

Case No. 11-3037

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NE OH Coalition for the Homeless, et al.
Plaintiff-Appellant/Cross-Appellant

v.

State of Ohio
Intervenor-Appellant/Cross-Appellee

and

Secretary of State
Defendant-Appellee

On Appeal from the
U.S. District Court for the
Southern District of Ohio
Eastern Division at Columbus
Case No. 06-cv-00896

**MOTION OF DEFENDANT-APPELLEE OHIO SECRETARY OF STATE
TO FILE HIS REPLY BRIEF *INSTANTER***

Now comes Ohio Secretary of State and asks this Court to grant him leave to file the attached reply brief *instanter*. The issues raised in this cross-appeal are the same as the issues raised in Case Numbers 11-3035 and 11-3036. The arguments that the Secretary wishes to file in his reply brief in this case are verbatim the same as the arguments made by Appellant/Cross-Appellee State of Ohio's Third Brief in 11-3035 and 11-3036.

Counsel for the Secretary of State inadvertently believed that his reply brief in 11-3037 was due the same time that the State of Ohio's Third Brief was due in 11-3036 and incorrectly calendared both briefs as being due on the same day, May 31, 2011. Appellant Northeast Ohio Coalition for the Homeless will not be

prejudiced by this filing as these same arguments were already filed in Case Nos. 11-3035 and 11-3036.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

/s/ Richard N. Coglianese

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DEFENDANT-APPELLEE SECRETARY OF STATE'S REPLY BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee Ohio Secretary of State Jon Husted request oral argument because they believe it will aid this Court's consideration of the complex legal issues in this case.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction under 28 U.S.C. § 1331, as this was a civil action purportedly arising under the laws of the United States. On November 30, 2010, the court granted in part and denied in part Appellees' third motion for attorneys' fees and costs. Appellant State of Ohio filed a timely notice of appeal on December 29, 2010. Plaintiffs-Appellees Northeast Ohio Coalition for the Homeless and Service Employees International Union filed a cross-appeal on January 11, 2011. Cross-Appellee Ohio Secretary of State Jon Husted filed a cross-appeal on January 11, 2011.

STATEMENT OF THE ISSUE

The issue presented by the Appellant State of Ohio and Cross-Appellee Ohio Secretary of State is whether the Consent Decree constituted a settlement in full of all of the Plaintiffs' claims, thereby waiving Plaintiffs' subsequent third claim for attorneys' fees.

INTRODUCTION

In this appeal and cross-appeal, Plaintiffs-Appellees Northeast Ohio Coalition for the Homeless and the Service Employees International Union (the “Plaintiffs”) request this Court to ignore the doctrine of *stare decisis* and adopt two rules of law directly contrary to Sixth Circuit precedent. First, they argue that because the Consent Decree does not mention the additional fees at issue in this appeal, the Decree cannot be a settlement in full of the claims raised in Plaintiffs’ complaints. Therefore, Plaintiffs argue, they did not waive their third request for attorneys’ fees. This proposed rule, however, turns this Court’s well-settled decision from *Jennings v. Metropolitan Gov. of Nashville*, 715 F.2d 1111 (6th Cir. 1983), completely on its head.

In *Jennings*, this Court held that silence on the issues of attorneys’ fees in a consent decree is not controlling in determining whether a party has waived the opportunity to seek attorneys’ fees. Rather, the appropriate test is whether the parties intended the consent decree to be a final disposition of all claims in the complaint. Plaintiffs’ insistence that the determination of whether the Consent Decree was a complete settlement depends on whether the parties reached an agreement on Plaintiffs’ ability to seek additional fees must be expressly rejected.

The express language of the Consent Decree demonstrates whether the parties intended the Decree to resolve this litigation. That language provides:

The parties, *desiring that this action be settled* by an appropriate Consent Decree (“Decree”) and *without the burden of protracted litigation*, agree to the jurisdiction of this Court over the parties and the subject matter of this action. Subject to this Court’s approval of this Decree, and subject to the continuing validity of this Decree if it or its terms are challenged in any other court, the parties waive a hearing and findings of fact and conclusions of law on *all issues*, and further agree to the entry of this Decree as *final and binding* among and between themselves as to the issues raised in the Plaintiffs’ Complaint and Supplemental Complaint, and the matters resolved in this Decree.

R. 210, p. 2 (emphasis added).

The intent of the parties is clear from the plain language. When this language is combined with Ohio’s principles of contract interpretation and the only relevant evidence in the record regarding the parties’ specific intent, all evidence demonstrates that the parties intended the Consent Decree to terminate and finally resolve this litigation.

Accordingly, the district court erred, as a matter of law, by concluding that the Consent Decree was not a settlement in full of all claims in Plaintiffs’ complaints. The district court’s decision on waiver should be reversed and remanded with instructions to completely deny Plaintiffs’ third motion for attorneys’ fees because the Consent Decree was a comprehensive and global settlement of the claims in this litigation.

If this Court reverses the district court's waiver decision, Plaintiffs' cross-appeal is moot. On the other hand, if this Court affirms the district court's waiver decision, this Court should also affirm the lower court's application of the three percent rule. In *Coulter v. Tennessee*, 805 F.2d 146 (6th Cir. 1986), this Court established a rule that absent unusual circumstances, attorneys' hours for litigating fee issues should not exceed 3% of the hours in the main case. Despite the fact that the *Coulter* holding is now the "default rule" in this Circuit (*United States v. General Elec. Co.*, 397 Fed. Appx. 144, 151 n.10 (6th Cir. 2010)), Plaintiffs request this Court to "re-examine" *Coulter*. The district court was required to apply the rule, and Plaintiffs have failed to demonstrate that *Coulter* should be overruled or that the lower court's application was clearly erroneous.

For these reasons, this Court should reverse the district court's legal interpretation of the Consent Decree that it did not settle this litigation. If the Court affirms the waiver decision, the Court should also affirm the trial court's application of this Circuit's well-established three percent rule.

**COUNTER-STATEMENT OF THE FACTS AND THE CASE TO
PLAINTIFFS' CROSS-APPEAL**

State Defendants incorporate the “Statement of Facts and the Case” from their Principal (First) Brief. First Br., pp. 6-16. In response to Plaintiffs’ Statement of Facts in their Second Brief, State Defendants submit the following.

I. The 2006 and 2008 consent orders did not terminate this litigation and did not award attorneys’ fees.

Plaintiffs stress the fact that the State Defendants did not argue that Plaintiffs waived their right to seek fees after entry of the 2006 and 2008 orders. Second Br., pp. 4-5. State Defendants could not have argued waiver after entry of the 2006 and 2008 orders, however, because waiver focuses on “whether the parties intended the settlement to be a final disposition of all claims.” *Jennings v. Metropolitan Gov. of Nashville*, 715 F.2d 1111, 1114 (6th Cir. 1983). The 2006 and 2008 orders did not terminate this litigation; they were temporary and related only to the pending election. *See, e.g.*, R. 51, p. 2 (stating that it applies “only to the November 2006 General Election”); R. 57, p. 4 (stating that the order “shall not be deemed to have any precedential effect in any future election”). In contrast, as Plaintiffs admit, the 2010 Consent Decree “terminat[ed] this litigation”; therefore, it was a final disposition of all claims. R. 213, ¶¶ 6, 15; R. 212, pp. 1, 5, 11.

Similarly, as Plaintiffs also admit, the 2010 Consent Decree “contains more than twenty-five detailed paragraphs” and is “painstakingly specific.” Second Br.,

pp. 7, 20. The 2006 and 2008 orders do not contain any such specificity or detail. Further, unlike the 2010 Consent Decree, the previous orders do not purport to be “final and binding . . . to the issues raised in the Plaintiffs’ Complaint and Supplemental Complaint,” and, unlike the 2010 Consent Decree, the previous orders do not expressly award attorneys’ fees to Plaintiffs. *Cf.* R. 210, p. 2 *with* R. 51, 57, 142, and 143.

Accordingly, the fact that Plaintiffs did not previously argue waiver of attorneys’ fees is irrelevant to the facts of this appeal. To the extent the previous orders are relevant, they highlight the stark differences between the temporary orders from 2006 and 2008 and the final 2010 Consent Decree. Thus, State Defendants did not previously argue waiver because, unlike the 2010 Consent Decree, the previous orders did not terminate this litigation.

II. Plaintiffs’ three categories of fees in their third fee request are attorney-fee related.

In Plaintiffs’ own words, their third attorneys’ fee motion requested fees and costs relating to the following three categories:

- (1) “briefing and argument of the Plaintiffs’ successful prior motions for attorneys’ fees” (R. 212, p. 1);
- (2) “the opposition to *and settlement of* the State of Ohio’s appeal of this Court’s decision awarding attorneys’ fees” (*id.*, emphasis added); and
- (3) “negotiation of this Court’s April 19, 2010 Consent Decree *terminating this litigation*” (*id.*, emphasis added).

Plaintiffs' own description of their third fee motion demonstrates that all three categories were attorney-fee related and that the Consent Decree resolved this litigation. Plaintiffs now assert that the Consent Decree did not actually terminate this litigation. In addition, in their cross-appeal, Plaintiffs now claim that the second category of requested fees only relates to "defending the State's appeal," which, Plaintiffs allege, was eventually dismissed for lack of prosecution and, Plaintiffs allege, somehow exempts this category from the three percent rule. Second Br., p. 8, 54-55.

Plaintiffs' original third fee motion, however, demonstrates that the second category included the "settlement of the State of Ohio's appeal of this Court's decision awarding attorneys' fees." R. 212, p. 1. Thus, under Plaintiffs' description, the second category of fees was fee-related.

III. The district court awarded Plaintiffs \$15,132 in this "fees for fees" litigation.

In their cross-appeal, Plaintiffs attempt to diminish the district court's order granting Plaintiffs \$15,132 in fees, plus the full amount of requested costs, by requesting this Court to view the award as a breakdown of what each lawyer received under that individual lawyer's billing rate. *See, e.g.*, Second Br., pp. 15-16 (stating that Mr. Chandra was compensated for just six hours of work). A court's primary concern in a fee case, however, is that the fee awarded be reasonable, and a reasonable fee is one that is adequate to attract competent

counsel. The “three percent rule” from *Coulter* is part and parcel of a court’s reasonableness determination. The *Coulter* court established the rule in its examination of whether the amount of fees requested by the plaintiff was “reasonable” or “excessive.” 805 F.2d at 151. Thus, the district court’s award of attorneys’ fees should be examined within this framework – not through the lens of what each individual attorney received under his or her billing rate.

Accordingly, the issue is whether the entire amount, \$15,132, was reasonable in this fees-for-fees litigation. When viewed in that context, the amount is appropriate. With this amount, Plaintiffs could pay counsel billing at \$290 an hour, such as Plaintiff counsel Caroline Gentry, for over 52 hours of work. *See R. 212, p. 10.* In State Defendants’ view, this amount would be sufficient to attract competent counsel.

SUMMARY OF THE ARGUMENT

The district court erred in concluding that the Consent Decree was not a settlement in full of all the claims raised in Plaintiffs' complaints. Because the lower court's decision was based solely on its interpretation of the Consent Decree's language, the decision on waiver is reviewed *de novo*. In this Circuit, the test to determine whether a party waives the opportunity to seek attorneys' fees after entry of a consent decree is whether the parties intended the decree to be a final disposition of all claims. *Jennings v. Metropolitan Gov. of Nashville*, 715 F.2d 1111, 1114 (6th Cir. 1983). Plaintiffs assert that the Consent Decree was not a final settlement because it does not address Plaintiffs' right to seek **additional** fees beyond those awarded in the Consent Decree. The Court should reject this circular argument because it is an implicit request to overrule the holding in *Jennings*. The focus should be on whether the parties intended the Decree to globally settle the litigation, not whether the parties intended a certain subset of fees to be included in the agreement.

Here, the plain language of the Consent Decree, along with applicable Ohio contract construction principles, demonstrate that the Consent Decree was meant to terminate this litigation. Plaintiffs rely too heavily on what was allegedly omitted from the Decree's language, rather than its express terms, which provide that the Decree is "final and binding . . . as to the issues raised in the Plaintiffs'

Complaint.” R. 210, p. 2. Further, Plaintiffs incorrectly apply Ohio’s interpretative cannons. Finally, the only factual evidence in the record of the parties’ specific intent is that the Consent Decree was meant to globally settle this litigation. The self-serving affidavits submitted by Plaintiffs’ counsel are irrelevant, and there was no “understanding” between the parties that Plaintiffs would be permitted to seek additional fees after entry of the final Consent Decree.

This Court should reverse the district court’s waiver decision and remand with instructions for the lower court to find that the Consent Decree was a comprehensive settlement that resolved all claims in Plaintiffs’ complaints, including a request for additional fees. If the Court agrees with State Defendants and reverses the district court’s waiver decision, Plaintiffs’ cross-appeal is moot and should be dismissed.

In the alternative, if this Court affirms the district court’s waiver decision, this Court should also affirm the lower courts application of the three percent rule, pursuant to *Coulter v. Tennessee*, 805 F.2d 146 (6th Cir. 1986). The district court’s determination that Plaintiffs’ entire third fee request contained “fees for fee” – in the absence of unusual circumstances – is entitled to substantial deference and reviewed under an abuse of discretion standard.

Plaintiffs fail to provide any persuasive authority that the district court abused its discretion by applying the three percent rule here. Plaintiffs claim that

the lower court should have deviated from the rule because of the “complex” issues involved here and because of State Defendants’ opposition to their previous fee requests. Neither of these arguments, however, demonstrate the existence of “unusual circumstances.” It is not “unusual” to oppose fee motions. Moreover, State Defendants were justified in opposing Plaintiffs’ previous fee motions, as evidenced by the district court’s 20% across-the-board reduction of Plaintiffs’ requested amount.

Finally, the district court did not abuse its discretion in applying the three percent rule to the entire fee petition. Plaintiffs’ second category of requested fees was for defending and settling State Defendants’ appeal of the initial fee decision, which is clearly fee-related. The third category of fees involved hours working with the Sixth Circuit’s mediator in settling this case, including the attorneys’ fees issue. The only reason that the parties were in the Sixth Circuit was because of the State Defendants’ appeal of the initial fee award. Because all of the requested fees in Plaintiffs’ third fee petition can reasonably be characterized as relating to “fees for fees,” the district court did not abuse its discretion by applying *Coulter*. The district court’s application of the three percent rule should be affirmed.

**STATE DEFENDANTS' REPLY IN SUPPORT OF
PRINCIPAL (FIRST) BRIEF**

I. The District Court Erred In Concluding The Consent Decree Was Not A Settlement In Full Of All The Claims Raised In Plaintiffs' Complaints.

A. The appropriate standard of review is *de novo*.

The parties agree that a district court's interpretation of a consent decree "is a matter of law subject to *de novo* review, and the underlying findings of fact are reviewed for clear error." *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007); Second Br., p. 19. Plaintiffs allege that the court "review[ed] the relevant facts" and determined that the parties "did not intend the Decree to be final"; therefore, according to Plaintiffs, this Court must review the district court's decision for "clear error." Second Br., p. 19.

However, in determining that the Consent Decree was not a final disposition of all claims, the district court cited only to the language of the Decree and compared that language to the settlement agreement in *McCuiston v. Hoffa*, 202 Fed. Appx. 858, 863 (6th Cir. 2006). R. 234, p. 8 (holding that the "*language in the Decree at issue here . . . does not lead to a similar inference of finality*" and "*the Decree's language is not as expansive as that in the McCuiston consent judgment*") (emphasis added). The district court did not specify any "underlying findings of facts" in its decision, and Plaintiffs have failed to specify any "facts" on which the district court relied or that this Court could possibly review for clear

error. Accordingly, because the trial court's decision rests solely on its legal interpretation of the Consent Decree, this Court reviews the district court's legal conclusions *de novo*. See e.g., *Nat'l Ecological*, 496 F.3d at 476.¹

B. The test is whether the Consent Decree was a comprehensive settlement of all claims – not whether the parties reached an explicit agreement on the waiver of future fees.

The issue before this Court is whether the parties intended the Consent Decree to be a final disposition of all claims. Plaintiffs argue that the Decree is not a complete settlement because it does not explicitly waive their opportunity to request additional fees. In their response brief, Plaintiffs repeatedly emphasize:

[N]owhere in the plain language of the April 2010 Consent Decree do the Plaintiffs waive their right to seek fees and costs unrelated to those that were “previously awarded” by the District Court. R. 210. Although the April 2010 Decree lists six separate “Purposes of this Decree,” none mentions any waiver of attorneys’ fees or costs.

Second Br. at 7. Similarly, Plaintiffs argue:

[P]aragraph [¶] 12] was only intended to require the State to pay the attorneys’ fees that were “previously awarded” and to set a deadline for making such payment. It does not include any language relating to future fees, let alone a waiver of such fees. In short, there was no waiver.

¹ Even if the Court accepts Plaintiffs’ position that the lower court’s decision should be reviewed for an abuse of discretion, the decision should still be reversed. As explained *infra*, there is no evidence in the record on which the district court could reasonably rely to hold that the Consent Decree did not terminate and fully resolve the claims raised in Plaintiffs’ complaints. Thus, under either standard of review, the district court’s waiver decision should be reversed.

Id. at 24; *see also id.* at 20-21, 31, 35-36 (arguing that because the Consent Decree is silent regarding Plaintiffs' third fee request, there cannot be any waiver of additional fees).

In this Circuit, silence on the waiver of attorneys' fees is not controlling. Since the leading decision in *Jennings v. Metropolitan Gov. of Nashville*, 715 F.2d 1111, 1114 (6th Cir. 1983), and re-affirmed more recently in *McCuiston v. Hoffa*, 202 Fed. Appx. 858, 863 (6th Cir. 2006), if a settlement agreement is silent as to whether attorneys' fees are recoverable, courts must focus on whether the entire agreement was intended to fully settle the litigation. In *Jennings*, the lower court – similar to Plaintiffs' arguments here – focused its inquiry on whether the parties explicitly agreed to include attorneys' fees in the settlement. *Id.* at 1114. On appeal, this Court reversed, holding that the question is “whether the parties intended the settlement to be a final disposition of all claims, *rather* than whether the parties intended to include attorneys' fees in the settlement.” *Id.* (emphasis added). This distinction is important because it is “not necessary for the parties to have reached a separate settlement on each aspect of the claim” – such as the issue of attorneys' fees – “in order to have reached a settlement in full.” *Id.*

This Circuit has “specifically rejected” (*see McCuiston*, 202 Fed. Appx. at 86) the approach taken by the Ninth and Tenth Circuits, which focus their inquiry on whether the parties explicitly agreed to waiver of attorneys' fees in a settlement,

and these Circuits place the burden on the defendant to negotiate an express waiver into the settlement. *See, e.g., Muckleshoot Tribe v. Puget Sound Power & Light Co.*, 875 F.2d 695, 698-99 (9th Cir. 1989) (defendant has burden of demonstrating that plaintiff released it from liability for attorneys' fees); *Ellis v. Univ. of Kansas Medical Ctr.*, 163 F.3d 1186, 1200 (10th Cir. 1998) (courts must "focus on whether such fees were discussed and intended to be covered by the settlement"). Despite the fact that this Circuit has "specifically rejected" this approach, Plaintiffs cite to the Ninth and Tenth Circuit decisions approvingly in their response brief. Second Br., pp. 23-24, 35-36. In fact, Plaintiffs urge this Court to adopt the reasoning of Tenth Circuit's *Ellis* decision and hold that State Defendants should bear the burden of failing to negotiate an express waiver of Plaintiffs' third (and hidden) fee request. *Id.* at 36 ("the government should bear the loss of its unexpressed intent") (citing *Ellis*, 163 F.3d at 1201).

To the extent Plaintiffs are implicitly requesting this Court to reconsider its decisions in *Jennings* and *McCuiston* in favor of *Ellis* or *Muckleshoot* – or Plaintiffs misunderstand the appropriate standard – Plaintiffs' arguments should be rejected. The test developed in *Jennings* and *McCuiston* is not only binding precedent in this Circuit but also the most fair and reasonable approach to determine whether a consent decree waives a future claim for attorneys' fees under §1988. That statute does not require indulging future fee requests – and thereby

exposing state and local governments to future, unknown liability – after the parties negotiate in good faith a comprehensive settlement that was intended to dispose of all the claims in the complaint, terminate the litigation, and avoid any further protracted litigation. Parting from this Circuit’s rule will reduce the attractiveness of settlement in § 1988 cases and deter state and local governments from entering into such final and binding agreements.

C. Plaintiffs have failed to identify any claims left unresolved after the Consent Decree – other than its third fee request.

As explained above, the issue before the Court is whether the parties intended the Consent Decree to be a final disposition of all claims. *McCuiston*, 202 Fed. Appx. at 863. Plaintiffs’ admit that the many issues, including its voter identification and provisional balloting claims, were “fully resolved” by entry of the Consent Decree. Second Br., p. 21. Thus, Plaintiffs’ brief suggests that the *only* claim from their Complaints left unresolved by the Consent Decree is its claim for additional fees – beyond those awarded in the Decree. *See, e.g., id.* (“That the Decree contains no provision regarding the *other* attorneys’ fees at issue here suggests that the parties did not intend for the Decree to be a final disposition of all claims.”) (emphasis added); *id.* at 28 (“the exclusion of future fees . . . suggests that the parties . . . did not intend that the Decree fully resolve all

issues relating to the voting rights claims outlined in the Complaint”) (emphasis in original).

Plaintiffs’ circular argument is exactly what this Court in *Jennings* and *McCuiston* was attempting to avoid. Again, “silence of the parties regarding attorneys’ fees is not controlling.” *Jennings*, 715 F.2d at 1114. The parties were not required to reach an explicit agreement on additional attorneys’ fees, nor is this Court required to answer that question to determine whether the Consent Decree was a settlement in full. Accepting Plaintiffs’ argument will essentially overrule *Jennings* and *McCuiston*. If Plaintiffs are correct, silence will be controlling because every plaintiff will argue that, if the consent decree is silent on fees, then the decree is not a settlement in full because the parties did not reach an explicit agreement on the fee issue. This Court rejected this narrow focus in *Jennings* and *McCuiston* and should reject it again here.

D. The plain language of the Decree and Ohio contract interpretation principles demonstrate that the Consent Decree is a settlement in full.

Plaintiffs’ misunderstanding of the appropriate test is further demonstrated in their response to State Defendants’ plain language and interpretive canon arguments. Plaintiffs assert that because the Decree is silent on the issue of additional attorneys’ fees, “there is no ambiguity to support the use of the interpretive canons.” Second Br., p. 26. Alternatively, Plaintiffs claim that if the

Court refers to interpretative canons, the canons support Plaintiffs' position because the Decree's silence on "future fees" suggests that it was not final and binding. *Id.*, p. 28.

The Consent Decree's silence on "future fees" – and the inferred meaning that Plaintiffs read into that silence – cannot trump the *actual language* of the agreed entry indicating that it is a "final and binding" as to the "issues raised in the Plaintiffs' Complaint and Supplemental Complaint." R. 210, p.2. The Consent Decree's language is the best evidence to demonstrate the parties' intent. *Kelly v. Med. Life Ins. Co.*, 509 N.E. 2d 411, ¶ 1 syllabus (Ohio 1987) ("The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement."). Plaintiffs rely too heavily on what was allegedly omitted from the Decree's language rather than its actual text.

Moreover, Plaintiffs misapply two of the interpretive canons. First, Plaintiffs argue *expressio unius est exclusio alterius* supports their reading of the Decree because "the exclusion of future fees altogether from the explicit purpose section suggests that the parties did not intend to resolve the future fees issue." Second Br., p. 28 (emphasis in original). The canon only applies, however, to items "in an associated group or series," which would then justify the inference that an item not mentioned was excluded by deliberate choice, not inadvertence. *Mercer v. 3M Precision Optics, Inc.*, 908 N.E. 2d 1016, 1018 (Ohio Ct. App. 2009)

(quoting *Barnhardt v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)). Therefore, if the canon applies, it must apply to the section in the Consent Decree addressing the associated group: *i.e.*, attorneys' fees, not the unrelated "Purposes" section.

Similarly, Plaintiffs incorrectly argue that the principle that an Ohio contract should be construed against the party who drafted it applies only between parties of unequal bargaining power. Second Br., p. 29. To the contrary, if the Court finds the language of the Consent Decree is ambiguous, this principle applies, as it applies to all Ohio contracts. *See, e.g., Mead Corp. v. ABB Power Generation, Inc.*, 319 F.3d 790, 798(6th Cir. 2003) (applying principle in a case with parties of equal bargaining power because "[u]nder Ohio law, ambiguous contractual language will be construed against the drafter of the contract") (citing Ohio cases). As this Court held in *Mead*, because Plaintiffs drafted the Consent Decree, any ambiguity should be resolved in favor of the State Defendants.

Finally, Plaintiffs assert that the Consent Decree cannot be a final disposition of all claims because it remains in effect until 2013. Second Br., p. 21-22. Plaintiffs fail to address the fact that the settlement agreements in *Jennings* authorized the plaintiff to "reopen" the action for purposes of enforcing the settlement. *Jennings*, 715 F.2d at 1112. Despite this language, this Court declared that the agreements were settlements in full. *Id.* at 1114. Moreover, consent decrees are always subject to judicial policing, and such language does not indicate

that the document is not a comprehensive settlement. For example, the fact that the Plaintiffs may enforce the terms of the Consent Decree in the future does not mean that the Consent Decree did not dispose of all claims in the complaints. If Plaintiffs are correct, then no Consent Decree could be a final disposition of all claims, which could not have been intended by this Court in *Jennings* or *McCuiston*.

E. The only evidence in the record of the parties' intent is that the Consent Decree was a global and comprehensive settlement.

The factual circumstances surrounding the Consent Decree demonstrate that it was not intended to be a settlement in full.

1. Plaintiffs' counsel's opinions are irrelevant.

The Court cannot rely on Plaintiff counsels' affidavits to decipher the individual Plaintiffs' intent. If the parties' intent is an issue of fact – as Plaintiffs argue in their response brief (Second Br., p. 19, 33-34) – then only the individual Plaintiffs may testify to their intent. Plaintiffs had a month to submit admissible evidence, such as affidavits from individuals at NEOCH or SEIU, setting forth whether the Plaintiffs intended the Consent Decree to be final disposition of all claims. Plaintiffs failed to submit this evidence, and, instead relied solely on opinions from their counsel. Such “evidence” is irrelevant and inadmissible, especially in this case where the evidence is important and the clients could have supplied it. And, Plaintiffs' response brief fails to cite any supporting case law

authorizing an attorney to testify to the client's intent or that counsels' frame of mind in entering a settlement is relevant to determining the client's intent.

Further, contrary to Plaintiffs' assertions, the State Defendants have not asked the Court to draw an "arbitrary distinction" by allowing the State Defendants' lawyers to provide their opinions but disallowing Plaintiffs counsels' opinions. *See* Second Br., p. 33. State Defendants submitted affidavits *from their clients* indicating that the *clients* intended the Consent Decree to "globally" settle this litigation. R. 219-1 (B. Shinn Aff.); R. 219-2 (S. Ashbrook Aff.). Brian Shinn and Susan Ashbrook – irrespective of whether they are licensed attorneys – were the *client representatives* in this case, and unlike Plaintiffs' counsel, were not signatories to the briefs submitted herein. R. 219-1, ¶ 2; R. 219-2, ¶ 3.

Accepting Plaintiffs' argument and giving any weight to the opinions of their counsel leads to a far-reaching legal proposition. Plaintiffs' lawyers assert that because they – rather than their clients – were the "key players" in the negotiation of the Consent Decree, the lawyer's declarations should be substituted for those of their clients. Second Br., p. 34. Further, Plaintiffs' counsel claim that they would not have "agreed to forfeit the ability to seek the fees at issue just to settle the pending appeal." *Id.*, p. 33. It was not *counsel's* decision, however, whether to forfeit or waive § 1988 attorneys' fees. United States Supreme Court precedent is clear: the client has the right to waive, settle, or negotiate the client's

right to recovery attorneys' fees. *Evans v. Jeff D.*, 475 U.S. 717, 731-33 (1986); *Venegas v. Mitchell*, 495 U.S. 82, 88 (1990). Because it is the client's decision to forfeit fees, counsel's opinion is entirely irrelevant to the issue before the Court, and giving any weight to counsels' affidavits will erode this well-settled jurisprudence.

Finally, even if counsels' affidavits were admissible, they are self-serving, contradictory and should not be given any weight. When Plaintiffs first submitted their third fee request, Plaintiffs' counsel averred that the Consent Decree "terminat[ed] this litigation." R. 213, ¶¶ 6, 15; *see also* R. 212, pp. 1, 5, 11. However, after State Defendants opposed Plaintiffs' third fee request, citing the waiver standard from *Jennings* and *McCuiston*, Plaintiffs flip-flopped by submitting a reply brief and supplemental declarations, which backed away from their previous position by claiming "it is an obvious fact that it did *not* fully and finally resolve all of the claims between the parties." R. 222, p. 6 (emphasis in original). Plaintiffs' counsel's complete turnabout of their alleged understanding of the Decree demonstrates the inherent unreliability of their affidavits.

2. Statements from the April 2010 status conference are irrelevant and inconclusive as to whether the Consent Decree was intended to resolve all of Plaintiffs' claims.

Plaintiffs place great emphasis on the fact that State Defendants' counsel did not expressly declare to the district court at an April 2010 status conference that

the Consent Decree waived any future request for attorneys' fees. Second Br., pp. 7, 31-32 (State Defendants counsel "said nothing about the attorneys' fee at issue") (emphasis in original)). A review of the eight-page, fifteen minute transcript demonstrates that the conference transcript is irrelevant to the issue before this Court. *See* R. 217. State Defendants were not asked to summarize every term or every possible effect of the Consent Decree.

Plaintiffs further assail the State Defendants for not expressly declaring on the record at the status conference that the Consent Decree was not a "final disposition of all claims." Second Br., p. 31 (State Defendants "did not say that the State intended the Decree to be a final disposition of all claims."). Plaintiffs, however, never said that the Consent Decree did *not* resolve all claims, nor did Plaintiffs indicate which claims are allegedly left unresolved after entry of the Decree. The transcript of the April 2010 status conference is completely irrelevant to the issue before this Court.

3. There was no "understanding" between the parties that Plaintiffs would seek a third fee request.

Plaintiffs also claim the parties had an "understanding" that Plaintiffs would pursue attorneys' fees following entry of the Consent Decree because Plaintiffs pursued fees after the two consent orders entered in 2006. Second Br., p. 30-31 (citing to the 2006 consent orders found at R. 51 and R. 57). For the following reasons, there was no such "understanding." First, State Defendants have

unequivocally testified that the 2010 Consent Decree was intended to “globally” settle this litigation and act as a “final resolution of this four year litigation.” R. 219-2 ¶¶ 5, 7; *see also* R. 219-1, ¶ 4. Inclusion of a “final and certain amount of attorneys’ fees was a material term of the complete settlement,” and State Defendants would not have settled if the parties intended to “leave the issue of additional attorneys’ fees open or unsettled.” R. 219-1, ¶¶ 7-8; R. 219-2, ¶¶ 10-11; R. 219-1. There is no evidence in the record to the contrary (other than the self-serving opinions of Plaintiffs’ counsel).

Second, if Plaintiffs actually relied on this alleged “understanding,” such reliance was unreasonable. The 2006 consent orders were not meant to resolve all issues relating to Plaintiffs’ complaint because, by their terms, they were limited to the impending election. *See, e.g.*, R. 51, p. 2 (“[T]he parties enter into the following Consent Order, which shall apply only to the November 2006 General Election.”). The 2010 Consent Decree, however, was not limited to any impending election and “fully resolved” Plaintiffs’ voter identification and provisional balloting claims. *See* Second Br., p. 21. Moreover, the previous consent orders did not address an award of attorneys’ fees, while the 2010 Consent Decree expressly awards Plaintiffs fees. Actually, a comparison of the 2006 orders to the 2010 Consent Decree demonstrates the difference between consent orders that are not meant to be final (the 2006 orders) and one that is a final disposition of all

claims (the 2010 Consent Decree). There was no “understanding” between the parties.

F. State Defendants’ interpretation does not lead to an absurd result.

In their final argument, Plaintiffs assert that the State Defendants’ interpretation of the Consent Decree is absurd because “the Decree, as to the Plaintiffs, is worthless” and Plaintiffs were supposed to give up compensation for attorneys’ fees in exchange “for nothing.” Second Br., p. 34-35. In terms of “compensation” alone, Plaintiffs received \$504,413 in attorneys’ fees by agreeing to the Consent Decree. R. 210, p. 6. State Defendants had strong arguments in its appeal of the district court’s first and second fee awards, which Plaintiffs could have lost on appeal and been left without any fee award. Moreover, Plaintiffs were at serious risk of an eventual dismissal of this entire case for lack of standing. As this Court held in 2006, the allegations in Plaintiffs’ complaint fell “far short of asserting that any of plaintiffs members have suffered or will imminently suffer a concrete, actual injury traceable to enforcement of the voter identification requirements.” *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F. 3d 999, 1010 (6th Cir. 2006). The weakness of Plaintiffs’ showing of standing led this Court to conclude that Plaintiffs’ likelihood of success was “not strong.” *Id.* As Judge McKeague observed, Plaintiffs could not identify a single member who was affected by Ohio’s voter identification law, and Plaintiffs could not provide any

“controlling or even persuasive precedent” to support the form of “representational or third party standing” on which they relied. *Id.* (McKeague, J., concurring).

Thus, Plaintiffs encountered a very real possibility that this Court not only would reverse the district court’s erroneous initial award of attorneys’ fees in response to Plaintiffs’ first and second fee award, but also dismiss this entire action. As to Plaintiffs, the Decree was far from “worthless.”

G. Conclusion

Because the Consent Decree represents the express intent of the parties, it deserves to be quoted again. The introduction to the Consent Decree provides:

The parties, *desiring that this action be settled* by an appropriate Consent Decree (“Decree”) and *without the burden of protracted litigation*, agree to the jurisdiction of this Court over the parties and the subject matter of this action. Subject to this Court’s approval of this Decree, and subject to the continuing validity of this Decree if it or its terms are challenged in any other court, the parties waive a hearing and findings of fact and conclusions of law on *all issues*, and further agree to the entry of this Decree as *final and binding* among and between themselves as to the issues raised in the Plaintiffs’ Complaint and Supplemental Complaint, and the matters resolved in this Decree.

R. 210, p. 2 (emphasis added).

Contrary to this intent, protracted litigation continues. Despite the agreement that the action “be settled” on “all issues” and be “final and binding,” Plaintiffs claim there are still unresolved claims: mainly, their third fee request,

which Plaintiffs kept hidden from State Defendants during negotiation of the Consent Decree.

The district court erred in holding that the Consent Decree was not a final disposition of this lawsuit. The lower court's decision will deter state and local governments from entering voluntary settlements of disputes, and it was counter to the objective intent of the parties, as stated in the Decree. For all the reasons explained herein, this Court should reverse the district court's decision and hold that the Consent Decree was a comprehensive settlement, thereby disallowing Plaintiffs' third fee request for hours spent prior to entry of the Decree.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General

/s/ Richard N. Coglianese

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,106 words, as determined by the word processing program used to generate this document, excluding the part of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Times New Roman 14-point type) using Microsoft Word 2003.

/s/ Richard N. Coglianese

RICHARD N. COGLIANESE (0066830)

Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

/s/ Richard N. Coglianese

RICHARD N. COGLIANESE (0066830)

Assistant Attorney General

Case No. 11-3037

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NE OH Coalition for the Homeless, et al.
Plaintiff-Appellant/Cross-Appellant

v.

State of Ohio
Intervenor-Appellant/Cross-Appellee

and

Secretary of State
Defendant-Appellee

On Appeal from the
U.S. District Court for the
Southern District of Ohio
Eastern Division at Columbus
Case No. 06-cv-00896

**DEFENDANT-APPELLEE SECRETARY OF STATE’S DESIGNATION OF
APPENDIX CONTENTS [OR ADDENDUM]**

Defendant-Appellee Secretary of State, pursuant to Sixth Circuit Rule 11(b), hereby designates the following filings in the district court record as items to be included in the Joint Appendix:

Record		
Date	Entry No.	Description Of Entry
11/01/2006	51	CONSENT ORDER. The Court shall retain jurisdiction to enforce this Consent Order. This Consent Order shall remain in effect until further order of this Court or until dismissal of this action. Signed by Judge Algenon L. Marbley on 11/1/2006. (cw,) (Entered: 11/01/2006)
11/15/2006	57	AGREED ENFORCEMENT ORDER Defendant Secretary of State, J Kenneth Blackwell, shall forthwith issue a directive to the County Boards of Elections

Date	Record Entry No.	Description Of Entry
		attaching this Agreed Enforcement Order and directing it to be followed by the 88 Ohio County Boards of Elections. Signed by Judge Algenon L. Marbley on 11/14/2006. (cw,) (Entered: 11/15/2006)
02/27/2008	99-2	MOTION to Dismiss for Lack of Jurisdiction and Memorandum in Opposition to Motion for Attorney Fees by Defendant Jennifer Brunner, Intervenor State Of Ohio., # 2 Exhibit Affidavit of Keith Yeazel
03/19/2008	100	Unopposed MOTION for Extension of Time to File Response/Reply as to [99] MOTION to Dismiss for Lack of Jurisdiction <i>and Memorandum in Opposition to Motion for Attorney Fees</i> New date requested 4/7/2008. by Plaintiffs The Northeast Ohio Coalition for the Homeless, Service Employees International Union, Local 1199. (Attachments: # 1 Text of Proposed Order) (Sestile, Lindsay)
10/24/2008	142	ORDER adopting and annexing Ohio Secretary of State Directive 2008-101. Signed by Edmund A. Sargus on 10/24/08. (dh) (Entered: 10/24/2008)
10/27/2008	143	ORDER granting in part by agreement 111 Plaintiffs' Motion for Preliminary Injunction. Signed by Edmund A Sargus on 10/27/08. (dh) (Entered: 10/27/2008)
10/30/2008	145	MOTION for Extension of Time [New date requested 12/15/2008] by Plaintiffs The Northeast Ohio Coalition for the Homeless, Service Employees International Union, Local 1199. (Hollenbaugh, H. Ritchey)
12/12/2008	166	MOTION for Extension of Time New date requested 1/12/2009. by Plaintiffs The Northeast Ohio Coalition for the Homeless, Kyle Wangler, James Wise, Columbus Coalition for the Homeless, Service Employees International Union, Local 1199. (Hollenbaugh, H. Ritchey)
12/17/2008	169	MOTION for Extension of Time [New date requested 1/12/2009] by Plaintiffs The Northeast Ohio Coalition

Date	Record Entry No.	Description Of Entry
		for the Homeless, Service Employees International Union, Local 1199. (Attachments: # 1 Text of Proposed Order) (Hollenbaugh, H. Ritchey)
7/28/2009	203	OPINION AND ORDER DENYING Defendants' Motion for Reconsideration and Plaintiffs' Motion for Reconsideration. The Court GRANTS Plaintiffs' First and Second Motions for Attorneys Fees and Costs and AWARDS \$401,905.50 in attorneys' fees and \$29,468.55 in costs and expenses, for a total of \$431,374.05. Signed by Judge Algenon L. Marbley on 7/28/2009. (Entered: 07/28/2009)
4/19/2010	210	CONSENT DECREE. Signed by Judge Algenon L. Marbley on 04/19/2010. (Attachments: # 1 Attachment) (Entered: 04/19/2010)
6/03/2010	212	Third MOTION for Attorney Fees <i>and Costs</i> by Plaintiffs Columbus Coalition for the Homeless, Service Employees International Union, Local 1199, The Northeast Ohio Coalition for the Homeless & Kyle Wangler. (Gentry, Caroline) (Entered: 06/03/2010)
6/03/2010	213	AFFIDAVIT <i>of Caroline H. Gentry</i> re 212 Third MOTION for Attorney Fees <i>and Costs</i> by Plaintiffs Columbus Coalition for the Homeless, Service Employees International Union, Local 1199, The Northeast Ohio Coalition for the Homeless & Kyle Wangler. (Attachments: # 1 Exhibit A) (Gentry, Caroline) Modified on 6/4/2010 to fix text. (Entered: 06/03/2010)
6/24/2010	217	Transcript of Status Conference Proceedings held on April 19, 2010, before The Honorable Algenon L. Marbley.
8/09/2010	219, 219-1, 219-2	RESPONSE in Opposition re 212 Third MOTION for Attorney Fees <i>and Costs</i> filed by Defendant Jennifer Brunner & Intervenor State Of Ohio. (Attachments: # 1 Exhibit 1, Affidavit of Brian Shinn, # 2 Exhibit 2, Affidavit of Susan Ashbrook, # 3 Exhibit 3, Affidavit

Date	Record Entry No.	Description Of Entry
9/09/2010	222	of Richard Coglianese) (Gale, Erick) (Entered: 08/09/2010) REPLY to Response to 212 Third MOTION for Attorney Fees <i>and Costs</i> filed by Plaintiffs Service Employees International Union, Local 1199, The Northeast Ohio Coalition for the Homeless & Kyle Wangler. (Attachments: # 1 Exhibit 1) (Gentry, Caroline) (Entered: 09/09/2010)
11/30/2010	234	OPINION AND ORDER granting in part and denying in part 212 Motion for Attorney Fees. Signed by Judge Algenon L. Marbley on 11/30/2010. (cw) (Entered: 11/30/2010)

/s/ Richard N. Coglianese

RICHARD N. COGLIANESE (0066830)

Assistant Attorney General