IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FRANK C. WHITTINGTON, II,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2291-VCP
	)	
DRAGON GROUP L.L.C.,	)	
THOMAS D. WHITTINGTON, JR.,	)	
RICHARD WHITTINGTON,	)	
L. FAITH WHITTINGTON,	)	
DOROTHY W. MINOTTI,	)	
MARNA A. McDERMOTT,	)	
SARAH I. WHITTINGTON,	)	
RUTH A. WHITTINGTON,	)	
MATTHEW D. MINOTTI, and	)	
DOROTHY A. MINOTTI,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: January 23, 2013
Decided: May 1, 2013

Frank C. Whittington, II, Middletown, Delaware; *pro se Plaintiff.*

John G. Harris, Esq., BERGER HARRIS, LLC, Wilmington, Delaware; *Attorneys for Defendants Dragon Group, LLC, Thomas D. Whittington, Jr., Richard Whittington, L. Faith Whittington, and Dorothy W. Minotti.*

Richard L. Renck, Esq., Andrew D. Cordo, Esq., ASHBY & GEDDES, P.A., Wilmington, Delaware; *Attorneys for Defendants Marna McDermott, Sarah Whittington, Ruth Whittington, Matthew Minotti, and Dorothy A. Minotti.*

PARSONS, Vice Chancellor.

This dispute is but the latest development in the now decades-long feud between the plaintiff and the defendants. This may be the final chapter of this case; regrettably, however, litigation between these parties undoubtedly will continue.[1]

After I entered judgment in favor of the plaintiff in the underlying lawsuit, the defendants appealed to the Delaware Supreme Court. With that appeal pending, the parties engaged in settlement negotiations and eventually reached a settlement. The parties formalized the settlement in a signed, written agreement executed by the plaintiff and each of the ten defendants. The defendants then paid the plaintiff the agreed settlement amount and voluntarily dismissed their appeal. The plaintiff, however, has not performed his obligations under the agreement to execute a general release of claims and satisfaction of judgment. The defendants now move for enforcement of the settlement agreement and for their attorneys' fees under a provision of the agreement that entitles any party that successfully files suit to enforce the terms of the settlement agreement to recover its reasonable attorneys' fees.

For the reasons stated in this Memorandum Opinion, I grant the defendants' motion to enforce the settlement agreement and to recover $2,500 in attorneys' fees.

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[1] A separate case involving essentially the same parties, C.A. No. 6654-VCG, is proceeding contemporaneously.

I. BACKGROUND

A. The Parties

All parties are members of, or entities controlled by, the Whittington family. The plaintiff is Frank C. Whittington, II ("Whittington" or "Plaintiff").

The defendants are Plaintiff's four siblings, Thomas D. Whittington, Jr., L. Faith Whittington, Richard Whittington, and Dorothy W. Minotti, and certain members of the next generation of the Whittington family: Marna A. McDermott, Sarah I. Whittington, Ruth A. Whittington, Matthew D. Minotti, and Dorothy A. Minotti (collectively, "Defendants"). Nominal Defendant Dragon Group, L.L.C. ("Dragon Group") is a Delaware limited liability company owned and managed by members of the Whittington family, including Plaintiff.

B. Facts

The complete factual predicate of this case has been recited in a previous Opinion, and will not be repeated.[2] The facts that follow are those relevant to the pending motion, all of which occurred after I entered a Final Order and Judgment on August 2, 2012. These facts are not contested and are drawn from the parties' briefs on this motion and the supporting exhibits and affidavits.

In an April 15, 2011 Opinion, I found in favor of Plaintiff, awarded him an amount to be determined, and declared him an 18.81% owner of Dragon Group.[3] In the

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2 *See Whittington v. Dragon Group, L.L.C.*, 2011 WL 1457455 (Del. Ch. Apr. 15, 2011).

3 *See id.*

subsequent Final Order and Judgment, I awarded Whittington $630,212.93 (the "Judgment").[4] On August 31, 2012, Defendants timely appealed my decision to the Supreme Court.[5]

While that appeal was pending, Whittington and Defendants engaged in settlement discussions. The parties negotiated throughout September, and by the end of that month were close to reaching an agreement in principle. On October 1, 2012, however, Whittington's attorneys, Cross & Simon, LLC ("C&S"), ceased representing him. C&S asserted an attorneys' lien (the "C&S Lien" or "Lien") against any funds paid from Defendants to Whittington in the amount of $65,812.67. On October 5, 2012, the parties finalized the terms of a settlement agreement (the "Settlement Agreement" or "Agreement"), and both Whittington and Defendants formally executed the Agreement.[6] The Agreement accounted for the Lien by requiring Defendants to pay the Lien amount directly to C&S.

In the Agreement, Defendants promised voluntarily to dismiss their appeal to the Supreme Court and to pay Whittington $396,000 to satisfy the Judgment from this

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4 *See* D.I. No. 290, ORDER (Aug. 2, 2012). All Docket Item Numbers ("D.I. No.") refer to the docket in this case, C.A. No. 2291-VCP.

5 D.I. No. 292, Notice of Appeal (Aug. 31, 2012).

6 Whittington signed the Agreement on or about October 9, 2012. Affidavit of Richard S. Gebelein, Esq. ("Gebelein Aff.") ¶ 5.

Court.[7] Of that amount, $330,187.33 would be placed in an escrow account for Whittington, and the remaining $65,812.67 would be placed in an escrow account for C&S.[8] As consideration for those payments, Whittington agreed that, within five days of the funds being escrowed, he would file a "release/satisfaction of the Judgment."[9] The Agreement also provided that C&S would release the C&S Lien upon receipt of the escrowed funds.[10] C&S, however, declined to sign the Agreement.[11]

The parties retained retired judge Richard S. Gebelein to serve as the escrow agent (the "Escrow Agent").[12] In mid-October, Defendants deposited the full amounts of $330,187.33 and $65,812.67 into the escrow accounts set up for Whittington and C&S, respectively. The Escrow Agent initially indicated that he would not release either fund until he obtained C&S's signature on the Agreement. C&S, however, was reluctant to sign the Agreement due to some of the language in the Agreement as to release.[13] Instead

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7 See Defs.' Mot. to Enforce Settlement Agreement and for Attorney's Fees ("Defs.' Mot.") Ex. A, Settlement Agreement, § 2.

8 *Id.* § 2(b).

9 *Id.* § 5.

10 *Id.* § 17; *see also infra* note 25 and accompanying text.

11 Gebelein Aff. ¶ 10.

12 According to Defendants: "After executing the Settlement Agreement, in light of the fact that Plaintiff was not represented by counsel, the parties retained retired judge Richard S. Gebelein, Esq., to serve as an escrow agent for the payment of the settlement consideration." Defs.' Mot. ¶ 7.

13 *Id.*

of signing the Agreement, C&S provided, and Whittington accepted, written assurances that payment under the Agreement would satisfy all of C&S's claims for attorneys' fees in this matter.[14] On October 24, the Escrow Agent released the funds to both Whittington and C&S.[15] Subsequently, the Escrow Agent sent to Whittington copies of the executed Agreement and the written assurances from C&S.

Despite having received the escrowed funds, Whittington has not executed a release of claims or acknowledged satisfaction of this Court's Judgment in his favor as required by the Agreement.

C. Procedural History

On December 19, 2012, Defendants filed the pending motion to enforce the Agreement and to recover $2,500 in attorneys' fees they incurred in connection with the motion. Whittington responded to Defendants' motion with a letter disputing the validity of the Settlement Agreement. He seeks both a declaration that the Settlement Agreement is unenforceable and an order enforcing the original Judgment in the full amount of $630,212.93. Whittington also requests an award of $1.1 million in attorneys' fees, the total amount he purports to have incurred over the entire course of this protracted litigation.[16]

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14 *Id.* ¶¶ 10–11; *see infra* notes 26–28 and accompanying text.

15 *Id.* ¶ 12 ("On October 24, 2012 $330,188.00 was wired to Mr. Frank Whittington's bank account as he had directed.").

16 *See* D.I. No. 299, Letter from Whittington to the Court (Jan. 14, 2013) ("Whittington Letter"), at 2.

D. Parties' Contentions

Defendants contend that the Agreement is a binding contract enforceable against Whittington. To the extent that C&S's participation was required to effectuate the Agreement, Defendants assert that Whittington's acceptance of C&S's written assurance suffices to bind him. In addition, Defendants seek to recover their reasonable attorneys' fees of $2,500 pursuant to Section 13 of the Agreement.

Whittington, on the other hand, argues that the Agreement is invalid because C&S did not sign it. In support of this contention, Whittington avers that the Escrow Agent affirmed that the Agreement was incomplete and invalid without C&S's signature. He also challenges the validity of the Agreement on the ground that the time element on the Agreement expired.[17] Lastly, Whittington argues that it is inequitable to allow Defendants, but not him, to receive payment of their attorneys' fees from the Dragon Group business jointly owned by him and Defendants. Accordingly, he seeks reimbursement of the attorneys' fees he incurred in this litigation.

II. ANALYSIS

A. Enforcement of the Settlement Agreement

"'Delaware law favors the voluntary settlement of contested suits,' and such arrangements will bind the parties where they agree to all material terms and intend to be

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[17] Whittington Letter 1. The Agreement, however, contains no such "time element." Notably, Whittington executed the Agreement on October 9, 2012 and received payment on October 24, just over two weeks later. There is no basis to conclude that a fifteen-day time lapse between execution and payment could invalidate the Agreement. I therefore reject this perfunctory argument.

bound by that contract . . . ."[18] "A party seeking to enforce [a] settlement agreement has the burden of proving the existence of [a] contract by a preponderance of the evidence."[19] When dealing with a motion to enforce a settlement agreement, the Court generally determines whether a binding agreement arose by asking

> whether a reasonable negotiator in the position of one asserting the existence of a contract would have concluded, in that setting, that the agreement reached constituted agreement on all of the terms that the parties themselves regarded as essential and thus that that agreement concluded the negotiations and formed a contract.[20]

In other words, to determine whether a contract was formed, a party's "overt manifestation of assent—not subjective intent—controls."[21]

In this case, Whittington does not dispute that the parties reached a settlement agreement on all material terms. Furthermore, Defendants filed the Settlement Agreement, which was executed by Whittington and each Defendant, with their motion. Thus, Defendants have demonstrated the existence of a contract. Whittington's main

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18 *Schwartz v. Chase*, 2010 WL 2601608, at *4 (Del. Ch. June 29, 2010) (quoting *Clark v. Ryan*, 1992 WL 163443, at *5 (Del. Ch. June 17, 1992)). Delaware law governs the Settlement Agreement. *See* Settlement Agreement § 11.

19 *Id.* (quoting *Heiman Aber & Goldlust v. Ingram*, 1998 WL 442691, at *2 (Del. Super. May 14, 1998)).

20 *Id.* (quoting *Leeds v. First Allied Conn. Corp.*, 521 A.2d 1095, 1097 (Del. Ch. 1986)).

21 *Loppert v. WindsorTech, Inc.*, 865 A.2d 1282, 1285 (Del. Ch. 2004) (quoting *Indus. Am., Inc. v. Fulton Indus., Inc.*, 285 A.2d 412, 415 (Del. 1971)).

defense against the enforceability of the Agreement is that it was not signed by his former attorneys, C&S.

Nothing in the law of contracts requires that a contract be signed to be enforceable.[22] Where a settlement agreement has been reached, "the fact, alone, that it was the understanding that the contract should be formally drawn up and [executed], [does] not leave the transaction incomplete and without binding force, in the absence of a *positive agreement* that it should not be binding until so reduced to writing and formally executed."[23] Therefore, "[t]he question is whether the parties positively agreed that there

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[22] *See Willard F. Deputy & Co. v. Hastings*, 123 A. 33, 35 (Del. Super. 1923) ("[I]n the absence of testimony showing that execution by all of the parties was intended or some other reason or consideration calling for joint execution, the signatures of part of those named in the instrument bind them though others named therein have not signed the same."); *Schutzman v. Gill*, 154 A.2d 226, 229 (Del. Ch. 1959) ("[W]hen a contract is reduced to writing and a number of persons are named therein as parties, a portion of whom sign the same and a portion of whom do not affix their signatures, the question whether or not those who have signed the contract are bound thereby is determined by the intention and understanding of the parties at the time of the execution of the instrument. . . . [I]n the absence of testimony showing that execution by all of the parties was intended or some other reason or consideration calling for joint execution, the signatures of part of those named in the instrument bind them though others named therein have not signed the same."); *see also Operating Eng'rs Local 139 Health Benefit Fund v. Gustafson Constr. Corp.*, 258 F.3d 645, 648 (7th Cir. 2001) ("Nothing in the law of contracts requires that a contract, whether original or modified, must be signed to be enforceable. The contract needn't be in writing; if it is in writing, it needn't be signed, provided there's other evidence of acceptance, for example by performance . . . ."); 17A Am. Jur. 2d *Contracts* § 174 ("[A]part from statute a signature is not necessary to the formation of a contract . . . .").

[23] *Loppert*, 865 A.2d at 1285 (emphasis added) (quoting *Universal Prods. Co. v. Emerson*, 179 A. 387, 394 (Del. 1935)).

will be no binding contract until the document is executed."[24] In this case, the only person that did not sign the Agreement is C&S. There is no evidence, however, that the parties positively agreed that the Agreement would not be binding until C&S formally executed it.

The Settlement Agreement states:

> C&S joins as a party to this Agreement *solely for the purpose* of agreeing that, upon wiring of the C&S Payment . . . it: (i) releases and discharges and terminates the C&S Lien; and (ii) releases Defendants and their counsel from any claim of any kind or nature relating to or arising out of the C&S Lien or any funds purported to be due or owing to C&S.[25]

Thus, C&S's signature was required *solely* to ensure that C&S discharged its Lien and released Defendants from any claim relating to the Lien. While C&S did not sign the Agreement, Whittington consented to accept C&S's written assurances in lieu of C&S's signature on the Agreement.[26] Whittington does not directly address the written assurances in his January 14, 2013 letter to the Court. In a November 2, 2012 letter, which Defendants attach as Exhibit C to their motion, however, Whittington alluded to these written assurances by stating:

> [C&S] did not sign this agreement, and thus according to what I was told by Judge Gebelein would not be eligible to receive any money till they did. Yet later a fax was sent to partially agree with the agreement. So I believe that the

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[24] *Schwartz v. Chase*, 2010 WL 2601508, at *8 (Del. Ch. June 29, 2010).

[25] Settlement Agreement § 17 (emphasis added).

[26] Gebelein Aff. ¶ 11.

> defendants still have an obligation to pay me the $65,812.67.[27]

Thus, Whittington acknowledged that he received a document whereby C&S partially agreed with the Agreement. It is reasonable to infer that he is referring to the written assurances. Retired judge Gebelein provided a sworn statement that he "obtained Mr. Whittington's consent to accept that written assurance and disbursed all funds as provided in the settlement agreement upon receipt of those assurances."[28] Based on this evidence, I find that Whittington received the written assurances and consented to accept them. Thus, Whittington manifested an intent to be bound by the terms of the Agreement even absent C&S's signature.[29]

Notably, Whittington does not dispute that he agreed to and intended to be bound by the Agreement.[30] Rather, he disputes the legal effect of the Agreement based on the absence of C&S's signature. Defendants relied on Whittington's manifestation of intent when they paid Whittington the amount owing under the Agreement and voluntarily

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27 Defs.' Mot. Ex. C.

28 Gebelein Aff. ¶ 11.

29 *See Corp. Serv. Co. v. Kroll Assocs., Inc.*, 2001 WL 755934, at *4 (Del. Super. June 15, 2001) ("[C]onduct which imports acceptance or assent is acceptance or assent, in the view of the law . . . ."); *see also Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995) ("In the absence of a signature, a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate."); *In re Gaynes*, 27 B.R. 161 (B.A.P. 9th Cir. 1983) (stating that an unsigned contract will be valid "where subsequent conduct of the parties manifest [sic] the intent to adhere to a binding contract.").

30 *See* Whittington Letter 2.

dismissed their appeal in the Supreme Court. Whittington also does not dispute that he received the $330,188 that the Escrow Agent attests was wired to Whittington's bank account as Whittington had directed.[31]

In support of his position, Whittington asserts that the Escrow Agent informed him that the Agreement would be binding only after C&S formally executed the Agreement.[32] The Escrow Agent, however, indicates that he informed Whittington that C&S's signature was required before he would *release the escrowed funds*, not that it was required to make the Agreement binding.[33] Moreover, the Escrow Agent made the alleged statement before learning that the law firm had a problem with signing the Agreement and before receiving written assurances from C&S. As the Escrow Agent explained:

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[31] Gebelein Aff. ¶ 12; *see also* Defs.' Mot. Ex. C, Letter from Whittington to the Court (Nov. 2, 2012) ("However only $330,187.33 was actually provided to me.").

[32] *See* Whittington Letter 1. Whittington stated:

> According to Judge Gebelein, who acted as the mediator, the agreement is incomplete and invalid without the Cross and Simon signatures. At the time of the plaintiffs signing it, the reason Judge Gebelein gave for refusing to give the plaintiff a copy which had all the signatures except Cross and Simon, was that it invalidated the agreement without the Cross and Simon signatures that were listed in the agreement.

Id.

[33] Gebelein Aff. ¶ 9 ("I did indicate that I would not release funds to either Mr. Frank C. Whittington, II or to his former attorneys until I had obtained the law firm's signature on the agreement.").

> Subsequent to [the meeting at which Whittington signed the original documents,] Mr. Cross had problems with the language in the agreement as to the release and instead agreed to provide Mr. Whittington with written assurance that payment under this agreement would satisfy all claims for attorneys' fees in this matter. []I obtained Mr. Whittington's consent to accept that written assurance and disbursed all funds as provided in the settlement agreement upon receipt of those assurances. []On October 24, 2012 $330,188.00 was wired to Mr. Frank Whittington's bank account as he had directed. []One of the original agreements was then provided to Mr. Whittington along with the written assurances from his previous attorneys.[34]

In addition, immediately after Whittington and Defendants executed the Agreement, and before C&S was contacted for their signature, Defendants deposited the entirety of the settlement funds into the escrow accounts and voluntarily dismissed their appeal.[35] These facts severely undermine Whittington's argument that the Agreement was not valid because C&S declined to sign it. In fact, the Escrow Agent and Defendants appear to have relied on Whittington's manifestation of intent to be bound by the Agreement's terms after C&S provided the written assurances. Whittington, having now received the full benefit of the bargain he struck with Defendants, cannot justly assert that he did not intend to be bound by that bargain and attempt to repudiate the Settlement Agreement and obtain the full amount of the Judgment.[36] Thus, I conclude that both

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34 *Id.* ¶¶ 10–13.

35 *See* Notice of Voluntary Dismissal, C.A. No. 482,2012 (Oct. 15, 2012).

36 *See Capital Gp. Cos. v. Armour*, 2004 WL 2521295, at *6 (Del. Ch. Oct. 29, 2004) ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously

Whittington and Defendants intended to be bound by the Settlement Agreement and that it constitutes a valid, binding agreement.

Whittington does not dispute that his failure to file a release of claims and satisfaction of Judgment as required by the Agreement, if valid and binding, was a material breach of the Agreement. Because "breaches of settlement agreements are not readily remedied by monetary damages," specific enforcement of a settlement agreement's essential terms is generally appropriate.[37] Thus, I conclude that Defendants are entitled to specific enforcement of the Settlement Agreement.

B. Defendants' Attorneys' Fees

The second issue before me is whether Defendants are entitled to their attorneys' fees under the Settlement Agreement. Section 13 of the Agreement provides:

> If any of the Parties are required to file suit to compel performance or enforce the terms and conditions of this Agreement, the prevailing party in the litigation, as determined by a Delaware court of competent jurisdiction, shall be entitled to recover his, her or its reasonable attorneys' fees and costs.

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avoid its burdens would . . . disregard equity." (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000))).

[37] *Loppert*, 865 A.2d at 1292.

Because I have concluded that the Settlement Agreement is binding and enforceable, Defendants are the "prevailing party" in this litigation. As such, they are entitled to recover their reasonable attorneys' fees and costs.[38]

Defendants seek reimbursement of $2,500 in attorneys' fees and costs. Defendants' counsel has submitted an affidavit pursuant to Court of Chancery Rule 88 stating that their actual attorneys' fees and expenses incurred in pursuing enforcement of the Agreement total $3,117.[39] The affidavit attests that ten attorney hours were spent (1) drafting written correspondence with Plaintiff, (2) conducting phone conversations with Plaintiff, (3) conducting internal strategy discussions, (4) drafting this motion, and (5) drafting and collecting supporting documentation. Whittington did not dispute the reasonableness of the fees Defendants seek. An award of $2,500 in these circumstances would provide Defendants' counsel an implied hourly rate of $250. I find this rate and the time expended to be reasonable. Thus, I award Defendants $2,500 in attorneys' fees.

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[38] Settlement Agreement § 13.

[39] Defs.' Mot. Ex. F. Rule 88 states:

> In every case in which an application to the Court is made for a fee or for reimbursement for expenses or services the Court shall require the applicant to make an affidavit or submit a letter, as the Court may direct, itemizing (1) the amount which has been received, or will be received, for that purpose from any source, and (2) the expenses incurred and services rendered, before making such an allowance.

C. Plaintiff's Attorneys' Fees

Plaintiff asks this Court "to consider the full reimbursement of his entire attorney's fees of 1.1 million dollars."[40] Whittington asserts that on the merits of the litigation underlying this most recent dispute, Defendants lost, and he won. Nevertheless, he complains that he was not afforded the same ability as Defendants to have the jointly owned Dragon Group pay for his attorneys' fees.[41] But, this Court has heard and rejected that argument before.

In July 2007, while litigating the claims leading up to the Settlement Agreement, Defendants met and authorized Dragon Group to pay legal fees "to defend the members and the LLC against actions attempting to diminish their share and force [Whittington] on the LLC as a member" (the "Authorization").[42] Pursuant to the Authorization, Dragon Group paid $798,241 in legal fees for itself and Defendants.[43] In a May 25, 2012 Letter Opinion, I ruled that the Authorization provides for indemnification only when members "defend" themselves in litigation.[44] Because Whittington was the plaintiff in that action,

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40 Whittington Letter 2.

41 *Id.*

42 *Whittington v. Dragon Gp., L.L.C.*, 2012 WL 2052792, at *1 (Del. Ch. May 25, 2012).

43 *Id.* Whittington asserts that Dragon Group paid $890,000 in attorneys' fees. Whittington Letter 2.

44 *Whittington v. Dragon Gp., L.L.C.*, 2012 WL 2052792, at *1–2.

I concluded that he was not entitled to recover his attorneys' fees pursuant to the Authorization.[45]

Under Court of Chancery Rule 59(f), Whittington had five days to move for reargument on my ruling that he was not entitled to attorneys' fees, which he failed to do. Whittington also failed to appeal that ruling. The only other avenue for relief from my previous Order open to Whittington would be by way of a motion under Rule 60(b). Whittington's letter in opposition to Defendants' pending motion, however, does not mention Rule 60(b) or suggest that any of the possible grounds for relief under Rule 60(b) are applicable here. Thus, even allowing for the fact that Whittington is self-represented, I find that he has not presented any persuasive basis for his claim for attorneys' fees. Therefore, I deny that request.

III. CONCLUSION

For the foregoing reasons, I grant Defendants' motion to enforce the Settlement Agreement and award them $2,500 in attorneys' fees and costs. Plaintiff shall pay to Defendants $2,500 within ten days. I also deny Plaintiff's request for recovery of his attorneys' fees.

An appropriate form of Order is being entered concurrently with this Memorandum Opinion.

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[45] *Id.*