

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

AMERICAN BROADCASTING COMPANIES, :	:	
INC., <i>et al.</i> , :	:	
	:	Case No. 1:04-cv-00750-MHW
Plaintiffs, :	:	
	:	
v. :	:	
	:	
J. KENNETH BLACKWELL, :	:	
	:	
Defendant. :	:	

**DEFENDANT’S MEMORANDUM IN OPPOSITION
TO PLAINTIFFS’ EMERGENCY MOTION TO ENFORCE
THIS COURT’S JUDGMENT AND DECREE**

I. INTRODUCTION

“The lady doth protests too much, methinks.”

-- Hamlet, Prince of Denmark, Scene III, Act 2

When Plaintiffs’ Motion is boiled down to its true essence and full consideration is given thereto, it becomes evident that the only purpose to be served by the Plaintiffs’ persistent protestations is to harass the Secretary and hinder him in his administration of the upcoming election. As elaborated below, the Assistant Secretary has been mindful and respectful of the scope and intent of this Court’s prior Opinion and Order regarding exit polling on election day. In fact, in order to comply fully with the Court’s prior order and to not create the potential of an infringement upon the Plaintiffs’ constitutional rights, the Assistant Secretary relied upon a prior directive that according to this Court properly balanced the fundamental constitutional rights at stake. Thus, Plaintiffs’ present protestations are much ado about nothing and, while arguably deserving of a moderate scolding, should simply be disregarded.

II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

On November 1, 2004, just on the eve of the November 2004 election, Plaintiffs commenced this litigation, seeking complete, unlimited and unrestrained access to voters within 100 feet of polling places on election days in order to conduct exit polling. After a series of amended complaints, the Plaintiffs ultimately asserted three claims: (i) the Oral Directive impermissibly restricted Plaintiffs' speech and ability to gather information in violation of the First Amendment; (ii) the New Directive is unconstitutionally vague in violation of the First and Fourteenth Amendments; and (iii) to the extent they are interpreted to prohibit exit polls within 100 feet of polling places, Ohio's Loitering Statutes impermissibly restrict plaintiff's speech and ability to gather information.¹ (Second Amended Complaint, Doc. #44.) The gist of the Plaintiffs' claims concerned an as-applied challenge to the Directives and the Loitering Statutes, not a facial challenge.

Ultimately, the parties filed cross-motions for summary judgment (Doc. #46, 51). On September 26, 2006, the Court ruled on the cross-motions, entering an Opinion and Order. (Doc. #62.) Within the Opinion and Order, this Court concluded that the Oral Directive violated the First Amendment; additionally, this Court concluded that the Loitering Statutes could not be interpreted to prohibit exit polling within designated area within 100 feet of the polling place without violating the First Amendment and, thus, enjoined their operation but only to that extent. Finally, the Court directed the Secretary to issue a written directive that included language indicating that it would be unlawful and a violation of the United States Constitution to interpret, apply or enforce the Loitering Statutes so as to prohibit exit polling within 100 feet of polling

¹ In the interest of judicial economy, references to the terms "Oral Directive," "New Directive" and the "Loitering Statutes" shall be consistent with the use of those terms throughout this case, without redefining such terms herein. The "New Directive" refers to Directive 2005-09 issued by the Secretary on April 28, 2005, a copy of which is attached hereto as Exhibit 1. A copy of the document designated herein as Directive 2006-75 is attached as Exhibit 2.

places. However, within that same Opinion and Order, this Court expressly rejected the Plaintiffs' claim that the New Directive violated Plaintiffs' First Amendment rights. In so doing, the Court explicitly recognized that an exit pollster could still be found to violate the Loitering Statutes if he or she departed from the norm, *i.e.*, engaged in conduct outside of that which Plaintiffs represented and characterized as constituting "exit polling," and, instead, engage in prohibited conduct, such as blocking the exit of a polling place. The Judgment Entry was entered in this case the following day on September 27, 2006 (Doc. #64), although it did not contain any of the injunctive or declaratory language within the Opinion and Order, but simply declared that "this action is hereby DISMISSED."

On October 13, 2006, the Assistant Secretary issued Directive 2006-75 to the 88 county boards of election throughout the State of Ohio.² In light of the fact that this Court found and concluded that the New Directive, *i.e.*, Directive 2005-09, met constitutional muster, the Assistant Secretary used the structure, format and general language of the New Directive as the basis for Directive 2006-75. The most significant difference between the New Directive and Directive 2006-75 was the insertion, at an appropriate place and in a block quote format, the explicit language that this Court order be included.

A review of Directive 2006-75 reveals that it addresses in a systematic and orderly process various aspects relating to access to the polling places on election day, including exit polling. Initially, Directive 2006-75 discusses the required placement of the small flags outside the polling place in order to demark the "designated area" and then discusses generally the statutory prohibitions in the Loitering Statutes against loitering, congregating, engaging in

² Plaintiffs repeatedly mention *ad nauseam* that the Secretary did not seek or obtain pre-clearance and pre-approval from the Plaintiffs prior to issuing Directive 2006-75. In fact, it appears that Plaintiffs mention or reference how the Secretary would not allow Plaintiffs to pre-approve Directive 2006-75 at least 5 separate times in their Motion. And, in his Affidavit, Mr. Goehler reiterates it *ad*

electioneering, *etc.*, within the designated area. Having established the foundational aspect concerning the Loitering Statutes, Directive 2006-75 discusses exit polling and this Court's Opinion and Order of September 26, 2006. Borrowing almost verbatim from the New Directive (which, again, this Court concluded in its Opinion and Order did not violate the Plaintiffs' constitutional rights), Directive 2006-75 discusses the potential violation of the Loitering Statutes by, *inter alia*, hindering or delaying an elector from leaving the polling place. Directive 2006-75 then, with language similar to that in the New Directive, indicated that the Loitering Statute should still be construed to protect the fundamental right to vote and the freedom of speech. Following this, Directive 2006-75, in an indented and separated quote, relayed the *exact* language that this Court ordered included in a directive to the effect that to enforce the Loitering Statute so as to prohibit exit polling within 100 feet of polling places would be a violation of the First Amendment and unlawful.³ Directive 2006-75, again with language from the Court-approved New Directive, reminded the local county election officials that they and the precinct judges and clerks had the ultimate responsibility for enforcing the Loitering Statutes. And, finally, Directive 2006-75 concluded by referring any questions that the boards of elections may have regarding the specific interpretation of the Loitering Statutes to their respective county prosecutor who, under Ohio law, are the legal advisers for the county boards of election. R.C. 309.09(A) (“[t]he prosecuting attorney shall be the legal adviser of the ... board of elections”).

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in finitum. Mr. Goehler and his clients are not the Secretary of State. And the relevance of the lack of pre-clearance with the Plaintiffs is *nil*.

³ Apparently the Plaintiffs are upset that the Court-mandated language regarding exit polling was inserted in the Directive 2006-75 in a place where the content and context of such language was logical and consistent with the overall directive. Claiming, through its *ipse dixit*, that the language was somehow “buried” in Directive 2006-75, (Motion, at 5), it appears that Plaintiffs would have such language be the opening paragraph of any directive. But to do so without any indication of the provisions of the Loitering Statutes would result in such language being out-of-place, out-of-context and confusing to local election officials.

Now, once again on the eve of an election, Plaintiffs are back before this Court attempting to disrupt the administration of Ohio's elections by making a vague and non-descript allegation that the Assistant Secretary somehow engaged in some allegedly egregious conduct, even though the Assistant Secretary complied to the letter with the Court's Opinion and Order. In support of their Motion, Plaintiffs tendered a 10-paragraph Affidavit of Richard Goehler, counsel for Plaintiffs, wherein Mr. Goehler spends a majority of the affidavit whining about not having been provided an opportunity to review the Directive in advance⁴ and that Defendant's counsel did not immediately respond to his repeated demands for a copy of the Directive.⁵ With the exception of a single conclusory, self-serving and non-descript assertion that "Defendant has failed to comply with this Court's Order," (Goehler Aff., at ¶ 3), Plaintiffs have offered nothing to demonstrate clearly and convincingly that the Assistant Secretary has not complied with the Court's Opinion and Order. When consideration is given to the fact that 6 out of the 10 paragraphs in Mr. Goehler's Affidavit discuss the fact that he and his client were not provided the opportunity to pre-approve Directive 2006-75 before it was issued to the boards of elections⁶, it becomes self-evident that the pending Motion has more to do with Plaintiffs' arrogant attitude in response to having been denied the opportunity to pre-approve the directive, as opposed to their concern with compliance *vel non* with the Court's Opinion and Order.

⁴ In the event that Plaintiffs' counsel was personally offended by the Secretary's failure to take advantage of the generous offer of his client's insight and wisdom in the crafting of Directive 2006-75, he should take comfort in the fact that no offense was intended, for the Secretary's office is not in the habit of soliciting the media's input on *any* of its directives before they are issued.

⁵ Of course, had Plaintiffs' counsel spent less time creating a paper trail of his repeated communications to Defendant's counsel and more time reviewing the law, he would have realized that Directives are required by statute to be posted on the Secretary's website.

⁶ Out of the 10 paragraphs in Mr. Goehler's Affidavit, they may be broken down as follows: (a) 6 paragraphs complain about the Secretary not granting Plaintiffs and their counsel pre-clearance and pre-approval of Directive 2006-75 (Goehler Aff., at ¶¶ 4-9); (b) 1 paragraph establishes Mr. Goehler's position as an attorney in this case (Goehler Aff., at ¶ 1); (c) 1 paragraph summarizes the Court's Opinion and Order (Goehler Aff., at ¶ 3); (d) 1 paragraph simply identifies as attachments irrelevant advisories or directives issued previously by the Secretary (Goehler Aff., at ¶ 10); and (e) 1 paragraph contained the

Indeed, adding further to the speculation concerning Plaintiffs' questionable motives for filing the within motion is the fact that at the same time they are complaining to this Court about the Assistant Secretary's Directive, they are sending correspondence to the boards of elections wherein the firm they have hired to conduct exit polling specifically states:

To give all voters an opportunity to participate in our study, we are asking that polling place officials allow our interviewers to stand in a position where all voters will pass as they leave. Edison/Mitofsky personnel will work with the polling place officials to determine the best place to stand, **abiding by state law**.

(Declaration of Judith M. Grady, at Ex. A (emphasis *sic*).⁷). In other words, out of one side of their mouth Plaintiffs are asking this Court to remove any constraints whatsoever on their exit polling activities at the polling places—including most notably the constraints imposed by Ohio's Loitering Statutes—and out of the other side of their mouth they are politely notifying local election officials that they have every intention of abiding by those statutes.

At the very least, such inconsistent behavior makes one wonder what is truly going on here.

III. DISCUSSION

A. **Plaintiffs' Allegation Are Simply an Effort to Repackage and Reargue that Portion of the Court's Opinion and Order On Which Plaintiff Lost**

Reading past the hyperbole within Plaintiffs' Motion, it becomes evident that the Plaintiffs are, by and large, attempting to reargue that portion of the cross-motions for summary judgment that they lost. Specifically, Plaintiffs are simply trying to purge from Directive 2006-75 those portions of the New Directive that this Court found met constitutional muster, albeit the

(continued...)

above-noted *ipse dixit* of Mr. Goehler that alleges in a conclusory manner that the Secretary failed to comply with the Court's Opinion and Order (Goehler Aff., at ¶ 3).

⁷ The Grady Declaration is attached as Exhibit 3.

Plaintiffs now attempt to challenge such provisions under the disingenuous guise of accusing the Assistant Secretary of refusing to comply with the Court’s order.

At the outset, Plaintiffs make much ado about whether someone would know whether “this Court issued a permanent injunction barring the Secretary of State and all those acting in concert with him from prohibiting exit polling within 100 feet of Ohio polling places.”

(Plaintiffs’ Motion, at 6-7.) But there is no indication or proof that the Assistant Secretary or anyone else has engaged in any conduct that would or reasonably indicates that anyone would prohibit exit polling.

As for what is in Directive 2006-75 about which the Plaintiffs complain, Directive 2006-75 is consistent and compatible with the decisions of this Court. In considering the cross-motions for summary judgment, this Court expressly rejected the Plaintiffs’ contention that the language in the New Directive (which is also contained in Directive 2006-75) was unconstitutionally vague. Consider the following language that was contained within both the New Directive and Directive 2006-75:

The New Directive Directive 2005-09	Directive 2006-75 Directive 2006-75
The [Loitering] Statutes do not necessarily prohibit a person from conducting “exit polls” within the designated area. However, if a person conducting “exit polls” is “loitering” or “congregating” within the designated area, or otherwise “hindering” or “delaying an elector from leaving the polling place, that person could be in violation of one or more of the [Loitering] Statutes.	If a person conducting exit polls is “loitering” or “congregating” within the designated area, or otherwise “hindering” or “delaying an elector from leaving the polling place, that person could be in violation of one or more of the Statutes.
Of course, to the extent possible, the Statutes should be construed to protect both the fundamental right to vote and the freedom of speech rights which are guaranteed by the Ohio constitution and the United States Constitution.	Of course, to the extent possible, the Statutes should be construed to protect both the fundamental right to vote and the freedom of speech, rights which are guaranteed by the Ohio constitution and the United States Constitution.
On election day, it is the responsibility of	On election day, it is the responsibility of

<p>county election officials, and, more specifically, precinct judges and clerk – working in cooperation with local police officers (see R.C. 3599.31) – to enforce the Statutes at each polling place. Any person charged with a violation of one of more of the Statutes may be subject to prosecution by the county prosecutor or local municipal authorities, as applicable.</p>	<p>county election officials, and, more specifically, precinct judges and clerk – working in cooperation with local police officers (see R.C. 3599.31) – to enforce the Statutes at each polling place. Any person charged with a violation of one of more of the Statutes may be subject to prosecution by the county prosecutor or local municipal authorities, as applicable.</p>
<p>If you have any questions regarding the interpretation of any of the foregoing Statutes, or their application (or potential application) to a specific context, I encourage you to contact your county prosecutor.</p>	<p>If you have any questions regarding the interpretation of any of the foregoing Statutes, or their application (or potential application) to a specific context, I encourage you to contact your county prosecutor.</p>

In this Court’s opinion addressing the above-quoted language in the New Directive (which, as demonstrated above, is almost verbatim in Directive 2006-75), this Court rejected Plaintiffs’ challenge and, instead, concluded:

that the New Directive, in conjunction with the Loitering Statutes, provide sufficient information such that a person of common intelligence would understand what conduct is prohibited. *In essence, the New Directive gives notice that an exit pollster could be found to violate the Loitering Statutes. This is legally correct and not difficult to understand.* Although exit polling as described by plaintiffs would not violate the Loitering Statutes, the possibility remains that a renegade pollster could depart from the norm and engage in prohibited conduct. The First Amendment would not protect an exit pollster who blocks the exit of a polling place, for example. The Court has ruled that the Loitering Statutes cannot be construed to bar exit polls without offending the First Amendment. The ruling, however, does not go so far as to hold that an individual pollster could never lawfully be charged under the statutes.

(Order and Opinion, at 43 (emphasis added).) Clearly, Plaintiffs are engaging in a subterfuge in an effort to obtain *carte blanche* to engage in any conduct whatsoever within the designated area. This Court’s Opinion and Order rejected this effort by the Plaintiffs, recognizing that its ruling “does not go so far as to hold that an individual pollster could never lawfully be charged under the statutes.” (*Id.*)

The fact that Plaintiffs are seeking to repackage and reargue their case with respect to the New Directive becomes all the more self-evident when consideration is given to the relief that Plaintiffs seek—an order rescinding Directive 2006-75. (Plaintiffs’ Memorandum, at 8-9.) As this Court concluded the New Directive met constitutional muster, and a comparison of the New Directive and Directive 2006-75 reveal that they are nearly identical without any substantive differences, then *a fortiori* Directive 2006-75 meets constitutional muster and should not be rescinded. And if the Court concluded in its Opinion and Order that the New Directive was permissible, then Plaintiffs’ claim that the nearly identical 2006 Directive “deliberately flouts this Court’s decree ... and is a direct affront to the authority of this Court” (Plaintiffs’ Memorandum, at 2), is baseless and misleading. By seeking an order rescinding Directive 2006-75, Plaintiffs demonstrate that they are simply seeking to obtain that which the Court explicitly denied them previously. If any party is engaging in gamesmanship, it is the Plaintiffs, in bringing the present motion. Indeed, if there is to be any outraged expressed, it should be directed towards Plaintiffs’ present conduct.

The true gist and design of the Plaintiffs’ Motion should be recognized for what it is and that the Assistant Secretary has not refused to comply with the Court’s order. Accordingly, Plaintiffs’ Motion should be DENIED.

B. Any Alleged Non-Compliance With the Court’s Order Must Be Demonstrated by the Movant by Clear and Convincing Evidence and Not Simply Its Counsel’s *Ipsse Dixit*

As even the foregoing demonstrates, the Assistant Secretary has substantively and consistently complied with this Court’s Opinion and Order. While not explicitly stating so, Plaintiffs appear to imply that the Assistant Secretary is somehow in contempt of the Court’s order. Yet, the sole evidence they present in support of their assertion is the conclusory, self-

serving and non-descript declaration of their counsel that “Defendant has failed to comply with this Court’s Order” (Goehler Aff., at ¶ 3). As elaborated below, Plaintiffs are obligated to demonstrate significantly more in order for this Court to conclude that the Assistant Secretary is somehow in contempt of or has failed to comply with this Court’s order.

Contempt is generally considered to consist of “a party's disobedience to a specific and definite court order by failure to take all reasonable steps within the party's power to comply.” But a party should not be held in contempt if he took all “reasonable steps” within his power to comply with the court’s order. *Gnesys, Inc. v. Greene*, 437 F.3d 482, 493 (6th Cir. 2005). For as the Supreme Court explained in *Int'l Longshoremen's Ass'n. v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967), “[t]he judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one.” Thus, in light of the contempt power’s potential to inflict harm, courts have created a number of principles designed to oversee its execution. See *North American Coal v. United Mine Workers of America*, 512 F.2d 238, 242 (6th Cir. 1975) (noting that the daunting contempt power is hedged by constitutional and statutory restrictions in protecting individuals from the arbitrary use of such powers). These principles include the requirement that the proof must be established—by clear and convincing evidence—that the order was “clear and unambiguous,” and that the order was indeed violated. *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 13 (6th Cir. 2006). This is a weighty burden of proof which necessitates more than proof by a preponderance of the evidence. *Consolidation Coal Co. v. Local No. 1784, United Mine Workers of Am.*, 514 F.2d 763, 766 (6th Cir. 1975).

With respect to the “clear and unambiguous” requirement, the initial determination is whether a party violated a “definite and specific” order of the court requiring him to perform or

avoid from performing a certain act or acts. *Elec. Workers Pension Trust Fund of Local Union #58 v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 379 (6th Cir. 2003); see also *NLRB v. Cincinnati Bronze*, 829 F.2d 585, 591 (6th Cir. 1987). The purpose of this is to assist the potential contemnor by narrowly cabining the circumstances in which contempt may be found in light of the potential consequences of a contempt finding. Indeed, “[u]nbroken lines of authority ... caution [courts] to read court decrees to mean rather precisely what they say.” *Grace Center for Auto Safety*, 72 F.3d 1236, 1241 (6th Cir. 1996)(quoting *NBA Properties, Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990)(Breyer, J.)). As such, any ambiguities or omissions in a court order “must be resolved in favor of the party charged with contempt.” *Liberte Capital Group*, 462 F.3d at 13.

As the previous section demonstrated, the Assistant Secretary’s issuance of Directive 2006-75 was consistent and complied with the mandate of the Court’s Opinion and Order. For that reason alone, Plaintiffs have failed to demonstrate that lack of compliance with the Court’s order. This fact—that the Assistant Secretary complied with the Court’s Opinion and Order—is further supported and buttressed as developed below.

C. The Assistant Secretary Clearly and Conspicuously Set Forth in Directive 2006-75 the Court-Mandated Language

Other than Mr. Goehler’s *ipse dixit* declaring that “Defendant has failed to comply with this Court’s Order” (Goehler Aff., at ¶ 3), Plaintiffs have failed to put forth any evidence, let alone clear and convincing evidence, demonstrating that Defendant has failed to comply with the Court’s Opinion and Order.

Initially, Plaintiffs appear to contend that the Assistant Secretary somehow violated the permanent injunction that enjoined “defendant and all those acting in concert with him from enforcing or issuing any rule, directive, advisory, policy or communication that would prohibit exit polls within the 100 foot designated area around polling places” because someone reading

Directive 2006-75 “would not know on reading ... that ... this Court issued a permanent injunction barring the Assistant Secretary of State and all those acting in concert with him from prohibiting exit polling within 100 feet of Ohio’s polling places.” (Plaintiffs’ Memorandum, at 6.) Yet, the Court never instructed or mandated that the Assistant Secretary explicitly state this and the associated items about which Plaintiffs raise in the Motion. Thus, lacking a clear, unambiguous and explicit mandate to do so, there is absolutely no basis for the Plaintiffs to claim, based upon this, that the Assistant Secretary somehow failed to comply with the Court’s order. Furthermore, Plaintiffs have not even contended (and have offered no evidence, let alone clear and convincing evidence) that their ability to conduct exit polling consistent with the Court’s Opinion and Order will be infringed. Plaintiffs’ Motion is much ado about nothing.

Next, Plaintiffs take issue with the Assistant Secretary’s inclusion of the Court-mandated language within Directive 2006-75. Plaintiffs do not contend that such language was not actually included, or that such language was presented in an obscure fashion, or that such language was displayed in a manner that would render it unreadable and meaningless for the average reader. Instead, Plaintiffs simply contend that the manner and location of its inclusion did not satisfy the personal whim or desire of the Plaintiffs. As noted above, note 3, *supra*, it appears that the only thing that would have prevented Plaintiffs’ present course-of-conduct would have been had the Assistant Secretary included the Court-mandated language as the initial paragraph of his directive or as the only statement within the directive. But as noted above, to do so without placing such language in the overall context of the Loitering Statutes would result in such language being out-of-place, out-of-context and more confusing to local election officials.

Furthermore, while the Court’s order indicated that the language should be prominently included in the directive, it did not provide any further specifications. In this case, besides

exactly inserting the Court-mandated language in the directive where it made sense in terms of context, the language was included as an indent, quoted passage, which served to draw further attention to it.⁸ While it is subjective to ascertain whether certain language or disclaimer is posted “prominently”, the only definitiveness of any perceived violation of the Court’s order would be situations which one can clearly say that the language was not prominent. See *Hayes v. Zakia*, 327 F.Supp.2d 224 (W.D.N.Y. 2004)(in discussing an attorney disciplinary rule that a disclaimer on representation of attorney specialization must be “prominently made”, the Court recognized that “while plaintiff is correct that ‘prominently made’ ... is subjective in its interpretation, the language is sufficiently plain and adequate to put attorneys on notice that the disclaimer provision cannot be presented in an obscure fashion. The term ‘prominently made’ simply informs an attorney who wants to advertise some type of certification that the accompanying disclaimer must be displayed in a manner that will not render it unreadable and meaningless for the average viewer”). In the present situation, the Court-mandated language was not presented in an obscure fashion or in an unreadable and meaningless manner. Thus, there is no indication that the Assistant Secretary failed to comply or is in contempt of the Court’s order. Accordingly, Plaintiffs’ Motion should be DENIED.

D. The Filing of a Notice of Appeal Has Limited This Court’s Jurisdiction To Modify Its Prior Judgment

Should the Court somehow conclude that Plaintiffs’ Motion has merit and desire to undertake to alter or enlarge its prior Judgment as requested by Plaintiffs, the filing of the Notice of Appeal (see Doc. #67) has divested the Court of jurisdiction to enter the remedy that Plaintiffs seek, *i.e.*, entry of an order expanding the scope of the order against the Assistant Secretary.

⁸ Moreover, the inadvertent, but conspicuous, *i.e.*, “prominent”, nature of the smaller font size seems to have prominently caught the attention of Plaintiffs’ counsel, since he makes such a big deal of it. How ironic.

As is well-established, “[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58-59 (1982). Thus, while a district court “has jurisdiction to act to enforce its judgment so long as the judgment has not been stayed or superseded ... a district court may not alter or enlarge the scope of its judgment pending appeal” *National Labor Relations Bd. v. Cincinnati Bronze*, 829 F.2d 585, 588 (6th Cir. 1987). In the present case, Plaintiffs are proposing an order seeking the issuance of a new directive that (i) rescinds Directive 2006-75 and (ii) compels transmittal of the Court’s Opinion and Order with the new directive. Such an order would clearly exceed and expand the scope and requirements of the Court’s Opinion and Order, which is now on appeal. Accordingly, the Court lacks jurisdiction to enter such an order.

E. The Judgment Entry In This Case Does Not Impose Any Obligation on the Assistant Secretary

While the foregoing addresses directly and substantively the merits of the issues raised by Plaintiffs’ Motion, a peripheral issue arising from the Motion must also be addressed and raised by the Assistant Secretary. Specifically, the Judgment in this case (which Plaintiffs claim the Assistant Secretary has violated) does not impose any obligations on the Assistant Secretary.

Subject to exceptions that are not present in this case, Rule 58(a) of the Federal Rules of Civil Procedure require that “[e]very judgment ... must be set forth on a separate document” A separate document “provides the basis for the entry of judgment” and must be “distinct from any opinion or memorandum.” Fed. Civ. R. 58, Notes of Advisory Committee on Rules, 1963 Amendments. Proper judgments under Rule 58 omit reasons and legal conclusions, and the meaning of a judgment depends on what it says rather than on what is in the complaint or what the parties (or judge) intended. *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68

F.3d 1016, 1021 (7th Cir. 1995). The requirement of Rule 58 informs “the parties ... exactly what has been decided and when.” *Reyblatt v. Denton*, 812 F.2d 1042, 1043 (7th Cir. 1987); *Hooker v. Weathers*, 990 F.2d 913, 914 (6th Cir. 1993) (Rule 58 informs a party of when the court “intends that no further action be taken”). Since the 1963 amendments to Rule 58, it no longer is possible for an opinion to have the effect of a judgment. 11 Wright, Miller & Kane, *Federal Practice & Procedure* 2d § 2785. Thus, a ruling granting summary judgment is not by itself a judgment. *Calmaquip Eng'g W. Hemisphere Corp. v. West Coast Carriers, Ltd.*, 650 F.2d 633 (5th Cir. 1981); *United States v. Woods*, 885 F.2d 352, 353 (6th Cir. 1989) (per curiam) (holding that a district court's order granting summary judgment failed to meet the requirements of Rule 58 because “a party may reasonably be confused as to the standing of its case” by issuance of an informal decision). In other words, the Opinion and Order of this Court (Doc. #62) which simply ruled upon the cross-motions for summary judgment, is not technically the Judgment of this Court. For “[t]wo requirements must be met before an adjudication becomes an effective judgment: (1) the judgment must be set forth in writing on a *separate document*, and (2) the judgment so set forth must be entered in the civil docket as provided by rule 79(a).” 6A James W. Moore et al., *Moore's Federal Practice* ¶ 58.02, at 58-58 (2d ed. 1983).

On September 27, 2006, the judgment entry pursuant to Rule 58 was filed in this case. (Doc. #64.) This Judgment declared that “this action is hereby DISMISSED.” Nothing within the Judgment imposed any obligation upon the Assistant Secretary. Thus, to the extent that Plaintiffs claim that the Assistant Secretary has violated the Judgment in this case, there is nothing within the Judgment to violate. That said, it is evident from the Directive and the foregoing arguments that the Assistant Secretary has sought to comply (and indeed has precisely

complied) with the “order” as set forth in the Opinion and Order (Doc. #62), even if that order technically does not have the effect of mandating any action or inaction on the part of the parties.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs’ motion lacks merit and should be DENIED.

Respectfully submitted,

s/ David R. Langdon

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 26th day of October 2006, the foregoing was electronically filed with the Clerk of the Court, using the CM/ECF system which will send notification of such filing to the following:

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