

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD¹



BIGFOOT 4x4, INC.,

Opposer,

vs.

BIG O TIRES, INC.,

Applicant.

Opposition No. 91166074

**APPLICANT'S BRIEF IN REPLY TO
OPPOSER'S RESPONSE TO
APPLICANT'S MOTION TO DISMISS
OR IN THE ALTERNATIVE
MOTION FOR SUMMARY JUDGMENT**

As set forth in Applicant's Motion to Dismiss or in the Alternative Motion for Summary Judgment, after years of litigation between the parties, a Final Order and Judgment was entered holding, *inter alia*, "Plaintiff Big O is the owner of the trademark BIG FOOT, as well as the design of a 'Bigfoot' or Sasquatch character, as exemplified by Exhibit A, hereto, and the design of a 'big foot' as exemplified by Exhibit B, hereto, in connection with the following items for vehicles . . . vehicle replacement parts . . ." See Final Order and Permanent Injunction on Consent, p. 1. Additionally, the Final Order held:

4. Defendant Bigfoot 4x4, Inc., and the directors, officers, agents, employees and all other persons acting on behalf of, or in concert with, Bigfoot 4x4, Inc. and who have notice of this injunction, are

¹ Applicant's dispositive motion was filed with two (2) exhibits, as reflected in the TTABVUE database and recognized by Opposer's Brief. However, for the sake of clarity, Applicant notes that it inadvertently labeled these exhibits as if they were to be associated with Applicant's simultaneously filed Motion to Amend. They were not and the TTABVUE database correctly associated the exhibits.



11-02-2005

hereby permanently enjoined from applying, or authorizing or licensing another to apply, the trademark BIG FOOT (alone or in conjunction with any other word, design or symbol, and whether as one word or two) to, and/or from using BIG FOOT (alone or in conjunction with any other word, design or symbol, and whether as one word or two) as a trade name, trademark, or service mark for, and/or in connection with, any of the following items for vehicles: .

- g. vehicle replacement parts.
5. A use of the BIG FOOT mark (as one word or two) which is in violation of this injunction infringes the rights of Big O in the Big O BIG FOOT Mark(s).

Id., at p. 2.

Bigfoot 4x4, Inc. (“Bigfoot 4x4”) argues that notwithstanding this clear order and injunction, it is not barred either by claim or issue preclusion from maintaining this opposition. Bigfoot 4x4 rests its argument on the claim that the term “vehicle replacement parts” does not include “vehicle batteries;” or more precisely (and incongruously) that the collective term “vehicle replacement parts” is more narrow than the individual items contained within this product category – *i.e.*, that the whole is *less* than the sum of its parts, or that the genus is *narrower* than the species. This tired argument – that the term “vehicle replacement parts” as used in the context of the Final Order has some limited significance other than its obvious, broad and all-encompassing meaning – was repeatedly raised by Bigfoot 4x4 in the infringement action brought by Big O Tires, Inc. (“Big O”) in the United States District Court for the District of Colorado (Civ. Action No. 01-F-349) (the “District Court Litigation”) and repeatedly denied by the Magistrate Judge and the District Court Judge. Accordingly, application of the twin preclusive doctrines raised by Big O in its responsive pleading is especially warranted in this case.

The District Court Litigation addressed and finally resolved the all-encompassing breadth of the term “vehicle replacement parts” in the Settlement Agreement. By agreement of the parties, it remained an “undefined term which stands on its own” and “does not require further definition to be understood.” See Recommendation of United States Magistrate Judge (“Magistrate’s Recommendation”), attached hereto as Exhibit 1, at pp. 12, 14.

As set forth in the dispositive Motion, the parties to this opposition litigated Big O’s claim to exclusive rights in the BIG FOOT mark for vehicle replacement parts for three years. The final dispute concerned the breadth of a single term: “vehicle replacement parts” – the very same term at issue in the case *sub judice*, and Bigfoot 4x4’s efforts to limit such term. This unresolved dispute precipitated Big O’s Motion to Enforce Settlement Agreement, which ultimately was granted by the District Court. In its introductory paragraph, the Magistrate’s Recommendation summarized the issue and the parties’ respective positions:

Bigfoot 4x4 “stated that it agrees that the parties have settled this case,” but contended that Bigfoot 4x4 intended that the “term sheet” executed by the parties on April 8, 2003, would be supplemented by a definition of the phrase “vehicle replacement parts.” Big O Tires, Inc. (“Big O”), argues that there was no agreement to define the phrase “vehicle replacement parts,” and seeks enforcement of the term sheet as written and accepted by the parties.

See, Magistrate’s Recommendation p.1.² Indeed, the purpose of the hearing, “was to determine whether the parties [sic] agreement to settle the case included language defining the term ‘vehicle replacement parts’ as that term was contemplated being used in a final order and injunction of the

² Indeed, the District Court credited Big O’s principal’s testimony that he “consistently and repeatedly rejected Bigfoot 4x4’s request to define the term ‘vehicle replacement parts.’” See Magistrate’s Recommendation, p.13.

Court, or whether the term was to be used without a definition. The Magistrate Judge determined that the parties [sic] agreement to settle was reached without explicitly defining the term ‘vehicle replacement parts’ in the final order. *He further found that the term ‘vehicle replacement parts’ to be clear and unambiguous, without requirement for further definition to be understood.”* See Order Regarding Magistrate Judge’s Recommendation, pp. 1-2, attached hereto as Exhibit 2 (emphasis supplied). Thus, in the District Court Litigation, the “only dispute [was] whether ‘vehicle replacement parts’ is a defined term with the definition attributed by Bigfoot 4x4 or is an undefined term which stands on its own.” *Id.*, at p.5. Since the precise issue pressed again by Bigfoot 4x4 in defense of the dispositive motion in this opposition proceeding was fully litigated and decided in the District Court Litigation in favor of Big O, the Board need not – and may not – entertain this opposition.

The Magistrate Judge and the Court both found that the meaning of the term “vehicle replacement parts” was clear and unambiguous, and rebuffed Bigfoot 4x4's post-agreement attempts to narrow it. In holding that Big O has exclusive rights in the BIG FOOT mark for all goods within this product category, the District Court, in its Final Order and Permanent Injunction, imposed no limitations on the channels of trade in which or the market segments/customers to whom such products could be sold. *Cf. Bongrain International v. Moguet*, 230 U.S.P.Q. 626, 628 (T.T.A.B. 1986) (“in the absence of a restriction in the identification as to type of goods, channels of trade, or classes of purchasers, the presumptions afforded to a registration under Section 7(b) of the Trademark Act of 1946 include a presumption of use on all goods comprehended by the identification in all of the normal markets or channels of trade for such goods to all potential

purchasers therefor.”). There was no exclusion in either the Magistrate Judge’s detailed recommendation and findings after trial, nor in the Court’s Final Order and Permanent Injunction, of vehicle replacement parts *except* those used in high performance racing vehicles.³ There was no exclusion in the Magistrate’s Recommendation or in the Court’s Final Order and Permanent Injunction, of vehicle replacement parts sold to original equipment manufacturers.

Indeed, the very limitation and definition of “vehicle replacement parts” Bigfoot 4x4 proffered was “contribute to or permit the performance of the basic function of the vehicle, namely locomotion (*e.g.*, spark plugs, fuel injectors, exhaust systems); and [m]eet **original equipment manufacturer’s** specifications.” *See* Magistrate’s Recommendation, p.4. However, this determination was found to be under inclusive, not over inclusive as Bigfoot 4x4 now claims. The Magistrate’s Recommendation correctly recounted that “[a]ny definition, according to Big O, would serve only to narrow the scope of the term, which Big O was unwilling to do.” *Id.* The Magistrate’s Recommendation went on: “Bigfoot 4X4’s argument is not so much that it cannot understand the term ‘vehicle replacement parts,’ but that the term is too broad and prohibits Bigfoot 4X4 from use of the trademark in too much of the market. I do not agree for two reasons.” *Id.*, p. 14.

After reviewing the transcripts of, and the evidence proffered during, a three day trial, the Magistrate Judge found “that Big O and Bigfoot 4x4 agreed that the Terms Sheet would grant Big O the exclusive right to use the mark ‘Big Foot’ for ‘vehicle replacement parts,’ without any further definition of that term.” *Id.*, at p.12 (emphasis supplied). The meaning of the term “vehicle

³ However, there is no factual or evidentiary support in the record concerning this issue.

replacement parts” contained in the injunction and even tested in the Rule 65(d) crucible, was found to be sufficiently clear and unambiguous:

I find that the term “vehicle replacement parts” is *clear and unambiguous* and *does not require further definition to be understood*. The injunctive term agreed to by the parties addresses the issue head on and states precisely what conduct is being enjoined. *Id.* at p. 1244. As Mr. Adams testified:

[A]utomotive parts is very clear to me, and there was no need to define it. Parts is parts so to speak. And any effort to define parts is to limit our use of parts.

Vehicle replacement parts. **If it’s a part, it’s on a vehicle and it has to get replaced, then it falls into that category.**

Trans. at p. 39 line 25 through p. 40 line 20.

Id., at p. 14 (emphasis supplied).

Vehicle batteries clearly fall within this broad, unambiguous term, as described and found by the Magistrate Judge and the District Court. If Bigfoot 4x4 used the BIG FOOT mark for vehicle replacement batteries – even if sold to original equipment manufacturers or for high performance racing vehicles, (whatever those are; the record does not reveal this) – it would violate the District Court’s “clear and unambiguous” injunction.⁴

For the same reasons, Bigfoot 4x4’s remaining argument must fail, as well. Bigfoot 4x4 points to the parties’s Settlement Agreement which permits it to open ten additional retail outlets,

⁴ In fact, however, Bigfoot 4x4 has not pleaded its right to use the BIG FOOT mark in connection with vehicle replacement parts sold to original equipment manufacturers or for high performance racing vehicles. Thus, in any event, it clearly has no standing to assert such channels of trade.

under certain conditions, and in those outlets, under certain conditions, to sell the same “types” of products it previously sold in its single existing store. But this in no way limits Big O’s rights to use its BIG FOOT mark for “vehicle replacement parts” or its exclusive rights in such *trademark* use.

First, Bigfoot 4x4 has confused the sale of BIGFOOT-branded products, which is forbidden, on the one hand, with the sale of products under other, or no, brand names at a BIGFOOT store, which might not be forbidden, on the other hand. Thus has Big foot 4x4 mistaken a trademark use in connection with goods for a service mark use for retail stores. *Cf.* TMEP §904.05 (“Bags and other packaging materials bearing the name of a retail store and used by the store merely for packaging items of sold merchandise are not acceptable to show trademark use of the store name for the products sold by the store (*e.g.*, bags at cash register). When used in this manner, the name merely identifies the store.”). Thus, the fact that the Settlement Agreement allows Bigfoot 4x4’s “single store [to] continue to sell all of those **type** of items previously sold in the store” does not mean that Bigfoot 4x4 can sell “vehicle replacement parts” under the BIGFOOT mark in that store.

Second, there is no evidence in the record that Bigfoot 4x4 ever did sell vehicle replacement batteries in its store at that time, or ever. Additionally, the Notice of Opposition does not plead such use or rights.

Moreover, the sale of BIGFOOT-branded products – whether at Bigfoot 4x4’s retail outlet or not – is clearly proscribed by the “clear and unambiguous” terms of the permanent injunction.⁵

⁵ As an aside, Big O notes that Bigfoot 4x4 has not offered any evidence in support of its bald assertion that “Bigfoot has previously sold vehicle replacement parts from its retail locations.” *See* Bigfoot 4x4’s Brief in Opposition, p. 9.

Thus, Bigfoot 4x4's strained construction would render the *res* of the Settlement Agreement and the permanent injunction a nullity; creating a clearly untenable result.

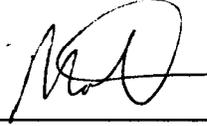
After the conclusion of years of litigation, Big O's exclusive rights in the BIG FOOT mark were recognized and formalized *vis a vis* Bigfoot 4x4 with respect to all vehicle replacement parts – including vehicle replacement batteries – in all channels of trade to all customers. In the District Court Litigation, these rights were repeatedly and expressly held to be broad and unlimited. As noted above, this issue, and attendant claims, have been fully and fairly litigated. Whether or not Bigfoot 4x4 can accept the bargain it struck⁶, it is simply time to put this matter to rest.

For the above reasons and those raised in Big O's responsive pleading, Bigfoot 4x4 has neither a real interest in the proceeding nor a reasonable basis for belief in its claimed damage. The Notice of Opposition should be dismissed *with* prejudice.

Respectfully submitted,

BIG O TIRES, INC.

By:



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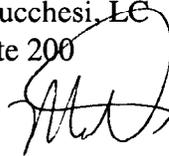
Attorneys for Applicant

⁶ See Magistrate's Recommendation, p. 14 ("Bigfoot 4X4's argument is not so much that it cannot understand the term 'vehicle replacement parts,' but that the term is too broad and prohibits Bigfoot 4X4 from use of the trademark in too much of the market.")

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2005, a true copy of the foregoing APPLICANT'S BRIEF IN REPLY TO OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT on the Pleadings was served by first-class mail, postage prepaid, upon counsel for Applicant:

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

BIGFOOT 4x4, INC.,

Opposer,

vs.

BIG O TIRES, INC.,

Applicant.

Opposition No. 91166074

Exhibit 1 to

**APPLICANT'S BRIEF IN REPLY TO
OPPOSER'S RESPONSE TO
APPLICANT'S MOTION TO DISMISS
OR IN THE ALTERNATIVE
MOTION FOR SUMMARY JUDGMENT**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Boyd N. Boland

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

NOV 10 2003

GREGORY C. LANGHAM
CLERK
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Civil Action No. 01-F-349

BIG O TIRES, INC.,

Plaintiff,

v.

BIGFOOT 4X4, INC. and VULCAN CHAIN AND WEBBING PRODUCTS, INC.,

Defendants.

and

VULCAN CHAIN CORPORATION, INC.,

Cross-Claimant,

v.

BIGFOOT 4X4, INC.,

Cross-Defendant.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter is before me on the **Plaintiff's Motion to Enforce Settlement Agreement** (the "Motion"), filed June 13, 2003. On June 23, 2003, the defendant filed its response to the Motion, captioned "Bigfoot 4X4, Inc.'s Confession of Motion to Enforce Settlement," (the "Response"). In its Response, Bigfoot 4X4, Inc. ("Bigfoot 4X4"), stated that it "agrees that the parties have settled this case," but contended that Bigfoot 4X4 intended that the "term sheet" executed by the parties on April 8, 2003, would be supplemented by a definition of the phrase "vehicle replacement parts." Big O Tires, Inc. ("Big O"), argues that there was no agreement to

define the phrase "vehicle replacement parts," and seeks enforcement of the term sheet as written and accepted by the parties.

I held an evidentiary hearing on the Motion on October 1, 2003, and took the matter under advisement. The parties submitted written arguments following the hearing. I now respectfully RECOMMEND that the Motion be GRANTED.

BACKGROUND

Big O commenced this action for trademark infringement, dilution, false designation, false representation of origin, false advertising, deceptive trade practices, and unfair competition against Bigfoot 4X4 and Vulcan Chain and Webbing Products, Inc. ("Vulcan").¹ At issue is use of Big O's trademark "Big Foot":

Big O began using the Big Foot name, alternatively styled as both one word and two words, in 1974. The company has linked the name not only with its identically named tires, but with its franchise stores generally. The name Big Foot is often linked in Big O's advertising to a design of a "Big Foot monster" or Sasquatch figure. In some cases the name Big Foot is also used in conjunction with a large footprint designed to appear as that of a Sasquatch. In addition, Big O has linked the Big Foot name to the Big O stores through a pervasive national advertising campaign denoting Big O stores as "Big Foot Country."

Big O Tires, Inc. v. Bigfoot 4X4, Inc., 167 F. Supp. 1216, 1219 (D. Colo. 2001).

On September 26, 2001, the district judge granted Big O's motion and entered a preliminary injunction. Among other things, the preliminary injunction prohibits Bigfoot 4X4 from "directly or indirectly applying, or causing others to apply the trademark 'Bigfoot' to *any automotive part or accessory product*" and from "licensing the trademark 'Bigfoot' for *any*

¹The claims involving Vulcan have been settled separately and have no bearing on the determination of the Motion.

automotive part or accessory product. . . ." Big O Tires, 167 F. Supp. at 1230 (emphasis added).

The case proceeded through discovery and a pretrial conference, and was scheduled for trial beginning on June 23, 2003. On approximately May 29, 2003, counsel for Bigfoot 4X4 contacted my chambers and stated that a settlement of the claims between Big O and Bigfoot 4X4 had been reached. By minute order, I required the parties to file a stipulation or motion to dismiss the case on or before June 13, 2003, or a status report addressing why dismissal had not been accomplished.

On June 13, 2003, counsel for Bigfoot 4X4 filed a status report which stated, in relevant part:

Defendant Bigfoot 4X4, Inc., by its attorneys, pursuant to the Minute Order of May 29, 2003, advises the Court that while the parties have entered into settlement agreements covering all issues, Big O and Bigfoot have not been able to complete reducing the terms of their agreement to final form, including the language of a final order incorporating injunctive language. . . . The undersigned [counsel for Bigfoot 4X4] believes that negotiations to complete such language is workable, and that an additional two weeks should be sufficient to complete the negotiations between the two parties.

Big O, by contrast, filed the Motion to enforce settlement agreement here at issue, stating in part:

This case as between all parties . . . has been settled. That fact has been reported to the Court orally and in writing on several occasions in the past few weeks, most recently by [Bigfoot] 4X4 itself. . . .

However, despite an extraordinary diligent and good faith effort by Big O to bring closure to this case, [Bigfoot] 4X4 has demanded that Big O agree to new substantive terms that are unacceptable to Big O. Big O has refused [Bigfoot] 4X4's attempts to renegotiate the terms of settlement that were reached by Big O's and [Bigfoot]

4X4's principals on April 8, 2003, which are reflected in the signed Settlement Term Sheet. . . .

Motion, at p.2.

The nub of the dispute is this: The parties executed a document captioned "Settlement Terms/April 8, 2003" (the "Terms Sheet") which purports to state the terms of a settlement reached by John Adams on behalf of Big O and Robert Chandler on behalf of Bigfoot 4X4 at a meeting between the two on April 8, 2003. Among many other provisions, the Terms Sheet states the following:

2. Big O shall have the exclusive rights to use the mark "Big Foot" for:

* * *

g. "vehicle replacement parts. . . ."

Exhibit 6, at p.6-2. "Vehicle replacement parts" appears on the Terms Sheet in quotation marks, and is the only term on the Terms Sheet that is enclosed in quotation marks.

In earlier drafts of the Terms Sheet, Bigfoot 4X4 had proposed that "vehicle replacement parts" be a defined term, as follows:

[T]hose parts which

i. contribute to or permit the performance of the basic function of the vehicle, namely locomotion (e.g., spark plugs, fuel injectors, exhaust systems), and

ii. Meet original equipment manufacturers' specifications.

Exhibit 2, at pp.2-2 through 2-3.

Big O claims that it expressly rejected Bigfoot 4X4's definition of vehicle replacement parts and also refused any definition of that term whatsoever. Any definition, according to Big O, would serve only to narrow the scope of the term, which Big O was unwilling to do. The

presence of the quotation marks is innocent, according to John Adams, and merely an inadvertent carry-over from an earlier draft of the Terms Sheet. Bigfoot 4X4, by contrast, counters that the presence of the quotation marks indicates the parties' intention that "the definition already agreed upon by the principals would be scrawled in the final settlement agreement." Response, at p. 1. Bigfoot 4X4 contends further that "vehicle replacement parts" is an ambiguous term and that any injunction which precludes Bigfoot 4X4 from using the Big Foot mark in that market is "too vague to be understood' . . . and must be stricken." *Id.* at p.2, quoting Keyes v. School District No. 1, 895 F.2d 659, 668 (10th Cir. 1990).

The parties agree that a settlement was reached and is memorialized in the Terms Sheet. Motion, at p.1; Response, at pp.1, 3. The only dispute is whether "vehicle replacement parts" is a defined term with the definition attributed by Bigfoot 4X4 or is an undefined term which stands on its own. *Id.*

LEGAL STANDARD

A trial court has the power summarily to enforce a settlement agreement entered into by the parties while the litigation is pending before it. United States v. Hardage, 982 F.2d 1491, 1496 (10th Cir. 1993). Settlement agreements are favored by the courts. City & County of Denver v. Adolph Coors Co., 813 F. Supp. 1476, 1479 (D. Colo. 1993). The court must apply state contract law to issues involving the formation, construction, and enforcement of a settlement agreement. United States v. McCall, 235 F.3d 1211, 1215 (10th Cir. 2000). Where, as here, there are disputed issues of material fact concerning the existence or terms of a settlement agreement, the court must hold an evidentiary hearing in order to resolve the disputed

issues of fact. Hardage, 982 F.2d at 1496.

The Colorado Supreme Court stated the law applicable to the determination of the existence of an enforceable agreement in I.M.A., Inc. v. Rocky Mountain Airways, Inc., 713 P.2d 882, 888 (Colo. 1986):

In order to establish the existence of a contract, the evidence must show that the parties agreed upon all essential terms. The parties' agreement is evidenced by their manifestations of mutual assent. Furthermore, evidence of the parties' conduct, their oral statements and their writings, and other evidence illuminating the circumstances surrounding the making of an agreement are admissible to clarify the intent and purpose of the parties.

(Internal citations omitted.) The fact that Big O and Bigfoot 4X4 recognized that the Terms Sheet is preliminary does not foreclose a finding that they entered into an enforceable contract:

The mere intention to reduce an oral or informal agreement to writing, or to a more formal writing, is not of itself sufficient to show that the parties intended that until such formal writing was executed the oral or informal contract should be without binding force.

Id. (internal citations omitted).

In addition, a party arguing that it did not intend to be bound by a settlement agreement until "a formal document is executed" bears the burden of establishing that fact, as follows:

[T]he party arguing that the parties intended not to be bound until the execution of a formal writing has the burden of proving either that both parties understood they were not to be bound until the executed contract was delivered, or that the other party should have known that the disclaiming party did not intend to be bound before the contract was signed.

City & County of Denver, 813 F. Supp. at 1481 (internal quotations deleted).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On September 26, 2001, the district judge entered a preliminary injunction which, among other things, prohibits Bigfoot 4X4 from “directly or indirectly applying, or causing others to apply the trademark ‘Bigfoot’ to any automotive part or accessory product” and from “licensing the trademark ‘Bigfoot’ for any automotive part or accessory product. . . .” Big O Tires, 167 F. Supp. at 1230.

2. The parties engaged in ongoing settlement discussions from at least the fall of 2002 through April 2003.

3. On March 5, 2003, the parties and their lawyers met in person for a day-long meeting to discuss settlement. No mediator was present at the meeting.

4. Following the March 5 meeting, on March 10, 2003, counsel for Bigfoot 4X4 prepared a memorandum and distributed it to the parties. Exhibit 2; Transcript of Proceedings (hereafter “Trans.”) at p.37 lines 16-19. The memorandum is captioned “Big O/Bigfoot 4X4 negotiation progress outline.” Exhibit 2 at p.2-1. The memorandum states that it is “a slightly tweaked version of the columns we had on the board at the end of the day when we met on the 5th, together with the other issues we had at least brought up.” Id. Bigfoot 4X4's counsel also stated in the memorandum that his “goal is that we work from this, refining items as needed and adding sections as we resolve other issues.” Id. Attached to the memorandum is a document captioned “Tentative Terms As of March 5, 2003” (the “Tentative Terms”). Id. at pp.2-2 through 2-4. Significantly, part 2(h) of the Tentative Terms states:

2. Big O shall have the exclusive right to use the mark "Big Foot" for:

* * *

h. "vehicle replacement parts," defined as [*Bigfoot's recommended definition*] those parts which both

i. contribute to or permit the performance of the basic function of the vehicle, namely locomotion (e.g., spark plugs, fuel injectors, exhaust systems), and

ii. meet original equipment manufacturers' specifications.

Exhibit 2, at pp.2-2 through 2-3.

5. John Adams electronically loaded the Tentative Terms onto his laptop computer, exactly as they had been prepared by Bigfoot 4X4's counsel. Trans. at p.62 lines 9-12. The Tentative Terms as loaded onto Mr. Adams' laptop computer included the quotation marks around the words "vehicle replacement parts" and included also the definition proposed by Bigfoot 4X4. Trans. at p.60 line 8 through p.62 line12.

6. On April 8, 2003, Mr. Adams and Robert Chandler met in St. Louis, Missouri, in a final attempt to reach a settlement of the claims between them. Trans. at p.54 lines 6-14. Messrs. Adams and Chandler met alone. During that meeting, Mr. Chandler proposed again that "vehicle replacement parts" be defined essentially as Bigfoot 4X4 had proposed in the Tentative Terms. Trans. at p.55 line 20 through p.56 line 18.

7. There is conflicting testimony about Big O's response to Mr. Chandler's request on April 8 that the term "vehicle replacement parts" be defined. Mr. Adams testified that he rejected the proposal. See, e.g., Trans. at p. 56 lines 12-18; p.66 lines 1-7; p.85 lines 4-10; p.87 lines 8-19; p.88 lines 8-23.

Mr. Chandler initially testified that Mr. Adams rejected the proposed definition of the

term:

Q [by Mr. Jacobson, counsel for Bigfoot 4X4]: Did you ever agree that the term ["vehicle replacement parts"] would not be defined at all?

A: No.

Q: Did you agree on a definition?

A: I agreed on a definition, but I don't know if I ever got that from John [Adams]. I don't believe so.

Trans. at p.100 lines 18-23. Subsequently, Mr. Chandler testified that he understood that the term "vehicle replacement parts" would be defined as it had been in the Tentative Terms:

Q: Did he [Mr. Adams] ever say to you I'm not accepting your definition?

A: No, I don't recall that at all.

Q: When you signed the term sheet, Exhibit 6, did you have an understanding of what the phrase vehicle replacement parts meant?

A: My understanding was that when this was--this document was given to our attorneys that the rest of the information would be put in there, the definition for replacement parts would be put in there for sure.

* * *

Q: Did Mr. Adams ever say to you, no, we're not putting a definition in?

A: No.

Q: Did Mr. Adams ever say to you we are going to have all auto parts?

A: Up to that point, no.

Trans. at p.101 lines 1-24.

On cross-examination, Mr. Chandler also testified as follows:

A: Our agreement was that this--the agreement we made was going to go to our lawyers and all the final updates would be put in it.

* * *

Q: And on April 8th when you got that settlement term sheet, there was no definition of the term vehicle replacement parts in the document, was there?

A: That's correct, but there was parentheses.

Q: You think there were parentheses?

A: Or quotes.

Q: What did you say to him [Mr. Adams] that day about those quotation marks?

A: Nothing.

Trans. at p.103 lines11-13; p.104 lines 15-23.

Finally, in response to my questioning, Mr. Chandler testified as follows:

Q: Did you say to Mr. Adams this ["vehicle replacement parts"] will be defined later?

A: No, I did not.

Q: Did you say this will be subject to--not these exact words, but this is subject to the definition that we previously discussed?

A: I don't believe I did, no.

* * *

Q: Were there any other terms [other than "vehicle replacement parts"] that you thought the lawyers were going to supplement in some way?

A: I thought every single one of them.

Trans. at p 113 lines 2-7; p.115 lines2-4.

8. At the end of their meeting on April 8, 2003, Mr. Adams printed copies of a

document containing the agreement he and Mr. Chandler had reached, and gave them to Mr. Chandler. Trans. at p.58 lines 3-8. Exhibit 6 is a copy of the document Mr. Adams printed and gave to Mr. Chandler. Trans. at p.64 lines 11-23.

9. Mr. Adams asked Mr. Chandler to sign the Terms Sheet at the conclusion of their meeting on April 8, 2003. Trans. at p.58 lines 9-19.

10. Mr. Chandler did not sign the Terms Sheet on April 8, 2003. Instead, he wanted to show a copy of the document to his daughter, Ann Trent, a lawyer who is, among other things, president and in-house counsel for Bigfoot 4X4. Trans. at p.58 line 20 through p.59 line 2; p.136 lines 17-20. Subsequently, on April 10, 2003, Mr. Chandler signed the Terms Sheet, evidencing his acceptance of it, and returned it to Mr. Adams by facsimile. Trans. at p.62 line 14 through p.63 line 1. Mr. Adams thereafter also signed the Terms Sheet, evidencing his acceptance of it. Trans. at p.64 line 11 through p.65 line 5. Mr. Adams and Mr. Chandler did not speak on April 10, 2003, in connection with the execution of the Terms Sheet. Trans. at p.65 lines 6-7. In fact, no one from Bigfoot 4X4 contacted Mr. Adams during the month of April 2003 to discuss further defining the term or to express a need for further negotiations. Trans. at p.93 line 23 through p.94 line 3.

11. I find that the quotation marks around the phrase "vehicle replacement parts" occurred because the Terms Sheet executed by the parties originated from the March 5, 2003, Tentative Terms prepared by Bigfoot 4X4's counsel which enclosed the words in quotation marks and which also contained a definition of that term. I find that the presence of the quotation marks is inadvertent, has no meaning, and did not indicate an intention on the part of the parties either to insert the definition proposed by Bigfoot 4X4 in the Tentative Terms or to otherwise define

the term. I base this finding on the fact that Mr. Chandler never told Mr. Adams that he understood that the words “vehicle replacement parts” would be further defined, even in the face of Mr. Adams’ repeated rejections of any attempt to define the term. Neither Mr. Chandler nor Ms. Trent inserted a definition in the Terms Sheet prior to Mr. Chandler’s execution of it on April 10, 2003, despite adequate opportunity to do so. Neither Mr. Chandler nor anyone else from Bigfoot 4X4 contacted Mr. Adams within a reasonable time after April 10, 2003, indicating an intention that any further definition of the term was necessary. See City & County of Denver, 813 F. Supp. at 1480 (holding that the secret intent of a party to a contract is irrelevant; “[m]utual assent is to be judged only by overt acts and words rather than by the hidden or secret intention of the parties”). In fact, in view of Mr. Chandler’s testimony that he thought “every single” term in the Terms Sheet would be supplemented, Trans. at p.115 lines 2-4, I find incredible Mr. Chandler’s testimony that he understood that the words “vehicle replacement parts” would be further defined. I find that Bigfoot 4X4’s position concerning the presence of the quotation marks and its asserted belief--unstated and unilateral--that the term would be further defined is an after-the-fact construct in an attempt to avoid the agreement it freely and knowingly accepted on April 10, 2003. Bigfoot 4X4’s later dissatisfaction with the terms of compromise agreed to in the Terms Sheet is not a basis to set aside that agreement. See Recreational Development Co. of America v. American Construction Co., 749 P.2d 1002, 1005 (Colo. App. 1987).

12. I find that Big O and Bigfoot 4X4 agreed that the Terms Sheet would grant Big O the exclusive right to use the mark “Big Foot” for “vehicle replacement parts,” without any further definition of that term. That is the meaning and significance of Mr. Chandler’s act of

signing the Terms Sheet on April 10, 2003, and delivering a signed copy of the document to Big O.

13. I reject Bigfoot 4X4's argument that I should find Mr. Adams' silence on the issue of defining the term "vehicle replacement parts" constitutes acceptance by Big O of the definition urged by Bigfoot 4X4, and I reject Bigfoot 4X4's reliance on Brooks Towers Corp. v. Hunkin-Conkey Construction Co., 454 F.2d 1203, 1207 (10th Cir. 1972), for the proposition that "where a duty exists to communicate either an acceptance or rejection, silence will be regarded as an acceptance." To the contrary, Mr. Adams consistently and repeatedly rejected Bigfoot 4X4's request to define the term "vehicle replacement parts." See, e.g., Trans. at p.56 lines 12-18; p. 66 lines 1-7; p.85 lines 4-10; p.87 lines 8-19; and p. 88 lines 8-23. More to the point, the Terms Sheet as written and signed by the parties does not contain any definition of the term. Exhibit 6 at p.6-2. There was no silence by Big O from which Bigfoot 4X4 reasonably could have inferred an acceptance.

14. I also reject Bigfoot 4X4's argument that an injunction prohibiting Bigfoot 4X4 from using the trademark "Big Foot" in connection with "vehicle replacement parts" is ambiguous or too vague to be enforced. Rule 65(d), Fed. R. Civ. P., requires that an injunction be "specific" and "shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts to be restrained." The specificity requirement of the rule has been explained in Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1243-44 (10th Cir. 2001), as follows:

The specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to

avoid the possible founding of a contempt citation on a decree too vague to be understood. . . .

However, Rule 65(d) does not require the impossible. There is a limit to what words can convey. . . . The right to seek clarification or modification of the injunction provides assurance, if any be sought, that proposed conduct is not proscribed. [An] . . . injunction is vague only when the delineation of the proscribed activity lacks particularity or when containing only an abstract conclusion of law, not an operative command capable of enforcement.

(Internal citations and quotations omitted.)

I find that the term “vehicle replacement parts” is clear and unambiguous and does not require further definition to be understood. The injunctive term agreed to by the parties addresses the issue head on and states precisely what conduct is being enjoined. *Id.* at p.1244.

As Mr. Adams testified:

[A]utomotive parts is very clear to me, and there was no need to define it. Parts is parts so to speak. And any effort to define parts is to limit our use of parts.

* * *

Vehicle replacement parts. If it's a part, it's on a vehicle and it has to get replaced, then it falls into that category.

Trans. at p.39 line 25 through p.40 line 20.

Bigfoot 4X4's argument is not so much that it cannot understand the term “vehicle replacement parts,” but that the term is too broad and prohibits Bigfoot 4X4 from use of the trademark in too much of the market. I do not agree for two reasons. First, unlike most cases where an injunction is challenged as ambiguous and not capable of enforcement, the injunction here is based on an agreement of the parties and not an order of the court in a contested setting. Compare Keyes v. School Dist. No. 1, 895 F.2d 659 (10th Cir. 1990). More importantly, Bigfoot

4X4 agreed to the injunction, and its subsequent dissatisfaction with the terms of its agreement is not a basis to reject that agreement. Recreational Development Co., 749 P.2d at 1005.

15. I also reject Bigfoot 4X4's argument that failing to define "vehicle replacement parts" somehow is inconsistent with the "posture of the case." See Bigfoot's Closing Argument, filed October 15, 2003, at pp.6-7. Bigfoot 4X4 argues:

Thus, because of the actual context of the case at the time of the settlement agreement, Bigfoot believed in fact that the most likely outcome of a total loss at trial would be an injunction precluding it from licensing cargo restraint devices. It is simply disingenuous for Big O to ask the Court to ignore the context--the law and the actual posture of the case at the time of the settlement discussions--in determining the intentions and actions of the parties in regard to the definition of "vehicle replacement parts."

Id. at p.7.

The context of the case notwithstanding, the fact of the matter is that Bigfoot 4X4 agreed not to use the "Bigfoot" trademark in connection with "vehicle replacement parts." Bigfoot 4X4 knows its business and business plans; I do not. Obviously Bigfoot 4X4 perceived some advantage to settling the case rather than taking the matter to trial. At least part of that advantage is obvious. The preliminary injunction entered against Bigfoot 4X4 on September 26, 2001, enjoined Bigfoot 4X4 from use of the trademark "Bigfoot" with respect to "*any automotive part or accessory product. . . .*" Big O Tires, 167 F. Supp. 2d at 1230 (emphasis added). The agreement of the parties as set out in the Terms Sheet limits the scope of the injunction to "automotive replacement parts." A prohibition against use of the trademark in connection with "*any automotive part*" is limited to "replacement parts," and automotive accessory products are deleted altogether from the prohibited conduct. See Trans. at p.36 lines 7-19; and p.38 lines 11-

24 (noting that Big O agreed to “using vehicle replacement parts in lieu of automotive parts and accessories as an effort to reach a compromise”). That that advantage no longer is perceived as sufficient to justify the settlement once agreed to by Bigfoot 4X4 is no basis to refuse to enforce the agreement. Recreational Development Co., 749 P.2d at 1005.

CONCLUSION

A settlement agreement was reached by Big O and Bigfoot 4X4 on April 8, 2003, and a copy of the Terms Sheet memorializing their agreement was signed by representatives of both parties on April 10, 2003. The agreement evidenced by the Terms Sheet is clear and unambiguous and should be enforced.

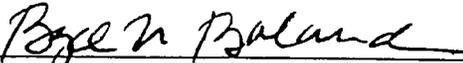
I respectfully RECOMMEND that the settlement agreement of the parties evidenced by the Terms Sheet be enforced as an order of the court. To effectuate my recommendation, I further RECOMMEND that the court enter a Final Order and Permanent Injunction substantially in the form attached as Exhibit B to Plaintiff’s Reply to Defendant Bigfoot 4X4’s Confession of Motion to Enforce Settlement, filed June 24, 2003, a copy of which is attached hereto as an appendix.

FURTHER, IT IS ORDERED that pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the parties have 10 days after service of this recommendation to serve and file specific, written objections. A party’s failure to serve and file specific, written objections waives *de novo* review of the recommendation by the district judge, Fed. R. Civ. P. 72(b); Thomas v. Arn, 474 U.S. 140, 147-48 (1985), and also waives appellate review of both factual and legal questions. Makin v. Colorado Dept. of Corrections, 183 F.3d 1205, 1210 (10th Cir. 1999); Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996). A party’s objections to this recommendation must be

both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review. United States v. One Parcel of Real Property, 73 F.3d 1057, 1060 (10th Cir. 1996).

DATED November 10, 2003.

BY THE COURT:



United States Magistrate Judge

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Chief Judge

Civil Action No. 01-B-349

BIG O TIRES, INC.,

Plaintiff,

v.

BIGFOOT 4X4, INC. and VULCAN CHAIN AND WEBBING PRODUCTS, INC.

Defendants.

FINAL ORDER AND PERMANENT INJUNCTION ON CONSENT

THE COURT, being duly advised in the premises and after reviewing Plaintiff's Motion to Enforce Settlement Agreement, Defendant Bigfoot 4x4, Inc.'s Confession of Motion to Enforce Settlement Agreement and Plaintiff's Reply to Defendant Bigfoot 4x4's Confession of Motion to Enforce Settlement hereby ORDERS, ADJUDGES and DECREES the following:

1. This Court has jurisdiction of the subject matter of the claims asserted herein and the above-named parties to this action.

2. Plaintiff Big O is the owner of the trademark BIG FOOT, as well as the design of a "Bigfoot" or Sasquatch character, as exemplified by Exhibit A, hereto, and the design of a "big foot", as exemplified by Exhibit B, hereto, in connection with the following items for vehicles: tires, wheels, tire accessories, wheel accessories, cargo restraints, shock absorbers, struts, suspension parts, and vehicle replacement parts [hereafter, collectively referred to as the "Big O BIG FOOT Mark(s)"], and the U.S. registrations therefor, nos. 1,102,058; 1,102,059; 1,904,955; and 2,314,775 [hereafter, the "Big O BIG FOOT Registrations"]

85296--04000.016

3. Each of the Big O BIG FOOT Registrations is good and valid in law.

4. Defendant Bigfoot 4x4, Inc., and the directors, officers, agents, employees and all other persons acting on behalf of, or in concert with, Bigfoot 4x4, Inc. and who have notice of this injunction, are hereby permanently enjoined from applying, or authorizing or licensing another to apply, the trademark BIG FOOT (alone or in conjunction with any other word, design or symbol, and whether as one word or two) to, and/or from using BIG FOOT (alone or in conjunction with any other word, design or symbol, and whether as one word or two) as a trade name, trademark or service mark for, and/or in connection with, any of the following items for vehicles:

- a. tires;
- b. wheels;
- c. shock absorbers, struts and/or suspension parts;
- d. tire accessories;
- e. wheel accessories;
- f. cargo restraints; and
- g. vehicle replacement parts.

5. A use of the BIG FOOT mark (as one word or two) which is in violation of this injunction infringes the rights of Big O in the Big O BIG FOOT Mark(s).

6. The bond of \$1,500,000 posted by Big O in this action in connection with the preliminary injunction entered by the Court is hereby released, in full, to Big O and/or its surety, and Big O shall have no further obligation or liability for, and/or with respect to, such bond, vis-

a-vis the Court or Bigfoot 4x4, Inc., and Bigfoot 4x4, Inc. shall have no right, title or claim with respect to that bond and/or the proceeds of that bond.

7. All remaining matters at issue between Big O and Bigfoot 4x4, Inc. shall be, and hereby are, dismissed, the parties to pay their own costs and attorneys fees.

Dated: _____, 2003, in Denver, Colorado.

BY THE COURT:

Lewis T. Babcock, Chief Judge

EXHIBIT A

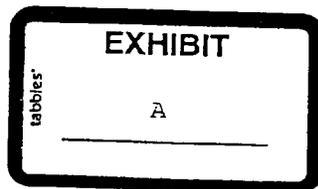
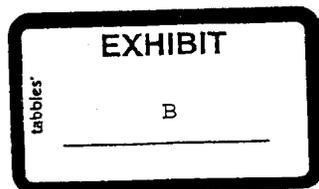


EXHIBIT B



UNITED STATES MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

BOYD N. BOLAND
U.S. Magistrate Judge

CERTIFICATE OF MAILING
Civil Action No. 01-F-349 (BNB)

I hereby certify that a copy of this **RECOMMENDATION** dated November 10, 2003, entered by Magistrate Judge B.N. Boland was served by (*) delivery to or (**) depositing the same in the United States mail, postage prepaid, this 10 day of November, 2003, to the following persons:

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TIMOTHY P. GETZOFF, ESQ.
HOLLAND & HART
D.C. BOX NO. 06

GREGORY C. LANGHAM, CLERK


Deputy Clerk

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BIGFOOT 4x4, INC.,

Opposer,

vs.

BIG O TIRES, INC.,

Applicant.

Opposition No. 91166074

Exhibit 2 to

**APPLICANT'S BRIEF IN REPLY TO
OPPOSER'S RESPONSE TO
APPLICANT'S MOTION TO DISMISS
OR IN THE ALTERNATIVE
MOTION FOR SUMMARY JUDGMENT**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Phillip S. Figa

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

JAN 20 2004

GREGORY C. LANGHAM
CLERK

Civil Case No. 01-F-0349 (BNB)

BIG O TIRES, INC.,

Plaintiff,

v.

BIGFOOT 4X4, INC., and
VULCAN CHAIN CORPORATION, INC.,

Defendants,

and

VULCAN CHAIN CORPORATION, INC.,

Cross-Claimant,

v.

BIGFOOT 4X4, INC.,

Cross-Defendant.

ORDER REGARDING MAGISTRATE JUDGE'S RECOMMENDATION

This matter comes before the Court on the Recommendation of the Magistrate Judge entered on November 10, 2003, which recommends granting plaintiff's Motion to Enforce Settlement Agreement (Dkt. #176) filed June 13, 2003. In that Recommendation, the Magistrate Judge made findings of facts and entered conclusions of law following an evidentiary hearing he conducted on October 1, 2003. The purpose of the hearing, as this Court understands the record, was to determine whether the parties agreement to settle the case included language defining the term

"vehicle replacement parts" as that term was contemplated being used in a final order and injunction of the Court, or whether the term was to be used without a definition. The Magistrate Judge determined that the parties agreement to settle was reached without explicitly defining the term "vehicle replacement parts" in the final order. He further found that the term "vehicle replacement parts" to be clear and unambiguous, without requirement for further definition to be understood. The Magistrate Judge appended to his Recommendation a proposed Final Order and Injunction on Consent which he recommended for entry by this Court. The form of the proposed Final Order and Injunction on Consent is substantially the same as that attached to Plaintiff's Reply to Defendant Bigfoot 4x4's Confession of Motion to Enforce Settlement, filed on June 24, 2003. The Magistrate Judge recommended that this Final Order and Injunction be entered by this Court. This Court understands the Magistrate Judge's Recommendation to be relating to a dispositive matter and therefore submitted pursuant to F.R.CivP. 72(b).

On November 25, 2003, after the Magistrate Judge entered his Recommendation, Defendant Bigfoot 4x4 filed an Objection To Recommended Form of Order. This document does not contain "specific, written objections to the proposed findings" pursuant to F.R.Civ.P. 72(b). Rather, the document merely states that paragraphs 2, 3 and 5 of the proposed order (the Final Order and Injunction on Consent) together with the exhibits appended to that order, were never agreed upon by the parties and therefore are not properly included in the final order. On December 4, 2003, plaintiff filed a response to this Objection.

In an Order entered on December 8, 2003, the Magistrate Judge indicated that he would consider defendant's Objection as a motion to reconsider. He denied the motion to reconsider stating that the proposed form of injunction was submitted as an exhibit to plaintiff's reply in support of its motion to enforce settlement agreement in June 2003 as noted above, and that "[a]t no point thereafter did Bigfoot 4x4 raise any objection to or otherwise address the specific terms of the proposed form of injunction now being objected to in its Motion for Reconsideration. To the contrary, Bigfoot 4x4 limited itself to arguing that the parties had agreed to define 'vehicle replacement parts' or perhaps to arguing that the term needed to be defined if the settlement agreement was to be sufficiently specific so as to be enforceable." (Order, at 2). The Magistrate Judge concluded that the form of injunction submitted with his Recommendation accurately reflects the agreement of the parties and contains such terms as are necessary to effectuate the agreement of the parties, and therefore denied what he described as the motion to reconsider.

More than 30 days have elapsed since the Magistrate Judge's Recommendation of November 10, 2003 and since his order of December 8, 2003, and no objection has been filed by any party with this Court. This Court will not review *de novo* the findings of the Magistrate Judge or his conclusions of law as set forth in the recommendation of November 10, 2003. This Court accepts the findings, conclusions and recommendation of the Magistrate Judge that the form of injunction attached as an appendix to his order of November 10, 2003 reflects the agreement of the parties and should be entered.

This Court further notes that the objection filed by Defendant Bigfoot 4x4 on November 25, 2003 objects to three specific paragraphs contained in the proposed

Final Order and Injunction attached to the Magistrate Judge's recommendation, namely paragraphs 2, 3 and 5. These three paragraphs relate, essentially to plaintiff's ownership of the trademark at issue (§ 2), to the validity of plaintiff's registrations of the trademark (§ 3), and to the rule that use of the mark which violates the injunction would constitute an infringement of the mark (§ 5). As the Magistrate Judge correctly found, each of these three paragraphs was included in the proposed injunction attached to plaintiff's reply filed on June 24, 2003 and Defendant Bigfoot 4x4 had ample opportunity to object to these provisions, but did not do so. This Court further notes that language virtually identical to these three paragraphs is also contained in the Final Judgment and Injunction on Consent entered by Judge Babcock on July 3, 2003 in connection with the resolution of the claims against co-defendant Vulcan Chain Corporation, Inc. (see paragraphs 2, 3 and 5 of that Final Judgment and Injunction on Consent). Thus, this Court is satisfied that the language of the three paragraphs was not only agreed to by the parties, but also that the language properly represents the facts and law applicable to this case.

For all the reasons set forth above, this Court ACCEPTS the Recommendation of the Magistrate Judge entered on November 10, 2003 and his Order of December 8, 2003.

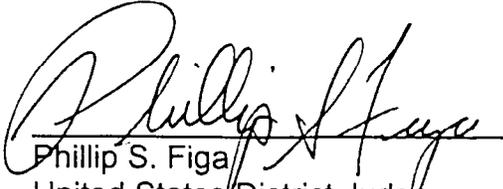
This Court GRANTS plaintiff's motion to enforce settlement agreement (Dkt. # 176) and DENIES defendant's Objection filed November 25, 2003 (Dkt. # 208).

This Court enters the Final Order and Permanent Injunction on Consent attached hereto and directs the Clerk of Court to take such steps as are necessary to enter the Final Order and Permanent Injunction, to release the bond posted by plaintiff, and to

dismiss any remaining matters in this case, each party to pay its own costs and attorneys fees.

DATED: January 20, 2004.

BY THE COURT:


Phillip S. Figa
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE

Civil Case No. 01-F-349 (BNB)

The undersigned certifies that a copy of the foregoing **Order Re Magistrate Judge's Recommendation** was served on January 20, 2004, by:

(X) delivery to:

Jane Michaels, Esq.
Timothy P. Getzoff, Esq.
Holland & Hart
D. C. Box 6

Magistrate Judge Boyd N. Boland

(X) depositing the same in the U.S. Mail, postage prepaid, addressed to:

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GREGORY C. LANGHAM, CLERK

By: 
Deputy Clerk/Secretary