IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PHILLIP LETTEN, et al.,

Plaintiffs,

Case No. 10-cv-12182

vs.

Hon. Avern Cohn

SCOTT HALL, et al.,

Defendants.
_____/

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PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AGREEMENT, IMPOSE SANCTIONS, AND AWARD ATTORNEY'S FEES

Plaintiffs hereby move for enforcement of their settlement agreement. This case was settled over eight months ago, subject only to approval by city council. City council approved the settlement over three months ago. Plaintiffs' counsel have repeatedly implored defendants to carry out their obligations under the settlement agreement, to no avail. Plaintiffs therefore request the following immediate relief:

1. Enforcement of the settlement agreement by an order for specific performance.

2. Sanctions for the extraordinary delay caused by defendants.

3. Attorney's fees for having to bring this motion.

Local Rule 7.1(a) requires plaintiff to ascertain whether this motion will be opposed. Plaintiffs' counsel telephoned defendants' counsel on December 5, 2011, to explain the nature of this motion and its legal basis. Defendants' counsel did not answer, and her voicemail system was full such that no message could be left. Plaintiffs' counsel therefore sent defense counsel a letter by fax and email explaining the nature of this motion and its legal basis. Plaintiffs' counsel requested but did not obtain concurrence in the relief sought.

A supporting brief and evidentiary material accompany this motion.

Respectfully submitted,

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Dated: December 6, 2011

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AGREEMENT, IMPOSE SANCTIONS, AND AWARD ATTORNEY'S FEES

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INTRODUCTION

Soon after this case began in June 2010, there were promising signs of an impressive settlement. Then-deputy city attorney Saul Green and corporation counsel Krystal Crittendon, along with defense counsel of record Jane Mills, met with plaintiffs' attorneys and agreed that the parties would negotiate a comprehensive settlement that would include revised city policies, police training, and a monetary payment. Negotiations continued over the next several months, and by this spring the parties had reached agreement on all material terms of settlement. Several more months elapsed while plaintiffs waited for city council to approve the settlement. City council finally did so on September 6, 2011.

Unfortunately, plaintiffs' subsequent efforts to bring this case to a swift resolution have been met with extraordinary periods of silence and inaction by the city. Plaintiffs have signed all necessary releases and other paperwork required by the city as a condition of settlement. The parties' agreement now requires the city to do two things. First, it must implement the police policy and training requirements enumerated in the settlement agreement. Second, it must pay plaintiffs and their counsel $20,000 as agreed to in the settlement agreement. The city has failed to carry out these obligations for several months with no explanation or excuse.

Consequently, plaintiffs have little choice but to request the following immediate relief. First, this court should enforce the settlement agreement by an order of specific performance so that this case may be closed. Second, the court should impose sanctions for the extraordinary delay. Third, the court should award plaintiffs attorney's fees for having to bring this motion.

FACTS

This motion is based on the following facts:

1. On June 2, 2010, this case began as two separate civil actions alleging police misconduct in violation of 42 U.S.C. § 1983 and the First, Fourth, and Fourteenth Amendments. (Korobkin Declaration, ¶ 3.) The two cases were later consolidated under a single docket number and judge, Case No. 2:10-cv-12182-AC. (*Id.*; Dkt. ## 13-14.)

2. On August 9, 2010, plaintiffs' counsel met with then-deputy mayor Saul Green, corporation counsel Krystal Crittendon, and defense counsel Jane Mills. The parties agreed that instead of litigating the individual disputes, they would focus on revising the city's policies and implementing new police training regarding retaliation, citizen complaints, leafleting on a public sidewalk, and loitering. (Korobkin Declaration, ¶ 4.)

3. Between September 2010 and February 2011, attorneys for both sides (along with a representative of the Detroit police department) negotiated a comprehensive written settlement agreement on police policies, training, and monetary compensation to plaintiffs and their attorneys. (*Id.*, ¶ 5.)

4. On February 10, 2011, the parties' attorneys met with Judge Cohn at a status conference and reported that agreement had been reached regarding police policies and training, but that they had not yet reached a final agreement on monetary compensation. (*Id.*, ¶ 6.)

5. On March 29, 2011, the parties' attorneys met with Judge Cohn at a status conference and reported that agreement had been reached regarding monetary compensation, but that they had not yet reached a final agreement as to whether the court would retain jurisdiction over the settlement agreement after the case was dismissed. (*Id.*, ¶ 8.)

6. Also on March 29, 2011, the parties' attorneys reviewed the written settlement agreement line by line and finalized every part of the agreement with the exception of the term

that would provide for the court to retain jurisdiction. (*Id*., ¶¶ 9-10 and Exhibit A, with annotations in the handwriting of defense attorney Jane Mills.)

7. On April 5, 2011, the parties' attorneys conferred by telephone and agreed that the court would not retain jurisdiction after the case was dismissed. They further agreed that the settlement was complete and ready for submission to city council for approval on or before April 8, 2011. Defense counsel stated to plaintiffs' counsel that she would sign the settlement agreement after it received final approval from city council. (Korobkin Declaration, ¶ 11.)

8. On April 6, 2011, plaintiffs' counsel sent the final version of the written settlement agreement to defense counsel by email, fax, and first-class mail. (*Id*., ¶ 12 and Exhibit B.)

9. On May 17, 2011, the parties' attorneys met in Judge Cohn's chambers and agreed to release-of-liability language that plaintiffs would sign after city council's approval of the settlement agreement. (*Id*., ¶¶ 13-14 and Exhibit C, with handwritten annotations and initials of defense attorney Jane Mills.)

10. On August 9, 2011, the parties' attorneys met with Judge Cohn at a status conference and reported that the case had been settled pending final approval by city council. In chambers, Judge Cohn drafted and read aloud the following proposed order, which the parties' attorneys agreed to verbally before it was entered: "This case has been settled. All that remains is final approval of the Detroit City Council. . . ." (*Id*., ¶ 15.)

11. The next day, the above order was signed and entered by the court. (Dkt. # 22.)

12. On September 12, 2011, the parties' attorneys conferred by telephone. Defense counsel informed plaintiffs' counsel that city council had approved the settlement on September 6, 2011. She further stated that she would sign the written settlement agreement after plaintiffs

signed the city's release-of-liability forms which she would send to plaintiffs' counsel by September 16. (Korobkin Declaration, ¶ 17.)

13. On September 19, 2011, plaintiffs' counsel received release-of-liability forms in the mail, but the forms did not have the language agreed to by the parties at the May 17, 2011 status conference. Plaintiffs' counsel immediately sent defense counsel a letter listing the deficiencies and requesting corrected versions of the release forms. (*Id*., ¶¶ 18-19 and Exhibit D.)

14. Several weeks elapsed while plaintiffs' counsel waited for defense counsel to correct the errors in the release-of-liability forms. Defense counsel left a voicemail for plaintiffs' counsel stating that she would revise the release-of-liability forms, but she never did. (*Id*., ¶ 20.)

15. On October 13, 2011, plaintiffs' counsel sent defense counsel a letter stating that his office would prepare corrected versions of the release forms for plaintiffs to sign, at which point defense counsel was expected to sign the settlement agreement. (*Id*., ¶¶ 21-22 and Exhibit E.)

16. On October 25, 2011, plaintiffs' counsel sent defense counsel fully executed release-of-liability forms and the written settlement agreement signed by plaintiffs' counsel. In his cover letter, plaintiffs' counsel asked defense counsel to promptly sign and return the settlement agreement. (*Id*., ¶¶ 23-24 and Exhibit F.)

17. On November 8, 2011, the parties' attorneys conferred by telephone. Defense counsel acknowledged having received the October 25 mailing and specifically agreed to sign and return the settlement agreement by November 11, 2011. (*Id*., ¶¶ 25-26 and Exhibit G.)

18. On November 23, 2011, plaintiffs' counsel mailed and faxed defense counsel a letter asking her to sign and return the settlement agreement immediately. (*Id*., ¶¶ 26-27 and Exhibit H.)

19. Defense counsel did not respond to the November 23 letter. (*Id*., ¶ 28.)

ARGUMENT

I. THE COURT SHOULD ORDER SPECIFIC PERFORMANCE OF THE SETTLEMENT AGREEMENT.

A. This court has the inherent power to enforce the settlement agreement.

The legal standard governing the relief sought by this motion is clear:

> It is well established that courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them. A federal court possesses this power even if that agreement has not been reduced to writing. Before enforcing settlement, the district court must conclude that agreement has been reached on all material terms. The court must enforce the settlement as agreed to by the parties and is not permitted to alter the terms of the agreement.

Brock v. Scheuner Corp., 841 F.2d 151, 154 (6th Cir. 1988) (citations and internal quotation marks omitted).

B. The parties reached an agreement on all material terms.

In this case, the parties reached an agreement on all material terms. The following order was entered with the consent of the parties, and without objection: "This case has been settled. All that remains is final approval of the Detroit City Council. . . ." (Dkt. # 22.) City council gave final approval to the settlement on September 6, 2011. Therefore, as of September 6, 2011, there was a final enforceable agreement.

The terms of the settlement are memorialized in writing. (Exhibits A, B, C, and F.) Although defense counsel has not actually signed the settlement agreement, neither a written instrument nor a signature is required for an agreement to be enforceable. If "the objective acts of the parties reflect that an agreement has been reached," each party is obligated to perform. *Re/Max Int'l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 646 (6th Cir. 2001).

C. The city is in breach of the agreement.

The settlement agreement requires the city to adopt new policies, distribute copies of those policies within 30 days, read those policies aloud to police officers within 30 days, and take other actions regarding those policies within 30 days. (Exhibit F, ¶¶ 6-20.) It also requires the city to pay plaintiffs and their counsel $20,000. (*Id.*, ¶ 21.) The city has not done any of those things.

D. Specific performance is the appropriate remedy.

A settlement agreement is essentially a contract, and state-law contract principles govern a federal court's enforcement of a settlement agreement. *See Limbright v. Hofmeister*, 566 F.3d 672, 674 (6th Cir. 2009); *Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 152 (6th Cir. 1992). Specific performance is an appropriate remedy for breach of contract where a damages remedy is inadequate or impracticable. *See Ruegsegger v. Bangor Twp. Relief Drain*, 127 Mich. App. 28, 31 (1983).

In this case, the court should order specific performance. With respect to paragraphs 6-20 of the settlement agreement (Exhibit F), a damages remedy would be inadequate. In settling this case, the parties agreed on new police policies and training as a component of the settlement because monetary compensation alone would not have accomplished substantial justice. They are entitled to the benefit of that bargain.

As for the monetary component of the settlement (paragraph 21 of the settlement agreement), the court should order immediate payment. Specific performance of the settlement agreement entails plaintiffs dismissing their claims against defendants in exchange for *all* of the city's promises in the settlement agreement—including payment of $20,000 within a reasonable amount of time. It is not reasonable for the city to delay payment for several months without explanation. *See Green v. City of Detroit*, Case No. 09-cv-11589 (E.D. Mich. filed July 22,

2011, Pg ID 275) (Zatkoff, J.) (Exhibit I) (ordering payment of $50,000 settlement within 10 days after four-month delay).

Accordingly, plaintiffs request that the court order the following relief:

(1) specific performance of ¶¶ 6-20 of the settlement agreement (Exhibit F) to begin within 14 days of the court's order.

(2) specific performance of ¶ 21 of the settlement agreement ($ 20,000 payment in full) within 14 days of the court's order.

(3) sworn statements to be filed with the court when performance has begun.

(4) sworn statements to be filed with the court when performance is complete.

II. THE COURT SHOULD IMPOSE SANCTIONS FOR THE EXTRAORDINARY DELAY.

The City of Detroit's dilatory conduct in consummating and complying with settlement agreements is becoming notorious in this district. In *Green*, *supra*, Judge Zatkoff ordered the entire city council to appear before him and explain why it failed to take action on a settlement agreement for nearly three months. *See Green*, *supra* (order filed June 29, 2011, Pg ID 258) (Exhibit I). Judge Zatkoff noted that his was "not the only recent case where City Council has been egregiously dilatory in approving a settlement for a case that stemmed from alleged misconduct by City of Detroit police officers." *Id*., Pg ID 257, slip op. at 3 n.1 (Exhibit I). Similarly, in *Anderson v. Gaines*, Case No. 09-cv-11193 (E.D. Mich. filed Mar. 7, 2011, Pg ID 97) (Exhibit J), Judge Roberts granted the plaintiffs' motion to enforce the settlement agreement and entered judgment for the plaintiffs. Judge Roberts also awarded sanctions based on the city's egregiously dilatory conduct: $ 250 per day that the settlement remained unpaid, retroactive to the date of the plaintiffs' motion. *Id*. (Pg ID 99) (Exhibit J). Those sanctions

amounted to over $20,000 on a $25,000 settlement that, as in this case, went unpaid for approximately eight months. *See id.* (motion filed Dec. 16, 2010, Pg ID 88) (Exhibit J).

A similar sanction is appropriate here. When the parties agreed on a settlement figure, they agreed that payment would be made within a reasonable time. It has been over eight months since an agreement was reached in this case. Such a lengthy delay is inexcusable, and of course any further delay should not be countenanced. Plaintiffs therefore request sanctions as follows:

(1) $ 250 per day since November 11, 2011. (*See supra* p. 4, ¶ 17 and Exhibit G.)

(2) $ 250 for every day the settlement sum is unpaid after this motion is filed.

(3) $ 250 for every day after this motion is filed that performance of paragraphs 6-20 of the settlement agreement (Exhibit F) has not begun.

III. THE COURT SHOULD AWARD ATTORNEY'S FEES.

The court should also award attorney's fees for having to bring this motion. *See Anderson, supra* (order filed Mar. 7, 2011, Pg ID 99) (Exhibit J) (awarding over $ 1,000 in fees under circumstances similar to this case). Attorney's fees may be awarded as a sanction for dilatory conduct. *See* 28 U.S.C. § 1927. Additionally, because this is a case brought under 42 U.S.C. § 1983, attorney's fees should be awarded because plaintiffs will be prevailing parties as a result of this court's order of specific performance. *See Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 451 (9th Cir. 2010); *Doe v. Hogan*, 421 F. Supp. 2d 1051, 1057 (S.D. Ohio 2006).

In this case, plaintiffs' counsel have spent well over six hours preparing this motion at a reasonable hourly rate of $ 250. Plaintiffs therefore request a fee award in the amount of $ 1,500. Plaintiffs are able to submit billing records upon request.

CONCLUSION

For the reasons stated above, plaintiffs request the following relief:

1. Enforcement of the settlement agreement by an order for specific performance.

2. Sanctions for the extraordinary delay caused by defendants.

3. Attorney's fees for having to bring this motion.

Respectfully submitted,

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Dated: December 6, 2011

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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