ORDERED in the Southern District of Florida on March 6, 2014.

Paul G. Hyman, Chief Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re:	**Case No.: 09-36379-BKC-PGH** **Case No.: 09-36396-BKC-PGH**
Palm Beach Finance Partners, L.P. **Palm Beach Finance II, L.P.,**	**(jointly administered)**
Debtors.	**Chapter 11**

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FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION TO APPROVE SETTLEMENT (ECF NO. 1704)

THIS MATTER came before the Court for an evidentiary hearing on December 5, 2013, ("Trial") on the *Motion to Approve (1) Settlement with the Ashton Revocable Living Trust and Marie Ashton and (2) Payment of Contingency Fee* (the "Motion to Approve Settlement") (ECF No. 1704)[1] filed by Barry E. Mukamal (the

[1] Unless otherwise noted, all ECF numbers refer to court documents filed in Case No. 09-36379-BKC-PGH.

"Liquidating Trustee" or "L.T."), in his capacity as liquidating trustee for the Palm Beach Finance Partners Liquidating Trust and the Palm Beach Finance Partners II Liquidating Trust. The Ashton Revocable Living Trust (the "Ashton Trust") and Marie Ashton ("Ms. Ashton," and together with the Ashton Trust, the "Ashton Parties") filed a *Response and Memorandum of Law in Opposition to the Trustee's Motion to Approve Settlement* (the "Objection") (ECF No. 1720). Based upon the evidence received by the Court at Trial, the arguments of the parties, and the relevant law, the Court makes the following findings of fact and conclusions of law and finds that the parties entered into an enforceable oral settlement agreement.

FINDINGS OF FACT

I. Background

Palm Beach Finance Partners, L.P. and Palm Beach Finance II, L.P. (the "Debtors") invested with Thomas Petters ("Petters") and Petters Company, Inc. ("PCI") in what was eventually revealed to be a Ponzi scheme (the "Petters Ponzi Scheme"). After the collapse of the Petters Ponzi Scheme, PCI was placed into a federal receivership and Douglas A. Kelley was appointed as PCI's federal receiver. Mr. Kelley eventually filed a voluntary bankruptcy petition on behalf of PCI in the United States Bankruptcy Court for the District of Minnesota (the "Minnesota Bankruptcy Court") and was appointed as trustee for PCI (the "PCI Trustee," and together with the Liquidating Trustee, the "Trustees").

On November 30, 2009, the Debtors filed their own voluntary chapter 11 bankruptcy petitions in the United States Bankruptcy Court for the Southern District of Florida. On October 21, 2010, the Court entered its *Order Confirming Second Amended Joint Chapter 11 Plan of Liquidation* (the "Confirmation Order") (ECF No. 444), which confirmed the Second Amended Joint Plan of Liquidation (the "Confirmed Plan") (ECF No. 245), created the Palm Beach Liquidating Trusts, and appointed the Liquidating Trustee.[2]

On November 27, 2011, the Liquidating Trustee commenced an adversary proceeding against the Ashton Parties (the "Ashton Adversary Proceeding"), alleging unjust enrichment and seeking, pursuant to Minnesota's Uniform Fraudulent Transfer Act ("Minnesota's UFTA"), avoidance and recovery of alleged fraudulent transfers made by Metro Gem, Inc. ("MGI") to or for the benefit of the Ashton Parties. *See* Case No. 11-02995-ADV-PGH, ECF No. 1. The factual allegations and legal theory behind the Ashton Adversary Proceeding, and others like it,[3] are that: (1) Frank Vennes ("Vennes") procured investors for Petters and had these investors loan money to MGI, which in turn, loaned money to PCI or a PCI affiliate; (2) some of these MGI investors, including the Ashton Parties, were "net winners"; (3) the net winnings of these MGI investors—funds received from MGI in excess of the their principal investment—constitute fraudulent transfers;

[2] The United States Trustee appointed the Liquidating Trustee as chapter 11 trustee for the Debtors. *See* ECF No. 107.

[3] As part of his role under the Confirmed Plan, the Liquidating Trustee instituted numerous "clawback" and "avoidance" adversary proceedings, many of which sought to avoid transfers from Frank Vennes ("Vennes") and Metro Gem, Inc. ("MGI") to third-party transferees.

and (4) the Debtors, as creditors of MGI, have standing to avoid and recover these transfers pursuant to Minnesota's UFTA and § 541 of the Bankruptcy Code. The PCI Trustee has fraudulent transfer claims against the Ashton Parties based upon a similar theory. Collectively, the Liquidating Trustee and the PCI Trustee assert that the Ashton Parties received $858,020.00 in alleged fraudulent transfers from MGI.

After the commencement of the Ashton Adversary Proceeding, the Liquidating Trustee and the PCI Trustee entered into an agreement to mediate jointly with the Ashton Parties and numerous other transferees of MGI and Vennes and to share and allocate any recoveries procured as a result of these mediations (the "Mediation and Allocation Agreement"). *See Mot. to Compromise Controversy with Douglas A. Kelley* (ECF No. 1282); *Order Granting Mot. to Compromise Controversy with Douglas A. Kelley* (ECF No. 1350). In accordance with the Court's *Order Setting Filing and Disclosure Requirements for Pretrial and Trial* (Case No. 11-02995, ECF No. 3) and the Court's *Order Granting Amended Motion Establishing Uniform Mediation Procedures for Adversary Proceedings* (ECF No. 1210), the Trustees and Ms. Ashton, on her own behalf and on behalf of the Ashton Trust,[4] attended mediation (the "Mediation").

II. The Mediation

The Mediation took place on August 21, 2012, in the Eden Prairie, Minnesota, offices of retired Minnesota Supreme Court Justice James H. Gilbert

[4] Although the Court often refers solely to Ms. Ashton, at all material times, Ms. Ashton was acting on her own behalf and on behalf of the Ashton Trust.

("Justice Gilbert"). The following individuals attended the Mediation: (1) Ms. Ashton; (2) Keith T. Appleby, Esquire ("Mr. Appleby"), Ms. Ashton's legal counsel; (3) Dan Rosen, Esquire ("Mr. Rosen"), as the Liquidating Trustee's legal counsel and representative; and (4) Josiah Lamb, Esquire ("Mr. Lamb"), as the PCI Trustee's legal counsel and representative. The Court will refer to these individuals as the "Mediation Participants." Throughout the majority of the Mediation, the Mediation Participants remained in separate rooms: Mr. Rosen and Mr. Lamb were in one room, and Mr. Appleby and Ms. Ashton were in another.

At the Mediation, the Mediation Participants executed a mediation agreement (the "Mediation Agreement"). The Mediation Agreement,[5] which substantially conforms to Ashton's Exhibit P,[6] was a form agreement used by Justice Gilbert to set forth the terms of the mediations he conducted. Particularly, the Mediation Agreement contained the following provision:

> **Minnesota Civil Mediation Act**. Pursuant to the requirements of the Minnesota Civil Mediation Act, the mediator hereby advised the parties that: (a) the mediator has no duty to protect the parties' interest or provided them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect the parties' legal rights; (c) the parties should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights; and (d) a written mediated settlement agreement is not binding unless it contains provisions that it is binding and a provision stating substantially that the parties were advised in writing of (a) through (c) above.

[5] The Liquidating Trustee and the Ashton Parties agree that a copy of the actual Mediation Agreement signed by the Mediation Participants could not be located.

[6] All exhibits referenced by the Court were admitted into evidence at Trial.

Ashton's Ex. P, at 2. Notwithstanding this provision, Mr. Lamb testified at Trial that he did not believe the Minnesota Civil Mediation Act applied. Similarly, Mr. Rosen testified that there was no notion whatsoever that the Mediation was governed by the Minnesota Civil Mediation Act and that he viewed the provision as a general advisory by Justice Gilbert and not as a statement that the Minnesota Civil Mediation Act applied to the Mediation.

All of the Mediation Participants testified that they believed an agreement was reached at the conclusion of the Mediation. At her May 17, 2013, deposition (the "Ashton Deposition"), Ms. Ashton stated several times that she believed she and the Trustees reached a settlement agreement at the Mediation.[7] Particularly, she gave the following testimony:

> Q: When you left the mediation, did you think you had a deal?
>
> A: Yeah. Yes.
>
> . . .
>
> A: We had a verbal -- we had a verbal agreement at mediation, but we did not have a written agreement.
>
> . . .
>
> Q: Now, for you, it says "settled but not yet filed." Did you ask yourself, maybe mine shouldn't say settled, it should say settlement negotiations ongoing?
>
> A: Did I -- no, I didn't. I thought I had a settlement agreement at mediation . . . . We had a settlement at the end of mediation. Some [other] people were still going through mediation.

[7] At Trial, counsel for the Liquidating Trustee read into evidence the relevant testimony given by Ms. Ashton at her deposition. Tr. (ECF No. 2103) 8:24-18-4.

Ashton Dep. Tr. 51:21-23; 93:8-10; and 94:3-11. Ms. Ashton also testified on cross-examination at Trial that she left the Mediation with the understanding that she and the Trustees reached a settlement agreement:

> A: We reached an agreement at that time, an oral agreement, yes.
>
> . . .
>
> Q: And when you left the mediation, you told Mr. Lamb and Mr. Rosen that you were glad to have this behind you, correct?
>
> A: Yes. With the assumption that I would have no future liability in my case, and I would have a global settlement, and I would have no exposure. That was my understanding leaving that mediation appointment.
>
> Q: But you didn't say those words to Mr. Lamb or Mr. Rosen. You said when you left you were glad to have this behind you, correct?
>
> A: Yes.

Tr. (ECF No. 2103) 162:12-163:2.

Although Mr. Appleby did not appear at Trial, he testified in his May 9, 2013, deposition (the "Second Appleby Deposition") that when he and Ms. Ashton left the Mediation, they were both under the impression that the case was settled.[8] Moreover, Mr. Appleby testified that there was no ambiguity as to the terms of the settlement:

> Q: What did you understand when you left the mediation to be the key terms of this agreement?

[8] As with the Ashton Deposition, at Trial counsel for the Liquidating Trustee read into evidence the relevant testimony given by Mr. Appleby at his depositions. The Ashton Parties also provided deposition designations (the "Ashton Deposition Designations") relating to Mr. Appleby's depositions. The Liquidating Trustee filed an *Objection to the Deposition Designations* (ECF No. 2048) as instructed by the Court at Trial. However, the Liquidating Trustee withdrew that Objection on February 13, 2014. *See Notice of Withdrawal* (ECF No. 2166). Accordingly, the Court receives into evidence the Ashton Deposition Designations, which the Ashton Parties provided to the Court at Trial.

A: The key terms would be that Ms. Ashton received a release from any and all claims, and she in turn was going to turn over $225,000.00. My understanding of who was going to release was the trustees that were involved in the mediation, any and all claims that either trustee had have known, unknown.

. . .

Q: And when you left the mediation, you didn't have any ambiguity as to what the parties agreed to, right?

A: At that time, I did not.

Q: If you had any ambiguity, you would have sought to clarify it, correct?

A: That's correct.

Q: Did Ms. Ashton ever tell you that she had ambiguity the day of the mediation?

A: I don't recall that to be the case.

Second Appleby Dep. Tr. 40:5-13; 61:18-62:3. Mr. Appleby also testified that he explained to Ms. Ashton during the Mediation that what she was getting was a dismissal of the Ashton Adversary Proceeding and a release from the Liquidating Trustee and a release from the PCI Trustee. When asked if he told Ms. Ashton that she was getting a release from anybody else, Mr. Appleby replied, "No. And the question was not asked by her." Second Appleby Dep. Tr. 75:3-11.

Mr. Lamb testified at Trial that the Mediation Participants reached a settlement agreement upon the following terms: the Trustees were to provide the Ashton Parties with a release from liability as to any and all claims held by the Trustees, and Ms. Ashton was to pay the Trustees $225,000.00. Mr. Lamb also testified that he spoke directly to Mr. Appleby and Ms. Ashton at the Mediation:

A: Near the end of the mediation, Mr. Appleby came into our room.

Q: Tell us about that conversation.

A: He came in and had questions about who else could have claims against Ms. Ashton.

Q: How did you answer that question?

A: I answered that question explaining Gary Hansen's role that was outlined in Judge Montgomery's order, explaining that he was a liquidating trustee and his roles were limited going forward.

Q: At that point, had Mr. Hansen been converted from the receiver for Metro Gem to the liquidating trustee under the asset distribution plan for Metro Gem?

A: Yes.

. . .

Q: Okay. How did Mr. Appleby respond when you explained to him the role of Mr. Hansen?

A: He indicated he would go back to the other room and speak with his client.

Q: Okay. Did he, to your knowledge, did he do that?

A: I believe -- I don't know, but I believe so.

Q: Okay. Did he leave the room?

A: Yes.

Q: Did you hear back after that?

A: Yes.

Q: What did you hear after that?

A: That there was a settlement.

Q: Okay. Did you speak again with Mr. Appleby?

A: Yes.

Q: Tell me about that.

A: After the settlement -- after we were made aware there was a settlement, Mr. Appleby and Ms. Ashton came into our room.

Q: And what was said?

A: We exchanged pleasantries. Ms. Ashton expressed her relief at having a settlement, and thanked us for coming to terms.

Tr. 28:19-30:11. Finally, Mr. Lamb answered in the negative when asked if he thought the agreement reached was "simply talk . . . which didn't mean anything until reduced to a signed writing." Tr. 30:16-19.

Mr. Rosen also testified at Trial that the Mediation Participants reached a settlement agreement upon the following terms: the Trustees were to provide the Ashton Parties with a release from liability as to any and all claims held by the Trustees, and Ms. Ashton was to pay the Trustees $225,000.00. Further, Mr. Rosen testified that he did not tell Mr. Appleby that whatever was discussed on the day of the Mediation was simply a non-binding discussion until the parties executed a written settlement agreement. When asked whether he believed that either of the Trustees could have asked, after the conclusion of the Mediation, for additional money from Ms. Ashton in exchange for the releases, Mr. Rosen replied, "No . . . because we had reached a settlement agreement, and it was full and complete." Tr. 81:20-82:2. As to the discussion between Mr. Lamb and Mr. Appleby described above, Mr. Rosen confirmed Mr. Lamb's testimony as to the substance of that discussion:

Q: Tell us what was discussed during that conversation.

A: Mr. Appleby was making inquiry and expressing a concern of Ms. Ashton with regard to potential claimants against her, other than Mr. Mukamal and Mr. Kelley. Mr. Appleby came into our room for the specific purpose of discussing that issue.

Mr. Lamb explained to Mr. Appleby that while there were theoretically other potential claimants out there in the world, that it was his understanding, and I echoed that, that there was virtually no practical likelihood that any of those could or would assert a claim.

That he specifically discussed Mr. Hansen as well, explaining to Mr. Appleby that the order under which Mr. Hansen was operating, which at that time was actually what I would characterize as a winding up order . . . , and that both under the terms of the original order appointing Mr. Hansen, and under the winding up order, asserting claims against the parties was not part of it.

But that in any event, it was made clear, Mr. Lamb made clear on behalf of Mr. Kelley, and I made clear on behalf of Mr. Mukamal, that no indemnities against such claims would be provided, that rather, they would get complete releases from Mr. Mukamal and from Mr. Kelley.

. . .

Q: How did Mr. Appleby respond, or what did he do next?

A: . . . At the conclusion of that substantive discussion, Mr. Appleby then said, okay, I'm going to go now and explain all that to Ms. Ashton, whereupon Mr. Appleby and the mediator got up, left the room, went to Ms. Ashton's room.

Q: And after that, did you hear back further as to what the status was in terms of --

A: Yes, I did.

Q: What did you hear?

A: . . . [A]fter some time passing, we were informed that all terms were agreed to and we were settled.

Tr. 78:18-80:19.

There is conflicting testimony as to whether the above-referenced discussion between Mr. Appleby, Mr. Lamb, and Mr. Rosen actually occurred during the Mediation. Mr. Appleby testified that he did not recall having a discussion during the Mediation with Mr. Lamb and Mr. Rosen:

> A: I agree that Mr. Lamb and I did have this discussion . . . and would point out that the discussion on this was not at the mediation. This was the discussion I referred to a couple of days before Thanksgiving 2012.
>
> Q: Did the conversation . . . take place at the mediation?
>
> A: I don't think so. This conversation -- I know that I had [this] conversation with Josiah Lamb . . . the last week of November 2012, when Mr. Lamb and I spoke *via* telephone. . . .
>
> Q: That's not my question.
>
> A: I understand. And I'm saying I don't recall having this conversation at mediation. This indicates that if that were the case all the attorneys and Ms. Ashton were sitting in the same room discussing the mediation. And I don't recall that happening with Ms. Ashton.
>
> . . .
>
> Q: Okay. Can you tell me that the conversation . . . did not occur at the mediation?
>
> A: I don't believe it occurred. Can I tell you with absolute certainty? No.

Second Appleby Dep. Tr. 88:6-24; 89:13-18. Similarly, Ms. Ashton testified at Trial that Mr. Appleby did not once leave her room during the Mediation and that she had no knowledge of any conversation between Mr. Appleby, Mr. Lamb, and Mr. Rosen. Notwithstanding the testimony of Mr. Appleby, who did not appear at Trial, and Ms. Ashton, the Court finds that the testimony of Mr. Lamb and Mr. Rosen is

credible as to both the occurrence of the discussion at the Mediation and the substance of the discussion.

III. Post-Mediation

On August 22, 2012, the day after the Mediation, Jessica Wasserstrom, Esquire ("Ms. Wasserstrom"), counsel for the Liquidating Trustee, sent a draft settlement agreement (the "Draft Agreement") to Mr. Appleby by email. *See* L.T.'s Ex. 21. The Draft Agreement set forth the principal terms of the oral settlement: (1) Ms. Ashton was to pay $225,000.00 to the Trustees; and (2) the Trustees were to provide the Ashton Parties with a complete release of any further liability relating to claims held by the Trustees. *Id.*

On August 28, 2012, Justice Gilbert filed a report in the Ashton Adversary Proceeding (the "Report of Mediator") (Case No. 11-02995, ECF No. 14), which indicates that the parties reached an agreement at the Mediation that completely resolved all issues. Neither the Ashton Parties nor Mr. Appleby objected to the Report of Mediator. The Report of Mediator was amended (the "Amended Report of Mediator") (Case No. 11-02995, ECF No. 36) on April 12, 2013, to include the basic terms of the agreement: (1) Ms. Ashton was to pay the Trustees $225,000.00; (2) the parties were to sign an appropriate stipulation of settlement within fourteen days of August 24, 2012, and file a joint motion for approval of the settlement; and (3) the Trustees were to provide the Ashton Parties with a "general release."

On September 4, 2012, Mr. Appleby responded by email to Ms. Wasserstrom's August 22, 2012, email and attached a "redline" copy of the Draft Agreement. *See*

L.T.'s Ex. 22. This redline copy contained nominal proposed revisions to the Draft Agreement, particularly the due date of Ms. Ashton's $225,000.00 payment. *Id.* Neither Mr. Appleby's September 4, 2012, email nor the redline copy of the Draft Agreement altered the release language or indicated in any way that Ms. Ashton had an issue with the release. *Id.* Later that day, Ms. Wasserstrom responded to Mr. Appleby and transmitted an updated, revised version of the Draft Agreement, which incorporated his uncontroversial edits (the "Revised Draft Agreement"). *See* L.T.'s Ex. 24. She requested that Mr. Appleby have Ms. Ashton execute a copy of the Revised Draft Agreement and return the executed copy at his earliest convenience. *Id.* Mr. Appleby did not provide any further revisions to the Revised Draft Agreement, did not provide any other comments on the Revised Draft Agreement, and did not otherwise respond to Ms. Wasserstrom.

According to the testimony given by Ms. Ashton at Trial, she called Mr. Appleby in early October 2012 to inquire into the status of her settlement. Subsequently, on October 12, 2012, Mr. Appleby sent Ms. Ashton the Revised Draft Agreement *via* email. *See* Ashton's Ex. O. In this email, Mr. Appleby asked Ms. Ashton to sign the settlement agreement and return it to him or to let him know if she decided to utilize another attorney. *Id.* At Trial, Ms. Ashton testified that after receiving the Revised Draft Agreement from Mr. Appleby on October 12, 2012, she realized the release provided was not the "global" release she believed she was going to receive in exchange for her $225,000.00 payment:

> What I thought global was, that I would be indemnified from any lawsuits that would be coming down the line. I thought with the larger

> lawsuit that I was settling on, that I would have no exposure; I would have a global settlement that meant I would have nobody that would be able to pursue me in the future. And it was very clearly stated within my settlement agreement that that would only be between the two parties, which would be PCI, and also with Palm Beach.

Tr. 130:14-23. It was then, after Ms. Ashton reviewed the Revised Draft Agreement, that Mr. Appleby learned for the first time that Ms. Ashton had a problem with the release language:

> The term "global" was used several times by, again, both the Mediator and even myself [Mr. Appleby], and I would assume even the other side [during the Mediation]. But our understanding was different than Ms. Ashton. Ms. Ashton's understanding clearly was global meant anyone, anywhere, anyhow. And that became apparent as soon as Ms. Ashton reviewed a written draft of the settlement agreement.

Second Appleby Dep. Tr. 40:14-21. Ms. Ashton asked Mr. Appleby to inform Ms. Wasserstrom that she was not satisfied with the release language and that she wanted an indemnification provision included in the settlement agreement so that she would be protected from any potential causes of action held by individuals or entities other than the Trustees.

At his depositions, Mr. Appleby testified that he informed Ms. Wasserstrom *via* telephone that Ms. Ashton would not sign the Revised Draft Agreement absent a truly "global" release. Although he could not pinpoint a timeframe, Mr. Appleby testified that he informed Ms. Wasserstrom of Ms. Ashton's refusal to go forward with the Revised Draft Agreement at some point between October and November 2012, when he left the law firm of Fowler White Boggs, P.A. ("Fowler White"). Mr. Appleby also testified that he informed Mr. Lamb on November 20, 2012, that Ms.

Ashton would not execute the Revised Draft Agreement because of her issues with the release.

At Trial, however, Ms. Wasserstrom testified that Mr. Appleby never informed her that Ms. Ashton had any issues with the release language in the Revised Draft Agreement or even gave her any comments on the Revised Draft Agreement. In fact, Ms. Wasserstrom testified that she first learned of Ms. Ashton's problems with the Revised Draft Agreement in January 2013 from Ms. Ashton's current counsel, Helen Davis Chaitman, Esquire ("Ms. Chaitman"). Mr. Lamb similarly testified that Mr. Appleby never told him that there were any problems with the settlement. Ms. Ashton testified at Trial that she did not know whether Mr. Appleby ever told Ms. Wasserstrom of her issue with the Revised Draft Agreement. Indeed, at her deposition, Ms. Ashton testified that she could not recall ever instructing her lawyer to tell Ms. Wasserstrom that she would not sign the Revised Draft Agreement. Furthermore, at his second deposition, Mr. Appleby testified that he did not specifically name Ms. Ashton when he informed Ms. Wasserstrom that there were problems with going forward with some of the settlements. Finally, the Ashton Parties offered no documentary evidence to support the contention that Mr. Appleby communicated to Ms. Wasserstrom that Ms. Ashton had a problem with the Revised Draft Agreement. Accordingly, the Court finds the testimony of Ms. Wasserstrom and Mr. Lamb to be credible[9] and finds that

[9] In addition to the testimony of Ms. Wasserstrom and Mr. Lamb, at Trial the Liquidating Trustee introduced into evidence an email chain between Ms. Wasserstrom and Mr. Appleby that demonstrates a lack of communication on the part of Mr. Appleby. *See* L.T.'s Ex. 25. Particularly, on October 10, 2012, Ms. Wasserstrom expressed her concern about the lack of communication from Mr.

Mr. Appleby never informed either Ms. Wasserstrom or Mr. Lamb that Ms. Ashton had problems with the Revised Draft Agreement or with the settlement in general.

After Mr. Appleby left Fowler White on November 26, 2012, Darren Farfante, Esquire ("Mr. Farfante"), another attorney at Fowler White, took over the representation of Ms. Ashton. Ms. Wasserstrom and Mr. Lamb both testified at Trial that they each spoke with Mr. Farfante several times, but that Mr. Farfante never informed either of them that Ms. Ashton refused to execute the Revised Draft Agreement. Although he did not appear at Trial, Mr. Farfante testified at his March 19, 2013, deposition that he never advised the Liquidating Trustee's counsel that Ms. Ashton refused to execute the Revised Draft Agreement.[10]

On November 27, 2012, Mr. Lamb, on behalf of the PCI Trustee, filed a Motion to Approve Settlement of Multiple Adversary Proceedings and Claims (the "Minnesota 9019 Motion") in the Minnesota PCI bankruptcy proceeding. *See* L.T.'s Ex. 4. In the Minnesota 9019 Motion, the PCI Trustee sought approval of the settlement of numerous claims, one of which was the PCI Trustee's claim against the Ashton Trust. The PCI Trustee listed its total claim against the Ashton Trust as

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Appleby on the various pending settlement agreements: "It has been well over a month since I responded to your comments on the settlement agreement and sent a revised clean for execution . . . . And I've gotten no response to my email below from 2 weeks ago." *Id*. at 3. In a subsequent email to Mr. Appleby on October 10, 2012, Ms. Wasserstrom asked, "Are you OK with the current settlement agreement draft? Are the signature pages expected soon?" *Id*. at 2. Two days later, on October 12, 2012, Mr. Appleby responded that he would call Ms. Wasserstrom, but made no mention of Ms. Ashton's problems with the Revised Draft Agreement. *Id*. Mr. Appleby had sent the Revised Draft Agreement to Ms. Ashton earlier in the day, at 6:33 a.m. on October 12, 2012. *See* Ashton's Ex. O. Neither party introduced into evidence any additional email correspondence between Ms. Wasserstrom and Mr. Appleby.

[10] At Trial counsel for the Liquidating Trustee read into evidence the relevant testimony given by Mr. Farfante at his deposition. The Ashton Parties also provided deposition designations ("Ashton Deposition Designations") relating to Mr. Farfante's deposition testimony, which the Court received into evidence at Trial.

$858,020.00, and the total settlement amount as $225,000.00. *Id*. The PCI Trustee served the Minnesota 9019 Motion and the corresponding Notice of Hearing on Mr. Farfante. *See* L.T.'s Ex. 5. Neither Ms. Ashton nor anyone on her behalf filed a written objection to the Minnesota 9019 Motion, appeared in opposition to the Minnesota 9019 Motion at the hearing, or informed the PCI Trustee or Mr. Lamb that she opposed the Minnesota 9019 Motion. On December 20, 2012, the Minnesota Bankruptcy Court entered an Order granting the Minnesota 9019 Motion and approving the identified settlements (the "Minnesota 9019 Order"). *See* L.T.'s Ex. 6. To date, the Ashton Parties have not sought relief from the Minnesota 9019 Order.

On November 26, 2012, the Liquidating Trustee filed with this Court a *Status Report and Proposed Agenda* (the "Status Report") (ECF No. 1536)[11] in preparation for the November 29, 2012, pretrial conference on all of the Liquidating Trustee's then-pending adversary proceedings (the "November 2012 Pretrial Conference"). The Status Report included a summary of the status of each of the pending adversary proceedings, including the Ashton Adversary Proceeding. As to the Ashton Adversary Proceeding, the Liquidating Trustee listed the status as, "Settled (9019 not yet filed)" and proposed to "[reset] the pretrial conference to 90 days from November 29, 2012[,] and [suspend] any pretrial deadlines or disclosure requirements during the period." Status Report at 2, 9. The Liquidating Trustee served the Status Report on Mr. Appleby *via* CM/ECF and on Ms. Ashton *via* U.S. Mail.

[11] The Court admitted the Status Report into evidence as the Liquidating Trustee's Exhibit 3.

Mr. Farfante's colleague, Jake C. Blanchard, Esquire ("Mr. Blanchard") of Fowler White, attended the November 2012 Pretrial Conference *via* CourtCall. See *Nov. 12 Pretrial Conference Tr.* (ECF No. 1890) 22:22-23:1. Mr. Blanchard did not indicate at the November 2012 Pretrial Conference that the Ashton Adversary Proceeding was not settled or that there were any issues regarding the Revised Draft Agreement. At the November 2012 Pretrial Conference, the Court granted the request to continue the pretrial conference in the Ashton Adversary Proceeding and other similar adversary proceedings to March 2013. Consistent with the Court's practices and procedures, the Court also instructed the Liquidating Trustee to submit proposed dismissal orders as to the adversary proceedings listed as settled. Thereafter, on December 3, 2012, the Court entered an *Order Dismissing Adversary Proceeding as Settled* (the "Dismissal Order") (Case No. 11-02995, ECF No. 15)[12] in the Ashton Adversary Proceeding. The Dismissal Order gave the Liquidating Trustee thirty days to file a motion to approve the settlement with the Ashton Parties. The Liquidating Trustee served the Dismissal Order on Mr. Farfante and Ms. Ashton. *See Certificate of Serv*. (Case No. 11-02995, ECF No. 16).[13] To date, the Ashton Parties have not challenged the Dismissal Order. On January 12, 2013, the Clerk of Court closed the Ashton Adversary Proceeding.

After the entry of the Dismissal Order and the Minnesota 9019 Order, Mr. Farfante sent a letter dated December 7, 2012, to Ms. Ashton, advising her of the results of the November 2012 Pretrial Conference and stating:

[12] The Court admitted the Dismissal Order into evidence as the Liquidating Trustee's Exhibit 7.

[13] The Court admitted the Certificate of Service into evidence as the Liquidating Trustee's Exhibit 8.

> [The Liquidating Trustee] is awaiting receipt of the signed Mediated Settlement Agreement from you to move this matter forward to a final resolution. I understand your concerns with the potential claimants who were not parties to the Mediation, but I need you to respond to my office on or before Tuesday, December 11th as to whether you intend to execute the Settlement Agreement.

L.T.'s Ex. 32. Also on December 7, 2012, Ms. Wasserstrom replied to an email sent by Mr. Farfante inquiring as to the status of another adversary proceeding and stated that she was waiting on an executed settlement agreement for that proceeding and for the Ashton Adversary Proceeding. L.T.'s Ex. 26.

On December 27, 2012, Mr. Farfante sent an email to Ms. Wasserstrom notifying her that Fowler White no longer represented the Ashton Parties. *See* L.T.'s Ex. 27. On December 31, 2012, Ms. Chaitman of Becker & Poliakoff, LLP informed Ms. Wasserstrom *via* email that the Ashton Parties retained her to represent them in connection with the Ashton Adversary Proceeding. L.T.'s Ex. 28. Ms. Wasserstrom replied to Ms. Chaitman, explaining that "[t]he case was settled at mediation back in August and [that she is] just waiting on a signed agreement from Mrs. Ashton." *Id*. Ms. Wasserstrom also explained that the deadline to file the motion to approve the settlement was upon them and attached a copy of the Revised Draft Agreement. *Id*. In response, Ms. Chaitman stated that Ms. Ashton would not be able to go forward with the settlement. *Id*.

Subsequently, on February 1, 2013, the Liquidating Trustee filed the Motion to Approve Settlement now before the Court. On February 21, 2013, the Ashton Parties filed the Objection, asserting that: (1) the Mediation was governed by the Minnesota Civil Mediation Act, which requires an executed written settlement

agreement in order for a settlement reached at mediation to be enforceable; (2) the parties did not execute a written settlement agreement because they did not have a "meeting of the minds" as to the key terms of the settlement; (3) even if a written settlement agreement was not required, the parties did not reach an oral settlement agreement because they did not have a "meeting of the minds" as to the key terms of the settlement; (4) any settlement reached by the parties was conditioned upon the Ashton Parties receiving a release from all potential future "clawback" lawsuits, not just those held by the Trustees; and (5) the Liquidating Trustee breached any settlement reached by the parties because he failed to procure such a release.

CONCLUSIONS OF LAW

I. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

II. Judicial estoppel

The Liquidating Trustee contends that the Ashton Parties are judicially estopped from arguing that the parties are not bound by an enforceable settlement agreement because (1) the Ashton Parties did not object at the November 2012 Pretrial Conference to the characterization of the Ashton Adversary Proceeding as settled; (2) the Ashton Parties did not seek relief from the Dismissal Order; (3) the Ashton Parties did not seek to reopen the Ashton Adversary Proceeding after it was dismissed as settled and closed; (4) the Ashton Parties did not file an objection to the Minnesota 9019 Motion; (5) the Ashton Parties did not raise an objection at the

hearing on the Minnesota 9019 Motion; and (6) the Ashton Parties did not seek relief from the Minnesota 9019 Order. The Court agrees that the Ashton Parties should have raised an objection earlier and that their failure to do so warrants the application of judicial estoppel.

Courts developed the doctrine of judicial estoppel in order to protect "the integrity of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50, 121 S. Ct. 1808, 1814, 149 L. Ed. 2d 968 (2001) (citations omitted). "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Id.* at 749 (alteration in original) (*quoting Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895)). Several factors typically guide the decision of whether to apply the doctrine of judicial estoppel in a particular case: (1) whether the party's later position is "clearly inconsistent" with its earlier position; (2) whether the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 750-51. Finally, "[j]udicial estoppel is an equitable concept invoked at a court's discretion." *Parker v.*

Wendy's Int'l, Inc., 365 F.3d 1268, 1271 (11th Cir. 2004) (internal quotations marks omitted) (*quoting Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002)).

Here, the Ashton Parties failed, on numerous occasions, to object to the representation that the parties reached a settlement and thus effectively persuaded this Court and the Minnesota Bankruptcy Court to accept the representation that the parties reached a settlement. If the Court allowed the Ashton Parties to maintain inconsistent positions, it may create the perception that the bankruptcy courts were misled. The Ashton Parties' position on the several previous occasions in which they failed to object to the representation that the parties settled is clearly inconsistent with the position they assert now—that no settlement was reached. Finally, allowing the Ashton Parties to maintain their current position would impose an unfair detriment on the Liquidating Trustee and the Debtors' bankruptcy estates as the Liquidating Trustee has ceased preparing to move forward with the Ashton Adversary Proceeding and the Debtors' estates have been forced to spend significant funds litigating the enforceability of the parties' settlement agreement.

For these reasons, the Court, in its discretion, determines that it is appropriate to judicially estop the Ashton Parties from asserting that the parties reached a settlement.

III. Formation of an enforceable settlement agreement

Notwithstanding the Court's determination that the Ashton Parties are judicially estopped from disputing that the parties reached a settlement, the Court

will address whether the Ashton Parties and the Trustees entered into an enforceable settlement agreement at the Mediation.

A. Choice of law

Although federal courts, including bankruptcy courts, possess the inherent power to enforce agreements entered into in settlement of litigation, "the construction and enforcement of settlement agreements is governed by principles of state law applicable to contracts generally." *Lee v. Hunt*, 631 F.2d 1171, 1173-74 (5th Cir. 1980) (citation omitted); *see also, Chira v. Saal (In re Chira)*, 567 F.3d 1307, 1311 (11th Cir. 2009); *Allapattah Servs., Inc. v. Exxon Corp*., 05-21338-CIV, 2007 WL 7756735, at *2 (S.D. Fla. Sept. 26, 2007) (*citing Blum v. Morgan Guar. Trust Co.*, 709 F.2d 1463, 1467 (11th Cir. 1983)). In deciding which state law will govern the interpretation of a settlement agreement between private parties, federal courts must look to the choice-of-law provisions of the forum state. *Lee*, 631 F.2d at 1174-74.

Because the Court is located in Florida, Florida is the forum state. "Under Florida law, absent 'a contractual provision specifying the governing law, a contract (other than one for the performance of services) is governed by the law of the state in which the contract was made.'" *Landmark Equity Fund II, LLC v. Residential Fund 76, LLC*, 13-20122-CIV, 2014 WL 552974, at *5 (S.D. Fla. Feb. 12, 2014) (*citing Fioretti v. Mass. Gen. Life Ins. Co.*, 53 F.3d 1228, 1235 (11th Cir. 1995)); *Del Istmo Assurance Corp. v. Platon*, No. 11–61599–CIV, 2011 WL 5508641, at *8 (S.D. Fla. Nov. 9 2011) (*citing Trumpet Vine Inv., N.V. v. Union Capital Partners I, Inc*.,

92 F.3d 1110, 1119 (11th Cir. 1996)). A contract is made where the last act necessary to complete the contract is done. *Prime Ins. Syndicate, Inc. v. B.J. Handley Trucking, Inc.,* 363 F.3d 1089, 1093 (11th Cir. 2004) (*citing Pastor v. Union Cent. Life Ins. Co.,* 184 F.Supp.2d 1301, 1305 (S.D. Fla. 2002)). "The last act necessary to complete a contract is the offeree's communication of acceptance to the offeror." *Id*. (citation omitted).

Here, the parties formed the purported settlement agreement at the Mediation, which took place in Minnesota. All the Mediation Participants were physically located in Minnesota during the Mediation, and the purported acceptance of the offer occurred in Minnesota. Accordingly, the Court will apply the substantive law of Minnesota to determine whether the parties formed an enforceable settlement agreement.

B. The common law of contracts

A settlement agreement is a contract and is therefore governed by general principles of contract law unless specific statutory provisions alter the common law. *Dykes v. Sukup Mfg. Co*., 781 N.W.2d 578, 581-82 (Minn. 2010). Pursuant to general principles of contract law, "[t]o constitute a full and enforceable settlement, there must be such a definite offer and acceptance that it can be said that there has been a meeting of the minds on the essential terms of the agreement." *Jallen v. Agre*, 119 N.W.2d 739, 743 (Minn. 1963); *see also, Gates v. Scherer*, A11-1326, 2012 WL 1070104 (Minn. Ct. App. Apr. 2, 2012). Only those terms upon which the settlement hinges are to be considered essential terms. *Goddard, Inc. v. Henry's Foods, Inc*.,

291 F.Supp.2d 1021, 1028 (D. Minn. 2003). "The fact that the parties left some details for counsel to work out during later negotiations cannot be used to abrogate an otherwise valid agreement." *Sheng v. Starkey Labs., Inc.*, 117 F.3d 1081, 1083 (8th Cir. 1997) (citation omitted) (construing Minnesota law).

When determining whether one party accepted[14] the other party's offer, and thus, whether the parties had a meeting of the minds, courts consider only the *objective* manifestations of the parties. *Cederstrand v. Lutheran Bhd.*, 117 N.W.2d 213, 221 (Minn. 1962); *Rosenbloom v. Gen. Nutrition Ctr., Inc.*, CIV. 09-1582 DWF/SRN, 2010 WL 1050297, at *1 (D. Minn. Mar. 18, 2010) (*citing TNT Props., Ltd. v. Tri-Star Developers, LLC.*, 677 N.W.2d 94, 102 (Minn. Ct. App. 2004)). Moreover, once an offer is positively accepted, a contract is instantly formed, and a requested or suggested modification will not negate the contract formation. *Id.* Finally, although the terms of a settlement agreement should be, and almost always are, reduced to writing, it is generally not essential to the enforcement of a settlement agreement that it be in writing unless it falls within the ambit of the statute of frauds.[15] *Jallen*, 119 N.W.2d at 743; *Luigino's Inc. v. Societes des Produits*

[14] "Minnesota follows the 'mirror image rule,' which requires that an acceptance be coextensive with the offer and not introduce additional terms or conditions." *Commercial Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 782 (Minn. Ct. App. 2006).

[15] Here, the purported oral settlement agreement is not subject to the requirements of Minnesota's statute of frauds. Pursuant to Minnesota Statutes § 336.2-201 and §§ 513.01-513.07, the following categories of contracts are subject to the requirements of Minnesota's statute of frauds: (1) contracts for the sale of goods for the price of $500 or more; (2) contracts that cannot be performed within one year from the making thereof; (3) contracts whereby the promisor agrees to answer for the debt, default, or doings of another (sureties); (4) contracts made upon consideration of marriage; (5) contracts whereby the promisor agrees to pay a debt which has been discharged by bankruptcy or insolvency proceedings; (6) trust agreements; (7) contracts to convey real property and conveyances of real property; (8) contracts for the lease of real property for a period longer than one year; and (9)

Nestle S.A., CIV. 03-4186ADM/RLE, 2005 WL 735919, at *3 (D. Minn. Mar. 30, 2005) (*citing Bergstrom v. Sears, Roebuck & Co.*, 532 F.Supp. 923, 932 (D. Minn. 1982); *Shell v. Amalgamated Cotton Garment*, 871 F.Supp. 1173, 1181 n. 16 (D. Minn. 1994)).

C. The Minnesota Civil Mediation Act

In certain circumstances, the Minnesota Civil Mediation Act alters the general principles of contract law with respect to the enforceability of mediated settlements. The Minnesota Civil Mediation Act applies generally when a mediator strives to promote and facilitate a voluntary settlement of a controversy identified in an "agreement to mediate." Minn. Stat. § 572.33. The Act, which is somewhat internally inconsistent,[16] provides:

> **Subdivision 1. General.** The effect of a mediated settlement agreement shall be determined under principles of law applicable to contract. A mediated settlement agreement is not binding unless:
>
> (1) it contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights; or
>
> (2) the parties were otherwise advised of the conditions in clause (1).

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contracts extending the time of payment for manual labor, performed or to be performed in cutting, hauling, banking, or driving logs, beyond the time of the completion of such labor.

[16] "[T]he drafters of the Minnesota Civil Mediation Act were concerned about the fairness of the mediation process. Unfortunately, the Act suffers from inconsistent policy choices, lack of integration with other statues and rules, and ambiguous and incomplete language. The technical provisions of the Act jeopardize the finality of mediated settlements inviting extended litigation to bring peace and end the conflict." James R. Coben and Peter N. Thompson, *The Haghighi Trilogy and the Minnesota Civil Mediation Act: Exposing A Phantom Menace Casting A Pall over the Development of ADR in Minnesota*, 20 Hamline J. Pub. L. & Pol'y 299, 299 (1999).

> **Subdivision 2. Debtor and creditor mediation.** In addition to the requirements of subdivision 1, a mediated settlement agreement between a debtor and creditor is not binding until 72 hours after it is signed by the debtor and creditor, during which time either party may withdraw consent to the binding character of the agreement.

Minn. Stat. § 572.35 (emphasis added).

Based upon the plain language cited above, the enforceability requirements laid out in § 572.35 of the Minnesota Civil Mediation Act apply only to a "mediated settlement agreement." The term "mediated settlement agreement" is defined in the Act as "a written agreement setting out the terms of a partial or complete settlement of a controversy identified in an agreement to mediate, signed by the parties, and dated." Minn. Stat. § 572.33, subd. 4 (emphasis added). Accordingly, the requirements of the Act, which alter the general principles of contract law, apply only to written agreements signed by the parties.

Notwithstanding the Ashton Parties' assertion to the contrary, nothing in the Minnesota Civil Mediation Act requires that a settlement be in writing or in any way makes oral settlement agreements unenforceable.[17] "It is . . . clear that the [Act] contains no language that would supercede [sic] common law principles on the

[17] The Court notes that the plain language of the Minnesota Civil Mediation Act leads to the seemingly arbitrary result that oral settlement agreements need no special clauses, but written mediated settlement agreements must have certain "magic words" in order to be binding. Coben and Thompson, *supra* note 16, at 312-13. However, it is the Court's role to enforce the laws as written, not to question the judgment of the Minnesota legislature. The Minnesota Court of Appeals in the unpublished opinion cited by the Ashton Parties overreached. In *Schwartz v. Adamson*, C8-98-1416, 1999 WL 170676 (Minn. Ct. App. Mar. 30, 1999), the Minnesota Court of Appeals determined that a settlement agreement was unenforceable because the unsigned written agreement did not comply with the Minnesota Civil Mediation Act. The court rejected the assertion that there was an oral agreement that should be enforced under the principles of contract law. *Id.* at *2. Notwithstanding the plain language of the Minnesota Civil Mediation Act, the court concluded that "[i]t is illogical to argue that even if a written agreement is not enforceable, the oral agreement on which the written agreement was based is enforceable." *Id.*

enforceability of a proper oral agreement. To the contrary, the act expressly declares that '[t]he effect of a mediated settlement agreement shall be determined under principles of law applicable to contract.'" *Vo v. Honeywell, Inc.*, C3-97-1393, 1998 WL 15909, at *2 (Minn. Ct. App. Jan. 20, 1998) (alteration in original) (quoting Minn. Stat. § 572.35, subd. 1).[18]

Here, the parties did not execute a written settlement agreement. Accordingly, the enforceability requirements of the Minnesota Civil Mediation Act do not apply.

D. The parties entered into an enforceable oral settlement agreement

"Settlement of lawsuits without litigation is highly favored, and such settlements will not be set aside lightly." *Rosenbloom*, 2010 WL 1050297, at *1 (*citing Johnson v. St. Paul Ins. Cos.*, 305 N.W.2d 571, 573 (Minn. 1981)). As discussed above, the Minnesota Civil Mediation Act does not apply here. Thus, the issue of whether the parties formed an enforceable settlement agreement is governed by principles of Minnesota contract law. Pursuant to Minnesota contract law, oral agreements are readily enforceable provided they satisfy the requirement that there was such a definite offer and acceptance that it can be said that there was a meeting of the minds on the essential terms of the agreement. The Ashton

[18] *Vo v. Honeywell* presents a factual scenario which is similar to the scenario now before the Court. In that case, the plaintiff and the defendant participated in a mediation regarding the plaintiff's workers' compensation claim. 1998 WL 15909, at *1. As result of the mediation, the plaintiff verbally agreed, in a three-way telephone call between the plaintiff, his attorney, and the mediator, to a global settlement of all his claims. *Id*. The defendant then sent a draft of the agreement to the plaintiff's attorney. *Id*. Two months later, the defendant was advised that the plaintiff did not intend to go forward with the settlement. *Id*. On appeal, the Court of Appeals of Minnesota found that the Minnesota Civil Mediation Act requirements were not applicable and affirmed the trial court's enforcement of the parties' oral settlement agreement. *Id*. at *2.

Parties assert that Ms. Ashton and the Trustees did not have a "meeting of the minds" as to one of the essential terms of the agreement—the release. However, for the following reasons, the Court determines that at the Mediation on August 21, 2012, Ms. Ashton and the Trustees had a meeting of the minds regarding all of the essential terms of the settlement and thus, formed an enforceable contract.

i. Meeting of the minds

All of the Mediation Participants—Ms. Ashton, Mr. Lamb, Mr. Rosen, and Mr. Appleby—unequivocally testified that they believed the parties reached a settlement at the Mediation. The Ashton Parties, however, now contend that Ms. Ashton and the Trustees never had a meeting of the minds with regard to the terms of the release. It is Ms. Ashton's position that she believed the "global" release she was to receive from the Trustees was a release from liability not only from the Trustees, but also from all other similarly situated individuals and entities—essentially, any person or entity who could potentially have a claim against the Ashton Parties stemming from the Ashton Parties' investment with MGI and Vennes. The Liquidating Trustee, on the other hand, asserts that the Ms. Ashton and the Trustees did have a meeting of the minds as to all of the essential terms of the settlement, including the release. According to the Liquidating Trustee, Ms. Ashton and the Trustees objectively assented to a "global" release of Ms. Ashton from any liability stemming from the claims held by the Trustees. The Court agrees with the Liquidating Trustee.

One of the most important, and the most basic, principles of contract law is that courts consider only the outward, objective manifestations of the parties when determining whether a "meeting of the minds" occurred and thus, whether the parties intended to form a contract. As previously discussed, secret intentions and unspoken meanings subjectively ascribed to important terms are irrelevant. "[W]hether a meeting of the minds exists is an objective question, and 'it is the expressed mutual assent [of the parties to the purported agreement] rather than actual mutual assent which is the essential element.'" *Christianson v. Jansen*, A11-1833, 2012 WL 2368914, at *1 (Minn. Ct. App. June 25, 2012) (*quoting N. Star Ctr., Inc. v. Sibley Bowl, Inc.*, 205 N.W.2d 331, 332 (Minn. 1973)). Under this objective standard,

> [T]he existence of a meeting of the minds "does not require a subjective mutual intent to agree on the same thing in the same sense, but may be based on objective manifestations whereby one party by his words or by his conduct, or by both, leads the other party reasonably to assume that he assents to and accepts the terms of the other's offer."

Id. at *1 (*quoting Holt v. Swenson*, 90 N.W.2d 724, 728 (Minn. 1958) (footnote omitted)). Stated differently, the Court "must determine not what the parties really meant, but what words and actions justified the other party to assume what was meant." *Powell v. MVE Holdings*, Inc., 626 N.W.2d 451, 460 (Minn. Ct. App. 2001) (*quoting Capital Warehouse Co. v. McGill-Warner-Farnham Co.*, 114, 149 N.W.2d 31, 35 (Minn. 1967)). Furthermore, the Court "may look behind words to 'consider the surrounding facts and circumstances in the context of the entire transaction, including the purpose, subject matter and nature of it.'" *Id.* (citation omitted).

Here, the evidence presented at Trial indicates that based upon their objective manifestations at the Mediation, Ms. Ashton and the Trustees had a meeting of the minds on the essential terms of the settlement: the Trustees agreed to provide the Ashton Parties with a "global" release from liability as to any and all claims *they* possessed in exchange for Ms. Ashton's payment of $225,000.00 to the Trustees. Mr. Appleby, Ms. Ashton's attorney who accompanied her to the Mediation, testified at his deposition that he understood that the key terms of the settlement reached at the Mediation were that Ms. Ashton was to receive a "global" release from liability as to any and all claims held by the Trustees and that she was to pay the Trustees $225,000.00. Mr. Lamb and Mr. Rosen, counsel for the PCI Trustee and the Liquidating Trustee, respectively, both testified at Trial that the key terms of the settlement were the same as those identified by Mr. Appleby. Significantly, Justice Gilbert filed a Report and an Amended Report of Mediator, stating that the parties reached an agreement completely resolving all issues and identifying the same key terms of the agreement identified by Mr. Appleby, Mr. Lamb, and Mr. Rosen.

Ms. Ashton testified at her deposition and at Trial that she believed the parties reached a settlement agreement at the Mediation. Indeed, Ms. Ashton does not dispute that she agreed to pay $225,000.00 to the Trustees. Instead, Ms. Ashton testified that during the Mediation, she was under the impression that the "global" release she was to receive in exchange for her payment was a release from liability

not only from the Trustees, but also from all other similarly situated individuals and entities.[19]

At the Mediation, however, Ms. Ashton objectively assented to the key terms of the settlement as presented by Mr. Lamb and Mr. Rosen. Ms. Ashton did not communicate her understanding as to the terms of the release to her attorney, Mr. Appleby, or to Mr. Lamb and Mr. Rosen. In fact, Mr. Appleby testified at his deposition that he explained to Ms. Ashton during the Mediation that she was to receive a release and dismissal of the Ashton Adversary Proceeding from the Liquidating Trustee and a release from the PCI Trustee. When asked if he told Ms. Ashton that she would receive a release from anyone other than the Trustees, Mr. Appleby replied that he did not and that Ms. Ashton never asked that question. Mr. Appleby also testified that Ms. Ashton never told him on the day of the Mediation that she had any ambiguity whatsoever as to the terms of the settlement and that he did not learn of Ms. Ashton's understanding as to the terms of the release until after Ms. Ashton reviewed the Revised Draft Agreement. Moreover, Mr. Lamb and Mr. Rosen had a conversation with Mr. Appleby at the Mediation in which they explained that other potential claims against the Ashton Parties were possible, but unlikely, and clarified that the Trustees would not provide the Ashton Parties with any protection against these potential claims. If Ms. Ashton thought that the

[19] Ms. Ashton testified at Trial that she thought she "would be indemnified from any lawsuits that would be coming down the line." Indemnification and release are entirely different legal concepts, and if Ms. Ashton believed she would be indemnified by the Trustees, surely she would have spoken up at the Mediation when the only term used by the Mediation Participants was "release."

"global" release was ambiguous[20] or that she was getting a release from liability as to anyone other than the Trustees, she kept it to herself.

The post-Mediation actions of Mr. Appleby and Ms. Wasserstrom, counsel for the Liquidating Trustee, support the conclusion that there was a meeting of the minds at the Mediation as to the essential terms of the settlement, including the terms of the release. The day after the Mediation, Ms. Wasserstrom sent the Draft Agreement to Mr. Appleby. The Draft Agreement stated that the Trustees would provide the Ashton Parties with a complete release of any further liability relating to claims held by the Trustees. Mr. Appleby responded to Ms. Wasserstrom with several proposed changes to the Draft Agreement. None of these changes related to the terms of the release. Ms. Wasserstrom incorporated Mr. Appleby's changes and sent him the Revised Draft Agreement. Mr. Appleby did not provide any further revisions to the Revised Draft Agreement. Instead, on October 12, 2012, Mr. Appleby sent Ms. Ashton an email asking her to sign the Revised Draft Agreement and return it to him. All other actions taken by Ms. Wasserstrom on behalf of the Liquidating Trustee, including her representation to the Court that the matter had settled, demonstrate the Liquidating Trustee's belief that a settlement occurred at

[20] To the extent that the release was ambiguous, that ambiguity was cleared up by the fact that no other individuals or entities with potential claims against the Ashton Parties attended the Mediation. Ms. Ashton testified that she knew prior to the Mediation that there were other individuals or entities with potential claims against the Ashton Parties arising from their investment with MGI and Vennes. One of these individuals was Gary Hansen, the court-appointed receiver for MGI. Ms. Ashton knew he was not present at the Mediation, did not ask that he be present at the Mediation, and could not have reasonably believed that the Trustees had the ability to release claims on behalf of Mr. Hansen. It is thus implausible that Ms. Ashton believed that the Trustees could release her from liability on behalf of unidentified third parties. Likewise, it is implausible that any of the Mediation Participants represented to Ms. Ashton during the Mediation that a release given to Ms. Ashton by the Trustees would release her from liability as to unidentified third parties.

the Mediation and that the essential terms were not in dispute. Ms. Wasserstrom testified at Trial that she did not know of Ms. Ashton's problem with the release language until Ms. Chaitman informed her, in January 2013, of Ms. Ashton's unwillingness to go forward with the settlement.

As noted above, the existence of a meeting of the minds does not require a subjective mutual intent to agree on the same thing in the same sense, but may be based on objective manifestations whereby one party by his words or by his conduct, or by both, leads the other party to reasonably assume that he assents to and accepts the terms of the other's offer. Ms. Ashton may have believed[21] that she was getting a "global" release from liability not only from the Trustees, but also from all other similarly situated individuals and entities. However, there is no evidence that she made her purported understanding of "global" known to anyone at the Mediation. Ms. Ashton's unmanifested beliefs and unspoken understanding of the term "global" are not relevant to the Court's determination of whether the parties had a meeting of the minds and thus, formed an enforceable settlement agreement. Based upon the evidence received by the Court at Trial, Ms. Ashton, by her words and conduct at the Mediation, led Mr. Lamb and Mr. Rosen, as counsel for the

[21] The Court is not making a finding as to whether at the time of the Mediation, Ms. Ashton believed she was getting release from liability not only from the Trustees, but also from all other similarly situated individuals and entities. Mr. Appleby testified in his deposition that he told Ms. Ashton that she was only getting a release from the Trustees. Additionally, it is implausible that Ms. Ashton believed that the Trustees could release her from liability on behalf of unidentified third parties. However, the evidence is conflicting as to whether Ms. Ashton had this understanding during the Mediation or whether she simply changed her mind as to the terms of the settlement after consulting with another attorney months after the Mediation. Because there is no evidence that she made her purported belief as to the terms of the release known to anyone at the Mediation and because only the objective manifestations of the parties matter, a finding as to Ms. Ashton's understanding at the time of the Mediation as to the term "global" is unnecessary.

Trustees, to reasonably assume that she assented to and accepted the terms of Trustees' settlement offer. Accordingly, the Court finds that Ms. Ashton and the Trustees had a "meeting of the minds" as to the essential terms of the settlement agreement.

ii. The authority of Mr. Appleby and Mr. Farfante to bind their client

Even if the Court did not find that Ms. Ashton had a meeting of the minds with the Trustees on all the essential terms of the settlement, including the release, Mr. Appleby and later, Mr. Farfante, as Ms. Ashton's attorneys, effectively bound Ms. Ashton to the settlement. Mr. Appleby, who unequivocally understood the terms of the release being offered by the Trustees, agreed to the essential terms of the settlement at the Mediation and bound Ms. Ashton to the oral settlement. Furthermore, Mr. Appleby and Mr. Farfante, in representing Ms. Ashton post-Mediation, ratified the settlement agreement in writing through their email correspondence with Ms. Wasserstrom.

Generally, an attorney has no authority to settle on behalf of her client in the absence of her client's knowledge or consent. *Schumann v. Northtown Ins. Agency, Inc.*, 452 N.W.2d 482, 484 (Minn. Ct. App. 1990) (*citing Aetna Life & Casualty Co. v. Anderson*, 310 N.W.2d 91, 95 (Minn. 1981)). However, even if an attorney does not have explicit authority to settle, pursuant to Minnesota Statute § 481.08, "[a]n attorney may bind a client, at any stage of an action or proceeding, by agreement made in open court or in the presence of the court administrator, and entered in the minutes by such court administrator, or made in writing and signed by such

attorney." Mr. Appleby and Mr. Farfante exchanged several emails with Ms. Wasserstrom which indicated that Ms. Ashton and the Trustees reached a settlement agreement at the Mediation. Mr. Appleby reviewed the Draft Agreement, made minor changes to the Draft Agreement, and emailed the Draft Agreement back to Ms. Wasserstrom with his minor, non-substantive changes. This effectively ratified, in writing, the parties settlement and the terms of that settlement as memorialized in the Revised Draft Agreement. Furthermore, after Mr. Appleby left Fowler White and Mr. Farfante took over Ms. Ashton's representation, Mr. Farfante emailed Ms. Wasserstrom on December 7, 2012—nearly four months after the Mediation took place—and informed her that he was waiting on an executed settlement agreement from Ms. Ashton. This too effectively ratified the existence of the settlement.

Additionally, even "[i]n the absence of express authority, oral settlements are binding under three theories: (1) ratification; (2) estoppel; and (3) implied acceptance." *Schumann*, 452 N.W.2d at 484 (*citing Austin Farm Ctr., Inc. v. Austin Grain Co.*, 418 N.W.2d 181, 185-86 (Minn. Ct. App. 1988)). Mr. Appleby, who represented Ms. Ashton at the Mediation, unequivocally understood the terms of the release offered by the Trustees. In his capacity as Ms. Ashton's attorney, Mr. Appleby assented to the terms of the settlement at the Mediation, and Ms. Ashton is bound by Mr. Appleby's oral settlement based upon the principles of implied acceptance and estoppel.

In *Schumann*, the Minnesota Court of Appeals enforced a settlement agreement, finding, under similar circumstances as those presented here, that the clients authorized their attorney to settle based upon the principles of implied acceptance and estoppel. *Id.* at 484-85. The *Schumann* court noted that the clients "presented no material evidence to indicate that their attorney lacked authority to accept the settlement offer. They allege merely that they erred in agreeing to the settlement and misunderstood the effect of their agreement." *Id.* at 485. Moreover, the court found that "[e]ven if the settlement entered into by the parties' attorneys had not been in writing, the agreement would nevertheless have been binding on the [clients] without evidence of express authority to settle" because although the record did not indicate that the clients affirmatively accepted the settlement, "they waited over three months after their attorney's acceptance before their new attorney indicated that the settlement offer was unacceptable." *Id.* In finding that the clients impliedly accepted the settlement and were estopped from repudiating their former attorney's settlement agreement, the court emphasized the lapse of time before the clients repudiated the settlement and noted that opposing counsel relied upon the settlement agreement and ceased preparing for trial. *Id.* Finally, the court stressed that "[a] party who voluntarily enters into a settlement agreement cannot avoid the agreement upon determining after consultation with replacement counsel that the agreement has ultimately become disadvantageous or the settlement amount paltry." *Id. (citing Worthy v. McKesson Corp.,* 756 F.2d 1370, 1373 (8th Cir. 1985)).

Here, neither party offered evidence demonstrating that Mr. Appleby had express authority to settle on behalf of Ms. Ashton. However, as noted above, even in the absence of express authority, an oral settlement made by a party's attorney may be binding under the theories of ratification, estoppel, and implied acceptance. Ms. Ashton and Mr. Appleby left the Mediation believing that Ms. Ashton and the Trustees reached a settlement agreement. Nearly four months after the Mediation, Mr. Farfante still believed Ms. Ashton would execute the Revised Draft Agreement. Indeed, Ms. Ashton ultimately allowed more than four months to pass before her new attorney, Ms. Chaitman, informed Ms. Wasserstrom that Ms. Ashton refused to proceed with the settlement. In fact, it was only after Ms. Ashton consulted with her new attorney that the Trustees learned that Ms. Ashton refused to proceed with the settlement. By the time Ms. Ashton's new attorney informed Ms. Wasserstrom that Ms. Ashton refused to proceed with the settlement, the Trustees had ceased preparing to move forward with their cases against the Ashton Parties, had obtained the Minnesota 9019 Order, and had obtained a dismissal of the Ashton Adversary Proceeding.

Accordingly, for the reasons just discussed, even if the Court did not find that Ms. Ashton accepted the Trustees' settlement offer such that she and the Trustees had a meeting with the minds on all the essential terms of the settlement, Mr. Appleby and later, Mr. Farfante effectively bound Ms. Ashton to the settlement.

iii. The parties' understanding that the agreement would be reduced to writing

The Ashton Parties assert that the oral settlement agreement is unenforceable because the evidence shows that Ms. Ashton and the Trustees did not intend to be bound by the settlement until they executed a written settlement agreement. The Court disagrees.

An oral agreement is not enforceable when the evidence shows that the parties did not intend to be bound until they executed a written settlement agreement. *Hansen v. Phillips Beverage Co.*, 487 N.W.2d 925, 927 (Minn. Ct. App. 1992) (*quoting Northway v. Whiting*, 436 N.W.2d 796, 799 (Minn. Ct. App. 1989)). However, the evidence must be clear that "the parties [knew] that the execution of a written contract was a condition precedent to their being bound." *Dataserv Equip., Inc. v. Tech. Fin. Leasing Corp.*, 364 N.W.2d 838, 841 (Minn. Ct. App. 1985) (*citing Staley Mfg. Co. v. N. Coops., Inc.*, 168 F.2d 892 (8th Cir. 1948)); *see also, Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 462 (Minn. Ct. App. 2001). "Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof." Restatement (Second) of Contracts § 27 (1981).

"Parties may be contractually bound even when they contemplate and express a desire for a future memorialization of their agreement, unless one of the parties objectively manifests an intention that an executed document is a condition precedent to the contract." *Moga v. Shorewater Advisors, LLC*, A08-785, 2009 WL

982237 (Minn. Ct. App. Apr. 14, 2009) (*citing* Restatement (Second) of Contracts §§ 21, 27). "Mere statements that such a document should or will be created do not satisfy the requirement for an objectively expressed intent to create a precondition." *Id*. (*citing* Restatement (Second) of Contracts § 17 cmt. c); *see also, Massee v. Gibbs*, 210 N.W. 872, 874 (Minn. 1926). Indeed, there is an important distinction between parties that reference a future contract in writing and those that explicitly require the agreement to be reduced to writing and executed as a condition precedent to being bound by the agreement. *Luigino's Inc.*, 2005 WL 735919, at *3. Accordingly, in considering "whether the parties exhibited an objective intent to be bound by the settlement prior to execution of a written document, courts consider 'the course of negotiations, agreement on material terms, whether the parties described the settlement as such, and whether any existing disagreements were merely technicalities.'" *Id*. (*quoting Sears, Roebuck & Co*., 532 F.Supp. at 932-33).

Here, neither Ms. Ashton nor the Trustees objectively stated that an executed written contract was a condition precedent to the settlement. Mr. Lamb testified at Trial that he did not believe the agreement reached at Mediation was "simply talk" which was not binding until reduced to an executed signed writing. Likewise, Mr. Rosen testified that he did not tell Mr. Appleby that whatever was discussed on the day of the Mediation was simply a discussion until there was an executed written settlement agreement. When asked whether he thought that either of the Trustees could have asked for additional money in exchange for the releases after the

Mediation concluded, Mr. Rosen replied in the negative because the parties' settlement agreement was complete.

Mr. Appleby testified at his deposition that he believed that any agreement reached would not be binding until signed because the Mediation Agreement "very specifically . . . said that no agreement would be binding unless it was signed by all the parties." Second Appleby Dep. Tr. 34:2-9. However, the Mediation Agreement, which substantially conforms to Ashton's Exhibit P, does not in fact provide that no agreement will be binding unless it is signed by all the parties. Instead, the Mediation Agreement simply provides that pursuant to the Minnesota Civil Mediation Act, Justice Gilbert advised the parties that a written mediated settlement agreement is not binding unless it contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing of several other statutory provisions. As previously discussed, the Minnesota Civil Mediation Act does not apply. Accordingly, this provision of the Mediation Agreement does not require that the parties' agreement be in writing. Furthermore, when asked if anyone at the Mediation said that any agreement would not be final and binding until a formal written agreement was signed by the parties, Mr. Appleby responded:

> Without using the words you used, I'll explain it to say, that, yes, there was a discussion that following the mediation, there would be a formal settlement agreement that would outline the terms of what we believe the agreement to be. And that that was the agreement that the parties would . . . need to sign and that settlement agreement would be filed with both the Florida Bankruptcy Court and the Minnesota Bankruptcy Court for approval.

Second Appleby Dep. Tr. 34:2-9. As noted above, an *expectation* that the parties would eventually execute a formal written agreement is not equivalent to *requiring* the execution of a formal written agreement as a *condition precedent* to the parties being bound by the agreement.

Ms. Ashton also testified that during the Mediation, Mr. Appleby told her that the oral settlement agreement would not be binding until there was a signed, written document. However, as the Court discussed extensively when determining whether the parties had a meeting of the minds, subjective, unmanifested intent is irrelevant.[22] It is only when one party knows[23] the other does not intend to be bound until execution of a written agreement that the execution of a written agreement is

[22] For instance, the Minnesota Court of Appeals in *Luigino's Inc.* rejected a party's argument that the execution of a written settlement agreement was a condition precedent to the parties being bound. 2005 WL 735919, at *3. In that case, the plaintiff admitted that the agreement did not contain a provision explicitly requiring execution as a condition precedent. *Id.* The plaintiff's attorney and CEO maintained that "it was their 'intention' and 'understanding' that [p]laintiff did not intend to be bound by the Settlement Agreement until it was executed." *Id.* However, the court noted that "the secret, unexpressed intention of the parties does not matter" and that "[d]espite being represented by sophisticated counsel . . . , there is no evidence either party suggested including an explicit provision requiring execution before the Agreement became effective." *Id.* The Court in *Moga v. Shorewater Advisors* also determined that despite an understanding that a formal contract would be prepared, nothing in the record established that the parties expressed an intention not to be bound until a formal written contract was prepared and executed. 2009 WL 982237, at *5.

[23] The following cases involve scenarios in which both parties know that the execution of a written agreement is a condition precedent to formation of a binding contract. In *Hansen v. Phillips Beverage Co.*, one provision of a written offer stated that the offer "shall not be a binding legal agreement" and that "neither party shall have any liability to the other until the execution of the definitive purchase agreement." 487 N.W.2d at 927. In *Hoyt v. Piper Jaffray & Co.*, A07-1737, 2008 WL 3289722 (Minn. Ct. App. Aug. 12, 2008), a letter signed by both parties, which formed the basis of the plaintiff's claim that there was a binding contract, stated: "This proposal is preliminary and should not be construed as a commitment to make the loans . . . Any commitment . . . to make the loans will only be made in written format." *Id.* at *2. In *Horace Mann Ins. Co. v. Ferguson*, A07-1055, 2008 WL 2246142 (Minn. Ct. App. June 3, 2008), an email contained a disclaimer that read: "Contract formation in this matter shall occur only with manually-affixed original signatures on original documents." *Id.* at *3. Finally, in *Northway v. Whiting*, 436 N.W.2d 796 (Minn. Ct. App. 1989), a letter signed by the parties' attorneys stated that the offer was "contingent upon . . . entering into a definitive stock purchase agreement with standard representations and warranties." *Id.* at 798 (internal quotation marks omitted).

a condition precedent to the formation of an enforceable contract. *Hoyt v. Piper Jaffray & Co.*, A07-1737, 2008 WL 3289722, at *2 (Minn. Ct. App. Aug. 12, 2008) (*quoting Hansen v. Phillips Beverage Co.*, 487 N.W.2d at 927). Thus, even if Ms. Ashton and Mr. Appleby subjectively believed that the settlement agreement would not be binding until the parties executed a written agreement, the Ashton Parties presented no evidence that either Ms. Ashton or Mr. Appleby made this belief known to the Trustees, Mr. Lamb, or Mr. Rosen.

Furthermore, all of the Mediation Participants testified that after the Mediation concluded, Mr. Appleby and Ms. Ashton exchanged pleasantries with Mr. Lamb and Mr. Rosen, and Ms. Ashton expressed her relief at having the litigation with the Trustees behind her. Ms. Ashton's testimony does not indicate that she was concerned about the parties' ability to work out an acceptable written agreement. Indeed, Ms. Ashton testified on several occasions that she left the Mediation believing that she reached a settlement with the Trustees. If the parties' settlement was indeed contingent upon the execution of a written agreement, Ms. Ashton would not have believed the matter was behind her upon leaving the Mediation.

Finally, the parties objectively agreed to all of the essential terms of the agreement. When the Mediation concluded, the only terms left to be worked out during the drafting of the written settlement agreement were minor, technical provisions.

For these reasons, the Court finds that although there was an understanding amongst the Mediation Participants that the settlement would eventually be reduced to a written agreement and executed by the parties, there is no evidence that the parties intended the execution of a written contract to be a condition precedent to being bound by the agreement.

iv. The parties entered into an enforceable settlement agreement

Notwithstanding the Court's application of judicial estoppel, the Court finds that, for the reasons discussed above, Ms. Ashton and the Trustees entered into an enforceable oral settlement agreement at the Mediation, the terms of which are memorialized in the Revised Draft Agreement.[24] Ms. Ashton and the Trustees had a meeting of the minds as to the essential terms of the settlement agreement: the Trustees were to provide the Ashton Parties with a release from liability as to any and all claims held by the Trustees, and Ms. Ashton was to pay the Trustees $225,000.00. Although there was an understanding that the settlement would eventually be reduced to an executed written agreement, the execution of a written agreement was not a condition precedent to being bound by the agreement.[25]

IV. Unilateral mistake

The doctrine of rescission allows a party to disaffirm or set aside a contract and seek equitable relief. *Am. Litho, Inc. v. Imation Corp.*, 08-CV-5892(JMR/SRN),

[24] Based upon the post-Mediation actions of Mr. Appleby, Mr. Fanfante, and Ms. Ashton, the Court finds that the Ashton Parties are bound by the terms of the Revised Draft Agreement.

[25] The Ashton Parties alternatively argue that the Liquidating Trustee breached the settlement agreement because he failed to provide the Ashton Parties with a release as to all other potential claimants. However, the Court concluded that this kind of release was not a term of the settlement. Accordingly, the failure of the Liquidating Trustee to provide such a release is not a breach.

2010 WL 681275, at *3 (D. Minn. Feb. 23, 2010) (*citing Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 732 (8th Cir. 1995) (applying Minnesota law)). "The effect of the remedy of rescission is generally to extinguish a rescinded contract so effectively that in contemplation of law it has never had existence." *Chase Manhattan Bank, N.A. v. Clusiau Sales & Rental, Inc.*, 308 N.W.2d 490, 494 (Minn. 1981) (*citing Koch v. Han-Shire Invs.*, 140 N.W.2d 55 (Minn. 1966)). "Because the law favors the enforcement of contracts, a right to rescind arises only in circumstances that may fairly be described as 'unusual.'" *Am. Litho, Inc.*, 2010 WL 681275, at *3 (*quoting N.L.R.B. v. MEMC Elec. Materials, Inc.*, 363 F.3d 705, 709 (8th Cir. 2004)). These "unusual" circumstances which may justify rescission of a contract include: mutual mistake, mutual assent to rescission, and under narrow circumstances, a unilateral mistake. *Id.* (citations omitted).

A unilateral mistake is a mistake made by just one of the contracting parties as to the subject matter of the contract. Here, Ms. Ashton purportedly made a unilateral mistake as to the terms of the release she was to receive in exchange for her payment of $225,000.00 to settle the Trustees claims against her. However, "[a]bsent ambiguity, fraud or misrepresentation, a mistake of one of the parties alone as to the subject matter of the contract is not a ground for reformation." *Nichols v. Shelard Nat. Bank*, 294 N.W.2d 730, 734 (Minn. 1980) (*citing Olson v. Shephard*, 206 N.W. 711 (Minn. 1926)). Additionally, "[a] party may not . . . escape contract liability based on unilateral mistake if the party bears the risk of that mistake." *HealthEast Bethesda Hosp. v. United Commercial Travelers of Am.*, 596

F.3d 986, 988 (8th Cir. 2010) (citations omitted) (applying Minnesota law). "A party bears the risk of mistake if it is aware, at the time of contracting, that it has limited knowledge of facts to which the mistake relates, but treats that knowledge as sufficient," and "[a] court may . . . allocate risk to a party where reasonable." *Id.* (citations omitted). Indeed, with respect to one party's mistaken belief as to the terms of a release, the Minnesota Court of Appeals held:

> [A]ppellants' testimony about what they believed is not helpful. Unilateral mistake as to the scope of a release will not avoid its plain language; appellants must come forward with evidence that there was a *mutual* mistake regarding the intended scope of the releases or that respondents induced the mistake in some way.

Goldberger v. Kaplan, Strangis & Kaplan, P.A., 534 N.W.2d 734, 737 (Minn. Ct. App. 1995) (emphasis in original) (*citing Sorensen v. Coast-to-Coast Stores (Central Org.), Inc.*, 353 N.W.2d 666, 670 (Minn. Ct. App. 1984)); *see also, Feed Prods. N., Inc. v. Reliance Ins. Co. of Ill., Inc.*, CIV.01-487(JNE/JGL), 2005 WL 1703135, at *3 (D. Minn. July 20, 2005) (holding that a party's unilateral mistake as to the terms of the stipulation of settlement does not permit it to avoid the stipulation's plain meaning).

Here, the Ashton Parties do not contend that the Trustees defrauded them or made any misrepresentations in the Mediation. Furthermore, as previously discussed, based upon the parties who attended the Mediation and Ms. Ashton's knowledge that there existed other potential plaintiffs who were not in attendance at the Mediation, there was no ambiguity as to the terms of the "global" release. Even if there was ambiguity, Ms. Ashton bears the risk of her mistake. Ms. Ashton could have asked her attorney or Justice Gilbert to clarify the terms of the release.

Furthermore, if Ms. Ashton was indeed mistaken as to the terms of the release or the ability of the Trustees to release her from liability as to other potential claimants, she should have been aware that she possessed insufficient knowledge and sought clarification.

Accordingly, Ms. Ashton's unilateral mistake is not a ground for rescinding the settlement agreement entered into at the Mediation.

V. Approval of the settlement

Federal Rule of Bankruptcy Procedure 9019(a) provides that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct." Because the Ashton Parties objected to the Motion to Approve Settlement solely on the basis that there was no enforceable settlement and because no other parties objected to the reasonableness of the settlement, the Liquidating Trustee presented no evidence and made no proffer as to the reasonableness of the settlement. Accordingly, the Court will set a hearing to approve the parties' settlement pursuant to the terms recited in the Revised Draft Agreement.

VI. Conclusion

Based upon the foregoing findings of fact and conclusions of law, the Court determines that the Liquidating Trustee, the PCI Trustee, and Ms. Ashton, on behalf of herself and the Ashton Trust, entered into an enforceable settlement

agreement, the terms of which are memorialized in the Revised Draft Agreement. The Court will set a hearing to approve the parties' settlement agreement.

ORDER

The Court, being fully advised in the premises and for the reasons discussed above, hereby **ORDERS AND ADJUDGES** that:

1. The Liquidating Trustee, the PCI Trustee, and Ms. Ashton, on behalf of herself and the Ashton Trust, entered into an enforceable settlement agreement, the terms of which are memorialized in the Revised Draft Agreement.
2. The Court will conduct a hearing on the *Motion to Approve Settlement* (ECF No. 1704) on **April 1, 2014, at 1:30 p.m.** at the United States Bankruptcy Court, Courtroom A, Flagler Waterview Building, 1515 North Flagler Drive, 8th Floor, West Palm Beach, Florida.
3. The Courtroom Deputy will issue a re-notice of hearing on the *Motion to Approve Settlement* (ECF No. 1704), which the Liquidating Trustee will serve on all interested parties.

Copies furnished to:

Michael S Budwick, Esq.

Helen Davis Chaitman, Esq.