03-6009 (L)

03-6011 (Con)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KATHLEEN BRENNAN, SUSAN J. GIANNONE, ESTHER LIDSTROM, JEAN MARCOVECCHIO, MICHELE MEYER, LORRAINE MCINTYRE, ELLEN STEIN, BARBARA STEMMLE, DOREEN TRIOLA, KATHLEEN VEDDER, MARY ANN DURKIN,

Plaintiffs-Appellants,

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NASSAU COUNTY, a municipal corporation organized pursuant to the laws of the state of New York, DANIEL, Commissioner, Nassau

(For continuation of caption, see back of page)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS APPELLEE

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Defendants-Appellees,

ALICE WOODSON WHITE, JACQUI HARRIS WILSON, On behalf of herself and all others similarly situated, CAROLANN CALAMIA, on behalf of herself and all others similarly situated, KAREN RYAN,

Plaintiffs.

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STATEMENT OF THE ISSUES

1. Have the beneficiaries of a 1982 consent decree set forth any basis upon which the district court could have awarded them the additional benefits that they now seek under the Decree?
2. Are the beneficiaries' claims for pension and leave benefits untimely?

STATEMENT OF THE CASE

The appellants in *United States* v. *Nassau County*, No. 03-6009, are ten beneficiaries of a 1982 consent decree to which the United States, Nassau County, the Nassau County Police Commissioner, and the Nassau County Civil Service Commissioners (collectively "Nassau County") are parties (the "Consent Decree"). The Consent Decree resolved a lawsuit filed by the United States in 1977 alleging that Nassau County had unlawfully discriminated on the basis of sex, race, and national origin in hiring and promotions within the Nassau County Police Department. Among other things, the Consent Decree required Nassau County to hire female police officers and provide them with back pay and retroactive seniority. In 1984, the ten beneficiaries were hired under the Consent Decree.

In July 2002 — 20 years after the Court approved the Consent Decree — the ten beneficiaries sought and obtained an *ex parte* order from the district court directing Nassau County to show cause why the County should not be compelled to comply with the Consent Decree. In their application for the order, the beneficiaries claimed that the County was not providing them with certain leave, pension, and separation benefits that they claim are due under the Decree. The County and the United States both opposed the requested relief, arguing that it was

not provided by the Consent Decree, and that the beneficiaries' application was untimely. The district court treated the beneficiaries' application as a motion and denied it, concluding that the requested relief was time barred. This appeal followed.[1]

STATEMENT OF THE FACTS

1. The Underlying Litigation And Consent Decree.

On September 21, 1977, the United States filed this suit against Nassau County, alleging a pattern or practice of employment discrimination against African Americans, Hispanics, and women in the Nassau County Police Department, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*, as well as other statutory and constitutional provisions. JA 25 (Consent Decree at 1).[2]

On April 21, 1982, after more than four years of substantial discovery and litigation, the United States and Nassau County entered into the Consent Decree, in which Nassau County expressly denied a pattern or practice of discrimination, but agreed to provide remedial relief for African Americans, Hispanics, and women.

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[1] The district court's order underlying the appeal in No. 03-6009 also underlies the consolidated case *White* v. *Nassau County Police*, No. 03-6011. The United States is not a party to the *White* action, and Mary Ann Durkin, the plaintiff-appellant in that appeal, is not a party to the *United States* action. The *White* case was settled by a separate consent decree. See JA 93-94.

[2] The Patrolmen's Benevolent Association of Nassau County, Inc., (PBA) was also a defendant in the action, and it entered into the Consent Decree, as did defendant-intervenor Superior Officer's Association of Nassau County, Inc. See JA 26 & 59.2 (Consent Decree at 2 & 37).

The purpose of the Consent Decree was to ensure that African American, Hispanic, and female applicants were considered for employment on an equal basis with other applicants, and to remedy the "present effects of the County's alleged prior discriminatory employment practices." JA 26 (Consent Decree at 2, ¶ 1). The Decree required Nassau County to, *inter alia*, (1) take certain steps regarding its selection and qualification criteria, JA 27-32, and its future recruitment and appointment of police officers, JA 32-35; (2) accommodate female officers who wished to transfer to other positions, JA 35-36; and (3) provide remedial relief to certain women who, in March 1972, had taken an examination as part of their application to the Nassau County Police Department. JA 38-45.

With regard to the women who had taken the March 1972 examination, Paragraph 46(f) of the Consent Decree provided that they would receive a "back pay award to compensate [them] for [their] monetary loss incurred as a result of the County's alleged refusal to consider [them] for appointment." JA 45. In addition, the women in this group who still wished to become police officers were eligible for appointment under Paragraph 46(e). JA 43-44 (Consent Decree at 19-20, ¶ 46(d)). This provision stated that once these women completed their instruction and training, Nassau County would provide them "with all of the emoluments of the rank of Police Officer, including retroactive seniority, for all purposes (except pension and time-in-grade for eligibility for promotion), in that rank" as of certain dates between February 1973 and July 1975. JA 44 (Consent Decree at 20, ¶ 46(e)(1)-(e)(2)) & JA 39 (Consent Decree at 15, ¶ 32). These ten beneficiaries did

complete their instruction and training and were appointed to the Nassau County Police Department in September 1984. JA 22-23 (Giannone Aff. at ¶¶ 1 & 4); JA 96 (Hannon Aff. at ¶ 2).

2. The Present Motion.

On July 26, 2002, the ten beneficiaries obtained an *ex parte* order from the district court directing Nassau County to show cause why the County should not be compelled to comply with the Consent Decree. See R. 399. In their papers supporting their application for the order, the ten beneficiaries alleged that Nassau County failed to comply with the requirements of Paragraph 46(e) in three ways: (1) by refusing to credit them with vacation, sick leave, and personal days for the period between the retroactive seniority date and their actual appointment date; (2) by taking the position that their pensions would be calculated from their appointment date rather than from the retroactive seniority date; and (3) by taking the position that their separation pay should be calculated from their appointment date rather than from their retroactive seniority date. JA 16-17 (Affirmation at 5-7) & JA 23-24 (Giannone Aff. at ¶¶ 7-9).

The United States did not file a pleading in response to the order to show cause because the order was directed solely at Nassau County. However, the United States' attorney who negotiated the Decree appeared at the oral argument to ensure that the Consent Decree would be properly interpreted. Counsel for the United States — with the concurrence of Nassau County — made clear that the parties never intended for the Decree to provide the additional benefits that the

beneficiaries now seek and, in any event, their claim was untimely. See JA 103-109 (Tr., 10/11/02 Hr'g at 6-12).

On December 17, 2002, the district court entered an order denying the beneficiaries' motion.[3] The court reasoned that the requested relief was in the nature of a contract action and that the six-year statute of limitations for such actions imposed by New York law would apply. JA 134-135 (Order at 2-3 (citing N.Y. C.P.L.R. 213)). At the hearing, the beneficiaries' counsel admitted that if Nassau County had breached the Consent Decree, it had done so "from the get go," that is, more than 18 years before. JA 125-126 (Tr., 10/11/02 Hr'g at 28-29). The district court relied on this concession in concluding that the beneficiaries' claims arose 18 years before they were brought, and were thus untimely. JA 135 (Order at 4). The beneficiaries then filed a timely notice of appeal. JA 136.

SUMMARY OF THE ARGUMENT

The beneficiaries ask this Court to reverse the district court's order concluding that their claim is time barred and to remand the case for further proceedings. Appellants' Br. at 14-15. Even if the Court were persuaded by the appellants' arguments regarding the statute of limitations, there is no reason to remand this case to the district court. This Court reviews the interpretation of a consent decree *de novo*, and this Court can affirm the judgment of a district court on any grounds appearing in the record. Here the judgment of the district court

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[3] While the beneficiaries presented this matter to the district court in the form of an application for an order to show cause, the court treated it as a motion.

denying the beneficiaries' request for additional relief is correct and should be affirmed. The Consent Decree does not provide the additional benefits they are seeking and their claims for leave and pension benefits are untimely.

1. The additional pension benefits that the beneficiaries seek are excluded by the plain language of the Consent Decree, which states that retroactive seniority applies for all purposes "except pension." A court's authority to enforce consent decrees is limited by the express terms of those decrees. To the extent the beneficiaries are attacking the fairness or adequacy of the relief provided by the Decree, they were obligated make those arguments in 1982 when the district court approved the Consent Decree, and their claim is, therefore, untimely.

2. The beneficiaries are not entitled to be credited for leave that would have accumulated prior to their appointment as police officers. The beneficiaries' interpretation of the Decree is inconsistent with its explicit language and structure, in addition to the parties' stated intent and course of performance.

Moreover, the beneficiaries' claim for pre-appointment leave is barred by the doctrine of laches. The beneficiaries knew or should have known for at least 18 years that the Decree did not provide for and Nassau County did not credit them with the leave they now seek, yet they failed to prosecute their claims. The beneficiaries' failure to act in a timely fashion has prejudiced the United States and Nassau County's ability to litigate this case as the records that might have been used to demonstrate their intentions when they entered into the Consent Decree are no longer available due to the passage of time.

3. The additional separation pay benefits that the beneficiaries seek are not benefits provided by the Consent Decree, but rather are benefits provided by a collective bargaining agreement that is not in the record. Without this key information, neither the district court nor this Court can or should consider this issue.

ARGUMENT

THE BENEFICIARIES FAILED TO SHOW THAT THEY ARE ENTITLED TO ANY ADDITIONAL BENEFITS UNDER THE CONSENT DECREE, AND, IN ANY EVENT, THEIR CLAIMS ARE UNTIMELY

I. STANDARD OF REVIEW

This Court reviews *de novo* a district court's interpretation of a consent decree, and reviews for clear error its factual findings. *United States* v. *Broadcast Music, Inc.*, 275 F.3d 168, 175 (2d Cir. 2001). The district court denied the beneficiaries' motion to enforce the consent decree because the court found the request time barred under a six-year statute of limitations borrowed from state contract law. The application of a statute of limitations is a legal conclusion reviewed *de novo*. See *Golden Pac. Bancorp.* v. *FDIC*, 273 F.3d 509, 515 (2d Cir. 2001).

This Court can affirm the judgment of the district court on any grounds appearing in the record. See, *e.g.*, *Adirondack Transit Lines, Inc.* v. *United Transp.*

Union, Local 1582, 305 F.3d 82, 88 (2d Cir. 2002).

II. STANDARDS FOR INTERPRETING AND ENFORCING CONSENT DECREES

The standards for interpreting consent decrees are well-settled. "Because consent decrees embody a compromise between parties who have waived their rights to litigation, 'they should be construed basically as contracts.'" *Broadcast Music, Inc.*, 275 F.3d at 175 (quoting *United States* v. *ITT Cont'l Baking Co.*, 420 U.S. 223, 236 (1975)). Consent decrees are judicially approved settlements, *County of Suffolk* v. *Stone & Webster Engineering Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997), and as such are judicial orders, *EEOC* v. *New York Times Co.*, 196 F.3d 72, 78 (2d Cir. 1999). As with any order, consent decrees are enforced through the district court's equitable powers. See *ibid.* ("Although courts have equitable powers to enforce consent decrees, such power exists only to ensure compliance with the decrees' terms.").

III. THE BENEFICIARIES' CLAIMS FOR ADDITIONAL PENSION BENEFITS AND LEAVE ARE WITHOUT MERIT AND ARE UNTIMELY

A. Nassau County Provided The Beneficiaries With All The Relief Afforded By The Consent Decree.

The relief provided to the ten beneficiaries is set forth in Paragraphs 46(e) and 46(f) of the Consent Decree. Paragraph 46(e) states, in relevant part:

> [T]he County shall provide those females who is [sic] appointed pursuant to Paragraph 46d, *supra* and who successfully completes all phases of instruction at the Training Academy with all of the emoluments of the rank of Police Officer, including retroactive seniority, for all purposes (except pension and time-in-grade for eligibility for promotion), in that rank. * * *

JA 44. Paragraph 46(f) states:

> Lastly, the County shall provide each of these females with a back pay award to compensate her for the monetary loss she has incurred as a result of the County's alleged unlawful refusal to consider her for appointment as a Police Patrolman or for hire as a Police Cadet because of her sex. The amount of the back pay award to each of these females shall be determined by the United States, but in no event shall the amount of the back pay award exceed $17,600.00 to any female who meets those criteria set forth in Paragraph 43, *supra*, and $13,200.00 to any female who meets those criteria set forth in Paragraph 44, *supra*. None of these females is required to indicate a present interest in or to accept an offer of appoinment as a condition of her receipt of the back pay award to which she is entitled under this Paragraph 46f.

JA 45. It is apparent from the structure of these provisions that Paragraph 46(e) was intended to set forth the prospective benefits that a beneficiary would receive if she accepted an appointment to become a police officer, and that Paragraph 46(f) was intended to provide retrospective relief in the form of "back pay" to compensate the beneficiaries for their "monetary loss" resulting from the alleged discrimination. JA 45. In addition, Paragraph 46(e) contemplates two different "seniority" dates for each of the beneficiaries who elected to become police officers: (1) a seniority date based on a beneficiary's actual appointment date, which for these ten beneficiaries was September 1984, which would apply to "pension and time-in-grade for eligibility for promotion"; and (2) a retroactive seniority date, which would have been some date between February 1973 and July 1975.

There is no dispute in this case that the beneficiaries received the back pay

award set forth in Paragraph 46(f). There is also no dispute that the beneficiaries received all of the prospective relief contemplated by Paragraph 46(e), namely, an appointment to the position of police officer, with retroactive seniority for the purpose of calculating prospectively all benefits except for pension and time-in-grade for eligibility for promotion. Before the district court, the beneficiaries' counsel acknowledged that Nassau County for 20 years applied the retroactive seniority provision of Paragraph 46(e) of the Consent Decree only to provide the beneficiaries with prospective relief; that is, from their date of appointment forward, they received pay, accumulated leave, and competed for vacation times and work assignments as if they had been hired on their retroactive seniority date. Counsel explained:

> My clients received longevity pay which is pay scale units based on the years of service, based on the original seniority date.
>
> * * * Plaintiffs received their 30 days of vacation per year based on the original seniority, rather than 27, given to less senior members.
>
> * * * Plaintiffs were permitted annually to select premium vacation based on their original appointment date. Again, plaintiffs were permitted to select their tour and work schedule preference based on their original appointment date. * * *

JA 114 (Tr., 10/11/02 Hr'g at 17).

B. The Consent Decree Expressly Excludes The Requested Additional Pension Benefits.

In the district court, the ten beneficiaries sought pension benefits computed from their retroactive seniority date rather than from their appointment date. The

beneficiaries asserted:

> Pursuant to paragraph 46(e) of the Consent Decree, the USA Action Movants are entitled to credit in Section 384-E of the New York State and Local Police and Fire Retirement System for years of service calculated from the applicable dates of appointment calculated as set forth in paragraph 46(e) of the Consent Decree. Upon information and belief, Defendants contend that the USA Action Movants are entitled to credit in Section 384-E only for years of service calculated from the USA Action Movant's actual dates of appointment.

JA 17 (Affirmation at 6-7 (¶ 18)); see also JA 24 (Giannone Aff. at ¶ 9) (same language).

This argument lacks merit, as Paragraph 46(e) of the Consent Decree unambiguously excludes pension benefits from the "emoluments" for which retroactive seniority was to apply. JA 44 (retroactive seniority applied "for all purposes" "except pension"). "When the language of a consent decree is unambiguous, 'the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.'" *United States* v. *Broadcast Music, Inc.*, 275 F.3d 168, 175 (2d Cir. 2001) (quoting *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971)). Although the beneficiaries asserted that the terms of the Consent Decree were ambiguous, JA 111 (Tr., 10/11/02 Hr'g at 14), the term "except pension" in the context of Paragraph 46(e) is not. See *In re Holocaust Victim Assets Litig.*, 282 F.3d 103, 108 (2d Cir. 2002) ("the language of a contract is ambiguous if it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated

agreement") (brackets and internal quotation marks omitted). Indeed, even if there were some ambiguity in the term "except pension," such an ambiguity would not permit a court to impose the opposite meaning — "including pension" — on the consent decree. See *United States* v. *International Bhd. of Teamsters*, 141 F.3d 405, 408 (2d Cir. 1998) ("[a] court is not entitled to expand or contract the agreement of the parties as set forth in the decree").

The beneficiaries' real complaint is that the Consent Decree is unfair. See, *e.g.*, JA 113 (Tr., 10/11/02 at 16) ("There are two dates being used and this is what we see is very unfair."); JA 111 (Tr., 10/11/02 Hr'g at 14) ("And what has happened 20 years later is that similarly situated people, meaning men and women police officers, upon retirement, have been treated differently."); JA 119-120 (Tr., 10/11/03 Hr'g at 22-23) (arguing that in expecting to receive "all of the emoluments" they never contemplated that "after being victims of the discrimination of Nassau County, that at the end of their 20 years they would still be victims based on either inartful drafting or whatever."). Such arguments are 20 years too late. The beneficiaries were obligated to attempt to intervene or object in a timely fashion. If the district court denied their requests, they could have pursued an appeal in 1982, when these issues were ripe and capable of being fairly adjudicated. Cf. *United States* v. *City of Chicago*, 908 F.2d 197, 199-200 (7th Cir. 1990) (after waiting 15 years, motion to intervene by police officers dissatisfied with the relief provided by consent decree was untimely), cert. denied, 498 U.S. 1067 (1991); *In re Holocaust Victim Assets Litig.*, 282 F.3d 103, 106 (2d Cir. 2002)

(party objecting to term of consent decree must appeal from order entering that term and cannot attack it in later appeal). The beneficiaries should not be permitted to attack the Consent Decree 20 years later because they are now dissatisfied with the relief that they accepted.

C. The Beneficiaries Are Not Entitled To Leave For The Period Between Their Retroactive Seniority Date And Their Appointment Date.

The ten beneficiaries claim that they are entitled to be credited with the vacation, sick, and personal leave that would have accumulated between their retroactive seniority date and their appointment date — a period of approximately 9 to 11 years. If the Court were to accept the beneficiaries' interpretation of the Consent Decree, they each would be entitled to a credit for 9 to 11 months of leave (which presumably would be converted to a cash payment at separation) in addition to the back pay award they already received from Nassau County for the "monetary losses" resulting from the alleged discrimination.

There is absolutely no basis for the beneficiaries' belated attempt to inject additional retrospective relief provisions into the Consent Decree. As explained below, the only retrospective relief provided by the Decree was the monetary payment contained in Paragraph 46(f). Paragraph 46(e) pertains only to prospective benefits for the beneficiaries, to be accrued from the appointment date. See JA 105-106 (Tr., 10/11/02 Hr'g at 8-9) (counsel for the United States explaining that retroactive seniority benefits were applied "[f]rom the day [the beneficiaries] came on forward").

Paragraph 46(f) states that the County "shall provide each of these females with a back pay award to compensate her for the *monetary loss she has incurred as a result of the County's alleged unlawful refusal to consider her for appointment*." JA 45 (emphasis added). This language makes plain that all monetary losses resulting from the alleged discrimination were to be addressed by the monetary payment. By claiming an entitlement to additional leave, the beneficiaries are demanding an additional monetary payment for the alleged discrimination that is not authorized by Paragraph 46(f).

Because Paragraph 46(f) lends no support for their position, the beneficiaries rely instead on Paragraph 46(e). The beneficiaries assert that "the term 'all emoluments' [in Paragraph 46(e)] includes, on its face, vacation, sick and personal leave days," and that they are, therefore, entitled to be paid for such leave for the many years prior to their appointment. Appellants' Br. at 5. This argument lacks merit because the Decree does not state whether the term "emoluments" includes leave for the period before the appointment date. In fact, the only reasonable interpretation of Paragraph 46(e) is that it pertains to prospective relief since it explicitly states that its benefits apply only to those women who choose to become police officers.

The cap on monetary damages contained in Paragraph 46(f) further undermines the beneficiaries' claim that they are entitled to additional retrospective relief in the form of accrued leave. The cap demonstrates that the parties did not intend for Nassau County to pay any more money than the amount specified in

Paragraph 46(f) for retrospective relief. The beneficiaries' claim for 9 to 11 months of leave as a part of the retrospective relief under the Decree, if granted, would drastically increase Nassau County's monetary liability under the Decree, and undermine the very purpose of the monetary cap. Such a reading renders Paragraph 46's sub-paragraphs inconsistent with one another and is therefore contrary to basic principles of contract interpretation that are also applicable to consent decrees. See *Broadcast Music, Inc.*, 275 F.3d at 175 ("Because consent decrees embody a compromise between parties who have waived their rights to litigation, they should be construed basically as contracts.") (internal quotation marks omitted); *Seabury Constr. Corp.* v. *Jeffrey Chain Corp.*, 289 F.3d 63, 69 (2d Cir. 2002) (holding that all the provisions of a contract must be read together and as a harmonious whole) *Terwilliger* v. *Terwilliger*, 206 F.3d 240, 245-246 (2d Cir. 2000) (same).

It is also important to recognize that if the beneficiaries are correct, all the people who were appointed under the Consent Decree would be entitled to this relief, not merely the ten who are now before the Court, and that number for females alone may be as high as 65. See JA 44 (Paragraph 46(d) requires appointment of up to 65 female police officers).

Moreover, to the extent that there is any ambiguity in the terms of a Consent Decree, "a court may consider extrinsic evidence to ascertain the parties' intent." *Broadcast Music, Inc.*, 275 F.3d at 175. The attorney for the United States who negotiated the Consent Decree 20 years ago confirmed that the parties had no

intention of requiring Nassau County to pay more than the back pay award contained in Paragraph 46(f). He put forth the following explanation about why the Consent Decree did not provide additional leave or retroactive pension benefits:

> [M]oney is a finite quantity, that to the extent the County would have to provide for, for example, pension relief or vacation relief or sick leave relief, that never was taken, by the way, because it predated the date of hire, that is an expense that the County would have had to have paid and that was something that I could not negotiate with the County.

JA 106 (Tr., 10/11/02 Hr'g at 9).

Relevant "extrinsic evidence" also includes the "prior course of performance" under the Consent Decree. *Broadcast Music, Inc.*, 275 F.3d at 175 (citing *Reynolds* v. *Roberts*, 202 F.3d 1303 (11th Cir. 2000)). Thus, Nassau County's application of Paragraph 46(e) over the course of the last 20 years further supports the parties' position that this Paragraph provides no basis for retrospective relief. As the beneficiaries' counsel had to acknowledge at the hearing in the district court, Nassau County has consistently treated Paragraph 46(e)'s retroactive seniority provision as providing prospective benefits from the date of appointment. See JA 114 (Tr., 10/11/02 Hr'g at 17).

Finally, it is important to recall that the Consent Decree was a negotiated settlement. "As settlement agreements, * * * decrees themselves are compromises; 'in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation.'" *EEOC* v. *Local 40, Int'l Ass'n of Bridge Workers*, 76 F.3d 76, 79 (2d Cir. 1996) (quoting

United States v. *Armour & Co.*, 402 U.S. 673, 681 (1971)); see also *United States* v. *City of Chicago*, 908 F.2d 197, 199 (7th Cir. 1990) ("But total, individualized relief is too much to expect from a consent decree which attempts to remedy many wrongs and redress many groups."), cert. denied, 498 U.S. 1067 (1991). The relief the United States obtained for the beneficiaries – partial, not total make whole relief – reflects this fact. The beneficiaries could have objected to the Consent Decree, or they could have pursued their own lawsuits. But what they cannot do now, 18 years later, is rewrite the Decree's terms.

D. The Beneficiaries' Claim For Pre-Appointment Leave Is Untimely.

The beneficiaries' counsel, when questioned by the district court, conceded that if Nassau County had breached the terms of the Consent Decree, it had done so "from the get go." JA 125-126 (Tr., 10/11/02 Hr'g at 28-29). Thus, the district court correctly concluded that the beneficiaries are challenging an alleged breach that occurred more than 18 years ago. JA 135 (Order at 4). Indeed, on being first appointed as police officers in September 1984, the beneficiaries must have been aware that they were not credited with the substantial additional leave they now seek, which, as discussed above, would have been between 9 and 11 months. Notwithstanding this fact, the beneficiaries did not move to enforce the Consent Decree until July 2002, nearly 18 years after they first became aware of Nassau County's application of the Consent Decree.

The beneficiaries recognize that their claim is subject to the equitable

defense of laches, Appellants' Brief at 10, but they do not assert how they might overcome this defense. To prevail on that defense, a party must show that it had been prejudiced by the other party's unreasonable delay in bringing its action. *ProFitness Physical Therapy Ctr.* v. *Pro-Fit Orthopedic & Sports Physical Therapy, P.C.*, 314 F.3d 62, 68 (2d Cir. 2002). Prejudice can be shown when the passage of time makes evidence unavailable or difficult to obtain. See *Robins Island Pres. Fund, Inc.* v. *Southold Dev. Corp.*, 959 F.2d 409, 424 (2d Cir.) (under doctrine of laches, "[a] defendant may suffer prejudice * * * because the delay makes it difficult to garner evidence to vindicate his or her rights"), *cert. denied*, 506 U.S. 1001 (1992); see also *Prudential Lines, Inc.* v. *Exxon Corp.*, 704 F.2d 59, 65 (2d Cir. 1983) ("the doctrine of laches instructs that an inequity might result in a case where a claim is permitted to go forward where relevant evidence has been lost due to a petitioner's delay in bringing suit").

As previously discussed, the plain language of the Consent Decree does not support the additional leave sought by the beneficiaries. But to the extent that the language of the Consent Decree is ambiguous, the parties to the Decree would be entitled to present extrinsic evidence regarding their intent. *Broadcast Music, Inc.*, 275 F.3d at 175. The beneficiaries' failure to complain for 18 years has prejudiced the parties' ability to present the evidence. Due to the passage of time, neither the United States nor Nassau County has the records to recreate the negotiation process that resulted in the settlement embodied in the Consent Decree. See JA 129 (Tr., 10/11/02 Hr'g at 32). It would be fundamentally unfair to permit the beneficiaries

to pursue their claims when their unjustifiable delay has so prejudiced the parties' ability to defend themselves. It is precisely this type of inequity that the doctrine of laches is designed to prevent. See *Robins Island Pres. Fund*, 959 F.2d at 424-425 (laches bars long-abandoned property claim where obtaining witnesses and evidence was impossible due to extreme delay).[4]

IV. THE BENEFICIARIES' CLAIM FOR SEPARATION BENEFITS IS BASED ON THE TERMS OF A COLLECTIVE BARGAINING AGREEMENT THAT IS NOT IN THE RECORD

In support of their claim regarding separation benefits, the beneficiaries argue that the term "'[a]ll emoluments' includes, on its face, contractual emoluments such as separation from service pay." Appellants' Br. at 5. The beneficiaries further explain that

> the County has taken the position that the USA Appellants are only entitled to contractually provided termination and/or separation pay (which is pay for accrued vacation days, sick days and compensatory time and one week's pay for every year on the job) from the date of their actual appointment and not from the date of appointment calculated pursuant to paragraph 46(e) of the Consent Decree.

Appellant's Br. at 5. The separation pay referenced above is not provided by the Consent Decree. The beneficiaries appear to be referring instead to a provision of a collective bargaining agreement, which was referred to in their Motion in the

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[4] The six-year statute of limitations for contract actions that the district court applied to dismiss the beneficiaries' claims is clearly relevant in measuring the unreasonableness of the beneficiaries' failure to bring their claims for 18 years. Cf. *Conopco, Inc.* v. *Campbell Soup Co.*, 95 F.3d 187, 191 (2d Cir. 1996) (for Lanham Act claim, court will presume laches applies if claim was filed outside period set by relevant statute of limitations).

district court as "the PBA contract." JA 14 (Affirmation at 3, ¶ 8); see also JA 93-94 (1983 letter from Durkin's counsel).

Neither this Court nor the district court can address this claim because the collective bargaining agreement referenced is not in the record. This Court cannot even determine whether it has before it the parties obligated by the collective bargaining agreement, let alone what benefits it might confer on the beneficiaries. All that appears on this record is the beneficiaries' assertions of what the collective bargaining agreement's terms are and what they mean. Although the affidavits supporting the beneficiaries' request for additional benefits assert the meaning of the collective bargaining agreement, such legal conclusions are without force. See *Schwapp* v. *Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997) ("[t]o the extent these affidavits contain bald assertions and legal conclusions * * * the district court properly refused to rely on them"); *Bellsouth Telecomm., Inc.* v. *W.R. Grace & Co.*, 77 F.3d 603, 615 (2d Cir. 1996) (where "affiants' statements advocated conclusions of law," affidavits "are insufficient to raise a triable issue of material fact, and hence were properly disregarded"). Accordingly, there is no basis for the beneficiaries' request for additional separation benefits.

CONCLUSION

The Court should affirm the district court's denial of the beneficiaries' motion to enforce the Consent Decree.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7) and 29(d), I certify that the foregoing Brief of the United States as Appellee is proportionally spaced, has a typeface of 14 points, and contains 5474 words, as determined using the word counting feature of WordPerfect 9.

June 27, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2003, two copies of the Brief For The United State As Appellee were served by First Class Mail, on each of the following persons:

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