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7 **United States District Court**
8 **For The District Of Arizona**

9 Heidi Powell, an Arizona resident,

10 Plaintiff,

11 v.

12 Kent Powell and Heidi Powell, husband
13 and wife,

14 Defendants.

Case No. 2:16-cv-02386-SRB

**Motion to Enforce Settlement Against
Defendants**

(Assigned to the Hon. Susan R. Bolton)

15
16 Plaintiff Heidi Powell hereby moves the Court to enforce the settlement she
17 reached with Defendants Kent and Heidi Powell. The parties reached a settlement to
18 mutually dismiss the lawsuit with prejudice, and Defendants have purported to revoke
19 their assent. This Motion is supported by the following Memorandum of Points and
20 Authorities.

21
22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. SALIENT FACTS**

24 In a letter dated September 9, 2016, Plaintiff offered a mutual dismissal of the
25 lawsuit. **Exhibit A.** Defendants responded that they would only dismiss if it was with
26 prejudice. **Exhibit B.** Plaintiff responded by email in agreement to the terms, and, in

1 execution of the agreement, provided the appropriate joint motion to dismiss. **Exhibit**
2 **C.** Defendants thereafter attempted to change the terms of the joint dismissal and have
3 since purported to revoke their initial assent entirely. **Exhibit D.**

4 **II. ARGUMENT**

5 **A. The Parties Have a Binding Agreement, and Defendants Cannot** 6 **Repudiate.**

7 Federal courts apply state law principles when interpreting contracts. *Cooper v.*
8 *QC Fin. Services, Inc.*, 503 F. Supp. 2d 1266, 1276 (D. Ariz. 2007); *Haugland v.*
9 *Winnebago Indus.*, 327 F. Supp. 2d 1092, 1096 (D. Ariz. 2004).

10 The ordinary rules of contract apply to the parties' settlement agreement. *See*
11 *Lamb v. Arizona Country Club*, 124 Ariz. 32, 34,601 P.2d 1068, 1070 (App. 1979)
12 (holding that contract principles applied to enforceability of negotiated settlement). "It
13 is elementary that before there can be a binding contract there must be mutual consent
14 of the parties but once it is mutually agreed between them the contract [is] formed and is
15 binding according to its terms." *Spellman Lumber Co. v. Hall Lumber Co.*, 73 Ariz. 322,
16 325, 241 P.2d 196, 198 (1952). Mutual assent arises where there has been an offer and
17 an acceptance of the offer. *Id.* (holding that contract was formed when one party
18 formally accepted the offer of the other by mailing a written confirmation). Moreover,
19 pursuant to LRCiv. 83.7, an agreement in writing signed by counsel is binding between
20 the parties.

21 Plaintiff extended a settlement offer to mutually dismiss the lawsuit by sending a
22 letter through counsel. **Exhibit A.** Thereafter, Defendants extended a counteroffer to
23 mutually dismiss *with prejudice* through a letter signed by their counsel. **Exhibit B.**
24 And, Plaintiff's counsel responded by email that the counteroffer was accepted and
25 provided the appropriate joint motion in execution of the agreement. **Exhibit C.** The
26 agreement is therefore binding and enforceable between the parties. *See id.*; *see also*
Hays v. Fischer, 161 Ariz. 159, 164, 777 P.2d 222, 227 (App. 1989) ("[W]here the
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1 client expressly so authorizes the attorney, the attorney may enter into an agreement on
2 the client's behalf compromising a lawsuit, and his action in doing so binds the client.”).
3 However, after the binding agreement was reached, defense counsel attempted to alter
4 the agreement by demanding a new material term, and, although Plaintiff had not yet
5 responded to request for the additional term, Defendant then purported to revoke
6 Defendants' assent altogether. **Exhibit D.** But the agreement was binding, and
7 Defendants could not revoke the agreement.

8 Furthermore, Defendants cannot claim that their lawyers did not have permission
9 to settle the matter on their behalf. *See United Liquor Co. v. Stephenson*, 84 Ariz. 1, 5,
10 322 P.2d 886, 888 (1958) (“Upon making a settlement within the apparent scope of his
11 authority, the principal whom he represents is bound thereby, and cannot subsequently
12 shelter himself behind a restriction upon the authority of the agent, of which the party
13 dealing had no notice or reason to believe existed, and which was not disclosed at the
14 time of the transaction.”) (internal quotations and citations omitted); *Canyon*
15 *Contracting Co. v. Tohono O’Odham Hous. Auth.*, 172 Ariz. 3 89, 392, 837 P.2d
16 750,753 (App. 1992) (settlement agreement entered into based on apparent authority of
17 counsel to enter into the agreement would be enforceable upon showing that party's
18 conduct allowed other party reasonably to conclude that counsel was authorized to settle
19 the matter, that other party relied on counsel's apparent authority, and that the reliance
20 was reasonable); *accord Perry v. Ronan*, 225 Ariz. 49, 51-53, 234 P .3d 617, 619-621
21 (App. 2010) (where party's counsel conveyed offer but failed to include deadline, and
22 offer was accepted by other party who had no reason to know that deadline had passed
23 and that offeror had fired his attorney, settlement agreement was created
24 notwithstanding offeror's argument that attorney did not have authority to extend offer
25 beyond the deadline).

26

1 Neither Defendants nor their counsel advised Plaintiff that defense counsel
2 lacked authority to settle this matter. Plaintiff's reliance on the authority of defense
3 counsel was reasonable.

4 Therefore, in an exchange of letters between counsel, the parties entered into a
5 binding agreement to mutually dismiss the current lawsuit with prejudice. Plaintiff
6 respectfully requests that the Court enforce the settlement agreement between the
7 parties and dismiss the case with prejudice.

8 **B. The Court Should Award Plaintiff her Fees**

9 This Motion arises out of contract for purposes of awarding fees under A.R.S.
10 §12-341.01(A), and Plaintiff respectfully requests that the Court enter such award on its
11 behalf. *See Hays*, 161 Ariz. at 166, 777 P.2d at 229; *Lamb*, 124 Ariz at 34, 601 P.2d at
12 1070. The Court should also award Plaintiff her fees under A.R.S. § 12-349, as defense
13 counsel has no reasonable justification for repudiating the settlement agreement.
14 Defense counsel's conduct merely compounds the proceedings and squanders both
15 public and private resources. Therefore, an award of attorney fees is justified, both to
16 reimburse the expense of enforcing the agreement and the continued expense of defense
17 counsel' aggressive litigation tactics that would not have been incurred if not for the
18 purported repudiation.

19 **III. CONCLUSION AND RELIEF REQUESTED**

20 For the foregoing reasons, Plaintiff Heidi Powell respectfully requests that the
21 Court enter an Order enforcing the settlement agreement—or alternatively requiring
22 Defendants and their counsel to show cause why it should not be enforced—and
23 awarding Plaintiff her reasonable attorney fees and costs under A.R.S. §§ 12-341.01 &
24 12-349.

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1 DATED this 3rd day of October, 2016.

2
3 **Jaburg & Wilk, P.C.**

4
5 /s/Maria Crimi Speth

6 Maria Crimi Speth

7 Laura Rogal

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11
12 *Certificate of Service*

13 I hereby certify that on October 3, 2016, I electronically transmitted the attached
14 document to the Clerk's Office using the CM/ECF System for filing, and for transmittal
15 of a Notice of Electronic Filing to the following CM/ECF registrants:

16 David E. Weslow
17 Wiley Rein LLP
18 1776 K Street NW
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20 Ari Scott Meltzer
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25 /s/Debra Gower
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