UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FIRST AMERICAN TITLE INSURANCE COMPANY, assignee and successor in interest by assignment from PNC BANK NATIONAL ASSOCIATION, **Plaintiff,** **v.** **DAVID SADEK, ETTY SADEK, et al.,** **Defendants.**	**Civ. Action No. 11-1302 (KM) (MAH)** **REPORT AND RECOMMENDATION**

This matter comes before the Court on Plaintiff's motion to enforce a settlement agreement between it and Defendant David Sadek. Mot. To Enforce Settlement, June 7, 2021, D.E. 275. United States District Judge Kevin McNulty referred the motion to the Undersigned for a Report and Recommendation. The Court has considered the papers submitted in support of, and in opposition to, the motion. The Undersigned also held oral argument on August 19, 2021.[1] For the reasons set forth herein, the Undersigned respectfully recommends that the District Court grant Plaintiff's motion.[2]

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[1] The August 19, 2021 hearing was originally scheduled to be an evidentiary hearing, based on Defendant's request for one. Def.'s Mem. in Opp., D.E. 276, at 12. However, the parties agreed on the record at the August 19, 2021 hearing that the facts were largely undisputed and that an evidentiary hearing was unnecessary. Therefore, Defendant Sadek withdrew his request for an evidentiary hearing, and the Court instead held oral argument.

[2] A decision to enforce a settlement is dispositive. *See Shell's Disposal and Recycling, Inc. v. City of Lancaster*, 504 Fed. Appx. 194, 200 n.8 (3d Cir. 2012) (A magistrate judge's "order granting the motion to enforce the settlement . . . . requires the parties' consent" because it is dispositive.).

I. BACKGROUND

Plaintiff First American Title Insurance Company ("First American")'s predecessor and assigner, PNC Bank National Association ("PNC"), commenced this action by filing a Complaint on March 8, 2011. *See generally* Compl., D.E. 1. First American subsequently amended its pleading twice. The Second Amended Complaint alleges that Defendant David Sadek, who has filed for bankruptcy, refinanced his home mortgage with a loan from First Financial Equities ("FFE"), a banking firm for which he acted as President, primary shareholder, and Chief Executive Officer. *See* Second Am. Compl., D.E. 93, at ¶¶ 18-19; Schoenfeld Decl. in Supp. of Mot., D.E. 275-14, Ex. 1, at 3. FFE subsequently sold the loan to National City Mortgage Company. Through a chain of ownership, PNC took possession of the loan. *Id.* at ¶¶ 31-35. Plaintiff alleges that Mr. Sadek sold his home, used the sales proceeds for personal purposes other than repaying the loan, and failed to inform PNC of the sale as the loan agreement required.[3] *See id.* at ¶ 33.

In total, the Second Amended Complaint alleges five counts against Mr. Sadek: (1) breach of contract; (2) fraud; (3) civil conspiracy; (4) unjust enrichment; and (5) conversion. *See id.* at ¶¶ 36-95. Mr. Sadek resolved the first count, breach of contract, by entering into a Consent Judgment for the amount of the loan and interest.[4] Schoenfeld Decl., D.E. 275-2, at 5. United States District Judge Kevin McNulty granted summary judgment for First American on the fifth count, conversion. *See* Opinion, Dec. 29, 2017, D.E. 215, at 1. However, Judge McNulty

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[3] On October 7, 2017, PNC transferred its interest in this action to First American. *See* Stipulated Order on Consent, D.E. 186.

[4] Etty Sadek, Sadek's ex-spouse, also is a defendant in this action. However, Ms. Sadek is not a party to the proposed settlement agreement. Schoenfeld Decl., D.E. 275-2, at 1, n.1. First American does not seek judgment or other relief against her in this motion. *See id.*

determined that whether the judgment against Mr. Sadek was dischargeable in Mr. Sadek's bankruptcy action should be resolved at trial. *See id.* at 13-14; 11 U.S.C. § 523.

The Undersigned engaged in numerous settlement efforts with the parties, and the parties had their own settlement discussions. *See, e.g.*, Schoenfeld Decl., D.E. 275-2, at ¶¶ 18-21. During once such discussion, the parties conceptually agreed that Mr. Sadek would make payments to First American over the course of several years, and that a non-dischargeable confession of judgment would secure the outstanding balance. *Id.* at ¶ 21. These negotiations continued in December 2020. In an email dated December 10, 2020, Plaintiff's counsel, Steven R. Schoenfeld, Esq., emailed Defendant's counsel, William N. Dimin, Esq., with the following terms:

> 1. Payment of $470,000 (Four Hundred and Seventy Thousand Dollars) over a term of 15 years with monthly payments [is] to be made on the first day of each month and a balloon payment [is] to be made after 15 years as set forth below:
>
>   a. $1,500 a month for 24 months (years 1 and 2);
>   b. $1,600 a month for 24 months (years 3 and 4);
>   c. $1,700 a month for 24 months (years 5 and 6);
>   d. $1,800 a month for 24 months (years 7 and 8);
>   e. $1,900 a month for 24 months (years 9 and 10);
>   f. $2,000 a month for 24 months (years 11 and 12);
>   g. $2,100 a month for 24 months (years 13 and 14);
>   h. $2,200 a month for 12 months (year 15); and
>   i. balloon payment of $141,200 payable one month after the end of year 15.
>
> 2. Payment secured by a non-dischargeable Confession of judgment in the amount of $1,000,000 (One Million Dollars), but the amount of the confession of judgment that may be entered upon default at the end of year 3 and thereafter shall be reduced in accordance with paragraph 3 provided that all payments have been made in a timely manner.
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> 3. Confession of judgment may be entered upon default for the full amount (defined as $1,000,000 (One Million Dollars) face amount referenced in paragraph 2) less credit for payments received by First American up to the date of default of the amount set forth below, whichever is less. . . .
>
> 4. 10 day grace period for monthly payments.

5. No notice and cure requirement as a pre-condition to default except that a 15 day notice and opportunity to cure will be provided for no more than two late monthly payments per 12 month period as pre-condition to default.

Execution of settlement that will not be a matter of public record with the Court as you have requested and we can do a stipulation of dismissal of the action without prejudice, but we want to be clear that the confession of judgment must be a non-dischargeable debt (that is a non-negotiable requirement).

Schoenfeld Decl., D.E. 275-7, Ex. 5, at 1-3. Mr. Sadek had already agreed to the first four items above, because during a November 18, 2020 conference among counsel, "Dimin indicated that Sadek was agreeable to Points 1 to 4 of First American's then pending settlement proposal[.]" *Id.* at ¶ 22. Mr. Sadek, however, wanted a notice and opportunity to cure if he failed to make timely payment, as well as a confidentiality provision. *Id.* Accordingly, the terms embodied in the December 10, 2020 email (above) reflect the parties' agreement to the first four points, and First American's acquiescence to Mr. Sadek's demand for notice and an opportunity to cure in the event of a default.[5] *Id.*

According to Mr. Schoenfeld, "Dimin called me the same day and confirmed that Mr. Sadek accepted the terms set forth in my December 10, 2020 email to settle this action." *Id.* at ¶ 31. Later that day (December 10, 2020), the parties reported to the Court "that First American and David Sadek have reached a settlement agreement in principle subject to documentation." *See* Schoenfeld Decl., D.E. 275-8, Ex. 6, at 1. On December 11, 2020, the Court entered an Order dismissing the action "without prejudice to the right of either party to re-open the matter within . . . 60 days if settlement is not consummated." *See id.*, D.E. 275-9, Ex. 7, at 1.

[5] First American agreed to confidentiality in a revised draft settlement agreement in February 2021. Schoenfeld Decl., D.E. 275-12, Ex. 10, at 1.

Counsel for First American provided to counsel for Mr. Sadek a draft settlement agreement on or about January 5, 2021. *Id.*, ¶¶ 35-36 & D.E. 275-10, Ex. 8. The draft settlement agreement tracked the terms set forth in the December 10, 2020 email. It also included the specific language for the confession of judgment. Paragraph 6 of the confession of judgment called for, among other things, Plaintiff to admit the allegations and claims of the Second Amended Complaint.[6] *Id.* D.E. 275-10, Ex. 8, at Ex. C. On January 29, 2021, Mr. Dimin replied "I am confident we are still on tract [sic] to finalize the settlement." *Id.* D.E. 275-11, Ex. 9.

Those discussions continued into February 2021. During a February 8, 2021 telephone conference between counsel, the parties discussed adding the confidentiality clause and making several small and undisputed changes to the agreement. *Id.* at ¶ 39. However, Mr. Dimin also expressed Mr. Sadek's reservations about that part of paragraph 6 of the confession of judgment in which Mr. Sadek would admit to the allegations and claims in the Second Amended Complaint. *Id.* *See* William N. Dimin Decl. in Opp. to Mot., D.E. 276-1, at ¶ 5. On February 16, 2021, Mr.

[6] Paragraph 6 of the confession of judgment provides as follows:

> The Debt is justly owed to First American, and this affidavit of Confession of Judgment arises out of the facts set forth in the complaint filed in the Non-Discharge Proceeding that is annexed as Exhibit 1 hereto and deemed a part of this affidavit of Confession of Judgment, and I admit the facts and claims in that complaint and I admit the Debt is not dischargeable under Sections 523(a)(2), (4) and (6) of the Bankruptcy Code.

Schoenfeld Decl., D.E. 275-10, Ex. 8, at Ex. C. *See also id.* Ex. 10, at Ex. C (redlined version of affidavit of confession of judgment, emailed to Defense counsel on February 16, 2021, noting amendments that are not in dispute). The specific language of paragraph 6 to which Mr. Sadek refused to agree states "I admit the facts and claims in that complaint[.]" For ease of reference, hereinafter the Court will refer to this provision as the admissions provision of paragraph 6. The remainder of paragraph 6 is not in dispute, specifically the admission that the debt is nondischargeable. Mr. Sadek had already agreed that the debt would not be dischargeable in bankruptcy, and does not now rely on that part of paragraph 6 in arguing there is no enforceable settlement agreement. *See* Dimin Decl., D.E. 276-1, at ¶¶ 5-6; Schoenfeld Decl., D.E. 275-7, Ex. 5 & ¶ 22.

Schoenfeld provided a revised copy of the settlement documents which, among other things, reflected the parties' agreement on confidentiality. Schoenfeld Decl., D.E. 275-12, Ex. 10. The revised draft settlement agreement also called for March 1, 2021 as the due date for the first payment that Mr. Sadek would make to First American. *Id.*

In emails sent on March 5, 2021 and March 11, 2021, Mr. Dimin acknowledged receipt of the documents that Mr. Schoenfeld had sent on February 16, 2021, and expressed the hope that the parties could finalize the settlement. *Id.*, D.E. 275-13 to 275-14, Exs. 11-12. However, on March 16, 2021, Mr. Dimin forwarded to Mr. Schoenfeld an email sent by Mr. Sadek. *Id.*, D.E. 275-14, Ex. 12. Mr. Sadek's email stated:

> Sorry, I left rather unexpectantly (sooner than I thought) to Israel. I've thought it over and I do not want to agree to it. I appreciate your advice that I stand to lose at trial but committing to this long term and the balloon is not prudent form me. I've thought about all the judgments I've obtained, Siegel, Abba Horowitz, Litkowsky, Reiner, Lewinson and etc. and I've never been able to collect a penny. I'd rather pay you and I'll take my chances with the trial and if I lose work with the potential garnishment. I truly appreciate the efforts to get this settled.

Id.

First American alleges that it stood ready to sign the Agreement. *See* Bryan W. Thomas Decl. in Supp. of Mot., D.E. 275-15, at 2. Accordingly, on June 7, 2021, First American filed the subject motion to reopen the case and to enter all appropriate relief. *See generally* Notice Pl.'s Mot. to Enforce Settlement Agreement, D.E. 275-1. First American's motion requests that the Court reopen the matter and find that the parties entered into an enforceable settlement agreement. First American also asks that the Court conclude that Mr. Sadek defaulted on the payment schedule embodied in that agreement, and enter final judgment in the amount of $1,000,000, plus reasonable attorneys' fees incurred related to the enforcement and effectuation of the settlement agreement.

II. DISCUSSION

A settlement agreement is a contract and its enforceability is governed by contract law.[7] *Tedesco Mfg. Co. v. Honeywell, Int'l Inc.*, 127 Fed. Appx. 50, 52 (3d Cir. 2005) (unpublished); *Metropolitan Life Insurance Co., v. Hayes-Green,* Civ. No. 07-2492, 2008 WL 2119976 (D.N.J. May 20, 2008). A "contract is formed where there is offer and acceptance and terms sufficiently definite that the performance to be rendered by each party can be ascertained with reasonable certainty." *See Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 435 (1992). Thus, a "contract is enforceable if the parties agree on essential terms, and manifest an intention to be bound by those terms. Where the parties do not agree on one or more essential terms, however, courts generally hold that the agreement is unenforceable." *United States v. Lightman*, 988 F. Supp. 448, 458 (D.N.J. 1997). Oral settlement agreements are binding if they are voluntarily entered into by parties with authority to do so. *See Pascarella v. Bruck*, 190 N.J. Super. 118, 124 (App. Div.1983) (quoting *Green v. John H. Lewis & Co.*, 436 F.2d 389, 390 (3d Cir.1970)); *Harrington v. Harrington*, 281 N.J. Super. 39, 46 (App. Div.1995) (citing *Lahue v. Pio Costa*, 263 N.J. Super. 575, 596 (App. Div.1993)). When a court is asked to "to enforce an unwritten and unexecuted agreement, the court must base its decision upon whether the parties manifested an intent to be bound." *Lightman*, 988 F. Supp. at 459 (citing *Comerata v. Chaumont, Inc.,* 52 N.J. Super. 299, 305 (App. Div.1958)). If the intent of the parties is in dispute, the Court may

[7] "State law governs the construction and enforcement of settlement agreements in federal court." *Excelsior Ins. Co. v. Pennsbury Pain Ctr*., 975 F. Supp. 342, 348-49 (D.N.J. 1996). The parties do not address whether the law of a specific state applies. "A federal court may apply the substantive law of the forum state in deciding questions pertaining to the construction and enforcement of contracts." *Cram v. The Fanatic Group LLC*, Civ. No. 18-13531, 2020 WL 532975, at *1 (D.N.J. Jan. 9, 2020) (citations omitted), *Report and Recommendation adopted*, 2020 WL 528853 (D.N.J. Feb. 3, 2020).

examine documents, the parties' conduct, and reasonable inferences drawn from these items to make findings. *Id.* (citations omitted.).

A binding settlement agreement does not require the parties' concurrence on every term, no matter how ministerial or insubstantial. Instead, "[s]o long as the basic essentials are sufficiently definite, any gap left by the parties should not frustrate their intention to be bound." *Berg Agency v. Sleepworld-Willingboro, Inc.*, 136 N.J. Super. 367, 377 (App. Div. 1975); *see also Hagrish v. Olson*, 254 N.J. Super. 133, 138 (N.J. Super. Ct. App. Div. 1992) (quoting *Berg Agency*, 136 N.J. Super. at 377). The party seeking to enforce an agreement has the burden of proving that an enforceable agreement exists. *Lightman*, 988 F. Supp. at 458. It is well established that a court should grant a motion to enforce a settlement if no genuine dispute over material facts exists. *Tiernan v. Devoe*, 923 F.2d 1024, 1031 (3d Cir. 1991).

First American argues that the Court should find that there is an enforceable settlement agreement, and enter judgment against Mr. Sadek because the parties "agreed to all essential terms for a binding agreement to settle this action," including a default term. Schoenfeld Decl., D.E. 275-1, at 2. First American points to the parties' apparent agreement as reflected in the terms set forth in the December 10, 2020 email from Mr. Schoenfeld to Mr. Dimin, as well as the parties' email to the Court later that day to inform the Court that they had settled. Based on those emails, First American argues that the parties reached agreement on: (1) the overall amount ($470,000) that Mr. Sadek would pay to First American; (2) that Mr. Sadek would pay the amount in monthly installments over fifteen years in particular amounts, with a balloon payment at the end of the fifteen years; (3) that Mr. Sadek would have a ten-day grace period, notice of default and right to cure; (4) that the settlement amount would be secured by a $1,000,0000 non-dischargeable confession of judgment, which could be reduced over the payout period; and (5) dismissal of the

action without prejudice to First American filing the confession of judgment in the event of default. Reply Brief, D.E. 277, at 4; Schoenfeld Decl., D.E. 275-7, Ex. 5.

Mr. Sadek acknowledges that the parties agreed that he would pay First American the total of $470,000 over fifteen years, in monthly installments. He also acknowledges that the parties agreed that the debt would be non-dischargeable. Dimin Decl., D.E. 276-1, at ¶ 10. Mr. Sadek also does not dispute Plaintiff's assertion that the parties agreed that the confession of judgment would secure the debt.[8] However, Mr. Sadek contends that the parties did not enter into a binding settlement agreement because they had not finalized the terms of the confession of judgment. Def.'s Mem. in Opp., July 9, 2021, D.E. 276, at 1-3. Specifically, Mr. Sadek asserts that he objected to First American's insistence on that part of paragraph 6 of the confession of judgment requiring him to admit the allegations and claims in the Second Amended Complaint. *See* Def. Mem. in Opp., D.E. 276, at 8. Based on Mr. Sadek's demurral on making such admissions, which do not appear to be in dispute,[9] Mr. Sadek argues that the parties did not reach final agreement. Instead, he maintains, negotiations were ongoing, and neither party intended the proposed settlement agreement to be enforceable. *See id.* at 7-11. As such, Mr. Sadek argues that he did not breach the settlement agreement. Furthermore, Mr. Sadek argues that an award of counsel fees is inappropriate because he did not act "in bad faith, vexatiously, wantonly, or for other oppressive reasons." *See id.* at 14 (citing *Walther & Cie v. U.S. Fid. & Guar. Co.*, 397 F. Supp. 937, 946 (M.D. Pa. 1975)).

[8] Mr. Sadek also acknowledges that he has not paid anything toward the amount due under the settlement. *See id.* (First American "has suffered no legitimate damages stemming from Sadek's failure to abide . . . .").

[9] A careful examination of Mr. Sadek's opposition papers–including the brief, Mr. Dimin's Declaration, and the exhibits that both parties submitted—does not reveal any other settlement term that Mr. Sadek maintains remained in dispute.

In reply, First American contends that the admissions provision in paragraph 6 of the confession of judgment is not a material term. *See* Reply Brief, D.E. 277, at 5-6. That provision, First American argues, was "merely language proposed by First American's counsel to lay part of the predicate for a non-dischargeable confession of judgment that was already an agreed upon settlement term. Any disagreement over the wording of that language does not change the undisputed fact that the parties had already agreed to a $1 million non-dischargeable confession of judgment to be entered upon default." *Id.*

The Court is persuaded that the parties reached agreement on the material terms of settlement. *See McKeon v. City of Asbury Park*, 2020 WL 5747886, at *5 (D.N.J. Sept. 25, 2020) ("[A]s long as those essential terms are agreed to, 'the settlement will be enforced notwithstanding the fact . . . [that the] writing does not materialize because a party later reneges.'") (quoting *McDonnell v. Engine Distribs.*, No. 03-1999, 2007 WL 2812621, at *3 (D.N.J. Sept. 24, 2007)). Mr. Sadek admits, through his counsel, that he agreed to pay Plaintiff a total of $470,000 in monthly installments over a term of fifteen years, with a balloon payment at the end of the fifteen-year term. Dimin Decl., D.E. 276-1, at ¶ 10; Schoenfeld Decl., D.E. 275-7, Ex. 5, at 1-3. Mr. Sadek also acknowledges that he agreed the debt would be non-dischargeable. Dimin Decl., D.E. 276-1, at ¶ 10. In fact, Mr. Sadek does not even deny that he had agreed to the confession of judgment as a means to secure the outstanding debt. Instead, he claims only that the parties were at an impasse over the requirement in paragraph 6 of the confession of judgment that Mr. Sadek admit to the facts and claims in the Second Amended Complaint. But there is no indication from the record that Mr. Sadek objected to submission of a confession of judgment itself. To the contrary, a fair reading of the e-mail exchange between counsel suggests that Mr. Sadek negotiated

the amounts at issue in the confession of judgment. Mr. Schoenfeld's December 10, 2020 e-mail to Mr. Dimin provides in pertinent part:

> David's proposal you conveyed today will **not** fly.
>
> I pushed First American over considerable resistance to reduce the amount of the C of J at the end further so the only change from the December 2 proposal is that the C of J may be entered as a judgment for $280,000 after the 15 years if the balloon is not paid. That is double the balloon amount to ensure/incentivize so the payment is made.
>
> My client said this is take it or leave it.
>
> Let me know if we have a deal and can so report to Judge Hammer today, and I can turn to drafting the settlement agreement.

Schoenfeld Decl., D.E. 275-7, Ex. 5, at 1 (emphasis in original). As noted above, later that day, counsel informed the Court that they had reached settlement. *Id.*, D.E. 275-8, Ex. 6. Further, even when Mr. Sadek attempted to back out of the settlement, he did not identify paragraph 6 as the problem.[10] Instead, Mr. Sadek stated "I've thought it over and I do not want to agree to it. I appreciate your advice that I stand to lose at trial but committing to this long term and the balloon is not prudent for me." Schoenfeld Decl., D.E. 275-14, Ex. 12.

The Court agrees with First American that the admissions provision in paragraph 6 of the confession of judgment is not material. The essential terms of the agreement are the payment amount, schedule, and non-dischargeability of the debt, and the confession of judgment itself, all terms on which the parties agreed. The purpose of the confession of judgment was as a means of recourse for First American in the event Mr. Sadek subsequently defaulted. In turn, the

[10] Nor did Mr. Sadek take issue with the payment schedule set forth in the December 10, 2020 email that Mr. Schoenfeld had sent to Mr. Dimin, before the parties informed the Court of the settlement. Schoenfeld Decl., D.E. 275-7, Ex. 5. In fact, nothing in the documents put forth before the Court suggests Mr. Sadek objected to the payment schedule. Further, the defense acknowledges that Mr. Sadek agreed to monthly installment payments. Dimin Decl., D.E. 276-1, at ¶ 10. As noted above, Mr. Sadek relies solely on the dispute concerning the admissions provision within paragraph 6 of the confession of judgment.

admissions provision within paragraph 6 was simply part of the execution of the confession of judgment, should its execution be necessary. There is no suggestion that the admissions provision within paragraph 6 was necessary to execute the confession of judgment. In fact, in its reply and at oral argument, First American has posited that the admissions provision of paragraph 6 is not material. Reply Brief, D.E. 277, at 5-6. Indeed, Mr. Sadek's own counsel concedes that paragraph 6 of the confession of judgment was drafted "in order to effectuate the terms that counsel for both parties agreed to and to enter into a binding settlement agreement." Dimin Decl., D.E. 276-1, at ¶ 5. Courts have held that a court may enforce a settlement agreement even where there is a disagreement over a provision meant to aid implementation of the essential terms. *See*, *e.g.*, *Cram,* 2020 WL 532975, at *3 (court enforced settlement agreement despite dispute over auditing and record keeping of agreed upon royalties because that provision was "a means to facilitate the implementation of the essential terms, but is not itself essential"); *McDonnell*, 2007 WL 2814628 at *8 (holding that a settlement agreement was enforceable when the parties still disputed terms such as how payment of amount due would be guaranteed, scope of release, tax treatment, indemnification, and confidentiality, reasoning that those issues "all speak to the settlement's implementation" and not whether the parties agreed on the settlement terms themselves); *Hagrish,* 254 N.J. Super. at 137-38 (dispute concerning wording and execution of releases did not preclude binding settlement agreement because "[e]xecution of a release was a mere formality, not essential to the formation of the contract of settlement"). Mr. Sadek, on the other hand, provides no caselaw supporting the proposition that agreement on the admission provision in paragraph 6 was a prerequisite to a binding agreement.

It is theoretically possible that parties to an agreement could regard the admissions provision of paragraph 6 as a material term, or could specify that there would be no binding

agreement absent complete agreement on the terms of the confession of judgment. After all, a settlement agreement is a contract, and the parties themselves may dictate the terms. *Tedesco*, 127 Fed. Appx. at 52. But nothing in the record suggests that either party regarded the admissions provision in paragraph 6 as such. The record supports that the confession of judgment itself was a material term. It was included in the December 10, 2020 email from Mr. Schoenfeld to Mr. Dimin, and in each subsequent draft settlement agreement provided to Defense counsel. Further, in the context of this litigation and the settlement itself, which contemplated a fifteen-year payout term, the confession of judgment was a necessary means of ensuring Mr. Sadek complied with his settlement obligations. But no party has identified or specified why Mr. Sadek's admission to the allegations in the Second Amended Complaint constituted a necessary prerequisite to the confession of judgment.

The course of the parties' conduct also manifests their intent to be bound by the material terms. *Lightman,* 988 F. Supp. at 459. Those terms were largely unchallenged by Mr. Sadek for months after the parties' and Court's settlement discussions in November 2020, Mr. Schoenfeld's December 10, 2020 email to Mr. Dimin, the parties' notice to the Court on December 10, 2020 that they had reached an agreement in principle, and their negotiations in January 2021 and February 2021. In fact, when Mr. Sadek insisted on confidentiality, First American accepted and included that provision in its February 16, 2021 revised draft of the settlement agreement. And even when Mr. Sadek, through Mr. Dimin, pushed back on the admissions contemplated by paragraph 6, there is no indication that he resisted or otherwise attempted to disavow the other terms on which the parties had already agreed, such as the overall amount to be paid, the monthly installment schedule, the non-dischargeability provision, or the confession of judgment. *See* Schoenfeld Decl., D.E. 275-10, Ex. 8, at 3. It is well settled that

"[w]here the issue of the intent of the parties is sharply contradicted, the credible evidence—such as the documents and the conduct of the parties—and permissible inferences therefrom are sufficient to justify the factual finding of the trial judge." *Lightman,* 988 F. Supp. at 460 (citing *Berg Agency,* 136 N.J. Super. at 374).

Indeed, Mr. Sadek does not now dispute that he and First American reached an agreement on specific settlement terms, *i.e.*, the amount of money to be paid, the extended payout schedule, the non-dischargeability of the judgment, or the confession of judgment. *See* Def.'s Mem. in Opp., D.E. 276, at 9; Dimin Decl., D.E. 276-1, at ¶ 3. Defendant concedes "it was represented to the Court that the parties had agreed to certain terms to settle this action, specifically, the amount of money to be paid from Mr. Sadek to First American and the non-dischargeability of the judgment." *See* Def.'s Mem. in Opp., D.E. 276, at 9. Instead, Mr. Sadek now contends that the agreement was not enforceable because of the disagreement concerning the admissions provision in paragraph 6 of the confession of judgment. The Court is unpersuaded by Mr. Sadek's argument for two reasons.

First, Mr. Sadek actually agreed to a confession of judgment in the event he defaulted on his payment obligations; that he disagreed with the specific wording of one provision in one paragraph in a nine-paragraph confession of judgment is of no moment. *See McDonnell*, 2007 U.S. Dist. LEXIS 70925 at *23-24. Mr. Sadek provides the Court with no legal authority to support his position that the Court should not disregard as immaterial that part of paragraph 6 of the confession of judgment calling for him to admit the allegations of the Second Amended Complaint, and otherwise enforce the settlement agreement, including the confession of judgment. As noted above, disagreement over the particular language used to memorialize and implement a settlement

agreement term on which the parties otherwise agreed does not render the settlement agreement unenforceable. *See id.*; *see also Cram*, 2020 U.S. Dist. LEXIS 17718 at *5-7.

Second, while Mr. Sadek now claims that the parties did not reach settlement because they could not agree on the manner by which the confession of judgment would be executed, the communications between Mr. Sadek and his attorney debunk that claim. On March 16, 2021, Mr. Sadek emailed Mr. Dimin, indicating that he did not wish to go through with the settlement because "I've thought it over and I do not want to agree to it. I appreciate your advice that I stand to lose at trial but committing to this long term and the balloon is not prudent for me." Mr. Dimin then forwarded this email to First American's counsel. *See* Schoenfeld Decl., D.E. 275-14, Ex. 12. The email makes no mention of any particular settlement term, much less one over which the parties had continued to disagree. It is clear from Mr. Sadek's communication that he no longer wished to be bound by the terms of the settlement agreement to which he had previously agreed. *See Cores v. Atlantic City High School,* 2010 WL 5396027, at *4 (N.J. App. Div. July 19, 2010) ("There is a strong public policy in New Jersey favoring settlements . . . . That [the plaintiff] may have had second thoughts about the settlement before he actually signed the agreement does not vitiate the settlement.").

For the reasons set forth above, this Court recommends that the District Court conclude that First American and Mr. Sadek entered into a binding settlement agreement. The next question is whether Mr. Sadek is in default of a payment schedule established by the settlement agreement, as First American maintains. There is no dispute that Mr. Sadek has not made any payments to First American. First American asserts that the first payment was due on March 1, 2021, and that because Mr. Sadek has not made any payment, First American is entitled to entry of judgment in the amount of $1,000,000.00. First American derives the March 1, 2021 date

from a schedule that Mr. Schoenfeld sent to Mr. Dimin on February 16, 2021, along with the revised settlement agreement. *See* Ex. 10 to Schoenfeld Decl., D.E. 275-12, Ex. A. That agreement also included First American's acquiescence to Mr. Sadek's demand of confidentiality.

The Court cannot agree that Mr. Sadek is in breach for failure to make the first payment by March 1, 2021. While the parties agreed on the amount and a monthly payment schedule, the record does not support that there was a meeting of the minds that the first payment would take place by or before March 1, 2021.[11] There is nothing in the settlement agreement itself that specifies the payment commencement date. However, it is clear from the parties' course of dealings that they had agreed that payment would begin within thirty days of the parties' execution of the settlement agreement and, thereafter, on the first of the month. *Lightman,* 988 F. Supp. at 459 (holding that Court may examine, among other things, parties' conduct and dealings to discern intent). For example, on December 10, 2020, when the parties notified this Court that they had settled, they had tentatively scheduled the first payment for January 1, 2021. *See id.*, D.E. 275-10, Ex. 8, at 2, 13. However, it became necessary in January 2021 for the parties to continue to negotiate the settlement, as reflected in the January 5, 2021 email that Mr. Schoenfeld sent Mr. Dimin with the updated terms of the agreement. Therefore, the first payment was pushed to February 1, 2021. *Id.* On February 16, 2021, the parties continued to negotiate the final terms, particularly as to confidentiality, and Mr. Schoenfeld again emailed Mr. Dimin to push the deadline for the first payment to March 1, 2021. *See* D.E. 275-12, Ex. 10, at 2.

In emails sent on March 5, 2021 and March 11, 2021, Mr. Dimin acknowledged receipt of the documents that Mr. Schoenfeld had sent on February 16, 2021, and expressed hope that the

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[11] Neither party argues that the specific date for the first payment constitutes a material term of the settlement.

parties could finalize the settlement. *Id.*, D.E. 275-13 to 275-14, Exs. 11-12. Thus, it is clear that as late as March 5 and March 11, 2021, the parties were still wrapping up negotiations. Mr. Sadek never agreed that March 1, 2021 would be the date on which payments would begin. Moreover, any confusion about when payments were to begin seems more than reasonable as Mr. Sadek's counsel was still negotiating on his behalf in March, after the payments were to have begun. Thus, it would be inequitable for this Court to find that Mr. Sadek breached the agreement by failing to begin making payments in March. Because the Court finds that Mr. Sadek has not yet breached the settlement agreement and therefore, is not in default, the Court recommends that the District Court find that First American is not entitled to the confession of judgment for $1,000,000.00. Nonetheless, because the parties agreed that payment would begin within thirty days of the finalized settlement agreement and thereafter on the first of the month, the Court recommends that the District Court require Mr. Sadek to make his first payment in accordance with the settlement agreement on the first of the month that falls at least thirty after the date on which the District Court's ruling becomes final. That result is the most consistent with the payment schedule that the parties contemplated in their negotiations.

III. CONCLUSION

For the foregoing reasons, the Undersigned respectfully recommends that the District Court require the parties to sign the February 16, 2021 unsigned formal written settlement agreement, which is the last draft that Mr. Schoenfeld provided to Mr. Dimin, and to which no objections were made. The Undersigned further recommends that the District Court require First American to redact that part of paragraph 6 of the Affidavit of Confession of Judgment attached as Exhibit C to the February 16, 2021 settlement agreement that states "I admit the facts and claims in that complaint[,]" and further require Mr. Sadek to then execute the modified Affidavit of Confession

of Judgment. *See* Schoenfeld Decl., Ex. 10, D.E. 275-12, at page 21 of 28 (redlined version of Affidavit of Confession of Judgment emailed to Mr. Dimin on February 16, 2021). The Undersigned further recommends that the District Court decline to enter judgment against Mr. Sadek at this time, and instead direct Mr. Sadek to begin making payments in accordance with the settlement agreement on the first day of the month that falls at least thirty days after the District Court adopts this Report and Recommendation, and on the first of the month thereafter. Finally, the Undersigned respectfully recommends that the District Court deny Plaintiff's application for attorneys' fees. [12]

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[12] Plaintiff requests that this Court exercise its inherent authority and impose sanctions against Mr. Sadek because he has reneged on the settlement in bad faith. Pl. Mem. in Supp., June 7, 2021, D.E. 275-1, at 8; Reply Br., July 22, 2021, D.E. 277, at 10. On the other hand, Mr. Sadek argues that this Court should not award Plaintiff attorneys' fees because he "has set forth a reasonable position as to the enforceability of the purported settlement agreement and has not acted with the purpose to harass First American, to delay this action, nor to inflict malicious injury onto any parties involved." Def.'s Mem. in Opp., D.E. 276, at 15.

The Court generally may act *sua sponte* in imposing sanctions. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). "It is firmly established that '[t]he power to punish for contempt is inherent in all courts.'" *Id.* at 44 (citing *Ex parte Robinson*, 19 Wall. 505, 510 (1874)). "The power extends to the regulation of attorneys as well." *Ferguson v. Valero Energy Corp.*, 454 Fed. Appx. 109, 112 (3d Cir. 2011). However, "an award of fees and costs pursuant to the court's inherent authority to control litigation will usually require a finding of bad faith." *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 278 F.3d 175, 181 (3d Cir. 2002). Sanctions under the Court's inherent power are disfavored where other statutory or rules-based sanctions are available. *Id.* at 189.

Although the Court concludes there was an enforceable settlement agreement, the Court cannot find that Mr. Sadek acted in bad faith. This is not a case where the parties all signed a settlement agreement or even term sheet, and one party simply refused to abide its terms. The settlement discussions and ensuing agreement were significantly more nuanced. Moreover, the Court has rejected Plaintiff's contention that the first payment was due on March 1, 2021. Accordingly, the Court concludes that Mr. Sadek set forth what he believed to be a valid position on the enforceability of the settlement agreement. Therefore, the Undersigned respectfully recommends that the District Court decline to award First American attorneys' fees.

The parties are advised that pursuant to 28 U.S.C. § 636 and L. Civ. R. 71.1(c)(2), any objection to this Report and Recommendation must be filed and served within fourteen days.

s/Michael A. Hammer
UNITED STATES MAGISTRATE JUDGE

DATED: September 8, 2021