

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

**SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT**

**WHEELING TIRE AND OIL CO., INC.,
and JAMES W. WHEELING,**

Plaintiffs,

VS.

Civil Action No. 98-1234D

HOOSIER PORTFOLIO, LLC,

Defendant.

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

STATEMENT OF FACTS

Plaintiff Wheeling Tire and Oil Co., Inc. ("Wheeling Tire") executed and delivered to the Bank of Hoosierville, N.A. (the "Bank") a Revolving Note dated July 23, 1986 in the principal amount of \$125,000 (the "Note"). On the same date, Plaintiff James W. Wheeling executed and delivered to the Bank a Guaranty ("Guaranty") whereby Mr. Wheeling guaranteed the payment of all of the obligations of Wheeling Tire to the Bank. Also on July 23, 1986, Wheeling Tire executed an Inventory and Accounts Receivable Security

Agreement (the "Security Agreement")¹ whereby Wheeling Tire granted the Bank a security interest in all of its inventory and accounts receivable to secure the payment of all liability of Wheeling Tire to the Bank, including the Note. No other security was given for the Note and the Guaranty.

The Bank later failed and was taken over by the Federal Deposit Insurance Corporation, which sold all of its right, title, and interest under the Loan Documents to Defendant Hoosier Portfolio, LLC ("Hoosier") on March 12, 1997. After Wheeling Tire defaulted on the Note, Hoosier obtained a judgment against Wheeling Tire and Mr. Wheeling in the amount of \$131,649.03, on November 20, 1997. On January 20, 1998, a Trustee Execution (the "Execution") was issued against Wheeling Tire and Mr. Wheeling in the amount of \$134,167.13. On January 30, 1998, Hoosier caused the Execution to be levied upon certain real property owned by Mr. Wheeling and used as his primary residence.

By the time Hoosier caused the Execution to be levied on Mr. Wheeling's home, Wheeling Tire had already gone out of business and Mr. Wheeling was without resources to pay the Execution, as Mr. Wheeling had disclosed in financial information previously provided to Hoosier. (*See* Letter from Rozier to Sebastien of 2/12/98 [attached hereto as Ex. A].) As a result, Mr. Wheeling was in a position where he would have to file a petition for protection from his creditors under Chapter 7 of the United States Bankruptcy Code if he could not come to an understanding with Hoosier with respect to the Execution. (*See id.*; Letter from Rozier to Sebastien of 4/24/98 [attached hereto as Ex. H] at 2.)

¹The Note, Guaranty, and the Security Agreement are hereinafter collectively referred to as the "Loan Documents."

To that end, on February 12, 1998, Mr. Wheeling, through his attorney, offered Hoosier \$5,000 "as payment in full" of his debt. (*See* Letter from Rozier to Sebastien of 2/12/98, Ex. A.) That offer was rejected. On April 8, 1998, Mr. Wheeling made a new offer to pay \$25,000, \$10,000 cash with the balance to be paid over three years, "in full settlement of the case." (*See* Letter from Rozier to Sebastien of 4/8/98 [attached hereto as Ex. B].)

Mr. Wheeling's second offer "to pay the sum of \$25,000.00 over three (3) years as full and final settlement" of the obligations owed to Hoosier was also rejected. (*See* Letter from Sebastien to Rozier of 4/13/98 [attached hereto as Ex. C] at 1.) However, Hoosier made its own counteroffer, which gave Mr. Wheeling two payment options, each of which was to "remain open through the end of business on Tuesday, April 21, 1998." (*Id.*) Option 2 stated, in full:

Payment of \$40,000 *as settlement in full* of the Defendants' obligations to Hoosier, payments to be made as follows: \$10,000.00 due within thirty (30) days of the acceptance hereof, with the *balance* of \$30,000.00 payable over three (3) years. Interest shall accrue on the outstanding balance at the rate of 11.5% per annum. *Collateral* shall be a life insurance policy of Wheeling naming Hoosier the beneficiary, in the amount of the total sum due to Hoosier on the Execution, with interest at 11.5%, less any payments made.

(*Id.* (emphasis added).) Hoosier's offer also indicated that it was "subject to the Defendant's execution of settlement documentation in form satisfactory to Hoosier in its sole and absolute discretion." (*Id.* at 2.)

Thereafter, the parties discussed Hoosier's counteroffer, and Hoosier agreed to reduce the interest rate to 9.5%. Mr. Wheeling accepted these terms, and his acceptance was conveyed in an April 16, 1998 letter from his attorney to Hoosier. (*See* Letter from Rozier to Sebastien of 4/16/98 [attached hereto as Ex. D].) Hoosier acknowledged Mr. Wheeling's

acceptance the next day: "We are in receipt of your correspondence dated April 16, 1998, wherein you formerly [sic] accept "Option Number 2" (with a 9.5% interest rate), in settlement of [Hoosier's action against Mr. Wheeling and Wheeling Tire]." (Letter from Sebastien to Rozier of 4/17/98 [attached hereto as Ex. E].)

On April 23, 1998, Hoosier sent Mr. Wheeling's attorney a draft Settlement Agreement for his signature. (See Letter from Sebastien to Rozier of 4/23/98 [attached hereto as Ex. F].) Unfortunately, the Settlement Agreement as drafted did not accurately represent the terms of the parties' agreement as reflected in Option 2 of Hoosier's counteroffer in several important respects. First, the Settlement Agreement called for Mr. Wheeling to obtain and assign to Hoosier a life insurance policy in the amount of not less than \$400,000 and naming Hoosier as the beneficiary thereof, despite the fact that Option 2 only required a life insurance policy in the amount of "the total sum due to Hoosier on the Execution," or \$134,167.13. (*Compare* Settlement Agreement [attached hereto as Ex. G] ¶ 3, *with* Letter from Sebastien to Rozier, Ex. C at 1.)

Second, the Settlement Agreement did not contain any terms indicating that Mr. Wheeling would be released from his obligation to Hoosier upon his payment of the \$40,000 agreed to in Option 2 of Hoosier's April 13 counteroffer. In effect, the Settlement Agreement provided that Hoosier would receive \$40,000 over a three-year period, *plus* \$400,000 upon Mr. Wheeling's death (less any payments made toward the \$40,000). Thus, under the Settlement Agreement, Hoosier would eventually collect \$400,000 to satisfy a \$134,167.13 Execution, despite the fact that Option 2 called for "[p]ayment of \$40,000.00 as settlement

in full of the Defendants' obligations to Hoosier." (Letter from Sebastien to Rozier, Ex. C at 1.)

Mr. Wheeling immediately communicated to Hoosier that the Settlement Agreement did not reflect the terms of their agreement. (*See* Letter from Rozier to Sebastien, [Ex. H].) To remedy the inaccuracies, Mr. Wheeling suggested that (1) Hoosier accept as collateral assignment of a life insurance policy that Mr. Wheeling already had previously out in the amount of \$200,000, far in excess of the collateral called for in Option 2, and (2) the Settlement Agreement be revised to include mutual releases. (*Id.*) Mr. Wheeling also indicated that if the parties could not reach agreement by 4:00 P.M. on April 28, 1998, he would be forced to file a petition for bankruptcy under Chapter 7. (*Id.* at 2.)

On April 27, 1998, Hoosier indicated to Mr. Wheeling that it would not accept \$40,000 from Mr. Wheeling as payment in full of the debt owed to Hoosier, as agreed in Option 2. (*See* Letter from Rozier to Sebastien of 4/27/98 [attached hereto as Ex. I].) Hoosier confirmed its position in a letter dated April 30, 1998, in which Hoosier also indicated that it would be willing to resolve the matter by accepting a cash payment of \$40,000 under the terms of the parties' original agreement, together with Mr. Wheeling's assignment of \$100,000 of his existing life insurance policy, plus interest accruing at the rate of 9.5%, which would result in Hoosier being paid more than the full amount of its Execution. (*See* Letter from Sebastien to Rozier of 4/30/98 [attached hereto as Ex. J] at 2.).

Counsel for the Plaintiffs forwarded to Hoosier a demand letter under Massachusetts Law Chapter 93A for specific performance of the settlement offer made by Hoosier on April 13, 1998 and accepted by Mr. Wheeling on April 15. (*See* Letter from Rozier to Sebastien

of 5/4/98 [attached hereto as Ex. K].) Hoosier refused the demand, responding that no enforceable agreement was reached and threatening to seek sanctions pursuant to Mass. R. Civ. P. 11 if the Plaintiffs filed suit. (See Letter from McGillicuddy to Rozier of 5/5/98 [attached hereto as Ex. L].)

This action was filed by the Plaintiffs on June 17, 1998. Hoosier subsequently brought the instant Motion to Dismiss Plaintiffs' Complaint on the ground that no binding contract was ever formed.

ARGUMENT

I. MOTION TO DISMISS STANDARDS.

Under Mass. R. Civ. P. 12(b)(6), a court may not grant the "radical relief" of dismissal unless it appears certain that the complaining party is not entitled to relief under any state of facts which could be proved in support of his claim. *Spinner v. Nutt*, 417 Mass. 549, 631 N.E.2d 542, 543 (1994); *Coraccio v. Lowell Five Cents Sav. Bank*, 415 Mass. 145, 612 N.E.2d 650, 652 (1993). Under this "lenient" standard of review, the allegations set forth in the complaint are taken as true, the plaintiff is entitled to all favorable inferences, and all doubts are resolved in favor of the plaintiff. *Kirkland Constr. Co. v. James*, 39 Mass. App. Ct. 559, 658 N.E.2d 699, 700 (1995), *review denied*, 422 Mass. 1104, 661 N.E.2d 935 (1996); *Pucci v. Amherst Restaurant Enters., Inc.*, 33 Mass. App. Ct. 779, 605 N.E.2d 309, 311 (1992), *review denied*, 414 Mass. 1103, 609 N.E.2d 88 (1993). Applying this standard here, the Plaintiffs have stated claims in their Complaint upon which relief can be granted, and Hoosier's Motion to Dismiss must be denied.

II. THE PARTIES' AGREEMENT TO SETTLE HOOSIER'S CLAIM AGAINST THE PLAINTIFFS IS AN ENFORCEABLE CONTRACT.

A. The Parties' Correspondence Is Admissible To Prove The Offer Of Compromise, Its Acceptance, And The Surrounding Circumstances.

Before turning to Hoosier's primary argument that the parties' agreement, embodied in the April 13 and 16, 1998 letters, is not an enforceable contract, a preliminary point must be addressed. In a cursory footnote in its Memorandum of Law in Support of Defendant's Motion to Dismiss Plaintiffs' Complaint ("Memorandum of Law"), Hoosier contends that the correspondence exchanged with respect to the parties' agreement (all of which is attached as exhibits hereto), including the crucial April 13, 1998 letter (Ex. C) that set forth Option 2 of Hoosier's counteroffer, will not be admissible in any court proceeding because the letters were part of settlement negotiations between the parties. (*See* Def.'s Mem. of Law at 3 n.5.)

Clearly, the general rule is that offers to compromise are not admissible in evidence. *See Hunt v. Rice*, 25 Mass. App. Ct. 622, 633, 521 N.E.2d 751, 758 (1988) (citing Proposed Mass. R. Evid. 408). However, that general rule has no application in this case.

It is just as clear as the general rule that "[i]f the compromise results in an enforceable contract—a novation or an accord—that is subsequently repudiated, the aggrieved party may sue in contract to prove the offer of compromise, its acceptance, and the surrounding circumstances." 2 Jack B. Weinstein et al., *Weinstein's Federal Evidence* § 408.03[6], at 408-14 (2d ed. 1998) (commenting on Fed. R. Evid. 408); *see also Catullo v. Metzner*, 834 F.2d 1075, 1078-79 (1st Cir. 1987) (Fed. R. Evid. 408 inapplicable because testimony was not offered to prove liability for original claim, but rather to prove terms of settlement

agreement itself, and admission would not contravene public policy favoring compromise); *Cates v. Morgan Portable Bldg. Corp.*, 780 F.2d 683, 691 (7th Cir. 1985) ("Obviously a settlement agreement is admissible to prove the parties' undertakings in the agreement should it be argued that a party broke the agreement."); *Union Trust Co. of Maryland v. Resist Manufacturing Co.*, 181 A. 726, 729 (Md. 1935) (rule of evidence excluding offers to compromise does not apply to a complete agreement, "even though it is the result of a compromise"); *Tagtow v. Carlton Bloomington Dinner Theatre, Inc.*, 379 N.W.2d 557, 562 (Minn. Ct. App. 1985) ("Even an offer to compromise may be admissible evidence . . . if the offer has been accepted but is later repudiated."). Thus, "[i]f an offer of compromise is accepted and a contract is thus created, the party aggrieved may sue on the contract and obviously may prove the offer and acceptance." Edward W. Cleary, *McCormick on the Law of Evidence* § 274, at 814-15 (3d ed. 1984).

Here, of course, this is precisely what the Plaintiffs, the aggrieved parties, have set out to do. In their Complaint, the Plaintiffs have alleged that the parties entered into a binding contract by virtue of their April 13 and 16, 1998 exchange of correspondence,² and that Hoosier breached that contract by refusing to honor the terms of their agreement. (*See* Compl. ¶¶ 17-20, 23, 26, 27.) As a result, far from it being "unconscionable" (*see* Def.'s Mem. of Law at 3 n.5), it is accepted procedure for the parties' correspondence to be

²Subsequent letters confirming the terms of the parties' agreement are also relevant evidence of the agreement. *See Nelson's Express & Warehouse Co. v. Alexander Grant & Son, Inc.*, 320 Mass. 317, 69 N.E.2d 458, 459 (1946) (defendant's letter stating that it confirmed prior conversations between the parties could be treated as an admission by the defendant).

admitted into evidence to prove the offer of compromise, its acceptance, and the surrounding circumstances.

B. The Parties' Agreement Is Supported By Sufficient Consideration.

Hoosier's initial argument in favor of dismissal is that the parties could not have entered into a binding settlement agreement on April 13 and 16, 1998 with respect to Option 2 of Hoosier's counteroffer because there was no consideration given by the Plaintiffs for the making of the agreement. Hoosier's simplistic argument is based entirely on the uncontroversial proposition that an obligor's promise to pay a preexisting debt does not constitute valid consideration for an agreement to pay only a portion of that debt. (*See* Def.'s Mem. of Law at 5-7.) It is equally well settled, however, that

if the bargained-for performance rendered by the promisee includes something that is not within the requirements of the promisee's pre-existing duty, the law of consideration is satisfied. It makes no difference that the agreed consideration consists almost wholly of a performance that is already required and that the receipt of this performance is the principal goal of the promisor. It is enough that some small additional performance is bargained for and given.

2 Joseph M. Perillo & Helen H. Bender, *Corbin on Contracts* § 7.20, at 456 (rev. ed. 1995); *see also* 3 Samuel Williston, *A Treatise on the Law of Contracts* § 7:40 (Richard A. Lord ed., 4th ed. 1992); Restatement (Second) of Contracts § 73 (1981); 17A Am. Jur. 2d *Contracts* § 149, at 164 (1991) ("The undertaking or doing of anything beyond that one is already bound to do, though of the same kind and in the same transaction, may be a sufficient consideration.").

So, for example, the giving of security, or additional or further security which the creditor has no right to demand, is a sufficient consideration to support an agreement by a creditor to accept less than the full amount of its liquidated debt. *See, e.g., Birenberg v. Razgunas*, 262 N.W. 914, 914 (Mich. 1935). *See generally* 2 Perillo & Bender, *supra*, § 7.20, at 458 ("[T]he creditor's new promise is binding if the debtor gives in return not only a promise to pay part or all of the debt but also some new collateral security."); 1 Am. Jur. 2d *Accord and Satisfaction* § 37 (1994); 1 C.J.S. *Accord and Satisfaction* § 30, at 501 (1985) ("It is well established that the acceptance of new, or additional, security, of whatever nature, for the payment of a sum in settlement and discharge of a claim or demand, or of a secured promise to pay such a sum, constitutes and effects a good accord and satisfaction of the preexisting claim, even though the sum secured or agreed to be paid is less than the amount claimed or owing.").

In this case, the Plaintiffs agreed to give security, in the form of a life insurance policy of Mr. Wheeling naming Hoosier as the beneficiary, in accordance with Option 2 of Hoosier's counteroffer set forth in its April 13, 1998 letter. Since the life insurance policy as "collateral" was not within the requirements of the Plaintiffs' preexisting obligation to Hoosier, their promise to give that security constituted sufficient consideration for the making of a binding settlement agreement with Hoosier, even though the Plaintiffs also agreed to pay only a portion of their preexisting debt to Hoosier. At the very least, the issue of whether consideration was given presents a fact question that must be resolved in favor of the Plaintiffs upon Hoosier's Motion to Dismiss. *See W.A. Robinson, Inc. v. Burke*, 327 Mass. 670, 100 N.E.2d 366, 368-69 (1951); *Codman v. Beane*, 312 Mass. 570, 45 N.E.2d

948, 950 (1942) (question of consideration is one of fact and not of law); *see also Champlin v. Jackson*, 313 Mass. 487, 48 N.E.2d 46, 47 (1943) (question whether there is an accord and satisfaction is one of fact).

In addition, where, as here, a debtor is known to his creditor to be insolvent, or seriously embarrassed financially, the debtor's agreement to make a partial payment of his debt furnishes sufficient consideration to support the parties' compromise agreement as to the reduction of the debt. *See Taylor v. Central of Georgia Ry.*, 108 S.E.2d 103, 107 (Ga. Ct. App. 1959); *Poray, Inc. v. Crescent Indus., Inc.*, 141 N.E.2d 879, 881-82 (Ill. App. Ct. 1957); *City of San Antonio v. Guido Bros. Constr. Co.*, 460 S.W.2d 155, 166 (Tex. Civ. App. 1970). *See generally* 1 C.J.S., *supra*, § 41(a). Similarly, an insolvent debtor who forbears from going into bankruptcy to discharge his debt, thus giving up the valuable right to have the benefit of the bankruptcy laws, gives a sufficient consideration for a creditor's agreement to accept a partial payment in full satisfaction of the debt owed. *See Curlee Clothing Co. v. Uberman*, 273 S.W. 899 (Tex. Civ. App. 1925); *see generally* 1 C.J.S., *supra*, § 41(b).

In this case, Hoosier was fully apprised of Mr. Wheeling's precarious financial position, including the demise of Wheeling Tire. (See Letter from Rozier to Sebastien, Ex. A.) Mr. Wheeling also informed Hoosier that he would need to file for bankruptcy if no settlement was reached with Hoosier. (See *id.*; Letter from Rozier to Sebastien, Ex. H at 2.) Thus, Mr. Wheeling's promise to pay a portion of the debt owed to Hoosier (in addition to giving additional security therefor), and to forbear from filing his Chapter 7 petition, as Hoosier was aware that Mr. Wheeling had been contemplating, furnished sufficient

consideration for Hoosier's agreement to accept \$40,000 "as settlement in full of the Defendants' obligations to Hoosier." (Letter from Sebastien to Rozier, Ex. C at 1.)

In sum, the Plaintiffs gave ample consideration for the making of the parties' agreement to settle Hoosier's claim against the Plaintiffs. As such, their breach-of-contract claim against Hoosier cannot be dismissed on the ground that there was no valid consideration to support a binding contract between the parties.

C. The Parties' Agreement Was Bilateral, And Was Breached By Hoosier's Anticipatory Repudiation Of The Contract.

Hoosier also contends that the settlement contract breached by Hoosier was a unilateral agreement that could only be accepted by Mr. Wheeling's performance thereunder, and, the argument goes, since Mr. Wheeling has not paid the \$40,000 to Hoosier, the contract was never accepted by Mr. Wheeling. (*See* Def.'s Mem. of Law at 7-10.) This is a remarkable argument. The most common form of contractual undertaking for at least the past four centuries has been the bilateral contract, "where a promise is exchanged for a promise." *See* 2 Perillo & Bender, *supra*, § 5.25, at 126-27. In such a contract, each promise serves as the consideration for the other promise. *Id.*; *see also Loranger Constr. Co. v. E.F. Hauserman Co.*, 376 Mass. 757, 384 N.E.2d 176, 180 (1978) (discussion of promises and consideration in the context of a "typical bargain"); *Witherington v. Eldredge*, 264 Mass. 166, 162 N.E. 300, 303 (1928) (mutual promises provided valid and sufficient consideration for contract).

This case involves a classic bilateral contract. Mr. Wheeling promised to pay Hoosier \$40,000 as settlement in full of the Defendants' obligations to Hoosier, as well as to provide Hoosier with security in the form of a life insurance policy on Mr. Wheeling naming Hoosier as beneficiary, in consideration of Hoosier's return promise to release the Plaintiffs from the remainder of their debt owing under the Execution. As such, Mr. Wheeling did not have to tender the \$40,000 to Hoosier in order to accept Hoosier's counteroffer in Option 2 of the April 13 letter. Moreover, Hoosier breached the parties' agreement by anticipatory repudiation when it informed Mr. Wheeling that it would not abide by the terms of their agreement. At that point, Mr. Wheeling was under no obligation to make payment under the agreement. *See Northern Heel Corp. v. Compo Indus., Inc.*, 851 F.2d 456, 471 (1st Cir. 1988) (anticipatory repudiation of contract "reliev[es] the [other party] from further performance") (quoting *F.F. Atteaux & Co. v. Mechling Bros. Manufacturing Co.*, 245 Mass. 483, 140 N.E. 271, 278 (1923)); *see also Eastern Inv. & Dev. Corp. v. Franks*, 339 Mass. 280, 158 N.E.2d 881, 886 (1959) (the law does not require the doing of a futile act).

Hoosier attempts to avoid these well-settled concepts of contract law by arguing that it was under no obligation to keep *its* promise until the parties had executed a final, written contract setting forth all of the terms of the parties' agreement. In support of its argument, Hoosier points to language contained in the April 13 letter stating that Hoosier's agreement under Option 2 was "subject to the Defendant's execution of settlement documentation in a form satisfactory to Hoosier in its sole and absolute discretion." (Letter from Sebastien to Rozier, Ex. C at 2.)

This argument fails to carry the day for Hoosier, however. It is black-letter law that

[m]anifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.

Restatement (Second) of Contracts § 27; *see Sands v. Arruda*, 359 Mass. 591, 270 N.E.2d 826, 829 (1971) ("No contract otherwise binding is to be treated as a nullity solely because it is a contract to execute still another document or instrument in the future."); *Nigro v. Conti*, 319 Mass. 480, 66 N.E.2d 353, 354 (1946) ("The inclusion of a provision for the later drawing up of a formal memorial of the terms of an agreement, written or oral, is not necessarily inconsistent with an intent to be presently bound to the agreement in its original informal state."). This rule is applied in the context of settlement agreements just as in the case of other types of contracts.

The distinction is well understood between oral agreements which become effective only upon their reduction to executed writings, and those which are effective upon utterance, with later writings expected but not crucial to enforceability. See Restatement (Second) of Contracts § 27 (1979). The distinction is found among agreements settling litigation, as among other agreements, and there are recent examples of settlement agreements held effective although the party thereafter reneged and refused to execute a written instrument. See *Dominick v. Dominick*, 18 Mass.App.Ct. 85, 88-89, 463 N.E.2d 564 (1984); *Carver v. Waldman*, 21 Mass.App.Ct. 958, 959-960, 488 N.E.2d 427 (1986).

Hubbard v. Peairs, 24 Mass. App. Ct. 372, 378, 509 N.E.2d 41, 45, *review denied*, 401 Mass. 1104, 511 N.E.2d 620 (1987). Where "the parties have agreed upon all material terms, it may be inferred that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract." *Goren v. Royal Invs., Inc.*, 25 Mass. App. Ct. 137, 140, 516 N.E.2d 173, 175 (1987), *review denied*, 401 Mass. 1104, 519 N.E.2d 595 (1988).

Here, the parties had already agreed on all material terms as a result of their exchange of correspondence. Mr. Wheeling was to pay \$40,000, \$10,000 in cash with the balance payable over three years with interest accruing at the rate of 9.5% per annum, as settlement in full of the Defendants' obligations to Hoosier. In addition, Mr. Wheeling was to provide collateral for the new obligation in the form of a life insurance policy naming Hoosier as the beneficiary. In return, Hoosier would drop its outstanding claim against the Defendants. (See Exs. C, D, E.) The written contract contemplated by the parties would simply be a "form" incorporating their already binding agreement. (See Letter from Sebastien to Rozier, Ex. C at 2.)³

In sum, the parties had a binding, bilateral contract once Mr. Wheeling accepted Option 2 of Hoosier's counteroffer in his April 16, 1998 letter. From Hoosier's standpoint, the most it could have accomplished by including the language in its April 13 letter referring to the execution of "settlement documentation in a form satisfactory to Hoosier" was to create a question of fact as to whether there are "circumstances" that may show that the parties' agreement, embodied in their exchange of correspondence, was only a preliminary

³Hoosier was under a good-faith obligation to draft a document that accurately reflected the parties' agreement. See *Hubbard*, 509 N.E.2d at 45 n.11; see also *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 649 N.E.2d 1102, 1105 (1995) (there is implied covenant of good faith and fair dealing between parties to a contract which requires that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract). Hoosier breached its good-faith obligation in this case by preparing a draft Settlement Agreement that sought to impose on Mr. Wheeling terms inconsistent with the agreement that had previously been reached by the parties. Cf. *Rand-Whitney Packaging Corp. v. Robertson Group, Inc.*, 651 F. Supp. 520, 535 (D. Mass. 1986) (parties made preliminary binding agreement and also agreed to proceed in good faith to the execution of a more formal document).

step toward the execution of a final agreement. *See* Restatement § 27. At this stage of the proceeding, that fact question must be resolved in favor of the Plaintiffs, and Hoosier's Motion to Dismiss must be denied.

III. HOOSIER'S BREACH OF ITS BINDING SETTLEMENT CONTRACT WITH THE PLAINTIFFS SUPPORTS THE PLAINTIFFS' CLAIM UNDER MASSACHUSETTS GENERAL LAWS CHAPTER 93A.

Count II of the Plaintiffs' Complaint asserts a cause of action under Mass. Gen. Laws ch. 93A based on Hoosier's breach of its settlement contract with the Plaintiffs. (*See* Compl. ¶¶ 28-29.) As Hoosier concedes in its Memorandum of Law, *see* Def.'s Mem. of Law at 11, "conduct 'in disregard of known contractual arrangements' and intended to secure benefits for the breaching party constitutes an unfair act or practice for c. 93A purposes." *Anthony's Pier Four, Inc. v. HBC Assocs., Inc.*, 411 Mass. 451, 583 N.E.2d 806, 821 (1991) (quoting *Wang Lab., Inc. v. Business Incentives, Inc.*, 398 Mass. 854, 501 N.E.2d 1163, 1165 (1986)). Hoosier also concedes that "[t]o determine if a party has done anything unfair or deceptive, the court must look at the facts and circumstances of the case." (Def.'s Mem. of Law at 12.)

As noted above, upon a motion to dismiss, the allegations set forth in the complaint are taken as true, the plaintiff is entitled to all favorable inferences, and all doubts are resolved in favor of the plaintiff. *Kirkland Constr. Co.*, 658 N.E.2d at 700; *Pucci*, 605 N.E.2d at 311. Since the Plaintiffs have alleged that Hoosier breached its agreement with them in known disregard of the agreement, and Hoosier has failed to show, as a matter of law, that the parties did not have a binding agreement, Hoosier's Motion to Dismiss Count

II of the Plaintiffs' Complaint must be dismissed in the face of the "facts and circumstances" assumed for purposes of ruling on Hoosier's motion.

Hoosier's additional argument that the Plaintiffs' ch. 93A claim should be dismissed because Mr. Wheeling cannot, as a matter of law, prove a loss of money or property, real or personal (*see* Def.'s Mem. of Law at 10-11), is patently absurd. Under the parties' contract, Mr. Wheeling was required to pay only \$40,000, plus interest, to settle in full Hoosier's \$134,167.13 Execution against the Plaintiffs. Thus, Hoosier's unfair decision to renege on its agreement may cost Mr. Wheeling in the range of \$100,000.

CONCLUSION

WHEREFORE, in light of the foregoing discussion of facts and applicable law, Defendant Hoosier Portfolio, LLC's Motion to Dismiss Plaintiffs' Complaint should be denied.

Respectfully submitted,

WHEELING TIRE AND OIL CO., INC. and
JAMES W. WHEELING

By their attorney,

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CERTIFICATE OF SERVICE

I certify that I have served the within document on all parties of interest by causing same to be mailed, first-class postage prepaid, to

Michael J. McGillicuddy, Esquire
Stefanie J. Sebastien, Esquire
McGillicuddy & Sebastien
One Center Plaza
Boston, Massachusetts 02108

on this _____ day of August, 1998.

Dorothy Z. Rozier, Esquire