Federal Court Cour fédérale

Date: 20260317

Docket: T-541-25

Citation: 2026 FC 362

Vancouver, British Columbia, March 17, 2026

PRESENT: Associate Judge Kathleen Ring

BETWEEN:

ASPEN CUSTOM TRAILERS INC.

Plaintiff / Defendant by Counterclaim

and

SEMPLE GLOBAL CORPORATION, BRANDT GROUP OF COMPANIES, BRANDT TRACTOR LTD.

Defendants / Plaintiffs by Counterclaim

ORDER

I. Overview

[1] The Plaintiff/Defendant by Counterclaim, Aspen Custom Trailors Inc. [the "Plaintiff"], brings this motion for an Order declaring that a legally binding settlement agreement has been reached between the Plaintiff and the Defendants, in accordance with the terms set out in Schedule "A" to the Notice of Motion.

[2] In its written submissions, the Plaintiff argued that a legally binding settlement agreement was reached on April 14, 2025. Alternatively, there was a matching offer and acceptance on all of the essential terms of the agreement at least on April 22, 2025, when Plaintiff's counsel sent the Defendants' counsel a copy of the settlement agreement executed by the Plaintiff.

[3] At the hearing of the motion, the Court was informed that the Plaintiff's current position is that the parties made a settlement agreement on April 22, 2025. The Plaintiff relies on the evidence set out in the Affidavit of Sylvia Li sworn on June 5, 2025 [the "Li Affidavit"], which attaches various email exchanges between counsel for the parties regarding their settlement discussions.

[4] The Defendants/Plaintiffs by Counterclaim, Semple Global Corporation, Brandt Group of Companies, and Brandt Tractor Ltd. [together, the "Defendants"], oppose the motion. They submit that the parties did not enter into a valid and enforceable agreement because there was no mutual intention to create legal relations. They have adduced the Affidavit of Tania Flavel sworn on June 13, 2025 [the "Flavel Affidavit"] in support of their position.

[5] This motion was heard by videoconference at the General Sittings of the Federal Court on June 17, 2025. During the hearing, the Court raised some concerns regarding the content of the Flavel Affidavit. Following the hearing, the Court issued a direction inviting the parties to provide supplemental written submissions on any additional case law from the Federal Court or the Federal Court of Appeal which they wish to bring to the Court's attention regarding whether a binding settlement agreement has been reached. Supplemental submissions were received from both parties.

[6] Based on the material before the Court and the oral submissions of the parties, I would frame the issues to be decided on this motion as follows:

1. Is the Flavel Affidavit tendered by the Defendants admissible in whole or in part?
2. Did the parties enter into a legally binding settlement agreement?

[7] Having reviewed the motion records filed by the parties and considered the parties' oral submissions made at the hearing of this motion, along with their supplemental written submissions, and for the reasons that follow, I find that the Flavel Affidavit is only partially admissible. I conclude that a legally binding agreement was reached between the parties on April 22, 2025, in accordance with the terms set out in Schedule “A” to the Notice of Motion.

II. **Facts**

[8] The Plaintiff is the owner of Canadian Trademark Registration No. TMA1,O33,559 issued June 28, 2019, for the trademark “HAUL MORE” in association with heavy-haul trailers, trailer accessories, the manufacture of heavy-haul trailers to the order and specification of others, and the design of heavy-haul trailers to the order and specification of others.

[9] On February 18, 2025, the Plaintiff commenced an action for trademark infringement against the Defendants. The Statement of Claim [the “Claim”] alleges that at least as early as January 2025, the Defendants have made, offered for sale, and sold heavy-haul trailers and accessory vehicles, and have offered and provided the services of designing and manufacturing trailers to the specification of customers in association with the trademark “HAUL MORE”.

[10] Shortly after service of the Claim on the Defendants on March 11, 2025, Chris Semple, as Director of the Defendant, the Semple Global Corporation, and as representative of all of the Defendants, reached out to John Zork, a representative of the Plaintiff, to discuss the Claim. Mr. Semple and Mr. Zork agreed that their respective legal counsel would work to develop a settlement agreement with respect to the Claim.

[11] On April 2, 2025, counsel for the Plaintiff sent an email to the Chief Legal Officer of the Defendants, enclosing a draft settlement agreement for the Defendants' consideration. That same day, the Chief Legal Officer forwarded the draft agreement to Defendants' counsel, MLT Aikans LLP. The first paragraph of the Plaintiff's draft settlement agreement provides that the Defendants will discontinue using the expression "HAUL MORE" in Canada or the United States on the terms set out below:

> 1. The Brandt Companies hereby undertake to cease and not resume use of the expression "HAUL MORE" as a slogan, tagline, motto, strapline, or brand name, in any medium used to market or to deliver their products and services in Canada or the United States.

[12] On April 4, 2025, counsel for the Defendants sent an email to counsel for the Plaintiff, wherein the Defendants proposed amendments to the Plaintiff's draft settlement agreement. The email states that the "The Brandt Companies are quite prepared and amendable (*sic*) to discontinue the use of HAUL MORE from their marketing (as the agreement indicates)." The email also enclosed a revised draft settlement agreement whereby the Defendants modified several provisions. In their modified version of paragraph 1, the Defendants agree to discontinue the use of the expression "HAUL MORE" in Canada and the US but, as counsel for the Defendants put it,

they "tighten up the some of the language" in that paragraph (the Defendants' proposed changes underlined):

> 1. The Brandt Companies hereby undertake to cease and not resume use of the expression "HAUL MORE" as a slogan, tagline, motto, strapline, or brand name, in any medium used to market or to deliver their products and services <u>with respect to heavy-haul trailer and trailer accessory vehicles, such as dollies, jeeps, and boosters,</u> in Canada or the United States.

[13] On April 11, 2025, Plaintiff's counsel sent email correspondence to Defendants' counsel enclosing a further revised draft settlement agreement which contains further revisions to paragraphs 3 and 5 of the agreement for the Defendants' consideration. No changes were proposed to paragraph 1 of the draft agreement.

[14] On April 14, 2025, counsel for the Defendants responded over email, stating: "We have reviewed your proposed changes and have no further comments on our end; everything looks agreeable. Please proceed with next steps so that we may finalize the agreement."

[15] Later that day, counsel for the parties had a conversation which prompted counsel for the Defendants to send further email correspondence on April 15, 2025, enclosing a further revised draft settlement agreement which modified paragraphs 4 and 5 to provide "clear guidance regarding timelines and obligations to achieve the Agreement's purpose".

[16] On April 16, 2025, Defendants' counsel sent email correspondence to Plaintiff's counsel requesting their consent to an enclosed draft letter to the Court seeking an extension of time for the Defendants to file their defence. The email states that: "We intend to file this letter pursuant to Rule 7 to buy the parties more time while we work to negotiate this matter and settle it outside of Court."

[17] Later on April 16, 2025, Plaintiff's counsel emailed Defendants' counsel enclosing a further revised draft settlement agreement for the Defendants' review and comments. The draft agreement makes minor grammatical changes to paragraphs 2 and 4, and some wording changes to paragraph 5. The email states that "[w]e will be running it by our client shortly."

[18] Later that same day, counsel for the Defendants responded with a short email advising that "your revisions look fine to us. Please proceed with finalizing the draft and circulating for signatures, subject to your client's approval, of course." The email also inquired whether the Plaintiff had any comments on the proposed letter to the Court.

[19] On the morning of April 22, 2025, Defendants' counsel emailed Plaintiff's counsel requesting their consent to the Defendants' letter to the Court requesting an extension of time to file a defence. The email states that: "We intend to file this letter today pursuant to Rule 7 to afford the parties more time while we work to negotiate this matter and finalize the settlement."

[20] Later that same day, counsel for the Plaintiff emailed counsel for the Defendants enclosing a copy of the settlement agreement "executed by [their] client" and requesting Defendants' counsel to arrange to have it executed by their clients.

[21] Very shortly thereafter, counsel for the Plaintiff sent another email to counsel for the Defendants confirming the Plaintiff's consent to the extension of time and to the Defendants' proposed letter to the Court.

[22] With the Plaintiff's consent in hand, the Defendants submitted a letter to the Court dated April 22, 2025 requesting an extension of time to file their defence. The letter states that: "the parties are actively working to finalize a negotiated outcome, outside of this Court. Therefore, the

parties jointly request a 20-day extension … to May 12, 2025." As explained below, the April 22nd letter was not ultimately placed on the Court file.

[23] Two days later, on April 24, 2025, counsel for the Defendants emailed counsel for the Plaintiffs requesting further amendments to paragraph 1 of the settlement agreement. The email reads in part:

> Thanks for sending this. Our apologies, but prior to executing the settlement agreement, our client noticed that paragraph 1 mentions the United States. Given the claim only discusses Aspen's Canadian trademark, and our search of the USPTO's database shows Aspen's "Haul More" trademark status as abandoned in the United States, we would kindly request that you remove the language "or the United States" in paragraph 1.

[24] On April 29, 2025, the Court Registry contacted counsel for the Defendants regarding their April 22nd correspondence, and advising that opposing counsel would need to sign the Rule 7 consent. The April 22nd correspondence was therefore not placed in the Court file.

[25] Later that day, Defendants' counsel emailed Plaintiff's counsel inquiring as to whether he had had an opportunity to discuss the Defendants' "final revision request" with his clients. Defendants' counsel relayed his conversation with the Registry and requested that Plaintiff's counsel execute an enclosed revised Rule 7 request to file with the Court. Defendants' counsel also stated that: "Given we will likely need a longer extension while we work to finalize the settlement agreement and comply with its terms and timelines, we anticipate needing to bring this informal request motion, as well."

[26] That same day, counsel for the Plaintiff sent email correspondence to counsel for the Defendants stating that the Defendants' revision request was not in line with the approach initially proposed by the Defendants' representative, Mr. Semple. As for the Rule 7 request, counsel for the Plaintiff stated that he was agreeable to providing a signed consent, "but we do not want to say that we are still negotiating a settlement, since it seems to us that settlement was reached and agreed".

[27] On May 7, 2025, the Defendants filed their Statement of Defence and Counterclaim. On May 16, 2025, the Plaintiff filed its Reply and Defence to Counterclaim.

[28] On June 10, 2025, the Plaintiff filed the present motion.

III. **Admissibility of the Flavel Affidavit**

[29] The Defendant's affiant, Ms. Flavel, is a senior paralegal employed by the Defendant, Brandt Group of Companies. In her affidavit, she recounts the sequence of events relating to the settlement discussions between the parties. Ms. Flavel also provides hearsay statements regarding her "understanding" of the Defendants' intentions during various phases of the negotiation process.

[30] At the hearing of the motion, I raised some concerns regarding the Flavel Affidavit. While Rule 81 of the *Federal Courts Rules*, SOR/98-106 allows for hearsay evidence on a motion, the grounds for the affiant's belief must be sufficiently stated to demonstrate the reliability of the evidence. Many of the statements in the Flavel Affidavit fail to identify the source of the affiant's "understanding" or belief. As the evidence is being tendered for the truth of its contents, this defect is material because the reliability of the evidence cannot be properly determined.

[31] Most importantly, the Federal Court of Appeal teaches that on a motion to determine whether a binding settlement has been reached between parties, the affidavit evidence should be confined to the relevant documents, uncontroversial context surrounding those documents and, if necessary, objective information about the circumstances surrounding the negotiations. It is improper for either party's affiant to offer evidence as to the party's subjective intentions: *Apotex Inc. v Allergan, Inc.*, 2016 FCA 155 at para 51 [*Allergan*].

[32] Some examples of evidence in the Flavel Affidavit regarding the Defendants' subjective intentions are as follows:

(a) "I understand that the representatives of the Defendants permitted their legal counsel to engage in these without prejudice discussions with the Plaintiff's legal counsel because it was understood any settlement would require a written agreement that we could review and formally approve…" (para 5);

(b) "With respect to the Li Affidavit, I understand that the Plaintiff relies upon the emails found at Exhibits G, H, and I in support of their notion that the parties agreed to the terms of the draft settlement agreement. However, I can confirm that the key representatives for the Defendants were not fully agreed to the essential terms, despite the emails relied upon by the Plaintiffs" (para 11);

(c) "…It was understood that while the proposed revisions to the draft agreement looked fine, it would still need to be circulated for signatures and final review and approval" (para 12); and

(d) "It was not clearly understood that the matter had been settled, and terms had been agreed to, given the parties were still offering proposed revisions and circulating the draft agreement for review. …From the Defendants' perspective, the draft agreement had not been signed, and terms were not agreed to" (para 14).

[33] The above-noted examples also illustrate that some of the evidence in the Flavel Affidavit constitutes impermissible opinion evidence and argument.

[34] Having carefully considered the Flavel Affidavit, I conclude that it is appropriate for the Court to give weight to the documents attached to the affidavit. I have also given weight to evidence in the body of the Flavel Affidavit insofar as it contains uncontroversial context surrounding the exhibited documents and uncontroversial objective information about the circumstances surrounding the negotiations.

[35] However, consistent with the principles in *Allergan*, I give no weight to the affiant's statements as to the Defendants' subjective intentions, nor to controversial hearsay evidence that fails to state the source of the information and/or is opinion evidence or disguised legal argument.

IV. **The Governing Legal Principles**

[36] Neither party challenges the jurisdiction of the Federal Court to determine this motion. Although contract law, viewed in isolation, is normally under provincial jurisdiction, it is well-settled that the Federal Court has jurisdiction to determine whether the parties have reached a settlement agreement regarding a matter that is otherwise within its statutory jurisdiction: *SSE Holdings, LLC v Le Chic Shack Inc.*, 2020 FC 983 at para 60; *Allergan* at para 13.

[37] This Court also has jurisdiction to rule upon whether or not a proceeding subsists as part of its plenary powers, since the existence or non-existence of a settlement agreement affects the status of the proceeding before the Court: *Allergan* at para 14.

[38] The parties agree that the 5-part test for determining whether a binding settlement has been reached between parties is set out by the Federal Court of Appeal in *Allergan*. The elements of the test may be summarized as follows:

(a) The parties had a mutual intention to create legal relations (para 21);

(b) There must be consideration flowing in return for a promise (para 25);

(c) The terms of the agreement are sufficiently certain (para 26);

(d) There is a matching offer and acceptance on all terms essential to the agreement (paras 30 to 32); and

(e) Any other requirements which may arise from legislation, the common law or otherwise (paras 40-43).

[39] In assessing whether the above-noted requirements are met, the Court must adopt an objective standpoint. Accordingly, evidence on the actual state of mind or subjective intentions of the parties is irrelevant. Where the parties exchange written communications, intentions are to be measured by an objective reading of the language chosen by the parties to reflect their agreement: *Allergan* at paras 45-46, 48.

[40] The whole course of the parties' negotiations must be considered and an objective test must be applied: *Allergan* at para 50.

V. Analysis

[41] As earlier noted, the Plaintiff's position at the hearing of the motion was that there was a matching offer and acceptance on all of the essential terms of the agreement at of April 22, 2025, when counsel for the Plaintiff sent Defendants' counsel a copy of the settlement agreement executed by the Plaintiff.

[42] The Defendants submit that the parties did not enter into a valid and enforceable agreement and therefore the motion should be dismissed. They argue that the Plaintiff fails at the first stage of the *Allergan* test because there was no mutual intention to create legal relations. The Defendants contend that the communications between the parties' counsel "were at best an invitation to treat and at no point did they disclose an identifiable offer and acceptance" (Brief of Law of the Defendants dated June 13, 2025, para 16). They also allege that the last element of the *Allergan* test is not met because it requires that when parties are represented by counsel, they must have authority to bind their clients, and must have done so. The Defendants assert that Plaintiff's counsel did not bind their clients at any point in the settlement discussions.

A. Mutual Intention to Create Legal Relations

[43] The Court must find on the evidence before it that, objectively viewed, the parties had a mutual intention to create legal relations. The test is whether a reasonable bystander observing the parties would conclude that both parties, in making a settlement offer and accepting it, intended to enter into legal relations: *Allergan* at paras 21-22.

[44] In *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22, the Supreme Court of Canada addressed the requirement of intention to create legal relations in these terms:

> 37. The test for an intention to create legal relations is objective. The question is not what the parties subjectively had in mind but whether their conduct was such that a reasonable person would conclude that they intended to be bound. In answering this question, courts are not limited to the four corners of the purported agreement, but may consider the surrounding circumstances.
>
> 38. Under the objective test, the nature of the relationship among the parties and the interests at stake may be relevant to the existence of an intention to create legal relations. For example, courts will often assume that such an intention is absent from an informal agreement among spouses or friends. The question in every case is what intention is objectively manifest in the parties' conduct.
>
> [Citations omitted]

[45] The Plaintiff submits that both parties were engaged in formal settlement negotiations through their respective counsel, which leaves little doubt that these actions satisfy the requirement of a mutual intention to create legal relations.

[46] The Defendants argue that the Plaintiff has failed to establish a mutual intention to create legal relations. They submit that a court will not attempt to enforce what is effectively an "agreement to agree" or a "contract to make a contract": *Berthin v Berthin*, 2016 BCCA 104 at para 48. The Defendants acknowledge that the parties' legal counsel were engaging in settlement discussions. However, they characterize these communications as being "at best an invitation to treat", and they argue that at no point did these communications disclose an identifiable offer and acceptance.

[47] The question of whether the Plaintiff and the Defendants had a mutual intention to create legal relations is a fact-dependant and fact-specific inquiry. Without question, the facts demonstrate that the parties had a mutual intention to settle their dispute. This is not a case in which the parties had some impromptu, informal communications in a relaxed, non-business setting. To the contrary, the whole purpose of the communications between the parties and their counsel was to settle the dispute that gave rise to the litigation.

[48] This is readily apparent from the initial communication between Mr. Semple (for the Defendants) and Mr. Zork (for the Plaintiff), indicating that "Mr. Semple has provided instructions to Brandt's marketing team to discontinue use of HAUL MORE and that he wishes to resolve the Federal Court action" (Li Affidavit, Exhibit "A"). This is corroborated by the following statement in the Flavel Affidavit: "Mr. Semple and Mr. Zork agreed that it would be prudent to have their respective legal counsel work to develop a settlement agreement with respect to the Claim" (para 3). Thereafter, counsel for the parties engaged in formal settlement negotiations and exchanged a series of draft settlement agreements. The whole tenor of these communications, objectively viewed, was that the parties had a mutual intention to settle their dispute.

[49] The fundamental issue before the Court, however, is not merely whether the parties had a mutual intention to engage in settlement discussions, but whether on the evidence, objectively viewed, parties had a mutual intention to create a legally binding settlement agreement.

[50] On a balance of probabilities, I accept the Plaintiff's position that a reasonable bystander would understand that there was an intention to create legal relations in the form of a binding settlement agreement as of April 22, 2025. In my view, the revised draft settlement agreement which Plaintiff's counsel sent to Defendants' counsel on April 16, 2025 constituted an offer capable of acceptance, subject only to the approval of the instructing authority for the Plaintiff.

[51] Also, in my view, the responding email from counsel for the Defendants on April 16, 2025 constituted acceptance of the Plaintiff's offer, subject only to the approval of the instructing authority for the Plaintiff.

[52] On April 22, 2025, counsel for the Plaintiff sent email correspondence to counsel for the Defendants enclosing a copy of the settlement agreement "executed by [their] client" and requesting that Defendants' counsel arrange to have it executed by their clients. The execution of the settlement agreement by the instructing authority for the Plaintiff signified the Plaintiff's approval of the agreement, thereby satisfying the only condition of the offer and the acceptance, and crystalizing the mutual intention of the parties to enter into legal relations.

[53] The Defendants rely on the evidence in the Flavel Affidavit to argue that "the key representatives for the Defendants were not fully agreed to the essential terms, despite the emails relied upon by the Plaintiffs" (*i.e.,* the communications between the parties on April 16th and 22nd] (para 11), and that "[i]t was understood that while the proposed revisions to the draft agreement looked fine, it would still need to be circulated for signatures and final review and approval" (para 12).

[54] However, evidence into the actual state of mind or subjective intention of the Defendants (or any of the parties) is irrelevant on this motion. Where the parties exchange written communications, as in the present case, intentions are to be measured by an objective reading of the language chosen by the parties to reflect their agreement. As Justice Stratas stated in *Allergan* at para 47:

> … the subjective reservations of one party do not prevent the formation of a binding agreement if, to all objective, outward appearances, the parties have intended to create legal relations and have agreed in the same terms on the same essential subject matter.

[55] The Defendants also rely on the subsequent conduct of the parties following the delivery of the partially executed settlement agreement on April 22, 2025 to argue that there was no mutual intention to create a legally binding agreement as of that date. In particular, they point to email correspondence dated April 24, 2025 from Defendants' counsel that requested the Plaintiff to remove the language "or the United States" in paragraph 1 of the settlement agreement prior to the Defendants executing the settlement agreement. The email stated that the Defendants had noticed that paragraph 1 mentions the United States, and their search of the United States Patent and Trademark Office's ["USPTO's"] database showed Aspen's "Haul More" trademark status as abandoned in the United States.

[56] I find that the subsequent conduct of the parties after April 22, 2025, objectively viewed, was markedly different than the subsequent conduct of the parties after April 14, 2025. Whereas the parties continued to engage in settlement discussions after April 14, 2025, no such re-engagement in further negotiations occurred after April 22, 2025. To the contrary, Plaintiff's

counsel's subsequent email on April 29, 2025 indicates that, from the Plaintiff's perspective, a settlement had already been reached and agreed upon between the parties.

[57] Moreover, Defendants' counsel's statement in his email dated April 24, 2025 – that their clients only then noticed that paragraph 1 of the settlement agreement mentioned the United States – is astonishing, to say the least, given that the reference to the "United States" in paragraph 1 had remained the same over several iterations of the draft agreement exchanged between the parties.

[58] Objectively viewed, it appears that the Defendants' apparent search of the USPTO's database, *after* they had agreed on April 22, 2025 to the revised draft settlement agreement received from the Plaintiff, prompted the Defendants to have second thoughts about that agreement.

[59] Finally, the Defendants also rely on various communications with the Plaintiff and the Court regarding an extension of time to file their defence, as described earlier herein, as evidence that no binding settlement agreement had been reached between the parties as of April 22, 2025.

[60] I have taken the Defendants' communications regarding their request for an extension of time into account in my determination of the mutual intentions of the parties to create legal relations. On balance, however, I give more weight to the communications between the parties themselves regarding their settlement negotiations, than to the Defendants' communications with the Court, for the following reasons.

[61] First, when parties communicate with the Court regarding settlement matters, they routinely describe the status of such matters in broad terms to ensure that settlement privilege is maintained. Second, and more importantly, the Defendants' objective in seeking an extension of time from the Court to file their defence was to defer having to take any further steps in the Action pending the settlement and discontinuance of the litigation. Under the terms of the settlement agreement, the Action would not be discontinued until the steps contemplated in paragraphs 2 through 5 of the agreement had been completed. The deadlines for the completion of those steps extend several weeks beyond the date of the agreement. For example, paragraph 2 provides that the Defendants were to take various steps to comply with paragraph 1 of the agreement "within 4 weeks of the date of this Agreement".

[62] When the Defendants' communications with the Court are viewed within the context of them seeking an extension of time to file a defence pending the discontinuance of the litigation, the statement that "the parties are actively working to finalize a negotiated outcome" may encompass not only the negotiation of a settlement but also the implementation of it.

[63] In conclusion, I am satisfied, based on the evidence before the Court, that a reasonable bystander would conclude, both from the communications between counsel for the parties, and the subsequent conduct of the parties and the surrounding circumstances, that the parties intended to create legal relations (*i.e.* the settlement agreement) as of April 22, 2025 when counsel for the Plaintiff sent the settlement agreement executed by his client to counsel for the Defendants.

[64] Accordingly, I find that the Plaintiff has satisfied the first requirement in *Allergan*.

B. Consideration

[65] A settlement agreement must satisfy the requirement that there be consideration flowing in return for a promise: *Allergan* at para 25.

[66] The Plaintiff submits that all versions of the settlement agreements included the Plaintiff agreeing to discontinue the present action in exchange for the Defendants' ceasing use of the Plaintiff's trademark. The Defendants do not contend otherwise.

[67] I am satisfied that the requirement for consideration flowing in return for a promise is met based on the evidence before the Court. All of the versions of the draft settlement agreement up to and including the version executed on behalf of the Plaintiff on April 22, 2025 contain an undertaking by the Defendants to discontinue the use of the expression "HAUL MORE" in exchange for the Plaintiff filing a Notice of Discontinuance of the Action on a without costs basis, as well as a release by the Plaintiff from all claims and causes of action against the Defendants arising from the allegations in the pleadings.

C. Certainty of Terms

[68] The third requirement for a legally binding agreement is that the Court must find, as an objective matter, that the terms of the agreement are sufficiently certain. Otherwise stated, the Court must be satisfied that the parties were objectively *ad idem* or were objectively of a common mind: *Allergan* at para 26.

[69] The Plaintiff asserts that both parties were represented by counsel in the negotiation of the settlement agreement, and that at no point up until April 24, 2025, when the Defendants sought to

change the geographic scope of the agreement, was there any disagreement concerning the certainty of the terms.

[70] The Defendants submit that "consensus *ad idem* was not reached" by the parties, but they do not clearly articulate which terms of the settlement were insufficiently certain to satisfy the third *Allergan* requirement.

[71] Undoubtedly, a disagreement regarding paragraph 1 of the settlement agreement ultimately arose between the parties on April 24, 2025, when counsel for the Defendants requested that the mention of the "United States" be removed from that paragraph. However, based on my review of the evidence, that disagreement did not arise from uncertainty as to the term itself. Throughout several iterations of the draft settlement agreement, paragraph 1 clearly stated that the Defendants would stop using the expression "HAUL MORE" with respect to the delineated products and services of the Defendants "in Canada or in the United States". Instead, the disagreement stemmed from the Defendants' apparent change of heart regarding the geographic scope within which they would not use the Plaintiff's trademark, notwithstanding that it had been plainly stated in paragraph 1 of the Agreement.

[72] Having carefully considered the evidence on this motion, I find that the essential terms of the draft agreement were sufficiently certain and that the parties were objectively of a common mind as of April 22, 2025. The terms of the parties' agreement were committed to writing in the form of the revised draft settlement agreement. The parties agreed that the Defendants would cease the use of the expression "HAUL MORE" and would provide written confirmation to the Plaintiff regarding their compliance within a prescribed timeframe. In exchange, the Plaintiff would provide

written response of compliance (or non-compliance), again within specific timelines, and a release of all claims related to the Action, and would file a Notice of Discontinuance with the Court.

[73] It is notable that when counsel for the Defendants received the Plaintiff's revised draft agreement on April 16, 2025, he responded that same day by stating that "your revisions look fine to us. Please proceed with finalizing the draft and circulating for signatures, subject to your client's approval, of course." This statement is indicative of a common mind between the parties.

D. Matching Offer and Acceptance

[74] An agreement does not arise until there is a matching offer and acceptance on all terms essential to the agreement. Disagreement, objectively assessed, on an essential term will mean that there is no agreement: *Allergan* at para 30.

[75] The Federal Court of Appeal provided the following guidance for determining what terms are essential and what terms are not (*Allergan* at para 32):

> The court is to view the specific facts of the case objectively in light of the practical circumstances of the case and ask whether the parties intended to be legally bound by what was already agreed or, in other words, whether an "honest, sensible business[person] when objectively considering the parties' conduct would reasonably conclude that the parties intended to be bound or not" by the agreed-to terms. Put another way, looking not through the eyes of lawyers, but through the eyes of reasonable businesspeople stepping into the parties' shoes, was there something essential left to be worked out? …
>
> [Citations omitted]
>
> [Emphasis added]

[76] When courts find that there has been an agreement on essential terms, they will often imply non-essential terms into the agreement. The lack of agreement on non-essential terms will not stand in the way of a finding of an agreement: *Allergan* at para 33.

[77] Whether or not a "subject to formal agreement" clause precludes a finding of agreement is a question of construction which focuses on "whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through". This is objectively assessed by looking at the correspondence passing among the parties, and the subsequent conduct of the parties, with a view to ascertaining whether the parties, through an exchange of matching correspondence, intended to create immediate legal relations: *Allergan* at paras 38, 39.

[78] The Plaintiff argues that a matching offer and acceptance on all essential terms of the agreement existed as of April 22, 2025. According to the Plaintiff, the statements made by the parties were unequivocal, the terms of the agreement were clear and fully negotiated, and the communications were both formal and sufficient to bind the parties.

[79] The Defendants assert that, looking at the circumstances objectively, the parties' legal counsel were engaging in settlement discussions. However, these communications were at best an invitation to treat and at no point did they disclose an identifiable offer and acceptance.

[80] I disagree with the Defendants. I find that an honest, sensible business person, when objectively considering the parties' communications and conduct, would reasonably conclude that there was a matching offer and acceptance on all terms essential to the agreement as of April 22, 2025. Objectively viewed, the further revised draft settlement agreement which counsel

for the Plaintiff sent to Defendants' counsel on April 16, 2025 constituted an "identifiable" offer capable of acceptance, subject only to the approval of the instructing authority for the Plaintiff. On its face, the Plaintiff's revised draft agreement proposes terms of settlement.

[81] Further, I find that the responding email from counsel for the Defendants on April 16, 2025 constituted acceptance of the Plaintiff's offer, subject only to the approval of the instructing authority for the Plaintiff. The Defendants' acceptance of the Plaintiff's offer manifested itself in counsel for the Defendants' responding email to the Plaintiffs on April 16th stating that "your revisions look fine to us. Please proceed with finalizing the draft and circulating for signatures, subject to your client's approval, of course." The subsequent email from Plaintiff's counsel enclosing an executed copy of the settlement agreement satisfied the only condition of the offer and the acceptance, thereby crystalizing a binding settlement agreement between the parties.

[82] The Defendants' April 16th response does not indicate any disagreement on any essential terms of the agreement. Even if I assume, for the purposes of this motion, that the geographic scope of the Defendants' undertaking described in paragraph 1 of the proposed settlement agreement is an essential term of the agreement, that provision remained the same throughout the various revisions to the draft agreement, and consistently defined the geographic scope of the Defendants' undertaking not to use the expression "HAUL MORE" as being "in Canada or the United States".

[83] Otherwise stated, a reasonable business person would not view the exchanges between the parties on April 16, 2025, followed by the Plaintiff's approval of the agreement, as being a transaction in which there was something essential left to be worked out. Indeed, insofar as the

geographic scope of the Defendant's undertaking was concerned, that issue was addressed in the first iteration of the draft agreement and remained the same up to April 22, 2025.

[84] Accordingly, I conclude that the Plaintiff has satisfied the fourth requirement of the test in *Allergan*.

E. Other Requirements – Authority to Bind

[85] The last element of the test in *Allergan* requires the Court to consider any other requirements arising from legislation or the common law based on the particular facts of the case.

[86] In this case, as the parties are both represented by counsel, a further issue for determination is whether the parties' counsel possess the authority to bind their clients. In *Allergan*, Justice Stratas discussed the implications of that authority, or the absence thereof, on whether the parties have made a legally enforceable settlement agreement (para 43):

> Thus, in the case of parties represented by counsel, if both counsel possess the apparent authority to bind their clients—neither has qualified their authority at the outset or neither has qualified an offer or acceptance by saying it is "subject to my client's approval" or "subject to instructions"—then a matching offer and acceptance by counsel binds the clients. A lawyer's explicit reservation of the client's authority to decide whether an offer is accepted means that there can be no agreement until the client is heard from.

[87] The Plaintiff submits that there is no indication that counsel did not have the authority to bind their respective clients.

[88] Conversely, the Defendants assert that "at no point during the negotiations did the Plaintiff's counsel bind their clients to an agreement." They assert that on April 16, 2025, the Plaintiff's counsel informed the Defendants' counsel that they would run the changes by their clients.

[89] I do not accept either party's characterization of the facts on this issue. Based on my review of the evidence, counsel for the Plaintiff did, in fact, qualify the Plaintiff's "offer" on April 16, 2026 that is manifested in the Plaintiff's revised draft agreement, by stating in his covering email that "[w]e will be running it by our client shortly …". In the Defendants' response later that same day, counsel for the Defendants acknowledged Plaintiff's counsel's explicit reservation of their client's authority to approve of the offer by saying: "Please proceed with finalizing the draft and circulating for signatures, *subject to your client's approval, of course*" [emphasis added].

[90] Based on the above-noted correspondence, I conclude that counsel for the Plaintiff did not have apparent authority to bind their client in respect of the April 16th offer when it was initially sent to the Defendants on that date.

[91] However, on April 22, 2025, the Plaintiff itself signified its approval of the April 16th settlement offer when the President of Aspen Custom Trailors Inc., Phil Johnston, signed the settlement revised draft settlement and it was sent to counsel for the Defendants for execution by the Defendants.

[92] As for the Defendants, based on the material before the Court, I find that their counsel possessed the apparent authority to bind the Defendants to the proposed settlement agreement. In

the email exchanges between counsel regarding settlement negotiations between the parties, Defendants' counsel neither qualified his authority at the outset of the negotiations, nor did he qualify the Defendants' acceptance of the Plaintiff's revised draft settlement agreement dated April 16, 2025 by saying it is "subject to his client's approval" or words to that effect.

[93] It was only after the fact in the Flavel Affidavit that a paralegal employed by one of the Defendants asserted her "understanding" that "the representatives of the Defendants permitted their legal counsel to engage in these without prejudice discussions with the Plaintiff's legal counsel because it was understood any settlement would require a written agreement that we could review and formally approve." For the aforementioned reasons, I give no weight to this evidence because the actual state of mind or subjective intentions of the parties are irrelevant.

VI. **Conclusion**

[94] For these reasons, the Plaintiff's motion should be granted. A reasonable bystander observing the exchange of written communications between counsel for the parties, along with the surrounding circumstances and the conduct of the parties, would conclude that both parties, through their respective counsel, intended to enter into a binding agreement on April 22, 2025 in accordance with the terms set out in Schedule "A" to the Plaintiff's Notice of Motion.

[95] The Plaintiff seeks costs of this motion in any event of the cause. The Defendants also seek costs of the motion. I see no reason to deviate from the general rule that the successful party is entitled to an award of costs. Costs are hereby fixed in favour of the Plaintiff in the amount of $1500.00, inclusive of disbursements and taxes.

THIS COURT ORDERS that:

1. The Plaintiff's motion is granted.

2. It is hereby declared that the parties concluded a legally binding settlement agreement on April 22, 2025, in accordance with the terms set out in the Settlement Agreement attached as Schedule "A" to the Plaintiff's Notice of Motion.

3. The Defendants shall pay to the Plaintiff its costs of the motion, hereby fixed in the amount of $1500.00, inclusive of disbursements and taxes.

"Kathleen Ring"
Associate Judge