No. 19-1079

In the
Supreme Court of the United States

M.W. WATERMARK, LLC AND
MICHAEL GETHIN, INDIVIDUALLY,
Petitioners,

v.

EVOQUA WATER TECHNOLOGIES, LLC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 corporate disclosure statement included in the petition for writ of certiorari remains accurate.

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INTRODUCTION

Respondent Evoqua Water Technologies, LLC ("Evoqua") did not dispute the facts presented by Petitioners M.W. Watermark LLC ("Watermark") and Mr. Gethin, but provided this Court with a lengthy counterstatement of the case. Many of the "facts" cited by Evoqua are *allegations* from the 2003 *Gethin I* Complaint that were denied in full or in part by Watermark and Mr. Gethin.[1] Gethin I, Record 15, PageID.305-307. Those allegations were never litigated; *Gethin I* was settled four months after filing for a $4,000 payment, mutual releases, an acknowledgment that neither party admitted any liability, and entry of a Final Judgment including Permanent Injunction (the "2003 Consent Decree"). App. 123-125.

Contrary to Evoqua's assertion, Petitioners do not ask this Court to resolve a factual issue. Respondent's Brief, at 2. The questions before this Court relate to whether the 2003 Consent Decree is assignable so that it may be enforced by Evoqua in this dispute.

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[1] Evoqua cites to 2003 Dkt. 1-1 PgID.54-55, 57-58 and 58-59. Respondent's Brief, at 3-5. However, Gethin I, Record 1-1 does not contain these pages. Petitioners believe Evoqua intended to cite to paragraphs 54, 55, 57, 58, and 59, which appear at Gethin I, Record 1-1, PgID.13-15.

ARGUMENT

This Court should grant certiorari to resolve the legal question of whether state law or federal law is applied when interpreting a consent decree issued by a federal court during federal litigation and relating to a federal question of law.

I. There are Only Two Undisputed Facts that are Relevant to this Matter

Petitioners are not asking this Court to resolve any factual issues between the parties because only two undisputed facts are relevant: (1) within the four corners of the 2003 Consent Decree there is no language modifying U.S. Filter/JWI, Inc. to include any successors or assigns, and (2) Evoqua was incorporated in 2013 and is not the same entity as U.S. Filter/JWI, Inc.

A. Evoqua is not U.S. Filter/JWI

Evoqua argues that Petitioners ask this Court to resolve "a factual dispute it has tried to create regarding Evoqua's status as a successor-in-interest" to U.S. Filter/JWI, Inc. Respondent's Brief, at 16. Evoqua does not deny that it was newly formed in 2013, nor does it assert that it is actually U.S. Filter/JWI, Inc. Evoqua asserts that it "is the real party in interest under Federal Rule of Civil Procedure 17 with respect to the 2003 Litigation, or at least the transferee of the interest in the litigation under Federal Rule 25(c)." Respondent's Brief, at 17. In its opinion finding that the 2003 Consent Decree was not assignable, the district court held that "Rule 25(c) does not determine whether Evoqua can enforce the consent judgment" and

"Evoqua cannot now insert itself as a party to the consent judgment, or expand the scope of the agreed-upon judgment to give itself enforcement rights." App. 114. Evoqua's Rule 25(c) arguments are another attempt to go outside the "four corners" of the 2003 Consent Decree.

B. The Consent Decree Does Not Contain Any Language Regarding Assignability by U.S. Filter/JWI

The 2003 Consent Decree was a carefully negotiated agreement between U.S. Filter/JWI, Inc. and Petitioners. It includes "successors and assigns" language as to Petitioners, but no such language for U.S. Filter/JWI, Inc. App. 123. It is telling that the parties were able to use this "successors and assigns" language for one party and not the other.

II. The Sixth Circuit Did Not Apply This Court's Precedents Properly

In *Armour* this Court expressly held that a consent decree must be construed as it is written. *U.S. v. Armour & Co.*, 402 U.S. 673, 681–682 (1971). Within the "four corners" of the 2003 Consent Decree, there is no reference to any successor or assign of U.S. Filter/JWI, Inc. Evoqua was not, and still is not, a party to the 2003 Consent Decree, and therefore cannot enforce it. App. 114. In *Blue Chip Stamps,* this Court further opined that "a well settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it, even though they were

intended to be benefited by it." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975).

A. The Sixth Circuit Ignored Controlling Supreme Court Precedent

After citing to *Armour* and *Blue Chip Stamps* (App. 10-12), the Sixth Circuit perplexingly leapt to the conclusion that there was an "absence of controlling federal law" and turned to its decision in *Sault Ste. Marie* for the proposition that "contractual interpretation of the Consent Judgment is governed by Michigan law." App. 11, *citing Sault St. Marie v. Engler*, 146 F.3d 367, 372. The Sixth Circuit then relied on Michigan contract law to hold that "[t]he primary goal in the construction or interpretation of any contract is to honor the intent of the parties." App. 11, *citing Rasheed v. Chrysler Corp.*, 517 N.W.2d 19, 29 n.28 (Mich. 1994). The Sixth Circuit then held that because contracts are "freely assignable" under Michigan state law, that this would apply to the Consent Decree. App. 11.

The Sixth Circuit made no attempt to explain how allowing free assignment of the 2003 Consent Decree complied with this Court's holding in *Blue Chip Stamps*. Rather, it held that "[a] court 'must look for the intent of the parties in the words used in the instrument.'" App. 11, *citing Mich. Chandelier Co. v. Morse*, 297 N.W. 64, 67 (Mich. 1941).

The Sixth Circuit even ignored the Michigan contract law it purported to apply because, while it "must look for the intent of the parties in the words used in the instrument," it cited to no words in the

instrument that it was interpreting – it simply found the 2003 Consent Decree "silent" as to assignability and grafted the right of assignment onto the 2003 Consent Decree. App. 11, 14, *citing Michigan Chandelier Co. v. Morse*, 297 N.W. 64, 67 (Mich. 1941). Once the Sixth Circuit looked to Michigan contract law, it ceased interpreting the 2003 Consent Decree within its four corners, ceased following *Armour*, and ceased following *Blue Chip Stamps* by allowing a consent decree to be enforced by an entity that was not a party to it. Evoqua's argument that the "Sixth Circuit was correct to look to state law as part of the ordinary tools of contract construction" (Respondent's Brief, at 28) is misplaced and ignores the well-settled "four corners" rule of *Armour*.

Evoqua's claim that the 2003 Consent Decree should be interpreted only in the context of the enjoined party's conduct is also without merit. Respondent's Brief, at 29-30. It is logical that scrutiny should be placed on consent decrees and who can enforce them because a party with the right to enforce an injunction can bring the full force of the federal court system upon a party in contempt proceedings. Great care should be taken to ensure that a party who was not named in a consent decree cannot enforce it upon an unaware victim.

B. The Continued Viability of *Armour* is Eviscerated by the Sixth Circuit Opinion

Evoqua makes the unsubstantiated argument that "[t]he Sixth Circuit did not depart from the four-corners rule or rely on parol evidence when it construed

the Permanent Injunction [the 2003 Consent Decree] to be assignable." Respondent's Brief, at 19. This is false because that is exactly what the Sixth Circuit did. In finding that there was an "absence of controlling federal law" (even after citing to *Armour* and *Blue Chip Stamps*), the Sixth Circuit held that "contractual interpretation of the Consent Judgment is governed by Michigan law." App. 11, *citing, Sault St. Marie*, 146 F.3d at 372.

The error by the Sixth Circuit is clear: it turned to contractual "aids to construction" to inject terms that unambiguously were not within the four corners of the 2003 Consent Decree. While this Court has held, in *U.S. v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975), that reliance on certain "aids to construction" is proper for construing ambiguous terms found in a consent decree, the *ITT* decision did not overturn *Armour*. In *Stotts*, this Court reinforced the restrictive reading of consent decrees by applying the "four corners" rule of *Armour*. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 562 (1984). *Armour* may be reconciled with *ITT* as permitting courts to use so-called "aids to construction" to interpret ambiguous terms that appear within the four corners of a consent decree. This is not the case here.

Evoqua cites to *Sprint Communications Co. v. APCC Services, Inc.*, for the proposition that when the "assignee receives the transfer of all rights, title, and interest in a claim, they are asserting 'legal rights of their own.'" Respondent's Brief, at 16*, citing Sprint*, 554 U.S. 269, 290 (2008). *Sprint* appears to be wholly irrelevant to the issues at hand in this case as it dealt

with the practice of aggregator companies taking assignments of money judgments at a discount from payphone operators to sue non-paying phone companies in bulk. *Sprint* does not mention *Armour* or *Blue Chip Stamps*, nor does it relate to the enforcement of a consent decree by someone who is not a party to it, nor does it deal with the assignability of an injunctive consent decree issued by a federal court.

III. Petitioner Does Not Ask This Court to Resolve Questions of State Law

Evoqua's assertion that this case is about applying the contract law of one state in regard to assignability versus that of another state is nonsensical because, under Evoqua's argument, both Courts would be applying the same state law contractual principles. Petitioners' request is actually the converse: that it was inappropriate for the Sixth Circuit to turn to state law at all to provide for assignability for a consent decree that is silent as to assignability. *Armour* states that the scope of the consent decree must be found within its "four corners" and *Blue Chip Stamps* holds that non-parties to a consent decree cannot enforce it. To find otherwise ignores this Court's precedent.

The state contract law of Michigan and Illinois both call for the general proposition that contracts are assignable. *See, Shah v. State Farm Mutual Automobile Insurance Company*, 324 Mich. App. 182 (2018), *citing Burkhardt v. Bailey*, 260 Mich. App. 636, 652 (2004) ("Under general contract law, rights can be assigned unless the assignment is clearly restricted"); *Plumb v. Fluid Pump Services, Inc.*, 124 F.3d 849, 864 (7th Cir. 1997), *citing Moutsopoulos v. American Mut.*

Ins. Co., 607 F.2d 1185, 1189 (7th Cir. 1979) ("[e]lementary contract law provides that upon a valid and unqualified assignment the assignee stands in the shoes of the assignor and assumes the same rights, title and interest possessed by the assignor").

The Sixth Circuit reviewed the 2003 Consent Decree, found it silent as to assignability, and turned to Michigan contract law to hold it to be freely assignable. Faced with a virtually identical fact pattern, the Federal Circuit held the exact opposite in *Thatcher*, finding the consent decree in that case was not assignable when it was silent as to that issue. *Thatcher v. Kohl's Department Stores, Inc.*, 377 F.3d 1370, 1374 (Fed. Cir. 2005). The Federal Circuit went on to explain: "This silence is the functional equivalent of the parties' express intent to exclude language of assignment. Equally as telling is that the consent judgment specifies successors and assigns when listing Kohl's obligations." *Thatcher,* 397 F.3d at 1375. The Federal Circuit correctly applied this Court's "four corners" rule of *Armour*. For Evoqua to represent to this Court that the *Thatcher* court applied Illinois state contract law is disingenuous.

Nothing in Petitioners' request for review by this Court involves a complaint that the Sixth Circuit applied incorrect state law; rather, it never should have applied state law in the first place. In this case, the Sixth Circuit applied Michigan state contract law to "fill in the gap" (App. 13-14) with language permitting assignment (when no such language was present within the four corners) while the Federal Circuit in

Thatcher found the lack of language allowing assignability as to one party to be a bar to assignment.

This is precisely the type of issue that the Court should review and is of significant importance as it would provide clarity across the circuits when dealing with the enforcement of consent decrees.

IV. Petitioners' Request for Review Identifies a Stark Split in the Circuits

There is a clear and unmistakable split between the Sixth Circuit's decision in this case and the Federal Circuit's *Thatcher* decision. *Cf.,* App. 12-15, *with Thatcher,* 397 F.3d at 1375. Evoqua's position that this stark disagreement between these circuits is immaterial defies logic. In one circuit, lack of language as to assignability was dismissed in favor of the "freely assignable" principles of state contract law, and in another, the exact same absence of language regarding assignability was found to be a complete bar to enforcement by successors and assigns consistent with *Armour*.

The Sixth Circuit's decision here is also split from its own prior decisions. In *Huguley v. General Motors Corp.,* 67 F.3d 129 (1995), the court relied on *Armour* and found a consent decree could not be enforced by a successor. Evoqua improperly attempts to explain away *Huguley*, arguing that construction of the consent decree at issue was a matter of contract interpretation. Perhaps Judge Bush said it best in his concurring opinion when he interlineated the facts of this case within the *Huguley* quote from the Sixth Circuit:

> Therefore, applying federal common law, the agreement would not be read to tether the defendants' obligations to the specific intellectual property regardless of who owns it. Instead, the agreement, as written, reflects the parties' intent to bind the defendants to the intellectual property at issue when it is owned by U.S. Filter/JWI. To hold otherwise, would depart from the parties' intended arrangement. See *Huguley*, 67 F.3d at 133 ("A consent decree is a contractual agreement and, **if the parties have agreed not to impose [enforcement by successors-in-interest or assigns], the district court is not free to reform the contract to compensate one party for making a bad bargain**.").

App. 52 (emphasis added). Yet the Sixth Circuit did exactly that when it reformed the 2003 Consent Decree with the Michigan state law free assignment principle. This is an inconsistent application by the Sixth Circuit of its own precedent.

Evoqua turns to *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), arguing that this case is "similar" to *John Wiley* in that union employees' rights do not automatically terminate if the corporate employer disappears due to a merger. Respondent's Brief at 25. This is an important distinction, because while U.S. Filter/JWI, Inc. was merged into various entities, none of those entitles was Evoqua. Evoqua purchased certain assets that were spun-off from Siemens Industry, Inc. through a carve-out agreement (opposite of a merger). App. 109. Evoqua cites

additional cases from the First, Eleventh, and Sixth Circuits in support of its misguided proposition, all of which are related to mergers of entire corporate entities, and are inapplicable to the case at hand. Respondents Brief, at 26. In any event, this argument only serves to exacerbate the split between the circuits.

Evoqua raises the specter again that the Sixth Circuit was simply performing an exercise of "contract interpretation" when it determined that silence as to assignability was correctable by application of Michigan state contract law. Respondent's Brief, at 26. This is incorrect. The Sixth Circuit was not interpreting language in the 2003 Consent Decree, but rather it was grafting language onto the consent decree that was not there. That is a critical difference. When the Sixth Circuit pointed to *Sault Ste Marie* as the basis for doing so, it was misguided in its approach. In *Sault Ste Marie*, the Sixth Circuit was attempting to interpret "exclusive right to operate," language that appeared within the consent decree at issue in that case, and applied Michigan contract law in doing so. *Sault St. Marie,* 146 F.3d at 372. Here, the Sixth Circuit improperly extended *Sault Ste Marie* to insert language allowing assignability of the 2003 Consent Decree that did not include any such language to be interpreted.

Evoqua claims that Petitioners' argument relating to *U.S. v. FMC Corp.,* 531 F.3d 813 (9th Cir. 2008), is an attempt to address "alleged errors in a decision of another circuit." Respondent's Brief, at 27. This is not the case. Petitioners raise this case not in an attempt to address an error in another circuit, but rather as an

example of another circuit that treats silence as to assignability of a consent decree differently. In *FMC,* the Ninth Circuit has taken an approach that illustrates a third interpretation of the "four corners" rule of *Armour* and the holding of *Blue Chip Stamps* by holding that intended third party beneficiaries could enforce consent decrees, which is directly contrary to the holding of *Blue Chip Stamps* that prohibits enforcement of consent decrees by entities that are not parties to them even if they are intended to be benefited by them. *FMC,* 531 F.3d at 819-820; *cf. Blue Chip Stamps*, 421 U.S. at 750. *FMC* further demonstrates the need for this Court to grant certiorari and address the split between the circuits.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court grant their Petition for Certiorari to correct this unprecedented decision from the Sixth Circuit and provide clarity to all circuits on how assignability and enforceability should be interpreted only within the four corners of the consent decree and silence as to these issues establishes that the consent decree is not enforceable by anyone who is not a party to it.

Respectfully submitted,

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