Taxpayers Against Fraud Education Fund
Settlement–Twists and Turns Along the Way-October 2018

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The lawyer's task is to determine as quickly as possible the client's preferences and how best to negotiate to obtain a settlement that is a fair deal for your client.

1. Make the deal with a writing.

The settlement agreement is usually reached before there is a document. Be clear about what you agree upon when you and opposing counsel make a deal. Jointly inform the Court that the case is "settled" and the terms. Do not just talk in terms of numbers. Prepare a list of essential terms (mutual release of claims, payment within 30 days, etc.) that you keep handy when you finally arrive at a dollar amount that you can agree upon. Then confirm it all in writing, before that defendant settlement agreement arrives, with all of its objectionable terms.

2. Find out what is boilerplate and what is sacred.

Settlement agreements come from corporate headquarters or law firm files. What looks like boilerplate, inapplicable and inappropriate to your case, may turn out to be sacred language that is virtually unchangeable. Some settlement documents are written by highly competent counsel specifically for your particular situation. Others are full of hodgepodge duplicative boilerplate provisions written by long-forgotten counsel and blessed by in-house counsel years ago. Many have clauses that someone in the decision-making chain insisted upon. In short, frequently the first draft of the settlement agreement is not well-suited to the individual client's situation.

Don't let a one-sided or badly drafted proposed settlement document upset you, just move forward. How? By deleting the "stupid stuff" and revising objectionable provisions to make them relator/employee-palatable. Talk with opposing counsel about the need for changes and try to elicit where there is flexibility and a willingness to compromise.

3. Look out for the really outrageous provisions.

You know what they are: gag provisions against communicating with or assisting others with similar pending claims, huge liquidated damages penalties for even nonmaterial breaches, a requirement that the plaintiff admit that the lawsuit was frivolous, etc. To those, just say "No."

4. Object if it matters. But only dig in if it matters to your client.

Most settlement documents will contain some objectionable provisions. Some are *per se* objectionable, but will not have any practical effect on your client. If so, don't let them be a sticking

point. For example, increasingly there are bars against future employment. Such provisions are of dubious legality, morally reprehensible, and fly in the face of anti-retaliation provisions in virtually every employment and labor law. However, many clients never wish to have anything to do with the former employer and have no objections. As the counselor, you must make sure that clients understand long-term ramifications of the agreement. However, so long as the provision is clear as to what employment is "off limits" and is not so broadly written that it requires your client to resign if the defendant acquires his current employer through merger or acquisition or puts your client in breach by simply applying for work, this provision may be one you can live with.

5. Fight for good stuff.

A settlement agreement is an opportunity. Often you can improve a severance or settlement agreement with non-pecuniary provisions that will make the client's future a little easier. These pro-plaintiff provisions include:

a. Mutual release of claims

b. Good or neutral references, including a written letter of reference

c. Designated person or office to provide employment references

d. Agreed statement of reasons for ending the employment relationship and the employee's work performance when prospective employers contact the company concerning your client.

e. Payment over a period of years or at least split into 2 years.

The allocation and timing of payments can reduce the effective overall tax rate, minimize the amount of Social Security over-withholding, and defer taxes owed. Settlement payments divided and paid out in more than one year, such as on December 1 of the settlement year and January 1 of the next year, just 31 days apart, could defer substantial income tax payments for 15 months.

f. Mutual non-disparagement agreements–although some consider these objectionable

Non-disparagement clauses, enforceable by the defendant employer, are often not enforceable where the clause precludes full and open communications by whistleblowers with governmental authorities. Any settlement agreement with a mutual non-disparagement clause should not preclude lawful communications with government agencies and employees.This protection often can be broadly written.

g. Non-wage Settlement Benefits

Some non-wage settlement benefits include:

(1) putting the employee on a leave of absence for a period of time with the employer paying for medical insurance;
(2) extra pension plan contributions or credits of years of service (commonly done in union grievance reinstatement matters);
(3) maintaining company-paid life insurance and disability insurance;
(4) providing job placement, education, or training assistance;
(5) providing the employee an interest free loan; and
(6) negotiating sale of used property (company car, laptop computer, fax machine, etc.) at reduced prices.

h. <u>Interest on Settlement</u>

Settlement payments can be delayed. Provide for interest for any significant delays (say 30 days from signature). Where settlement payments are delayed, under most state laws the plaintiff is entitled to interest.[1] Interest is due from the date when an agreement to settle in principle is reached until the date of payment. The right to interest, however, can be waived by an express agreement.

i. <u>Other items: State and Local Taxes</u>

Do not ignore state and local income tax savings. Clients who, at time of settlement, legally reside in a state with no income tax (Alaska, Florida, Nevada, South Dakota, Texas, Washington, Wyoming, New Hampshire, and Tennessee) may be able to avoid state income tax. Likewise, local income taxes may not apply to settlement amounts paid where the individual is not a resident of the local jurisdiction at the time of settlement, or if earnings are for services performed elsewhere.[2]

6. Troublesome Areas:

a. **<u>A "gag" or confidentiality clause</u>** prohibiting disclosure of the amounts or terms of settlement except as required by law.

Defense counsel consider confidentiality provisions second only in importance to the release. Defendants view them as "standard" in employment settlement agreements. (Plaintiffs do not.) Employers generally insist upon such clauses, believing that they discourage litigation by others and are beneficial to employee morale. In actual experience, the company grapevine tends to inflate settlement amounts. Disclosure of amounts paid would probably not harm defendants as much as they think. On the

[1] *Hartmann v. Duffey*, 95 Ohio St.3d 456, 2002-Ohio-2486, 768 N.E.2d 1170 (2002). Under Ohio Rev. Code §1343.03(a), interest is payable ``from the point when money becomes due and payable."

[2] *Czubaj v. City of Tallmadge,* 2003 Ohio 5466 (Summit Cty App. 2003) (severance pay for agreement not to work in area not taxable income for municipal income tax purposes.).

other hand, clients will encounter a lot of unsolicited requests for donations from family and friends if it is known that the lawsuit resulted in a substantial "windfall." Most clients eventually will agree to reasonable confidentiality provision that allows them to say, with a smile, that the matter is resolved satisfactorily.

Items to address in crafting an enforceable, reasonable confidentiality clause:

i. What information about the settlement or the agreement is confidential, only the dollar amount of the settlement or other specific terms of the agreement.

ii. It is not reasonable to require that the plaintiff keep the fact of a claim or settlement of a claim or a lawsuit completely confidential, although many employers would like to "erase history" as to the fact that there was ever a dispute or litigation. There should be at least some few words that the parties agree that anyone can say in response to inquiries. For example:

The case was settled and dismissed by the court.
The parties agreed to resolve their differences.
The matter is settled and the parties agreed to dismiss the case.

iii. When making a confidentiality provision mutual, an employer may reasonably want to limit who has an obligation to protect the settlement as confidential, such as the board of directors, officers, lawyers, those involved in issuing settlement funds or handling financial matters for the business, like accountants, bookkeepers, chief financial officers; those involved in the matter or litigation, like supervisors, human relations managers, labor relations personnel, etc.

iv. Breach of confidentiality? Where a party gives proper notice to the other that information about the settlement is sought by a litigant or government agency and gives the other party the opportunity to seek and obtain a protective order, it should not breach the agreement to disclose terms in a proper investigation, deposition, or court proceeding. <u>Do not obligate your client to take legal action, file a protective order, etc. Notice to the defendant is all that should be required.</u>

v. The confidentiality provision should not be overbroad and one-sided. If the employee is barred from talking about the settlement terms and amount, so should the employer be barred. If false information is disseminated publicly or in the press, there needs to be a way to correct it without running afoul of the agreement.

vi. Above all, the confidentiality clause should not interfere with the client's communications with government authorities (i.e., EEC, OSHA, DOL., SEC, CFB, NLRB, DOES, etc.). *More below on this issue.*

vii. Confidentiality agreements are not generally available where the defendant is a public employer in states where "sunshine" or other public records laws and open meeting requirements provide that the public is entitled to know about the expenditure of public funds.

b. Indemnification on Tax Treatment or Witholding

Defendants may insist upon an indemnification provision that imposes financial consequences on the plaintiff. Resist them. Indemnification limited to parties' allocation of settlement damages for tax purposes, with each side paying its own taxes is acceptable. Indemnification provisions become relevant only when the settlement's tax treatment of damages is later found lacking by tax authorities.

Some very good lawyers take the approach that indemnification clauses are harmless since they never experienced the IRS investigating a settlement nor had a relator having to indemnify a defendant as a result of such clauses. Others are less confident. In any event, they can be negotiated away in most settlement agreements where they appear.

If the clause cannot be eliminated, the safest course, usually acceptable to defendants, is to make these clauses evenhanded. That is, each side will be responsible for its own taxes and penalties, if any. This creates a common interest among the parties to actively support, at a later date, the allocations made in the settlement.

c. Allocation as Wages Versus Other Non-Wage Damages

While the tax laws make most settlement amounts taxable as income that does *not* necessarily mean that they are wages subject to Social Security or self-employment taxes or tax withholding. Plaintiffs normally fare better if only a reasonable portion of the recovery is allocated to wages and the rest to non-wage (taxable) income, such as interest, compensatory damages for pain and suffering, and attorneys fees and costs.

Where the settlement agreement makes a reasonable allocation between back pay amounts and compensatory damages to assist in avoiding excessive tax liability, normally the IRS will accept the parties' reasonable allocations and not challenge them. It is important that both parties make the allocation, not just the plaintiff.

The risk to the employer of denominating in settlement an amount that is not for lost wages is relatively slight. The IRS requires an employer to withhold taxes and Social Security amounts on wages paid in settlement and can penalize an employer who fails to do so. This problem can usually be addressed by having the settlement agreement provide that should the IRS review the settlement and find that amounts have been improperly denominated as non-taxable items which should be taxable, your client will agree to the taxes and interests due on the amount that should have been categorized as wages. The parties, of course, should agree not to deliberately call the matter to the IRS' attention.

What is a reasonable allocation? That is going to depend upon your particular client's circumstances. Where the client has only a few months of lost pay and benefits, allocating the majority of damages to non-wages is more reasonable than a situation where a highly-paid employee has years of back pay damages.

d. Future Claims

Common to many settlement agreements is a release of future claims, that is, claims that have not yet arisen and about which no one knows or could predict. These should be resisted. They are likely unenforceable on public policy grounds, among others.[7]

e. Other Claims About Which the Lawyer Does Not Know Enough to Be Able to Give Good Advice

If the plaintiff has or may have a workers compensation, EISA, foreign country law claim, or other odd claims involving this same employer, you should ensure that the settlement terms adequately protect the right to pursue such relief or, alternatively, that the appropriate government authorities approve the settlement, if required. Generally, ERISA and workers compensation claims should be excluded in any general release of claims, unless those claims or potential claims have been fully investigated and resolved.

f. Time of Payment

Payment should be simultaneous with the exchange of signatures. If this is flatly refused, try to work out a procedure whereby you notify opposing counsel that you have the signatures and will deliver them when the funds are delivered. Do not agree to payment 30 days hence and other such silliness. In many FCA cases the order of procedure is that the settlement agreement is signed, funds are disbursed, and then a dismissal entry or proposed order provided to the Court.

g. Agreement Not to Cooperate with or Assist Other Litigants

Confidentiality clauses interfering with communications between employees, former employees, and the EEOC, SEC, and other government offices have been struck down on public policy grounds. These clauses are becoming less frequent as a result. In particular, the courts are critical of agreements to impede free communication with civil rights agencies, like the EEOC, DOJ, and SEC.

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[7] "Judicial approval ...may not be obtained for an agreement which is illegal, a product of collusion, or contrary to the public interest." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) (consent decree containing impermissible waivers of future discrimination claims held invalid); *Rogers v. General Electric Co.*, 781 F.2d 452 (5th Cir. 1986) (employee may validly release only those Title VII claims arising from "discriminatory acts or practices which antedate the execution of the release."

Provisions of settlement agreements that prohibit an employee from aiding the EEOC's investigation of a charge are unlawful. An employer may not interfere with the protected right of an employee to file a charge or participate in any manner in an investigation, hearing or proceeding or from voluntarily giving information to the EEOC or cooperating with its investigators.[8] Despite these provisions, your client can legally waive and release the right to any benefits obtained as a result of an EEOC Charge and investigation. The client may not be prohibited from filing a charge or assisting the EEOC, nor does the client's waiver and release affect the EEOC's ability to move forward.

Where the client is or was an employee of a publicly-traded company, the Securities and Exchange Commission expressly bars employers from entering into "non-cooperation" and "gag" clauses.[9] In 2015 the SEC sanctioned KBR, Inc. for requiring employees to agree

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[8] *General Telephone Co. v. EEOC*, 446 U.S. 318, 326 (1980) (quoting 118 Cong. Rec. 4941 (1972)); *EEOC v. Astra USA, Inc*., 94 F.3d 738 (1st Cir. 1996) (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984)(the EEOC's ability to investigate charges of systemic discrimination must not be impaired); *EEOC v. U.S. Steel Corp*., 671 F.Supp. 351, 357-59 (W.D. Pa. 1987) (invalidating retirement plan provision conditioning higher benefits on promise not to assist in EEOC investigation as contrary to public policy); See also, *EEOC v. Cosmair, Inc*., 821 F.2d 1085, 1089 (5th Cir. 1987) (primary purpose of a charge under ADEA is not recovery for employee, but to inform the EEOC of discrimination and promise not to file is invalid); *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 28 (1991) (individual who signs an agreement to submit an employment discrimination claim to arbitration can still file EEOC charge). Moreover, to withhold settlement benefits because a charge of discrimination is filed with the EEOC is unlawful retaliation. *EEOC v. Board of Governors*, 957 F.2d 424 (7th Cir.), *cert. denied*, 506 U.S. 906 (1992) (unlawful retaliation to terminate grievance proceeding where EEOC charge is filed); *EEOC v. Cosmair, Inc.*, 821 F.2d at 1089 (illegal retaliation occurs when payments end because of EEOC charge filing); *EEOC v. U.S. Steel Corp*., 671 F.Supp. at 358 (ADEA retaliation when employer eliminates enhanced pension benefits for those involved in EEOC proceedings).

[9] 17 CFR § 240.21F-17 Staff communications with individuals reporting possible securities law violations:

> (a) No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F-4(b)(4)(i) and § 240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications.
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> (b) If you are a director, officer, member, agent, or employee of an entity that has counsel, and you have initiated communication with the Commission relating to a possible securities law violation, the staff is authorized to communicate directly with you regarding the possible securities law violation without seeking the consent of the entity's counsel.

not to talk with government officials without involving company counsel.[10]

h. <u>The Age Discrimination in Employment Act Wait Period</u>

The ADEA now has a 7 day "cooling off" period and a 21-day time period for review of all settlement documents. Because the provision covers employees under age 40 but who could have ADEA retaliation claims, you cannot readily get this deleted.

Be alert to the possibility that your client might get paid sooner rather than later. Don't presume that the defendant will strictly observe these time limits. Often, defense counsel will count the 21 day period from the date that you first exchange settlement documents. At this point, these time periods are a nuisance, not a benefit.

i. <u>Liquidated Damages: Mostly Bark and Not Bite?</u>

Try to eliminate liquidated damage provisions as they ever-so-slightly increase the risk to the client should something run amiss in the future. However, they are mostly for show and for preventive purposes. Normally they apply to breach of confidentiality clauses–-a breach most likely caused by defendant employees, not the plaintiff. I tell this fact to defense counsel–that the rumor mill starts at its corporate offices and often add a zero or two to the settlement amount paid. That is exactly why one prominent CEO of a Fortune 500 company paid plaintiffs with multiple payments coming from geographically-disbursed offices; few actually knew the total settlement amount.

<u>If the defendant insists upon a liquidated damage provision, make sure it is mutual</u>. Also, try to get the amount reduced to a reasonable amount that is more fair to the client. These changes will reduce your client's worries that the defendant will unfairly persecute him by falsely claiming a violation of the agreement.

j. <u>Scope of release</u>

Releases, as written, would be rewarded with an "F" in a college English class. They suffer from the ills of endless cutting, pasting, and copying inherent in settlement agreements and cumbersome, paragraph-long phrases involving the parties' agents, attorneys, representatives, heirs, subsidiaries, parent companies, etc. And, yet, we often overlook them. For example, they should be mutual–your client and you should not have to worry about a countersuit or Rule 11 proceedings brought after the dismissal. Also, they should not release your client's rights to workers compensation, pension, or other similar benefits. Do not release unresolved claims to attorneys fees, costs, or future retirement benefits. Employ a law firm policy that always has more than one attorney reviewing the settlement documents and, especially, this and other critical provisions. ***<u>Read releases very carefully</u>.***

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[10] Order, Securities Exchange Act of 1934 Release No. 74619 / April 1, 2015 Administrative Proceeding, File No. 3-16466. (Copy included with materials.)

k. Conflicts of laws or choice of laws and forums for future disputes.

Plaintiffs want the applicable law and forum to be that where they are or their lawyers are located. Attorneys are usually most comfortable with a jurisdiction where they know the case law involving settlement agreements. Sometimes, however, there is good reason to agree to the other state or to at least not oppose the other state. For example, if you doubt anything will ever occur after the money is received, if your client is essentially judgment-proof, or if the defendant's chosen state is for some reason convenient or is known to have better law in the event of a dispute, then you need not insist upon your jurisdiction. Sometimes a more neutral jurisdiction is appropriate, such as Washington, D.C.

Consider proposing that mandatory mediation or low-cost arbitration before court proceedings ensue. Non-attorney corporate leaders prefer extrajudicial dispute resolution, even if outside counsel do not, and such provisions are readily agreed upon. If payment is to be made in the future, ask the court to retain jurisdiction until the settlement if fully consummated. In any FCA settlement, include a provision in the dismissal Order that retains jurisdiction.

l. Return of Documents

Defendants typically want "their documents" returned as part of settlement. Frankly, resistance to this provision can be successful if the DOJ is still awaiting a comprehensive settlement. Where you may have other claims pending, such as an SEC, IRS, or other similar claim, you simply must say "no" to a document return. In these and other cases, create an exception to the obligation to return or destroy for any documents that a law enforcement or regulatory authority has requested that you maintain.

Where your client may be willing to agree to destroy documents, do that. Return is fraught with inadvertent release of privileged and work product materials, personal client information, and release of materials from third parties. If you do return, agree to send back only the clean un-marked versions, on paper. Do not return anything with any markings, attorney notes, etc. Destroy, not return, electronic records.

For malpractice purposes, it's important that an attorney retain a set of litigation documents for at least a few months past the applicable statutes of limitation. Six years or so is much better. Since you will have been legally obligated to provide DVD's and flash drives of documents to various government entities, it's not like the documents are forever unavailable for appropriate use.

7. "We never agreed to that"

Employment lawyers have developed a different settlement process than that common in other tort cases, such as in personal injury cases. Rather than straightforward settlement documents, the settlement documents provided by defendants routinely contain provisions about which there is

no agreement, nor are the terms standard in all agreements. They then proceed to revise the settlement in a very substantial way, all to the benefit of the defendant employer. Many employment lawyers advise clients to accept this after-the-fact negotiation, but they are increasingly recognizing that it's not a good process. If you have not adopted this practice, don't. If you have, the trend is to work to end this prolongation of the settlement process which tends to operate to the favor of employers.

Because over-reaching defense counsel always add provisions to the settlement after-the-fact, it can often take weeks or months to actually wrap up the settlement, with defense counsel insisting upon new and onerous terms, like indemnification, confidentiality, agreements not to apply to work for the defendant in the future, etc. and routinely adding terms never agreed to or, worse, not even proposed by the defendant in the first settlement document draft. It is not only a huge waste of time and effort, it can be very demoralizing to a client.

Parties who announce their settlement and its terms to the court or who reach their settlement in the court's presence have entered into an oral, binding contract that is fully enforceable by a court. Counsel should be certain that the settlement terms are announced to the court. If the only settlement terms agreed upon are the amount of payment by the defendant, that is enough to create an oral, binding contract. Defendants who insist upon new and different terms in a final settlement document, after a settlement has been reached, have been ordered to proceed with the settlement on the terms originally agreed upon and to pay the attorneys fees of the party seeking to enforce the settlement.

Plaintiffs' counsel who take a firm stand against defense counsel who attempt to re-negotiate a settlement already reached will find that they may have less of a problem in the next settlement. By the same token, plaintiffs' counsel need to be sure that all essential terms desired by their client in any settlement are agreed upon when an agreement is reached as to the amount of the settlement. Such terms might well include allocation between wages and non-wages, attorneys fees and costs, and items of damages not subject to wage witholding, positive reference letter, date for payment of settlement amount, which party will draft the settlement documents, agreed statement regarding reason for plaintiff's employment termination, return of documents produced in discovery, etc. Make a checklist of these items to use in all cases, then customize it for each case. Keep the list handy--by your phone and on your pc (email it to yourself)--in the event that "the call" your client is waiting for finally comes.

In a really tough "I never agreed to that" settlement enforcement dispute, your job is doubly hard. Not only do you need to be firm (and creative) with opposing counsel, at the same time you need to carefully counsel your client about the situation and make sure that what you are fighting about what matters to your client–and is not just about the "principle." You will need to discuss with the client what terms are most likely to create a problem in the future and which clauses are such that you will need to grit your teeth, hold your nose, look the other way, and agree to them if you must.[11]

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[11] Attached at the end of this article is a draft of a motion to enforce a settlement, suitable where the defendant tries to revise the original settlement terms, recited in open court to the

8. You are the only lawyer that ever objected to this provision and other fairy tales from defense counsel.

When defense counsel run out of legitimate reasons to insist upon an onerous settlement provision, they commonly tell relators' counsel, that "You are the only lawyer that ever objected to this provision." When you hear this comment and the settlement negotiation is not smooth, it is easy to start doubting your own judgment. One technique to help you get over this hurdle is simply asking for a little time to think things through ("I will need to talk this over with my client and she is at her grandmother's funeral....") Additionally, consider the advice of others. Probably not an inquiry broadcast over TAFNET, but at least a careful confidential phone call or two to level-headed colleagues whose judgments you respect.

Remember, the decision to settle a case is ultimately that of your client, it is not your decision. On some issues, the client may decide that it is more important to get the case over with, stop the negotiation, and put some money in the bank, than to continue to negotiate or litigate settlement provisions that may not matter now, if ever.

One last thought on the "only you have ever complained about this provision." We all like to think we are special and supremely talented lawyers. So, when told by defense counsel that "all the other lawyers" readily agree to the term I oppose, one must wonder – is this a back-handed compliment showing my zealous representation of my client? Is everyone else really that careless? Or, on the other hand, is my concern just theoretical or even silly? The answer is most likely that I am both flattered and gullible when I believe defense counsel who use this "only you" line.

9. False Claims Act Qui Tams and Personal Claims

Timing can be critical. Ideally, you settle your non-qui tam claims simultaneously with the False Claims Act settlement. Defendants are often far more likely to settle and settle at a fair amount, when the DOJ is lurking in the background and seems to think highly of your client. Take advantage of the timing. Once the case is over, a defendant has all sorts of tactical reasons to make a non-settling plaintiff regret not resolving the entire case.

When settling at the same time as the *qui tam*, you have several procedural choices:

A. Settle all claims within a single document that includes the DOJ's settlement terms (least favored);

B. Settle, in two coordinated separate documents, both the FCA and personal claims and attorneys fees and costs claims (better than just one document);

C. Settle with three documents:

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judge, so that the written settlement document is far more favorable to the defendant.

(1) FCA Settlement with DOJ, Defendant, and Relators,
(2) Relators' Personal Claims Settlement between Defendant and Relators, and
(3) Relators' Settlement of Attorneys Fees and Costs, often with attorneys as signatories and parties to that settlement only.

Settlement of personal claims within the Government's FCA settlement documents is very difficult. Negotiations then have to involve the Government. Government lawyers want to control the document, but you need to protect your client's interests. For example, Government lawyers can become very nervous about such matters as the terms that allocate damages to wage and non-wage damages because of their IRS implications. The scope of the Government's definition of the parties covered by the settlement may be extremely limited, different from that which you and the defendant intend to use. In most cases, a separate document, that coordinates with the primary FCA Settlement Agreement, is best. However, if there is a comprehensive global settlement, the FCA Settlement should be contingent upon and ineffective if the separate personal claims agreement is not signed and fulfilled.

Because attorneys fees and costs are part of the client's damages remedy, they can be settled in the same document as the client's personal claims. However, some defendants will insist upon counsel signing the settlement documents that include payment for fees and costs, including signatures of previously discharged counsel. If part of the personal claims settlement document, it will take careful drafting to be sure that the lawyers are not, for example, agreeing to never apply for work with the defendant, releasing any and all claims that they have of any kind against the defendant, etc. For this reason, where the attorneys are being asked to affirm in writing their approval of the settlement of attorneys fees and costs claims, good practice is to have a settlement document that only addresses attorneys fees and costs.

PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT - WHEN ALL ELSE FAILS

Plaintiffs move for enforcement of the settlement reached by the parties as set forth in the transcript of the Court proceedings and the attached Settlement Agreements, signed by Plaintiffs. Both parties have moved to enforce the settlement, but disagree on the settlement's terms.

Plaintiffs and Defendant do not dispute that a settlement was reached in Court on January 9, 2006. The dispute is whether Defendant may impose additional "supplemental terms" not presented on January 9 and not agreed upon and whether other terms that were agreed upon after January 9 are enforceable. The law is clear, "settler's remorse"[12] is no basis for unilaterally amending a settlement.

Plaintiffs seek enforcement of the January 9 Agreement. Plaintiffs request that interest accrue on their settlement amounts at the Ohio statutory rate, beginning January 9, 2006 and that they be awarded costs and fees for their efforts required to enforce the settlement.

Alternatively, Plaintiffs seek enforcement of the January 31 Agreement and the supplemental terms agreed to by Plaintiffs thereafter and memorialized in the attached and signed Plaintiffs' Settlement Agreements. Plaintiffs suggest that the parties' Counsel be given 5 days to present, jointly, stipulations to the Court as to agreed-upon post-January9 matters.[13]

Attached are a Declaration of Plaintiffs' Counsel, Plaintiffs' signed Settlement Agreements, Settlement Agreements showing Plaintiffs' changes from the Defendant November 5 drafts, and a proposed Order regarding proposed Stipulations as to the post-January 9 settlement terms. Plaintiffs' Settlement Agreements in electronic format, showing changes from the Defendant drafts is also being provided to the Court.

MEMORANDUM IN SUPPORT

Plaintiffs request judicial enforcement of the January 9 settlement presented to the Court on January 9, 2006. Second, Plaintiffs request enforcement of the post-January 9, 2006 agreements reached, but not those terms that have not been mutually agreed upon or which are unlawful. The supplemental terms agreed to by Plaintiffs after January 9, as part of a total written settlement, are memorialized in attached, signed, Plaintiffs' Settlement Agreements.

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[12] See, *Stewart v. Carter Machine Co., Inc.* 82 Fed. Appx. 433, 2003 U.S. App. LEXIS 23008*8 (6th Cir. 2003) *(unpublished)*.

[13] Plaintiffs do not want alteration of the January 9 agreements, except those illegal as a matter of law and inappropriate for judicial enforcement. Plaintiffs do request an Order providing that Counsel meet and confer and within 5 days thereafter prepare a Stipulation of post-January 9 agreed terms in a format suitable for Entry of Judgment by the Court; and

I. The January 9, 2006 Settlement Agreement Terms

On January 9, 2006, the Court facilitated a settlement between Defendant and Plaintiffs and the terms are in the Court Transcript. After Counsel presented the settlement terms in a hearing, the Plaintiffs and the Defendant's representative affirmed their agreement on the record. These terms are:

1. Defendant pays Plaintiffs $ 100,000, divided equally.
2. There is a complete and general releases of claims.
3. The settling Plaintiffs withdraw their charges of discrimination from the EEOC.
4. No admission of liability by Defendant.
5. Confidentiality. Settlement may be discussed with spouse, attorney, accountant, tax advisor, court, or IRS.
6. Prompt payment in 15 days or less.

II. Defendant's Refusal to Honor the Settlement Agreement

Defendant has not executed documents that memorialize the settlement agreement. This is in breach of its promise to pay the settlement amounts within 15 days.

Defendant's failure to abide by the settlement agreement began on January 10, 2006, when it delivered 15-page settlement documents, single-spaced, that substantially differed from the terms reached in Court and omitted others agreed upon in Court.[14] Plaintiffs did not oppose mutual agreements on supplemental terms, if they were promptly and mutually agreed upon. Plaintiffs never agreed to adopt Defendant's post-January 9 terms, but not Plaintiffs' modifications. The unsigned Defendant's drafts are invalid one-sided documents.

III. Plaintiffs' Settlement Agreements Accurately Set Forth the Parties' Agreements

Because Defendant refused to memorialize the January 9 agreements after more than 3 weeks and there was no mutual agreement on all supplemental terms proposed, Plaintiffs revised the Defendant drafts. Plaintiffs' Settlement Agreements, as accurately as possible, did the following:

1) Set forth the January 9 agreements;
2) Set forth post-January 9 terms (i.e. after the presentation of the terms to the Court) that were mutually agreed upon;
3) Modified existing terms that were illegal or retaliatory;

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[14] The post-January 9 negotiations are detailed in the attached Declaration. Counsel corresponded and communicated by phone about settlement. Plaintiffs' Counsel sent detailed letters outlining terms that were not agreeable. Defendant refused to alter certain material terms that varied from the January 9 agreement. Instead, it insisted upon objectionable terms, while making few concessions in exchange.

4) Included terms that Defendant raised post-January 9, but which were otherwise objectionable unless Plaintiffs' post-January 9 changes to the Defendant post-January terms were acceptable; and
5) Made minor changes to accurately reflect intent and avoid ambiguity.

Plaintiffs executed Settlement Agreements, reflecting the above changes and promptly delivered them to Defendant Counsel.

IV. The Applicable Law Supports Enforcement of the January 9 Agreement and Plaintiffs' Settlement Agreements

The Sixth Circuit "....has long recognized the broad, inherent authority and equitable power of a district court to enforce an agreement in settlement of litigation pending before it . . . ." *Bostick Foundry Co. v. Lindberg*, 797 F.2d 280, 282-83 (6th Cir. 1986).[15] Settlement agreements between parties to litigation are highly favored in the law. *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St. 3d 501, at 502, 660 N.E.2d 431 (1996); *Mutual Poole v. Becker Motor Sales*, 1999 Ohio App. LEXIS 5557 (Montgomery App. November 24, 1999) (other history omitted). Once concluded, a settlement agreement is as binding, conclusive, and final as if it had been incorporated into a judgment. *Re/Max Int'l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 647 (6th Cir. 2001) (citing *Clinton St. Greater Bethlehem Church v. City of Detroit, 484 F.2d 185, 189 (6th Cir. 1973)); Bostick* at 283. Counsel for the parties may not later repudiate the agreement when the parties were represented by counsel and "assented to the agreement, the terms and conditions of which were incorporated in the district court record. *Bostick at* 283 (6th Cir. (1986) (citing *Cf. In re Tidewater Group, Inc.*, 8 Bankr. 930 (Bankr. N.D. Ga. 1981)); accord, *Mutual Poole v. Becker Motor Sales*, (citing *Klever v. Stow*, 13 Ohio App. 3d 1, at 4, 468 N.E.2d 58 (1983)).

A. The Court May Enter a Judgment Entry Enforcing the January 9 Settlement

This Court is empowered to enforce the parties' settlement agreement because there is no dispute that a settlement agreement has been reached. *Aro Corp. v. Allied Witan*, 531 F.2d at 1371; *Kukla*, 483 at 621. The court may sign a journal entry reflecting the terms of the agreement. *Spercel v. Sterling Industries, Inc.*, 31 Ohio St. 2d 36, syllabus at ¶2 (1972), *cert. denied*, 411 U.S. 917 (1973); *Mutual Poole v. Becker* ; *Mack v. Polson Rubber Co.*, 14 Ohio St. 3d 34, 36 (1984).

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[15] Citing *Bowater North America Corp. v. Murray Machinery, Inc.*, 773 F.2d 71, 76-77 (6th Cir. 1985); *Odomes v. Nucare, Inc.*, 653 F.2d 246, 252 (6th Cir. 1981); *United States v. Scholnick*, 606 F.2d 160, 166 (6th Cir. 1979); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir.), *cert. denied*, 429 U.S. 862, (1976); *Kukla v. National Distillers Products Co.*, 483 F.2d 619, 621 (6th Cir. 1973); *All States Investors, Inc. v. Bankers Bond Co.*, 343 F.2d 618, 624 (6th Cir.), *cert. denied*, 382 U.S. 830 (1965)).

1. The Court Should Enforce the Settlement Agreement Where the Parties Entered into Settlement in the Court

"It is well established that courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them." *Brock v. Scheuner Corp*., 841 F.2d 151, 154 (6th Cir. 1988) (quoting *Aro Corp. v. Allied Witan Co.*, 531 F.2d at1371 (6th Cir.) (citations omitted)); *See also Kukla*, 483 F.2d at 621. Where parties to an action voluntarily enter into a settlement agreement *in the presence of the trial court*, the agreement is a binding, enforceable contract. *Spercel v. Sterling Industries*, 31 Ohio St.2d 36, 285 N.E.2d 324 (1972); *Reddick v. Reddick*, 1995 Ohio App. LEXIS 33*6; *accord, Ullmann v. Olwine, Connelly, Chase, O'Donnell & Weyher*, 857 F.2d 1475, 1988 U.S. App. LEXIS 12081 (6th Cir. 1988) (*unpublished*).

The parties' January 9 Agreement is fully enforceable, even though not reduced to writing in the form of a settlement agreement:

> A federal court possesses this power "even if that agreement has not been reduced to writing." *Bowater North American Corp. v. Murray Machines*, 773 F.2d 71, 77 (6th Cir. 1985) (citing *Odomes v. Nucare, Inc.*, 653 F.2d 246, 252 (6th Cir. 1981)). ***The court must enforce the settlement as agreed to by the parties and is not permitted to alter the terms of the agreement. *In re Air Crash Disaster at John F. Kennedy International Airport*, 687 F.2d 626, 629 (2d Cir. 1982).

Brock v. Scheuner Corp., 841 F.2d 151, 154 (6th Cir. 1988). Summary enforcement of a settlement agreement for which there is no dispute as to the terms of the agreement is the only appropriate judicial response, absent proof of fraud or duress. *Re/Max at 647 (citi*ng, see, e.g., *Aro Corp., 531 F.2d at 1372; Kukla, 483 F.2d at 621;* cf. *Dillow v. Ashland, 1999 U.S. App. LEXIS 20354,* No. 97-6108 at **1-**2 (6th Cir. Aug. 24, 1999) (unpublished) (court did not abuse its discretion in enforcing a settlement agreement where parties agreed on the record to the same material terms enforced by the court)); *Ullmann, supra*. Indeed, Title VII claims are subject to dismissal where there has been a voluntary and knowing settlement. *Ullmann,* 1988 U.S. App. LEXIS 12081*7 (*citing Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974)).

a. State Law Determines Whether a Valid Contract Exists as to the Post-January 9 Terms.

Ohio contract law governs the settlement issues here as to the Defendant "supplemental terms" and/or other post-January 9 terms. *Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 152 (6th Cir. 1992). As Judge Holschuh wrote:

> The basic elements of contract formation are an offer and acceptance. *Restatement (2d) of Contracts* § 22 (1981). A valid settlement agreement also

> requires a meeting of the minds. *See Rulli v. Fan Co.*, 79 Ohio St. 3d 374, 376, 683 N.E.2d 337, 338-39 (1997). Defendants must first show that there was a valid offer. An offer is defined as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (2d) of Contracts § 24 (1981). An offer "cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain." *Id.* at § 33(1). Where future essential terms are yet to be determined, there is no definite offer and therefore no contract. *See General Motors Corp. v. Keener Motors*, 194 F.2d 669, 675-76 (6th Cir. 1952).

Huffer v. Herman, 168 F. Supp. 2d 815, 824 (S.D. Ohio 2001) (Holschuh, J.).

b. To the Extent That a Contract is Ambiguous, It Should Be Construed Against the Drafter

Under Ohio law, "the determination whether a contract is ambiguous is made as a matter of law by the court." *Potti v. Duramed Pharmacy, Inc.*, 938 F.2d 641, 647 (6th Cir. 1991). A contract is ambiguous if, on its face, it is subject to two reasonable interpretations. See *Schachner v. Blue Cross & Blue Shield of Ohio*, 77 F.3d 889, 893 (6th Cir. 1996). If a term is ambiguous, it should be construed against the drafting party. *Sulit v. D. Boothe & Co.*, 30 Fed. Appx. 37, 2002 U.S. App. LEXIS 2362 (6th Cir., February 8, 2002) (*unpublished) (citing,* See *McKay Mach. Co. v. Rodman*, 11 Ohio St. 2d 77, 228 N.E.2d 304, 307 (Ohio 1967). "[A] provision that can be given more than one reasonable construction will be construed against the party that prepared it." *Neely v. Miller Brewing Co.*, 25 Fed. 370, Appx. 2002 U.S. App. LEXIS 531 (Citing *Restatement (Second) of Contracts* § 206 (1981)). When interpreting an ambiguous term, the fact-finder may consider evidence outside of the agreement to assess the parties' intent, but not afford an evidentiary hearing. *Sulit v. D. Boothe (citing,* See *Ohio Historical Society v. General Maintenance and Engineering Co.*, 65 Ohio App. 3d 139, 583 N.E.2d 340, 344 (Ohio Ct. App. 1989)).

B. The Parties Are Bound by the Settlement Agreement Terms Presented Orally to the Court on January 9, 2006

The settlement terms were primarily announced by Defendant Counsel on January 9, 2006. Thus, it is bound by its failure to address various terms that it now seeks and its failure to make clear special meanings it may have intended.

IV. Plaintiffs Seek Enforcement of the Agreements They Made Subsequent to the January 9 Hearing and Entered into Settlement Outside the Presence of the Court

The parties' post-January 9 agreements, extrajudicial in the sense that the trial judge was not advised as to the terms, "can be enforced only if the parties are found to have entered

into a binding contract...." *Reddick v. Reddick*, 1995 Ohio App. LEXIS 33*7 (citing *Bolen v. Young*, 8 Ohio App.3d 36, 455 N.E.2d 1316, paragraph two of the syllabus (1982)). *Huffer v. Herman*, 168 F. Supp. 2d 815, 823 (S.D. Ohio 2001) (Holschuh, J.). The party seeking judicial enforcement of the alleged agreement must establish by clear and convincing evidence that the parties entered into a settlement agreement resolving all issues.[16] Plaintiffs submit that the electronic version of Plaintiffs' Settlement Agreements will readily show which agreements were reached. Because discussions between counsel and the exchange of the letters and proposed releases can reach the stage of an enforceable settlement agreement, Plaintiffs request that Counsel be given 5 days to present, jointly, Stipulations to the Court as to agreed-upon post-settlement .[17] If there has been agreement on the post-settlement terms, they are also enforceable.

V. Plaintiffs Oppose Judicial Enforcement of Terms Not Agreed to By Them, As Well as all Terms that are Illegal or Violate Public Policy

A. Settlement of Plaintiffs' Workers' Compensation Claims is not Contemplated in Settlement of a Civil Rights Employment Case

Plaintiffs never agreed to settle workers' compensation claims. They made clear, in their changes to the Defendant drafts, that they have not abandoned any rights under Ohio workers compensation law. At the hearing, no mention was made of such claims nor of the procedural requirements that such an agreement would require, including a 30-day "cooling off" period under Ohio Rev. Code § 4123.65, during which a party may renege on the settlement.[18]

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[16] *Anschutz v. Radiology Assocs.*, 827 F. Supp. 1338, 1344 (N.D. Ohio 1993).

[17] Plaintiffs do not want alteration of the January 9 agreements, except terms illegal as a matter of law and inappropriate for judicial enforcement.

[18] *Day v. Hunter*, 2000 Ohio App. LEXIS 2243 *5-7(Cuyahoga Cty. App., May 25, 2000) (citing *Estate of Orecny v. Ford Motor Co.* (1996), 109 Ohio App. 3d 462, 466, 672 N.E.2d 679; *accord State ex rel. Longacre v. Penton Publ. Co.*, 77 Ohio St. 3d 266 1997 Ohio 276; 673 N.E.2d 1297, 1997 Ohio LEXIS 1 (1997)). Ohio Rev. Code § 4123.65 states:

> (C) No settlement ...shall take effect until thirty days after the administrator approves the settlement for state fund employees and employers, or after the self-insuring employer and employee sign the final settlement agreement. During the thirty day period, the employer, employee or administrator for state fund settlements, and the employer or employee for self-insuring settlement, may withdraw his consent to the settlement....

The 30-day waiting period "is essentially a cooling-off period to allow the employer or the

B. Defendant Agreed to Timely Pay Plaintiffs

The parties were clear on January 9 that the settlement was to be consummated promptly. Defendant now offers two excuses for not paying Plaintiffs promptly: 1) Age Discrimination in Employment Act (ADEA) provisions in 29 U.S.C. § 626(f) and providing for a 7-day wait period; and 2) A desire for 10 business days to finalize the settlement, after the wait period. However, the ADEA applies only to federal ADEA claims. Plaintiffs have no ADEA claims to settle.

Defendant's "no more than 15 days" expired weeks ago. In the Defendant drafts, Defendant was still insisting upon 21 days **after** all parties signed the settlement agreements.

C. Plaintiffs Should Not Pay Defendant's Taxes and Fees

There is no support for Defendant's insistence that Plaintiffs pay Defendant's taxes, penalties, liabilities, and attorneys fees for taxes that Defendant may need to pay in conjunction with the settlement. Plaintiffs are willing to compromise and have proposed that each side is responsible for paying its own taxes, penalties, etc. No more should be required.

D. "No future employment"

1. Plaintiffs Agree to No Reinstatement to Work

This Court was told that the parties had agreed upon "no future employment." Plaintiffs submit that this meant that they were not entitled to a statutory remedy of reinstatement. Defendant contends that it means that Plaintiffs may not apply nor become employed by Defendant in the future. An agreement not to apply to work in the future with the settling defendant in the future is illegal retaliation against persons who asserted their civil and employment rights. Such an illegal provision cannot be enforced by this Court. "Judicial approval ...may not be obtained for an agreement which is illegal, a product of collusion, or contrary to the public interest." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) (consent decree containing impermissible waivers of future discrimination claims held invalid); *Rogers v. General Electric Co.*, 781 F.2d 452 (5th Cir. 1986) (employee may validly release only those Title VII claims arising from "discriminatory acts or practices which antedate the execution of the release.") In order to give this clause meaning and to allow any judicial enforcement, this provisions should mean that Plaintiffs will not be reinstated to their jobs.

E. The Parties Agreed to a General Release of Claims by All Parties

> Where litigation is settled by agreement, it is quite common for the settlement agreement to include, as one of its provisions, the release of all claims by each party against the other. ***If, as Poole seems to be arguing, a trial court lacks authority to enforce a provision in a settlement agreement for

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employee to withdraw from the self-insuring settlement agreement." *Day v. Hunter* at *6-7.

a general release of all claims that each party may have against the other, it would make the settlement, by agreement, of litigation virtually impossible.

Mutual Poole v. Becker Motor Sales, 1999 Ohio App. LEXIS 5557 (Montgomery App. November 24, 1999) (other history omitted) (citing *Klever v. Stow*, 13 Ohio App. 3d 1, at 4, 468 N.E.2d 58 (1983). Accordingly, by adopting the language drafted by Defendant Counsel for Plaintiffs' release and removing overbroad language, Plaintiffs have endeavored, in a fair manner, to make the release language similar for all parties.

F. Confidentiality Provisions Apply to All Parties

Defendant insisted upon confidentiality of the settlement–but then drafted a confidentiality clause was that was one-sided and applied to Plaintiffs only. This is unworkable. There can be no confidentiality unless it applies to all parties. Moreover, one-sided confidentiality is really a "gag order" that prevents one side from truthfully talking about what occurred, while the other may speak freely without being challenged as to the truth of its statements.

G. This Court May Not Enforce An Illegal Clause Barring All Assistance to Other Defendant Employees and Former Employees and Restricting Plaintiffs' Counsel's Right to Practice Law

Defendant has insisted upon two illegal provisions:

1. That Plaintiffs agree not to assist co-workers.

2. That Plaintiffs' Counsel may not assist others with claims against Defendant.

Settlement provisions barring assistance to the EEOC investigating charges of discrimination against other employees of the defendant are unenforceable. *EEOC v. Astra, Inc.*, 94 F.3d 738 (1st Cir. 1996); *EEOC v. Morgan Stanley & Co.*, 89 Fair Empl. Prac. Cas. (BNA) 1791, 2002 U.S. Dist. LEXIS 17484; 89 Fair Empl. Prac. Cas. (BNA) 1791; 83 Empl. Prac. Dec. (CCH) P41,265 (S.D. N.Y., September 20, 2002) (other history omitted). Likewise, Ohio Code of Professional Responsibility, Rule 2-108(B) states: "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law."

VI. Plaintiffs Are Entitled to An Award of Fees, Costs, and Interest

While Plaintiffs did not initiate the enforcement process, they have now had to file a Motion to Enforce the Settlement because Defendant that has refused to honor the January 9 agreements and refused to try to resolve the impasse. Plaintiffs are entitled, therefore, are entitled to an award of fees and costs and prejudgment and post-judgment interest.

Imposition of fees and costs is appropriate where a defendant sought to impose additional terms after a settlement was reached, that were not agreed upon, and the plaintiff has had to seek enforcement of the settlement from the court. *Jaynes v. Austin*, 20 Fed. Appx. 421; 2001 U.S. App. LEXIS 21179; 26 Employee Benefits Cas. (BNA) 2626 (6th Cir., September 25, 2002); *Bomerilease*, 958 F.2d at 154; *Gliniecki v. Borden, Inc.*, 444 F. Supp. 619 (E.D. Wisc. 1978). The Sixth Circuit stated in *Jaynes*:

> Here, **Defendant attempted to include new terms in the General Releases that were not included in the Settlement Agreement and not agreed to or bargained for**. ... the district court stated that "there is no question in the Court's mind that the **defendant has attempted to impose a new term in the proposed releases which is definitely outside the contemplation of the parties in their settlement negotiations. This he may not do."** The district court then awarded attorney fees to Plaintiffs for the fees associated with the insertions of new terms in the General Releases....
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> In its Second Order, **the district court approved the requested amount of attorney fees and ordered Defendant to execute and deliver the General Releases prepared by the plaintiffs within ten days of the order**. In its Third Order, the district court awarded attorney fees to Plaintiffs "to compensate them for the additional legal expenses incurred in responding to the defendant's continuing effort to delay and obstruct final resolution of this action."
>
> Although the district court did not use the phrase "wilfully abuse the judicial process," it did conclude that Defendant attempted to "obstruct" and "delay" resolution of the action. We find that to be a sufficient discretionary finding of bad faith to justify an award of attorney fees.
>
> Defendant argues that he was simply responding to Plaintiffs' motions, which he has a right to do. **What Defendant ignores, however, is that he had already agreed in the Settlement Agreements to resolve this dispute, but then attempted to impose new terms in the proposed release, which resulted in additional expense to Plaintiffs.**

20 Fed. Appx. 421, 427; 2001 U.S. App. LEXIS 21179*14-16 (emphasis added). Plaintiffs may also recover all costs incurred in enforcing the settlement. *Plasin, S.A. v. c.V.B.W. Wright,* Inc., 2002 U.S. Dist. LEXIS 20007 (S.D. Ohio, Sept. 9, 2002) (Rice. C.J.).

A party may recover prejudgment interest on all contracts and settlements between parties. Ohio Rev. Code § 1343.03(A); *Plasin*. A settlement agreement between parties is a contract. *Plasin*. Because Defendant was contractually obligated to pay Plaintiffs $ 100,000 on or before January 24, 2006 (within 15 days after January 9), Plaintiffs are entitled to a Judgment Entry providing for the payment of prejudgment interest, at the Ohio statutory rate, on the sum of $ 100,000, from January 9, 2006 to the date of the Judgment Entry. The entry should provide for payment of post-judgment interest in accord with 28 U.S.C. § 1961.

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Arguments Made in Response to Defendant Employer' s Motion to Enforce Settlement

A. No future employment

Defendant contends that the term "no future employment" means no future employment or re-employment ever. Prospective waivers of future Title VII and other civil rights may not be enforced by the Court on the facts presented here. This law is dispositive of the issue. Adams v. Phillip Morris, Inc., 67 F. 3d 580 (6th Cir. 1996) and Dhaliwal v. Hesston Corp., 930 F.2d 547 (7th Cir. 1991) are of little assistance.[19] Defendant misread Adams. Adams refused to enforce a prospective waiver of re-employment rights, even though the plaintiff received a substantial severance payment in a large reduction-in-force, the employee was still receiving severance payments, and the employee was effectively seeking his old job back in applying for work.

Instead, Adams holds *only* that prospective waivers of civil rights claims are invalid unless they are intended by the parties to address continuing effects of past discrimination and are narrowly construed and applied. Id. at 583. Here, Defendant Employer is not seeking to prevent a second lawsuit about the effects of past discrimination. Instead, it wants to prospectively avoid future discrimination claims by Plaintiffs *that have not yet arisen* and *might* theoretically occur if Plaintiffs apply for work or are re-employed and experience race discrimination anew. In remanding Adams for further factual review, the Sixth Circuit emphasized that prospective waivers of Title VII rights are invalid and that settlement terms cannot be a "license to discriminate":

> The Supreme Court has stated that "an employee's rights under Title VII are not susceptible of prospective waiver." *Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974)*. Although some courts have questioned whether this language was dictum in *Gardner-Denver*, we held that this statement precluded minority police officers in a consent decree from waiving their prospective rights under Title VII. *Williams v. Vukovich, 720 F.2d 909, 926 (6th Cir. 1983)*. *** It is the general rule in this circuit that an employee may not prospectively waive his or her rights under either Title VII 584
>
> ****.
>
> An employer cannot purchase a license to discriminate. *See United States v. Trucking Employers, Inc., 182 U.S. App. D.C. 315, 561 F.2d 313, 319 (D.C. Cir.*

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[19] The Seventh Circuit opinion does not supercede Sixth Circuit and Supreme Court authority, which clearly prohibits prospective waivers of employment rights, except in very narrow circumstances not present here. Dhaliwal involved a *pro se* litigant and did not consider Gardner-Denver's holding nor the Sixth Circuit case law. It admittedly examined no controlling law on the issue ("We have found no cases on this question....").

> *1977)* ("An employer cannot purchase a license to avoid its duty to eliminate practices which perpetuate prior discriminatory acts any more than it can circumvent its responsibility for future acts of purposeful discrimination."). An employment agreement that attempts to settle prospective claims of discrimination for job applicants or current employees may violate public policy under *Gardner-Denver* and related cases unless there were continuing or future effects of past discrimination, or unless the parties contemplated an unequivocal, complete and final dissolution.
>
> ****
>
> In summary, we hold that [defendant]PM is entitled to summary judgment on the issue of the execution of the release and waiver, and the execution thereof, by [plaintiff] Adams knowingly and voluntarily. We must, however, **REVERSE** and **REMAND** on the issue of the intent of the parties in executing the agreement of waiver and release in light of the then existing employment discrimination law.

Adams at 583, 585. Since no Plaintiff now seeks employment by Defendant Employer and since Defendant Employer has not, therefore, sought to enforce the employment bar, this Court need not attempt to devine the extent of the "no future employment" provision. The Court may find that the "no employment" provision bars reinstatement and litigation of discrimination claims that were raised or could have been raised *in this lawsuit*.

B. Complete and general release

Defendant insists that Plaintiffs agreed to a broad, complete and general release extending to any rights they have to obtain *future* benefits under Ohio's workers compensation system, without regard to the statutory protections precluding such releases.[20] Plaintiffs settled *this case* on January 9--they did not settle workers compensation issues that may arise in the future. Resolution of whether this settlement impacts future workers compensation matters is best left to a future time when and if Plaintiffs make such claims and Defendant Employer determines that it should raise this settlement as a bar to paying for any work-related injuries or illnesses suffered. Of course, such future proceedings should properly involve the Ohio Bureau of Workers Compensation as a participant, consistent with Ohio law.

Coddington v. Leesman, 1999 Ohio App. LEXIS 416 (Montgomery Cty App., February February 12, 1999), cited in support of Defendant's argument that the term "general release" bars Plaintiffs' future workers compensation benefits, is inapplicable. Coddington involved a broken engagement and litigation to recover an engagement ring–facts bearing no resemblance to Plaintiffs' situation. The appellate court held that a *written* general release settling a dispute over jointly-owned real estate was worded sufficiently broadly to preclude the fiancé from later claiming the ring given to his prospective bride. Significantly

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[20] No Plaintiff is now receiving workers compensation benefits, nor do they have any open, pending claims involving Defendant Employer.

in Coddington, the parties had an actual dispute before them and were not asking the court to do what Defendant Employer seeks, a preemptory ruling as to the scope of the release upon facts that have not and may never occur.

Defendant also wants a release of claims that is one-sided in its favor. Plaintiffs Counsel advised Defendant's Counsel that a settlement required that all parties release claims. Defendant argues that because the singular term "release" was used in the Courtroom, this means that the parties intended that only Plaintiffs released claims, not Defendant Employer. This ignores reality-–if Defendant's interpretation were adopted it would result in only one Plaintiff releasing his claims, because if all 10 had done so, the parties would have used the plural form, "releases." Notably, Defendant's authority, Coddington, referred to the parties' mutual release of each other as a "general release," rather than a mutual release, and used the singular term, "release," rather than "releases."

Defendant also takes issue with the contention that Poole v. Becker Motor Sales, Inc., 1999 WL 1062241, 1999 Ohio App. LEXIS 5557 (Montgomery Cty. App., November 24, 1999) supports a finding that the parties' release was mutual. Plaintiffs agree with Defendant and Poole that it is frequently a factual issue, not a legal issue, as to whether there was mutual release. Poole nonetheless supports Plaintiffs' contention that all parties agreed to a release of claims in stating: "Where litigation is settled by agreement, it is quite common for the settlement agreement to include, as one of its provisions, the release of all claims by each party against the other." Id., 1999 Ohio App. LEXIS *4. Again, since none of the parties are now suing the other nor threatening to do so, the extent to which this settlement released claims outside the lawsuit need not be resolved.[21]

C. Defendant Employer's Failure to Timely Pay the Settlement

Rather than admit that it failed to pay Plaintiffs timely, Defendant Employer argues that it did not have to make a payment until a signed settlement document satisfactory to Defendant Employer existed. The Court transcript belies this argument. The settlement recited to the Court and agreed to by the parties present was not conditioned upon signed documents nor was it an unenforceable "agreement to agree." Defendant's 15 business days long ago expired. Further, the ADEA waiting periods long ago expired and still no payment has been made.

D. Illegal Prohibition Against Assistance to Other Victims of Defendant Employer's Discrimination

Defendant Employer has no basis for requesting a preemptive ban upon Plaintiffs assisting others with discrimination claims against Defendant Employer. Zanders v. National

[21] Various legal doctrines and statutes of limitations bar the parties from raising issues in subsequent litigation that could have been raised here.

Railroad Passenger Corp., 898 F. 2d 1127 (6th Cir. 1990), is inapposite. Zanders involved a judicially-enforced restriction upon a former Amtrak paralegal assistant who had privileged, confidential attorney-client and work product information. She worked on Amtrak's employment discrimination cases for 7 years. The no assistance restriction was applied to protect privileged information, not to preclude her from assisting others. Zanders states:

> While absolute bans against disclosure might, we concede, run afoul of both the language and intent of Title VII of the Civil Rights Act of 1964, as amended, *42 U.S.C. § § 2000e, et seq.*, such an absolute ban was not contained in the agreement presented to the Ohio court and to the district court. Instead, the Ohio court construed the agreement to prohibit disclosure unless the employer was accorded an opportunity to interpose any rights it might have to assert the attorney-client or work product privileges. A contract so limited, the Ohio court held, violated neither Ohio nor federal public policy. The Ohio court, therefore, enjoined the premature disclosure, without court supervision, of the allegedly confidential information.

Zanders at 1129. Plaintiffs were hourly union production workers. They have no Defendant Employer attorney-client nor work product information. There is no legitimate reason to prevent them from assisting others with claims against Defendant Employer.

Zanders' precautionary warning that courts should not bar assistance to other litigants is fully consistent with EEOC v. Astra, Inc., 94 F.3d 738 (1st Cir. 1996), which invalidated agreements not to assist others involved in EEOC proceedings. Section 704(a) of Title VII of the Civil Rights Act clearly protects Plaintiffs, as former employees, from retaliation because they assist others with discrimination claims:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-*3*(a). Indeed, since Defendant Employer's provision is aimed at future conduct, it is unlawfully attempting to immunize Defendant Employer from prospective claims by Plaintiffs. As discussed previously, such prospective waivers of civil rights are not countenanced in the Sixth Circuit.

Finally, Defendant Employer complains that the agreement not to assist others in litigation should not apply to Defendant Employer. Nothing in the Court Transcript limits the prohibition on assistance to others to Plaintiffs only, bringing to mind the ancient maxim, "what is good for the goose should also be good for the gander." These efforts to enforce an illegal provision should be denied.

E. Defendant's Settlement Agreement Terms Are Not Enforceable

Defendant Employer does not contend that the parties agreed on its January 30 terms, nor identify a "meeting of the minds" on the "supplemental terms" written by Defendant Employer. It just urges that its "settlement papers most faithfully implement the terms of the agreement reached at the Court Conference." Defendant Employer's argument is contradicted by a simple review of th documents. They contain far more terms than those presented to the Court on January 9. Thus, these documents cannot be enforced.

F. Concluding Remarks

All parties are requesting enforcement of the January 9 Agreement. While the best result for all parties is a written settlement agreement signed by all parties, Defendant determined not to pursue that route when it filed, without communicating with opposing Counsel, its February 10 motion to enforce the settlement. That Motion insists upon enforcement of Defendant Employer's January 30 drafts, even though they are laden with provisions contradicting the January 9 settlement and as to which Plaintiffs have not agreed.

In contrast, the Plaintiffs' signed Settlement Agreements of January 31 were a good faith attempt to "bridge the gap" between the parties. Plaintiffs tried to honor the January 9 settlement agreement and also to include only terms upon which either tentative agreement had been reached or which were Plaintiffs' best effort at meeting various of Defendants' demands for provisions that were beyond the scope of the January 9 agreements.

Plaintiffs request interest on their settlement at the state statutory rate, beginning January 9, 2006, and that they be awarded costs and fees, with interest, for their efforts to enforce the January 9 settlement.

Plaintiffs seek enforcement of all post-January 9 agreements reached and about which there is no dispute, as set forth in their Motion to Enforce). Plaintiffs request that the Court deny Defendant's Motion to Enforce Settlement in all other respects and specifically deny enforcement of the January 30 Defendant Employer supplemental terms as to which there was no settlement.

Plaintiffs respectfully request that this Court:

1) Enter a Judgment setting forth the terms of the settlement between the parties made on January 9, 2006;
2) Order Defendant to pay prejudgment and post-judgment interest;
3) Order Defendant to pay Plaintiffs' attorneys fees and costs incurred in enforcing the settlement;
4) Require Counsel to meet and confer and within 5 days thereafter file a Stipulation of post-January 9 agreed terms in a format suitable for Entry of Judgment by the Court; and
5) Deny Defendant's Motion to Enforce Settlement.