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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

FRANK ORTIZ,	)	
	)	3:07-CV-0531-BES (VPC)
Plaintiff,	)	
	)	
vs.	)	<b><u>REPORT AND RECOMMENDATION</u></b>
	)	<b><u>OF U.S. MAGISTRATE JUDGE</u></b>
ISIDRO BACA, et al.,	)	
	)	
Defendants.	)	January 15, 2009

This Report and Recommendation is made to the Honorable Brian E. Sandoval, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants’ motion to enforce settlement agreement (#25) which plaintiff opposed (#28). Also before the court is plaintiff’s motion for order enforcing settlement agreement and for sanctions and request for sanctions (#26), which defendants opposed (#31).<sup>1</sup> As more fully set forth below, the court recommends defendants’ motion be granted and plaintiff’s motion be denied.

**I. Procedural History**

Plaintiff Frank Ortiz (“plaintiff”) is an inmate in the custody of the Nevada Department of Corrections (“NDOC”). At all times relevant to this action, plaintiff was housed at Ely State Prison (“ESP”). Plaintiff generally alleges that on June 22, 2007, defendants shackled him in “black box” wrist restraints that were too tight, which caused him to suffer extreme pain and numbness in his left-hand thumb, and that defendants ignored his complaints and requests for medical attention. Plaintiff further alleged that defendants retaliated against him for filing grievances. The court issued a screening order and dismissed plaintiff’s first claim for relief, which alleged denial of access to the court and the underlying factual allegations (#10).

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<sup>1</sup>Plaintiff moved to strike defendants’ opposition to his motion to enforce settlement agreement (#35), and the court denies that motion in a separate minute order.

1 On November 18, 2008, this court convened an early mediation conference in this case,  
2 and the parties reached a settlement (#24). As is the court's custom, the terms of the settlement  
3 were placed on the official court record. The court has reviewed the recording of the hearing to  
4 confirm its recollection of the settlement. The court stated on the record that it would recite the  
5 terms of the settlement and that if any party or counsel required clarification or had any questions,  
6 that person was invited to so advise the court. The court further stated that an essential term of  
7 the settlement was that the parties had a binding agreement that day, and the court would canvass  
8 the parties and counsel to confirm that they understood and agreed to the settlement terms. The  
9 court noted that although the parties had a binding settlement agreement that day, defendants'  
10 counsel was to memorialize those terms in a written settlement agreement for the parties'  
11 signatures (#24). However, the parties understood and agreed that that fact would be no basis to  
12 renege on the settlement.

13 The terms of the settlement stated on the record and agreed among the parties and counsel  
14 were as follows:

- 15 1. The parties understood and agreed that they had a binding settlement  
16 agreement that day, that the agreement would be memorialized in writing.
- 17 2. Plaintiff agreed to dismiss all claims arising from or related to this lawsuit,  
18 whether or not raised in his complaint.
- 19 3. Plaintiff agreed to sign the written settlement agreement and stipulation  
20 and order dismissing this case with prejudice on November 25, 2008,  
21 when defendants' counsel and plaintiff believed they would appear  
22 together at a court hearing in another case.
- 23 4. Defendants agreed to furnish plaintiff with copies of the following  
24 documents filed in another case filed with this court, Case No. 3:01-CV-  
25 0018-HDM-RAM (the "Abrahamson litigation") at the agreed-upon cost  
26 of eight cents (\$.08) per downloaded page:
  - 27 A. The case docket sheet;
  - 28 B. The case scheduling order;
  - C. The most recently filed amended complaint, which was filed prior  
to the issuance of the scheduling order;
  - D. The plaintiff's motion for temporary restraining order, filed in  
February or March 2003;
  - E. The defendants' opposition to the motion for a temporary  
restraining order;
  - F. The defendants' motion for summary judgment filed on March 31,  
2003; and
  - G. The order granting defendants' motion for summary judgment.

- 1 5. Defendants agreed to pay plaintiff the sum of Fifty Dollars (\$50.00) in  
2 consideration of this settlement, which amount would first be applied to  
3 the copying costs for the papers plaintiff identified from the Abrahamson  
4 litigation.
- 5 6. To the extent any balance remained after copying costs, the defendants  
6 would deposit that sum into plaintiff's Trust Two inmate account.
- 7 7. Copying of the documents and the deposit of any balance remaining of the  
8 Fifty Dollars (\$50.00) in plaintiff's Trust Two account was to be  
9 completed no later than December 8, 2008.
- 10 8. The signed stipulation and order dismissing this case with prejudice would  
11 be filed no later than December 10, 2008, and this court would retain  
12 jurisdiction over the settlement until the parties lodged that document with  
13 the clerk of court.
- 14 9. The stipulation and order of dismissal would not be lodged with the clerk  
15 of court until copying of the documents was complete and any balance  
16 remaining was deposited in plaintiff's Trust Two account.
- 17 10. If the documents identified above exceeded Fifty Dollars (\$50.00) at Eight  
18 Cents (\$.08) per page, defendants' counsel would confer with plaintiff to  
19 allow plaintiff to decide which documents he would not have copied so  
20 that he would not exceed the Fifty-Dollar copying limit.
- 21 11. Plaintiff agreed that he did not want defendants' counsel to copy any  
22 medical records that might be attached as exhibits to the documents  
23 identified above.
- 24 12. In anticipation that plaintiff and defendants' counsel would meet in person  
25 on November 25, 2008, at a court hearing, it was agreed that defendants'  
26 counsel would review the requested documents on the court's PACER  
27 system so that in the event the number of copies exceeded Fifty Dollars  
28 (\$50.00) in copying costs, plaintiff could prioritize what documents he  
wanted copied at that time.

19 When the court, counsel and the parties put the settlement terms on the record, the court  
20 inquired of all present at least three times if there were any clarifications or questions concerning  
21 the settlement. In each instance, the plaintiff responded that he had no questions or clarifications,  
22 and he had no additional terms to be placed on the record.

23 Subsequent to the settlement conference, plaintiff and defendants' counsel did not meet  
24 in person on November 25, 2008, since plaintiff did not attend the hearing in person as originally  
25 expected; however, the court clerk allowed the two to speak telephonically before the hearing to  
26 discuss the settlement (#25, Geddes decl.). As set forth in Mr. Geddes's declaration, he and  
27 plaintiff discussed the volume of papers to be copied, which exceeded the agreed-upon Fifty  
28 Dollars (\$50.00). *Id.* Plaintiff identified the documents he wanted to have copied for a total of

1 129 pages for a total cost of \$10.32. *Id.* Having resolved the copying issue, defendants' counsel  
2 faxed the proposed settlement agreement and the stipulation and order of dismissal to plaintiff  
3 that same day. *Id.*

4 In response, plaintiff faxed defendants' counsel the draft agreement and stipulation with  
5 revisions. *Id.* To better understand the revisions, defendants' counsel called plaintiff again on  
6 December 1, 2008, and after a lengthy discussion, defendants' counsel agreed to some, but not  
7 all, of plaintiff's requested changes. *Id.* The agreed-upon language appears in the written  
8 settlement agreement, attached as Exhibit E to defendants' motion (#25).

9 Subsequent to this discussion, plaintiff asked for new consideration before he would sign  
10 the settlement agreement. These items include copying of documents from another of plaintiff's  
11 lawsuits, items of personal property from the prison store, and a color television (#25, Geddes  
12 decl.). Defendants' counsel declined, and this motion followed.

## 13 **II. Discussion and Analysis**

14 Courts have inherent authority to enforce settlement agreements between parties in  
15 pending cases. *See Metronet Services Corp. v. U.S. West Communications*, 329 F.3d 986, 1013-  
16 1014 (9<sup>th</sup> Cir. 2003). (*cert. granted and judgment vacated on other grounds by Quest Corp. v.*  
17 *Metronet Services Corp.*, 540 U.S. 1147 (2004); *Doi v. Halekulani Corporation*, 276 F.3d 1131,  
18 1136-1138 (9<sup>th</sup> Cir. 2002); *In re City Equities Anaheim, Ltd.*, 22 F.3d 954, 957, (9<sup>th</sup> Cir. 1994).  
19 Moreover, a material term of this settlement agreement was that the court retained jurisdiction  
20 over the settlement until the stipulation for dismissal was lodged with the clerk of court.

21 To enforce a settlement agreement, two elements must be satisfied. *Marks-Foreman v.*  
22 *Reporter Pub Co.*, 12 F.Supp 1089, 1092 (S.D.Cal. 1998). First, the settlement agreement must  
23 be complete. *Id.*, citing *Maynard v. City of San Jose*, 37 F.3d 1396, 1401 (9<sup>th</sup> Cir. 1994); *Doi*, 276  
24 F.3d at 1137. Second, the settlement agreement must be the result of an agreement of the parties  
25 or their authorized representatives concerning the terms of the settlement. *Marks-Foreman*, 12  
26 F.Supp at 1092, citing *Harrop v. Western Airlines, Inc.*, 550 F.2d 1143, 1144-1145 (9<sup>th</sup> Cir.  
27 1977), *Doi*, 276 F.3d at 1137-1138. Where parties raise objections after the parties agree to a  
28 settlement, the court may rightfully deny such objections. *Harrop*, 550 F.2d at 1144.

1 \_\_\_\_\_ The court must first consider whether the settlement agreement was complete. *Marks-*  
2 *Foreman, supra*, at 1092. In this case, as in *Doi*, 276 F.3d 1131, the parties spent several hours  
3 in private and joint sessions and agreed to a settlement of this case. The parties and counsel then  
4 reconvened in open court to place the material terms of the agreement into the record (#24). The  
5 parties and counsel stated that they understood and agreed that they had a binding settlement that  
6 day, that the terms could not be changed, even though a written settlement agreement  
7 memorializing the terms would follow. The settlement was complete on November 18, 2008,  
8 when the parties agreed to each material term.

9         The court must next consider whether the settlement agreement was the result of an  
10 agreement of the parties or their authorized representatives. *Marks-Foreman, supra*, at 1092.  
11 There is no dispute that plaintiff and defendants' authorized representative agreed to the stated  
12 terms of the settlement, which were later reduced to writing in the settlement agreement, attached  
13 as Exhibit E to defendants' motion (#25).

14         Plaintiff contends that the settlement agreement was not intended to include portions of  
15 the case that this court dismissed in its screening order (#10) or the dismissal of defendant  
16 Jackson as a party. As noted earlier, the court listened to the entire tape of the hearing during  
17 which the terms of the settlement were placed on the record, and there was no discussion  
18 whatsoever about carving out any claims for relief or allowing plaintiff to retain claims against  
19 any named defendants in the case. The court specifically asked the parties and counsel if they  
20 understood and agreed that *all* claims related to this litigation were to be dismissed, and plaintiff  
21 agreed to that term. There was a full and complete settlement of the entire case.

22         Plaintiff next claims that defendants reneged on the settlement agreement when plaintiff  
23 asked for an adjustment for the copy work. The court finds that it was plaintiff, not defendants,  
24 who sought to modify the settlement terms by attempting to obtain copies of documents never  
25 discussed or identified during the settlement conference. The court asked plaintiff to identify the  
26 documents he sought to have copied in open court, and he did so. Those are the only documents  
27 subject to the copying requirement under the settlement agreement.  
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1 Finally, plaintiff seeks to add new consideration in the form of a color television and other  
2 items of personal property from the prison canteen. These items were not part of the agreed-upon  
3 consideration when the settlement terms were placed on the record, and plaintiff is bound by the  
4 agreement he made on November 18, 2008.

5 **III. Conclusion**

6 The parties agreed to the materials terms of the settlement in the case and placed them on  
7 the court record. Plaintiff received what he bargained for at the early mediation conference as  
8 more fully set forth in the settlement agreement, attached as Exhibit E to defendants' motion  
9 (#25). Defendants did not agree that certain claims or parties to this litigation would survive this  
10 settlement, nor did they agree to the additional consideration that plaintiff now requests. The  
11 bargain is memorialized in the settlement agreement (#25, Exhibit E) and in the court's record,  
12 and defendants stand ready and willing to perform in accordance with the agreement. Plaintiff's  
13 change of heart with respect to the settlement is no basis to set it aside.

14 The court notes that plaintiff has refused to sign the written settlement agreement (#25,  
15 Exhibit E), and the stipulation for dismissal of this case with prejudice. The court anticipates that  
16 plaintiff will continue to refuse to sign these settlement documents. Therefore, this court  
17 recommends that the District Court grant defendants' motion to enforce the settlement (#25) and  
18 order that the settlement agreement attached as Exhibit E to defendants' motion be ratified as a  
19 binding agreement. The court further recommends that the defendants be ordered to perform as  
20 agreed in the settlement agreement (Ex. E), and the District Court order this case dismissed with  
21 prejudice with the parties to bear their own costs and attorney's fees. The court further  
22 recommends that the District Court deny plaintiff's motion for order enforcing the settlement  
23 agreement (#26).

24 The parties are advised:

25 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,  
26 the parties may file specific written objections to this report and recommendation within ten days  
27 of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and  
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1 Recommendation” and should be accompanied by points and authorities for consideration by the  
2 District Court.

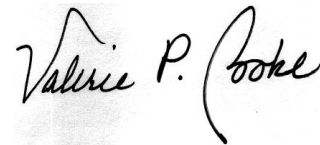
3 2. This report and recommendation is not an appealable order and any notice of appeal  
4 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court’s  
5 judgment.

6 **IV. Recommendation**

7 **IT IS THEREFORE RECOMMENDED** that the District Court enter an order as  
8 follows:

- 9 1. **GRANTING** defendants’ motion to enforce the settlement (#25), order that the  
10 settlement agreement attached as Exhibit E to defendants’ motion be ratified as  
11 a binding agreement, and attach Exhibit E to its order for the court’s record;  
12 2. **ORDERING** defendants to perform under the terms of the settlement agreement  
13 as outlined in Exhibit E;  
14 2. **DISMISSING** this case **with prejudice** with the parties to bear their own costs  
15 and attorney’s fees; and  
16 3. **DENYING** plaintiff’s motion for order enforcing the settlement agreement (#26).

17 **DATED:** January 15, 2009.

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19 UNITED STATES MAGISTRATE JUDGE  
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