoing, Defendants respectfully request the Court issue an Order enforcing the terms of the parties settlement agreement and dismissing all Kendall's claims with prejudice.

DATED this 7th day of July, 2016.

/s/ Samantha J. Slark
SAMANTHA J. SLARK
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2016, a true and correct copy of **MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS AND MEMORANDUM IN SUPPORT** was electronically filed with the Court using the CM/ECF system, which sent notice to the following:

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