IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

In re:	
Scienda, LLC,	Bankruptcy Case No. 02-02693-W
Debtor.	
Jerry C. Pryor,	
Plaintiff,	
vs.	Adversary No. 02-80128
Charles D. Cathcart, Individually and as officer, director and manager of Scienda, LLC, f/k/a C3 Industries, LLC and as agent of Shenandoah Holdings, Ltd., and as agent of Diversified Design Associates, Ltd.; Scienda, LLC, f/k/a C3 Industries, LLC, *et al.*;	**Order Overruling Pryor Objection to Notice of Settlement, Granting Motion to Enforce Settlement and Compel Compliance with Settlement, and Denying Motion for Sanctions without prejudice**
Defendants.	

THIS MATTER came before the Court for an expedited hearing on the Notice and Application for Settlement and Compromise filed on May 3, 2002 ("Notice") by the debtor Scienda, LLC ("Debtor" or "Scienda") in both the Debtor's Main Case, Case Number 02-02693-W ("Main Case"), and the adversary proceeding, *Pryor v. Cathcart et al.*, Adversary Number 02-80128 ("Adversary"). As of May 23, 2002, two objections had been filed to the Notice, one by the United States Trustee ("UST Objection") and one by Jerry Pryor ("Pryor Objection"). The deadline for creditors to object to the Notice runs on May 28, 2002.

Under the terms of the Notice, hearings on any objections to the Notice were scheduled to be heard by the Court on June 11, 2002 at 2:00 p.m. By letter dated May 15, 2002, counsel for Pryor asked that the Court schedule an expedited hearing on the Pryor Objection. The Court granted counsel's request and scheduled an expedited hearing for 9:30 a.m. Thursday, May 23, 2002 ("Expedited Hearing"). The Court intended to consider at the Expedited Hearing both the UST and Pryor Objections. However, because of the dynamic nature of the case, and because the Court's ruling on the Pryor Objection might have a significant impact on the Main Case which, in turn, might affect the UST's Objection, the Court granted the parties' request that the hearing on the UST Objection be carried over to June 11, 2002 at 2:00 p.m., and that the exclusive focus of the Expedited Hearing be the Pryor Objection and the responses filed thereto.

After reviewing the pleadings filed and the exhibits admitted into evidence, considering the arguments of counsel, and applying the applicable and relevant law, the Court makes the following

Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52, made applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7052:[1]

FINDINGS OF FACT

On or about February 20, 2002, Pryor filed a shareholder derivative action in the Court of Common Pleas, Orangeburg County, captioned *Pryor v. Cathcart, et al.*, Case No. 02-CP-38-0204, and named as defendants the Debtor, Shenandoah Holdings, Ltd. ("Shenandoah"), Charles D. Cathcart, individually and as officer, director, and manager of Scienda, as agent of Shenandoah, and as alleged agent of Diversified Design Associates, Ltd., Scott Cathcart, individually and as a director of Scienda, Yurij Debevc, individually and as a director of Scienda, LLC (Messrs. Cathcart, Cathcart, and Debevc will be collectively referred to herein as "Individual Defendants"), Jonathan Sandifer, individually and as an officer and director of Scienda (collectively "Sandifer") Howard Kuhn, individually and as an officer and director of Scienda (collectively "Kuhn"), and Howard Rudd, individually and as a director of Scienda (collectively "Rudd").

On March 4, 2002, creditors of the Debtor filed an involuntary bankruptcy petition against the Debtor, which action was assigned Case Number 02-2693-W. On March 7, 2002, the Debtor admitted the allegations of the involuntary complaint and voluntarily converted the case to one under Chapter 11 of the Bankruptcy Code. Thereafter, on or about March 22, 2002, pursuant to 28 U.S.C. § 1446(a) and Federal Rule of Bankruptcy Procedure 9027, the Debtor removed the lawsuit to the United States District Court for the District of South Carolina, Orangeburg Division. Because this Court had jurisdiction over the issues raised in the lawsuit, as well as any counterclaims and cross-claims, the action was referred to this Court for final adjudication, pursuant to 28 U.S.C. § 157(a) and (b).

The Debtor filed its Answer to Pryor's Complaint on April 1, 2002. Defendants Rudd, Kuhn, and Sandifer filed their Answer on March 29, 2002. The remaining defendants filed their Answer and Counterclaim on April 12, 2002.

On April 19, 2002, Pryor and his attorney met with counsel for the Debtor, counsel for Shenandoah and the Individual Defendants, and Messrs. Cathcart, Cathcart, and Debvec. The sole purpose of the meeting was to discuss the possibility of settlement of all issues raised in the Adversary. After protracted negotiations lasting approximately seven (7) hours, the parties reached a settlement of all issues raised in the Adversary and executed a Settlement Term Sheet ("Term Sheet") containing the material terms of the settlement.

On April 22, 2002, the parties advised the Court that the Adversary had been settled. On May 3, 2002, the Debtor served the Notice on creditors and attached the Term Sheet as an exhibit. On or about May 13, 2002, Pryor filed his Objection, wherein he asserted that, because their signature appeared on the Term Sheet, the Individual Defendants had personally guaranteed the payment of monies by Shenandoah and Scienda. Pryor's Objection further requested as

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[1]The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

alternate relief (in the event the Court declined to infer individual guarantees) that the settlement be nullified.

In response to Pryor's Objection, Shenandoah and the Individual Defendants (collectively "Movants") filed a Reply, Motion to Enforce Settlement, Motion to Compel Pryor to comply with Settlement, and Motion for Sanctions against Pryor and his counsel. In addition, the Debtor and the remaining defendants filed returns and joinders to the relief requested by Movants.

At the Expedited Hearing, the Term Sheet, a draft proposed Settlement Agreement and Release, and an Affidavit of Pryor's counsel were introduced into evidence without objection. Counsel for the parties also argued in support of their respective positions and relied on the pleadings filed with the Court. Although given the opportunity to do so, no party offered testimony.

CONCLUSIONS OF LAW

In making this ruling, the Court has considered the record before it and applicable law. The Court has reviewed the Term Sheet. The Court finds that there are no factual questions before it and the issues presented can be decided as a matter of law.

The Court begins its inquiry by recognizing that settlement agreements are contracts. *See United States v. ITT Continental Banking Co.*, 420 U.S. 223, 238 (1977); *United States v. Newport News Shipbuilding and Dry Dock Co.*, 571 F.2d 1283, 1286 (4th Cir.), *cert. denied* 439 U.S. 875 (1978) (citations omitted) ("Parties to contractual negotiations may enter into an enforceable oral contract that is later to be expressed in writing if, intending to be bound, they reach agreement on all major issues."). Furthermore, "if [the parties'] expressions convince the court that they intended to be bound without a formal document, their contract is consummated, and the expected formal document will be nothing more." *Alston v. Moses H. Cone Memorial Hospital*, 1999 U.S. Dist. Lexis 21161 (M.D.N.C. 1999) (citing *Courtin v. Sharp*, 280 F.2d 345, 349 (5th Cir. 1960), *cert. denied* 365 U.S. 814 (1961)).

If there is a dispute as to the existence of a settlement, the Court must first determine whether the parties entered into a binding contract. As stated by the Fourth Circuit in *Hensley v. Allcon Laboratories, Inc.:*

> [I]f an agreement for complete settlement of the underlying litigation, or part of it, has been reached and its terms and conditions can be determined, the court may enforce the agreement summarily as long as the excuse for nonperformance of the agreement is "comparatively insubstantial."

Hensley, 277 F.3d 535, 540 (4th Cir. 2002) (citing *Millner v. Norfolk & W.R. Co.*, 643 F.2d 1005, 1009 (4th Cir. 1981)); *see also Moore v. Beaufort County,* 936 F.2d 159, 162 (4th Cir. 1991).

Reviewing the record before it, the Court finds as a matter of law that the parties settled the Adversary and that the terms of this settlement are memorialized in the Term Sheet. The Court finds that the contents of the Term Sheet are capable of but one interpretation, and therefore, finds that Term Sheet is unambiguous as a matter of law. *Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 486 S.E.2d 742 (1997). Thus, the Court may summarily decide the issues

presented by Pryor without conducting a plenary evidentiary hearing to resolve the dispute. *Milner*, 643 F.2d at 1009.

Pryor argues that, because they signed the Term Sheet individually, the Individual Defendants either personally guaranteed the monetary payments to be made by Shenandoah and Scienda or are personally obligated to ensure that Shenandoah and/or Scienda perform under the agreement. In support of this assertion, Pryor relies on the case *Costas v. First Federal Savings and Loan Association*, 283 S.C. 94, 321 S.E.2d 51 (1984). The Court finds *Costas* inapplicable to the case at bar and based on the record before it, *Costas* is distinguishable.

Costas involved an action by First Federal Savings and Loan ("Bank") to collect on a debt owed by Wyboo Gulf Marina, Inc. ("Corporation"). When credit was extended, the Corporation's note to Bank was personally guaranteed by the Corporation's then current shareholders, Hursey, Hooper, Houser, and Bradham. In the years after the closing and before the litigation, the Corporation's shares were transferred to various individuals, each of whom, as part of their stock purchase, signed assumption agreements assuming the Bank's debt and agreeing to indemnify their sellers in the event the Bank attempted to collect the note. Eventually, half of the Corporation's shares ended in the hands of Costas, who challenged his personal liability under the indemnity provisions of his purchase contract.

The Supreme Court, in ruling that Costas was personally liable to his predecessors for the Bank debt, reiterated the longstanding rule that:

> It is recognized that a corporation is an entity separate and distinct from its officers and stockholders, and that its debts are not the individual indebtedness of its stockholders. This is expressed on the presumption that the corporation and its stockholders are separate and distinct . . . and this oft-stated principal is equally applicable, whether the corporation has many or only one stockholder.

Costas, 283 S.C. at 102, 321 S.E.2d at 56 (citations omitted). However, based on the record before it, the Court found that Costas had forsaken the protections of the corporate veil and was individually liable:

> The September, 1976 Note given to the Joneses by Costas was not clothed with any indicia of corporate capacity. It should be noted further that Costas negotiated the transfer of stock formerly pledged as collateral to the Joneses to himself and made several payments to First Federal on the Note obligation after the stock was transferred to him.
>
> It is well settled that directors and officers are personally liable on written instruments signed by them which are not so worded as to bind the corporation. [citation omitted] Upon examination of the record this Court concludes that the defendant Costas was not acting in a corporation capacity when he entered into his business relationship with the Joneses, and therefore, does not enjoy the cloak of corporate limited liability as to them. Hence, he is individually liable to the Joneses.

Id. at 103, 321 S.E.2d at 56.

Costas is not applicable to this case. Assuming that *Costas* has some relevance, the case is clearly distinguishable. Unlike *Costas*, there is no assumption agreement, personal guaranty,

or evidence in the record that the Individual Defendants failed to follow corporate formalities and shed the protection of the corporate veil. There is no evidence, either by way of testimony or documentation, that the Individual Defendants agreed to personally guarantee the monetary obligations contained in the Term Sheet. The only evidence before the Court is the Term Sheet, and it is silent on the issue.

An ambiguous contract is one that is capable of multiple meanings. *Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 486 S.E.2d 742 (1997). The Term Sheet is unambiguous and the terms contained therein are capable of only one meaning. Therefore, the Court will and must limit its inquiry to the four corners of the document. *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 33 S.E.2d 501 (1945). Pryor agreed to sell his 20% interest in the Debtor to Shenandoah, and Shenandoah agreed to buy that interest. Cash payments for the interest is to come from Shenandoah, and Shenandoah alone. Nowhere on the face of the Term Sheet do the words guaranty, indemnity, assurance of performance, or any like language appear that would make the Individual Defendants personally responsible for cash payments contemplated under the Term Sheet. The Individual Defendants are bound by the terms of the Term Sheet; however, they are not personally responsible, either through indemnification or guaranty, for the cash payments to be made to Pryor. As the Term Sheet states, Shenandoah alone is responsible for payment of the $670,000.00 share purchase price and Scienda alone is responsible for payment of the $330,000.00 debt forgiveness.

The Court finds that Pryor's arguments are without merit. Pryor sued the Individual Defendants in their corporate and individual capacity. The individual signatures appear on the Term Sheet because the individuals are beneficiaries of the Agreement [through dismissal of the Adversary and receipt of a release from Pryor and his wife] and are obligated under the settlement to grant Pryor and his wife releases. The appearance of individual signatures on the Term Sheet was necessary. However, the appearance of individual signatures does not impose additional obligations on the Individual Defendants beyond those contained in the Term Sheet.

Pryor also argues that the statements made by Movants' counsel at the April 22 hearing evidenced the parties' agreement that the Individual Defendants were guarantors under the Term Sheet. The Court agrees that the colloquy of counsel could be susceptible to multiple interpretations, but this fact is irrelevant. The April 22 hearing occurred after the settlement was reached and after the Term Sheet was negotiated and executed by the parties. Furthermore, the Court finds, as a matter of law, that the colloquy of counsel did not modify the Term Sheet. For a written contract to be modified by a subsequent oral agreement, the modification must fulfill all of the elements required for a valid contract; namely, offer, acceptance, and consideration. *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997) (citing *King v. PYA/Monarch, Inc.*, 317 S.C. 385, 453 S.E.2d 885 (1995); *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989); *Carolina Amusement Co., Inc. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122 (Ct.App.1993)). The Court finds that none of these elements were present at the April 22 hearing.

Court finds it significant that this is not a situation where an attorney, acting outside the scope of his authority, agreed to a settlement that was later objected to by his client. Mr. Pryor initialed and signed the term sheet himself, clearly evidencing his intent to be bound. "Having second thoughts about the results of a settlement agreement does not justify setting aside an

otherwise valid agreement." *Young v. FDIC,* 103 F.3d 1180, 1195 (4th Cir.), *cert. denied* 522 U.S. 928 (1997); *see Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.,* 203 F.3d 291, 298 (4th Cir. 2000).

The final issue before the Court is Movants' request for the imposition of sanctions against Mr. Pryor and his attorney. Counsel for Mr. Pryor objected to Movants' request on the ground that the motion was not procedurally proper because it failed to satisfy the prerequisites for filing a Federal Rule of Bankruptcy Procedure 9011 motion. First, the motion was joined with a prayer for additional relief and not filed as a separate pleading. Second, the "Safe Harbor" provisions of Rule 9011(c)(1)(A)(b) were not complied with. Movants' counsel conceded the error of the joining the request with other relief. As to the issue of the "Safe Harbor" provision of Rule 9011, Movants counsel noted that because of Pryor's demand for an expedited hearing on his Objection, compliance with the "Safe Harbor" provision was not feasible. To resolve the issue, Movants' counsel offered to withdraw the request for sanctions from consideration at the Expedited Hearing. However, Pryor's counsel objected and insisted that the matter be ruled on.

The Court, relying on the case *In re Sammon*, Case No. 99-03632-W (September 2, 2000) (unpublished), denies Movants' motion for sanctions, without prejudice, on the grounds that the Motion is procedurally defective for the reasons stated herein. ~~In denying the motion without prejudice, the Court notes that, as set forth in counsel's Certification, before seeking relief from the Court, counsel for Movants repeatedly consulted with Pryor's counsel telephonically regarding the arguments raised in Pryor's Objection, without success. This, coupled with Pryor's demand for an expedited hearing on his Objection, leads the Court to conclude that compliance with the "safe harbor" provision would not have made a significant difference.~~

CONCLUSION

Based on the foregoing, it is hereby ORDERED that

Pryor's Objection is Overruled. The Motion to Enforce Settlement is Granted. Pryor is directed to comply with the requirements of the Term Sheet and, on or before June 3, 2002, execute and deliver to counsel for Defendants a Release and Non-Compete Agreement, the terms and scope of which are to be negotiated by the parties within the time required by the Term Sheet; It is further:

ORDERED that Movants' Motion for Sanctions is denied, without prejudice; It is further:

ORDERED that the hearing on the UST's objection, and any other objection filed within the time provided under the notice, shall be heard by the Court on June 11, 2002 at 2:00 p.m., without further notice.

AND IT IS SO ORDERED.

John E. Waites
United States Bankruptcy Judge

May 29, 2002