

**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.

---

**PLAINTIFF’S MOTION TO ENFORCE SETTLEMENT AGREEMENT**

---

**COMES NOW** the Plaintiff, Open Studios, Inc. (“Open Studios”), who files this Motion to Enforce Settlement Agreement.

**DISCUSSION**

On October 13, 2016, the parties held a settlement conference conducted by Magistrate Judge Mix, during which the parties reached a settlement. The principal terms of the settlement were reduced to writing, in a document prepared by the Court and titled Draft Settlement Agreement (the “Settlement Agreement”), which representatives for both Open Studios and Boulder Metalsmithing Association (“BoMA”) and their respective counsel signed. (Ex. 1) Beth Merkel, Executive Director of BoMA, executed the Settlement Agreement on behalf of BoMA. The Settlement Agreement, paragraph 2, states in relevant part, “The parties agree not to disparage each other.” The Settlement Agreement, paragraph 3, states in relevant part, “Defendant agrees to only use the phrase ‘open studio’ (no capital letters) in digital and print media and/or advertising to indicate that its metalsmithing art studio is open to the public and/or various artists for any reason (e.g., learning, practicing, creating, displaying and/or studying art).”

Also on October 13, 2016, Magistrate Judge Mix entered a Minute Entry for Settlement that states, in relevant part, that “A settlement conference was held on this date, and a settlement was reached as to All claims in this action.” (Ex. 2)

It has been two weeks since the execution of the Settlement Agreement and the entry of the Minute Entry for Settlement. During that time, counsel for Open Studios has been aware that BoMA and Ms. Merckel are continuing to disparage Open Studios in violation of the Settlement Agreement. Specific and numerous examples of this disparagement are provided below. BoMA also continues to use the phrase “Open Studios” in capital letters and in bold print on its Legal Defense tab of its website in violation of the Settlement Agreement. (Ex. 3) In addition, counsel for Open Studios has become aware that neither BoMA nor its counsel believe that the Settlement Agreement is valid, with BoMA characterizing the Settlement Agreement as a “proposal” on its Facebook page. (Ex. 4) When undersigned counsel wrote to BoMA’s counsel to express concern over BoMA’s mischaracterization of the Settlement Agreement as a mere proposal, BoMA’s counsel, who signed the Settlement Agreement, responded that she would not “banter over semantics. You call it a ‘draft’ settlement agreement; BoMA calls it a ‘proposal’”. The terms are synonyms!” (exclamation mark in the original) (Ex. 5)

Since the parties have agreed in the Settlement Agreement not to disparage each other, Open Studios has chosen not to mention BoMA on social media rather than post something that BoMA might consider disparaging. By contrast, BoMA has engaged in a concerted campaign to disparage Open Studios via social media, even taking the extraordinary step of paying to sponsor a disparaging blog post that falsely claims that Open Studios has no intention of honoring the results of the settlement conference. (Ex. 6a) Although BoMA finally removed the link to this disparaging post earlier this week, that occurred only after the blog post was already widely circulated as

BoMA's counsel stalled by claiming she did not understand why Open Studios considered the blog post disparaging. It should be noted that since Open Studios is the only party honoring the terms of the Settlement Agreement, BoMA's paid sponsorship of a blog post that indicates otherwise is disparaging to Open Studios.

At 1:30pm on October 13, 2016, just an hour before the settlement conference began, a post on BoMA's Facebook page described organizations that use the term "open studio" on their websites and then asks "Will Open Studios will (sic) sue them all?" (Ex. 6b) Since the instant lawsuit is the only lawsuit that Open Studios has initiated in its 21 years of existence, characterizing Open Studios as a litigious organization is disparaging. This disparaging characterization of Open Studios also appeared on BoMA's website under its Legal Defense tab which has since been revised to remove that characterization. (Ex.6c) Nonetheless, when counsel for Open Studios requested that BoMA take down this disparaging post in light of the Settlement Agreement, counsel for BoMA claimed she was unclear why Open Studios considered the post disparaging. (Ex. 5) At the time undersigned counsel made this request, Open Studios was unaware of the extent of the disparagement by BoMA and Ms. Merckel. Open Studios is now aware of numerous disparaging posts made by BoMA (Ex. 7) and Ms. Merckel (Ex. 8), some of which still have not been removed. Some were removed just a few days ago from BoMA's and Ms. Merckel's Facebook page. (Ex. 6a-6f) Although one post appears to have been removed from BoMA's Facebook page, it can still be viewed as a "Top Public Post" when performing a Facebook search for Boulder Metalsmithing Association. (Ex. 9) In addition, a disparaging comment to post on October 6 from BoMA's Facebook page (Ex. 6d) was removed after repeated requests from Open Studios to remove all references to Open Studios. However, by not removing all posts, BoMA and Ms. Merckel continue to provide a forum for their followers to post disparaging comments.

Counsel for Open Studios is concerned that BoMA's characterization of the executed Settlement Agreement as being a mere "proposal" is being used as a misguided excuse to continue to post disparaging information about Open Studios in violation of the Settlement Agreement and to continue using "Open Studio" on its website. Nowhere has the Court stated that BoMA is free to continue to disparage Open Studios and otherwise violate the Settlement Agreement until the case is dismissed. Rather, the actual wording of the Settlement Agreement is, "The parties agree not to disparage each other." Open Studios is the only party that is honoring the language of the Settlement Agreement.

Since the parties executed a Settlement Agreement and the Court entered its Minute Entry for Settlement, Open Studios considers the lawsuit settled. From Open Studios' perspective, filing a Stipulation of Dismissal with Prejudice should be a mere formality. Accordingly, seeing that BoMA considers the Settlement Agreement to be a mere "proposal" raises serious concerns about BoMA's intentions. Moreover, BoMA continues to use "Open Studio" in capital letters on its website. (Ex. 3), which is a clear breach of the Settlement Agreement and was the basis of the instant lawsuit. Two weeks after execution of the Settlement Agreement, and despite requests from Open Studios' counsel, BoMA is acting as if the Settlement Agreement is a non-operative "proposal," the terms of which are not binding. This is borne out by BoMA's insertion of the following language concerning the prohibition against disparagement in paragraph 8 of the draft Final Settlement Agreement which BoMA's counsel prepared pursuant to the Settlement Agreement, paragraph 5: "This section is not intended nor should it violate either party's right under the First Amendment of the U.S. Constitution." (Ex. 10) The signed Settlement Agreement clearly states that neither party shall engage in disparagement of the other. This provision is clearly a restriction on both parties' First Amendment rights, a provision that was agreed to and signed by

both parties. BoMA's attempt to render that provision meaningless evinces their desire to continue to engage in this type of public disparagement, which is consistent with their refusal to remove all references to Open Studios even though undersigned counsel has made numerous requests that they do so. Carving out a First Amendment exception to the parties' explicit agreement not to disparage one another is a recipe for a defamation suit.

Undersigned counsel certifies that his office attempted to confer with counsel for BoMA but was unable to do so because counsel for BoMA hung up and then failed to call back in response to a written request to confer. (Ex. 11) Given that counsel for Open Studios has been trying for over a week to get BoMA to honor the Settlement Agreement, BoMA's counsel knows the content of this Motion. BoMA's counsel indicated by email, "If we are at a stalemate, then I suggest we contact the Court to assist in finalizing he (sic) parties' agreement." (Ex. 12)

### **ARGUMENT**

As the matter is still pending before the Court, the Court has the power to enforce a settlement agreement between the parties.

"A trial court has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it." *United States v. Hardage*, 982 F.2d 1491, 1496 (10<sup>th</sup> Cir. 1993)... Issues involving the formation and construction of a purported settlement agreement are resolved by applying state contract law. *United States v. McCall*, 235 F.3d 1211, 1215 (10<sup>th</sup> Cir. 2000).

Shoels v. Klebold, 375 F.3d 1054, 1060 (10<sup>th</sup> Cir. 2004).

Under Colorado law, a settlement is achieved when the negotiations are sufficiently definite and final to create a binding contract. See id. In the instant case, there can be no doubt that the parties entered into a settlement agreement. All parties signed the agreement in the presence of United States Magistrate Judge Mix. Thus BoMA is bound by the Settlement Agreement and so a

motion to enforce is appropriate.

As noted in the Discussion section, the agreement signed by the parties in front of Magistrate Judge Mix explicitly described all of the provisions unique to this Settlement Agreement including that “the parties agree not to disparage each other.” BoMA’s counsel’s uncooperative response to Open Studios’ request to comply with the Settlement Agreement, asserting that the Settlement Agreement is a mere proposal and feigning ignorance over what constitutes disparagement, leaves Open Studios worried that BoMA will never honor its obligations under the Settlement Agreement absent an order from the Court. This concern is reinforced by BoMA’s proposed insertion of First Amendment language into the Final Settlement Statement that would vitiate the agreement by the parties not to disparage each other.

BoMA’s refusal to remove all disparaging Facebook posts and its ongoing requests for legal defense assistance on its website and Facebook page defy the terms of the Settlement Agreement and are calculated to damage Open Studios, the only party that is actually honoring the terms of the Settlement Agreement. As this Court still maintains jurisdiction over this action, it is appropriate for the Court to enforce the Settlement Agreement. Accordingly, Open Studios requests that the Court order BoMA and its Executive Director who executed the Settlement Agreement on behalf of BoMA to immediately discontinue using capital letters to refer to their “open studio” hours. Furthermore, as neither BoMA nor Ms. Merckel are willing to concede that BoMA and Ms. Merckel are disparaging Open Studios, this Court should order that BoMA and Ms. Merckel remove any existing references to Open Studios from their Facebook pages and their website. Finally, since no Final Settlement Agreement should contain language that is diametrically opposed to the non-disparagement language in the Draft Settlement Agreement, this Court should order that the language of the Final Settlement Agreement be consistent with what the

parties agreed to in the Draft Settlement Agreement.

**CONCLUSION**

**WHEREFORE**, Open Studios asks that the Court grant this Motion to Enforce Settlement Agreement and therefore instruct BoMA and its Executive Director to promptly remove all posts on BoMA's and Ms. Merckel's Facebook pages and pages on their website that disparage Open Studios, remove all references to the Draft Settlement Agreement as a "proposal" and present Open Studios with a draft Final Settlement Agreement that is consistent with the Draft Settlement Agreement.

**DATED** this 27th day of October, 2016.

Respectfully submitted,

HOWARD O. BERNSTEIN, P.C.

By: */s/ Howard O. Bernstein*  
Howard O. Bernstein, Atty. No. 24476  
Amber J. Reed, Atty. No. 39265  
Kate Merlin, Atty. No.45672  
Howard O. Bernstein, P.C.  
1111 Pearl Street, Suite 203  
Boulder, CO 80302  
Tel: (303) 494-3321  
Fax: (303) 544-5955  
e-mail: [howard@bernsteinattorney.com](mailto:howard@bernsteinattorney.com)

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a copy of the foregoing **PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT AGREEMENT** was served via CM/ECF to the following on this 27<sup>th</sup> day of October, 2016:

Jahn & Associates, LLC  
Kirstin M. Jahn  
1942 Broadway, Suite 314  
Boulder, CO 80302  
Email: Kirstin@jahnlaw.com

ATTORNEY FOR DEFENDANT

/s/ Sara B. Bridgeforth