UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

CARL CAVALIER	**CIVIL ACTION NO.: 3:21-cv-000656**
VERSUS	**JUDGE: JOHN W. DEGRAVELLES**
THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY & CORRECTIONS, ET AL.	**MAGISTRATE JUDGE: RICHARD L. BOURGEOIS, JR.**

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO ENFORCE SETTLEMENT AGREEMENT

Plaintiff, Carl Cavalier (Cavalier), opposes Defendants' motion to enforce settlement agreement (Rec. Doc 56). Cavalier cites the fact that he was subjected to coercion and duress by his attorney in that he had consistently communicated to his attorney that he was not willing to settle for the amount that had been offered by defendants. Cavalier also points out that at least one material term had not been resolved at the Zoom conference with the Magistrate Judge. As such, Cavalier contends that he believes that what was reached was merely an "agreement to agree." Neither party should be entitled to have this Court summarily dispose of this motion, or plaintiff's own competing Motion to Reopen the Case and Rescind the Proposed Settlement (Rec. Doc. 52). Rather, the Court should set the competing motions for hearing.

Cavalier incorporates by reference by reference into this memorandum in opposition his allegations and argument contained in his previously filed Motion to Reopen the Case and Rescind the Proposed Settlement (Rec. Doc. 52), and Memorandum in Support of Plaintiff's Motion to Reopen the Case and Rescind the Proposed Settlement (Rec. Doc 52-2).

LAW AND ARGUMENT

Standard of Review: In the case cited by defendants, a reviewing court will not disturb a denial of motions such as these absent an abuse of discretion. Furthermore, this Court's factual findings, specifically as to whether a settlement agreement exists and whether the parties assented to it, will not be disturbed absent clear error.[1]

A district court "has inherent power to recognize, encourage, and when necessary enforce

1 Powell v. Omnicom, 497 F.3d 124, 128 (2nd Cir. 2007).

settlement agreements reached by the parties" in the case before the Court.[2] The cases are also clear that settlement agreements are contracts and as such, principles of contract law as developed in the federal jurisprudence are to be applied when the legal issues underlying the case are questions of federal law.[3] Common law contractual concepts such as offer and acceptance, mutual assent, and whether the contract was entered into knowingly and voluntarily are all factors the court must consider. It is also acknowledged that settlement agreements need not be reduced to writing in order to be enforceable.[4]

Aside from making it clear that common law principles of contract law apply to the enforceability of settlement agreements, the cases cited by defendants provide little guidance in this matter. In the *R.D. Sprinkler* case, this Court had the benefit of an on-the-record Settlement Agreement which is absent in the Cavalier matter.[5] *R.D. Sprinkler* primarily concerned itself with whether certain unresolved settlement terms were material and essential, for which if they were, would render the oral settlement agreement unenforceable.[6] Courts generally find there is agreement on all of the material terms of settlement were the parties have agreed upon the monetary amount of the settlement payment and the fact that plaintiffs will release specific claims.[7]

Plaintiff indicated to his counsel that he would not settle the case unless certain non-monetary aspects of his employment were included in any settlement (Rec Doc 52-3, Cavalier Dec. ¶ 6).8 During the settlement conference Mr. Cavalier had attempted to re-direct his counsel's attention to a certain non-monetary aspect of the settlement, namely his re-employment with state police. On or about September 27, 2022, during a telephone conversation between Mr. Cavalier and his attorney, Ms. Craft outlined the settlement proposed by the Defendant, including holding a settlement conference before a magistrate judge.[9] During the settlement conference Mr. Cavalier had attempted to re-direct his counsel's attention to a certain non-monetary aspect of the

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2 Guidry v. Halliburton Geophysical Servs., Inc., 976 F.2d 938, 940 (5th Cir. 1992), and Bowers v. Abundant Home Health, LLC, No. 3:16-CV-1314-C, 2021 WL 706783, at *7 (N.D. Tex. Jan. 25, 2021), report and recommendation adopted, No. 3:16-CV-1314-C, 2021 WL 693652 (N.D. Tex. Feb. 23, 2021).
3 Id, at 7.
4 Bowers v. Abundant Home Health, LLC, No. 3:16-CV-1314-C, 2021 WL 706783, at *8 (N.D. Tex. Jan. 25, 2021), report and recommendation adopted, No. 3:16-CV-1314-C, 2021 WL 693652 (N.D. Tex. Feb. 23, 2021).
5 Rd. Sprinkler Fitters Loc. Union No. 669, U.A., AFL-CIO v. CCR Fire Prot., LLC, No. CV 16-00448- JWD-EWD, 2019 WL 4739293, at *35.
6 R.D. Sprinkler, at 31.
7 R.D. Sprinkler, at 32.
8 Rec Doc 52-3, Cavalier Dec. ¶ 6
9 (Rec. Doc. 52-6, page 3, line 25 – page 6, line 4). After hearing his offer, Mr. Cavalier responded, "Okay. Um, yeah, I'm—I'm not going to agree to that, * * *" (Rec. Doc. 52-6, page 6, lines 6- 7) (Also see Rec. Doc. 52-6, page 31, lines 3-7.)

settlement, namely his re-employment with state police which she refused to do.[10] That Cavalier's re-employment was essential and material term, rather than a mere issue of how the settlement would be implemented had to be known. He repeatedly communicated this, and his desire to go forward with his administrative appeal to the Louisiana State Police Commission to his counsel. Certainly by this time the defendants had to know this was a material issue to Cavalier as they were well aware of the State Police Commission appeal.

In Bowers, defense counsel notified the parties claiming to have been given his client's authority to settle the demand for a certain sum of money. A series of email exchanges followed after which a draft settlement was produced. Afterwards the parties filed a notice of settlement with the Court, prompting an administrative closure of the case. Some confusion then followed as to which draft of the agreement the parties actually agreed upon. The Court then summarily granted a motion to enforce the settlement agreement.

In reversing, the Fifth Circuit pointed out that "it is axiomatic that

> "one who signs or accepts a written instrument will normally be bound in accordance with its written terms," regardless of whether he bothered to read the document before signing it, "ordinary contract principles require a 'meeting of the minds' between the parties in order for agreements to be valid." [11]

Comparing the facts of the case before this Court, Cavalier has shown through communications to his attorney that he did not want to settle, nor did he give his counsel authority to settle, for the amount that had apparently been offered at least a month prior to the settlement conference. What was vitally important to him was reemployment, and in lieu of that, to have his hearing before the State Police Commission. Whatever affirmations he made at the conclusion of the settlement conference were due to the pressure and coercion by his counsel.[12] As it concerns either the scope or validity of the settlement agreement itself, as in Bowers, Cavalier should be afforded an evidentiary hearing.[13]

Lozano involved an employment discrimination claim(s) brought by a transit cop against his employer. Shortly after a pre-trial conference, counsel agreed to a settlement over the phone,

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10 See Rec. Doc. 52-3, ¶8.

11 Bowers v. Abundant Home Health, LLC, No. 3:16-CV-1314-C, 2021 WL 706783, at *6 (N.D. Tex. Jan. 25, 2021), citing Bowers v. Abundant Home Health, No. 19-10537 (5th Cir. March 5, 2015) at 3-4.

12 See Rec. Doc. 52-3, ¶8-9.

13 Although a district court has inherent power to enforce an agreement to settle a case pending before it *summarily*, when opposition to enforcement of the settlement is based not on the merits of the claim but on a challenge to the validity of the agreement itself, the parties must be allowed an evidentiary hearing on disputed issues of the validity and scope of the agreement. Bowers, at *9, citing In re Deepwater Horizon, 786 F.3d 344, 354.

later confirmed by an email exchange which contemplated preparation of a formal settlement document. Thereafter counsel for the parties informed the Court the case had settled and waived their trial setting. One of the conditions of the settlement was that Lorenzo's employer place him on unpaid leave, which they did. Somewhere around this time, Lorenzo refused to sign the settlement agreement which prompted his employer, METRO, to have the trial court enforce the settlement agreement. In response, Lorenzo alleged that his counsel never had the authority to settle on his behalf, or that such authority was procured through fraud, deception, or coercion.

Once the party seeking to enforce a settlement agreement proves that an agreement was reached on all material terms, the burden then shifts to the party seeking to avoid the agreement to show that he agreement is tainted with invalidity and should not be enforced.[14] Although there was a testimonial swearing match between counsel and client, the Court found that Lozano had given such authority when he told his attorneys to "go do it."[15] That is something completely absent from this case as the telephone conversation transcripts and email correspondence between Cavalier and his counsel show he was consistently opposed to not only the terms offered, but also insisted an attempt be made, through settlement or following through with the State Police Commission, to get his job back.

In RE Diamond Services Corp also involved a motion to enforce a settlement reached through email exchanges between counsel, concluding with counsel's email response of "deal." Here the Court, finding that this involved solely a question of law, cited the fact that the parties disputed the mere legal effect of the words and acts reflected in their month-long emails in denying an evidentiary hearing.[16] In the case before this Court however, Cavalier disputes the validity of the agreement itself, rather than any terms contained therein.

Coleman as well involved competing motions to enforce and to reopen the case subsequent to a Zoom settlement conference with the Magistrate Judge. At the conclusion of the conference the terms of the agreement were recited as represented in the minutes of the settlement conference.[17] Procedurally speaking, "the party opposing the enforcement of a settlement

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14 Lozano v. Metro. Transit Auth. of Harris Cnty., No. CV H-14-1297, 2016 WL 3906295, at *5-6 (S.D. Tex. July 19, 2016) noting that the non-moving party could meet this burden by proving that counsel did not have authority to settle the case); *see also Smith v. Amedisys Inc.*, 298 F.3d 434, 441 (5th Cir. 2002) (explaining that the non-moving party has the burden to demonstrate that the release "was invalid because of fraud, duress, material mistake, or some other defense"). In performing this analysis, the court is primarily concerned with whether the release was "knowing and voluntary." *See Smith*, 298 F.3d at 441 ("A release of a Title VII claim is valid only if it is 'knowing and voluntary.'")

15 Lozano, at 21

16 In re Diamond Servs. Corp., No. 6:20-CV-00408, 2022 WL 4813911, at *4-5 (W.D. La. Sept. 30, 2022)

17 Coleman v. City of Opelousas, No. 6:20-CV-01469, 2021 WL 3812483 at *2 (W.D. La. July 23, 2021)

agreement has the burden of showing that the contract is invalid and must be allowed an evidentiary hearing."[18] To determine whether a settlement agreement was knowingly and voluntarily executed, the Fifth Circuit has adopted a "totality of the circumstances" approach. Taking this approach, the Court cited the fact that

> the plaintiff had both his counsel and family physically present with him. He was able to confer with his parents;
>
> the plaintiff never voiced opposition to the terms of the settlement;
>
> did not allege that his counsel acted without his authorization in agreeing to accept the defendant's offer;
>
> did not allege that he was coerced by the judge or by any of the defense counsel.[19]

Although Cavalier participated in the settlement conference with the benefit of counsel, his instructions were ignored. Through numerous citations herein, he had long since informed his counsel that he disagreed with the settlement amount and explained his rationale why. He was clear that he wanted to proceed with his hearing before the State Police Commission if favorable settlement on his reemployment could not be reached. As Cavalier has raised the claim that he was unduly pressured and coerced to agree, which goes to the validity of the settlement agreement itself, this Court should not rule summarily on these motions, but rather afford him a hearing.[20]

The case most heavily relied on by the defendants, Powell, involved a purported settlement agreement over plaintiff's claims against his employer which were mediated in court before the Magistrate Judge. At the conclusion of the mediation, and after defense counsel read the terms into the record the Magistrate Judge asked the plaintiff if the terms as read were acceptable to her, and whether "on the basis of agreeing to those terms that this case will be terminated with prejudice and cannot be reponed. Powell responded affirmatively to both questions."[21] The parties ran into difficulty reducing their agreement to writing. Powell then sought to reopen the case, urging the following grounds which may be relevant to those before this Court: (1) The settlement agreement the plaintiff agreed to was not reduced to writing, and (2) Were the parties bound absent a writing?

The 2nd Circuit quickly disposed of plaintiff's first contention, pointing out that parties can

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18 Coleman v. City of Opelousas, No. 6:20-CV-01469, 2021 WL 3812483, at *5(W.D. La. July 23, 2021), citing In re Deepwater Horizon, 786 F.3d 344, 354 (5th Cir. 2015) (citing Mid-South Towing Co. v. Har-Win, Inc., 733 F.2d at 390)

19 Coleman, at *11.

20 When the parties "negotiated at arms-length and there was no taint of fraud, deception, coercion[,] or overreaching, the settlement [is] binding, despite a claim of mutual mistake." Coleman v. City of Opelousas, No. 6:20-CV-01469, 2021 WL 3812483, at *8(W.D. La. July 23, 2021) citing Mid-South Towing Co. v. Har-Win, Inc., 733 F.2d at 392 (citing Strange v. Gulf & South American Steamship Co., 495 F.2d 1235, 1237 (5th Cir. 1974)

21 Powell v. Omnicom, 497 F.3d 124, 127 (2nd Cir. 2007).

enter into a binding contract orally. Here, the Court found that

> "Powell and Omnicom entered into a "voluntary, clear, explicit, and unqualified" settlement on the record in open court: Omnicom recited the terms of the agreement on the record, and Powell expressly assented on the record to those terms and the dismissal of the case. Accordingly, the fact that the settlement was never reduced to writing is insufficient to render the settlement nonbinding."[22]

Whether the parties intended to be bound absent a writing was a more complex question causing the Court to answer it applying four factors:

> "(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing. No single factor is decisive, but each provides significant guidance."[23]

In weighing those four factors against the plaintiff who sought to rescind the purported agreement, the Court found that neither party made an express reservation to be bound only by a writing. As to the second factor, the Court found partial performance of the agreement on the part of Omnicom. Applying the third factor, the Court found that all of the material terms of the agreement at the hearing. As to the fourth factor,

> "We have held that a settlement, whose terms were not announced in open court, for $62,500 paid over several years "strongly suggest[ed]" that the parties would intend to be bound only by a writing. Winston, 777 F.2d at 83. Similarly, we have held that a settlement, also not announced in open court, containing perpetual rights similar to those in the settlement at issue would normally be put in writing. Ciaramella, 131 F.3d at 326. That settlement, like this one, contained provisions concerning how future requests for employee references would be handled, prohibiting the plaintiff from reapplying for employment with the defendant, and imposing confidentiality requirements.

Unlike in Winston and Ciaramella, however, the terms of this agreement were

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22 Powell, at 129.
23 Powell, at 129-130, citing Winston, 777 F.2d at 80; see also Ciaramella, 131 F.3d at 323.

announced on the record and assented to by the plaintiff in open court. In Ciaramella, we stated that "[s]ettlements of any claim are generally required to be in writing or, at a minimum, made on the record in open court." Id. (emphasis added). The significance of announcing the terms of an agreement on the record in open court is to ensure that there are at least "some formal entries ... to memorialize the critical litigation events," Willgerodt v. Hohri, 953 F.Supp. 557, 560 (S.D.N.Y. 1997) (quoting Dolgin v. Dolgin (In re Dolgin Eldert Corp.), 31 N.Y.2d 1, 10, 334 N.Y.S.2d 833, 286 N.E.2d 228 (1972)), and to perform a "cautionary function" whereby the parties' acceptance is considered and deliberate, see Tocker v. City of N.Y., 22 A.D.3d 311, 802 N.Y.S.2d 147, 148 (2005) Powell v. Omnicom, 497 F.3d 124 (2nd Cir. 2007)"[24]

There are distinguishing features between Powell and the case before this Court. While it certainly appears that neither party expressly reserved the right not to be bound absent a writing, the other three factors weigh in more favorably towards the plaintiff herein. Cavalier is unaware of any partial performance by any party. Most importantly however, is the fact that here, unlike in Powell, the terms of this agreement were not announced on the record and in open court but rather exchanged in a video conference.

Plaintiff asserts that he never gave authority for his attorney to settle this matter for two hundred thousand dollars, an amount the evidence suggests had been bantered about for quite some time nor did want to settle for that amount. In fact, Mr. Cavalier had unequivocally expressed dissatisfaction with that amount in written correspondence. As far back as September 1, 2022, Cavalier wrote

"I had a chance to over the 200k, the numbers associated with my retirement and the money I would have earned if I were to retire at Louisiana State Police. The 200k is not nearly worth it as I thought. I would not like to move forward with agreeing to that amount. Please advise the opposing counsels.....I do not believe 200k is fair." [25]

Furthermore, on October 13, 2022, Cavalier wrote

"..... As for the proposed settlement, I am not comfortable with it and have never been comfortable with it. I have expressed that to you verbally and in writing.

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24 Powell, at 130-131.
25 Exhibit 1, email from plaintiff to plaintiff's counsel dated September 1, 2022.

> While in the conference with the magistrate judge, I asked you to ask for my job back. You refused to even present it to the judge or opposing counsel. I expressed to you prior to settlement talks that I wanted to proceed with my case through LSP commission hearings and other necessary avenues with hopes of getting my job back."[26]

Mr. Cavalier also sought relief regarding at least one non-pecuniary aspect of the case, namely to get his job back at Louisiana State Police. He repeatedly asked his counsel to seek this relief both before and during the settlement conference, which was repeatedly refused.[27] It is beyond belief that Mr. Cavalier consistently maintained his position regarding acceptable settlement terms in every communication with his attorney, yet not on the date of the settlement conference.[28]

CONCLUSION

Mr. Cavalier made it clear to his attorney at least since early September that he had no intention of settling this case for the amount that would be eventually offered at the settlement conference. He further expressed not only that to his attorney, both during and immediately after the settlement conference, but the fact that his reemployment was not pursued. He was clear that should defendants not agree to his reemployment, he did not want to waive his rights before the State Police Commission. To characterize this as some form of "buyer's remorse" as defendants would have the Court believe is inaccurate.

WHEREFORE, Carl Cavalier prays that the Court will deny defendant's Motion to Enforce Settlement Agreement and set the two competing motions for hearing, and thereafter, reopen the cause, and return the matter to the Court's docket.

RESPECTFULLY SUBMITTED:

s/ Clifton J. Ivey
Clifton J. Ivey, Jr., Roll No.: 28094
IVEY LAW FIRM, LLC
8748 Quarters Lake Road, 2nd Floor
Baton Rouge, Louisiana 70809
Telephone: (225) 922-9111
Facsimile: (225) 922-9121

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26 Exhibit 2, email from plaintiff to plaintiff's counsel, dated October 13, 2022.
27 Rec. Doc. 52-3 ¶'s 6, 7, & 8.
28 Rec Doc. 52-7, pg 21 lns 20-25, through pg 22 ln 4. In that telephone call between plaintiff and his counsel, counsel asked Mr. Cavalier "What part of the judge telling you it was a fantastic settlement did you not hear? Mr. Cavalier replied "Yeah, I heard the judge saying a fantastic settlement, but, as my counsel, you knew how I felt about that. I didn't think it was a fantastic settlement. And you knew that. I told you that, Miss Jill.

Email: cliftonivey@att.net
-and-
s/ James C. Carver
James C. Carver, Ph.D., J.D.
LA Bar #19514-T.A.
THE CARVER LAW FIRM, LLC
201 St. Charles Street
Baton Rouge, LA 70802
Phone: (225) 636-2642
Fax: (225) 387-3198
Email: jim@thecarverlawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2022, a copy of the foregoing pleading was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to counsel for Defendants, by operation of the Court's electronic filing system.

s/ Clifton J. Ivey
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MIDDLE DISTRICT OF LOUISIANA

CARL CAVALIER	**CIVIL ACTION NO.: 3:21-cv-000656**
VERSUS	**JUDGE: JOHN W. DEGRAVELLES**
THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY & CORRECTIONS, ET AL.	**MAGISTRATE JUDGE: RICHARD L. BOURGEOIS, JR.**

EXHIBIT LIST FOR MEMORANDUM IN OPPOSITION TO MOTION TO ENFORCE SETTLEMENT AGREEMENT

1. Ex. 1 - Email from plaintiff to plaintiff's counsel dated September 1, 2022, at 3:55 PM CDT
2. Ex. 2 - Email from plaintiff to plaintiff's counsel dated October 13, 2022, at 3:11 PM CDT

RESPECTFULLY SUBMITTED:

s/ Clifton J. Ivey
Clifton J. Ivey, Jr., Roll No.: 28094
IVEY LAW FIRM, LLC
8748 Quarters Lake Road, 2nd Floor
Baton Rouge, Louisiana 70809
Telephone: (225) 922-9111
Facsimile: (225) 922-9121
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-and-
s/ James C. Carver
James C. Carver, Ph.D., J.D.
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system.

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Clifton J. Ivey, Jr., Roll No.: 28094
IVEY LAW FIRM, LLC
8748 Quarters Lake Road, 2nd Floor
Baton Rouge, Louisiana 70809
Telephone: (225) 922-9111
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Email: cliftonivey@att.net

-and-

s/ James C. Carver
James C. Carver, Ph.D., J.D.
LA Bar #19514-T.A.
THE CARVER LAW FIRM, LLC
201 St. Charles Street
Baton Rouge, LA 70802
Phone: (225) 636-2642
Fax: (225) 387-3198
Email: jim@thecarverlawfirm.com

From: Karl Cavalier <karlcavalier@yahoo.com>
Date: September 1, 2022 at 3:55:18 PM CDT
To: Jill Craft <jcraft@craftlaw.net>, Brett Conrad <bconrad@craftlaw.net>, Stacy Campbell <scampbell@craftlaw.net>
Subject: Re: Continued Negotiation Discussion(s) in Progress for EEOC Charge No. 461-2021-02228 (Carl Cavalier)

Jill,

Can you please give me a call as soon as possible. I had a chance to over the 200k, the numbers associated with my retirement and the money I would have earned if I were to retire at Louisiana State Police. The 200k is not nearly worth it as I thought. I would not like to move forward with agreeing to that amount. Please advise the opposing counsels.

I do not mean to be difficult but Louisiana State Police ended my career and disrupted my life. I do not believe 200K is fair.

Sent from my iPhone

From: Karl Cavalier <karlcavalier@yahoo.com>
Sent: Thursday, October 13, 2022 3:11 PM
To: Jill Craft <jcraft@craftlaw.net>
Subject: Re: Discussion

Jill,

I will not repeat all we discussed today on the phone and many times prior to today. As for the proposed settlement, I am not comfortable with it and have never been comfortable with it. I have expressed that to you verbally and in writing. While in the conference with the magistrate judge, I asked you to ask for my job back. You refused to even present it to the judge or opposing counsel. I expressed to you prior to settlement talks that I wanted to proceed with my case through LSP commission hearings and other necessary avenues with hopes of getting my job back.

My position is well documented with documentation that will not be able to argue against.

I am asking you once again as my attorney to either file a motion to discontinue any proposed settlement agreements or take Jeanie Pellegrin's suggestion and request a second meeting with the magistrate judge.

I do not feel my position was properly represented. I felt a large amount of pressure to make a decision at the conference with the magistrate judge, which I do not feel was proper.

In addition to the pressure I felt, I feel as though the decision made on my part was made with incomplete information given.

If you are stepping down as my attorney, please make that clear now. If you are stepping down, I need you to copy my entire file and have it ready for me, so that I can properly represent myself at the LSP commission hearing on 11/10/22.

If you are still representing me, I am telling you that we need to discontinue the proposed/ unsigned settlement and meet with the magistrate judge. We need to also, prepare for the LSP commission hearing on 11/10/22.

Please reply in a timely manner so that I may have proper representation in my case.