

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9 Calvin Matthews; Tyrone Hunt; Michael)
10 Buckner,

No. CV 09-2326-PHX-FJM

11

Plaintiffs,

ORDER

12

vs.

13

14 NPMG Acquisition Sub, LLC,

15

Defendant.

16

17 We have before us defendant's motion for summary judgment (doc. 55), defendant's
18 statement of undisputed facts in support of motion for summary judgment ("DSOF") (doc.
19 56), plaintiffs' response (doc. 62), plaintiffs' statement of facts in support of opposition to
20 motion for summary judgment ("PSOF") (doc. 63), defendant's reply (doc. 66), and
21 defendant's response to plaintiffs' statement of facts (doc. 67).

22

I

23

24 In November and December 2006, plaintiffs each filed charges of race discrimination
25 and harassment with the Equal Employment Opportunity Commission ("EEOC"). They also
26 alleged that they had been terminated by defendant due to their race. In February 2009, the
27 EEOC filed a Title VII class action lawsuit against defendant, naming the plaintiffs as
28 charging parties. On September 15, 2009, Judge Bolton entered the Consent Decree
negotiated by the EEOC and defendant (doc. 36, ex. 1). EEOC v. iPayment, Inc. & NPMG

29

1 Acquisition Sub, LLC, No. CV 08-01790. On November 4, 2009, plaintiffs filed a complaint
2 against defendant alleging a violation of 42 U.S.C. § 1981, based on the same conduct at
3 issue in the EEOC's action (doc. 1). Defendant filed a motion to dismiss on January 6, 2010
4 (doc. 12). On July 30, 2010, Judge Murguia granted this motion for failure to state a claim
5 for relief under Rule 12(b)(6), Fed. R. Civ. P. (doc. 21). Matthews v. NPMG Acquisition
6 Sub, LLC, 2010 WL 3023300 (D. Ariz. July 30, 2010). Judge Murguia allowed plaintiffs
7 fifteen days to amend their complaint. When plaintiffs failed to meet this deadline, a
8 judgment was entered against them on August 24, 2010 (doc. 23). Nevertheless, the court
9 later granted plaintiffs' motion to vacate and allowed plaintiffs to file an amended complaint
10 on March 22, 2011 (docs. 34, 36). Defendant now moves for summary judgment (doc. 55).

11 II

12 The first paragraph of the Consent Decree states:

13 This Consent Decree resolves all claims of the Commission and of Mssrs.
14 Matthews, Hunt, Buckner, Gawarecki (each a "Charging Party," and
15 collectively the "Charging Parties") . . . against Defendant . . . arising out of
the issues that were or could have been raised in this lawsuit up until the date
of the execution of this Consent Decree by the parties.

16 Plaintiff's First Amended Complaint, ex. 1 at 8.

17 When interpreting a consent decree, we follow contract principles and look first to the
18 language's plain meaning. If the language is clear, then extrinsic evidence cannot be used
19 to vary its terms. Judge Murguia previously concluded that "paragraph 1 of the Consent
20 Decree is unmistakably clear; all claims of Plaintiffs Matthews, Hunt, and Buckner, that
21 could have been raised in EEOC v. iPayment have been expressly waived." Matthews v.
22 NPMG Acquisition Sub, LLC, 2010 WL 3023300, at *2 (D. Ariz. July 30, 2010). Thus, if
23 plaintiffs are bound by the Consent Decree, they may not bring a claim under 42 U.S.C. §
24 1981 because they could have raised this claim in the earlier action.

25 The crux of plaintiffs' complaint is that they should not be bound because they were
26 not parties to the EEOC lawsuit or Consent Decree. Thus, they argue they did not waive
27 their § 1981 claim by failing to intervene. This argument is without merit. Plaintiffs did not
28 sign the Consent Decree, but they did accept the benefits of it. They "cannot now request

1 additional monetary relief merely because [they are] dissatisfied with the amount [they]
2 voluntarily agreed to accept in the settlement as compensation for [their] claims." Strozier
3 v. General Motors Corp. (Lakewood Assembly Plant), 635 F.2d 424, 426 (5th Cir. 1981).

4 Similarly, plaintiffs contend their claim is not barred by res judicata because they were
5 not parties in the previous lawsuit. "In order for res judicata to apply there must be: 1) an
6 identity of claims, 2) a final judgment on the merits, and 3) identity or privity between
7 parties." Western Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997). The
8 first two elements are undisputedly present in this case. First, there is an identity of claims
9 because defendant's right to finality would be impaired by prosecution of this action, the
10 same evidence would be presented in both actions, both actions involve infringement of the
11 same rights, and both actions arise out of the same transactional nucleus of facts. See United
12 States v. Liquidators of European Fed. Credit Bank, 630 F.3d 1139, 1150 (9th Cir. 2011)
13 (listing four criteria to decide the identity of claims). Second, a consent decree is a final
14 judgment on the merits. SEC v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984) ("A consent
15 decree is a judgment, [which] has the force of res judicata[.]"). Plaintiffs claim, however,
16 that the third element has not been met because they were not parties to the EEOC lawsuit
17 and privity is no longer a viable concept. Their understanding of Taylor v. Sturgell, 553 U.S.
18 880, 128 S. Ct. 2161 (2008), is misguided. In this case, the Supreme Court avoided the term
19 "privity" but confirmed the viability of nonparty preclusion based on substantive legal
20 relationships. Id. at 894 & n.8, 128 S. Ct. at 2172 & n.8.

21 Defendant argues that privity exists between the EEOC and plaintiffs because the
22 EEOC brought an action on plaintiffs' behalf, plaintiffs were identified as charging parties,
23 they had a significant interest in that action, participated in that action, and accepted
24 settlement payments from defendant. The interests of the EEOC and aggrieved individuals
25 may occasionally diverge, however. The United States Court of Appeals for the Eleventh
26 Circuit has held that where there is "a clear divergence of interests," a consent decree is not
27 an absolute bar to an individual's subsequent lawsuit. Riddle v. Cerro Wire & Cable Group,
28 Inc., 902 F.2d 918, 922, 923 n.5 (11th Cir. 1990). While the factual record of the motion to

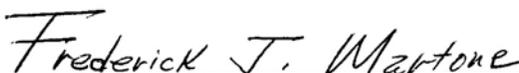
1 dismiss was insufficient to determine if this showing had been made (doc. 21 at 8), it is now
2 apparent that plaintiffs' interests did not clearly diverge from those of the EEOC.

3 In Riddle, the plaintiff did not receive any money and notified the EEOC and the
4 defendant before the consent decree was finalized that she was dissatisfied with the EEOC's
5 handling of her case. Id. at 923. Here, to the contrary, each plaintiff has received a payment
6 in the amount promised in the Consent Decree (doc. 36, ex. 1; DSOF ¶¶ 31-32, 66, 79).
7 Plaintiffs Matthews and Buckner never objected to the terms of the Consent Decree, either
8 before or after its entry. DSOF ¶ 37-39, 83. Nor did they notify the EEOC or defendant that
9 they were unhappy with the EEOC's handling of their case. Id. Plaintiff Hunt apparently
10 objected to the terms of the settlement before entry of the Consent Decree, and made his
11 objection known to an EEOC attorney. PSOF ¶ 60. Although the parties disagree about the
12 timing of Hunt's complaint, their disagreement is immaterial. It is undisputed that Hunt
13 received and cashed a check sent to him pursuant to the Consent Decree. DSOF ¶¶ 66, 68.
14 Therefore, this case does not fall within the narrow exception found in Riddle. The plaintiffs'
15 interests did not clearly diverge from the interests of the EEOC. As a result, there was privity
16 between plaintiffs and the EEOC. Because we find an identity of claims, a final judgment
17 on the merits, and privity between the parties, res judicata bars plaintiffs' § 1981 claim.

18 **III**

19 **IT IS HEREBY ORDERED GRANTING** defendant's motion for summary
20 judgment (doc. 55).

21 DATED this 13th day of September, 2011.

22
23 
24

 Frederick J. Martone
25 United States District Judge
26
27
28