

ESTTA Tracking number: **ESTTA439115**

Filing date: **11/02/2011**

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

Proceeding	92048118
Party	Plaintiff Jack Richeson & Co., Inc.
Correspondence Address	PAUL W KRUSE BONE MCALLESTER NORTON PLLC 511 UNION STREET, SUITE 1600 NASHVILLE, TN 37219 UNITED STATES trademarks@bonelaw.com
Submission	Other Motions/Papers
Filer's Name	Paul W. Kruse
Filer's e-mail	trademarks@bonelaw.com
Signature	/Paul W. Kruse/
Date	11/02/2011
Attachments	Request to Resume Action (00674158).PDF ( 3 pages )(20299 bytes ) final judgement against select export (00674159).PDF ( 2 pages )(131610 bytes ) denial of attempt to alter final judgment (00674160).PDF ( 18 pages )(532747 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Jack Richeson & Co., Inc.,	)	
	)	
Petitioner,	)	
	)	Cancellation No. 92048118
v.	)	
	)	Reg. No. 2,619,642
Select Export Corp. dba Trident,	)	
	)	
Registrant.	)	
	)	
Attorney Ref. No. 002763-060801	)	

**MOTION TO RESUME ACTION**

Box TTAB NO FEE  
Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, Virginia 22313-1451

Sir:

In response to the Board's order of June 9, 2011, Jack Richeson & Co., Inc. requests that the Board resume action on this cancellation proceeding and cancel Reg. No. 2,619,642 as per the now final determination of the civil action which occasioned the previous suspension of this proceeding. Copies of the court orders are submitted herewith, incorporated herein and made of record hereby.

Please direct all communications to the undersigned at (615) 238-6300 or [trademarks@bonelaw.com](mailto:trademarks@bonelaw.com).

Jack Richeson & Co., Inc.

A handwritten signature in black ink, appearing to read 'P. Kruse', written over a horizontal line.

By: \_\_\_\_\_

Name: Paul W. Kruse

Title: Attorney

Date: November 2, 2011

Submitted by:

Bone McAllester Norton PLLC  
511 Union Street  
Suite 1600  
Nashville, Tennessee 37219

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on Registrant's attorney, Cheryl Meide with an address at Meide Law Firm, P.A., Corners at Deerwood 7545 Centurion Parkway, Suite 201, Jacksonville, Florida 32256, via first class mail, postage prepaid, today November 2, 2011.

A handwritten signature in black ink, appearing to be 'P. Kruse', written over a horizontal line.

By: \_\_\_\_\_

Name: Paul W. Kruse

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-80526-CIV-DIMITROULEAS

SELECT EXPORT CORP., a Florida  
corporation,

Plaintiff,

vs.

JACK RICHESON, et al.,

Defendant.

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Magistrate Judge Snow

**FINAL JUDGMENT**

THIS CAUSE is before the Court upon the Parties' Stipulation of Judgment as to Jack Richeson & Co., Inc.'s Counterclaim for Damages Pursuant to 15 U.S.C. § 1120 [DE 225-1] and Defendants' Motion for Summary Judgment [DE 128], which the Court granted in its May 5, 2011 Order. The Court has carefully considered the Stipulation, the record in this case, and is otherwise fully advised in the premises. Pursuant to Federal Rule of Civil Procedure 58(a), the Court enters this separate final judgment.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Joint Stipulation [DE 225-1] is hereby **APPROVED**;
2. Judgment is hereby entered in favor of Jack Richeson & Co., Inc. in the amount of \$375,000.00 on Count III of its Counterclaim. This judgement shall be deemed satisfied by Select Export Corp.'s payment of \$150,000.00 to Jack Richeson & Co., or its counsel's trust account, on or before May 20, 2011;
3. Select Export Corp. hereby waives its right to appeal, and shall not appeal the final judgment;

4. Judgment is hereby entered in favor of Jack Richeson & Co., Inc. on Count I and Count II of its Counterclaim;
5. Trademark Reg. No. 2,619,642 is hereby **CANCELLED**;
6. It is **DECLARED** that Select Export Corp. is not the owner of and has no rights in and to the TRIDENT mark listed in Reg. No. 2,619,642;
7. The Clerk shall **DENY** any pending motions as moot;
8. The Clerk shall **CLOSE** this case.

**DONE AND ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida,  
this 9th day of May, 2011.

  
WILLIAM P. DIMITROULEAS  
United States District Judge

Copies furnished to:

Counsel of Record

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-80526-CIV-DIMITROULEAS/SNOW

SELECT EXPORT CORP.,

Plaintiff,

vs.

JACK RICHESON & CO., INC., et al.,

Defendants.

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REPORT AND RECOMMENDATION

**THIS CAUSE** is before the Court on the plaintiff's Verified Motion to Alter or Amend Final Judgment (DE 237), which was referred to United States Magistrate Judge Lurana S. Snow for report and recommendation. The defendants have responded to the motion and an evidentiary hearing was conducted on September 20 and 21, 2011. The motion is ripe for consideration and, for the reasons set forth below, it is recommended that the motion be **DENIED**.

**I. PROCEDURAL HISTORY**

On April 12, 2011, the plaintiff filed the instant complaint against defendant, Jack Richeson, individually, Jack Richeson & Co., and others for trademark infringement under the Lanham Act. (DE 1). An amended complaint was filed on August 18, 2010. (DE 31). Defendant Jack Richeson was deposed in October 2010, after which the plaintiff moved to voluntarily dismiss the complaint against him, individually. (DE 72). On October 26, 2010, this Court entered an order dismissing with prejudice the case against defendant Jack Richeson, individually. (DE 73). On February 11, 2011, the Court granted defendant Trident Industria De Preciso Ltd.'s Motion to Dismiss for Lack of Jurisdiction Amended Complaint. (DE 147).

The amended complaint alleges that the remaining defendants infringed and were continuing to infringe on the "TRIDENT" mark, and were willfully attempting to misappropriate the "vast goodwill" associated with the "TRIDENT" mark and to cause consumer confusion as to the origin or sponsorship of their products. (DE 31 ¶¶ 25, 27, 35, 37). Defendant Jack Richeson & Co. filed a counterclaim seeking a declaratory judgment that the plaintiff had no right to the "TRIDENT" mark and asking the Court to cancel the plaintiff's registration of the mark. (DE 38).

On February 11, 2011, counsel for the plaintiff filed a Motion to Withdraw as Attorney. (DE 145). The undersigned conducted a hearing on the motion on February 24, 2011. On that date, a notice of appearance as counsel for the plaintiff was filed by Kevin Fabrikant, Esq., and prior counsel's Motion to Withdraw was granted. (DE 156-158). On April 21, 2011, prior counsel for the plaintiff filed a retaining lien "against any and all files, papers documents or otherwise in his possession related to Select Export Corporation," which would be released "upon satisfaction of all outstanding invoices for attorneys' fees and costs." (DE 200).

On February 25, 2011, the Court scheduled trial for Monday, May 9, 2011, with calendar call on Friday, May 6, 2011. (DE 159). On May 5, 2011, the Court granted the defendants' Motion for Summary Judgment, dismissing with prejudice all counts of the amended complaint. The Order Granting Summary Judgment also entered judgment in favor of defendant, Jack Richeson & Co., on both counts of its counterclaim, and cancelled the plaintiff's registered trademark. (DE 221).

On May 6, 2011, calendar call was conducted on the defendants' counterclaim, with trial to proceed on May 9, 2011. Based on the order granting summary judgment on the counterclaim, the only issue remaining for trial was the defendant's claim for damages, attorney's fees and costs. Later, on May 6, 2011, the parties filed a Stipulation for Entry of Final Judgment. (DE 225). On

May 9, 2011, the Court entered its Final Judgment, approving the stipulation and entering judgment in favor of Jack Richeson & Co., Inc., in the amount of \$375,000. The order further provided that the judgment could be satisfied by payment by the plaintiff of \$150,000, if said payment were made by May 20, 2011, and that the plaintiff waved its right to appeal the final judgment. Declaratory judgment was entered that the plaintiff is not the owner of and has no rights in the "TRIDENT" mark, and the mark was canceled. (DE 227).

On June 6, 2011, a Stipulation for Substitution of Counsel was filed, substituting Michael J. Winer as counsel for the plaintiff. (DE 234). On the same day, the plaintiff filed a Motion to Alter or Amend Judgment. (DE 235). A corrected Motion to Alter or Amend Judgment was filed the following day. (DE 237). The plaintiff asks the Court to vacate the Final Judgment entered against it on the ground that prior counsel, Mr. Fabrikant, was not authorized to enter into the Stipulation for Entry of Final Judgment. Both parties requested an evidentiary hearing on the issues raised by the Motion.

## **II. EVIDENCE PRESENTED**

At the hearing on the instant motion, Kevin Fabrikant, Esq., testified that throughout the time of his representation of the plaintiff, he was a member of the Florida Bar and the federal bar of this Southern District of Florida. All of Mr. Fabrikant's dealings with the plaintiff corporation were with its principal, Herbert Moebius. Mr. Fabrikant stated that on May 5, 2011, he informed Mr. Moebius that he had lost the motion for summary judgment and all that remained for trial was the determination of damages due the defendant on its counterclaim. Mr. Fabrikant recalled telling Mr. Moebius that the Court had found that the Trident trademark had been obtained either by fraud or by misrepresentation, but the attorney did not remember which of the two terms he used. Mr.

Fabrikant stated that neither Mr. Moebius nor his father requested a copy of the Court's order on summary judgment, and that he did not provide either of them with a copy.

According to Mr. Fabrikant, he discussed with Mr. Moebius the possibility of resolving the case by stipulation. Mr. Moebius told Mr. Fabrikant that he was very stressed out and just wanted to get the case over with. Mr. Moebius explained that he had made very little money during the past several years and had already discussed with a bankruptcy lawyer filing for corporate bankruptcy. Mr. Fabrikant told Mr. Moebius that he was not sure of the amount which the plaintiff would have to pay the defendants, but predicted that it would be a substantial number. Mr. Moebius orally authorized Mr. Fabrikant to negotiate a stipulated settlement, but no written authorization was obtained.

Mr. Fabrikant testified that he attended calendar call the following morning, May 6, 2011. The parties told United States District Judge William P. Dimitrouleas that they were attempting to reach a settlement. Judge Dimitrouleas instructed the lawyers to notify the court by 3:00 p.m. that day if a settlement had been reached. Mr. Fabrikant surmised that the court wanted sufficient time to cancel the jury for the following Monday.

Mr. Fabrikant stated that on the morning of May 6, counsel for the defendants had offered to stipulate to judgment in the amount of \$450,000. Mr. Fabrikant relayed this number to Mr. Moebius. Mr. Moebius did not instruct him to stop negotiations. Mr. Fabrikant got the impression that Mr. Moebius did not care about the amount of the judgment because he was going to file for bankruptcy. Nevertheless, Mr. Fabrikant offered to negotiate for a lower amount.

Mr. Fabrikant recalled that he had at least four conversations with Mr. Moebius on May 6, during which they discussed the progress of negotiations. During one of these conversations, Mr.

Fabrikant read the terms of the proposed stipulation to Mr. Moebius. Mr. Fabrikant's associate, Sahar Awal, Esq., listened to the conversation via speaker phone. During one of the conversations on May 6, Mr. Fabrikant told Mr. Moebius that he had made a counter-offer to the defendants of \$300,000, but he believed that the final number would be halfway between \$300,000 and \$450,000. Mr. Moebius agreed to the amount.

Email records reveal that counsel for the defendants sent a proposed stipulation to Mr. Fabrikant at 2:52 p.m. on May 6, 2011. (Defendants' Ex. 2). Mr. Fabrikant's counteroffer of \$300,000 was made at 3:42 p.m. (Defendants' Ex. 3). At 3:49 p.m., counsel for the defendant offered to split the difference and make the amount \$375,000. (Defendants' Ex. 4). Mr. Fabrikant agreed to this amount at 4:03 p.m. (Defendant's Ex.5). At 4:09 p.m., Mr. Fabrikant electronically signed the stipulation and emailed it to defendants' counsel. Mr. Fabrikant added a provision to the stipulation that all pending motions were to be deemed moot. At 4:15 p.m., defense counsel acknowledged that the addition was acceptable, but requested Mr. Fabrikant to hand-sign the stipulation and either scan it or fax it back, which Mr. Fabrikant did at 4:18 p.m. (DE 267-1, Ex. 10; Defendants' Ex. 6). The parties stipulated at the hearing that the settlement stipulation was filed with the Court at 4:42 p.m. on May 6, 2011.

Mr. Fabrikant did not send Mr. Moebius copies of his email correspondence with defense counsel or a copy of the signed stipulation. At 4:08 p.m., Mr. Moebius sent an email to Mr. Fabrikant asking Mr. Fabrikant to "please E-mail the case decision so that I can send it to the bankruptcy lawyer." (Defendants' Ex. 7). Mr. Fabrikant understood this to refer to the bankruptcy attorney's request for a copy of the final judgment. It did not occur to Mr. Fabrikant that Mr. Moebius was referring to the order on summary judgment because the bankruptcy attorney had told

Mr. Fabrikant that he needed a judgment..

Shortly before 5 p.m. on May 6, Mr. Fabrikant received an email from Ms. Awal indicating that Mr. Moebius had some issues with the stipulation. According to Mr. Fabrikant, the email he received from Ms. Awal was the first indication he had that Mr. Moebius had any concerns about the stipulation which had been negotiated. Mr. Fabrikant, who was subpoenaed by counsel for the defendants, did not bring that email to the hearing on the instant motion or to his deposition. He testified that the subpoena to the deposition asked for communications between Mr. Fabrikant's law firm and Mr. Moebius, not between Mr. Fabrikant and members of his firm. The subpoena issued for Mr. Fabrikant to appear as a witness at the hearing on the instant motion was not a subpoena *duces tecum*.<sup>1</sup>

Mr. Fabrikant testified that he was prepared to proceed to trial on May 9, 2011 if the case did not settle. Mr. Fabrikant acknowledged that he had not subpoenaed any witnesses for trial, but stated that Mr. Moebius had assured him that the witnesses would attend voluntarily. The primary witnesses for the plaintiff were Mr. Moebius and his father.

Mr. Fabrikant stated that he was authorized to settle the case by Mr. Moebius, with whom he was in constant contact throughout the negotiations. Mr. Moebius told Mr. Fabrikant that he

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<sup>1</sup> Subsequent to the deposition, counsel for the plaintiff requested a copy of the email, to which Mr. Fabrikant objected on the ground that it was covered by the work product privilege. Thereafter, Mr. Moebius executed a written waiver of the privilege and again requested a copy of the email. Mr. Fabrikant did not produce it, and testified to his position that the attorney work product privilege must be waived by the attorney, not the client. Counsel for the plaintiff did not seek a court ruling on the privilege issue and did not issue a subpoena *duces tecum* to Mr. Fabrikant directing him to bring a copy of the email to the hearing on the instant motion. Plaintiff's counsel explained this omission by stating that he assumed Mr. Fabrikant would bring the email to the hearing because the plaintiff had waived the privilege and had requested a copy of the email.

wanted to avoid the stress, time and expense of a trial, as well as the inconvenience to witnesses. However, if Mr. Moebius had instructed Mr. Fabrikant to cease settlement negotiations, he was prepared to proceed to trial.

Following Mr. Fabrikant's testimony, both parties read into the record portions of the deposition of Sahar Awal, Esq., and requested that the undersigned consider the entire deposition. (DE 261-1). Ms. Awal is no longer employed as an associate of Mr. Fabrikant, having left the firm voluntarily approximately one month prior to the hearing.

Ms. Awal testified in her deposition that Mr. Fabrikant had several conversations with Mr. Moebius after the calendar call on May 6, 2001. Ms. Awal was present for one of these conversations, during which Mr. Fabrikant read the stipulation to Mr. Moebius and asked Mr. Moebius if he was agreeable to the terms. Mr. Moebius made some inquiries into the terms of the stipulation and Mr. Fabrikant answered his questions. Mr. Moebius then said he agreed to the terms and expressed no objection. Ms. Awal stated that Mr. Moebius was aware that Mr. Fabrikant would be conducting further negotiations with defense counsel. During that conversation, Mr. Moebius never stated that he would not agree to any stipulation without first reading the Court's order granting summary judgment. *Id.* at 7-9, 28-29.

Ms. Awal further testified that Mr. Moebius never told Mr. Fabrikant that he was not authorized to accept an offer for stipulation on Select Export's behalf. She stated that Mr. Moebius expressed that he was ready to get this over with and do whatever needed to be done; he just wanted to put the matter behind him. Ms. Awal testified that Mr. Fabrikant told Mr. Moebius that the stipulation provided that Mr. Moebius would waive his right to appeal and there would be no trial on Monday. Ms. Awal recalled that a monetary amount and a date also were mentioned, but she did

not recall the specific amount or date. She did recall that Mr. Moebius indicated that it did not matter what the price was, because he was tired and just wanted to get it past him, and he would be ok with it. Id. at 9-11, 29-30.

Ms. Awal related that Mr. Moebius called the office some time after 4:00 p.m. on May 6 and told her that he was having second thoughts about the settlement stipulation and that he needed to speak to Mr. Fabrikant. She did not recall if Mr. Moebius explicitly stated that he did not want to enter into the stipulation, but he did indicate he was not sure if he wanted to go forward with it. Ms. Awal did not remember the exact time of the call, but stated that it was within minutes of the stipulation being filed. Ms. Awal told Mr. Moebius that the settlement stipulation was not under her control, but she would relay the message to Mr. Fabrikant and would have Mr. Fabrikant contact Mr. Moebius. Id. at 12-13, 32-34.

Ms. Awal called Mr. Fabrikant, who was not in the office, but he did not answer his phone. She then sent Mr. Fabrikant an email to let him know that Mr. Moebius had called. Ms. Awal did not state in the email that Mr. Moebius was having second thoughts about the settlement, but did say that Mr. Moebius had called about the settlement stipulation and asked Mr. Fabrikant to please call Mr. Moebius back. However, at that point the stipulation already had been filed. Ms. Awal knew this because she received email notifications when anything was filed in any of the firm's cases. She stated that the call from Mr. Moebius had come minutes before the stipulation was filed, and that by the time Mr. Fabrikant called her back it had been filed. Ms. Awal testified that she did not believe that there was any way she could have prevented the defendants' firm from filing the stipulation after she spoke to Mr. Moebius, because the stipulation was filed within minutes of that conversation. Id. at 35-37, 40.

Mr. Moebius took the stand on behalf of Select Export, testifying that on May 5, 2011, Mr. Fabrikant told Mr. Moebius and his father that the defendants' motion for summary judgment had been granted. According to Mr. Moebius, Mr. Fabrikant did not say anything about the court's finding that fraud had been committed. Mr. Moebius stated that he and his father both asked Mr. Fabrikant for a copy of the order granting summary judgment, and Mr. Fabrikant responded that he would email it to them. Mr. Moebius testified that Mr. Fabrikant told him that the case was a small one and that federal judges would not be interested in looking at it. Mr. Fabrikant also mentioned that the Brazilians had used "Trident" on their letterhead. Mr. Moebius tried to look up the order on the PACER system, but was unable to locate his password to access the system until 8:00 p.m. on the night of May 6, 2011.

Referring to a printout of his metroPCS cellular telephone log (Plaintiff's Ex. 1), Mr. Moebius stated that he spoke to Mr. Fabrikant at 2:58 p.m. on May 6, 2011. It was during this conversation that Mr. Moebius learned for the first time that the defendants had offered to settle for \$450,000. According to Mr. Moebius, he told Mr. Fabrikant that he would not pay them a dollar because they owed *him* money. Also, Mr. Moebius told his lawyer that he would not make any decisions without seeing the order on summary judgment. Mr. Moebius testified that Mr. Fabrikant then suggested that he file for bankruptcy so he could go on with his life and not have to pay anything. Mr. Moebius did not believe this was true, and after this conversation with Mr. Fabrikant, he attempted to contact Mary Stockman, a lay person who had been advising him on bankruptcy matters.

Mr. Moebius stated that when he was unable to reach Ms. Stockman, he contacted Mr. Fabrikant to tell him this and to inform Mr. Fabrikant that he did not intend to sign the stipulation.

Mr. Fabrikant responded that Mr. Moebius did not have to sign the document, that Mr. Fabrikant could sign it. Mr. Moebius stated that at that point, he did not believe that Mr. Fabrikant was representing his interests.

Mr. Moebius found a bankruptcy attorney on the internet, with whom he spoke. Mr. Moebius testified that he told the bankruptcy attorney that the attorney should speak to Mr. Fabrikant and that he should get a copy of the order on summary judgment. Mr. Moebius also emailed Mr. Fabrikant requesting a copy of that order for the bankruptcy lawyer. Mr. Moebius conceded that the tone of that email, sent at 4:08 p.m., was very polite and said nothing about his refusal to sign the settlement stipulation. Mr. Moebius explained that he thought he had made it clear by telephone that Mr. Fabrikant was not to sign the stipulation. Also, Mr. Moebius believed that his own signature on the stipulation was required.

Nevertheless, at 4:36 p.m., Mr. Moebius called Mr. Fabrikant's office. He spoke to Ms. Awal, who stated that Mr. Fabrikant was not in the office. Mr. Moebius instructed her to call Mr. Fabrikant and tell him not to sign anything. At 4:52 p.m., Mr. Fabrikant called Mr. Moebius and told him that the stipulation had been filed.

Mr. Moebius testified that Mr. Fabrikant was not ready to proceed to trial on May 9, 2011, because he did not have all the documents from the plaintiff's prior counsel. Also, Mr. Fabrikant had not subpoenaed any witnesses. Instead, he told Mr. Moebius to call the witnesses on the phone, but Mr. Moebius did not believe that a telephone call would ensure their appearance. Mr. Moebius also testified that he had discussed an appeal of the summary judgment order with Mr. Fabrikant, but had told Mr. Fabrikant that he would decide whether to appeal after he had read the order.

Based on the metroPCS log, Mr. Moebius testified to the following communications with Mr.

Fabrikant's office:

(a) 9:15 a.m. (41 seconds): Mr. Moebius called Mr. Fabrikant's office, Mr. Fabrikant was in court;

(b) 10:35 a.m. (8 minutes, 43 seconds): Mr. Fabrikant called Mr. Moebius to discuss an appeal, said nothing about the calendar call;

(c) 12:08 p.m. (11 minutes, 11 seconds): Mr. Fabrikant called Mr. Moebius;

(d) 2:58 p.m. (9 minutes, 20 seconds): Mr. Fabrikant called Mr. Moebius to discuss the \$450,000 offer and Mr. Moebius tells him he will not agree; Mr. Fabrikant suggests bankruptcy;

(e) 3:20 p.m. (21 minutes, 19 seconds): Mr. Moebius called Mr. Fabrikant;

(f) 4:03 p.m. (1 minute, 9 seconds): Ms. Awal called Mr. Moebius, but Mr. Moebius denies that she told him that the defendant had agreed to settle for \$375,000;

(g) 4:36 p.m. (6 minutes, 25 seconds): Mr. Moebius called Mr. Fabrikant, but spoke to Ms. Awal, and

(h) 4:52 p.m. (4 minutes, 3 seconds): Mr. Fabrikant called Mr. Moebius.

At 4:58 p.m. Mr. Moebius sent an email to Mr. Fabrikant rejecting the stipulated settlement and stating that Mr. Moebius was confirming a telephone conversation with Mr. Fabrikant "before 4 p.m. today." (Plaintiff's Ex. 2). At 6:27 p.m., Mr. Moebius sent an email to counsel for the defendants stating that he was rejecting the stipulation because Mr. Moebius still had not received from Mr. Fabrikant the order granting summary judgment. (Plaintiff's Ex. 3).

In response to a question posed by the undersigned, Mr. Moebius stated that he understood the relief sought in the instant motion to be a first step toward vacating the order granting summary judgment.

### III. FINDINGS OF FACT

Based on the testimony and other evidence presented at the hearing, the undersigned finds as facts:

(1) On May 5, 2011, Mr. Moebius authorized Mr. Fabrikant to negotiate a stipulated settlement of the instant case on behalf of the plaintiff corporation.

(2) At some point after the calendar call and prior to 4:09 p.m. on May 6, 2011, Mr. Fabrikant read to Mr. Moebius the terms of the proposed settlement, to which Mr. Moebius agreed.

(3) At 4:09 p.m., Mr. Fabrikant electronically signed the stipulation, after inserting an additional provision that pending motions would be deemed moot, and emailed it to defense counsel.

(4) At 4:15 p.m., counsel for the defendants agreed to all stipulation terms, but requested that Mr. Fabrikant hand-sign the document.

(5) At 4:18 p.m. Mr. Fabrikant hand-signed the stipulation and sent it to defense counsel.

(6) At 4:36 p.m. Mr. Moebius called Mr. Fabrikant's office and told Ms. Awal that he was having second thoughts about the stipulation and wanted to speak to Mr. Fabrikant;

(7) Following this telephone call, Ms. Awal called Mr. Fabrikant, but receiving no answer, sent an email to Mr. Fabrikant stating that Mr. Moebius had called about the stipulation and asking Mr. Fabrikant to call Mr. Moebius.

(8) At 4:42 counsel for the defendants filed the stipulation with the Court.

(8) Shortly after 4:42 p.m., Mr. Fabrikant spoke to Ms. Awal and learned that Mr. Moebius was not sure he wanted to proceed with the settlement.

(9) At 4:52 p.m., Mr. Fabrikant called Mr. Moebius and advised him that the settlement had been filed.

(10) At 4:58 p.m., Mr. Moebius sent an email to Mr. Fabrikant stating that he rejected the stipulation and wanted to proceed to trial.

To the extent that these findings conflict with the testimony of Mr. Moebius, the undersigned rejects that testimony as incredible and unworthy of belief. Mr. Moebius' insistence that he never authorized Mr. Fabrikant to negotiate a settlement, and that he made this clear during all telephone conversations with Mr. Fabrikant on May 6, 2011, conflicts not only with the testimony of Mr. Fabrikant, but with the deposition testimony of Ms. Awal. Ms. Awal is no longer employed by Mr. Fabrikant's law firm and, of all the witnesses, she has the least interest in the outcome of the case. Accordingly, the undersigned finds Ms. Awal's testimony to be fully credible.

Mr. Moebius' purported outrage at the settlement offer and belief that Mr. Fabrikant was no longer representing the interests of Select Export is belied by the email sent by Mr. Moebius to Mr. Fabrikant at 4:08 p.m. That email politely requested Mr. Fabrikant to send a copy of the case decision to the bankruptcy attorney and made no mention of the settlement stipulation, which Mr. Fabrikant supposedly had just threatened to sign in defiance of Mr. Moebius' orders. Moreover, based on Mr. Moebius' demeanor, manner of testifying and interest in vacating the final judgment as a first step toward overturning the order on summary judgment, the undersigned finds his testimony to be self-serving, and credible only to the extent that it was corroborated by other record evidence. In particular, the portion of Mr. Moebius' email to Mr. Fabrikant at 4:58 p.m. which purports to confirm a conversation "before 4 p.m." is rejected as self-serving, inconsistent with other evidence and unworthy of belief.<sup>2</sup>

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<sup>2</sup> Counsel for the plaintiff emphasizes Mr. Fabrikant's failure to produce the email he received from Ms. Awal on May 6, 2011, after Mr. Moebius called to voice second thoughts about the stipulation. Counsel asks the Court to infer that the email would establish that Mr.

#### IV. RECOMMENDATIONS OF LAW

The plaintiff seeks to vacate the Final Judgment entered in this cause pursuant to Fed. R. Civ. P. 59(e), which permits a court to alter, amend or vacate a judgment. The rule sets forth no specific grounds for relief, and the decision of whether to grant the motion is within the discretion of the trial judge. American Home Assurance Co. v. Glenn Estess & Associates, Inc., 763 F.2d 1237, 1238-39 (11<sup>th</sup> Cir. 1985). A motion to vacate judgment under Rule 59(e) may be granted in order “to correct a clear error of law or prevent manifest injustice.” Aird v. United States, 339 F.Supp.2d 1305, 1312 (S.D. Ala. 2004). However, “[e]ven when a movant has stated legally cognizable grounds for relief from a final judgment, such relief is granted rarely and only in extraordinary circumstances,” after the court has carefully balanced “the interest in finality, the interest in conservation of judicial resources, the interest in adjudication on the merits, and the interest that justice be done.” Jacobs v. Electronic Data Systems Corp., 240 F.R.D. 595, 599 (M.D. Ala. 2007).

\_\_\_\_\_ A district court also has discretion to relieve a party from a stipulation, settlement or consent decree to prevent manifest injustice. Morrison v. Genuine Parts Co., 828 F.2d 708, 710 (11<sup>th</sup> Cir. 1987)(stipulation)(citing Central Distributors, Inc. v. M.E.T., Inc., 403 F.2d 943, 945 (5<sup>th</sup> Cir. 1968)), cert. denied, 484 U.S. 1065 (1988); Oatman v. Potter, 92 Fed.Appx. 133, 139 (6<sup>th</sup> Cir.

\_\_\_\_\_ Fabrikant knew that Mr. Moebius had refused to enter into a stipulation prior to the time that the stipulation was filed. However, the subpoena *duces tecum* issued by counsel for the defendants to Mr. Fabrikant for his deposition appearance did not extend to communications between Mr. Fabrikant and his associate. Subsequent to the deposition, Mr. Fabrikant refused to produce the email to plaintiff’s counsel on the basis of the work product privilege, and did not produce the email even after receiving from Mr. Moebius a written waiver of the privilege. Counsel for the plaintiff did not seek a ruling from the court on the privilege question, and did not issue a subpoena *duces tecum* to Mr. Fabrikant directing him to bring the email to the hearing on the instant motion. Therefore, the undersigned finds that the facts equally support the inference that the email in question would be detrimental to the plaintiff’s argument.

2004)(stipulation); Vital Pharmaceuticals, Inc. v. S.A.N. Nutrition Corp., 2007 WL 1655421 at \*4 (S.D. Fla. June 6, 2007)(settlement); Valpak Direct Marketing Systems, Inc. v. Hyde, 2006 WL 1982877 at \*1 (M.D. Fla. July 13, 2006)(consent decree).\_\_

In the instant case, the plaintiff seeks to vacate the Final Judgment, which was entered pursuant to the parties' Stipulation for the Entry of Final Judgment, on the ground that counsel for the plaintiff was not authorized to enter into the stipulation. In this Circuit, "state law governs the scope of an attorney's authority to enter into a settlement agreement." Murchison v. Grand Cypress Hotel Corp., 13 F.3d 1483, 1485 (11<sup>th</sup> Cir. 1994). Under Florida law, the defendants, as the parties seeking to compel enforcement of the stipulated settlement, must demonstrate that Mr. Fabrikant "had clear and unequivocal authority to enter into the settlement agreement." Id. at 1485 (citing Weitzman v. Bergman, 555 So. 2d 448, 449-50 (Fla. 4<sup>th</sup> DCA 1990) and Vantage Broadcasting Co. v. WINT Radio, Inc., 476 So.2d 796, 798 (Fla. 1<sup>st</sup> DCA 1985)).

Some of the factors which will be considered in determining whether a client has given his lawyer clear authority to settle the case are:

- 1) whether the client knew his lawyer was in the process of negotiating a settlement;
- 2) whether and how many times the client met and spoke with his attorney while settlement negotiations were ongoing;
- 3) whether the client was present in the courtroom when the settlement was announced in open court;
- 4) whether the client immediately objected to the settlement; and
- 5) whether the client was an educated man who could understand the terms of the settlement agreement.

BP Products North America, Inc. v. Oakridge at Winegard, Inc., 469 F.Supp.2d 1128, 1135 (M.D. Fla. 2007)(citing Murchison, 13 F.3d at 1485-86). Additionally, courts have held that "the authority to negotiate the terms of a settlement agreement necessarily includes authority to enter into a binding agreement." Vital Pharmaceuticals, 2007 WL 1655421 at \*5. Finally, in Florida "[s]ettlement

agreements are favored by the courts as they are a means of resolving disputes without the necessity of a full trial, provided that the settlement is entered into fairly and in good faith by competent parties.” Levenson v. American Laser Corp., 438 So. 2d 179, 182 (Fla. 2d DCA 1983).

The undersigned finds that on May 5, 2011, Mr. Moebius clearly and unequivocally authorized Mr. Fabrikant to negotiate a settlement on behalf of the plaintiff. This is evidenced by the testimony of Mr. Fabrikant and the testimony of Ms. Awal, as well as by the telephone records of Mr. Moebius showing frequent conversations with Mr. Fabrikant on May 6, 2011 and the email sent by Mr. Moebius to Mr. Fabrikant at 4:08 p.m. on that date. The undersigned further finds that at 4:36 p.m., Mr. Moebius was re-considering whether to settle the case. However, a binding agreement had been reached by the parties at 4:15 p.m., when counsel for the defendants agreed to all terms of the settlement. This agreement was re-confirmed by Mr. Fabrikant at 4:18 p.m. when he transmitted his signed copy of the final stipulation to defense counsel. Mr. Moebius did not revoke Mr. Fabrikant’s authority to enter into the settlement until, at the earliest, the 4:52 p.m. telephone conversation with Mr. Fabrikant.

It is apparent that Mr. Moebius has become dissatisfied with the representation he received from Mr. Fabrikant, particularly in connection with his handling of the defendants’ motion for summary judgment, and that he hopes to vacate both the order on summary judgment and the final judgment entered in this cause. However, the undersigned notes that Mr. Fabrikant filed a detailed response, with exhibits, to defendants’ motion for summary judgment. Although that response failed to include a formal statement of material facts disputing the defendants’ statement of facts, the body of the response did dispute the facts asserted by the defendants in their motion. Moreover, the court considered the motion on its merits and credited only the facts that were supported by evidence.

There is nothing in the record to suggest that the inclusion of a statement of material facts in the plaintiff's response would have altered the Court's conclusion that the motion should be granted. In any event, such complaints are more properly raised in a malpractice action, and they do not provide a basis to set aside the Final Judgment in this case, which was entered pursuant to a valid stipulation reached by the parties.

The determination of whether a settlement agreement is enforceable is based on contract law. In making this determination, Florida courts employ an objective test. Robbie v. City of Miami, 469 So.2d 1384, 1385 (Fla. 1985). A settlement agreement will be enforced if it is "sufficiently specific and mutually agreeable on every essential element." Don L. Tullis and Associates, Inc. v. Bengel, 473 So.2d 1384, 1386 (Fla. 1<sup>st</sup> DCA 1985). Moreover, "the execution of the settlement documents [is] not a condition precedent to [a] settlement agreement, but rather a mere procedural formality." Boyko v. Ilardi, 613 So.2d 103, 104 (Fla. 3<sup>rd</sup> DCA 1993). Finally, as noted previously, "settlements are highly favored and will be enforced whenever possible." Robbie, 469 So.2d at 1385.

The record establishes that Mr. Moebius expressed his wish to end the litigation without a trial in order to save time and money, relieve his stress and avoid inconvenience to witnesses, and that he authorized Mr. Fabrikant to enter into a stipulated settlement. The record further establishes that Mr. Fabrikant read the terms of the proposed stipulation to Mr. Moebius, an experienced businessman, and that Mr. Moebius approved those terms. The stipulation became binding at 4:15 p.m. on May 6, 2011, when counsel for the defendants agreed to all terms proposed by plaintiff's counsel. Although Mr. Moebius appears to have changed his mind, this change occurred after the agreement of the parties became binding and enforceable. Therefore, the Final Judgment entered in this cause should not be vacated.

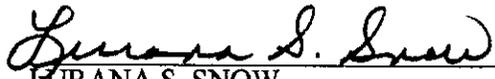
**V. CONCLUSION**

For the foregoing reasons, and being duly advised, it is hereby

**RECOMMENDED** that the plaintiff's Verified Motion to Alter or Amend Final Judgment (DE 237) be **DENIED**.

The parties shall have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, for consideration by the Honorable William P. Dimitrouleas, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1988), cert. denied, 488 U.S. 958 (1988); RTC v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993).

**DONE AND SUBMITTED** at Fort Lauderdale, Florida, this 12th day of October, 2011.

  
EURANA S. SNOW  
UNITED STATES MAGISTRATE JUDGE

Copies to:

All Counsel of Record