UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Cory Larsen, Plaintiff, v. Capital One Bank, N.A. and Kohl's Department Stores, Inc., Defendants.	Case No. 15-cv-4510 (WMW/HB) **FILED UNDER SEAL** **REPORT AND RECOMMENDATION**

David J. S. Madgett and Ryan D. Peterson, Madgett & Peterson, LLC, 619 South Tenth Street, Suite 301, Minneapolis, MN 55404, for Cory Larsen

Kimberly Fleming, Cousineau McGuire Chartered, 1550 Utica Avenue South, Suite 600, Minneapolis, MN 55416, Michael Andrew Innes, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C., 5 Becker Farm Road, Roseland, NJ 07068, and Vincent Paul Rao, II, Kelley Drye & Warren LLP, One Jefferson Road, Parsippany, NJ 07054, for Capital One Bank, N.A. and Kohl's Department Stores, Inc.

HILDY BOWBEER, United States Magistrate Judge

This matter is before the Court on Plaintiff's Motion to Enforce Settlement Agreement [Doc. No. 26] and Defendants' Cross Motion to Strike Confidential Settlement Information from the Docket and for Sanctions [Doc. No. 35]. The matter has been referred to the undersigned for a Report and Recommendation under 28 U.S.C. § 636 and District of Minnesota Local Rule 72.1(a) [Doc. No. 38]. For the reasons set forth below, the Court recommends Plaintiff's motion to enforce the settlement agreement be granted and Defendants' motion to strike confidential information and for

sanctions be denied.

I. Background

The following facts are undisputed: Plaintiff initiated this case on December 2, 2015, bringing claims under the Telephone Consumer Protection Act and invasion of privacy under Minnesota common-law. (Notice of Removal [Doc. No. 1].) On September 20, 2016, Plaintiff's counsel Ryan D. Peterson spoke over the phone with Defendants' counsel Vincent Rao. (Peterson Decl. ¶ 4 [Doc. No. 31].) The parties agreed to a dismissal of Plaintiff's claims in exchange for payment of $32,000 from Defendants.[1] (*Id.*) No other terms were mentioned in the conversation. After the phone call, Peterson sent an email to Rao that stated "I'm just writing to confirm our settlement of dismissal of my client's claims against Kohl's[2] in exchange for $32,000." (Peterson Decl. Ex. 1 [Doc. No. 31-1].) Rao replied, stating "Confirmed Ryan. Thanks very much. I will send you the settlement agreement first thing." (*Id.*) After several weeks, Defendants' counsel sent Plaintiff's counsel a writing purporting to memorialize the agreement. (Peterson Decl. ¶ 7.) The written agreement drafted by Rao included a clause requiring Plaintiff to keep the agreement confidential and not to disparage Defendants. (Peterson Decl. Ex. 2 [Doc. No. 31-2].)

[1] Because Defendant alleges the monetary terms of the settlement should have been kept confidential, the Court has redacted specific monetary term to which the parties agreed in the public version of this Report and Recommendation. However, the Court recommends enforcement of the settlement without a confidentiality term, and therefore recommends that the full version of this Report and Recommendation be unsealed if it is adopted.

[2] Peterson accidentally omitted the other Defendant, Capitol One, but neither party disputes that the settlement was intended to cover both Defendants.

Peterson spoke with Rao the same day to inform him that the confidentiality and non-disparagement provisions were not part of the settlement agreement, and asked that they be removed. (Peterson Decl. ¶ 8; Rao Decl. ¶ 6 [Doc. No. 34].) Rao responded that his client insisted on those provisions. (Peterson Decl. ¶ 9.) Peterson informed Rao that Plaintiff would be willing to agree to confidentiality and non-disparagement provisions in exchange for an additional monetary payment, but the discussion eventually broke down over the amount of that payment.

Plaintiff thereupon brought this motion to enforce the settlement on the terms set forth in Peterson's September 20, 2016, email to Rao confirming their telephone conversation. Defendants respond that Plaintiff's counsel should have known a final agreement would contain additional terms, and in particular would include confidentiality and non-disparagement clauses because, they assert, such clauses are typical in settlements of this type. Defendants further argue that these terms were material to them, and therefore if there was no meeting of the minds on these terms, there was no settlement. Finally, Defendants accuse Peterson of acting in bad faith by filing on the public docket a motion describing the settlement terms after Defendants had told him they viewed those terms as confidential.

II. Discussion

A. Motion to Enforce Settlement

This Court can enforce a settlement agreement as a matter of law where the terms are unambiguous. *Barry v. Barry*, 172 F.3d 1011, 1013 (8th Cir. 1999). "Settlement agreements are governed by basic principles of contract law." *Sheng v. Starkey Labs.*,

Inc., 53 F.3d 192, 194 (8th Cir. 1995). Minnesota contract law therefore applies. Under Minnesota law, a contract is not formed unless the parties mutually assent to all material terms. *Id.* (citing *Ryan v. Ryan*, 292 Minn. 52, 193 N.W.2d 295, 297 (1971)).

"Settlement agreements that do not expressly resolve ancillary issues can, nevertheless, be enforceable." *Sheng v. Starkey Labs., Inc.*, 117 F.3d 1081, 1083 (8th Cir. 1997). "To constitute a full and enforceable settlement, there must be such a definite offer and acceptance that it can be said there has been a 'meeting of the minds' on the material terms of the agreement." *Jackson v. Fed. Reserve Employee Ben. Sys.*, No. 08-cv-4873 (DSD/FLN), 2009 WL 2982924, at *2 (D. Minn. June 19, 2009), *R. & R. adopted* (D. Minn. Sept. 14, 2009) (citing *Jallen v. Agre*, 119 N.W.2d 739, 742-43 (Minn. 1963)). "Only those terms upon which the settlement hinges are to be considered material terms," and whether a term is material is a legal question for the court. *Id.*

The parties dispute whether they entered into a settlement agreement and whether the confidentiality and non-disparagement provisions were material terms of any agreement. Though the Court was unable to find any Minnesota or District of Minnesota case on all fours with the present factual scenario, several from this District provide guidance. In *Transclean Corp. v. Motorvac Techs., Inc.*, No. 01-cv-287 (JRT/FLN), 2002 WL 31185886, at *8 (D. Minn. Sept. 30, 2002), *dismissed*, 71 F. App'x 842 (Fed. Cir. 2003), decided under Minnesota law, the parties entered into a settlement agreement with an established monetary term in exchange for dismissal of the patent infringement suit. *Id.* The parties also agreed that there would be no patent license. *Id.* The defendants argued the agreement should have contained additional material terms, such

as which machines would be covered by the release, and whether defendants would be allowed to contest the validity of the asserted patents in future litigation. *Id.* The court found those terms were not material because they were not discussed before the plaintiffs made their settlement offer, and nothing indicated that the defendants were especially concerned with them after they accepted until the plaintiffs filed a motion to enforce the settlement. *Id.*

The decision in *Jackson v. Fed. Reserve Employee Ben. Sys.*, No. 08-cv-4873 (DSD/FLN), 2009 WL 2982924 (D. Minn. June 19, 2009), *R. & R. adopted* (D. Minn. Sept. 14, 2009), is also instructive. In that case, the parties conducted settlement negotiations through email. The defendant's counsel first sent an email offering to settle the case, stating "I can settle this for $15,000—that is my authority on this one. Subject to written settlement with confidentiality, non-disparagement, release, no re-employment—all the customary terms." *Id.* at *1. Plaintiff's counsel responded and asked if the monetary amount could be increased, but the defendant's counsel responded that it could not. *Id.* Plaintiff's counsel subsequently stated there was an agreement. *Id.* A few weeks later, plaintiff's counsel approved the written settlement agreement drafted by the defense counsel. *Id.* Plaintiff herself reviewed the written agreement shortly after and concluded that she did not want to settle for a lump sum payment. *Id.* Defense counsel brought a motion to enforce the settlement agreement. *Id.* The court found there was an enforceable settlement where the defendant would pay the plaintiff $15,000 and the plaintiff would dismiss her case against the defendant. *Id.* at *5. But despite the explicit reference in the defense counsel's email that the offer was "subject to" the

"customary terms," the court concluded that those other terms, which included confidentiality, non-disparagement, release, and no re-employment, were ancillary and remained to be negotiated, and therefore were not included in the settlement agreement enforced by the court. *Id.* at *4-5.

Finally, in *Ayala v. Aerotek, Inc.*, No. 15-cv-3095 (MJD/SER), 2017 WL 29659 (D. Minn. Jan. 3, 2017), defense counsel sent plaintiff's counsel by email a settlement proposal which included a monetary offer and other terms, including confidentiality. *Id.* at *1. After some communication difficulty with the plaintiff and his counsel, defense counsel re-sent the settlement offer and held it open. *Id.* Counsel for the parties discussed the settlement via telephone, and plaintiff's counsel soon after provided a counteroffer which addressed only the monetary amount. *Id.* Defense counsel accepted the counteroffer and stated that she would memorialize the agreement in writing; a few days later, she sent the written settlement agreement and stipulation of dismissal. *Id.* at *2. Nearly two weeks later, plaintiff's counsel advised defense counsel that his client no longer wished to settle his claims. *Id.* Defendant brought a motion to enforce the settlement agreement, which the court granted, explaining, "Based on the actions by both parties, there was a meeting of the minds on the material terms of the agreement: Defendant promised to pay the agreed upon monetary value, Plaintiff promised to dismiss the pending claims, and the parties promised to keep the terms of the settlement confidential." *Id.* at *3.

Here, it is undisputed that the September 20, 2016, telephone conversation between counsel included no mention either of confidentiality or nondisparagement.

Plaintiff's counsel sent an email confirming the oral settlement, specifying only the dismissal of his client's claims against Defendants in exchange for a specific monetary amount. Defendants' counsel responded, confirming the agreement, again without mention of any other terms, and stating that he would send the settlement agreement as soon as possible. In short, as of that point that had been no mention whatsoever of any other terms. Moreover, neither party had qualified or characterized the exchange thus far as a partial agreement only as to monetary terms contingent upon reaching agreement on other, non-monetary terms. The parties called it a settlement. It was only when Defendants' counsel sent a draft settlement agreement several weeks later that, for the first time the terms now at issue were raised. But by that point, the ship had sailed. The previous telephone conversation and exchange of emails confirming that conversation had evinced "completed negotiations between the parties and no disagreement about the terms." *Ayala*, 2017 WL 29659, at *3.

Defendants insist that both parties contemplated that the written agreement would include terms beyond the monetary amount. However, subjective, unexpressed intent is irrelevant to the final terms of the agreement. *See Metro. Sports Facilities Comm'n v. Gen. Mills, Inc.*, 470 N.W.2d 118, 123 (Minn. 1991) ("A party cannot alter unequivocal language of a contract with speculation of an unexpressed intent of the parties."). Defendants identify a number of terms not included in the email exchange that, they argue, are customarily included in settlement agreements and would have had to be negotiated between the parties, including how, when, and to whom the money should be paid, which state's laws should control the agreement, tax consequences, severability

issues, and non-admissions as to liability, as well as confidentiality and non-disparagement. But there is nothing in the record of the parties' communications to show that these terms were material to the agreement; on the contrary, as in *Transclean*, the parties did not discuss or even mention these terms before agreeing to a monetary amount in exchange for a dismissal of claims. Even in *Jackson*, where the defendant's email specifically stated the offer was "subject to" such "customary" additional terms as confidentiality, the court held those terms remained to be negotiated, and therefore found them to be ancillary and not among the enforced terms of the settlement agreement. That Defendants may have unilaterally assumed such provisions would be included, or were of the view that their willingness to pay the stated monetary amount was contingent upon keeping that amount confidential, does not change what was said, and not said, between the parties.[3]

The Court therefore recommends granting Plaintiff's motion to enforce the settlement agreement, the terms of which are payment to Plaintiff of $32,000 in exchange for a dismissal of Plaintiff's claims against both Defendants.

[3] The Court notes that Defendants' counsel's argument that terms of confidentiality and nondisparagement are "always" included in settlement agreements of this type was disputed by Plaintiff's counsel. Moreover, Plaintiff's counsel stated at the hearing that this was the first settlement he had ever negotiated with this particular counsel, so there was not even a history of past dealings between these lawyers from which Defendants could argue there was a shared understanding as to unstated terms (although in view of *Jackson* it is unclear whether such a history would have been effective to impute unstated obligations to an otherwise clear exchange of settlement terms).

B. Motion to Strike and for Sanctions

Defendants ask the Court to strike all reference to the parties' settlement negotiations, the monetary terms, and the draft settlement agreement from the record, and to sanction Plaintiff's counsel for placing confidential information on the public record. Because the Court finds that the terms as memorialized in the September 20, 2016, email are enforceable and included no obligation of confidentiality, the Court does not need to wade into the parties' debate about the competing policy goals of open access to the courts and the role that confidentiality can play in promoting settlements. While Defendants seem to argue Plaintiff's counsel breached an independent obligation to keep the negotiations themselves confidential, they point to no agreement between the parties to that effect, and the Court is aware of no rule or legal authority that imposed such an obligation in the context of these negotiations. Accordingly, the Court recommends that Defendants' motion be denied in its entirety.[4]

III. Recommendation

Based on the foregoing and all of the files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED** that:

1. Plaintiff's Motion to Enforce Settlement Agreement [Doc. No. 26] be **GRANTED**;
2. Defendants' Cross Motion to Strike Confidential Settlement Information from the Docket and for Sanctions [Doc. No. 35] be **DENIED**; and

[4] Thus, if this Court's recommendation is adopted, the Clerk's Office should be directed to unseal Doc. Nos. 28 and 31, the recording from the hearing on December 29, 2016, and the unredacted version of this Report and Recommendation.

3. If this Court's recommendation is adopted, the Clerk's Office be directed to unseal Doc. Nos. 28 and 31, the recording of the December 29, 2016, hearing, and the full version of this Report and Recommendation.

Dated: April 12, 2017

s/ *Hildy Bowbeer*
HILDY BOWBEER
United States Magistrate Judge

NOTICE

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore, not appealable directly to the Eighth Circuit Court of Appeals.

Under Local Rule 72.2(b)(1), "a party may file and serve specific written objections to a magistrate judge's proposed finding and recommendations within 14 days after being served a copy" of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set forth in LR 72.2(c).

Under Advisement Date: This Report and Recommendation will be considered under advisement 14 days from the date of its filing. If timely objections are filed, this Report and Recommendation will be considered under advisement from the earlier of: (1) 14 days after the objections are filed; or (2) from the date a timely response is filed.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Cory Larsen,

Plaintiff,

v.

Capital One Bank, N.A. and Kohl's Department Stores, Inc.,

Defendants.

Case No. 15-cv-4510 (WMW/HB)

ORDER ADOPTING REPORT AND RECOMMENDATION

This matter is before the Court on the April 12, 2017 Report and Recommendation (R&R) of United States Magistrate Judge Hildy Bowbeer. (Dkts. 45, 46.) The R&R recommends granting Plaintiff Cory Larsen's motion to enforce the settlement agreement, (Dkt. 26), and denying the cross motion to strike confidential information from the docket and for sanctions filed by Defendants Capital One Bank, N.A. and Kohl's Department Stores, Inc., (Dkt. 35). Objections to the R&R have not been filed in the time period permitted. In the absence of timely objections, this Court reviews an R&R for clear error. *See* Fed. R. Civ. P. 72(b) advisory committee's note to 1983 amendment ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation."); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (per curiam). Having reviewed the R&R, the Court finds no clear error.

ORDER

Based on the R&R and all the files, records and proceedings herein, **IT IS HEREBY ORDERED**:

1. The April 12, 2017 R&R, (Dkts. 45, 46), is **ADOPTED**;

2. The motion to enforce the settlement agreement filed by Plaintiff Cory Larsen, (Dkt. 26), is **GRANTED**;

3. The cross motion to strike confidential settlement information from the docket and for sanctions, (Dkt. 35), is **DENIED**; and

4. The Clerk of Court is directed to unseal ECF docket entry numbers 28 and 31, (Dkts. 28, 31), the recording of the December 29, 2016 hearing, (Dkt. 43), and the unredacted version of the April 12, 2017 R&R, (Dkt. 46).

Dated: May 23, 2017

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge