IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO GEORGIA

TRACY ANTHONY MILLER,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
VS.	)	
	)	6:98-109-JEG
HUGH SMITH, et al.,	)	
	)	
Defendants.	)	

MOTION FOR ENTRY OF DISMISSAL WITH PREJUDICE
AND BRIEF IN SUPPORT

COME NOW the Defendants, by and through counsel, Thurbert E. Baker, the Attorney General for the State of Georgia, and hereby move for enforcement of the private settlement agreement entered into by the parties and for the entry of dismissal with prejudice, with no continuing jurisdiction, showing the Court the following:

I. Procedural History and Terms of Settlement Agreement

On August 10, 2010, the Parties voluntarily participated in mediation in order to attempt to resolve both this litigation and Miller v. Owens, 1:05-cv-153, currently pending in the Southern District of Georgia before Judge Bowen. Although the Parties were not successful on that date, their efforts continued, and after several proposals, counter-proposals, and settlement drafts, reached an agreement which was memorialized in a final Settlement Agreement that has been executed by the Parties ("Agreement"). (*See* Exhibit A, attached hereto).

The Agreement provides that the settlement:

> it is intended to resolve all the claims raised in Miller's suit entitled Miller v. Smith, et. al., 6:98-cv-109-JEG, pending in the United States District Court for the Southern District of Georgia together with any and all disputes, claims or demands between Miller and GDC, its officers and employees.

(Exhibit A, p. 1, ¶ B).

Under the Agreement, Defendants agreed to pay to Plaintiff the amount of $50,000, and to pay to his attorneys the amount of $90,000. (Exhibit A, p. 4, ¶ B). In exchange, Plaintiff agreed to release his claims. The Agreement contains a mutual release provision that provides:

> Miller, for and in consideration of the performance of the above financial terms, does hereby and for the heirs, executors, administrators, successors and assigns of Miller acquit, remise, release and forever discharge the GDC, Brian Owens, James Donald, Johnny Sikes, Dr. Joseph Paris, Dr. Carolyn Mailloux, Victor Walker, Lisa Bozeman, Dennis Brown, Hugh Smith, Dr. Sharon Lewis, T.J. Conley, Don Jarriel, Dane Dasher, Dr. Tommy Jones, Tom King, and their agents, servants, employees, heirs, executors, administrators, successors, predecessors and assigns from any and all claims, fees, demands, rights, and causes of action brought, or that could have been brought, including claims for attorneys fees and costs of court, in Tracy Miller's Complaint and Amended Complaint filed in Miller v. Smith, et. al., Civil Action File No. 6:98-CV-109-JEG in the United States District Court for the Southern District of Georgia, Statesboro Division (the "Claims"), and all Complaints and Amended Complaints in Miller v. Owens, Civil Action File No. 1:05-cv-153-DHB in the United States District Court for the Southern District of Georgia, Augusta Division, and any and all claims, demands, rights, and causes of action, that have accrued as of the date of this Agreement. It is further the intention of Miller that this Agreement shall be a full settlement, satisfaction, release and discharge of GDC, together with its officers, employees, and medical providers, from any and all claims, actions, causes of action and demands, including claims for attorney's fees, arising from any act or omission of any of the released parties at any time from the beginning of time until the date of this agreement.

> GDC for and in consideration of this Agreement, does hereby acquit, remise, release and forever discharge Miller, together with his heirs, executors, and administrators, from any and all claims, demands, rights, and causes of action brought, or that could have been brought, in Civil Action File No. 6:98-CV-109-JEG in the United States District Court for the Southern District of Georgia, Statesboro Division (the "Claims").

(Exhibit A, pp. 4-5, ¶E.2).

The Court was advised of the settlement on August 19, 2010, and it was reported that a stipulation of dismissal would be forthcoming "after the checks cleared." (Exhibit B, e-mail correspondence dated August 19, 2010). No mention of continuing jurisdiction was made, nor did Plaintiff indicate that he would ask the Court to approve or supervise the terms of the Agreement, or would request that its terms be incorporated into a dismissal order or that the Court retain jurisdiction. (Exhibit B).

In accordance with the Agreement, Defendants requested that Plaintiff execute a Stipulation of Dismissal pursuant to Rule 41(a)(1) in the Miller v. Owens case. (Exhibit C, e-mail correspondence and Stipulation of Dismissal). The Stipulation of Dismissal dismisses Miller v. Owens with prejudice, with the Parties to bear their own costs. (Exhibit C). It does not incorporate the terms of the Agreement and does not provide for continued jurisdiction in the district court. Plaintiff has apparently executed the Stipulation of Dismissal as written, but has not filed it.[1]

Defendants continued their compliance with the terms of the Agreement by scheduling a re-inspection of the cells identified in the Agreement, by tendering

[1] Defendants will also be filing a motion for dismissal with prejudice in Miller v. Owens.

settlement funds to Plaintiff and his counsel, by paying the mediator's fees in full, and by taking the administrative steps necessary to forgive the debt Plaintiff owed to GDC.

On September 14, 2010, this Court entered an order administratively closing this action and giving the parties 60 days to file a "dismissal judgment" under FED. R. CIV. P. 41(a)(2) incorporating the terms of the Agreement to allow the Court to retain jurisdiction to enforce the Agreement. (Doc. 537). If the Parties fail to do so, a dismissal with prejudice will be entered. (Doc. 537). Defendants immediately advised Plaintiff that the private Agreement entered into by the Parties did not provide for the entry of a judgment or a consent decree, and that it was expected and intended that a Stipulation of Dismissal under Rule 41(a)(1), in the same form and substance as was executed by Plaintiff in Miller v. Owens, 05-153, would be filed. (Exhibit D, e-mail September 14, 2010).

Plaintiff responded by stating that the dismissal entered in the instant action "would be like Mr. Miller has previously signed," and that there was no intention to ask the Court for anything different. (Exhibit D). As noted, the Stipulation of Dismissal signed by Plaintiff in Miller v. Owens was prepared in accordance with FED. R. CIV. P. 41(a)(1) and did not incorporate the terms of the Agreement or provide for continued jurisdiction to enforce the terms of the Agreement.

A disagreement arose between the Parties regarding the scope of Defendants' obligations to "waive the debt" in Plaintiff's trust account. The Agreement provides that "GDC agrees to waive any debt in Miller's inmate trust account as of the date of the

execution of this agreement." (Exhibit A, p. 4). Plaintiff's trust account has various charges for debt Plaintiff has incurred. Some debt has been charged by GDC for things such as postage, correspondence materials, disciplinary report fees, and reimbursement for damage to state property.

The trust account also includes entries for court fees incurred by Plaintiff in various state and federal courts. These courts have placed claims on Plaintiff's funds and, in the case of the federal courts, the court claims were made under the Prison Litigation Reform Act ("PLRA"). (*See e.g.*, Exhibit E, illustrative correspondence from courts). Under the PLRA, an inmate may pay court fees in installments, in amounts up to 20% of the balance/deposit in the inmate's trust account. When courts make such a claim on a trust account, the entire debt is posted to the inmate's trust account, but the amount is paid under the provisions of the PLRA in the event that the inmate ever deposits any funds in the account. GDC does not pay inmate court fees.

The Agreement does not require GDC to pay debts owed by Plaintiff to third-parties, like the courts. Instead, it requires GDC to "waive" the debt Plaintiff owed to it. That task has been accomplished. Still, in an attempt finally resolve this case without further litigation, as additional consideration Defendants offered to pay the courts fees for which Plaintiff was indebted, including fees incurred in cases that were not included in the trust account, but which were learned of as Defendants' confirmed the amount of the court fees. In exchange, Defendants required from Plaintiff further consideration, as set

forth in a proposed Supplemental Settlement Agreement ("Supplemental Agreement"). (Exhibit F, Supplemental Agreement).

The Supplemental Agreement sets forth the precise amounts GDC was offering to pay on behalf of Plaintiff, the court to which the payment would be made, and the case to which the payment would be applied. The Supplemental Agreement required Plaintiff to acknowledge receipt of the settlement proceeds. In addition, since the court fee issue remained the last issue to be resolved to bring this matter to a final conclusion, and because the settlement checks had cleared and funds were disbursed, yet no stipulation of dismissal had been presented to Defendants, the Supplemental Agreement provided that Plaintiff would dismiss with prejudice the instant action and Miller v. Owens within 2 days after Plaintiff's trust account was credited. (Exhibit F).

While Plaintiff was amenable to having GDC pay his debts, he advised that he could not dismiss the litigation unilaterally. (Exhibit G, October 1, 2010 e-mail correspondence and proposed consent dismissal). Plaintiff instead proposed, for the first time, the entry of an order of dismissal with prejudice under Rule 41(a)(2), which incorporated the terms of the Agreement. (Exhibit G). Plaintiff has stated that his request for incorporation of the terms of the Agreement into the dismissal order is intended to provide him a federal cause of action for breach of contract and to allow the Court to "supervise" compliance with the Agreement. (Exhibit H, multiple October 5, 2010 e-mail correspondence). As set forth below, a dismissal order that incorporates the

terms of a settlement agreement is a judgment and consent decree. Smalbien v. City of Daytona Beach, 353 F.3d 901, 905 (11th Cir. 2003).

The entry of a consent decree was not intended by the Parties under the terms of their private settlement Agreement, but Plaintiff refuses to file a Rule 41(a)(1) Stipulation of Dismissal and insists that any dismissal incorporate the terms of the Agreement, even though he acknowledges that the Agreement does not provide for his requested relief. (Exhibit H).

In accordance with the unambiguous terms of the private Agreement, Defendants now move for the entry of a dismissal with no judicial enforcement. Should it be determined that there is an ambiguity as to the form of the dismissal, a plethora of parol evidence shows that the intent of the Parties was to enter into a private Agreement that would finally dispose of all issues within the subject matter of both this litigation and in Miller v. Owens. No consent decree was agreed to or contemplated, and the only remedy intended for a breach of the Agreement is a breach of contract action.

Moreover, Plaintiff's new request for the entry of a consent decree is contrary to the limitations on prospective relief imposed under the Prison Litigation Reform Act ("PLRA") and would also exceed the scope of this Court's mandate from the Eleventh Circuit. Finally, in the event that it is determined that the Agreement is not a private settlement agreement, such that it could permit for the entry of a consent decree, then

there was no meeting of the minds. Thus, the Agreement is void. In such an instance, the Agreement would also be void because it would lack consideration.

II. ARGUMENT AND CITATIONS TO AUTHORITY

A. Applicable Law

1. A dismissal order wherein the Court retains jurisdiction to enforce the terms of the settlement agreement is the equivalent of judgment and consent decree

When a court's dismissal order either incorporates the terms of a settlement agreement or expressly retains jurisdiction to enforce the settlement, the agreement functions as a consent decree. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380-82 (1994); Disability Advocates and Counseling Group, Inc. v. E.M. Kendall Realty, Inc., 366 Fed. Appx. 123, 125 (11th Cir. 2010); Smalbein v. City of Daytona Beach, 353 F.3d 901, 905 (11th Cir. 2003); Am. Disability Assoc., Inc. v. Chmielarz, 289 F.3d 1315, 1320-21 (11th Cir. 2002).

The Prison Litigation Reform Act ("PLRA") distinguishes private settlement agreements from consent decrees. The former are not subject to court enforcement, whereas the latter are entered by the court. Rowe v. Jones, 483 F.3d 791, 796 (11th Cir. 2007) (*citing* 18 U.S.C. § 3626(g)(1)). "Judicial enforcement is [] the critical distinction between private settlement agreements and consent decrees." Id.

There are substantial and significant differences between a private settlement and a consent decree. A consent decree is a judgment. Johnson v. Fla., 348 F.3d 1334, 1341

(11th Cir. 2003). It functions like any other court order or judgment. Rowe, 483 F.3d at 797. Judicial enforcement affects the remedies available in the event of a breach. Id. at 796. A breach of a consent decree can result in "judicial sanctions," including citation for contempt. Id. at 797. Other judicial sanctions include remedial orders, including injunctive relief. Dougan v. Singletary, 129 F.3d 1424, 1425 (11th Cir. 1997); Reynolds v. Roberts, 207 F.3d 1288, 1300 n.22 (11th Cir. 2000). Moreover, when a court retains jurisdiction to enforce a settlement agreement, the plaintiff becomes the "prevailing party" and can be entitled to an award of attorneys fees. Smalbein, 353 F.3d at 905, 906-07. On the other hand, the only remedy for a breach of a private settlement agreement is a state law breach of contract action. 18 U.S.C. § 3626(c)(2)(A); Rowe, 483 F.3d at 795.

Here, should this Court incorporate the terms of the Agreement into a dismissal order, or retain jurisdiction to enforce its terms, it will convert a private settlement agreement into a consent decree and judgment – something that was not intended under the Agreement and was never agreed to by Defendants.

2. The interpretation of settlement agreements

The construction and enforcement of a settlement agreement, including in cases arising out of federal law, is governed by the state's general contract law. Resnick v. Uccello Immobilien GMBH, Inc., 227 F.3d 1347, 1350 (11th Cir. 2000). Under Georgia law, a settlement agreement must meet the same requirements of formation as any other contract. W.C. Wong v. Bailey, 752 F.2d 619, 621 (11th Cir. 1985). To form a contract,

there must be a meeting of the minds on all material terms. Id. (*citing* O.C.G.A. § 13-3-2; Burns v. Dees, 252 Ga. App. 598, 601 (2002)).

Under Georgia law, any intention of the parties for the court to retain jurisdiction to enforce the terms of a settlement agreement must be included in the agreement itself. Daniel v. Daniel, 216 Ga. 567, 568 (1961) (finding that court did not have jurisdiction to enforce a settlement agreement because such a provision was not included in the agreement and the court could not reserve jurisdiction in its order when the parties did not consent). Even then, a court may not retain ongoing jurisdiction over the matter for an indefinite period of time. *See* Jorgensen v. Alsop, 240 Ga. App. 565, 566 (1999).

Settlement agreements should be interpreted so as to give meaning to all terms. Young v. Stump, 294 Ga. App. 351, 353 (2009). Courts should not interpret contracts in a manner to give some terms no effect. Id. Where the language of an agreement is definite and unambiguous, the agreement should be enforced according to its terms. Ins. Concepts, Inc. v. Western Life Ins. Co., 639 F.2d 1108, 1112 (11th Cir. 1981). Importantly, an agreement is not ambiguous merely because the language is not as comprehensive as it could have been. Id. Where the intent of the parties is reasonably clear from the language of the agreement and surrounding circumstances, it is enforceable. Id.

Conversely, a term is ambiguous if it is duplicative, uncertain, indistinct, difficult to comprehend, or open to various interpretations. Vinnett v. Gen. Elec. Co., 271 Fed.

App. 908, 912 (11th Cir. 2008). A term is not ambiguous merely because a party has a change of mind after an agreement has been reached. Pourreza v. Teel Appraisals & Advisory, Inc, 273 Ga. App. 880, 883 (2005); W.C. Wong, 752 F.2d at 621.

When a term is ambiguous, courts must apply the rules of construction to determine the intent of parties. In re Estate of Sims, 259 Ga. App. 786, 788 (2003). Under the rules of construction, words are given their ordinary meaning. Id. at 789 (*citing* Stinchcomb v. Clayton Cnty. Water Auth., 177 Ga. App. 558 (1986)). Under Georgia law, parol evidence is admissible to explain ambiguous language. Southern Stone Co. v. Singer, 665 F.2d 698, 701 (1982). Whether or not a term is ambiguous is a question of law. Ins. Concepts, Inc., 639 F.2d at 1112.

B. The Parties Have a Binding Private Agreement That Requires Plaintiff to Dismiss This Lawsuit with Prejudice, With no Continuing Enforcement Jurisdiction in this Court

Defendants have performed all of their obligations under the Agreement. The Agreement releases and forever discharges Defendants and all of their assigns from any and all claims, rights, and demands that Plaintiff has against them. It does not contemplate the entry of a consent decree, which would provide to Plaintiff continuing claims and rights. If the Agreement is found to be ambiguous as it relates to the form of the dismissal, parol evidence shows that the entry of a consent decree was never the Parties' intent.

1. Defendants have performed under the Agreement

Defendants have performed all of their obligations under the Agreement. All settlement proceeds have been paid to Plaintiff and his attorneys, the mediator's fees have been paid in full, GDC has waived the debt owed to it by Plaintiff, and a re-inspection of the cells referenced in the Agreement has occurred. The Agreement, however, does not require GDC to affirmatively pay Plaintiff's third-party debts, and GDC has not done so as a result of Plaintiff's refusal to execute the Supplemental Agreement.

The relevant provision in the Agreement provides:

> Additionally, the GDC agrees to **waive** any debt in Miller's inmate account as of the date of execution of this Agreement. The Defendants also agree to **pay** the mediator's fee in this case.

(Exhibit A, p. 4, ¶ E) (emphasis added).

"A waiver is a voluntary relinquishment of a known right, benefit, or advantage, which, except for such waiver, the party would otherwise have enjoyed." Mut. Life Ins. Co. of New York v. Durden, 9 Ga. App. 797, 797 (1911). A party cannot waive a right that it does not possess. In re Estate of Sims, 259 Ga. App. at 792.

GDC is required only to waive the debt owed to it by Plaintiff. GDC has never expended funds to the courts on Plaintiff's behalf. Instead, it simply made an accounting entry to assist the courts in recovering the debts owed to them, as they were required to do under the PLRA. GDC is not required to waive something that it had no right, benefit, or advantage to, and that it would not have "enjoyed" but for the waiver. Defendants do not

have a "right" to the court fees owed by Plaintiff to the courts, and thus could not have waived those rights.

Nor does the Agreement require GDC to "pay" Plaintiff's court fees. The word "waive" has a meaning different from the word "pay," as illustrated by the very next sentence in the Agreement that requires Defendants to "pay" the mediator's fees. Had the Agreement intended Defendants to also "pay" Plaintiff's debts, the word "pay" would have been used in the preceding sentence. It was not.

To the extent that the term "waive" is considered to be ambiguous, it should be construed against Plaintiff. Generally, ambiguities are construed against the drafter. Young, 294 Ga. App. at 353 (*citing* O.C.G.A. § 13-2-2(5)). *See also* Hertz Equip. Rental Corp. v. Evans, 260 Ga. 532, 533 (1990) ("if a contract is capable of being construed in two ways, it will be construed against the preparer and in favor of the non-preparer.").

In this case, the language in question was drafted by Plaintiff. (Exhibit I, August 12, 2010 e-mail correspondence and revised settlement agreement). Thus, if there is any ambiguity concerning whether "waive" means "pay," such ambiguity should be construed against Plaintiff.

2. The Agreement unambiguously requires a dismissal with prejudice, not a consent decree

Settlements are generally considered to be a final disposition of any claim against a party arising out of the subject matter, "unless remaining claims are specifically reserved" by a party. City of Demorest v. Roberts & Dunahoo Properties, LLC, 288 Ga.

App. 708, 712 (2008); Carey v. Houston Oral Surgeons, LLC, 265 Ga. App. 812, 817 (2004). When an agreement states that it is a "full, complete, and final disposition of all disputes," no claims are reserved. City of Demorest, 288 Ga. app at 712.

Here, the subject matter of the Agreement is clear and unambiguous. Under the Agreement, Plaintiff released and forever discharged GDC, Defendants, and all of its officers "from any and all claims, fees, demands, rights, and causes of action" arising out of the instant action and Miller v. Owens. The Agreement also provides that,

> it is further the intention of Miller that this Agreement shall be **a full settlement, satisfaction, release and discharge of GDC**, together with its officers, employees, and medical providers, **from any and all claims, actions, causes of action and demands**, including claims for attorney's fees, **arising from any act or omission of any of the released parties at any time from the beginning of time until the date of this agreement**.

(Exhibit A, pp. 4-5, ¶E2) (emphasis added).

Plaintiff did not retain any claims or rights. Specifically, he did not retain any rights that would accrue to him as the result of an entry of a consent decree. The clear and unambiguous language shows that it was the Parties' intent that ***all*** possible claims, demands, and rights would be released, and that the settlement was intended to resolve and discharge ***all*** claims and rights against Defendants. A general release like the one at issue here was found by the Eleventh Circuit to give up all rights to any remedy in connection with the underlying action. *See* Kobatake v. E.I. DuPont DeNemours and Co., 162 F.3d 619, 624 (11th Cir. 1999).

There was no intention to enter a judgment and consent decree that would subject Defendants into perpetuity to actions for contempt, injunctive relief, supervision, and possibly attorneys fees. Such a result would render the language of the Parties' intent and the mutual release language meaningless.

A settlement agreement will typically moot a case. United Airlines, Inc. v. McDonald, 432 U.S. 385, 400 (1977). That is exactly what the Agreement requires – finality to litigation through the entry of a final dismissal. It does not require, or permit, the entry of a judgment and consent decree.

3. Parol evidence shows that the intent of the parties was the entry of a final dismissal with prejudice, and a consent decree was never contemplated

If the language in the Agreement is determined to be ambiguous, parol evidence may be used to ascertain the parties' intent. *See* Southern Stone Co., Inc., 665 F.2d at 701. Parol evidence can show a party's assent to a term, which can be implied from counsel's failure to object to the term. W.C. Wong, 752 F.2d at 621. Similarly, a party's conduct after execution of an agreement can be considered as parol evidence regarding the parties' intent. Univ. Computing Co. v. Lykes-Youngstown Corp., 504 F.3d 518, 531 (11th Cir. 1974). A contract that is originally indefinite may later acquire more precision because of subsequent words or actions of the parties. Sanders v. Commercial Cas., Ins., 226 Ga. App. 119, 121 (1997); Arrow Exterminators, Inc. v. Gates Condo. Homeowners Assoc., Inc., 294 Ga. App. 620, 622 (2008).

There is sufficient parol evidence, from both before and after the execution of the Agreement, to show that the Parties intended to enter into a private settlement agreement, and not a consent decree. For example:

- Defendants have always made clear that they would not enter into a consent decree, and that they would not enter into any settlement agreement that would entail being summoned into court on a regular basis. (Exhibit J, January 12, 2009 correspondence; Transcript of Settlement Conference of February 19, 2009, p. 23).

- During the drafting of the Agreement, Plaintiff proposed a provision that allowed an award of attorneys fees, expenses, and costs to the prevailing party in any action to enforce the terms of the Agreement. (Exhibit I). Defendants refused to agree to the provision, expressing their intent that Plaintiff's sole remedy in the event of a breach was a breach of contract action. (Exhibit K, August 13, 2010 e-mail correspondence). Plaintiff assented to the removal of the attorney fee provision. Since there is no breach of contract claim over which the federal courts have jurisdiction, *see* Kokkonen, 511 U.S. at 375, any breach of contract claim would necessarily have had to have been contemplated as state court action. Even in the face of this legal reality, Plaintiff did not express a desire to include within the Agreement a provision for the Court to incorporate the terms of the Agreement or retain jurisdiction.

- The mediator will confirm that none of the Parties agreed to continuing jurisdiction as a term of settlement.[2]

- Plaintiff did not disagree when it was reported to the Court that the case had settled and that a stipulation of dismissal would be forthcoming. (Exhibit B). A stipulation of dismiss under Rule 41(a)(1) allows a plaintiff to dismiss a complaint without an order of the court. FED. R. CIV. P. 41(a)(1). On the other hand, Rule 41(a)(2) allows a court to dismiss an action at a "plaintiff's request." FED. R. CIV. P. 41(a)(2). Rule 41(a)(2) has no application when the parties dismiss by agreement. This distinction is important. When a lawsuit is dismissed by stipulation, "the trial court plays no role in overseeing or approving any settlement proposals." United States v. City of Miami, Fla., 614 F.2d 1322, 1330 (11th Cir. 1980). Thus, by assenting to the entry of a stipulated dismissal, Plaintiff necessarily assented to a Rule 41(a)(1) dismissal that would not entail oversight or approval by the Court.

- As the terms of the Agreement were being finalized, Plaintiff's counsel stated, "We haven't expressly discussed the mechanics of how the settlement works, but I assume our approach is that, we get the agreement executed, and once the money is in Miller's inmate account and our check is cleared, we can jointly request dismissal from

[2] The mediator in this case was Arthur Glaser. Mr. Glaser was contacted when it was realized that the form of dismissal had become an issue. He stated to defense counsel that if asked, he would tell the Court that no one agreed to continuing jurisdiction. Mr. Glaser informed defense counsel that he had made the same statement to Plaintiff's counsel, thus it is assumed that Plaintiff will not dispute Mr. Glaser's statement. In the event that Plaintiff does so dispute, Defendants reserve the right to introduce Mr. Glaser's testimony to the Court.

the court." (Exhibit L, e-mail correspondence of August 16, 2010). Again, a "joint request" has no meaning if a dismissal order is to be sought under Rule 41(a)(2), which allows for a plaintiff to seek the entry of a dismissal order. Thus, Plaintiff's reference to a stipulation of dismissal had to have been a reference to Rule 41(a)(1). Under that rule, the court does not enter an order and plays no role in overseeing or approving the settlement. *See* City of Miami, Fla., 614 F.2d at 1330.

- Plaintiff has agreed to a Rule 41(a)(1) Stipulation of Dismissal in Miller v. Owens, 05-cv-153, and represented that a dismissal similar in form and substance would be sought in the instant action. (Exhibit D). This is in keeping with the Agreement itself, which releases the instant action and the Miller v. Owens in an identical manner. There is simply no basis for concluding that the Parties intended that a final dismissal with no continuing enforcement would be entered in Miller v. Owens, but that a judgment and consent decree would be entered in the instant action.

- Plaintiff has indicated that the desire for court "supervision" has arisen only recently as the result of new "concerns." (Exhibit H). Thus, Plaintiff himself admits that judicial enforcement was not intended at the time the Parties executed the Agreement.

- Plaintiff's *pro se* motion "pursuant to FRCP 41(a)(2)" to "incorporate the terms" of the Agreement was filed on October 1, 2010. (Doc. 538). Plaintiff's stated reason for the motion was after 6 weeks his court fees had not yet been paid. (Doc. 538). Thus, Plaintiff clearly sought a dismissal under Rule 41(a)(2) only as the result of post-

execution events, not because it was the intent of the Parties at the time of execution. And, notably, Plaintiff's *pro se* motion indicates his intent to not dismiss with prejudice in any form. (Doc. 538).

Here, the parol evidence shows that Plaintiff intended to enter into a private settlement which did not include further involvement of the Court. This is in keeping with the general rule that in private lawsuits "settlement of the dispute is solely in the hands of the parties. If the parties can agree to terms, they are free to settle the litigation at any time and the court need not and should not get involved." United States v. City of Miami, Fla., 614 F.2d 1322, 1330 (11th Cir. 1980).

The Parties settled this matter and there was no intent to have continued action by the Court. The Agreement should be enforced as a private agreement and this case should be dismissed with prejudice, with no continuing enforcement.

C. The PLRA Prohibits the Entry of a Consent Decree is This Case

A consent decree cannot be entered because it is prohibited by the PLRA. The PLRA limits the scope of prospective relief that a court may grant in cases involving prison conditions. Rowe, 483 F.3d at 794. The PRLA states that:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any

> adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A).

A consent decree is prospective relief and is subject to these restrictions. 18 U.S.C. § 3626(c)(1); Rowe, 483 F.3d at 795. The Eleventh Circuit has found that these provisions are illustrative of Congress' intent to limit:

> the use of court-enforced consent decrees to resolve prison conditions suits, while freely allowing the use of private settlement agreements. Parties may continue to enter such agreements to avoid lengthy and burdensome litigation, but they cannot expect to rely on the court to enforce the agreement.

Rowe, 483 F.3d at 797 (*citing* H.R. Rep. No. 104-21, at 24-25 (1995)).

Here, none of the necessary findings have been made. There has been no finding that the Agreement extends no further than necessary to correct the violation of the Federal right of Plaintiff, there has been no finding that the Agreement is narrowly drawn, and there has been no finding that the Agreement is the least intrusive means to correct the violation of the Federal right. Indeed, such findings cannot be made in the absence of a trial. *See* City of Miami, Fla., 614 F.2d at 1332.

Moreover, any such consent decree – which is misnomer in this case given that Defendants have not consented – would clearly fall far short of reaching these requirements. The scope of a consent decree must be determined from the "four corners" of the document, which in this case is the Agreement. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574 (1984). *See also* Norfolk v. Southern Corp. v.

Chevron, U.S.A., Inc., 371 F.3d 1285, 1288 (11th Cir. 2004) (even when a consent decree is actually agreed upon, its scope is limited to those matters upon which the parties have consented). The Agreement clearly provides Plaintiff with more relief than is provided under any federal law.

For example, the Agreement requires GDC to house Plaintiff only in certain cells, (Exhibit A, p.2), allows Plaintiff to serve disciplinary sanctions only in certain cells, (Exhibit A, p. 2), requires Plaintiff to have access to a particular type of shower chair, (Exhibit A, p. 3), provides for "adequate" supplies of medical equipment, requires a "clean environment" and "appropriate receptacles for waste," and "regular documentation" regarding medical supplies. (Exhibit A, p. 3). The Agreement also requires GDC to maintain a regularly updated written medical Treatment Plan in Plaintiff's medical file, and generally provides that GDC will comply with its Standard Operating Procedures. (Exhibit A, pp. 3-4).

These provisions, and others like it, go far beyond what is required by the Constitution, the Americans with Disabilities Act, and the Rehabilitation Act. Even if a violation of a federal right had been found, which again it was not, the Agreement goes far beyond the narrow and least intrusive means necessary to rectify any violation.

Converting this private settlement agreement into a consent decree would result in the imposition of prospective relief that is not permissible under the PLRA. Even outside the prison context, "indefinite federal court oversight of state institutions is disfavored,

and a federal court should terminate supervision once the defendant comes into compliance with the law." Johnson, 348 F.3d at 1341. Here, Plaintiff seeks a consent decree that essentially subjects GDC to perpetual court supervision over the operation of its facilities in general and the terms of Plaintiff's incarceration in particular. The PLRA does not permit such a result. Thus, Plaintiff's post-execution efforts to obtain a consent decree should be refused.

D. If the Agreement Does Not Constitute a Private Settlement Agreement, Then the Agreement is Void

If the Agreement is not a private settlement agreement such that a consent decree could be entered, then the Agreement is void for two reasons: 1) there was no meeting of the minds, and 2) it lacks legal consideration.

In considering the enforceability of a settlement agreement, a court is limited to those terms upon which the parties have mutually agreed. Arrow Exterminators, Inc., 294 Ga. App. at 622; Pourreza, 273 Ga. App. at 882. When indefiniteness in subject matter is so extreme so as to present nothing upon which the contract can operate, it renders the contract void. Sanders v. Commercial Cas., Ins., 226 Ga. App. 119, 120 (1997). Importantly, a district court may not take a settlement agreement and change its crucial terms to enter a consent decree. Smalbein, 353 F.3d at 912.

Here, the Agreement does not provide for, or even mention, a consent decree. There is simply nothing in the Agreement upon which a consent decree can operate.

And, a court cannot "require the parties to accept a settlement to which they have not agreed." John V. Evans v. Jeff D., 475 U.S. 717, 726 (1986).

Defendants intended to enter into a private settlement agreement. They never agreed to have a consent decree or judgment entered against them. To force an "involuntary consent decree" upon a defendant in such a situation would eviscerate any motivation to settle litigation. No defendant would ever enter into a settlement agreement to compromise doubtful rights if that settlement could result in a judgment and consent decree against it without its consent.

There was no meeting of the minds regarding the entry of a judgment and consent decree, and thus should this Court determine that the entry of a consent decree is permitted, the Agreement is void. Moreover, in the event that Plaintiff can satisfy his dismissal obligations through the entry of a judgment and consent decree, the Agreement lacks sufficient consideration and is void for this reason as well.

Unlawful terms in a contract are not enforceable. Unami v. Roshan, 290 Ga. App. 317, 319 (2008). The only consideration offered by Plaintiff is the release and forever discharge of his claims, rights, and demands. If this obligation can be accomplished through the entry of a consent order which, as set forth above, would be violative of the PLRA, then the term is unlawful. If an unlawful term constitutes the only consideration of a party, then the agreement cannot stand. Unami, 290 Ga. App. at 320.

Should this Court determine that the Agreement is not a private agreement, then the Agreement is void. Plaintiff and his attorneys should be required to return all proceeds and reimburse Defendants for all payments made in reliance on the Agreement, Defendants should be permitted to debit Plaintiff's inmate trust account for the amounts waived, and this litigation should proceed.[3] *See* Smalbein, 353 F.3d at 912 (Carnes, J. concurring).

E. The Entry of a Consent Decree Would Exceed the Scope of the Eleventh Circuit's Mandate

The Eleventh Circuit remanded with the narrow instruction to make specific determinations regarding Plaintiff's claims against Georgia State Prison. (Doc. 190). The scope of a putative consent decree is the Agreement. *See* Firefighters Local Union No. 1784, 467 U.S. at 574. The Agreement includes provisions related to Augusta State Medical Prison and Georgia Diagnostic Medical Prison. Should this Court enter a dismissal order which incorporates the terms of the Agreement, it would be entering a consent decree that exceeds the scope of the mandate issued in this case.

The Eleventh Circuit recently reiterated its adherence to the rule that when acting under a mandate, a district court:

> . . . cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error upon a

[3] This includes $140,000 in settlement funds, the forgiveness of $1,373.30 for court reporter fees Plaintiff agreed to pay but which payment was waived in the settlement, and $3,430.00 for Plaintiff's portion of the mediator's fee. GDC has waived debt owed to it by Plaintiff in the amount of $3,690.26.

> matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

United States v. Ehrlich, 2010 U.S. app. LEXIS 12915, at * 3 (11th Cir. June 23, 2010).

Thus, entering a consent decree which exceeds the scope of the Eleventh Circuit's narrow mandate in this case would not be permitted.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court enforce the terms of their private Settlement Agreement and enter a dismissal with prejudice without incorporating the terms of the agreement or retaining jurisdiction.

Respectfully submitted this 15th day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing **DEFENDANTS' MOTION FOR ENTRY OF DISMISSAL WITH PREJUDICE AND BRIEF IN SUPPORT** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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This 15th day of October, 2010.

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