From: Todd Zucker
Sent: Thursday, November 19, 2015 12:22 PM
To: 'Wendy'
Cc: Michelle Bohreer; 'Sherri Evans'
Subject: Mediated Settlement Agreement
Attachments: Memo to Wendy.docx

Wendy: I have attached a memo that sets forth my view of the situation. Let's discuss after you have a chance to review. We have not heard back from Todd Frankfort or Allen Brady yet, but I think we do need to decide how to proceed.

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Wendy:

I feel like I need to give you, Michelle and Sherri my unadulterated observations and opinions about mediation and the Mediated Settlement Agreement so that you all can make an objective and informed decision about how you should proceed.

FACTS

The facts and circumstances as I understand them from my attendance and particpation at mediation, my prior meetings and discussions with you, as well as my conversation with the mediator, are as follows. From 10:00 a.m. until approximately 4:00, we tried to negotiate a buyout, but that did not pan out. During that time you did not complain about being hungry nor did you indicate that you were not feeling well. About 4:00, you had your head resting on your arms on the table, and I asked you if you were okay. You said you were tired. We talked about some mediations that go into the wee hours of the morning. You did not mention lack of food at the time or ask me to get you anything to eat. Trey did have snacks in the kitchen and in the room where the desserts were, and Robin had informed us both that they would remain available throughout the mediation. You did not mention any medical issues or concerns. You did not ask to stop the mediation.

Shortly before 5:00, you and Mike Johnston, without lawyers, went into the room with Trey Bergman to see if y'all could reach an agreement. You took a break shortly before 6:00, and you and the mediator indicated that the parties were making progress and wanted to continue. You started up again at approximately 6:00. Apparently before this session started, unbeknownst to me, you and Mike Johnston asked if you could have a cocktail. According to the mediator, the request was communicated to Todd Frankfort. You did not tell me you wanted a cocktail. I saw Todd Frankfort leaving in his car, and I texted him to see why he left. He said "To go get cocktails for our clients. Any requests?" I thought he was joking and asked for a large martini. About thirty minutes later, he and Allen Brady came into my mediation room with drinks in their hands. Although invited, I did not participate, and that never would even have crossed my mind to start drinking during a mediation.

Sometime between 7:00 and 8:00, Trey announced that y'all had reached a deal. We went into the large conference room, and you and Mike had drinks on the table in front of you. The tumblers were nearly full with Scotch and ice. I was under the impression at that time that you and Mike had just poured the drinks to celebrate reaching a deal. I understand from the mediator, however, that you and Mike had actually requested the alcohol, maybe during the break shortly before 6:00, and you each took a couple of sips, but that he requested that you refrain from further drinking until after you reached a final deal and could celebrate, and that you both agreed and did not consume any more alcohol during the discussions.

It was approximately 8:00 when Trey announced the terms of the agreement that you and Mike had reached. He went through the deal points. Afterwards, I told him that I needed to

discuss some things with you. You and I met in the smaller room and talked about some issues that I thought were deal breakers, and I believe I had five or six necessary modifications, two of which were deal breakers and the remainder of which were material and should not be a problem for Mike but needed to be addressed. When we were alone in our room you never mentioned being exhausted, fuzzy, unable to think, hungry or impaired in any way by alcohol or any medical condition. You did not request that we end mediation. I then discussed those issues with Trey and asked him how to approach the other side with the changes. He came back into the main room and announced that I had raised some issues and that he had some proposed solutions.

We continued the discussions, which included discussions between all parties, discussions between me and you, and discussions between me, Allen and Todd, some of which involved the mediator as well. During those discussions, you raised the issue of your attorney's fees. I mentioned that it was a significant addition to the deal you had announced and might blow the deal. Your response was that it was going to take several years for you to recoup your attorney's fees from the 4% royalty, but that you were okay with the deal if we had the long-term noncompete in place.

We concluded the mediation at approximately 10:30. Over a period of three and a half hours, you had something less than a full drink of Scotch, as far as I can tell. It made quite an impression on me, because I had never seen any alcohol consumed at any mediation I have attended, and I have certainly never had a client start drinking during discussions with the opposing party, and you had done so without my knowledge or consultation. My impression when I saw the two bottles of liquor was that Todd Frankfort had "cheaped out" on the Scotch, because he had bought a fifth of vodka but a smaller bottle of 10-year-old Scotch. The bottle was still pretty full when you carried it out of building after the mediation.

Trey and I were not drinking at all. At various times during the negotiations, I was interacting with you, and Trey was interacting with you. I did not observe any level of impairment whatsoever, and Trey did not either. He said that he has, on several occasions, instructed parties not to conclude a mediation when one party was too exhausted or was impaired. In your case, he said that you were effective during the negotiations because you were using the technique of getting Mike to agree to something, and then adding more things to which he agreed, and Mike was not forcing you to lay all of the deal points on the table before reaching agreement as to any of the points.

When you and I were interacting, you appeared to have every bit of your faculties, were speaking intelligently and were providing substantial input as to how to structure the deal. You did not ask me to stop the negotiations or the mediation. From 8:00 to 10:30, you did not appear to be what I would consider exhausted, or any more tired than any party at an all-day mediation. Instead, when we first came into the conference room where you and Mike were sitting, you both appeared to be relaxed and alert, and from that point until the time we all signed off on the settlement agreement, there was a fairly intense set of negotiations on the remaining points. During this time, we did not change the basic terms of the deal you had struck with Mike, but instead we concentrated on how to incorporate the five or six additional protections I wanted to add to the final agreement.

During this entire time period, I also don't believe you ever even came close to finishing the drink that was sitting on the table in front of you. By the end, from my observation, it was more than half full and was a mixture of Scotch and melted ice, as was Mike's.

Ultimately, the parties reviewed the agreement that Trey had prepared, added certain terms and made changes to certain language, and then signed the Mediated Settlement Agreement.

LEGAL PRINCIPLES

For the past week since the agreement was executed, you given "additive" reasons why you do not want to conclude the settlement. The last email you sent to Michelle raised concerning medical issues, and in your follow-up phone conversation with her you claimed you were not able to appreciate the consequences of your action, lacking the mental capacity necessary to enter into a contract on October 30. Your defense is that you did not have the mental capacity to enter into the agreement that evening, whether as a result of being exhausted, not having eaten, having consumed alcohol or having medical issues.

In terms of the legal defense of intoxication, the rule in Texas is that if a person is so intoxicated as to be non compos mentis, does not know what he is doing, and is deprived of his reason, there may be grounds for rescission. To afford grounds for avoiding a contract, however, the intoxication must be so excessive as to render the person incapable of exercising his judgment or understanding the nature of the agreement and the consequences of its execution. Equity will not interfere in behalf of one who is intoxicated to a less degree, though sufficiently so as to materially affect and interfere with his reasoning, judgment and will, his intoxication not having been procured or taken advantage of unfairly by the other party. *Portwood v. Portwood*, 109 S.W.2d 515, 524 (Tex. Civ. App. 1937, writ dism'd). It has been held that a less degree of intoxication than that required to absolutely invalidate a contract may serve as a basis for avoiding the same if the drunkenness was caused by the other party, or if he takes unfair advantage of it. This would involve questions of fraud and undue influence, however, and not those of capacity to execute the contract. *Dewitt v. Bowers*, 138 S.W. 1147, 1149 (Tex. Civ. App. 1911, no writ). We are not aware of any facts that support that Mike was "taking unfair advantage." Do you have a problem with alcohol that was known to Mike? If so, would Mike have known that you would accept alcohol if offered? Without this type of evidence, I do not believe an intoxication defense would prevail, and even with this evidence, there is no doubt in my mind that you were not intoxicated from alcohol. Also, if you do have a drinking problem and elect to raise it, that type of sworn testimony could be harmful in your divorce and in any issue with your pharmacy license.

Insofar as showing a lack of mental capacity, the principles may be summarized as follows. To establish mental capacity to contract, the evidence must show that, at the time of contracting, the person appreciated the effect of what the person was doing and understood the nature and consequences of his or her acts and the business he or she was transacting. *Mandell & Wright v. Thomas,* 441 S.W.2d 841, 845 (Tex. 1969). Mere mental weakness is not in itself sufficient to incapacitate a person; and mere nervous tension, anxiety, or personal problems do

not amount to mental incapacity to enter into contracts. 14 Tex. Jur. 3d Contracts § 41. Mental capacity, or lack thereof, may be shown by circumstantial evidence, including: (1) a person's outward conduct, "manifesting an inward and causing condition;" (2) any pre-existing external circumstances tending to produce a special mental condition; and (3) the prior or subsequent existence of a mental condition from which a person's mental capacity (or incapacity) at the time in question may be inferred. *See Bach,* 596 S.W.2d at 676. As a general rule, the question of whether a person, at the time of contracting, knows or understands the nature and consequences of her actions is a question of fact for the jury. *See Fox v. Lewis,* 344 S.W.2d 731, 739 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.).

MY OPINIONS

I personally believe it would be risky for you to repudiate the Mediated Settlement Agreement, and that it ultimately would prove to be a bad decision.

If you do repudiate, Mike's and Asyntria's legal remedy is to amend their pleadings to add a counterclaim for breach of the Mediated Settlement Agreement, and then file a motion for summary judgment seeking to enforce it, and ultimately have a trial on the issues if the Court does not grant summary judgment. I believe you ultimately will lose that fight, and in the process you will incur additional attorney's fees and you will also owe Johnston and Asyntria the attorney's fees they incur in connection with enforcing the agreement.

The evidence, circumstantial and direct, to be considered includes the following:

1. You were, in fact, tired around 3:00 and had your head in your hands on the table, and if you say you were exhausted, I take this at face value. From my observation, however, you were coherent and did not seem punch drunk. Just tired. I thought you were tired because we had been going at it since 10:00 a.m. That is not unusual at mediations.

2. Todd Frankfort, counsel for Johnston procured the alcohol, but you and Mike requested it. He told me he was getting cocktails for our clients, which I thought was a joke, and when I saw him and Allen with drinks in their hands, I did not know you and Mike were actually drinking.

3. While our communications regarding the substance of the agreement and mediation are privileged, my observations are not and if forced to testify, from my observations, you did not consume enough alcohol to become drunk, and that is based on both observing your glasses of Scotch, the level of Scotch remaining in the bottle when we left the mediation, the time period involved, and your demeanor during this time. If you were also drinking vodka, this might be different. I don't recall seeing the level of vodka in the bottle.

4. You did not mention any medical issues to me at the time, and you did not mention lack of food at any time.

5. Neither Trey nor I perceived you to be impaired at any point during the mediation.

6. The first time you raised any issues with the Mediated Settlement Agreement was November 4, four days after the mediation concluded. During that email, you did not mention impairment. You asserted that you wanted to add some terms to the settlement agreement.

7. When you responded to Michelle's email, you mentioned being exhausted and referred to the alcohol, but did not mention any medical issues. It was only on Sunday that you mentioned medical issues to Michelle.

8. At this time, we do not have any medical affidavits or diagnosis to support the medical incapacity.

9. You are a pharmacist and have an MBA.

My best analysis of the foregoing is that the judge or jury would think you exercised poor judgment by taking a few sips of alcohol; that you were not impaired to the point where either your lawyer or the mediator saw any issue regarding impairment; that the situation was such that not only did Trey and I not see any problem with impairment, we did not even see or observe anything that caused either of us to approach the other to discuss any issue of impairment; that it was improper for Todd Frankfort to purchase liquor for the parties (especially for my client without my clear consent) but that it was invited by the parties who are both adults with business experience; that there was no taking advantage of you by Mike, as it was not a situation where he plied you with alcohol while refraining from drinking himself, and there was no point where you were alone with Mike and his lawyers; that you were not impaired to the point where you were incapable of understanding what you were doing; and that you began having buyer's remorse several days after the mediation concluded.

Unfortunately, I think what would happen is that if you were to swear under oath that you did not understand what you were doing or the consequences, you might avoid summary judgment under the technical rules that govern Mike's ability to get your claims of incapacity thrown out on summary judgment, but ultimately, the trier of fact (judge or jury) would rule against you, finding that you were tired or even exhausted but not enough to meet the requirements for providing lack of capacity. I just don't think the jury is going to believe that if you were feeling incapacitated, you would have joined with Mike in asking for alcoholic beverages. That is not a logical reaction.

If it were a summary judgment, at least it would be a quick resolution, but if it goes to trial the attorney's fees would be considerable on both sides. I also don't think that they will engage in negotiations to add to the terms of the agreement, because in my opinion any attorney in their position would look at the facts and circumstances and advice Johnston that he will ultimately win and be entitled to collect attorney's fees.

In addition, you would be litigating mental capacity issues before the same judge who is presiding over the divorce action. I have no idea what the impact would be on the divorce, but I do believe the judge would be entirely unsympathetic as soon as she hears about alcohol having been consumed by the parties during the mediation, and that might spill over into your divorce

case. Likewise, any sworn testimony in this case, would be public record and could be used against you in a proceeding before any licensing board.

Maybe my opinions of the merits of your defense would change if you were to get an affidavit from a physician stating that you had a specific medical condition that resulted in your inability to have the faculties to ask me or Trey to terminate the mediation or to even raise the issues with us. But I frankly don't think it would change my belief about what transpired. I was there, and I interacted with you from approximately 8:00, when you and Mike announced your deal, until the very end. You were alert, coherent and articulate, and you actively participated in discussions with me, the mediator, Mike and the other lawyers until the moment the parties signed the Mediated Settlement Agreement. If you had called or emailed Michelle the morning after the mediation and stated that you had no idea what you were doing because of a medical condition, compounded by being tired and hungry and a few sips of alcohol and needed to notify the mediator and other side immediately, then I might have a different belief. But, from my standpoint, it appears that you reflected on the settlement agreement for several days, decided you wanted to add some terms in your favor, and when told that you couldn't add to it, began looking for excuses to back out of the deal, which grew over the next several days.

I would like for Michelle and Sherri to review the foregoing, get your comments and response, and give you their own opinions and advice. As for me, I am not willing to offer evidence or advocate a position that I not only believe is not supported by facts or law, but that I believe would be fabricating support for a defense to the agreement you made. If you wish to repudiate the contract, Bohreer & Zucker will need to file a motion to withdraw as counsel.