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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Rocket Dogs K-9 Aquatics & Wellness Center, LLC, Plaintiff and Appellant, vs. Derheim, Inc., a North Dakota corporation d/b/a My Aquatic Services and Troy Derheim, an individual, Defendants and Appellees,	Supreme Court No. 20220246 District Court No: 09-2022-CV-01009 **APPELLEES' RESPONSE BRIEF**

APPEAL FROM THE CASS COUNTY DISTRICT COURT'S ORDER GRANTING DEFENDANTS' MOTION TO ENFORCE SETTLEMENT DATED AUGUST 16, 2022 (DOC. ID #55), AND THE JUDGMENT DATED AUGUST 16, 2022 (DOC. ID #56), THE HONORABLE STEPHANNIE STIEL, JUDGE PRESIDING

ORAL ARGUMENT REQUESTED

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[¶ 1] Whether the district court erred in granting Defendants' Motion to Enforce Settlement without applying a summary judgment standard.

[¶ 2] Whether the district court erred in determining that Defendants' Motion to Enforce Settlement sought equitable relief to which no jury trial right attached.

[¶ 3] Whether the district court's finding of an enforceable settlement agreement between the parties was clearly erroneous.

[¶ 4] Whether the district court was clearly erroneous in finding Plaintiff authorized its former counsel to accept the settlement agreement.

STATEMENT OF THE CASE

[¶ 5] Appellant commenced this action by service of a Summons and Complaint on the Defendants Derheim, Inc. a North Dakota Corporation d/b/a My Aquatic Services ("MAS") and Troy Derheim's ("Derheim") (collectively "Defendants") on August 20, 2021. R1-4 (Summons, Complaint, and Affidavits of Service). Defendants served an Answer and Counterclaim on September 9, 2021. R9-10 (Answer and Counterclaim and Affidavit of Service). Rocket Dogs served an Answer to Counterclaim on September 30, 2021. R11-12 (Answer to Counterclaim and Affidavit of Service). The underlying litigation arose out of MAS's sale to Rocket Dogs of pool equipment and other related products, and a counterclaim for recovery of unpaid balances due and owing. See, e.g., R1(Complaint); R9 (Answer and Counterclaim); R11(Answer to Counterclaim). After the action was commenced in August 2021, the parties engaged in some written discovery and settlement negotiations without having filed the case with the Cass County District Court. See, e.g.,

R45:3-5 (Exhibit 1 – emails between counsel); R65:13:9-10 (Transcript of August 11, 2022 Evidentiary Hearing).

[¶ 6] On January 26, 2022, Rocket Dogs' then counsel Ashley Champ ("Champ") sent an email confirming receipt of Defendants' written discovery responses and conveying a settlement offer to Defendants' counsel. R45:4-5. That offer was for settling the action in exchange for Defendants' payment to Plaintiff in the amount of $15,000.00. Id. Defendants declined through their counsel by email dated February 3, 2022, and conveyed two counteroffers. Id. at 3-4. The first option offered was: "a mutual walk away and mutual release of claims." Id. at 3. The second option offered was a buyback of the pool equipment, along with a commitment to move and store the equipment, due in part to news of Rocket Dogs' apparent impending loss of its business space. R45:3-4.

[¶ 7] Champ responded on behalf of Rocket Dogs by email on February 7, 2022, stating, "We will accept the mutual dismissal on the condition that your office prepare the settlement and dismissal paperwork." R45:3. Defendants' counsel confirmed that such was acceptable, and further suggested a memorialization of the agreement with the pleadings attached. Id. Champ replied on behalf of Rocket Dogs, "That works, thanks." R45:1-2. On February 10, 2022, Defendants' counsel provided Champ with the promised documents via email. Id. On February 17, Champ advised Defendants that Rocket Dogs had terminated the representation, roughly ten days after the parties had agreed to resolve the dispute by a mutual dismissal and mutual release of claims with no money exchanged through Champ's email. R65:31:12-19 (Testimony of Ashley Champ; August 11, 2021 evidentiary hearing).

[¶ 8] Rocket Dogs thereafter retained its current counsel. Rocket Dogs filed its case with the Cass County District Court on April 19, 2022, serving the Notice of Filing

by mail on the same day. R1-6. On May 3, 2022, Rocket Dogs Noticed a Rule 16 Scheduling Conference. R14. On May 10, 2022, Defendants filed and served a Motion to Enforce Settlement, along with a Brief and supporting papers. R16-21. On May 20, 2022, Rocket Dogs filed and served a Brief in Opposition to Defendants' Motion, along with Rocket Dogs' supporting papers. R22-26. Defendants filed a Reply Brief in Support of the Motion on May 27, 2022. R27.

[¶ 9] The district court held a hearing Defendants' Motion on June 21, 2022, in combination with a rescheduled Rule 16 Conference. See R64:1. At this hearing, along with some limited argument, the district court and counsel primarily discussed whether an evidentiary hearing would be permitted on Defendants' Motion, timelines for discovery relevant to the Motion, privilege issues yet to be resolved, supplemental briefing invited by the court, and finally scheduling the Motion for an evidentiary hearing set to occur on August 11, 2022. See, e.g., R64. On August 1, 2022, Rocket Dogs filed its Supplemental Brief in Opposition to the Motion. R33. Defendants filed their Supplemental Brief in Support of the Motion on August 1, 2022. R40.

[¶ 10] On August 11, 2022, the district court held an evidentiary hearing on the Motion. See R65:1. At the outset of this hearing, the district court made oral rulings on issues that had been discussed at the June 21, 2022 hearing. See R65:6-11. Specifically, the district court determined that Rocket Dogs did not have a jury trial right on the issue presented by Defendants' Motion. R65:7-10. The district court further determined that Defendants were required to prove, by clear and convincing evidence, both the existence of settlement agreement alleged and the existence of authority to bind Rocket Dogs to the settlement agreement. R65:10:14-11:1.

[¶ 11] The district court heard testimony and received exhibits that will be further discussed below. At the conclusion of the hearing, the district court granted Defendants' Motion and made oral findings of fact and conclusions of law in support of its decision. R65:139:12-148:5. The district court requested Defendants' counsel file a proposed Order and Judgment that referenced the findings and conclusions orally made on the record. R65:148:6-149:3. On August 16, 2022, the district court entered its Order Granting Defendants' Motion and a Judgment of dismissal with prejudice and without costs to any party. R55-56. Rocket Dogs filed its Notice of Appeal on August 23, 2022. R59.

STATEMENT OF FACTS

[¶ 12] Champ represented Rocket Dogs at the time of commencement of the action through approximately February 17, 2022. R1; R65:30:12-16. The parties' engaged in some settlement discussions before the end of 2021 though counsel. R65:13:4-10. After receipt of Defendants' responses to Rocket Dogs' written discovery, Champ emailed counsel for Defendants on January 26, 2022. See R45:4 (Email from Champ to Doerr dated January 26, 2022). In said email, Champ made an offer for resolution, and stated, "my client has authorized me to accept $15,000.00 to fully resolve this matter." Id. Defendants responded through their counsel and advised that the offer was not acceptable, but provided two counteroffers—one which provided for payment of money by the Defendants, and one that did not. Id. at 3-4. The options presented for consideration were stated as follows:

> The first option is a mutual walk away and mutual release of claims.
>
> The second option that I have been authorized to put on the table is more unique, but may be a great option for all involved in light of recent developments. We are aware that Rocket Dogs is being forced to close down due to the sale of the building in which it is located and is planning to sell off its equipment. In exchange for a mutual release of claims (including a release of MAS's counterclaim against Rocket Dogs for nonpayment),

> MAS would agree to evaluate the pool equipment and buy it back from Rocket Dogs at a depreciated rate. In buying back the equipment, MAS would conduct the removal of the equipment. Under this option, your client would have a streamlined means by which she could obtain payment for the pool equipment without the need to list the same for sale. This would further obviate the need for Rocket Dogs to find storage for the pool equipment if it is unable to sell it before it is required to vacate the location.

R45:3-4. Champ contacted Rocket Dogs' owner Julie Saatoff by email, and also verbally discussed the two options presented in the February 3, 2022 email from Defendants' counsel with Saatoff. See, e.g., R50 (Email from Champ to Saatoff dated February 4, 2022); R65:17-18 (testimony of Ashley Champ); R65:103:11-105:2 (testimony of Julie Saatoff). Champ explained the meaning of Defendants' two counteroffers to Saatoff. R65:18. After explaining and discussing the options with Rocket Dogs, Saatoff gave Champ a directive, "to accept the mutual release and walkaway on the condition that [Defendants] draft the final paperwork." R65:18:9-10.

[¶ 13] In accordance with Saatoff's directive, Rocket Dogs responded by and through Champ on February 7, 2022, stating, "We will accept the mutual dismissal on the condition that your office prepare the settlement and dismissal paperwork." R45:3. By email February 7, 2022 at 3:04PM, Defendants' counsel confirmed that such was acceptable, and stated, "In terms of 'dismissal' paperwork, since we had not filed this with the Court and the mutual release will specifically attach the pleadings (is what I anticipate doing), I think there should be nothing further needed. That way no one has to incur filing fee or anything like that." Id. Champ replied on behalf of Rocket Dogs and stated, "That works, thanks." R45:1-2.

[¶ 14] The reason for requesting Defendants draft the memorialization of the parties' agreement was to preserve remaining retainer funds that could be refunded to the

client. R65:19:11-19; R65:20:12-23; R65:28:17-23 (testimony of Ashley Champ). That rationale was further expressed in email communications dated February 8, 2022, the day after Champ conveyed the acceptance of the mutual dismissal-mutual release-with no money exchanged settlement. R46: (Exhibit 4 email communications between Champ and Saatoff); R47 (Exhibit 5 email communications between Champ and Saatoff).

[¶ 15] Specifically, on February 7, 2022, Champ emailed Saatoff and advised that the paperwork was being prepared by Defendants' counsel, and Saatoff responded on February 8, 2022 at 1:16PM by stating "Great, thanks for the update. Do I have any money left from this? I'm sure Troy is dancing [now]. What a waste huh[?]" R46:1; See also, R47:2. Champ replied to Saatoff about ten minutes later and stated, "You will have funds leftover for sure." R47; R46. On February 10, 2022, Defendants' counsel sent Champ the memorialization of the parties' agreement as requested. R45:1.

[¶ 16] Champ thereafter received a call from a stranger requesting to speak about Rocket Dogs' case. R65:29:4-19. Champ felt uncomfortable visiting with Mr. Birch since he was not an owner of Rocket Dogs. Id. Champ requested to instead speak with Saatoff. Id. Champ later had a telephone conversation with Saatoff that was surreptitiously recorded. See R39 (Plaintiff's Exhibit 10-Recording of February 17, 2022 telephone call between Champ, Saatoff, and John Birch); R65:44:3-8 (Champ testimony); R65:86 (Saatoff Testimony and recording at R39 offered as Plaintiff's Exhibit 10). During the recorded call, Saatoff stated that she would not sign the documents memorializing the parties' agreement to settle the case. R39 at 1:54-2:01 of recording. Champ noted that the document need not be signed as written, but stated to Saatoff: "But you offered them a mutual walk away, and they'd be entitled to enforce that." Id. at 2:19. Champ further stated,

"But the substantive agreement that you agreed to and proposed to them was a mutual walk away." Id. at 2:33-2:36. Saatoff did not challenge these assertions during the call. Id.

[¶ 17] Just over six minutes into the call, Saatoff stated to Champ that there was just "nothing more I can do." R39 at 6:01. In response, Champ attempted to discuss next steps if Rocket Dogs was in fact terminating the representation. Id. at 6:04-6:10. John Birch next spoke with Champ and reiterated that Saatoff was ending the representation and that Champ should contact Derheim and advise she had been fired from the matter, and that Saatoff would not sign the memorialization of the parties' agreement. Id. at 6:51-7:08.

[¶ 18] After wishing Saatoff the best, Champ stated to Saatoff: "I will email the counsel saying that you are reneging on your settlement agreement and that they can take actions as appropriate." R39 at 8:48-9:03. In response, Saatoff stated: "Okay, I'm really sorry Ashley." Id. at 9:04-05. Champ disputed whether Saatoff was sincere, and Saatoff respond with a statement that Champ perceived as implying that she had not looked out for Saatoff's best interests. Id. at 9:10-9:16. Champ expressed displeasure with that implication and stated: "I didn't tell you you had to settle. You came to me, remember?" Id. at 9:22-9:27. Saatoff responded immediately, stating: "Yes, I did." Id. at 9:28. Champ further stated that "every step I have taken has been at your request," to which Saatoff immediately replied, "yes." Id. at 9:33-9:38.

[¶ 19] After this call, Champ advised Defendants that Rocket Dogs had terminated her representation. R65:31:12-19; R51 (Exhibit 12, Email communications between Champ and Saatoff dated February 17, 2022). Champ wrote the following to Saatoff:

> I write to inform you that I will be filing a motion to withdraw in this matter. Despite brokering a settlement on the terms you requested you've opted to renege on your accepted offer against my legal advice as to the consequences of that decision. . . .

. . .

> I have advised the Defendants' counsel of your decision to proceed in this matter without my representation and that you are presently unrepresented. I further advised him that you do not intend to settle the matter as you proposed and they accepted. I do not know at this time what direction that will take your pending litigation, but I don't mind telling you they were not pleased and believe your offer and their acceptance to be binding.

R51:1-2. Champ completed her email by notifying Saatoff that her office would process the final charges and make the remaining retainer funds available to her for pickup. Id. at 2. Roughly 30 minutes later, Saatoff responded in writing by thanking Champ for all she had done, and further stating that she would let her know of where to forward her file. Id. at 1. Noticeably absent from was any expression of Saatoff's disagreement with the statements contained in the Champ's email Champ. Id.

[¶ 20] At the August 11 evidentiary hearing, Champ acknowledged that there was no writing from Saatoff explicitly stated a verbatim instruction to accept the mutual dismissal and mutual walk away resolution. R65:32:24-33:2. However, Saatoff's written communications with Champ between February 4, 2022 and February 10, 2022 are consistent with Saatoff having given prior authorization, as well as confirmation of that prior authorization. See, R46; R47.

[¶ 21] Despite the timeline of events and emails discussed above, Saatoff testified her February 8 email to Champ inquiring about remaining retainer funds was sent because she was going to get new counsel. R65:94:2-12 Cf., R46; R47. Saatoff was challenged about how the February 17 recorded call in which she fired Champ was some nine days *after* her statements contained in Exhibits 4 and 5. R46; R47; R65:93:23-95:3. Saatoff testified her February 8 inquiry about remaining retainer funds, and statement that Derheim must be dancing were, "because he thinks he's going to get away without paying it for

anything, any damages." R65:95:4-9. Saatoff was asked why Derheim would think that, and Saatoff elaborated in relevant part:

> A. I don't know. That's what she said. She must've given me an update and said, thanks, are there any funds left. And that he's tickled pink he doesn't have to pay me anything. I bet he's tickled pink that I lost my business. I can't go back and know exactly what I was thinking or feeling. I'm sorry.

R65:95:11-15. The Court found, "Ms. Champ's testimony is consistent with the evidence. Ms. Saatoff's has been inconsistent with the evidence in front of me." R65:143:23-25; R65:144:1-13. The district court found that the parties had a valid settlement agreement by and through their respective counsel and granted Defendants' Motion. R65:146-149. The Court found that the "essential terms of the agreement was mutual release and walk-away and dismissal of the lawsuit. These were certain, pretty simple terms. There wasn't anything left open to be decided at a later date." R65:146:6-9. This appeal follows.

LAW AND ARGUMENT

I. A district court district court may summarily decide a motion to enforce settlement agreement without an evidentiary hearing, but where significant factual issues and questions of credibility predominate, the district court must hold an evidentiary hearing on the motion.

A. The district court correctly declined to deny Defendants' Motion to Enforce Settlement based on the presence of disputed facts.

[¶ 22] Trial courts have inherent power to enforce settlement agreements. See, e.g., Barry v. Barry, 172 F.3d 1011, 1013 (8th Cir. 1999); Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir.), cert. denied, 429 U.S. 862, 97 S.Ct. 165, 50 L.Ed.2d 140 (1976); See also, N.D.C.C. §§ 27-05-06(2); 27-05-06(3); 32-04-07. "The power of a trial court to enter a judgment enforcing a settlement agreement has its basis in the policy favoring the settlement of disputes and the avoidance of costly and time-consuming litigation[,]" which "has been upheld even where the agreement has not been arrived at in

the presence of the court nor reduced to writing." Kukla v. National Distillers Products Co., 483 F.2d 619, 621 (6th Cir.1973). Rocket Dogs incorrectly contends that the only standard a district court may apply to decide a motion to enforce a settlement agreement is under the standards applicable Rule 56. However, the district court properly conducted an evidentiary hearing under this Court's prior cases in Ryberg v. Landsiedel, 2021 ND 56, ¶¶ 14-15, 956 N.W.2d 749 and Thomas C. Role Associates, Inc. v. Henrikson 295 N.W.2d 136, 137 (N.D. 1980). Moreover, Defendants urge this Court to clarify and adopt the general rule that "when the parties dispute the existence or terms of a settlement agreement, the parties must be allowed an evidentiary hearing." Sheng v. Starkey Laboratories, Inc., 53 F.3d 192, 195 (8th Cir. 1995).

[¶ 23] Prior North Dakota cases reviewing orders enforcing settlement agreements on a party's motion have generally applied the standard applicable to the way in which the motion is postured. For example, in Lund v. Swanson, this Court noted it reviewed an appeal from a party's standalone action seeking enforcement of settlement agreement purportedly reached to resolve a "series of lawsuits" wherein the parties had filed cross-motions for summary judgment. 2021 ND 38, ¶¶ 1-6, 956 N.W.2d 354. Moreover, the dispute in Lund largely focused on the pure legal question of whether the statute of frauds barred an oral settlement agreement that transferred real property interests. Id. at ¶¶ 11-18. The Court there applied the standards under Rule 56, as that is what the district court had applied. See Id. at ¶¶ 6-7.

[¶ 24] Similarly, in Vandal v. Peavey Co., the Court specified that the party seeking to enforce a settlement agreement styled the motion as one brought under Rule 56, and thus applied the summary judgment standard. 523 N.W.2d 266, 268-69 (N.D. 1994).

Peavey also involved a cross-motion for summary judgment on the merits of a claim in the underlying litigation. Id. In Midwest Fed. Sav. Bank v. Dickinson Econo-Storage, this Court also reviewed under the Rule 56 standards because the party there had "moved for summary judgment contending" that the opposing party's former attorney possessed authority to bind that party to the settlement agreement. 450 N.W.2d 418, 420 (N.D. 1990).

[¶ 25] In contrast, this Court recently decided an appeal from an Order granting a "motion seeking to enforce a settlement agreement" without resorting to application of Rule 56's standards, despite noting that the "existence of an oral contract and the extent of its terms present questions of fact." Ryberg, 2021 ND 56 at ¶¶ 1; 14-15, 956 N.W.2d 749. In reaching its decision, the district court *"*did not hold a hearing, made no findings of fact as to the terms of the settlement[.]" Id. at ¶ 18, Additionally, the district court's order was conclusory; likely even more problematic since "no evidence appears in the record as to the agreement's terms." Id.

[¶ 26] In Ryberg, this Court noted that the motion to enforce settlement would have contemplated resolution of disputed facts, and yet nonetheless noted the absence of findings of fact from the court. Id. at ¶¶ 14-15. Perhaps since the movant had not invoked Rule 56, this Court did not engage in discussion of that Rule's standards. However, it is worth noting that the district court's procedures in Ryberg suffered from myriad blights and lack of a record. Id. at ¶¶ 16-19.

[¶ 27] Other Courts have determined that an evidentiary hearing is appropriate to determine fact issues attendant to a party's motion seeking enforcement of a settlement agreement, especially where the existence and terms of the agreement are at issue. See, Illinois Cent. R. Co. v. Byrd, 44 So.3d 943, 947 (Miss. 2010) (stating "trial judges

presented with motions to enforce settlement agreements customarily make findings of fact related to the existence and/or terms of the settlement agreements as necessary to rule on the motions to enforce settlement."); Griffin v. Wallace, 581 S.E.2d 375, 377 (Ga. App. 2003) (factual issues pertaining to motion to enforce settlement agreement resolved by trial court after evidentiary hearing at which the court considered the credibility of testimony.); Cruz v. Chavez, 347 P.3d 912, 915-16 (Wash. Ct. App. 2015) (Stating trial court applies summary judgment procedures in reviewing enforcement of a settlement agreement, but that failure to grant evidentiary hearing where genuine dispute of fact raised is an abuse of discretion). This Court's statements in Ryberg regarding a lack of a hearing or "findings of fact" is consistent with the cases cited. 2021 ND 56 at ¶ 18. Likewise, this Court's opinion in Henrikson, also cautions of the importance of an evidentiary hearing in determining a party's motion to enforce settlement agreement that has been filed in an underlying litigation. 295 N.W.2d at 137.

[¶ 28] In Henrikson, this Court agreed that a district court has "authority to enter judgment in accordance with the terms of a compromise agreement" Id. at 136-37. The Court further expressed the importance of making a proper record for appeal. Id. There, a party sought enforcement of a settlement brokered by the parties' attorneys prior to trial. Id. at 136-37. There were questions about whether the settlement agreement was ambiguous, which presented a question of law. Id. at 137. However, the Court elaborated as follows:

> But once it is determined that an agreement is ambiguous and that the parties' intent cannot be ascertained from the writing alone, reference must then be made to extrinsic evidence, and those questions in regard to which extrinsic evidence is adduced are questions of fact to be determined by the trier of fact. Metcalf v. Security Intern. Ins. Co., 261 N.W.2d 795 (N.D.1978); Farmers Elevator Company v. David, 234 N.W.2d 26

> (N.D.1975). If the agreement in this instance is ambiguous, then, as with any ambiguous contract, a hearing should be held so that evidence of the parties' intent at the time the agreement was entered into may be presented to aid the court in interpreting the agreement.

Henrikson, 295 N.W.2d at 137 (citation omitted). Accordingly, this Court in Henrikson and Ryberg has recognized that evidentiary hearings and findings of fact are necessary where a motion to enforce a settlement agreement is made within a pending litigation.

[¶ 29] Various federal courts have also recognized that an evidentiary hearing is appropriate on a motion to enforce a settlement agreement where material facts are in dispute. See Gatz v. Southwest Bank of Omaha, 836 F.2d 1089, 1095 (8th Cir. 1988) (Stating district court has power to summarily enforce settlement agreement but "must hold an evidentiary hearing" where factual dispute over existence or terms of agreement.); Callie v. Near, 829 F.2d 888, 890 (9th Cir. 1987) (same); Aro Corp., 531 F.2d at 1372, (Stating that courts can "summarily enforce settlement agreements, though an evidentiary hearing should be held when a substantial fact dispute exists."); See also, Surety Ins. Co. of California v. Williams, 729 F.2d 581, 583 (8th Cir. 1984) (Vacating Order denying relief under Rule 60(b) where attorney's authority to bind client to settlement was at issue, and further ordering remand to district court for evidentiary hearing.); Mid-South Towing Co. v. Har-Win, Inc., 733 F.2d 386, 389 (5th Cir.1984) (reversing entry of summary judgment where district court determined authority existed from client to attorney to approve settlement and remanding for evidentiary hearing to determine disputed facts necessary to resolve motion).

[¶ 30] "As a general rule, when the parties dispute the existence or terms of a settlement agreement, the parties must be allowed an evidentiary hearing. Sheng, 53 F.3d at 195 (citation omitted). The 8th Circuit Court of Appeals has further elaborated:

> When a motion is based on facts not appearing of record, Fed.R.Civ.P. 43(e) provides that a district court "may hear the matter on affidavits presented by the respective parties," or "may direct that the matter be heard wholly or partly on oral testimony or deposition." This rule invests the district court with considerable discretion to tailor the proceedings to the practical realities surrounding the particular motion. This court has said, it is true, that as a general rule, an evidentiary hearing should be held when there is a substantial factual dispute over the existence or terms of a settlement. TCBY Systems, Inc. v. EGB Assocs., 2 F.3d 288, 291 (8th Cir.1993), cert. denied, --- U.S. ----, 114 S.Ct. 2104, 128 L.Ed.2d 665 (1994). But this rule presupposes that there are essential issues of fact that can only be properly resolved by such a hearing. See Sheng v. Starkey Labs., Inc., 53 F.3d 192, 194-195 (8th Cir.1995) (remanding for a hearing where the district court enforced a settlement agreement on an erroneous ground, and did not fully consider whether the disputed terms were material); Greater Kansas City Laborers Pension Fund v. Paramount Indus., Inc., 829 F.2d 644, 646 (8th Cir.1987) (remanding for an evidentiary hearing where counsel agreed to a settlement allegedly without consent from his client, who was not in court to object to its enforcement). There is no automatic entitlement to an evidentiary hearing simply because the motion concerns a settlement agreement. See Vaughn v. Sexton, 975 F.2d 498, 505 (8th Cir.1992), *cert. denied*, 507 U.S. 915, 113 S.Ct. 1268, 122 L.Ed.2d 664 (1993).

Stewart v. M.D.F., Inc., 83 F.3d 247, 251 (8th Cir. 1996).

[¶ 31] In Stewart, the Court traced the district court's authority to hear testimony and receive evidence to Rule 43(e) of the Federal Rules of Civil Procedure, which provided that the court "may hear the matter on affidavits presented by the respective parties," or "may direct that the matter be heard wholly or partly on oral testimony or deposition." 83 F.3d at 251. "When a state rule is derived from a corresponding federal rule, the federal courts' interpretation of the federal rule may be used as persuasive authority when interpreting our rule." Johnson v. Menard, Inc., 2021 ND 19, ¶ 10, 955 N.W.2d 27 (citations omitted). Rule 43(b), N.D.R.Civ.P., provides: "When a motion relies on facts outside of the record, the court may hear the matter on declarations or may hear it wholly or partly on oral testimony or depositions." The above quoted portion of N.D.R.Civ.P. 43 was formerly contained in Rule 43(e). See Sandbeck v. Rockwell, 524 N.W.2d 846, 850

(N.D. 1994) (Stating motion "based on facts not appearing of record[,] the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. N.D.R.Civ.P. 43(e).").

[¶ 32] In Sandbeck, the North Dakota Supreme Court described the language of the former Rule 43(e) (now contained in Rule 43(b)) as "the procedure under the rules for a 'full hearing' on a motion." Id. This is in accord with the rationale of Federal Circuit Courts of Appeal recognizing that a district court may conduct an evidentiary hearing on a motion to enforce settlement where substantial factual disputes exist. See, Stewart, 83 F.3d at 251. "[T]his rule presupposes that there are essential issues of fact that can only be properly resolved by such a hearing." Id., see also, United Commercial Ins. Service, Inc. v. Paymaster Corp., 962 F.2d 853, 858 (9th Cir. 1992) (Reviewing grant of motion to enforce settlement agreement and stating Fed.R.Civ.P. 43(e) grants district court "wide discretion in deciding whether to admit or deny oral testimony.").

[¶ 33] The Court in Paymaster Corp. provided guidance for when a court should permit oral testimony on a motion to enforce settlement agreement: "Where factual questions are not ascertainable from the declarations of witnesses or *questions of credibility predominate, the district court should hear oral testimony*." 962 F.2d at 858 (emphasis added). Here, the district court effectively applied this rule. During the June 21, 2022 initial hearing on Defendants' Motion, the court wrestled with the decision of whether to hold an evidentiary hearing. See, e.g., R64:4-8. The district court here was cognizant of credibility issues being of especial importance to determination of the Motion. R64:5:1-9. Accordingly, the Court properly determined Defendants' Motion by conducting an

evidentiary hearing rather than denying the Motion due to the presence of genuine disputes of material fact.

[¶ 34] North Dakota has long embraced a strong public policy favoring the compromise of disputes between parties. "Because litigation is considered injurious to society, McGlynn v. Scott, 4 N.D. 18, 21, 58 N.W.2d 460, 461 (1894), compromises which diminish litigation and promote a peaceful society are favored." Hastings Pork v. Johanneson, 335 N.W.2d 802, 805 (N.D. 1983) (citing Swan v. Great Northern Ry. Co., 40 N.D. 258, 270, 168 N.W. 657, 660 (1918)). "A settlement agreement is a final determination upon the merits which should be upheld regardless of the merits of the original controversy." Id. Explicit adoption by this Court of the rule that, "where parties dispute the existence or terms of a settlement agreement, the parties must be allowed an evidentiary hearing" would further North Dakota's strong public policy. Sheng, 53 F.3d at 195.

B. The district court did not err when it determined that Plaintiff did not have a jury trial right on Defendants' Motion to Enforce Settlement.

[¶ 35] The right to a jury trial depends upon whether the nature of the relief sought is legal or equitable. See, e.g., Barker v. Ness, 1998 ND 223, ¶ 6, 587 N.W.2d 183. Here, Appellant had no right to a jury because Defendants' Motion sought an equitable relief under North Dakota law. Thus, the district court properly determined that Defendants' Motion presented a request for specific performance of the settlement agreement, to which no jury trial right attached on the part of Rocket Dogs. See R65:8:20-R65:10:13; Adams v. Johns-Manville Corp., 876 F.2d 702, 709 (9th Cir. 1989). A motion to "enforce a settlement agreement essentially is an action to specifically enforce a contract," and a request for specific performance without a claim for damages is purely equitable and has always been

tried to the court." Id. This Court has very clearly stated, that there "is no absolute constitutional right to a jury trial in an equitable proceeding absent an express statutory provision." Murphy v. Murphy, 1999 ND 118, ¶ 10, 595 N.W.2d 571 (citation omitted). There is no right to a jury trial on a claim or counterclaim for damages where such claim is incidental to, or dependent upon a primary claim for which a jury trial is not allowed. Sargent County Bank v. Wentworth, 547 N.W.2d 753, 761 (N.D. 1996).

[¶ 36] "Historically, specific performance has been an equitable remedy and no jury trial is available on such claims." Northwestern Bell Tel. Co. v. Cowger, 303 N.W.2d 791 (N.D. 1981) (citing Alfson v. Anderson, 78 N.W.2d 693 (N.D.1956)); see also, Adams, 876 F.2d at 709 (same). Appellant contends the district court violated its right to a jury trial because the general rule is that the existence of a contract is a question of fact for the jury. See Appellant's Brief at ¶ 47. Specific performance of an agreement is an equitable remedy under North Dakota law. Simply because a jury could find facts necessary to determine the existence of the contract in a breach of contract action does not mean that the district court committed error in this case. This Court has long recognized that a "compromise agreement may be enforced in a court of equity in a suit for specific performance." Muhlhauser v. Becker, 76 N.D. 402, 417, 37 N.W.2d 352 (N.D. 1948). In an "action for specific performance uncomplicated by other requests for relief or by counterclaims, there is no right to a jury trial." Adams, 876 F.2d at 709. The jury trial right does not arise "even if the party resisting specific performance disputes the formation of the contract." Adams, 876 F.2d at 709 (citing Medtronic, Inc. v. Benda, 689 F.2d 645, 661 (7th Cir. 1982), *cert. denied*, 459 U.S. 1204, 103 S.Ct. 1190, 75 L.Ed.2d 436 (1983)).

[¶ 37] These statements in the Adams opinion are consistent with this Court's prior decisions. see, Murphy, 1999 ND 118, 595 N.W.2d 571 (Affirming jury denial on rescission counterclaim where Court determined rescission was equitable.); Wentworth, 547 N.W.2d at 761 (Holding Appellants not entitled to jury trial where Appellants' other claims were incidental to their equitable one.). Here, Appellant's legal claims in the underlying litigation involved a completely different universe of facts than Defendants' Motion. Whether the legal claims would be tried was dependent upon the outcome of Defendants' Motion. As such, Appellant's legal claims were "incidental to and dependent upon a primary claim for which a jury trial is not allowed" in Defendants' request for enforcement of the parties' settlement agreement. Wentworth, 547 N.W.2d at 761. The North Dakota cases relied upon by the Appellant to the contrary are distinguishable.

[¶ 38] Appellant relies upon Schumacher v. Schumacher, 469 N.W.2d 793 (N.D. 1991) as supportive of their position that a jury must decide fact questions must on a motion to enforce settlement. See Appellants' Brief, at ¶ 47-48. However, the Schumacher case involved "issues and claims" that were complex and "inextricably intermingled," including breach of contract, fraud, deceit, as well as breaches of fiduciary duty. 469 N.W.2d at 800. Likewise, the Turner v. Burlington N. R.R. Co. cited by Appellant did involve issues of authorization of an attorney to resolve a case but was impacted by the existence of claims under Federal Employers' Liability Act ("FELA"). 771 F.2d 341, 342 (8th Cir. 1985); See Appellants' Brief at ¶ 49. The Turner Court noted that Congress could expand jury trial rights broader than an historic boundary, which it did when it enacted FELA. 771 F.2d at 343-44. The Court specifically stated that the jury trial right was "part and parcel of the

remedy afforded railroad workers under the Employers Liability Act." Id. (citation omitted). No similar statutory directive exists with respect to Rocket Dogs' claims.

[¶ 39] Rocket Dogs may argue that because the action would have entailed the claims Defendants contend were resolved by agreement, a jury should have been the fact finder on Defendants' Motion. However, due to the posture of the action, Rocket Dogs' position was more similar to that of the appellants in Cowger, 303 N.W.2d 791 (N.D. 1981). In Cowger, there was no counterclaim interposed and "the only relief demanded in the action was equitable in nature and the Cowgers were not entitled to a jury trial because all of issues tried in the case were equitable." Id. at 794. The Cowgers nonetheless contended they were entitled to have a jury decide the fact question of whether an option had been exercised. Id. However, this Court reasoned that "[f]actual questions which arise in an action regarded as equitable in nature generally are determined by the court." Id. While Defendants could have brought a separate action for specific performance to enforce the parties' settlement agreement, it was instead postured as a Motion within the case resolved. Becker, 76 N.D. at 417; See e.g., R16-17 (Defendants' Notice of Motion and Motion to Enforce Settlement).

[¶ 40] The facts attendant to Defendants' Motion occurred *after* litigation had commenced, and nearly two years after the events underlying the claims alleged by Appellant in that litigation. Cf., R1 (Complaint) at ¶¶ 7-9 (discussing events occurring between January 2019 and November 2020); R45 (Exhibit 1- emails dated January 26-February 10, 2022). This distinction is an important one. As the First Circuit Court of Appeals has distinguished:

> Plaintiff has claimed a jury trial on these matters. Accord and satisfaction is a traditional defense at law apparently requiring, if demanded a jury

> determination of disputed material facts. [internal citation omitted] But this is not a case where the defending party raises a consummated accord and satisfaction in bar. **Rather the defendant seeks to block plaintiff's continuation of an original action by asking the court to specifically enforce a settlement contract which plaintiff refuses to carry out. Specific performance is an equitable proceeding**.

Warner v. Rossignol, 513 F.2d 678, 683 (1st Cir. 1975) (emphasis added). In Warner, the case was remanded as the district court had granted the motion without opportunity for an evidentiary hearing, and the argument on the motion was attended only by counsel. Id. at 681; 683. On remand, the district court was directed to hear evidence attendant to the motion instead of the jury. Id. at 683-84. Therefore, the district court properly determined that Rocket Dogs was not entitled to a jury trial as a matter of law and this Court should affirm such decision.

II. The district court's findings of fact were not clearly erroneous and were well supported by the evidence.

[¶ 41] The district court observed the testimony of critical witnesses and assessed their credibility in determining whether Rocket Dogs had authorized Champ to enter into the parties' settlement agreement. A "district court's findings of fact are reviewed under the clearly erroneous standard." Great Plains Royalty Corp. v. Earl Schwartz Co., 2022 ND 156, ¶ 13, 978 N.W.2d 715. In applying this standard, this Court has repeatedly stated that it will not substitute its judgment for the district court's judgment. see, e.g., Service Oil, Inc. v. Gjestvang, 2015 ND 77, ¶ 13, 861 N.W.2d 490; Erickson v. Olsen, 2014 ND 66, ¶ 19, 844 N.W.2d 585; Peterson Mechanical, Inc. v. Nereson, 466 N.W.2d 568, 571 (N.D. 1991). Under this standard, "a finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or it, on the entire record, we are left with a definite and firm conviction the trial court has made a mistake." In re Estate of Egeland, 2007 ND 184, ¶ 6, 741 N.W.2d 724. In performing its review, this

court must "give due regard to the trial court's opportunity to assess the credibility of witnesses, and the court's choice between two permissible views of the evidence is not clearly erroneous." Id. (additional citation omitted). The court's findings, as they do here, should be "stated with sufficient specificity to enable a reviewing court to understand the factual basis for the trial court's decision." Brandt v. Somerville, 2005 ND 35, ¶ 12, 692 N.W.2d 144 (citation omitted). "Evaluation of credibility where evidence is conflicting is solely a trial court function." Alumni Ass'n v. Hart Agency, Inc., 283 N.W.2d 119, 121 (N.D. 1979). Here, the district court's findings of fact stated orally on the record were based on ample evidence and were sufficiently detailed so as to understand the basis for its decision. Therefore, the district court's findings of fact were not clearly erroneous, and this Court must affirm the judgment dated August 16, 2022. R56.

A. The district court properly found that Plaintiff expressly authorized its former counsel to settle its claims against Defendants.

[¶ 42] The relationship between attorney and client has been found to be an agency relationship under North Dakota law. See, e.g., R65:147:2-6; Mattco, Inc. v. Mandan Radio Ass'n, Inc., 246 N.W.2d 222, 228 (N.D. 1976). "[W]hether an attorney has been given express authority to settle a claim is normally a question of fact to be resolved by the trial court." Dickinson Econo-Storage, 450 N.W.2d 418, 420-21 (additional citations omitted). As such, the district court's finding on this issue is subject to the clearly erroneous standard. Earl Schwartz Co., 2022 ND 156 at ¶ 8. In the present case, the district court's findings were well supported by the evidence on the record and were not induced by an erroneous view of the law. The district court was cognizant of the importance of resolving questions of credibility as to the disputed facts. See, R:64:5:1-9; R65:73:16-17; R65:143:19-25.

Here, the Court was very clear in its determinations regarding credibility of the two primary witnesses who testified to different versions of events critical to the issue of authority:

> There's a question here involved—there's some disputes about what happened between February 3rd and February 7th. Ms. Saatoff had testified that she had met with Ms. Champ, she said, I believe, February 4th, prior to February 4th, and that she did not authorize any settlements, unless there would be an amount of money involved. She said that she had that meeting prior to this February 7th email being sent out.
>
> Although there was prior testimony that there wasn't a phone call and that the terms of the settlement weren't ever sent to her, and that she didn't accept those, there's also some other emails that are relevant to that. If we look to Exhibit 9, for example, there is an email, February 4th, sent at 10:32, where [Champ] does outline the offer of mutual dismissal with no money exchanged and another offer and asked Julie to call her.
>
> Julie submitted an affidavit that she did have—when I read the affidavit, paragraphs 9 and 10 indicate she had a conversation with Ms. Champ about that offer. Julie's testimony in her affidavit indicate that she did not accept any settlement and did not agree to that offer. This is inconsistent with and contrary to what the email correspondence states and Ms. Champ's testimony.
>
> Both Ms. [Champ's] testimony and Ms. Saatoff's testimony are considered evidence for these purposes. So when I look at that and I weigh the credibility of the evidence, I also have to look at everything else in front of me. Ms. Champ's testimony is consistent with the evidence. Ms. Saatoff's has been inconsistent with the evidence in front of me.

R65:142:21 – R65:143:25 (referencing R50 (Exhibit 9); R23 (Affidavit of Julie Saatoff) at ¶¶ 9 and 10). The Court further discussed how the February 7th email in Exhibit 1 contained Champ's statement of acceptance of the mutual dismissal option presented by Defendants' counsel. R65:144:1-2; see also, R45 (Exhibit 1).

[¶ 43] Appellant argues that Champ's testimony was the only evidence that Saatoff authorized Champ to settle. See Appellant's Brief at ¶ 55. This is simply incorrect. The district court here traced the timeline of the communications between Ms. Champ and Ms. Saatoff, noting that the terms of the offer were conveyed by Champ to Saatoff prior to Ms.

Champ relaying the response to Defendants and that there was evidence of a meeting to discuss settlement prior to Champ communicating acceptance. See R65:141-144.

[¶ 44] The Court further stated the essential terms of the agreement were "mutual release and walk-away and dismissal of the lawsuit. There were certain, pretty simple terms. There wasn't anything left open to be decided at a later date. R65:146:5-8. The district court further stated:

> If we look at Exhibit 4, there's further correspondence between Ms. Saatoff and Ms. Champ where they talk about that settlement. If we look to the first page of that exhibit, Ms. Champ indicates on the Monday after she had forwarded that settlement offer, it says that, "Troy's attorney's preparing the settlement paper for our review. Once I review and get back, I will let you know when it's ready for your signature." And then Julie responds, Ms. Saatoff responds, "Great. Thanks for the update. Do I have any money left from this? I'm sure Troy is dancing now. What a waste, huh?"
>
> This is completely consistent with a settlement. Ms. Champ testified that Julie was inquiring about if any retainer funds would be left over because this matter has been resolved.

R65:144:1-15 (referencing R46 - Exhibit 4). Ms. Saatoff's statements are plainly consistent with a prior authorization, as found by the district court. R65:142:21 – R65:143:25 (referencing R50 (Exhibit 9); R23 (Affidavit of Julie Saatoff) at ¶¶ 9 and 10). The Court noted that Saatoff's inquiry about remaining retainer funds was further consistent with Saatoff understanding the litigation to be concluded. Id.

[¶ 45] Appellant contends that there "is no case law that stands for the proposition that paying a retainer, or asking about a retainer, somehow shows the sort of express authority making it 'manifestly clear' that Champ had authority to irrevocably bind Rocket Dogs." Appellant's Brief, at ¶ 56. However, the conversation contained in the emails contained in Exhibit 4 were not simply about a retainer. Rather, the district court was quite clear that the context in which the emails were exchanged. See, R65:144:1-15. Champ

notified that she was waiting on the paperwork for Saatoff's signature, and Saatoff responded with asking whether she would have any money left from the representation—which is inconsistent with having given authority to settle the case in exchange for *payment* from Defendants. Id.

[¶ 46] The district court also noted the recorded telephone call received in evidence as Exhibit 10 revealed opportunities in which Ms. Saatoff could have challenged Champs' assertions that she authorized the settlement. R65:145. The district court gave weight to the fact that during the recorded call, Ms. Champ directly stated that it was Ms. Saatoff who wanted to settle. Id. at 145:9-14; see, R39 (Exhibit 10) at 9:22-9:38. Saatoff further *admitted* that Champ acted at her own request towards the end of the telephone conversation. Id. Specifically, Champ stated: "I didn't tell you you had to settle. You came to me, remember?" R39 at 9:22-9:27. Saatoff responded immediately, stating: "Yes, I did." Id. at 9:28. Champ further stated that "every step I have taken has been at your request," to which Saatoff also immediately replied, "yes." Id. at 9:33-9:38.

[¶ 47] The district court also discussed a second opportunity wherein Saatoff did not in any way challenge Champ's assertion that Saatoff provided authority. R65:145:15-23; R51 (Exhibit 12 – emails between Champ and Saatoff dated February 17, 2022). Thus, there is ample evidence in the record to support the district court's conclusion that Ms. Saatoff in fact authorized Champ to agree to the mutual dismissal—mutual release—no money exchanged resolution. "A trial court's choice between two permissible views of the weight of the evidence is not clearly erroneous, and simply because we may have viewed the evidence differently does not entitle us to reverse the trial court." Brandt, 2005 ND 35 at ¶ 12. This Court does not "reweigh conflicts in the evidence" and "gives due regard to

the trial court's opportunity to judge the credibility of witnesses." Id. (citing N.D.R.Civ.P. 52(a)).

[¶ 48] The district court's findings as to authority based on the timeline of events and communications, the witnesses' testimony in comparison to other evidence received, and Ms. Saatoff's own statements are not clearly erroneous. This Court must affirm the district court's judgment.

B. The district court properly found that Plaintiff did not disavow the parties' settlement agreement.

[¶ 49] The district court correctly determined Saatoff authorized Champ to bind Appellant to the settlement agreement, and that it was not disavowed. Appellant's focus on only a few statements made by Champ in a recorded telephone call as dispositive of whether a binding settlement was reached is an invitation to this Court to re-weigh the evidence and credibility of witnesses. See Appellant's Brief, at ¶¶ 59-60. However, this Court defers to the district court's observation of live witness testimony and will not reweigh conflicts in the evidence under the clearly erroneous standard of review. Brandt, 2005 ND 35 at ¶ 12. This Court should therefore decline this invitation and affirm the district court's judgment.

[¶ 50] Appellant's argument leans heavily on the language contained in Dickinson Econo-Storage, that the authority from the client must be "manifestly clear" and that a settlement entered into "by an attorney on behalf of the client without her express consent will not bind her and she may disavow it." 450 N.W.2d at 421 (quoting Szabo v. City of New York, 487 N.Y.S.2d 1007, 1008-09 (Sup. 1985)); See, e.g., Appellant's Brief at ¶¶ 43, 51, 54, 56. This statement appears during a review of other jurisdictions' approaches to determining whether an attorney has authority to bind a client. Id. at 420-421. The district

court here specifically stated it was determining the issues of authority, existence of the agreement, and its terms under a clear and convincing evidence standard. See R65:10:14-24.

[¶ 51] Appellant here also confuses "express authority" with "*express written authority*" and again invites this Court to reweigh evidence. See, e.g., R65:32-33; R36:3-6; Appellant's Brief at ¶ 55. Moreover, this Court has stated that "[e]ither precedent special authority from the client or subsequent ratification by the client is essential in order to make an attorney's settlement or compromise binding on the client." Dickinson Econo-Storage, 450 N.W.2d at 422 (citation omitted). Here, there was evidence of both, and that Saatoff testified to the contrary does not make the district court's findings of fact clearly erroneous. See, R65:18:18-18:15 (Champ testifying that Saatoff gave her the directive to accept the mutual release and mutual walkaway settlement offer); R46 (Exhibit 4 – February 7-8 email communication between Champ and Saatoff.); R39 (Exhibit 10 – recorded telephone conversation between Champ and Saatoff) at 9:22-9:38. Accordingly, there is sufficient evidence in the record from which the Court found by clear and convincing evidence that Saatoff granted Champ authority to bind Appellant to the settlement agreement.

C. The terms of the settlement agreement were simple and definite.

[¶ 52] The district court's findings that the agreement was a binding and enforceable agreement were not clearly erroneous. A contract requires parties capable of contracting, consent of the parties, a lawful object, and sufficient consideration. N.D.C.C. § 9-01-02. "Refraining from doing something which one has a legal right to do constitutes good consideration. Farmers Union Oil Co. v. Maixner, 376 N.W.2d 43, 46 (N.D. 1985). "To create an enforceable contract, there must be a mutual intent to create a legal obligation." Lire, Inc. v. Bob's Pizza Inn Restaurants, Inc., 541 N.W.2d 432, 434 (N.D.

1995). "The parties' mutual assent is determined by their objective manifestations, not their secret intentions." Id. at 434. Here, the objective manifestations appear in the emails creating the settlement agreement between the parties, as communicated through their respective counsel. See R45. A court will not enforce a contract that is "vague, indefinite or uncertain." Stout v. Fisher Industries, 1999 ND 218, ¶ 11, 603 N.W.2d 52. A court can enforce an oral contract "when the parties have agreed on its essential terms." Tarver v. Tarver, 2019 ND 189, ¶ 9, 931 N.W.2d 187 (citation omitted). "Where the parties have agreed on the essential terms of a contract, the fact they prevented a further writing memorializing the agreement does not prevent enforcement of the contract." Lonesome Dove Petroleum, Inc. v. Nelson, 2000 ND 104, ¶ 18, 611 N.W.2d 154.

[¶ 53] Here, the district court properly determined that the terms of the settlement agreed upon by the parties was simply a mutual dismissal and mutual walkaway with no money exchanged between the parties, as set forth in Exhibit 1 (R45 at 2). See R65:146:5-10; R65:146:19-25. The district court stated the essential terms were contained in Exhibit 1 and they were the "mutual dismissal with no money exchanged and dismissal. And because of the emails indicating that it was going to be attached to the pleadings, the essential terms were to dismiss any claims under the pleadings." R65:146:19-25. The district court further found there "wasn't anything left open to be decided at a later date." Id. at 146:8-9; compare Lohse v. Atl. Richfield Co., 389 N.W.2d 352, 356 (N.D. 1986) (discussing cases regarding terms essential to complicated oil & gas leases and holding no oral oil & gas lease contract was formed). The Court further distinguished the parties' agreement from that alleged in Tarver, 2019 ND 189, ¶ 12. Id.

[¶ 54] In Tarver, this Court affirmed a district court's determination that the parties had not reached a final agreement. 2019 ND 189 at ¶ 12. There, this Court stated, "[a]t multiple times, the parties stated they would have to work out specific terms and would put a finalized agreement in writing." Id. Crucially, the Court noted that the essential terms still left to be worked out "included determining when spousal support would terminate, under what circumstances Daniel Tarver could retire, and a definition for Daniel Tarver's income after retirement. *Each of these terms was essential in developing a final spousal support agreement, which in turn could affect all other aspects of the proposed agreement*." Id. (emphasis added). This is a stark contrast from the straightforward, "pretty simple" terms of the agreement that the district court enforced in the present case. R65:146.

[¶ 55] Likewise, the Lohse case relied upon by Appellant offers an even greater contrast. See Appellant's Brief at ¶ 65. There, a party sought to enforce an oral oil & gas lease and the appellee there argued the same was unenforceable because essential terms were missing, including, "deferred bonus payments, the matter of a Pugh clause, pooling and unitization powers, surface damage, and delay rental payments[.]" Lohse, 389 N.W.2d at 355. There, the Court reviewed cases from Texas and Kansas discussing what terms are accepted as essential to oil & gas leases. Id. at 355-56. The Court noted that the parties agreed upon only "the royalty, bonus, and primary term" and stated in "view of the complexity of the various rights and obligations of the parties to an oil and gas lease, we deem agreement as to these terms alone insufficient to constitute an enforceable oil and gas lease[.]" Id. at 356. As such, this Court concluded that the oral agreement was "too indefinite and uncertain to constitute a valid oil and gas lease." Id. This case is plainly distinguishable from the instant case.

[¶ 56] Additionally, the Burruss v. Wyoming Casing Serv., Inc. is distinguishable, as it also involved a settlement of an especially complex putative opt-in class action asserting overtime pay violations under the Fair Labor Standards Act. No. 1:16-00080, 2020 WL13300241 (D.N.D. Aug. 21, 2020, ¶ 3. There, the purported agreement reviewed provided for a large global settlement figure that would have "covered 295 of the 313 potential opt-in plaintiffs." Id. at ¶ 4. Moreover, the Court noted after the initial email exchanges between counsel for the parties occurred, the Parties worked through various issues related to the settlement and five months after communicating acceptance, Plaintiffs' counsel provided Defense counsel with a redlined written agreement containing a "Data Accuracy" provision that affected the scope of the release. Id. at ¶¶ 5-7. This provision affected the essential terms because, according to Plaintiffs' counsel, there needed to "be a process to dispute the number offered either before or after the checks are issued." Id. at ¶ 8. The District Court there noted that the email communications between counsel when the deal was purportedly made contained zero discussion about the scope of the release. Id. at ¶ 12.

[¶ 57] The Court further stated, "[t]he *only point of a possible agreement was the amount to be paid, and even that was apparently not settled* by the then-Plaintiff's Counsel." Id. (emphasis added). In contrast, the district court here noted that the attachment of the pleadings to the document memorializing the parties' agreement showed the release contemplated the "essential of terms were to dismiss any claims under the pleadings." R65:146:23-24. Moreover, the terms were simple and concise: a mutual dismissal and mutual release with no money exchanged between the parties. See R65:146; R45. Accordingly, all essential terms were agreed upon and the district court's findings were not

clearly erroneous. As such, this Court must affirm the district court's Judgment dated August 16, 2022. R56.

CONCLUSION

[¶ 58] The district court properly determined that it was the appropriate fact finder on the motion to enforce settlement and its findings of fact are not clearly erroneous and are well supported by the record. The district court correctly determined that the settlement agreement was properly authorized and further that its essential terms were definite and clear. As such, this Court must affirm the judgment dated August 16, 2022.

Dated: January 9, 2023

/s/ Brandt M. Doerr

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THE COURT SHOULD PERMIT ORAL ARGUMENTS

[¶ 59] Appellees request oral argument in this case. Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, the Appellant requests that this Court schedule oral argument. Oral arguments will be helpful to the Court because this case involves important questions of North Dakota law that are of interest to practitioners, and because this case provides an opportunity to clarify North Dakota law surrounding situations such as those presented in the instant case.

CERTIFICATE OF COMPLIANCE

[¶ 60] The undersigned hereby certifies that said brief complies with N.D.R.App.P. 32 in that the brief does not exceed 38 pages. Specifically, the total number of pages for this brief is 37 pages.

[¶ 61] Dated: January 9, 2023.

/s/ Brandt M. Doerr
Brandt M. Doerr (ND ID 08520)

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Rocket Dogs K-9 Aquatics & Wellness Center, LLC, Plaintiff and Appellant, vs. Derheim, Inc., a North Dakota corporation d/b/a My Aquatic Services and Troy Derheim, an individual, Defendants and Appellees,	Supreme Court No. 20220246 District Court No: 09-2022-CV-01009 **CERTIFICATE OF SERVICE**

[¶1] I, Brandt M. Doerr, an attorney licensed to practice law in this state, hereby certifies that on the date below, the following documents were served on all individual Parties:

- APPELLEES' RESPONSE BRIEF

[¶2] Service was completed by sending true and correct copies to the following address(es):

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