

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ISAIAH SMITH, ON BEHALF OF
HIMSELF AND ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

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v.

CIVIL ACTION No. 1:21-cv-00349-LY

MV TRANSPORTATION, INC.
Defendant.

**PLAINTIFFS' AMENDED RESPONSE TO DEFENDANT'S MOTION TO
ENFORCE SETTLEMENT AGREEMENT AND SANCTIONS AGAINST
ISAIAH SMITH**

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The Court granted Defendant’s Motion to Strike Plaintiffs’ original Response to Defendant’s Motion to Enforce and for Sanctions Against Isaiah Smith on the ground that it exceeded Local Rule CV-7(d)(3)’s 20-page limit. *See* Doc. 57, ¶ 2 (striking Doc. 38). The Court’s Order granted Plaintiffs permission to file a revised Response by March 8, 2023 that complies with the 20-page limit. Accordingly, Plaintiffs file the following Amended Response in opposition to Defendant’s Motion (Doc. 22):

A. Mr. Smith and Defendant Did Not Reach a Valid FLSA Settlement Agreement

The Court should not enforce a settlement against Isaiah Smith for several reasons:

1. Defendant cannot point to a fully executed FLSA settlement agreement that permits meaningful judicial review.

“[S]ettlements of . . . FLSA claims” like those in this case “are of the type typically committed to writing, because they require judicial approval.”¹ “Courts have refused to enforce alleged FLSA settlement agreements in the absence of a fully executed agreement that permits meaningful judicial review and approval.”² Here, the lack of a fully executed FLSA agreement for the Court to review is reason enough to deny Defendant’s Motion.

¹ *Velazquez v. Yoh Servs., LLC*, No. 17 Civ. 842 (CM), 2017 U.S. Dist. LEXIS 165497, at *9 (S.D.N.Y. Sept. 25, 2017) (citing *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 206 (2d Cir. 2015)); *see also Scalia v. Agave Elmwood Inc.*, 458 F. Supp. 3d 161, 171 (W.D.N.Y. 2020) (collecting cases).

² *See, e.g., Velazquez v. Yoh Servs. LLC*, 2017 WL 4404470, at *4 (S.D.N.Y. Sept. 25, 2017) (denying the defendants’ motion to enforce oral FLSA settlement agreement, noting that to hold otherwise would be “contrary to the FLSA policy of protecting plaintiffs”); *see also* Doc. 38, at 8 n.7 (collecting cases).

2. *The complexity of Defendant’s proposed agreement confirms that the Parties did not intend to bind themselves orally or by email.*

“[T]he complexity of the underlying agreement is an indication of whether the parties reasonably could have expected to bind themselves orally.”³ Here, Defendant’s unsigned settlement agreement spans ten pages of text and contains detailed provisions that will apply into perpetuity. For example:

- Sections 5.1 and 5.2 define Plaintiffs’ release in exhaustive detail. Sealed Doc. 31-1, at 5.
- Section 6.1 contains detailed confidentiality, nondisclosure, and liquidated damages provisions. *Id.* at 7–8.
- Section 6.2 prohibits Plaintiffs from “plac[ing Defendant] in a negative light” for the remainder of their lives. *Id.* at 8.
- Section 6.3 restricts Plaintiffs from joining “any class or group seeking relief against the COMPANY in any matter relating to their . . . employment.” *Id.*
- Section 6.4 states that Smith will “not [be] eligible for reinstatement, re-hire, future employment or any employment relationship with the COMPANY or any successor Company” *Id.* at 8–9.

Given the length, detail, and scope of terms in Defendant’s unsigned settlement agreement, it’s clear the Parties did not intend to bind themselves to any terms of settlement in the absence of a written, fully executed settlement agreement.⁴

³ *Ciaramella v. Reader's Digest Ass'n*, 131 F.3d 320, 326 (2d Cir. 1997).

⁴ *See Winston v. Mediasfare Entm't Corp.*, 777 F.2d 78, 83 (2d Cir. 1985) (finding a 4-page settlement agreement with obligations that would last over several years required reduction to writing).

3. ***The record clearly shows that the Parties did not intend to bind themselves to any terms of settlement before signing a written agreement.***

The provisions in Defendant’s unsigned settlement agreement indicate that the Parties contemplated the moment of signing as the point at which they would be bound by a settlement agreement.⁵ In Section 6.13 of the proposed agreement, it ***explicitly states***: ***“This Agreement is effective on the date signed by ISAIAH SMITH (‘Effective Date’).”***⁶ Sealed Doc. 31-1, at 10 (emphasis added).

Moreover, in Texas, a provision requiring that all amendments be in writing signed by both parties to be enforceable and a blank signature line at the end of the agreement are evidence that the parties did not intend to be bound until they both signed the agreement.⁷ Here, Section 6.5 of Defendant’s proposed Agreement states, “No . . . amendments . . . may be enforced unless evidenced by a subsequent ***written agreement executed by the Parties hereto***” and then contains blank signature lines for the parties. *See* Sealed Doc. 31-1, at 9–10 (emphasis added). Other provisions in Defendant’s unsigned agreement confirm the Parties’ intent not to bind themselves until they had both signed a written agreement:

- Under Section 4.5, Defendant is under no obligation to pay the Plaintiffs unless and until Smith and his attorney provide Defendant with a “fully executed Agreement.”⁸

⁵ *See Border Gateway, L.L.C. v. Gomez*, No. 14-10-01266-CV, 2011 Tex. App. LEXIS 7589, at *7 (Tex. App.—Hous. [14th Dist.] Sep. 20, 2011, no pet. h.) (“[W]e must therefore determine whether the parties intended for the contemplated formal writing to be a condition precedent to the formation of a contract, or merely a memorial of an already enforceable contract.”); *Ciaramella v. Reader’s Digest Ass’n*, 131 F.3d 320, 324 (2d Cir. 1997).

⁶ Sealed Doc. 31-1, at 10 (emphasis added).

⁷ *In re Bunzl USA, Inc.*, 155 S.W.3d 202, 211 (Tex. App.—El Paso 2004, orig. proceeding) (collecting cases); 14 DORSANEO, TEX. LIT. GUIDE § 210A.04 (2023).

⁸ Sealed Doc. 31-1, at 5. This is further evidence that, at the time, Defendant did not intend to bind itself to any representations or promises until the Parties had fully executed the proposed settlement agreement. *See*,

- Section 6.7 reflects Defendants’ intent to afford each Plaintiff “adequate time” to “carefully read” and discuss “the meaning and application of” the terms with their lawyer before binding them to the agreement.⁹
 - Section 6.7 makes clear that the Parties contemplated the moment of signing as the point at which the Parties would bind themselves to a settlement: “**PLAINTIFF[]...executes this Agreement** voluntarily and knowingly . . . **with the intent of being bound by the Agreement.**”¹⁰
 - Section 6.8 reflects the Parties’ intent not to enter into a binding settlement agreement without first affording every Plaintiff “**an opportunity to participate in the drafting and preparation of this Agreement.**”¹¹
 - Section 2.1 provides, “The rights and obligations set forth **in this document** are for the purpose of conclusively resolving and settling any claims,”¹² which further confirms that the Parties did not intend to be bound by any pre-existing promises, only a fully executed settlement agreement.
4. ***The Parties did not agree on all of the terms that they regarded as essential to resolving their dispute.***

The fact that the Parties did not agree on all essential terms of settlement further undermines Defendant’s Motion. To determine if the parties reached an enforceable agreement, “the moving party must prove that the parties reached an agreement regarding

e.g., R.G. Grp., Inc. v. Horn & Hardart Co., 751 F.2d 69, 71, 76 (2d Cir. 1984) (finding an explicit reservation of the right not to be bound absent signature in the wording of an agreement that declared, “when duly executed, this agreement sets forth your rights and your obligations”).

⁹ Sealed Doc. 31-1, at 9.

¹⁰ *Id.* (emphasis added).

¹¹ *Id.* (emphasis added). The fact that Defendant’s own draft agreement placed great significance on the execution date evinces an intent not to create a binding agreement until formally executed. *See, e.g., Davidson Pipe Co. v. Laventhol & Horwath*, 84 CIV 5192 (LBS); 84 CIV 6334 (LBS), 1986 U.S. Dist. LEXIS 29414, at *16-20, 1986 WL 2201, at *4 (S.D.N.Y. Feb. 11, 1986) (finding that wording in a settlement agreement that placed great significance on the execution date evinced an intent not to create a binding settlement until some formal date of execution).

¹² Defendant’s Unsigned Settlement Agreement § 2.1 (Sealed Doc. 31-1) (emphasis added).

all material terms.”¹³ “[T]he omission or failure of an essential element of a contract vitiates the whole.”¹⁴ Courts must examine whether a term is material “on a case-by-case basis.”¹⁵ A term is “material” if it’s one that “the parties reasonably regarded, at the time of contracting, as a vitally important ingredient in their bargain.”¹⁶ “Courts look not only at any relevant written agreements but also at...their course of dealings, and then answer the field and fact-specific question of whether essential terms were sufficiently settled to find a contract.”¹⁷

Here, the Parties’ course of dealings reveals that they did not agree on multiple terms that they regarded as essential to settling their dispute. First, the record does not contain any evidence that Isaiah Smith authorized his then-attorney, Doug Welmaker, to accept the global sum of \$[REDACTED] to settle *all* Plaintiffs’ claims *in the aggregate*. Smith has stated under oath that he did not authorize Mr. Welmaker to accept a global settlement payment on behalf of all Plaintiffs.¹⁸ Similarly, the record reveals that Smith did not authorize Mr. Welmaker to accept a specific dollar amount on behalf of any individual opt-in Plaintiff.¹⁹ Smith first became aware of the dollar amounts of the settlement payments that Defendant had offered to each opt-in Plaintiff on August 8, 2022, when Mr. Welmaker

¹³ *Lozano v. Metro. Transit Auth. of Harris Cty.*, No. CV H-14-1297, 2016 U.S. Dist. LEXIS 94031, 2016 WL 3906295, at *3 (S.D. Tex. July 19, 2016).

¹⁴ *Neeley v. Bankers Tr. Co. of Texas*, 757 F.2d 621, 628 (5th Cir. 1985).

¹⁵ *Coe v. Chesapeake Expl., L.L.C.*, 695 F.3d 311, 320 (5th Cir. 2012).

¹⁶ *Neeley v. Bankers Tr. Co. of Tex.*, 757 F.2d 621, 628 (5th Cir. 1985).

¹⁷ *APS Capital Corp. v. Mesa Air Grp., Inc.*, 580 F.3d 265, 272–73 (5th Cir. 2009).

¹⁸ Declaration of Isaiah Smith ¶¶ 7–9, 16 (Oct. 22, 2022) (Doc. 38-1).

¹⁹ *Id.* ¶ 9.

provided him with a draft of Defendant's proposed settlement agreement.²⁰ After reviewing these figures for the first time, Plaintiff told Mr. Welmaker *not* to settle the opt-in Plaintiffs' claims for the amounts set forth in Defendant's proposed settlement agreement.²¹

Second, Isaiah Smith stressed that Defendant's promise not to classify him as "ineligible for rehire" was a vitally important term of any settlement they may reach.²² Smith believed that Defendant had wrongfully classified him as being "ineligible for rehire" (which he believes will hinder his future employment prospects) in retaliation for his complaints related to, among other things, Defendant's FLSA violations.²³ According to Mr. Welmaker, however, "*That [term] is a deal killer* as far as [Defendant was] concerned."²⁴ But Smith insisted on the term's inclusion as part of any settlement: "I do not want [Defendant] to be telling my employers or any of my prospective employers that I am not eligible for rehire."²⁵ In response, Mr. Welmaker reiterated that Defendant would not agree to change Smith's classification as "ineligible for rehire," explaining, "I think the

²⁰ *Id.* ¶ 18; Email from Isaiah Smith to Doug Welmaker (subject: 'Settlement Agreement for Your Review') with Attachment: 'Settlement for Isaiah Smith Review.doc' (Aug. 8, 2022, at 9:31 am) (Doc. 38-1, at 22–32).

²¹ Smith Dec. ¶ 13 (Doc. 38-1).

²² *See* Email from Isaiah Smith to Doug Welmaker (subject: 'Settlement of your case') (July 23, 2022, at 4:27 pm) (Doc. 38-1, at 12).

²³ *See* Email from Isaiah Smith to Doug Welmaker (subject: 'Settlement of your case') (July 26, 2022 at 11:34 am) (Doc. 38-1, at 14).

²⁴ Email from Doug Welmaker to Isaiah Smith (subject: 'Settlement of your case') (July 23, 2022, at 4:48 pm) (Doc. 38-1, at 12) (emphasis added).

²⁵ Email from Isaiah Smith to Doug Welmaker (subject: 'Settlement of your case') (July 23, 2022, at 4:54 pm) (Doc. 38-1, at 13).

best I can get them to do is say that they have a policy thst [sic] only allows them to confirm your job title and dates of employment.”²⁶ Smith rejected this suggestion as an unsuitable compromise and asked Mr. Welmaker to explain to Defense counsel why this term was essential.²⁷

Although the Parties reached an impasse on this essential term, Defendant now asks the Court to enforce an unsigned agreement that states, “ISAIAH SMITH understands and agrees that he is not eligible for reinstatement, re-hire, future employment or any employment relationship with the COMPANY or any successor Company”²⁸ As the evidence cited above demonstrates, the Parties reached no such agreement. Because Mr. Welmaker resigned when Smith refused to sign Defendant’s proposed settlement agreement (Doc. 24), and Defendant moved to enforce the unsigned agreement (Doc. 22), Smith never had an opportunity to finish bargaining for the terms that he desired. Likewise, because the Parties’ lack of agreement over this term was a “deal killer” for both sides, the Parties did not reach a binding settlement agreement.

Third, the Parties did not agree on the scope of claims that Smith would release. On June 17, 2022, Mr. Welmaker informed Smith that Defendant had offered to pay him \$[REDACTED] in exchange for a general release of all claims, including Smith’s potential

²⁶ Email from Doug Welmaker to Isaiah Smith (subject: ‘Settlement of your case’) (July 23, 2022, at 4:56 pm) (Doc. 38-1, at 13).

²⁷ Email from Isaiah Smith to Doug Welmaker (subject: ‘Settlement of your case’) (July 26, 2022, at 11:34 am) (Doc. 38-1, at 14) (emphasis added).

²⁸ Defendant’s Unsigned Settlement Agreement § 6.4 (Sealed Doc. 31-1) (emphasis added).

retaliation claim.²⁹ A general release was one of Defendant’s “major condition[s]” of settlement.³⁰ Although Plaintiff responded, “That works. Send me the paperwork,” he did not intend to bind himself to any terms of settlement until the Parties reached agreements on all other material terms of settlement and then signed a written agreement.³¹ This is evident from the fact that Smith later told Mr. Welmaker that he planned to speak to another lawyer about his potential retaliation claim against Defendant before agreeing to release it.³² Mr. Welmaker’s response to Smith shortly thereafter further confirms that the Parties had yet to agree on this material term of settlement: “**This case does not settle unless you release the retaliation claim.**”³³

On August 8, 2022, Mr. Welmaker provided Smith with Defendant’s latest proposed settlement agreement in writing.³⁴ Mr. Welmaker explained that Defendant’s proposed agreement contained “a general release,” which meant that Smith would “waiv[e] all rights to sue MVT for any cause of action whatsoever up to the date of this settlement agreement” if signed.³⁵ One of Smith’s reasons for refusing to sign Defendant’s proposed agreement

²⁹ Email from Doug Welmaker to Isaiah Smith (subject: ‘Your case’) (June 17, 2022) (Doc. 38-1, at 8).

³⁰ *Id.*

³¹ *See* Email from Isaiah Smith to Doug Welmaker (subject: ‘Your case’) (June 17, 2022, at 1:00 pm) (Doc. 38-1, at 8); *see also* Smith Dec. ¶ 11 (Doc. 38-1).

³² *See* Email from Isaiah Smith to Doug Welmaker (subject: ‘Settlement of your case’) (July 25, 2022, at 6:46 am) (Doc. 38-1, at 13) (“I am speaking to another attorney about the retaliation claim and for the purposes as to getting the max on the retaliation claim.”).

³³ Email from Doug Welmaker to Isaiah Smith (subject: ‘Settlement of your case’) (July 25, 2022, at 7:16 am) (Doc. 38-1, at 14) (emphasis added).

³⁴ Email from Doug Welmaker to Isaiah Smith with Attachment: ‘Settlement for Isaiah Smith Review.doc’ (subject: ‘Settlement Agreement for Your Review’) (Aug. 8, 2022, at 9:31 am) (Doc. 38-1, at 22).

³⁵ *Id.*

was that he did not wish to release his potential retaliation claim against Defendant without receiving any additional consideration.³⁶ Mr. Welmaker's subsequent email to Smith further confirms that the Parties had yet to reach a final, binding settlement agreement: "Isaiah, ***it's not a final agreement***, thus I need your input."³⁷

Finally, although Defendant considered a confidentiality agreement and liquidated damages of \$[REDACTED] per breach to be essential terms of any settlement agreement, the Parties never agreed on these terms. On June 17, 2022, Smith's then-attorney advised him: "One other ***major condition*** is that you cannot talk about this to anyone. Defense counsel said that if they find out you have talked about this, ***they will undo the deal***, so please just keep this between us."³⁸ In a separate lawsuit, Defendant acknowledged that "***confidentiality is a 'material term' of the settlement agreement.***"³⁹ Here, after reviewing the wording of Defendant's proposed confidentiality and liquidated-damages provisions in this case, Mr. Welmaker unequivocally rejected them: "Isaiah, . . . ***They have asked that your liquidated damages be \$[REDACTED]. I have told them I can't agree to that.***"

Smith would not even consider Defendant's confidentiality and liquidated damages provisions unless Defendant agreed to place an expiration date or "fuse" on them.⁴⁰ Mr.

³⁶ Email from Isaiah Smith to Doug Welmaker (subject: 'Settlement of your case') (July 25, 2022, at 6:46 am) (Doc. 38-1, at 13).

³⁷ Email from Doug Welmaker to Isaiah Smith (subject: 'Your case') (Aug. 8, 2022, at 5:20 pm) (emphasis added) (Doc. 38-1, at 35).

³⁸ Email from Doug Welmaker to Isaiah Smith (subject: 'Your case') (June 17, 2022) (Doc. 38-1, at 8) (emphasis added).

³⁹ *Miller v. Mv Transp., Inc.*, No. 1:18-CV-538-RP, 2020 U.S. Dist. LEXIS 262657, at *3-4 (W.D. Tex. Nov. 3, 2020) (emphasis added).

⁴⁰ Email from Isaiah Smith to Doug Welmaker (subject: 'Settlement of your case') (July 22, 2022, at 6:33

Welmaker promised Smith that he would “ask [Defendant] about the fuse” on the confidentiality and liquidated-damages provisions,⁴¹ but does not appear to have done so. On August 8, 2022, Smith received Defendant’s latest proposed agreement that contained indefinite, sweeping confidentiality obligations and a “liquidated-damages” penalty of \$[REDACTED] per violation.⁴² Defendant cannot point to any evidence that Smith agreed to the confidentiality and \$[REDACTED] liquidated-damages provisions in the August 8 proposed settlement agreement or any other settlement agreement.

5. *The lack of partial performance weighs against enforceability.*

Another factor to consider “is whether one party has partially performed, and that performance has been accepted by the party disclaiming the existence of an agreement.”⁴³ No evidence of partial performance of the alleged settlement agreement exists here. Defendant has paid no money to Smith or any of the other Plaintiffs, nor has Defendant changed Plaintiff’s status to “eligible for rehire.” These were two basic elements of

am) (Doc. 38-1, at 12) (“I would request that there be some type of an expiration that is attached to that clause to where they cannot use that clause to enforce it after a certain amount of years.”); Email from Isaiah Smith to Doug Welmaker (subject: ‘Settlement of your case’) (July 23, 2022, at 4:54 pm) (Doc. 38-1, at 13) (“[W]hile they brought [the ‘liquidated-damages’ penalty for breach of the confidentiality provisions] down to [REDACTED], what about the fuse. [sic] Did they agree to that for a time limit on that? I would really like a fuse.”).

⁴¹ Email from Doug Welmaker to Isaiah Smith (subject: ‘Settlement of your case’) (July 23, 2022, at 4:59 pm) (Doc. 38-1, at 13).

⁴² See Defendant’s Unsigned Settlement Agreement § 6.1 (Sealed Doc. 31-1).

⁴³ *R.G. Grp., Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 71, 75 (2d Cir. 1984).

consideration that would have been due to Smith under the alleged settlement agreement. Defendant's lack of partial performance therefore weighs against enforceability.⁴⁴

B. The Opt-In Plaintiffs Did Not Enter into an Enforceable FLSA Settlement Agreement with Defendant

Even if the Court finds that Plaintiff Isaiah Smith entered into a binding settlement agreement with Defendant, it should not enforce a settlement agreement against the opt-in Plaintiffs for the following reasons:

1. *The opt-in Plaintiffs have the same status, rights, and protections as named Plaintiff, Isaiah Smith.*

When a collective-action lawsuit is filed under the FLSA, “similarly situated employees” may join (or “opt in” to) the lawsuit by filing a “consent in writing,” after which they become “party plaintiff[s].”⁴⁵ Importantly, opt-in plaintiffs enjoy “the same status in relation to the claims of the lawsuit as do the named plaintiffs.”⁴⁶ Thus, “original plaintiffs . . . no longer represent[] the additional” employees who opt in to the lawsuit because “they are all plaintiffs.”⁴⁷ As a court in this District pointed out, “although

⁴⁴ See *Ciaramella v. Reader's Digest Ass'n*, 131 F.3d 320, 325 (2d Cir. 1997).

⁴⁵ 29 U.S.C. § 216(b).

⁴⁶ *Pricket v. DeKalb Cnty.*, 349 F.3d 1294, 1297 (11th Cir. 2003); see also *Serrano v. Globe Energy Serv., LLC*, No. MO:15-CV-00170-RAJ, 2016 U.S. Dist. LEXIS 188027, at *16 (W.D. Tex. Mar. 3, 2016) (pointing out that 29 U.S.C. § 216(b) “does not indicate that opt-in plaintiffs have a lesser status than named plaintiffs”); *Alvarado v. Wang Ma LLC*, No. SA:13-CV-944-DAE, 2015 U.S. Dist. LEXIS 25701, at *4 (W.D. Tex. Mar. 3, 2015) (“Opt-in plaintiffs and original parties are treated equally under the FLSA.”); *Dives v. Unifirst Corp.*, No. 2:17-CV-00294, 2019 U.S. Dist. LEXIS 244239, at *5 (S.D. Tex. Oct. 9, 2019) (explaining that, unlike absent Rule 23 class members, opt-in employees “have the same status in relation to the claims of the lawsuit as do named plaintiffs”).

⁴⁷ *Coan v. Nightingale Home Healthcare, Inc.*, Civ. A. No. 1:05-CV-0101-DFH-TAB, 2006 U.S. Dist. LEXIS 48193, 2006 WL 1994772, at *2 (S.D. Ind. July 14, 2006).

the original plaintiffs in a collective action may pursue the suit on a representative basis, each FLSA claimant has the right to be present in court to advance his or her own claim.”⁴⁸

“Given its remedial purposes, courts generally ‘construe the FLSA liberally in favor of employees.’”⁴⁹

2. *The opt-in Plaintiffs were entitled to, but did not receive, notice of Defendant’s settlement offers and the opportunity to object.*

“[C]ourts generally require, at minimum, that opt-in plaintiffs be given notice of any settlement and an opportunity to object.”⁵⁰ Here, Plaintiffs did not receive notice of any terms of settlement or the opportunity to object.⁵¹ Rather, Mr. Welmaker attempted to settle their claims without their knowledge or input.⁵² Although the opt-in Plaintiffs signed consent forms designating “the Named Plaintiff as [their] agent to make decisions on [their] behalf concerning Fair Labor Standards Act litigation against Defendant including . . . entering into settlement agreements,”⁵³ as previously explained, Isaiah Smith did not authorize or negotiate a settlement agreement on behalf of any individual opt-in Plaintiff.⁵⁴

⁴⁸ *Johnson v. Trugreen Ltd. P’ship*, No. A-12-CV-166-LY, 2013 U.S. Dist. LEXIS 203742, at *10-11 (W.D. Tex. May 21, 2013) (internal quotation marks omitted).

⁴⁹ *Serrano v. Globe Energy Serv., LLC*, No. MO:15-CV-00170-RAJ, 2016 U.S. Dist. LEXIS 188027, at *17 (W.D. Tex. Mar. 3, 2016) (quoting *McGavock v. City of Water Valley, Miss.*, 452 F.3d 423, 425 (5th Cir. 2006)).

⁵⁰ *Gassel v. Am. Pizza Partners, L.P.*, Civil Action No. 14-cv-00291-PAB-NYW, 2016 U.S. Dist. LEXIS 195831, at *9 (D. Colo. Aug. 24, 2016); *see also* Doc. 38, at 21–22 n.65 (collecting cases).

⁵¹ Declaration of Colette Graham ¶¶ 10–11, 13 (Oct. 20, 2022) (Doc. 38-2); Declaration of Steven Laureano ¶¶ 11–15 (Oct. 20, 2022) (Doc. 38-3); Declaration of Lori Boykin ¶¶ 10–15, 20 (Oct. 21, 2022) (Doc. 38-4); Declaration of Leslie Smith ¶¶ 11–15 (Oct. 22, 2022) (Doc. 38-5).

⁵² Graham Dec. ¶¶ 10–11, 13 (Doc. 38-2); Laureano Dec. ¶¶ 11–15 (Doc. 38-3); Boykin Dec. ¶¶ 10–15, 20 (Doc. 38-4); L. Smith Dec. ¶¶ 11–15 (Doc. 38-5).

⁵³ *See, e.g.*, Doc. 9-1.

⁵⁴ I. Smith Dec. ¶¶ 9, 13 (Doc. 38-1).

Moreover, by signing the consent forms, the opt-in Plaintiffs did not give Mr. Welmaker authority to settle their claims without their knowledge or consent.⁵⁵ The consent forms that the opt-in Plaintiffs signed *do not* authorize Mr. Welmaker to settle their claims on their behalf. Rather, the consent forms “designate the Named Plaintiff” as their sole “agent to make decisions” on their behalf concerning “settlement agreements.”⁵⁶ The opt-in Plaintiffs reasonably believed that only Isaiah Smith (not Mr. Welmaker) could enter into a settlement agreement on their behalf after consulting with them about, and obtaining their agreement to, the specific terms of any proposed settlements.⁵⁷

3. *The alleged settlement is unenforceable against the opt-in Plaintiffs as against public policy and state law.*

In Texas, aggregate settlements are unenforceable as against public policy.⁵⁸ An aggregate settlement occurs when an attorney, who represents multiple clients, settles the entire case without individual negotiations on behalf of each client.⁵⁹ Texas Disciplinary Rule of Professional Conduct 1.08(f) prohibits aggregate settlements unless

⁵⁵ See Graham Dec. ¶¶ 7, 9, 13 (Doc. 38-2); Laureano Dec. ¶¶ 8–9, 14–15 (Doc. 38-3); Boykin Dec. ¶¶ 7–15 (Doc. 38-4); L. Smith Dec. ¶¶ 8, 12–14 (Doc. 38-5).

⁵⁶ See, e.g., Doc. 9-1.

⁵⁷ See Graham Dec. ¶¶ 7, 12–13, 16 (Doc. 38-2); Laureano Dec. ¶¶ 8–9, 11–12, 14–15, 18 (Doc. 38-3); Boykin Dec. ¶¶ 7, 9, 10–15, 18–20 (Doc. 38-4); L. Smith Dec., Ex. E, ¶¶ 8–9, 11–15, 18 (Doc. 38-5).

⁵⁸ *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 229–30 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.). *Quintero* was decided under former Rule 5-106(a), which is largely the same as Rule 1.08(f).

⁵⁹ *Arce v. Burrow*, 958 S.W.2d 239, 245 (Tex. App.—Houston [14th Dist.] 1997), *reversed in part on other grounds*, *Burrow v. Arce*, 997 S.W.2d 229, 247 (Tex. 1999); see also *Scrivner v. Hobson*, 854 S.W.2d 148, 152 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding).

each client has given their informed consent to it.⁶⁰ Comment 1 to Rule 1.08 makes clear that aggregate settlements “per se involve unacceptable conflicts of interests.”

In *Quintero v. Jim Walter Homes, Inc.*, for example, a plaintiffs’ attorney represented multiple homeowners in claims against a homebuilder.⁶¹ The plaintiffs’ attorney negotiated an aggregate settlement of \$1.8 million for his other multiple clients, to be divided among all the homeowner clients according to a formula.⁶² The plaintiffs’ attorney then obtained the Quinteros’ consent to join in the aggregate settlement with his other multiple clients and release their claims against the homebuilder.⁶³ The court, however, held that the settlement was void as against public policy because it violated the Disciplinary Rules.⁶⁴ Specifically, the court found that the plaintiffs’ attorney had violated the Disciplinary Rule governing aggregate settlements because he had settled the Quinteros’ claims without informing them of the global settlement amount (\$1.8 million) or providing them “a list showing the names and amounts to be received by the other settling plaintiffs” and then obtaining their consent to these terms.⁶⁵ The purpose of the Disciplinary Rule prohibiting aggregate settlements, the court explained, is to ensure that

⁶⁰ TEX. DISCIPLINARY R. PROF’L CONDUCT 1.08(f); *see also* 6 TEXAS TORTS AND REMEDIES § 103.02 (2022) (“An attorney has no power or authority to bind a client to a settlement of pending litigation without specific authority from the client to do.”); Tex. Disc. R. of Prof. Conduct 1.02(a) (requiring that decisions affecting the merits of a case or that may substantially prejudice the rights of a client, including the decision to accept or reject a settlement offer, be made by the client).

⁶¹ 709 S.W.2d 225, 227 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 229–31.

⁶⁵ *Id.* at 229.

clients do not give up their rights without full knowledge of the other settlements involved.⁶⁶

Here, with respect to the settlement that Defendant seeks to enforce against the opt-in Plaintiffs, the facts are *more extreme* than those presented in *Quintero*. In *Quintero*, the attorney at least informed his clients about the aggregate settlement (albeit inadequately) and the clients affirmatively consented to join it.⁶⁷ In the instant case, however, at no point did Mr. Welmaker inform the opt-in Plaintiffs of Defendant's aggregate settlement offer.⁶⁸ Likewise, the opt-in Plaintiffs never gave Mr. Welmaker their consent to join in Defendant's proposed aggregate settlement.⁶⁹ Although doing so would not have been overly burdensome, at no point did Mr. Welmaker consult with his clients before dividing Defendant's global settlement payment between them.⁷⁰

Further tainting the settlement is the fact that Mr. Welmaker appears to have negotiated the amount of his attorney's fees that Defendant would pay him simultaneously with the settlement amounts that Defendant would pay to the Plaintiffs. This created a clear

⁶⁶ *Id.*

⁶⁷ *Id.* at 228.

⁶⁸ Graham Dec. ¶¶ 7, 9, 13 (Doc. 38-2); Laureano Dec. ¶¶ 8–9, 14–15 (Doc. 38-3); Boykin Dec. ¶¶ 7–15 (Doc. 38-4); L. Smith Dec. ¶¶ 8, 12–14 (Doc. 38-5).

⁶⁹ Graham Dec. ¶¶ 11–14 (Doc. 38-2); Laureano Dec. ¶¶ 11, 13–16 (Doc. 38-3); Boykin Dec. ¶¶ 10, 13–16, 19–20 (Doc. 38-4); L. Smith Dec., Ex. E, ¶¶ 11–16 (Doc. 38-5).

⁷⁰ *Id.*

conflict of interest between Mr. Welmaker and his clients.⁷¹ Mr. Welmaker did not inform any of his clients of this conflict of interest.⁷²

Enforcing the proposed settlement agreement would also place Mr. Welmaker in violation of Texas Disciplinary Rule 1.08(e), which prohibits a plaintiff’s lawyer from accepting compensation from the Defendant “unless: (1) the client consents” and “(2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.”⁷³ Defendant cannot point to any evidence that Mr. Welmaker obtained Plaintiffs’ consent to accept compensation from Defendant.

C. The Unsigned Agreement that Defendant Seeks to Enforce is Not the Product of a Fair and Reasonable Compromise of a Bona Fide Dispute

Generally, “in the absence of . . . scrutiny from a court, a settlement of an FLSA claim is prohibited.”⁷⁴ The Fifth Circuit has recognized a narrow exception to the general rule in cases where the parties’ settlement agreement reflects a (1) fair and reasonable compromise of (2) a bona fide dispute under the FLSA.⁷⁵ Courts in this District have narrowly construed this exception.⁷⁶ Thus, for Defendant’s proposed agreement to become effective, the Court must enter a written judgment or order finding that the proposed

⁷¹ *Martin v. Huddle House, Inc.*, 2011 U.S. Dist. LEXIS 13670, at *12 (N.D. Ga. Feb. 11, 2011).

⁷² See Graham Dec. ¶¶ 14–16 (Doc. 38-2); Laureano Dec. ¶¶ 16–18 (Doc. 38-3); Boykin Dec. ¶¶ 16–18 (Doc. 38-4); L. Smith Dec. ¶¶ 16–18 (Doc. 38-5).

⁷³ TEX. DISCIPLINARY R. PROF’L CONDUCT 1.08(e).

⁷⁴ *Bodle v. TXL Mortg. Corp.*, 788 F.3d 159, 164 (5th Cir. 2015) (citing *O’Neil*, 324 U.S. at 706–08).

⁷⁵ *Id.* at 163.

⁷⁶ *Abad v. Maxum Petroleum Operating Co.*, No. MO:16-CV-00001-RAJ, 2016 U.S. Dist. LEXIS 197656, at *6-9 (W.D. Tex. Oct. 14, 2016) (“Because Plaintiffs’ FLSA claims cannot be waived except in narrow circumstances, and such circumstances do not exist in this case, the release agreement is not a valid waiver of Plaintiffs’ FLSA claims.”).

agreement was the result of (1) a fair and reasonable compromise of (2) a bona fide dispute under the FLSA.⁷⁷ The record does not support such findings for the following reasons:

- 1. The record does not support a finding that the alleged agreement is the product of a “bona fide” FLSA dispute.***

To determine whether a settlement is the product of a “bona fide dispute,” courts have considered a variety of factors. For example, “aggressive prosecution and strenuous defense demonstrates the palpable bona fides of [a] dispute.”⁷⁸ In *Sims v. Houston Authority City of El Paso*, “the Court determined that there was no bona fide dispute” prior to the parties’ execution of an agreement settling FLSA claims “because the only evidence the parties adduced of such a dispute was a ‘bare assertion’ in Defendant’s argument.”⁷⁹

Here, the record does not support a finding that the alleged settlement was the result of a bona fide dispute other than Defendant’s bare assertion. Defendant cannot show that there has been aggressive prosecution or strenuous defense. This case is in its early stages. The record in this case does not contain any documents that touch the merits of Plaintiffs’ claims. The Court has yet to hold a scheduling conference. Neither side has conducted any discovery. This case has not been set for trial. Defendant has not made any representations about what, if any, issues are disputed in this lawsuit. Instead, Defendant attaches as its

⁷⁷ *Prater v. Commerce Equities Mgmt. Co.*, No. H-07-2349, 2008 U.S. Dist. LEXIS 98795, at *5 (S.D. Tex. 2008) (Rosenthal, J.) (“FLSA claims may be compromised after the court reviews and approves a settlement in a private action for back wages under 29 U.S.C. § 216(b).”).

⁷⁸ *Bredbenner v. Liberty Travel, Inc.*, No. 09-905, 2011 U.S. Dist. LEXIS 38663, 2011 WL 1344745, at *18 (D.N.J. Apr. 8, 2011) (quoting *Hohnke v. United States*, 69 Fed. Cl. 170, 175 (Fed. Cl. 2005)); see also *Altier v. Worley Catastrophe Response, LLC*, No. 11-241, 2012 U.S. Dist. LEXIS 6391, at *46–47 (E.D. La. Jan. 18, 2012).

⁷⁹ No. EP-10-CV-109-PRM, 2012 U.S. Dist. LEXIS 190164, at *7–8 (W.D. Tex. Feb. 29, 2012). For additional discussion of *Sims* and its application to the instant case, please see Doc. 38, at 30.

only exhibits an email from Mr. Welmaker to Defense counsel and Defendant's unsigned, proposed settlement agreement. *See* Sealed Doc. 31-1.

Defendant's proposed settlement agreement includes a boilerplate statement that a bona fide dispute exists as to "liability" and "Plaintiffs' entitlement to additional compensation and wages."⁸⁰ But there is no evidence in the record to support these self-serving, bare assertions. Consequently, the record does not support a finding that a bona fide factual dispute exists to warrant enforcement of Defendant's proposed agreement.

2. *The unsigned settlement agreement that Defendant seeks to enforce is neither fair nor reasonable.*

"To be fair and reasonable, an FLSA settlement must provide adequate compensation to the employee and must not frustrate the FLSA policy rationales."⁸¹ First, Defendant's proposed agreement frustrates the policy rationales because it requires that the Parties file settlement-related documents under seal.⁸² This provision is contrary to "[t]he presumption of public access to settlements of FLSA actions[, which] is particularly strong."⁸³ "Sealing FLSA settlements from public scrutiny could 'thwart the public's independent interest in assuring that employees' wages are fair.'" ⁸⁴ "Absent an 'extraordinary reason,' the court cannot seal such records."⁸⁵ Here, Defendant has not

⁸⁰ Defendant's Unsigned Settlement Agreement § 3.1 (Sealed Doc. 31-1).

⁸¹ *McMillian v. BP Service, LLC*, 2020 WL 969870, at *2 (D. Kan. Feb. 28, 2020).

⁸² *See* Defendant's Unsigned Settlement Agreement § 5.3 (Sealed Doc. 31-1).

⁸³ *Nhan Tran v. Tran Thai*, No. H-08-3650, 2009 U.S. Dist. LEXIS 70733, at *2 (S.D. Tex. Aug. 12, 2009) (Rosenthal, J.).

⁸⁴ *Id.* at *3 (quoting *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945)).

⁸⁵ *Id.*

articulated an “extraordinary reason” (or *any* reason, for that matter) for requiring that the Parties file settlement-related documents under seal.

Second, Defendant’s proposed agreement forbids Plaintiffs from “disparaging” Defendant or discussing their case with current or former employees.⁸⁶ “[A] non-disclosure agreement in an FLSA settlement...is ‘contrary to well-established public policy’ because it inhibits one of the FLSA’s primary goals — to ensure ‘that all workers are aware of their rights.’”⁸⁷

Third, Defendant’s proposed agreement contains a general release.⁸⁸ An employer may not “use a FLSA claim . . . to leverage a release from liability unconnected to the FLSA.”⁸⁹ Many courts have rejected FLSA settlement agreements that contained general releases because “evaluating unknown claims is a ‘fundamental impediment’ to a fairness determination.”⁹⁰ Here, the record does not contain any evidence that Defendant agreed to pay additional consideration in exchange for each Plaintiff’s general release. The Court’s inability to evaluate the value of the claims that would be subject to the general release,

⁸⁶ Defendant’s Unsigned Settlement Agreement §§ 6.1, 6.2 (Sealed Doc. 31-1).

⁸⁷ *Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170, 179-80 (S.D.N.Y. 2015); *see also Pariente v. CLC Resorts and Developments, Inc.*, No. 6:14-cv-615-Orl-37TBS, 2014 U.S. Dist. LEXIS 160342, 2014 WL 6389756, at *5 (M.D. Fla. Oct. 24, 2014) (noting that courts have refused to enforce nondisclosure provisions because they “thwart . . . Congress’s intent to ensure widespread compliance with the FLSA”).

⁸⁸ Defendant’s Unsigned “Release and Settlement Agreement” §§ 3.3, 5.1 (Sealed Doc. 31-1).

⁸⁹ *Thallapaka v. Sheridan Hotel Assoc.*, 2015 U.S. Dist. LEXIS 117179, 2015 WL 5148867, at *1 (S.D.N.Y. Aug. 17, 2015) (internal citation and alterations omitted).

⁹⁰ *Duffey v. Surfside Coffee Co., LLC*, No. 2:20-cv-501-JES-MRM, 2022 U.S. Dist. LEXIS 12509, at *13 (M.D. Fla. Jan. 22, 2022); *Moreno v. Regions Bank*, 729 F. Supp. 2d 1346, 1351–52 (M.D. Fla. 2010).

lack of additional consideration for such provisions, and the Parties' impasse over the scope of the release render Defendant's proposed settlement agreement unenforceable.

D. The Court Should Deny Defendant's Request for Sanctions Against Isaiah Smith

A court may assess attorneys' fees under its inherent powers when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."⁹¹ Here, Defendant argues that Smith's refusal to sign its proposed settlement agreement is "frivolous and dilatory."⁹² The Court should deny Defendant's Motion for Sanctions because Smith had legitimate reasons for his actions. *See* I. Smith Dec. (Doc. 38-1). Moreover, Defendant has not offered any evidence that Isaiah Smith acted in bad faith, wantonly, or to oppress Defendant in refusing to sign a settlement document that contains terms to which he never agreed.

PRAYER

For these reasons, the Court should deny Defendant's Motion (Doc. 22), enter Plaintiffs' proposed order (Doc. 38-6), and grant Plaintiffs any and all other relief to which they may be justly entitled.

⁹¹ *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991) (internal citations omitted).

⁹² Doc. 22, at 6.

Respectfully submitted,

/s/ Nicholas J. Wagoner

Nicholas J. Wagoner
nick@wagonerlawfirm.legal

State Bar No. 24079530

Federal I.D. No. 1339971

WAGONER LAW FIRM

5339 Alpha Road, Suite 450

Dallas, Texas 75240

Telephone: 469-810-0473

Facsimile: 469-716-4184

ATTORNEY FOR PLAINTIFFS ISAIAH SMITH,

MARK ADAM, COLLETTE GRAHAM,

BARBARA NASH, LESLIE SMITH, STEVEN

LAUREANO, AND LORI BOYKIN

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2022, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will serve all counsel of record with a true and correct copy of this document.

/s/ Nicholas J. Wagoner

ATTORNEY FOR PLAINTIFFS ISAIAH SMITH,

MARK ADAM, COLLETTE GRAHAM,

BARBARA NASH, LESLIE SMITH, STEVEN

LAUREANO, AND LORI BOYKIN