IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

	) Civil Action No. 95-626
	)
IN THE MATTER OF THE ESTATE OF	) **DECISION AND ORDER DENYING:**
LARRY LEE HILLBLOM,	) **(1) IMEONG'S MOTION TO RESCIND**
Deceased.	) **SETTLEMENT AGREEMENT;**
	) **(2) MONCRIEFF'S MOTION FOR ORDER**
	) **WITHDRAWING COURT APPROVAL**
	) **OF SETTLEMENT AND FOR SANCTIONS**

On September 18, 1998, the Court heard oral arguments by counsel for Petitioners Naoko Imeong, David Moncrieff, J. Steven Grist and Milagros Feliciano, as *guardians ad litem* of their respective minor claimants, in support of their combined alternative motions for (1) rescission of the heirship Settlement Agreement; (2) withdrawal of the Court's approval of the Settlement Agreement; or (3) damages or sanctions against the Trust[1], the Trustees and/or their legal counsel based upon alleged misrepresentation and breach of certain provisions of the Settlement Agreement. Counsel for the Executor and for the Trust appeared in opposition to the motions. Because the combined motions arise from the same factual basis, the Court heard from all parties together and at one time on their respective motions and, after taking the matter under submission, hereby issues a single decision.

FOR PUBLICATION

[p. 2]

I. FACTS

The final set of heirship settlement negotiations took place in August and September of 1997, and an initialed Draft Settlement Agreement was presented to the Court on September 18, 1997, followed by a final version that was filed the next day. After a number of hearings to address issues presented by the

[1] Following the conventions that have developed in this proceeding for identifying the various parties, "Trust" refers broadly to the charitable entities identified in the Will of Larry Lee Hillblom unless a further distinction is specified.

Settlement Agreement, the Trustees finally submitted their signatures on November 21, 1997, which by its own terms became the "Execution Date", or "Effective Date" of the Agreement. Judge Timothy H. Bellas issued his final order approving the Settlement Agreement on December 17, 1997.

The Settlement Agreement was presented to the Court as a "global" resolution of the numerous claims and issues contained within the heirship litigation. Of particular importance to the Court was the fundamental fairness of the balance that the Agreement had achieved by respecting Larry Hillblom's testamentary intentions as expressed by his will, while at the same time providing for a procedure under which only the proven children of the decedent would substantially share in his estate. In addition to the distribution plan and paternity testing protocol, the Settlement Agreement also provides for monthly Interim Payments to Qualified Heir Claimants, reimbursement to counsel for the Trust and Heir Claimants for certain attorneys' fees and litigation costs, active involvement and information sharing by the distributees in regular estate administration, an allocation of the responsibility of the various distributees for taxes which must be paid by the Estate, as well as a comprehensive set of releases and indemnifications by and among the parties. The Settlement Agreement also sets forth goals for the prudent liquidation and distribution of the Estate along with a timetable for obtaining ancillary and guardianship court approvals and dismissals and for the satisfaction of its other obligations.

At issue in the present motions are two separate covenants of the Settlement Agreement. The first appears under "Acknowledgments and Warranties" at Paragraph XIV.Q.6 and XIV.Q.6.b.: "Each Party represents and warrants that neither the Party nor the Party's counsel knows of any of the following... (b) any agreement for the rebate or assignment of any part of any Estate payment by a Distributee to a creditor or a person asserting a claim against the Estate...". The other appears in the information disclosure provision of Paragraph IX.B, which states: "Within 30 days after the Execution **[p. 3]** Date, or within thirty days of acquiring the information, if later, the Trust, the Trustees, and each Heir Claimant shall disclose in writing to the Executor and all other Parties all information known to them or their counsel or other representative(s) concerning assets and/or liabilities of the Estate..."

On April 22, 1996 a "Loan Facility Agreement" was executed between DHL International, Limited ("DHLI") and the Larry L. Hillblom Foundation, Inc., ("Foundation") for the purpose of paying the legal expenses of the Trust with respect to Estate proceedings and related litigation. Under the loan agreement,

DHLI initially loaned the Foundation an unsecured $1.5 million and, by amendment dated November 8, 1996, an additional unsecured $1.5 million, all to be repaid in a lump sum only on the condition that "the Borrower has received a distribution from the estate of Larry Hillblom or other charitable contribution at least equal to the amount payable." (¶ 6.3) Petitioners draw attention to Paragraph 5.3 of the Loan Facility Agreement, which promises "The Borrower will also provide when requested such further information the Lender may require (subject only to the preservation of the relevant attorney-client privilege) as to the progress and conduct of any legal action being pursued." The Loan Facility Agreement was executed on behalf of the Foundation by Peter J. Donnici, who also was and is a long-term director of DHLI.

In March of 1996, DHLI delivered formal notice to the Special Administrator that it intended to exercise certain repurchase rights to the Estate's 23.576% interest in DHLI pursuant to the terms of a 1992 Shareholders' Agreement. DHLI then commenced arbitration before the International Chamber of Commerce in Paris in April of 1996 to enforce its claim against the Estate. The arbitration culminated in a settlement that was formally recorded before the ICC on July 8, 1997, and approved by this Court on August 21, 1997. Subsequently, DHLI raised issues that delayed the final closure of the repurchase agreement until September 26, 1997.

The Trust informed the California Attorney General of its Loan Facility Agreement with DHLI in early May of 1996. By a return letter dated May 8, 1996, addressed to Peter J. Donnici, Deputy Attorney General Yeoryios C. Apallas expressed the California Attorney General's approval of the Loan Facility Agreement. The Executor's counsel Kathleen V. Fisher of Morrison & Foerster, L.L.P., learned of the existence of the Loan Facility Agreement on March 27, 1997. The Bank of Saipan was reinstated **[p. 4]** as Executor of the Estate with Morrison & Foerster as its attorney of record on May 1, 1997.

According to the evidence presently before the Court, at no time during the period of any of the dates expressed above did the Trust, any Trustee, the California Attorney General or the Executor disclose to any of the Petitioners or to the Court the existence of the Loan Facility Agreement between DHLI and the Foundation. The Trust generally disclosed the existence of the loan in its February 13, 1998, First Report and Account of Trustees of Hillblom Charitable Trust and Larry L. Hillblom Foundation; Verified Petition for Approval Thereof, filed before the San Francisco Superior Court. A copy of the loan document itself was filed with the San Francisco Superior Court on April 27, 1998, and counsel for

Petitioners Moncrieff and Imeong were served with copies by mail on the same date.

II. ISSUES PRESENTED

By motion filed June 11, 1998, Petitioner Imeong argues that the failure of the Trust to disclose that its legal expenses were supported by a loan from DHLI was a material breach of the disclosure and warranty obligations of the Settlement Agreement, particularly the warranty provision set forth at Paragraph XIV.Q.6.b. Imeong also asserts that, had she known of the Loan Facility Agreement, she would have objected to the approval of the DHLI settlement and would not have agreed to the heirship Settlement Agreement. Contending that the Trust's non-disclosure of the loan constituted a failure of consideration for her promises under the Settlement Agreement, Imeong seeks recission of the Agreement. Alternatively, Imeong asks for damages from the Trust, Trust's counsel and the Trustees, such damages to be measured by her portion of the difference in value between the repurchase price of the Estate's DHLI shares under the DHLI arbitration settlement and the price at which DHLI later resold the shares to a third party.

Petitioner Moncrieff, in a motion filed with the Court on July 30, 1998, requests an order withdrawing the Court's December 17, 1997 approval of the Settlement Agreement. Alleging the same breach of warranty as Imeong, Moncrieff argues that the failed consideration means that the current form of the Settlement Agreement does not meet the expectations of the parties and is not in the best interest of the Estate. Moncrieff alternatively recommends that the Court reform the Settlement **[p. 5]** Agreement by conditioning re-approval of the Settlement Agreement upon the inclusion of terms that would (1) reduce the Trust's share of the Estate from 40% to 20%; (2) ensure that the current Trustees and/or their counsel comprise no more than 25% of the charitable entity; (3) deny reimbursements for certain of the Trust's legal expenses; and (4) establish that the Trust, Trustees and their counsel are liable to the Estate for damages resulting from diminished settlement amounts received from the DHL entities. Moncrieff also asks for a monetary sanction against the Trust respondents under the Court's inherent power to enforce settlements and for reasonable attorney's fees and costs pursuant to the Settlement Agreement. He requests an order for 90 days of supervised discovery to be followed by an evidentiary hearing so that the Court may make the requisite findings of fact.

Petitioners Grist and Feliciano filed responses on September 4, 1997, supporting the motions of

the other Petitioners' but including two additional claims for damages: one based upon Trust's breach of the covenant of good faith and fair dealing and a second claim for punitive damages based upon fraudulent misrepresentation.

The Executor and the Trust oppose all of the Petitioners' motions, both asserting that the non-disclosure of the Loan facility Agreement did not breach Paragraph XIV.Q.6 of the Settlement Agreement and that there is no basis for the remedies sought by the Petitioners. The Executor and the Trust diverge on the question of whether or not other provisions of the Settlement Agreement may have been breached. The Trust maintains that it had no duty at law or under the Settlement Agreement to disclose the Loan Facility Agreement to the Petitioners. The Executor implies a breach of the "asset disclosure" provisions, particularly Paragraph IX.B, but argues that the remedy provided for in the Settlement Agreement, i.e., the revocation of the breaching party's release under Section XII.E, applies and should be enforced.

III. ANALYSIS AND DISCUSSION

The heirship Settlement Agreement initially came before the Court in late Summer of 1997 accompanied by assurances from the various parties that the 83-page written agreement had been excruciatingly crafted word-by-word through the diligent efforts of the many experienced legal counsel who had participated in the notoriously heated heirship litigation. Associate Judge Timothy Bellas **[p. 6]** offered his observation at a September 24, 1997 approval hearing that it appeared from the settlement document that the parties were perhaps attempting to "outsmart each other", and this proposition gained at least the silent assent of those present. It was at this hearing that Petitioner Imeong's counsel described the painful process of forging every detail of the release provisions in his advocacy to the Court that the release provisions remain intact and untouched.

Consistently with Paragraph XIV.Q.5 of the Settlement Agreement and with general principles of interpretation[2], the Court will not construe the terms of the Settlement Agreement more or less strictly

---

[2] Settlement agreements are construed pursuant to the principles of contract law. *Core-Vent Corp. v. Implant Innovations, Inc.*, 53 F.3d 1252, 1256 (Fed. Cir. 1995). The intent of the parties is presumed to be encompassed by the plain language of the contract terms. *Riley v. Public School System*, 4 N.M.I. 85, 88 (1994). "The language of a settlement agreement must be construed literally in a straightforward manner...", "Words must be given their usual and ordinary meanings, and technical words their usual legal meanings." *T.N.T. Marketing, Inc. v. Agresti*, 796 F.2d 276, 278 (9th Cir. 1986), quoting *Air Line Stewards and Stewardesses Assoc. v. Trans World Airlines, Inc.*, 713 F.2d 319, 321 (7th Cir. 1983) and *Robin v. Sun Oil Co.*, 548 F.2d 554, 557 (5th Cir. 1977).

against or in favor of a party because of counsels' remarks made in court. On the other hand, the acknowledged history of the negotiation and execution of the document in question means that those principles of interpretation that may otherwise apply to protect consumers from boilerplate terms in contracts of adhesion will not apply here. *Cf*. Restatement (Second) of Contracts § 206, comm. a; 8 Williston on Contracts (4th Ed. 1998) § 19:21 page 278.

Paragraph XIV.Q.6b of the Settlement Agreement contains the warranty that neither a party nor their counsel know of an "agreement for the rebate or assignment of any part of any Estate payment by a Distributee or a person asserting a claim." Petitioners contend that the loan from DHLI to the Foundation to cover the legal expenses of the Trust was an agreement in breach of these terms. The terms "assignment" and "rebate", however, have common meanings that are materially congruent with their legal meanings. Legally, an assignment is the transfer of a right "by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." Restatement (Second) of Contracts § 317(1) (1981). The present transfer of a right distinguishes an assignment from the situation in which a promise is made to pay money that is earmarked from a fund that the promisor is owed from a third party obligor. *Id*., at § 330 comm. b. In **[p. 7]** the latter case, the promisee acquires no rights against the third party. *Webster's Third New International Dictionary* (G&C Merriam Co. 1969) defines an "assignment" as "the transfer to another of one's legal interest or right"; and the same dictionary defines "rebate" as "a retroactive abatement, credit, discount, or refund (as from a wholesaler to a retailer) usu. as consideration for a specified volume of business." *Black's Law Dictionary* (6th ed. 1990) defines "rebate" as a "deduction or refund of money in consideration of prompt payment," or a "deduction or drawback... not taken out in advance of payment, but handed back to the payer after he has paid the full stipulated sum." The rights and obligations of the parties to the Loan Facility Agreement cannot properly be construed as a "rebate" or "assignment" of an Estate payment, at least according to the common and legal definitions of those terms.

Furthermore, the warranty requires disclosure of such an agreement between a Distributee and a "creditor or person asserting a claim against the Estate." The DHLI claim against the Estate based upon its exercise of repurchase rights was withdrawn and the arbitration settled in early July of 1997, with this Court's approval following on August 21, 1997. The "Effective Date" of the Settlement Agreement was

November 21, 1997, by operation of its own terms and as affirmed by the subsequent representations of the parties. There is no basis for finding that the terms of the Settlement Agreement were effective any earlier than November 21, 1998 and equally no basis for finding, as the Petitioners suggest, that there was no effective settlement of the DHLI claim until funds were transferred to the Estate pursuant to the closing on September 26, 1997. DHLI was therefore no longer "asserting a claim" when the warranty provisions took effect on November 21, 1997.

Petitioners urge a broader and more flexible interpretation of the terms expressed in Paragraph XIV.Q.6.b. of the Settlement Agreement. They argue that a less literal, but reasonable, interpretation of "rebate or assignment" would include any transfer of Estate funds by a distributee who received the funds to a creditor or other claimant who had been asserting a claim at the time of the negotiations. The Court does not find an ambiguity in the terms that were chosen, however, nor does it find evidence of a prior alternative understanding between the parties that would justify reformation. Restatement (Second) Contracts § 155 comm. (a). From the most general perspective, the warranty provision at Paragraph XIV.Q.6.b. appears quite clearly to be designed to address the possibility of a claimant who would seize **[p. 8]** an interest in the Estate through the subterfuge of a secret proxy. The provision is intended to either expose or hold liable a settling party who is the undisclosed representative of such an interest in the Estate. The repayment to DHLI, with reasonable interest, of funds borrowed by the Foundation to pay for the legal expenses of the Trust does not fall into this category of concern. The Trust therefore did not breach Paragraph XIV.Q.6 of the Settlement Agreement by failing to disclose its Loan Facility Agreement to the Petitioners.

The Executor and Petitioners suggest that the non-disclosure by the Trust of the DHLI loan amounted to a breach of the "asset disclosure" provisions in Paragraph IX.B of the Settlement Agreement. It is not obvious and has not been demonstrated how the disclosure of the Loan Facility Agreement would fall within the requirement to provide written notice to the Executor of information "concerning assets and/or liabilities of the Estate." Nevertheless, in prior submissions to the Court, the Executor has made a preliminary showing that evidence may exist to raise the issue of the possible noncompliance of certain Trustees with the requirements of Paragraph IX.B. The Executor is pursuing the investigation of these matters as possible offset claims in this proceeding. It would be premature at this time for the Court to find,

as a matter of law, that the non-disclosure of the loan agreement pursuant to Paragraph IX.B did not constitute a breach of the Settlement Agreement.

Even a proven breach of these provisions, however, would not warrant rescission of the Settlement Agreement. At Paragraph XII.E, the Settlement Agreement provides a remedy for non-disclosure under both the warranty provisions and the "asset-disclosure" provisions. Because the agreement contemplates the possibility of non-disclosure and provides a negotiated remedy, the Petitioners may not now claim that the disclosure was fundamental to the purpose of the agreement so as to result in a complete failure of consideration justifying rescission. With an adequate legal remedy available, the remedy of rescission will be denied. *Santos v. Nansay Micronesia, Inc.*, 4 N.M.I. 155, 164 (1994)[3].

[p. 9] Similarly, the Court's approval of the Settlement Agreement was not conditioned upon the compliance of all parties with all of its terms, but rested instead upon a determination that its terms were fair and just, that it had been freely and competently negotiated, and was in the best interests of the Estate and all parties. There is no basis for an equitable reformation of the Settlement Agreement according to the specific terms suggested by Petitioner Moncrieff, nor may a court otherwise rewrite the specific terms of a settlement. *Evans v. Jeff D.*, 475 U.S. 717, 726 (1986); *Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1990).

IV. CONCLUSION

The motions of Petitioners for damages, including damages based upon breach of the implied covenant of good faith, and motions for rescission and for withdrawal of the Court's December 17, 1997 approval of the Settlement Agreement are DENIED. The Court finds that the Trustees' non-disclosure of the Loan Facility Agreement between DHLI and the Foundation did not constitute a breach of Paragraph XIV.Q.6 and Q.6.b. of the Settlement Agreement. Petitioners have not stated grounds for rescission, reformation or reconsideration of this Court's approval of the Settlement Agreement, nor have they stated a basis for an award of damages caused by the willful frustration of their justified expectations under the Agreement.

---

[3] The Court heard extensive argument from counsel on the issue of the availability or unavailability of equitable relief to the Petitioners, mostly in opposition to the motions. Because no breach of the Settlement Agreement has been determined, the Court does not reach these issues.

The Court does not rule on the question of whether or not Paragraph IX.B has been breached by the conduct of the Trustees. The Court does find that the parties to the Settlement Agreement have agreed to a remedy for a breach of Paragraph IX.B., and further takes notice of the fact that the Executor is currently engaged in the pursuit of potential claims or offsets that are related to the DHLI transactions. Under Rule 10 of the Commonwealth Rules of Probate Procedure as well as under Paragraph IX.A of the Settlement Agreement, it is the responsibility of the Executor to investigate and pursue if necessary any claims belonging to the Estate.

So ORDERED this 9th day of November, 1998.

/s/ Alexandro C. Castro
ALEXANDRO C. CASTRO, Judge Pro Tem