

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 16-cv-02002-WJM

OPEN STUDIOS, INC, a Colorado, Nonprofit Corporation

Plaintiff,

v.

BOULDER METALSMITHING ASSOCIATION, a Colorado, Nonprofit Corporation

Defendant.

DEFENDANT’S REPLY TO MOTION TO ENFORCE SETTLEMENT AGREEMENT

Defendant, Boulder Metalsmithing Association (BOMA) in reply to Plaintiff’s Motion to enforce the “draft” settlement agreement states:

INTRODUCTION

The ink barely dried on the “draft” settlement agreement when Open Studios started demanding that BOMA comply with it. *See, Exhibit A.* But, BOMA sent three emails to Open Studios before it finally received the specifics of any alleged derogatory remarks. *See, Exhibits A and B and Motion, Exhibit 5.* Once the remarks were identified to BOMA, BOMA removed them (within 24 hours). *See, Exhibits D1 and D2 and E.* No further posts or derogatory remarks were specifically identified by Open Studios. In fact, Open Studios refused to provide any further specific information to BOMA. It was not until Open Studios filed this Motion that any further specific alleged disparaging information was provided to BOMA. Open Studios’ Motion is unfounded and frivolous because it not supported with any affidavits or declarations supporting its

facts or exhibits. Nor is it supported by any law with respect to the material it claims to be disparaging.

FACTS

In the late afternoon of October 13, 2016, the parties engaged in confidential settlement discussions with Magistrate Judge Mix. The discussions resulted in the parties agreement to certain terms which were provided in a “DRAFT SETTLEMENT AGREEMENT” and were to be finalized in a “Final Settlement Agreement” between the parties. *See, Motion, Exhibit 1*. On October 14, 2016, the day after the settlement mediation with this Court, BOMA received an email from a legal assistant, Ms. Bridgeforth, with Mr. Bernstein’s office telling Ms. Jahn to clarify to BOMA its mis-characterization of the “draft” settlement agreement as a “proposal” and further requesting all defamatory posts to be taken down. *Declaration of Kirstin M. Jahn (“Jahn Decl.”) at ¶2, Exhibit A*. BOMA’s attorney, Ms. Jahn advised Ms. Bridgeforth that she would be happy to address any disparaging remarks with a lawyer from Mr. Bernstein’s office and requested the alleged disparaging remarks be identified so she could review and respond to them directly. *Id.*

On October 17, 2016, Mr. Bernstein sent Ms. Jahn an email, chastising Ms. Jahn for refusing to conduct legal discussions with a non-lawyer, providing a general request to take down all alleged derogatory posts as part of the “Final” Settlement Agreement, and noted his objection to BOMA’s classification of “proposed” settlement rather than “draft” settlement. *Jahn Decl. at ¶3; Motion at Exhibit 5*. In response, Ms. Jahn asked Mr. Bernstein to provide more specifics with respect to the alleged derogatory posts and

advised him that his objection to BOMA's characterization of the "proposed" verses "draft" settlement was overreaching. *Id.*

On October 21, 2016, Ms. Jahn had a conversation with yet another attorney affiliated with Mr. Bernstein's office, Ms. Kate Merlin. *Id.* at ¶4 During that conversation, Ms. Jahn once again asked that any alleged disparaging remarks be specifically identified by date and reference (because there were hundreds of posts on BOMA's facebook page. *Id.* At that time, Ms. Merlin stated she would get the exhibits so she could provide the specific information which was then provided to Ms. Jahn. *Id.* The information identified was then summarized in an email to Mr. Bernstein. *Id.* The purpose of the summary email was to ensure BOMA received all of the alleged disparaging posts which Open Studios desired to be removed. *Id.* The information was identified by Open Studios as facebook posts dated 10/13, 10/12 and 10/10 and some commentary on BOMA's legal defense webpage. *Id.*, *Exhibit B.* In that email, Ms. Jahn further requested that Open Studios identify any other alleged derogatory information so that BOMA could address it. *Id.* BOMA did not receive any further instances of alleged disparagement from Open Studios. *Id.*

Less than 24 hours later, on or before October 22, 2016, BOMA removed all the posts which Open Studios specifically identified as disparaging. *Id.* at ¶5.

On October 25, 2016, BOMA provided Open Studios with a draft of the final settlement agreement for "review and comments." *Id.* at ¶6, *Exhibit C.* BOMA never received any changes to this draft from Open Studios. *Id.*

On October 25, 2016, Ms. Jahn received an email from Ms. Merlin

acknowledging the removal of certain posts and providing further general comment about disparaging remarks without providing specific dates of posts or identifying the specific language of the alleged disparaging remarks. *Id.* at ¶7, Exhibit D1. Ms. Jahn responded in an email which again requested the specific comments which were considered disparaging and suggested providing a link to those references. *Id.* BOMA never received any more specific information from Open Studios. *Id.*

On October 26, 2016, Ms. Jahn called Ms. Merlin for a pre-scheduled conference call. *Id.* at ¶8. During that call, Ms. Jahn reiterated her request to have Open Studios provide details of any further alleged disparaging remarks. *Id.* at ¶9. Ms. Merlin refused to identify any further alleged disparaging information. *Id.* Instead, Ms. Merlin stated she would not scour the internet to find any more disparaging remarks, but she knew more were “out there” and began arguing in generalities about BOMA’s alleged disparagement, about individual facebook pages which contained posts about open studios, about how linking to press articles was disparaging and how BOMA’s future intent to not abide by the terms of any settlement agreement was evidenced by the terms of its draft final settlement agreement. *Id.* The call was abruptly terminated by Ms. Jahn due to Ms. Merlin’s argumentative tone and rude and inappropriate remarks. *Id.*

That same day, on October 26, 2016, a follow up email was sent to Ms. Merlin which once again, asked for any further specific instances of alleged disparagement so BOMA could address them. *Id.* at ¶10, Exhibit D2.

On October 27, 2017 another email was sent by Ms. Jahn to Mr. Bernstein

confirming the identified disparaging information was removed and requested Mr. Bernstein to provide legal support for his claim that links to press articles and individual facebook pages (not BOMA's facebook page) are somehow disparaging and part of the draft settlement terms. *Id. at ¶ 11, Exhibit E.* No further information was provided by Open Studios to BOMA. *Id.*

In addition, in the October 27, 2016 email to Mr. Bernstein, Ms. Jahn attempted to explain the reasonable nature of some items in the settlement agreement (e.g. notice and cure provisions) and offered to consult back with the court to assist in finalizing the agreement. *Id. at 12.*

Open Studios never provided any further specific instances of disparagement, or any case law in support of their position that certain information was disparaging. *Id. at 13.* Nor did Open Studios provide a redlined version of the settlement agreement. *Id.* Instead, Open Studios filed this Motion to enforce a "draft" settlement agreement which included alleged disparaging information which was not previously identified to BOMA by Open Studios. *Id.* BOMA has temporarily removed most of the additional posts considered disparaging by Open Studios. *Id. at 14.*

ARGUMENT

This motion should be denied for four reasons. First, the motion is premature because a Final Settlement Agreement has not been reached. Usually, the parties clarify language in a draft agreement which results in a final settlement agreement. Second, all discussions during the mediation are confidential which means that until a Final Settlement Agreement is reached, all negotiations and drafts are confidential. By

filing this motion prematurely and including a draft agreement executed during confidential settlement discussions, Open Studios violated the terms of the Settlement conference. Third, Open Studios refused to provide BOMA with the specific identification of alleged disparaging posts contained in this Motion making it impossible for BOMA to address them prior to Open Studios' filing of this Motion. Fourth, Open Studio's Motion is filled with accusations, innuendos and conclusions which are unsupported by affidavits, declarations or legal authority.

Premature Motion

Although the parties signed a "DRAFT SETTLEMENT AGREEMENT", the terms of settlement were to be finalized in a "Final Settlement Agreement" between the parties. *See, Motion, Exhibit 1.* Until a final settlement agreement is reached, there is no agreement for this Court to enforce.

Confidential Mediation

The Court mediation was confidential. All communications which took place during the settlement negotiations were confidential. This would include any draft settlement agreements which took place during that confidential meeting. And any drafts of a final settlement agreement provided by the parties. Open Studios has violated the terms of the Confidential Mediation by publicizing the draft settlement agreement and the draft of the final settlement agreement.

The "Draft" Settlement Agreement

On six occasions, BOMA requested Open Studios identify with specificity all alleged remarks it considered disparaging so that it could review and respond to them.

The only information which was specifically identified by BOMA were facebook posts dated October 10, 12 and 13, 2016 and some commentary on BOMA's legal defense web page. This was confirmed in an email to Mr. Bernstein's office with the specific intent of ensuring all alleged disparaging remarks could be addressed by BOMA. Even without a final settlement agreement in place and even though BOMA disagreed with Open Studios characterization that some of the posts were disparaging, BOMA removed the information specifically identified by Open Studios. Interestingly, Open Studios republished the posts which were deleted by BOMA over a week before this Motion was filed - the information deleted includes Exhibits 6a and 6b. So, Open Studios disparagement is self inflicted because it has republished information which it considered disparaging and took pains to argue the effect of those disparaging remarks (which again were deleted a week prior) in its brief. *See, Motion at p. 3.*

Other than the three dates and webpage identified, Open Studios did not provide BOMA with the specifics of any other remarks it considered disparaging (e.g. dates, links or specific language). Without being provided any further specific instances of disparagement, BOMA was unable to review and address Open Studios' general, sweeping claims that more disparagement was "out there."

Open Studios claimed BOMA should take down anything that mentioned "Open Studios." *See, Exhibit D1 and Motion at p.4.* But, that is not even what the "draft" settlement agreement requires. Further, no where in its motion does Open Studios identify how any of the Exhibits attached to its motion are disparaging because Open Studios did not provide any legal support demonstrating that any of the Exhibits (or portions thereof) are disparaging.

In sum, Open Studios motion is premature because no final settlement has been reached. Open Studios breached its agreement to keep the settlement discussions confidential because the “draft” settlement agreement was part of the confidential settlement discussions by the parties. The same holds true for the draft of the Final Settlement Agreement prepared by BOMA.

Further BOMA requested on at least six occasions for Open Studios to provide specific identification of remarks it considered disparaging, but did not receive any further information until Open Studios filed this Motion. Most of the posts referenced in Open Studios’ Motion have been temporarily taken down; but, BOMA does not consider many of them to be disparaging.

Open Studios motion should be denied as a matter of law because Open Studios has failed to support its motion with specific instances of disparagement, failed to provide any support, foundation or authentication for its exhibits, failed to provide any factual support via a declaration or affidavit for its motion and failed to provide any law in support of its general claims and arguments of disparagement. Rather, the Motion is fraught with innuendos, accusations and conclusions which are difficult to follow and are unsupported by facts and law and should be denied.

CONCLUSION

For the foregoing reasons, Open Studios motion should be denied and BOMA should be entitled to its attorneys fees and costs in responding to this frivolous, unsupported and unfounded motion.

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Dated: November 15, 2016

Respectfully submitted,

JAHN & ASSOCIATES, LLC

s/Kirstin M. Jahn

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Attorney for Defendant

Boulder Metalsmithing Association

CERTIFICATE OF SERVICE

I certify that on November 15, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which sent notification of such filing to Plaintiff's counsel at the following email address:

Howard Bernstein
howard@bernsteinattorney.com

Dated: November 15, 2016

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