

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

BILTMORE ASSOCIATES, as	)	
Trustee for the Visitalk,	)	
Creditors' Trust,	)	
	)	No. CV 02-2405-PHX-HRH
Plaintiff,	)	
	)	
vs.	)	Phoenix, Arizona
	)	March 13, 2008
PETER THIMMESCH, et al.,	)	1:19 p.m.
	)	
Defendants.	)	

BEFORE: THE HONORABLE H. RUSSEL HOLLAND, JUDGE

REPORTER'S EXCERPTED TRANSCRIPT OF PROCEEDINGS

SETTLEMENT AGREEMENT

Official Court Reporter:  
Candy L. Potter, RMR, CRR  
Sandra Day O'Connor U.S. Courthouse, Suite 312  
401 West Washington Street, Spc 36  
Phoenix, Arizona 85003-2151  
(602) 322-7246

Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A P P E A R A N C E S

For the Plaintiff:

Tiffany & Bosco  
By: **Christopher Reed Kaup**, Esq.  
2525 East Camelback Road, 3rd Floor  
Phoenix, Arizona 85016

For the Defendants:

Mariscal Weeks McIntyre & Friedlander  
By: **Gary L. Birnbaum**, Esq.  
**Timothy J. Thomason**, Esq.  
**Scot L. Claus**, Esq.  
2901 North Central Avenue, Suite 200  
Phoenix, Arizona 85012

1 (Previous proceedings held on the record not included  
2 in this transcript)

3  
4 THE COURT: Mr. Kaup.

5 MR. KAUP: Your Honor, in light of your ruling, 13:19:09  
6 counsel for Snell & Wilmer and I have had conversations right  
7 before we resumed with our principals, and we have a resolution  
8 of this matter between us and Snell & Wilmer which will avoid  
9 the need to continue to proceed in the trial as between us and  
10 Snell & Wilmer, assuming Your Honor approves of the resolution. 13:19:32

11 I'd like to put it on the record.

12 THE COURT: Let's do it.

13 MR. KAUP: Your Honor, first there would be a judgment  
14 in favor of the -- in favor of Snell & Wilmer on all counts for  
15 dismissal with prejudice of all counts, which obviously are the 13:19:49  
16 malpractice count, the aiding and abetting, and the preference  
17 count.

18 MR. BIRNBAUM: Excuse me, Mr. Kaup, there is one other  
19 count. It is all counts, which is malpractice, aiding and  
20 abetting, misrepresentation, and preference. 13:20:05

21 MR. KAUP: I apologize.

22 THE COURT: Understood.

23 MR. KAUP: Second, Your Honor, there would be an  
24 award -- an agreement that the plaintiff would pay a fee -- an  
25 amount of \$100. With all of the costs and fees to be borne by 13:20:24

1 each party.

2 THE COURT: Let me play that back to make sure I  
3 understand it. I'm sort of turning it around.

4 But this aspect of the agreement is that everyone  
5 would bear their own costs and attorney's fees, except that the 13:20:41  
6 plaintiff is going to pay \$100 --

7 MR. KAUP: To Snell & Wilmer.

8 THE COURT: -- to Snell & Wilmer.

9 MR. BIRNBAUM: Your Honor, let me clarify, please.

10 The concept is that there will be a judgment entered 13:20:52  
11 concluding this case.

12 THE COURT: Yes.

13 MR. BIRNBAUM: The judgment will provide for dismissal  
14 of all claims, for payment by the plaintiff of \$100 to Snell &  
15 Wilmer, and otherwise that all parties will bear their own 13:21:06  
16 costs and attorney's fees.

17 THE COURT: Agreed, Mr. Kaup?

18 MR. KAUP: Yes.

19 THE COURT: Okay. Anything else?

20 MR. KAUP: Yes. There will be full and complete 13:21:21  
21 mutual releases between all parties and principals of the  
22 parties and their counsel.

23 THE COURT: Now, when you say "all parties," we've got  
24 Mr. Thimmesch hanging out here.

25 MR. KAUP: I apologize, Your Honor. "All parties" 13:21:39

1 meaning between Biltmore Associates as the trustee of the  
2 Visitalk Creditors' Trust and Snell & Wilmer.

3 THE COURT: Got it.

4 MR. BIRNBAUM: We agree with that, Your Honor.

5 The only exception to the release is the \$100 payable 13:21:50  
6 under the judgment.

7 THE COURT: Okay. Anything else?

8 MR. KAUP: Your Honor -- yes. In addition,  
9 Your Honor, the plaintiff will agree to forego any and all  
10 rights of appeal from that judgment. 13:22:07

11 This agreement constitutes an unconditional withdrawal  
12 of all allegations and claims against Snell & Wilmer and its  
13 individual attorneys.

14 And finally, Your Honor, on behalf of Biltmore  
15 Associates as the trustee of the creditor's trust, as the 13:22:37  
16 plaintiff, we apologize to Snell & Wilmer and their individual  
17 attorneys for any difficulties associated with the litigation.  
18 The complaint was brought by Biltmore -- by Visitalk and  
19 Biltmore Associates in good faith. However, as the evidence in  
20 the trial developed, it has led us to the conclusion that the 13:23:02  
21 case should not proceed any further as against defendant Snell  
22 & Wilmer.

23 And that, I believe, is it.

24 MR. BIRNBAUM: We agree, Your Honor, that's the  
25 correct statement of the agreement that we've reached. 13:23:20

1 THE COURT: All right. Then I approve it.

2 MR. BIRNBAUM: Thank you, Your Honor.

3 THE COURT: That's a proper settlement of this case.  
4 I underscore "proper." This is the way it should come out.

5 Do you understand, Mr. Kaup, and your client, that  
6 this is the settlement, and I will enforce it? If there would  
7 be any question about it later, I will enforce this settlement.

13:23:38

8 MR. KAUP: There is no question in our mind,  
9 Your Honor, and we understand it. And we agree with each of  
10 those terms.

13:23:58

11 THE COURT: Okay. Who's going to prepare the  
12 judgment?

13 MR. BIRNBAUM: We will, Your Honor.

14 THE COURT: All right. Prepare it, serve it, and file  
15 it. We have a -- what is it called, a mail box for  
16 judgments -- the CM/ECF system has a wicket for you to lodge  
17 proposed orders and judgments in.

13:24:08

18 MR. BIRNBAUM: It will be --

19 THE COURT: That's where you need to send it.

20 MR. BIRNBAUM: We'll do that, Your Honor. It will be  
21 in the form of a stipulated judgment, so we'll run it by  
22 Mr. Kaup first. It will have both attorney s' signatures on it  
23 before we send it to you.

13:24:31

24 THE COURT: All right. Anything else we need to do?

25 MR. KAUP: Your Honor, the only issue is the prove up

13:24:43

1 of damages against Mr. Thimmesch. And we can do that in a  
2 form -- we can submit -- obviously he hasn't been here other  
3 than a few minutes at the beginning of the day on the first  
4 day.

5 THE COURT: That's what I thought. 13:25:00

6 MR. KAUP: And we can do that, Your Honor. It doesn't  
7 involve them, but we could do that either by bringing our  
8 damages expert back or submitting a declaration from her  
9 specific as to that issue so you have the evidentiary predicate  
10 to do that. 13:25:17

11 THE COURT: Do we know where Mr. Thimmesch is at this  
12 point?

13 MR. BIRNBAUM: We know he's in China next week,  
14 because we tried to get him.

15 MR. CLAUS: He is in Washington, D.C. at the present 13:25:32  
16 time, according to what I know. And then we served him with a  
17 subpoena when he was here, in trial, I had a subpoena ready for  
18 him.

19 THE COURT: And he left?

20 MR. CLAUS: Well, I candidly, Your Honor, I told him 13:25:48  
21 that he could leave because we didn't know when we were going  
22 to be scheduling for. And I even had a cover letter prepared  
23 that said, call Lori Mandell, Mr. Birnbaum's secretary, and  
24 tell us your schedule. He's been keeping in contact with  
25 Miss Mandell and informed her -- we had anticipated calling him 13:26:06

1 next week. And he said he's going to be in Beijing.

2 MR. BIRNBAUM: We actually understand, Your Honor,  
3 it's sort of interesting, that he's putting together some sort  
4 of computer system for outer Mongolia. And that's where he is  
5 the next few weeks. 13:26:23

6 THE COURT: I wish him luck. That's interesting.

7 MR. KAUP: Well, we could adjourn to outer Mongolia  
8 for the approval.

9 THE COURT: No, thank you.

10 I think in light of what I've been told, the better 13:26:38  
11 way to approach this is in due course, prepare the written  
12 prove-up material, serve it on Mr. Thimmesch somehow. I think  
13 we have a mail address for him. I think you have a mail  
14 address for him.

15 MR. KAUP: Camel in outer Mongolia? 13:26:58

16 THE COURT: No, I think we got a better one than that.

17 And I'm going to insist that he have an opportunity to  
18 respond --

19 MR. KAUP: Sure.

20 THE COURT: -- to the affidavit. 13:27:16

21 Anything else?

22 MR. KAUP: No, Your Honor.

23 MR. BIRNBAUM: Your Honor, we'd just like to express  
24 our thanks, first to you. I know it's difficult traveling up  
25 and down. But also to the staff. Visiting judge's staff 13:27:29

1 sometimes have an unusual burden, and yours has been  
2 particularly helpful to us. We appreciate it.

3 THE COURT: My secretary is not happy with me that she  
4 didn't get to come along on this trip.

5 MR. KAUP: Thank you, Your Honor. 13:27:48

6 THE COURT: Very, very good.

7 Again, I want to tell you that I compliment counsel on  
8 their good sense in reaching this resolution. You've done a  
9 good job of wrapping things up.

10 Thank you. 13:28:02

11 MR. BIRNBAUM: Thank you, Your Honor.

12 MR. KAUP: Thank you.

13 THE COURT: We'll be in recess.

14 (Proceedings concluded at 1:28 p.m.)

15

16 -oOo-

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

I, CANDY L. POTTER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 13th day of March, 2008.

s/Candy L. Potter  
Candy L. Potter, RMR, CRR