UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DENNIS C. VACCO and JOSEPH E. BERNSTEIN, individually in their capacities as Litigation Trustees of the CATSKILL LITIGATION TRUST,

Plaintiffs,

v.

07-CV-0663
(TJM/DEP)

HARRAH'S OPERATING COMPANY, INC., and CLIVE CUMMIS,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT HEREIN PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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TABLE OF CONTENTS

Table of Authorities ..... ii-iv

Preliminary Statement 1

Statement of Facts 3

Argument 10

I. Plaintiffs Lack Standing to Sue 10

II. The Arquette Actions Are Settled and That Settlement Acts As a Bar to This Action 13

A. Counsel in the Arquette Actions Agreed to Settle Those Actions 14

1. There Is No Express Reservation of Intent Not to Be Bound in This Case 16

2. There Has Been Partial Performance 18

3. There Are No Unresolved Negotiation Terms 20

4. A Written Agreement Is Not Necessary For the Type of Settlement the Parties Entered Into 20

B. Arquette Parties Executed Settlement Agreements and Releases 20

C. Under CPLR 2104, the Settlement Herein Is Effective 22

Conclusion 25

TABLE OF AUTHORITIES

Federal Cases

Alvarez v. City of New York, 146 F. Supp. 2d 327 (S.D.N.Y. 2001) 19

American Optical Co. v. Curtiss, 56 F.R.D. 26 (S.D.N.Y. 1971) 12, 13

Application of Kamerman, 278 F.2d 411 (2d Cir. 1960) 12

Ciaramella v. Readers Digest Association, Inc., 131 F.3d 320 (2d Cir. 1997) 13

DeBary v. Harrah's Operating Co., 465 F. Supp. 2d 250 (S.D.N.Y. 2006) 1, 3

Erie R. Co. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938) 23

Evolution Online Systems, Inc. v. Koninklijke PTT Nederland, N.V., 145 F.3d 505 (2d Cir. 1995) 16

J.B.P. Holding Corp. v. United States, 166 F. Supp. 324 (S.D.N.Y. 1958) 12

Kilcullen v. Metro North Commuter R.Co., 198 WL 647171 (S.D.N.Y. Sept. 22, 1998) 23

Koro Co. v. Bristol-Myers Co., 568 F. Supp. 280 (D.D.C. 1983) 11, 12

Martinez v. Barasch, 2005 WL 2465493 (S.D.N.Y. Oct. 6, 2005) 12

Monaghan v. SZS 33 Assoc., L.P., 73 F.3d 1276 (2d Cir. 1996) 13, 19, 22, 24

Mone v. Park East Sports Medicine and Rehabilitation, P.C., 2001 WL 1518263 (S.D.N.Y. Nov. 29, 2001) 17, 19, 23, 24

Pretzel Time, Inc. v. Pretzel Int'l, Inc., 2000 WL 1510077 (S.D.N.Y. Oct. 10, 2000) 17, 24

Rail Europe, Inc. v. Rail Pass Express, Inc., 1996 WL 157503 (S.D.N.Y. April 3, 1996) 21

Ransom v. Babbitt, 69 F. Supp. 2d 141 (D.D.C. 1999) 4, 6, 7, 9

Refac Int'l., Ltd. v. Lotus Development Corp., 131 F.R.D. 56 (S.D.N.Y. 1990) 11

RG Group, Inc. v. Horn and Hardart Co., 751 F.2d 69 (2d Cir. 1984) 16

Sears Robuck & Co. v. Sears Realty Co., 932 F. Supp. 392 (N.D.N.Y. 1996) 13, 16

Transit Advertisers, Inc. v. New York, New Haven & Hartford R.R., 194 F.2d 907 (2d Cir. 1952) 21

Trust for Certificate Holders of Merrill Lynch Mortg. Investors, Inc. v. Love Funding Corp., 2007 WL 631324 (S.D.N.Y. Feb. 27, 2007) 11, 12

Winston v. Media Fair Entertainment Corp., 777 F.2d 78 (2d Cir. 1986) 13, 15, 16, 19

State Cases

Barthel v. Town of Hurley, 292 A.D.2d 754, 739 N.Y.S.2d 771 (3d Dep't 2002) 12

Broadmass Assoc., LLC v. McDonalds Corp., 286 A.D.2d 409, 729 N.Y.S.2d 897 (2d Dep't 2001) 15

Clark v. Bristol-Myers Squibb & Co., 306 A.D.2d 82, 761 N.Y.S.2d 640 (1st Dep't 2003) 15

Deal v. Meenan Oil Co., 153 A.D.2d 665, 544 N.Y.S.2d 672 (2d Dep't 1989) 24

Frank H. Zindle, Inc. v. Friedman's Express, Inc., 258 A.D.636, 17 N.Y.S.2d 594 (1st Dep't 1940) 12

Golden Arrow Films, Inc. v. Standard Club of California, Inc., 38 A.D.2d 813, 328 N.Y.S.2d 901 (1st Dep't 1972) 24

Hallock v. State of New York, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984) 14, 15, 19

Hawkins v. City of New York, 40 A.D.3d 327, 833 N.Y.S.2d 894 (1st Dep't 2007) 15, 24

In re Dolgin Eldert Corp., 31 N.Y.2d 1, 334 N.Y.S.2d 833 (1972) 24

Popovich v. New York City Health and Hospitals Corp., 180 A.D.2d 493, 579 N.Y.S.2d 399 (1st Dep't 1992) 15, 23

Salmi v. Aetna Cas. & Sur. Co., 134 A.D.2d 765, 521 N.Y.S.2d 579 (3d Dep't 1987) 24

Smith v. Lefrak Organization, Inc., 142 A.D.2d 725, 531 N.Y.S.2d 305 (2d Dep't 1988) 19, 24

Suncoast Capital Corp. v. Global Intellicom Inc., 280 A.D.2d 281, 719 N.Y.S.2d 652 (1st Dep't 2001) 15

Van Ness v. Rite-Aid of New York, Inc., 129 A.D.2d 931, 514 N.Y.S.2d 570 (3d Dep't 1987) 18, 22

State Statutes

New York CPLR 2104 22

Judiciary Law § 489 ..... 11, 12

Federal Rules

10 Williston on Contracts § 29:7 21

Defendants Harrah's Operating Company, Inc., (hereinafter "Harrah's") and Clive Cummis (hereinafter "Cummis") submit this Memorandum of Law in support of their motion to dismiss pursuant to Fed. Civ. Pro. 12(b)(6) on the grounds that (1) plaintiffs lack standing to bring this action; and (2) the claims herein have been settled.

PRELIMINARY STATEMENT

This is the third action in this Court relating to the purported "tribal court judgment" rendered by a supposed tribal court of the St. Regis Mohawk Tribe on March 20, 2001. The same purported tribal court judgment was the subject of two previous federal actions: Park Place Entertainment Corporation, et al. v. Marlene Arquette, et al., Civil Action No.: 00-CV-0863 (hereinafter "Arquette I") and Marlene Arquette, et al. v. Park Place Entertainment Corporation, et al., Civil Action No.: 01-CV-1058 (hereinafter "Arquette II"), and a state court action brought in Franklin County, New York, Park Place Entertainment Corporation, et al. v Arquette, et al., Index No. 01106397) (hereinafter "Franklin County Action").

This latest action is purportedly brought by Dennis E. Vacco and Joseph Bernstein, who claim to be the trustees of a group called the "Catskill Litigation Trust" which, upon information and belief, was created by a group of companies that had originally entered into a contract with the Mohawk Tribe for the development of a casino in Monticello, New York (hereinafter "Catskill Group"). When the Tribe entered into an agreement with Park Place, the Catskill Group brought an action for tortious interference in the Southern District of New York, which ultimately was dismissed and is now on appeal to the Second Circuit Court of Appeals. See DeBary v. Harrah's Operating Co., 465 F. Supp. 2d 250 (S.D.N.Y. 2006) (hereinafter the "Catskill Litigation"). The Catskill Group has now taken an assignment, purportedly from the Mohawk Tribe and the Plaintiffs who brought the purported tribal court action (hereinafter

"Arquette Parties"), whereby the Catskill Group has agreed to give the tribe and the Arquette Parties a 50% interest in its litigation trust in return for the assignment. As is more fully set forth below, that arrangement clearly violates Judiciary Law § 489(1) as a champertous contract.

In any event, the Arquette actions and the Franklin County action were all settled in 2003. That settlement was sought by the Arquette Parties in the face of a pending motion for summary judgment brought by Park Place and Cummis in Arquette II and after this Court had expressed its view, in a decision on remand in Arquette I, that the federal government appeared not to recognize any purported tribal court.

The settlement was reached by an express agreement of counsel at a conference held before Magistrate Judge Peebles on March 31, 2003, which settlement was recorded in the docket of this Court in both Arquette I and Arquette II. Further, this Court entered a judgment in both Arquette I and Arquette II dismissing those actions and granting leave to the parties to reopen the actions should the settlement not be consummated within 60 days. That period was further extended to September 1, 2003 and no motion was ever brought by any party to reopen either Arquette I or Arquette II. In addition, counsel for the Arquette Parties and for Park Place, in a jointly signed letter, expressly advised this Court on July 11, 2003, that, although one of approximately 30 plaintiffs had refused to sign the settlement agreement and release, the parties had agreed to effectuate the settlement and the plaintiffs had agreed to vacate the purported default judgment. That letter is recorded in the docket of this Court as Docket No. 52 in Arquette I and as Docket No. 58 in Arquette II.

The law is clear that the agreement of counsel made on March 31, 2003 is a binding settlement, and the fact that one out of 30 of the plaintiffs subsequently refused to sign the agreement does not render the agreement of counsel unenforceable. Indeed, even counsel for the

Arquette Parties viewed the sole hold-out as unimportant and expressly reaffirmed to this Court his clients' commitment to honor the settlement and to vacate the purported default judgment.

That settlement bars the claims herein which are based on the same claims as the original Arquette II action.

STATEMENT OF FACTS[1]

On April 14, 2000, an agreement was reached between the St. Regis Mohawk Tribal Council and Park Place Entertainment Corporation (hereinafter "Park Place") which gave Park Place[2] the exclusive right to develop an Indian gaming casino in cooperation with the Mohawk Tribe in the State of New York, excluding certain existing or planned casinos. Carpinello Decl. at ¶ 3.

Almost immediately after that contract was signed a rival faction of the Mohawk Tribe opposed to the "Three Chief" system of government and the Tribal Council – the Arquette Parties – filed a purported class action in what that faction contended was a tribal court, against Park Place, Clive Cummis, a former officer of Park Place, and the late Arthur Goldberg, former CEO of Park Place (hereinafter "Goldberg"), seeking to annul the Tribal Council 's agreement with Park Place and seeking billions of dollars in damages for the alleged tortious interference with the relationship between the Mohawk Tribe and the Catskill Group. Carpinello Decl. at ¶ 4. The Catskill Group subsidized this faction of the Tribe and paid the Arquette Parties' attorneys fees. Soon after the commencement of the tribal court action, the Catskill Group filed its own tortious interference action against Park Place, the "Catskill Litigation", noted above. Id.

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[1] The facts are more fully set forth in the accompanying Declaration of George F. Carpinello dated August 13, 2007 ("Carpinello Decl.").

[2] Park Place changed its name to Caesar's Entertainment, Inc. and merged with Harrah's on or about June 28, 2005. Carpinello Decl. at ¶ 2.

Although Park Place, Cummis and Goldberg initially appeared and moved to dismiss the originally-filed purported tribal court complaint, they ultimately did not answer or respond to the amended complaint and did not further participate in the purported tribal court proceedings. A purported default judgment for $1.787 billion, with interest and costs, was entered on or about March 20, 2001. Carpinello Decl. at ¶ 2. On June 2, 2000, Park Place, Cummis and Goldberg commenced an action in the Northern District of New York against the Arquette Parties seeking to enjoin the litigation in the purported tribal court. In a decision rendered on September 18, 2000, this Court held that it lacked subject matter jurisdiction to entertain the matter and dismissed the case. Arquette I, 113 F. Supp. 2d 322 (N.D.N.Y. 2000).

In a decision rendered on January 12, 2002, the Second Circuit Court of Appeals remanded the matter to this Court for further development of the record in light of a letter from the Department of the Interior (hereinafter "DOI") to the St. Regis Mohawk Tribal Council, dated October 6, 2000 indicating that the DOI was precluded from recognizing the so-called constitutional government and the constitutional court of the St. Regis Mohawk Tribe. Carpinello Decl. at ¶ 8 and Exhibit E thereto.

On July 29, 2002, this Court issued a decision and order stating the following:

> It now appears that the DOI recognizes the Three Chiefs system of government for the Tribe, and that a tribal council resolution invalidated the tribal court system. Further, the Court notes that it appears that a referendum vote was held by the tribe in which the tribe voted that the tribal court was without authority. See Ransom v. Babbitt, 69 F. Supp. 2d 141, 153 (DDC 1999) (the vote against the court was 394 of the 411 cast).

Carpinello Decl. at ¶ 9 and Exhibit D thereto.

In light of these developments, this Court directed the parties to brief various issues within 45 days of the Court's Order. Carpinello Decl. at ¶ 10.

Also in 2002, Park Place and Cummis commenced the Franklin County Action in New York State Supreme Court in Franklin County against the Arquette Parties and other individuals, including Attorney Michael Rhodes-Devey, for defamation and *prima facie* tort arising out of the commencement of the purported tribal court action. Carpinello Decl. at ¶ 13.

Meanwhile, the Arquette Parties had commenced their own action in the Northern District of New York on June 27, 2001 against Park Place and Cummis seeking to enforce the purported tribal judgment. Arquette II. See Carpinello Decl. at ¶ 11 and Exhibit E thereto.

On or about August 17, 2001, Park Place and Cummis moved for summary judgment in Arquette II dismissing the complaint on a number of grounds, including, *inter alia*, (1) the St. Regis Mohawk Tribal Council had, in May 1999, rescinded the St. Regis Mohawk Tribal Judiciary Act of 1994, which established the tribal court; (2) the Tribal Council declared in June 2000 that the tribal court did not exist; (3) the District of Columbia District Court, in Ransom v. Babbitt, had reversed an earlier determination of the DOI recognizing the constitutional government and the tribal court, which was purportedly established as part of that government; (4) in a referendum held on November 30, 1996, the Tribe emphatically rejected the establishment of a tribal court; (5) in several actions taken in May 1999, the Tribal election board, which upon information and belief, was established as an organ of the constitutional government itself, refused to certify for election any individual running for the position of tribal judge; and (6) the DOI ultimately had taken the position that no tribal court existed.[3] Carpinello Decl. at ¶ 12.

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[3] In a subsequent decision in the action of Tarbell v. Dep't of Interior, et al., 7:02-CV-1072, Magistrate Judge Peebles held that the DOI erred in taking certain agency actions subsequent to the Ransom decision, and further held that the DOI needed to exercise its own independent judgment to determine the appropriate government of the St. Regis Mohawk Tribe and to determine whether a tribal court existed. Doc. No. 57 (Order of February 11, 2004). Upon information and belief, no agency action has been taken to date in response to Judge Peebles's decision.

While Defendants' motion for summary judgment was pending in Arquette II and this Court was considering the remand in Arquette I, the Arquette Parties' counsel approached Park Place counsel and offered to settle the actions by dismissal of both Arquette actions and the Franklin County Action with prejudice and by vacating the purported tribal court judgment. Carpinello Decl. at ¶ 14.

From September 2002 through March 2003, the terms of the settlement were negotiated by counsel for the parties. Carpinello Decl. at ¶ 15. Counsel agreed that it would make sense to have one document designated as "stipulation and release," which would be signed by all the parties. Id.

On March 31, 2003, a settlement conference was held in front of Magistrate Judge Peebles. Carpinello Decl. at ¶ 18. Present either in person or by phone were counsel for all the parties in the Arquette actions and the Franklin County Action. Id. At that conference, all counsel advised Judge Peebles that a settlement agreement had been reached whereby the purported tribal judgment would be vacated; Arquette I, Arquette II and the Franklin County Action would be dismissed with prejudice; and mutual releases would be exchanged. Carpinello Decl. at ¶ 19 and Exhibit G thereto. The Minute Entry Notice reflects this settlement and the fact that counsel for Park Place was to make changes to the settlement agreement as agreed to by all the parties and that all counsel would sign the agreement that day.[4] Id.

Judgment was entered on March 31, 2003 dismissing both Arquette actions by reason of settlement. Carpinello Decl. at ¶ 20 and Exhibit H thereto. The Court's order noted that the

[4] The notation that counsel would sign the settlement agreement that day apparently arose from a misunderstanding with the Court. Carpinello Decl. at ¶ 19, n.2. Prior to the March 31, 2003 conference, all counsel had agreed that the form of the settlement documents would be a stipulation and release to be signed by the parties themselves. Id. Numerous drafts of these settlement documents had been circulated among counsel prior to the March 31, 2003 conference. Id.

parties would have sixty (60) days to reactivate the actions if final settlement papers were not executed. Id. Prior to the March 31, 2003 conference, agreement was reached on all the material terms of the settlement and release and a revised draft reflecting the Arquette Parties' suggested language changes, along with revisions made by Park Place, was forwarded to counsel for the Arquette Parties on April 8, 2003. Carpinello Decl. at ¶ 21 and Exhibit I thereto. On April 11, 2003, final drafts of the agreements were forwarded to counsel for the Arquette Parties for signature. Carpinello Decl. at ¶ 22 and Exhibit J thereto.

On May 2, 2003, counsel for the Arquette Parties told Park Place counsel that all of the signatures for the settlement and release had been obtained except for about five or six and that he did not anticipate any problems, with two exceptions. Carpinello Decl. at ¶ 23. One exception was an individual who had died in the interim, and it was necessary to obtain the signature of an appropriate executor or administrator of that individual's estate. Id. The second exception was an individual by the name of Brian Garrow who refused to sign the agreement, but who had withdrawn from the tribal court action and who, according to Arquette Parties' counsel at that time,[5] had obtained an order withdrawing from that action. Id.

On June 17, 2003, the Arquette Parties' counsel advised Park Place counsel that he was about to secure all the signatures from the Arquette Parties, except for Garrow. Carpinello Decl. at ¶¶ 27-28. In late June 2003, counsel for the Arquette Parties said that he had not yet procured all the signatures, but was still in the process of doing so and that the purported tribal court judgment had not yet been vacated. Id. He therefore agreed to jointly apply to the Court for a

[5] Counsel Henry Greenberg and his firm, subsequently informed counsel for Park Place on May 13, 2003 that he and his firm, Couch White LLP, were withdrawing from representation of the Arquette Parties in Arquette II and the Franklin County Action. Carpinello Decl. at ¶¶ 24-26 and Exhibit K thereto. Michael Rhodes-Devey, attorney of record for the Arquette Parties in Arquette I, took over representation of the Arquette Parties in Arquette II and the Franklin County Action. Id.

60-day extension of the time within which the parties could apply to the Court to reopen the action. Carpinello Decl. at ¶¶ 29-30 and Exhibit L thereto.

In a letter dated June 30, 2003, the Arquette Parties' counsel wrote to Judge Peebles enclosing a letter signed by counsel for both the Arquette Parties and Park Place, advising the Court as follows:

> As you will recall, the Settlement Agreement in this matter requires the signatures of over 30 individuals. We have obtained, or are about to obtain, all of the signatures but one. *The parties have agreed to effect the settlement despite this one party's refusal to sign.* Nonetheless, it is necessary for certain steps to take place before final settlement can occur. *Specifically, the tribal litigants have agreed to vacate and discontinue a certain tribal class action.* Once that is completed, all the parties will execute stipulations of discontinuance and will exchange releases.
>
> We therefore respectfully request sixty (60) additional days to effectuate these steps and request the deadline set forth in Judge McAvoy's order of March 31, 2003 be extended for 60 days.

Carpinello Decl. at ¶ 31 and Exhibit N thereto.[6]

On July 17, 2003, the extension was so ordered by this Court, extending until September 1, 2003 the date that the parties could move to reopen the action. Carpinello Decl. at ¶ 32 and Exhibit O thereto. A series of communications with Arquette Parties' counsel were attempted, without success, by Park Place counsel in July and August 2003 requesting the signature pages from the Arquette Parties. Carpinello Decl. at ¶ 33 and Exhibit P thereto.

In several additional conversations through the Summer and Fall of 2003 and early into 2004, Park Place counsel attempted without success to obtain the executed copies of the stipulation and release. Carpinello Decl. at ¶ 34. Park Place counsel then learned through his conversations with Arquette Parties' counsel that Barbara Lazore's son, who was one of the

[6] On July 11, 2003, counsel for Park Place was advised that this letter should have been sent to Judge McAvoy, and it was conveyed to this Court on the same day. Carpinello Decl. at ¶ 32 and Exhibit O thereto.

Arquette Parties, had refused to sign the agreement because Barbara Lazore had induced him not to sign so as to hold a "bargaining chip" for future negotiations with Park Place. Id. Upon information and belief, Barbara Lazore is a member of the "constitutional faction", was a newly-elected member of the tribal council; is someone who was in regular contact with the Catskill Group; and was a representative who signed the Joint Alliance Agreement on behalf of the Tribe and the Arquette Parties. See Carpinello Decl. at ¶ 35, Exhibit Q thereto at 295:25-302:17; and Exhibit X thereto. At one point in time, Barbara Lazore's son expressed a willingness to sign the settlement agreement so long as Park Place made a contribution to the Boys' Club at the Akwesasne Reservation. Carpinello Decl. at ¶ 36. However, it is Park Place counsel's understanding that, to the present day, he has refused to sign the settlement and release. Id.

In February 2004, Judge Peebles issued his decision in Tarbell v. Department of Interior, et al., 7:02-CV-1072 (Doc. No. 57, Order of February 11, 2004) holding that the DOI had erred in recognizing the three chief government of the St. Regis Mohawk Tribe as a result of the decision in Ransom v. Babbitt and that the DOI was obligated to undertake its own independent determination as to the appropriate government of the St. Regis Mohawk Tribe. Carpinello Decl. at ¶ 37. Soon thereafter, counsel for the Arquette Parties, Michael Rhodes-Devey, suggested that Park Place should "sweeten the pot," in light of Judge Peebles's decision in Tarbell in order to effectuate the settlement of the Arquette and Franklin County cases. Carpinello Decl. at ¶ 38. Park Place counsel refused, citing the fact that the cases had already been settled, and demanded, once again to no avail, the executed settlements and releases signed by the Arquette Parties. Id.

In a conversation with Park Place counsel in December 2006, Mr. Rhodes-Devey stated that Park Place would have to pay additional funds to achieve a settlement of the Arquette and Franklin County cases and indicated that he personally had a lien on the proceeds of the

purported tribal judgment and expected some payment for his efforts in working to reverse the DOI's determination in the Tarbell case. Carpinello Decl. at ¶ 44.

On January 16, 2007, the members of the board of Harrah's Entertainment, Inc. received a letter from Russell Barr of Barr and Associates, acting as counsel to the St. Regis Mohawk Tribal Council, indicating, among other things, that, should "the actions of the Tribal Court in this matter [ ] be recognized by the federal government, the Tribal Court Action plaintiffs will clearly be entitled to pursue enforcement of their judgment." Carpinello Decl. at ¶ 45 and Exhibit W thereto.

On January 24, 2007, the Catskill Litigation Trust, which was the trust created by the Catskill Group to pursue the Catskill Litigation against Park Place, announced in a Form 8-K filed with the Securities and Exchange Commission that it had entered into an agreement called a Joint Alliance Agreement with the St. Regis Mohawk Tribe and the Arquette Parties. Carpinello Decl. at ¶ 46 and Exhibit X thereto. Pursuant to that agreement, the Catskill Litigation Trust, the Tribe and the Arquette Parties agreed to "work together to accomplish the merger of their respective litigation interests in the Litigation Trust." Id. The Arquette Parties further agreed to transfer their right, title and interest to the purported tribal court judgment to the Trust in return for receiving a 50% ownership interest in the Catskill Litigation Trust. Id. This action followed on June 22, 2007.

ARGUMENT

I. Plaintiffs Lack Standing to Sue.

This action is purportedly brought by Dennis Vacco and Joseph Bernstein individually in their capacities as litigation trustees of the Catskill Litigation Trust. According to Form 8-K filed with the Securities and Exchange Commission on January 24, 2007 (see Carpinello Decl. ¶

46 and Exhibit X thereto), the Catskill Litigation Trust entered into an agreement with the St. Regis Mohawk Tribe and the Arquette Parties whereby the Tribe and the Arquette Parties assigned any and all claims they had relating to the subject of the tribal action to the trust in return for 50% of the proceeds of any recovery in this action or in the Catskill Litigation. Id.

This agreement, which is called the Joint Alliance Agreement, is attached as an exhibit to the Form 8-K, is unequivocally a champertous relationship prohibited by Section 489(1) of the New York Judiciary Law.[7] That section prohibits any corporation or association from taking an assignment of a claim for the purpose of bringing an action thereon, which is expressly and unequivocally the purpose of the Joint Alliance Agreement. See § 5 of the Joint Alliance Agreement, Carpinello Decl. at ¶ 46 and Exhibit 46 thereto. Moreover, it is clear that a litigation trust such as the Catskill Litigation Trust is considered to be a "corporation or association" within the meaning of Judiciary Law § 489(1). Trust for Certificate Holders of Merrill Lynch Mortg. Investors, Inc. v. Love Funding Corp., 2007 WL 631324, at *5 (S.D.N.Y. Feb. 27, 2007) (finding assignment to a trust to fall under the champerty prohibitions of Judiciary Law § 489(1)).

Agreements such as that present here have been described as "speculating on a lawsuit" and have therefore been branded as "hunting licenses" by at least one court. (Koro Co. v. Bristol-Myers Co., 568 F. Supp. 280, 288 (D.D.C. 1983) (finding that such agreements are champertous under either District of Columbia or New York law); Refac Int'l., Ltd. v. Lotus Development Corp., 131 F.R.D. 56, 58 (S.D.N.Y. 1990).

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[7] Judiciary Law § 489(1) states, in relevant part: No corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of ... any claim or demand, with the intent and for the purpose of bringing an action or proceeding therein ...."

Litigation assignment agreements have been repeatedly struck down as champertous where the purchase of the assignment agreement was to allow the assignee to pay a fee in order to speculate on a lawsuit. Love Funding, 2007 WL 631324, at *5; Koro, 568 F. Supp. at 288; J.B.P. Holding Corp. v. United States, 166 F. Supp. 324, 327 (S.D.N.Y. 1958), *rev'd on other grounds by* Application of Kamerman, 278 F.2d 411 (2d Cir. 1960); American Optical Co. v. Curtiss, 56 F.R.D. 26, 31 (S.D.N.Y. 1971); Barthel v. Town of Hurley, 292 A.D.2d 754, 756, 739 N.Y.S.2d 771, 776 (3d Dep't 2002) (assignment of tax grievance claims to realtor, who also had his own tax claims, was champertous because it assigned to the realtor the owners' rights to "file a petition or petitions and to commence a proceeding or proceedings"); Frank H. Zindle, Inc. v. Friedman's Express, Inc., 258 A.D.636, 17 N.Y.S.2d 594 (1st Dep't 1940); *see also* Martinez v. Barasch, 2005 WL 2465493, at *6 (S.D.N.Y. Oct. 6, 2005) (pointing out that the related act of 'maintenance' – "the furnishing of money by a layman for the purpose of permitting a lawyer to provide, in part, costs and expenses in carrying on litigation for a third party" – is also prohibited in New York). The Joint Alliance Agreement is precisely the sort of agreement prohibited by Judiciary Law § 489(1) in that its sole purpose is to assign a claim to the Catskill Litigation Trust' so that the Trust can pursue the claim.

In Love Funding, the District Court found that an assignment made to a trust by a corporation of the corporation's "rights" concerning a defaulted loan was "made with the intent and for the purpose of bringing an action or proceeding." 2007 WL 631324, at *5. The court found evidence of such intent in statements by representatives of the trust that the assignment, which was made as part of a settlement of a lawsuit between the corporation and the trust, would result in "a whole new lawsuit" and "contin[ue] … the litigation that has already been going on the last three years [with the corporation]." Id. at *4. Similarly, in American Optical, where the

"very purpose and substance" of an agreement to assign a patent to an association was so the assignee could bring suit against the defendant, the assignment was found to be champertous. 56 F.R.D. at 31.

Here, the only purpose of the assignment from the Arquette Parties to the Litigation Trust was to give to the trust all "claims" the Arquette Parties had relating to the subject of the tribal action. Such an assignment is a classic case of champerty.

II. The Arquette Actions Are Settled and That Settlement Acts As a Bar to This Action.

Determining whether a settlement agreement is enforceable is two-step process. The first step is to determine whether the parties agreed to enter into a settlement agreement, and the second step is to decide whether that settlement agreement is enforceable. See Sears Robuck & Co. v. Sears Realty Co., 932 F. Supp. 392, 398-99 (N.D.N.Y. 1996) (Munson, J).

The Second Circuit has not yet decided whether the enforceability of a challenged stipulation agreement, settling an action in federal court, is determined under federal or state law. See e.g., Ciaramella v. Readers Digest Association, Inc., 131 F.3d 320, 326 (2d Cir. 1997); Monaghan v. SZS 33 Assoc., L.P., 73 F.3d 1276, 1283, n.3 (2d Cir. 1996). However, the Second Circuit held in Monaghan that the test for determining whether such a settlement agreement is enforceable is essentially the same under both federal and state law. 73 F.3d at 1283, n.3.

In Winston v. Media Fair Entertainment Corp., the Second Circuit made it clear that, under New York law, "parties are free to enter into a binding contract without memorializing their agreement in a fully executed document." 777 F.2d 78 (2d Cir. 1986). This freedom to contract orally remains even if the parties contemplate a writing to evidence their agreement. In such a case, "the mere intention to commit the agreement into writing will not prevent contract formation prior to execution." Id. at 80. The court went on to say that, "if either party

communicated an intent not to be bound until a fully executed document was executed, then "no amount of negotiations or oral agreement to specific terms" would be binding." Id.

In this case, there was an oral agreement by counsel with authority to enter into a settlement agreement, the parties communicated an intent to be bound by the settlement agreement irrespective of the execution of a written agreement and, in any event, there is a writing which has been subscribed by virtually all of the Arquette Parties, but which the Arquette Parties' counsel has refused to tender to counsel for Park Place.

A. Counsel in the Arquette Actions Agreed to Settle Those Actions.

In this case, there was a clear meeting of the minds. All counsel for Plaintiffs and Defendants in Arquette I, Arquette II and the Franklin County Action agreed to settle those actions, and they expressly agreed upon the terms of that settlement, which were memorialized in the settlement agreement and release that was circulated among the parties. All the parties had reached agreement on the basic terms by March 31, 2003 at the court conference. Those terms were: (1) the purported tribal court judgment would be vacated; and (2) after the entry of the vacation order, the Arquette I, Arquette II and the Franklin County Action would be dismissed, with prejudice. All the attorneys who attended the March 31, 2003 Court conference had apparent authority to settle, and no attorney expressed any reservations about his authority to represent his clients in advising the Court that the matter had been settled.

An attorney attending a settlement conference is presumed to have the authority to settle the action on behalf of his or her client, absent an express indication that the attorney lacks such authority. See Hallock v. State of New York, 64 N.Y.2d 224, 228, 485 N.Y.S.2d 510, 511 (1984); Hawkins v. City of New York, 40 A.D.3d 327, 327, 833 N.Y.S.2d 894, 895 (1st Dep't 2007) (plaintiff's counsel had apparent authority to settle); Popovich v. New York City Health

and Hospitals Corp., 180 A.D.2d 493, 493, 579 N.Y.S.2d 399, 400 (1st Dep't 1992) (same). In Hallock, the court noted that the attorney had apparent authority to settle on behalf of the client, even if he did not have actual authority, because he had "represented plaintiff throughout the litigation, engaged in prior settlement negotiations for them and, in furtherance of the authority which had been vested in him, appeared at the final pretrial conference, his presence there constituting an implied representation, by [plaintiff] to defendants that [the attorney] had authority to bind him to the settlement." 64 N.Y.2d at 231-32, 579 N.Y.S.2d at 514.

Moreover, even if either of the Arquette Parties' counsel lacked authority to settle (and neither of them have ever so stated), their actions in settling the Arquette actions have been ratified by the Arquette Parties themselves, none of whom have ever advised this court – until now – that the agreement reached by counsel was without authority. See Hawkins, 40 A.D.2d at 327; 833 N.Y.S.2d at 895 (plaintiff ratified counsel's settlement agreement by failing to make any formal objection for "nearly seven months after they were told about it"); Clark v. Bristol-Myers Squibb & Co., 306 A.D.2d 82, 85, 761 N.Y.S.2d 640, 643 (1st Dep't 2003) (plaintiff "implicitly ratified settlement by making no formal objection for months after she was told about it"); Suncoast Capital Corp. v. Global Intellicom Inc., 280 A.D.2d 281, 282, 719 N.Y.S.2d 652, 653 (1st Dep't 2001) (six months of silence constitutes implicit ratification of settlement agreement); Broadmass Assoc., LLC v. McDonalds Corp., 286 A.D.2d 409, 410, 729 N.Y.S.2d 897, 897 (2d Dep't 2001) (construing eight months of silence as an implicit ratification of stipulation).

Whether or not the counsel's oral argument constitutes a contract is determined by a four-part established by the Second Circuit in Winston. The four factors are:

1. Whether there has been an express reservation of right not to be bound in the absence of a writing;

2. Whether there has been partial performance of the contract;

3. Whether all the terms of the alleged contract have been agreed upon; and

4. Whether the agreement at issue is the type of contract which is usually committed to writing.

Sears, Roebuck & Co. v. Sears Realty Co., Inc., 932 F. Supp. 392, 404 (N.D.N.Y. 1996), citing Winston, 777 F.2d at 80. Applying these factors to this case, it is clear that there was a meeting of the minds that the actions be settled.

1. There Is No Express Reservation of Intent Not to Be Bound in This Case.

Although the parties clearly intended that there would be a final stipulation and release to be signed by all parties, it is also clear that there was no express reservation of rights. The parties finally agreed to the settlement on March 31, 2003 and so notified the court. The parties agreed that certain steps would be taken before final stipulations of discontinuance with prejudice would be filed, namely that the stipulation and releases would be signed by all the parties and then the tribal court judgment would be vacated. None of the parties expressed a reservation of right until the written agreement was executed.

The case law is very clear that an oral agreement to settle an action may be binding even where the parties fully anticipate that there will be a subsequent written agreement to memorialize the settlement. See Evolution Online Systems, Inc. v. Koninklijke PTT Nederland, N.V., 145 F.3d 505, 508 (2d Cir. 1995); Winston, 777 F.2d at 80; RG Group, Inc. v. Horn and Hardart Co., 751 F.2d 69, 74 (2d Cir. 1984) ("where there is no understanding that an agreement should not be binding until reduced to writing and formally executed, and where all the substantial terms of a contract have been agreed on, and there is nothing left for future

settlement, then an informal agreement can be binding even though the parties contemplate memorializing their contract in a formal documents") (internal citation omitted); see Pretzel Time, Inc. v. Pretzel Int'l, Inc., 2000 WL 1510077, at *3 (S.D.N.Y. Oct. 10, 2000). See also Mone v. Park East Sports Medicine and Rehabilitation, P.C., 2001 WL 1518263, at *3 (S.D.N.Y. Nov. 29, 2001) (court enforced an oral agreement of settlement even though parties expressly agreed that the oral agreement would be followed up by a formal stipulation).[8]

The fact that one or more of the Arquette Parties may have had misgivings, or decided to try to squeeze more out of Park Place before signing the agreement, is not a basis for undermining the binding nature of the agreement. Pretzel Time, Inc., 2000 WL 1510077, at *4.

Indeed, the lack of a reservation of rights could not be more clear in this case, where counsel expressly wrote to the Court advising the Court that, although not all the parties had signed the settlement agreement and release, the plaintiffs nonetheless considered the actions settled and expressly committed to vacate the purported tribal judgment. As such, the case is virtually identical to Mone, 2001 WL 1518263, at *1, where defense counsel expressly wrote the court confirming a conversation with the judge's law clerk and advising the court that the matter had been settled and that a formal stipulation would be drafted and forwarded to the court within three weeks. The Mone court found that the case had been settled, even though the formal stipulation was never submitted. Id.

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[8] It is true that the proposed stipulation and release contains a merger clause which provides that it is the sole agreement between the parties. That clause only provides that once the stipulation and release is signed by all parties, that writing supersedes any prior representations. Such a clause does not constitute a reservation of rights and does not mean that the parties did not intend to settle the actions on the terms expressly agreed at or before the Court conference. See Pretzel Time, Inc., 2000 WL 1510077, at *3 (the presence of a merger clause does not signify a reservation of rights. Moreover, the merger clause was simply "boilerplate language" added by the party seeking to enforce the agreement, not by the party challenging enforcement. The addition of that merger clause to the draft agreement "does not undermine the evidence that the settlement defendants intended to be bound by the oral agreement").

Equally on point is the Third Department Appellate Division's decision in Van Ness v. Rite-Aid of New York, Inc., 129 A.D.2d 931, 514 N.Y.S.2d 570 (3d Dep't 1987). In that case, the parties had orally agreed, outside of a court, to a settlement and plaintiff's counsel forwarded an executed general release and stipulation discontinuing the action to defense counsel. Van Ness, 129 A.D.2d at 931, 514 N.Y.S.2d at 570-71. Defense counsel retained the release and filed the stipulation of discontinuance and forwarded the settlement agreement to his client, an insurance company, for execution. Id. Before the settlement agreement could be executed, the insurance company went into receivership. Id. The insurance company refused to honor the settlement. Id.

The Third Department affirmed the decision of the Supreme Court granting judgment and enforcing the settlement, rejecting the defendant's argument that the settlement agreement was not expressly memorialized in a writing signed by the defendant or its counsel. Id. The court held that this argument "defies common sense and runs counter to the salutatory policy that settlement stipulations are favored by the courts" and held that the defendant was estopped from taking refuge in the argument that the settlement did not literally comply with the terms of CPLR 2104. Van Ness, 129 A.D.2d at 932, 514 N.Y.S.2d at 570-71.

2. There Has Been Partial Performance.

Park Place and Cummis clearly acted in reliance, to its detriment, on the representation of the Arquette Parties' counsel that the Arquette and Franklin County actions had been settled. Park Place had pending before this Court a significant motion for summary judgment in Arquette II seeking dismissal of the Arquette Parties' claims on numerous grounds. If the Arquette and Franklin County actions had not been settled, Park Place would have proceeded to seek a final adjudication of its rights back in 2003.

In Monaghan, the Second Circuit noted, in enforcing an oral settlement agreement reached in court but not placed on the court record, that "plaintiff reasonably relied on the parties' oral agreement in permitting her trial date to pass and foregoing her right to participate in a third-party trial." 73 F.3d at 1283. In Smith v. Lefrak Organization, Inc., cited approvingly by the Second Circuit in Monaghan, the court held that an oral stipulation was enforceable against defendant where the plaintiff acted in reliance in the ordering of his business affairs upon the representation by defendant's counsel that the matter had been settled. Smith, 142 A.D.2d 725, 726, 531 N.Y.S.2d 305, 306 (2d Dep't 1988).

As the New York Court of Appeals noted in Hallock v. State of New York, the decision by a party to abandon an action on the eve of trial in reliance upon a purported settlement constitutes reliance separate and apart from the question of whether that party suffered any harm as a result of the loss of witnesses or evidence. Hallock, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984). Similarly, in Mone, the court held that there was partial performance of the settlement agreement "in the sense that plaintiff gave up her right to the imminent firm trial date." 2001 WL 1518263, at *3.

Finally, in Alvarez v. City of New York, the court, applying the Winston test, held that there "was partial performance of the agreement in the sense that both sides, relying on the apparent settlement, did not resume active litigation of the case." Alvarez, 146 F. Supp. 2d 327, 335 (S.D.N.Y. 2001). In this case, neither party took any steps to resuscitate the Arquette I or Arquette II actions within the original 60-day period or within the additional period granted by the Court. Indeed, neither party took any steps to resume these litigations or the Franklin County Action until Plaintiffs commenced this action more than four years after the settlement of the original Arquette and Franklin County litigations.

3. There Are No Unresolved Negotiation Terms.

The parties had reached a complete meeting of the minds with regard to the terms of this agreement. Counsel negotiated the terms of this settlement over a period of several months, and counsel had fully agreed on all the material terms prior to the court conference on March 31, 2003. Nothing was left to be resolved; the only issue was obtaining the signatures that all counsel agreed would be obtained on the stipulation and release.

4. A Written Agreement Is Not Necessary For the Type of Settlement the Parties Entered Into.

The parties agreed to a written settlement agreement to be signed by the parties only because the stipulation contained mutual releases. Otherwise, counsel could have simply put the settlement on the record at the March 31, 2003 Court conference. The stipulations agreed to by counsel were simple and straightforward: the purported tribal court judgment would be vacated and Arquette I, Arquette II and the Franklin County Action would be dismissed with prejudice.

B. The Arquette Parties Executed Settlement Agreements and Releases.

In addition, there is a written settlement agreement in existence signed by virtually all of the Arquette Parties, and that written agreement is binding on them.

Subsequent to the March 31, 2003 conference with the Court, the settlement agreement and release were circulated to the Arquette Parties and, according to their counsel, all signed the agreement, with the possible exception of Brian Garrow, who was dismissed from the tribal court action, and the son of Barbara Lazore, one of the current chiefs of the St. Regis Mohawk Tribe. Nonetheless, the Arquette Parties' counsel expressly agreed in writing to the Court, to implement the settlement and vacate the default judgment. In a joint letter to the Court dated June 30, 2003, Mr. Rhodes-Devey expressly represented that "We have obtained, or are about to obtain, all the signatures but one. The parties have agreed to effect the settlement despite this one party's

refusal to sign." Mr. Rhodes-Devey went on to explicitly state "Specifically, the tribal litigants have agreed to vacate and discontinue a certain tribal class action." Carpinello Decl. at ¶31 and Exhibit N thereto. This letter expresses not only that there had been a clear meeting of the minds among the parties as to whether the case would be settled and how it would be settled, but also represents an undertaking by plaintiff's counsel as an officer of the Court to deliver the settlement agreement signed by his clients and to take the steps necessary to effectuate the settlement.

The refusal of the Arquette Parties' counsel to produce the signed stipulations, in the face of his commitment as an officer of the Court to effectuate the settlement, should not stand in the way of a declaration by this Court that, in fact, the Arquette I, Arquette II and the Franklin County cases have been settled.

Further, the fact that the attorney for the Arquette Parties refuses to turn over the signed agreements does not in any way affect their enforceability against the parties. Rail Europe, Inc. v. Rail Pass Express, Inc., 1996 WL 157503, at *4, n.4 (S.D.N.Y. April 3, 1996) ("Statue of Frauds does not mandate delivery so it does not matter that defendant never returned the signed contract to plaintiff"), citing Transit Advertisers, Inc. v. New York, New Haven & Hartford R.R., 194 F.2d 907, 910 (2d Cir. 1952) ("Delivery of the signed memorandum is not necessary to make it effective as evidence of the previous oral contract unless, by its terms the oral contract is not to be consummated until a memorandum has been delivered ... [a]bsent that condition upon the binding effect of the oral contract, non-delivery does not affect the probative value of the signed memorandum to satisfy the requirements of the statute of frauds"); and see 10 Williston on Contracts § 29:7 ("neither the original Statute [of Frauds] nor its successors mentions delivery ...

[therefore] a writing retained wholly within the control of the party to be charged, but which complies with the other requirements of the Statute, should be a sufficient memorandum").

C. Under CPLR 2104, the Settlement Herein Is Effective.

New York CPLR 2104 provides that a settlement agreement, in order to be effective, must be subscribed by the party or his attorney or must be made in open court.

The Second Circuit has not decided whether compliance with CPLR 2104 is necessary in order to make enforceable a stipulation settling a federal court action. However, the Second Circuit has noted that only "substantial compliance" with the conditions of CPLR 2104 are necessary. Monaghan, 73 F.3d at 1283, accord Van Ness v. Rite-Aid of New York, 129 A.D.2d 931, 931, 514 N.Y.S.2d 570, 571 (3d Dep't 1987) (enforcing settlement where "terms of CPLR 2104 were substantially complied with ... lead[ing] to the eminently reasonable conclusion that defendant is estopped from taking refuge in the technicality that literal compliance was not had with CPLR 2104").

In Monaghan, the parties held a conference with the court prior to trial in which the defendant offered to settle the personal injury action for a sum certain which plaintiff's counsel accepted and the trial date was adjourned as a result. 73 F.3d at 1283. However, no written agreement was ever executed because of a disagreement concerning one of the terms of the settlement, in particular, whether the settling defendant could seek full indemnity against the third-party defendant or whether the third-party defendant could invoke a set off under New York's General Obligation Law § 15-108. Id. No notation of this settlement was ever placed on the court record. Id. at 1284. Nonetheless, the Second Circuit found the settlement agreement to be fully enforceable.[9] Id.

[9] Several District Courts have expressed the view that CPLR 2104 is not binding on the federal courts since it is purely a procedural rule and, under the Rules Decisions Act, 28 U.S.C. § 1652, and Erie R. Co. Tompkins, 304

Similarly, the court in Mone also noted that CPLR 2104 is a rule of "convenience designed to relieve the courts from having to resolve embarrassing factual disputes between counsel." Mone, 2001 WL 1518263, at *5, quoting Weinstein-Korn-Miller, New York Practice, ¶ 2104.4. In Mone, the court held that strict compliance with CPLR 2104 was not necessary because there was no dispute in regard to the terms or about the fact that settlement had been reached. 2001 WL 1518263, at *6.

In this case, both conditions of CPLR 2104 have been met: there are both signed agreements and a settlement in "open court."

Virtually all of the Arquette Parties have signed the stipulation and release, which requires them to take steps to vacate the purported tribal default judgment, after which stipulations of discontinuance will be entered in Arquette I and Arquette II, as well as the related Franklin County Action.

Further, it is clear that the settlement was reached "in open court." In Popovich v. New York City Health and Hospitals Corp., the First Department held that the "open court" requirement was met by a notation on the court record that, after a pretrial conference, the parties had agreed to settle the matter. 180 A.D.2d 493, 579 N.Y.S.2d 399 (1st Dep't 1992). The court noted that "open court" as used in CPLR 2104, is a technical term that refers to the "formalities attendant upon documenting the fact that the stipulation and its terms, and not to the particular location of the courtroom itself...." Id.

Similarly, in Hawkins, the First Department again noted that the requirements of CPLR 2104 are met "when, following the conference and counsel's acceptance of the settlement, the

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U.S. 64, 58 S.Ct. 817 (1938), a federal court is not required to apply such a procedural rule. See Mone v. Park East Sports Medicine and Rehabilitation, P.C., 2001 WL 1518263, at *4-5 (S.D.N.Y. Nov. 29, 2001) (citing Willgerodt v. Hohri, 953 F. Supp. 557, 560, n.1 (S.D.N.Y. 1997) stating that federal, rather than state law governs, at least in a federal RICO action.); Kilcullen v. Metro North Commuter R.Co., 198 WL 647171, at *7, n.6 (S.D.N.Y. Sept. 22, 1998) (New York procedural rule such as CPLR 2104 is not applicable in federal action).

court clerk updated the court card to read 'settled before trial' and marked the case 'disposed' in the court's records." 40 A.D.3d 327, 327, 833 N.Y.S.2d 894, 895 (1st Dep't 2007); see also Pretzel Time, Inc., 2000 WL 1510077, at *5 (S.D.N.Y. Oct. 10, 2000) (requirement that the settlement agreement be "in open court" is "more figurative than literal" noting that the settlement agreement need not be in a court room or even before a judge so long as the settlement is undertaken with indicia of reliability similar to a statement made in open court, (citing Willgerodt v. Hohri, 953 F. Supp. at 560 (S.D.N.Y. 1997))); Deal v. Meenan Oil Co., 153 A.D.2d 665, 665-66, 544 N.Y.S.2d 672, 673 (2d Dep't 1989) (fact that settlement was recorded in clerk's "minute book" satisfied "open court" the requirements of CPLR 2104); Salmi v. Aetna Cas. & Sur. Co., 134 A.D.2d 765, 521 N.Y.S.2d 579 (3d Dep't 1987); and see Golden Arrow Films, Inc. v. Standard Club of California, Inc., 38 A.D.2d 813, 328 N.Y.S.2d 901 (1st Dep't 1972) (stipulation negotiated in judge's chambers in which judge took extensive notes, satisfied requirements of CPLR 2104); compare In re Dolgin Eldert Corp., 31 N.Y.2d 1, 5-6, 334 N.Y.S.2d 833, 836 (1972) (informal agreement made in chambers, without a notation placed in the record concerning the settlement, is not in "open court").

Even where there is not strict compliance with CPLR 2104, the courts will not allow a party to escape a settlement where the other party has relied to its detriment on the representations of the first party that the case has in fact been settled. Monaghan, 73 F.3d at 1283; Smith v. Lefrak Organization, Inc., 142 A.D.2d at 726, 531 N.Y.S.2d at 306. See also Mone, 2001 WL 1518263, at *6 (S.D.N.Y. Nov. 29, 2001) (noting that it is well established that a party can be estopped from invoking CPLR 2104 in holding, as in Monaghan, that plaintiff gave up her trial date in reliance upon defendant's representation of settlement). As noted above (Point A.4), Park Place and Cummis acted in reliance on the fact that the Arquette Parties had

settled the actions by foregoing a prompt adjudication of their pending motion for summary judgment.

Thus, whether strict or substantial compliance with CPLR 2104 is necessary or whether, under the federal rule, only evidence that the settlement agreement was formed is required, it is clear that defendants have met each and every one of those tests and that a settlement agreement was reached to dismiss the Arquette and Franklin County actions with prejudice.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request that this action be dismissed because of the Plaintiffs' lack of standing and because the claims herein have been settled.

Dated: Albany, New York
August 13, 2007

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