IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEROME DUVALL, *et al.,*	*	
Plaintiffs,	*	
v.	*	Civil Action No. ELH-94-2541
LAWRENCE HOGAN, *et al.,*	*	
Defendants.	*	

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PLAINTIFFS' REPLY IN SUPPORT OF RENEWED MOTION FOR ENFORCEMENT AND FURTHER RELIEF (DOC. 675, 702)

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INTRODUCTION

There is no dispute about the critical overarching fact presented in Plaintiffs' motion and renewed motion – with the 2016 Settlement Agreement set to expire in less than 17 months, ***Defendants are noncompliant with each and every medical and mental health provision of the Agreement***. Defendants' response recounts irrelevant ancient procedural history that predates the entry of the operative Agreement, and offers legal arguments that are contrary to its plain language, the recent history of this case, and the law.

What Defendants have not done in their response is address the uncontroverted evidence of noncompliance and resultant harm to class members detailed in Plaintiffs' filings. ECF 675, 675-1, 702, 702-1. Nor have Defendants offered a detailed plan articulating how they will finally achieve compliance with the Settlement Agreement and provide class members the relief that they have long been promised. The serious harm, including avoidable death, that class members have suffered is the tragic and predictable result of Defendants' unwillingness or inability to achieve compliance with the Settlement Agreement they signed more than five years ago.

Defendants' response is noteworthy for what is does not dispute:

- Defendants do not dispute that they are noncompliant with every medical and mental health provision of the Settlement Agreement.
- Defendants do not dispute that they are using the wrong unit of analysis, and that compliance must be assessed by substantive provision (numbered paragraphs), not by the lettered subdivisions of each numbered paragraph. *See* ECF 702-1 at 3-4.[1]
- Defendants do not dispute Dr. Todd Wilcox's conclusions regarding the preventable deaths that have occurred in the jail, with their own expert or indeed with any evidence whatsoever.[2]

[1] All citations to court docket filings are to the page number assigned by the Court's Electronic Case Filing ("ECF") system.

[2] Defendants argue only that Dr. Wilcox did not comment on one of the deaths and that he reviewed only a one-page mortality review for another death – but that is because that was the

Defendants' failure to dispute these matters operates as a concession. *See Stenlund v. Marriott Int'l, Inc*. 172 F. Supp. 3d 874, 887 (D. Md. 2016) ("In failing to respond to this argument[, the party] concedes the point."); *Ferdinand-Davenport v. Child.'s Guild*, 742 F. Supp. 2d 772, 777 (D. Md. 2010) ("By her failure to respond to this argument, the plaintiff abandons [her] claim.").

Defendants also—for the first time in more than five years since they signed the Settlement Agreement—argue that the Prison Litigation Reform Act ("PLRA") bars the motion and renders the Agreement unenforceable. Defendants conspicuously ignore that they *jointly* agreed to an Agreement that incorporates the findings required by the PLRA and explicitly contemplates enforcement by the Court, and that they failed to appeal the order approving the Settlement Agreement *or* oppose Plaintiffs' prior enforcement motions on these grounds. *See* ECF 616 (Response to 2018 enforcement motion); ECF 655, 662 (Response to 2020 enforcement motion regarding COVID-19). The law is clear that the Court may enforce the substantive terms of the Settlement Agreement to remedy previously identified constitutional violations; to hold otherwise would render it meaningless and the Court powerless. But Defendants now take the position that the Agreement—that they signed after robust, arms' length negotiations, and that was approved by this Court—is without any legal effect whatsoever.

Finally, Defendants argue at length that Plaintiffs jumped the gun and filed the motion and renewed motion without first notifying Defendants of their chronic and obvious noncompliance (ECF 709 at 10-12), but then a few pages later argue the motion is untimely and Plaintiffs waited *too long* to file it, because their noncompliance has been longstanding and notorious. *Id*. at 27-29.

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length of the report provided by Defendants. ECF 709 at 24. They also complain that Dr. Wilcox, the long-time medical director of a large urban jail, did not review their search or security policies to reach his common-sense conclusion that there are security lapses if multiple people have died due to drug overdoses. *Id.* Yet Defendants did not submit any of these policies, or offer sworn declarations regarding them.

Simply put, Defendants can't have it both ways.

Defendants' arguments are waived, meritless, and borderline frivolous. Accordingly, the Court should grant Plaintiffs' motion, issue a further enforcement order directing the Defendants to submit detailed plans to achieve compliance, and modify the Settlement Agreement to extend the termination date by two years, to June 22, 2024.

ARGUMENT

I. The PLRA Does Not Bar This Court From Enforcing the Settlement Agreement.

Defendants assert that the PLRA bars the Court from enforcing the Settlement Agreement unless Plaintiffs establish a new constitutional violation. ECF 709 at 12-15. Of course, Plaintiffs would be entitled to a remedy for a constitutional violation even absent the Settlement Agreement. *See, e.g.*, *Brown v. Bd. of Educ*., 349 U.S. 294, 298, 301 (1955) (rejecting a simple declaration of a right to be free of racial discrimination and ordering affirmative remedies "with all deliberate speed."); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("[I]t is a settled and invariable principle [. . .], that every right, when withheld, must have a remedy, and every injury its proper redress.") (quotation marks and citation omitted). Defendants' position, therefore, is that the Agreement has no legal effect whatsoever.[3]

These arguments are contrary to law, as well as the past history of this case. Moreover, due to Defendants' repeated failure to assert these arguments in response to past enforcement motions, they are waived.

[3] In fact, Defendants' position is that the Settlement Agreement puts Plaintiffs in a *worse* position than if it did not exist. They argue—without legal support, as none exists—that the Court cannot order a remedy unless Plaintiffs show *both* a violation of the Settlement Agreement *and* a Constitutional violation. *See* ECF 709 at 21 ("[T]his Court cannot order relief under the PLRA without a factual showing *both* that the defendants breached a term of the settlement agreement *and* that they were deliberately indifferent to the serious medical and mental health care needs of members of the plaintiff class.") (emphasis in original).

A. Defendants Cannot Now Repudiate the Settlement Agreement's Plain Language.

As a threshold matter, Defendants may not now repudiate and "assume a contrary position" or "deliberately chang[e] positions according to the exigencies of the moment" in an attempt to invalidate the Settlement Agreement years after they agreed to it. *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001) (quotation marks and citation omitted) (judicial estoppel). To rule otherwise would allow collateral attacks on the initial order for prospective relief and impede "the orderly conduct of litigation." *Laffey v. Nw. Airlines, Inc*., 740 F.2d 1071, 1089 (D.C. Cir. 1984) (discussing law of the case doctrine). If Defendants believed that no Constitutional violation supported the Settlement Agreement, they should have appealed the order entering it in June 2016 rather than waiting until Plaintiffs sought—for the third time since its entry—to enforce it. *See, e.g.*, 18A Fed. Prac. & Proc. Juris. § 4433 (3d ed. Oct. 2020) ("Preclusion, for example, prevents reexamination of the validity of a permanent injunction or similar order in subsequent contempt proceedings.") (citing *Local 28 of Sheet Metal Workers' Int'l. Ass'n v. EEOC*, 478 U.S. 421, 441, n.21 (1986)); *see also Union Carbide Corp. v. Richards*, 721 F.3d 307, 314 (4th Cir. 2013) (holding that the doctrine of res judicata precludes a party from "contesting matters that they have had a full and fair opportunity to litigate" in order to minimize "expense and vexation" and to "conserve judicial resources") (quotation marks and citation omitted). [4]

Numerous provisions of the Settlement Agreement—which Defendants agreed to more than five years ago—demonstrate beyond any doubt that the parties intended that the Court would

[4] Defendants also failed to raise this argument in opposition to Plaintiffs' 2018 and 2020 enforcement motions. *See* ECF 616, 655, 662. There has been no change in the facts, or in controlling law, since the entry of the Settlement Agreement or the earlier enforcement motions; accordingly, this argument is waived. *See Georgia Pac. Consumer Prod., LP v. Von Drehle Corp.,* 710 F.3d 527, 533–34 (4th Cir. 2013) (defendant waived defense by waiting sixteen months to assert it); *Arizona v. California*, 530 U.S. 392, 410, *supplemented*, 531 U.S. 1 (2000) (similar; "[w]e disapprove the notion that a party may wake up because a 'light finally dawned,' years after the first opportunity to raise a defense") (citation omitted).

have the power to enforce it. *See, e.g.,* ECF 541-2 at 19 ¶ 47.d. (setting forth Plaintiffs' entitlement to attorney fees if "they prevail in obtaining an order to enforce one or more substantive provision(s) of this Settlement Agreement"); *id.* ¶ 48 ("Only class counsel may seek to enforce the terms of this Settlement Agreement."); *id.* ¶ 49 ("The parties consent to the reservation and exercise of jurisdiction by the Court over all disputes between and among the parties arising out of this Settlement Agreement . . . "); *id.* at 20 ¶¶ 49.b., 49.c. (multiple references to "motion for enforcement"); *id.* at 21 ¶ 52 (the parties request that the Court "retain jurisdiction for the purpose of enforcing this Settlement Agreement"). And the Court has repeatedly issued orders enforcing the Settlement Agreement. *See* ECF 674, 684.

Defendants stipulated in the Settlement Agreement itself that it satisfies the PLRA. Paragraph 51 of the Settlement Agreement reads:

> The parties stipulate and jointly request that the Court find that, as of the Effective Date, this Settlement Agreement satisfies the requirements of 18 U.S.C. § 3626(a)(1)(A) in that it 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 of Plaintiffs.

ECF 541-2, at 21 ¶ 51. In a subsequent filing, Defendants conceded once again that the "Settlement Agreement . . . meets the standards established by Rule 23(e) and the PLRA." ECF 552 at 9. And in their instant Opposition, while arguing that Plaintiffs were required to give notice to Defendants of their noncompliance prior to filing the enforcement motion, Defendants concede that the Settlement Agreement is "*the result of the mutual agreement of the parties*, who 'had the expectation that the terms of the settlement to which they consented' were subject to enforcement," (ECF 709 at 12 (quoting *Bradley v. Am. Household Inc.*, 378 F.3d 373, 380 (4th Cir. 2004) (emphasis added)) — mere pages before Defendants proceed to repudiate the Settlement

Agreement and argue that it is unenforceable and null and void. Needless to say, the Court should reject Defendants' legal contortions.

In this Court's opinion approving the Agreement, it held that "[n]otably, the Settlement Agreement satisfies the requirements of the PLRA, set forth in 18 U.S.C. § 3626(a)(1)(A)." ECF 575 at 15. The Court further held that "[a]s required by the Prison Litigation Reform Act, I am satisfied that, as stipulated by the parties in ¶ 51 of the Settlement Agreement (ECF 541-2), the Settlement Agreement satisfies the requirements of 18 U.S.C. § 3626(a)(1)(A), in that it is narrowly drawn, extends no further than necessary to correct the violation of federal rights, and is the least intrusive means necessary to correct the violation of the federal rights of the plaintiffs." *Id.* at 22. And in the final order approving the Settlement Agreement,

> The Court . . . FINDS that the Settlement Agreement as amended satisfies the requirements of the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(a)(1)(A), in that it is narrowly drawn, extends no further than necessary to correct the violation of the federal right, and is the least restrictive means necessary to correct the violation of the federal right of Plaintiffs. This finding is based on the evidence in the record and the parties' stipulation set forth in the Settlement Agreement as amended, § IV.51.

ECF 577 at 1-2.

In sum, the parties agreed, and the Court found, that the Settlement Agreement was enforceable. Indeed, the Court could not have found the Agreement to be "fair, reasonable, and adequate" as required by Rule 23(e) if, as Defendants now claim, Plaintiffs were trading away their strong legal claims for an agreement that was not enforceable. *See* ECF 575 at 20 (the Court notes "the relative strength of plaintiffs' position prior to engaging in mediation"); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 404 F.3d 821, 828-29 (4th Cir. 2005) ("The Plaintiffs would

not have given up their claims in exchange for an agreement that they anticipated would not be followed").[5]

B. The Court Is Not Required To Make New Findings of a Constitutional Violation to Enforce the Settlement Agreement.

Defendants argue that under the PLRA, the Court cannot enforce the Settlement Agreement unless Plaintiffs establish a constitutional violation. ECF 709 at 18-22. Defendants are wrong. The cases Defendants cite are irrelevant to the situation at hand, as they deal with the initial imposition of prospective injunctive relief or motions to terminate relief under the PLRA.[6]

Defendants cite no authority relevant to the situation presented here – the enforcement of a settlement agreement in which the PLRA findings required by 18 U.S.C. § 3626(a)(1)(A) have already been stipulated to by Defendants and made by the Court. While the Fourth Circuit does not appear to have addressed this issue, other courts have unanimously held that district courts need *not* find a new constitutional violation in order to enforce a settlement agreement in which the PLRA findings were conceded by Defendants and made by the Court. In *Parsons v. Ryan*, 912

[5] Defendants criticize the recommendations of the medical and mental health Monitors, insinuating that they cannot be required to take any actions that are not explicitly set forth within the four corners of the Settlement Agreement. ECF 709 at 22. But this argument is foreclosed by the plain language of the Agreement, which explicitly requires the Monitors to "[p]rovide technical assistance to the Commissioner to achieve compliance with the terms of this Settlement Agreement by informing the Commissioner what the Monitors consider necessary to achieve compliance, and how the Monitors believe such compliance might be achieved[.]" ECF 541-2 at 15 ¶ 38.c. It further requires that "[t]he Commissioner shall implement any reforms necessary to effectuate this Settlement Agreement." *Id*. at 13 ¶ 28.

[6] For example, *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996), involved a state's motion to terminate relief under 18 U.S.C. § 3626(b), not the enforcement of a PLRA-compliant settlement agreement. The *Plyler* court simply made the unremarkable statements that under the PLRA, "a court is prohibited from terminating prospective relief if it determines that 'prospective relief remains necessary to correct a current or ongoing violation of the Federal right'" and that "[a] state may seek termination of prospective relief under § 3626(b)(2) even if the relief was approved before enactment of the PLRA." 100 F.3d at 369-70 (quoting 18 U.S.C.A. § 3626(b)(3)). Moreover, the Fourth Circuit has subsequently clarified that "Congress did not intend for the 'current and ongoing' standard [of § 3626(b)] to apply outside of the termination context." *Porter v. Clarke*, 923 F.3d 348, 367 (4th Cir. 2019).

F.3d 486 (9th Cir. 2018), *cert. denied sub nom. Ryan v. Jensen*, ____ U.S. ____, 140 S. Ct. 142 (2019), the Ninth Circuit rejected precisely the argument Defendants make here:

> Defendants assert the OPO [enforcement order] does not comply with the PLRA because the district court never determined that a constitutional violation occurred.
>
> Defendants are incorrect. In approving the Stipulation, the district court held "[b]ased upon the entire record in this case and the parties' Stipulation" that the Stipulation was "necessary to correct the violations of the Federal right of the Plaintiffs." This conclusion necessarily required a finding of a constitutional violation—that is, if there were no violation of a federal right, there would be nothing for the Stipulation to "correct." Therefore, the district court found the requisite constitutional violation in granting the initial prospective relief in this case.
>
> Nor do we accept Defendants' suggestion that the district court was required to make *new* findings of a constitutional violation before entering the OPO. The district court issued the OPO to enforce compliance with the Stipulation (which the parties agreed was necessary to correct violations of Plaintiffs' federal rights); it did not issue the OPO as prospective relief in response to new violations of federal rights. That is, the same constitutional violations upon which the Stipulation rests are the same violations the OPO is intended to remedy. Accordingly, the district court was not required to make new findings of a constitutional violation before enforcing the Stipulation with the OPO.

Parsons v. Ryan, 912 F.3d 486, 501 (9th Cir. 2018).[7]

Other courts agree. *See Jones 'El v. Berge*, 374 F.3d 541, 545 (7th Cir. 2004) ("The enforcement of a valid consent decree is not the kind of 'prospective relief' considered by § 3626(a). So long as the underlying consent decree remains valid—and the defendants here have not (yet) made a § 3626(b) motion [. . .]—the district court must be able to enforce it" without

[7] Defendants' attempt to distinguish *Parsons* based on the language of the Settlement Agreement falls flat. *See* ECF 709 at 25. The *Parsons* settlement gave that district court "the power to enforce this Stipulation through all remedies provided by law," with two exceptions. 912 F.3d at 494. In this case, the parties requested that the Court "retain jurisdiction for the purpose of enforcing this Settlement Agreement," ECF 541-2 at 21 ¶ 52, and "consent[ed] to the reservation and exercise of jurisdiction by the Court over *all* disputes between and among the parties arising out of this Settlement Agreement[.]" *Id.* at 19 ¶ 49 (emphasis added). To the extent that there is a meaningful difference between these provisions, the Court's power in this case is broader, not narrower, than the power of the district court in *Parsons*.

having to first make new PLRA findings) (citations omitted); *Essex Cty. Jail Annex Inmates v. Treffinger*, 18 F. Supp. 2d 445, 462 (D.N.J. 1998) ("As long as the underlying consent order remains valid—neither party has made a 3626(b) motion to terminate—the court must be able to enforce it."); *cf. Armstrong v. Brown*, 768 F.3d 975, 984 (9th Cir. 2014) (holding that the district court's modification of an injunction issued five years earlier was "necessary to correct the violations of Plaintiffs' federal rights" identified in the previous injunction and that those past violations "are not (and cannot be) contested in this proceeding.").

Here, Defendants stipulated to the prospective relief at issue. In particular, and as detailed above in Part I.A., the parties "stipulate[d] and jointly request[ed] that the Court find that [. . .] this Settlement Agreement [. . .] 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 of Plaintiffs." ECF 541-2 at 21 ¶ 51. The Court made these findings. ECF 577 at 1-2. Nothing more is required.

Finally, Defendants' cursory attempt to distinguish the cases cited in Plaintiffs' Motion, *see* ECF 709 at 25-26 & nn.12-14, is so summary that Defendants' arguments are waived. *See Belk, Inc. v. Meyer Corp. U.S.*, 679 F.3d 146, 152 n.4 (4th Cir. 2012) ("This issue is waived because Belk fails to develop this argument to any extent in its brief."); *Sanders v. Callender*, No. CV DKC 17-1721, 2018 WL 337756, at *7 n.5 (D. Md. Jan. 9, 2018) ("The United States Court of Appeals for the Fourth Circuit has explained that ruling on an issue minimally addressed is 'unfair to [opposing party] and would risk an improvident or ill-advised opinion on the legal issues raised.'") (quoting *Hunt v. Nuth*, 57 F.3d 1327, 1338 (4th Cir. 1995) (alterations in original)).

C. Under the PLRA the Settlement Agreement is a "Consent Decree," Not a "Private Settlement Agreement."

Defendants also argue that the Settlement Agreement in this case is a "private settlement agreement" and not a "consent decree" as defined by the PLRA. ECF 709 at 15-17. Once again, Defendants are wrong. Under the PLRA, an agreement between the parties to settle a prison conditions case falls into one of two categories. First, a "private settlement agreement" is "an agreement entered into among the parties that is *not* subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled." 18 U.S.C. § 3626(g)(6) (emphasis added). If the agreement does not have those characteristics, then it is, by default, a "consent decree" which is "*any* relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements." *Id*. § 3626(g)(1) (emphasis added).

Here, the Settlement Agreement includes "reference to § 3626(a)(1)(A)," (*see* ECF 541-2 at 21 ¶ 51), and "thus evinces the parties' intention to make the settlement agreement enforceable in federal court." *Kelly v. Wengler*, 822 F.3d 1085, 1095 (9th Cir. 2016) (holding that the district court had authority under the PLRA to enforce a "stipulation for dismissal" that incorporated the parties' "settlement agreement"). Parties can (and do) title agreements any number of things, and do not have to label them a "Consent Decree" to meet the definition under the PLRA. *See, e.g. Parsons*, 912 F.3d at 497-98 (holding that a document entitled a "Stipulation" that reserved the court's ongoing jurisdiction was not a private settlement agreement, and the district court could enforce it); *United States v. Territory of V.I.*, 748 F.3d 514, 518–19 (3d Cir. 2014) (noting that the district court accepted the parties' "Settlement Agreement" and entered a "consent judgment").

In *Taylor v. United States*, an *en banc* panel of the Ninth Circuit applied a functional approach to determine whether an order or stipulated judgment met the definition of a "consent

decree" under the PLRA: first, whether the court "retain[s] jurisdiction"; second, if "the judgment require[s] [the defendant] to report on compliance, request permission to make changes, or report to court for any purpose"; and third, if the operative document "put[s] an injunctive scheme in place and the court retains jurisdiction to enforce it." *Taylor v. United States*, 181 F.3d 1017, 1022–23 (9th Cir. 1999) (en banc).

Each characteristic is present here: (1) the Court has retained jurisdiction, ECF 541-2 at 1 ¶ 1; (2) Defendants must report upon their compliance, *id.* at 14-15 ¶¶ 34-36, and may not unilaterally modify the Settlement Agreement, *see id.* at 21 ¶ 53; and (3) an injunctive scheme is in place whereby the Court retains jurisdiction to enforce the Settlement Agreement. *Id.* at 17-18 ¶¶ 41, 44-45; 19-21 ¶ 49. As outlined above in Part I.A., the Settlement Agreement contains numerous provisions explicitly contemplating its enforcement by this Court. Clearly, the parties' intent in this matter was to not create a "private settlement agreement" enforceable only by "the reinstatement of the civil proceeding that the agreement settled." 18 U.S.C. § 3626(g)(6).[8]

D. The Court Has Inherent Power to Issue Further Enforcement Orders.

Finally, even if this Court were to find that the Settlement Agreement does not meet the PLRA's definition of a consent decree, the Court still has the inherent power to enforce it. It is axiomatic that a federal court has the power to issue further enforcement orders and injunctive relief to effectuate the purpose of a decree, settlement agreement, injunction, or past orders. *See Hensley v. Alcon Labs., Inc.*, 277 F.3d 535, 540 (4th Cir. 2002) (holding that "[a]lthough resolution of a motion to enforce a settlement agreement draws on standard contract principles, it may be accomplished within the context of the underlying litigation without the need for a new complaint.

[8] As Defendants acknowledge (ECF 709 at 7 & n.3), previous settlement agreements in this case explicitly provided that they were not consent decrees. By contrast, the current Settlement Agreement includes no such provision. *See generally* ECF 541-2.

To this extent, district courts have inherent authority [. . .] to enforce settlement agreements."); *accord*, *Thompson*, 404 F.3d at 833 ("[T]he court's inherent authority over its own judgment would have provided it with the continuing authority to enforce the consent decree against HUD."); *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004) ("Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, that decree may be enforced."); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984) (courts may enter further orders to exercise "the equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices") (quotation marks and citation omitted); *see also Armstrong*, 768 F.3d at 986 (in a prison conditions case where there was chronic noncompliance with a stipulated settlement, "[t]he ongoing, intractable nature of this litigation affords the district court considerable discretion in fashioning relief").

Indeed, this Court has repeatedly enforced the Settlement Agreement on this basis. *See* ECF 674 at 2 (ordering, "pursuant to the Court's authority to enforce the Settlement Agreement (ECF 541-2)," that Defendants develop a written policy governing monitoring and treatment of class members at heightened risk from COVID-19); ECF 684 (ordering, "[p]ursuant to the Court's authority to enforce the Settlement Agreement (ECF 541-2)," testing of staff for COVID-19 and provision of masks to people incarcerated in the jail). Defendants have not appealed or otherwise challenged these orders.

II. Plaintiffs Have Met the *Rufo* Standard to Modify the Settlement Agreement.

If the Court concludes that it lacks the power to set compliance deadlines pursuant to its enforcement power, Plaintiffs seek in the alternative a modification of the Settlement Agreement to incorporate such deadlines. ECF 702-1 at 19-21. Plaintiffs also seek an order extending the

term of the Settlement Agreement – now set to expire on June 22, 2022 – by two years, so that there is some chance that Plaintiffs will actually receive the benefit of their bargain. *Id.* at 22.

Defendants argue that the Court is powerless to modify the Settlement Agreement, but the Court has already rejected that argument. *See Duvall v. Hogan*, No. CV ELH-94-2541, 2020 WL 3402301, at *8 (D. Md. June 19, 2020) (citing *Thompson*, 404 F.3d at 833, for the proposition that "courts have 'inherent' power to modify a consent decree"). Defendants' arguments are meritless.

Plaintiffs' opening brief relied upon *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992), and *Thompson*, 404 F.3d at 826. In those cases, the Supreme Court and the Fourth Circuit affirmed modification of settlement agreements in long-running institutional reform litigation pursuant to Fed. R. Civ. P. 60(b)(5), which provides that a court may allow relief from "from a final judgment, order, or proceeding" when "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." *See Thompson*, 404 F.3d at 826 ("Under Rule 60(b)(5), a court may relieve a party from an order if it is no longer equitable that the judgment should have prospective application") (internal quotation marks omitted); *see also Kelly*, 822 F.3d at 1098 (affirming order extending term of settlement agreement in prison conditions case by two years; "[h]ere, the court's extension of the settlement agreement returned Plaintiffs to the position they would have occupied had [defendants] not violated the agreement from its inception. The modification of the settlement agreement was therefore well within the court's inherent power").[9]

Rufo is the seminal case on modification of settlement agreements in prison and jail cases, and *Thompson* affirmed precisely the relief Plaintiffs seek here – a modification to extend the

[9] Defendants falsely state that Rule 60(b)(5) applies only to "a judgment that has been satisfied, released or discharged." ECF 709 at 30 n.16.

duration of the settlement agreement in light of defendants' chronic noncompliance. Defendants make no serious effort to distinguish these controlling cases. Instead, they argue that some cases require a showing of "exceptional circumstances" for relief under Rule 60(b)(6) (ECF 709 at 30) – but those cases have no relevance where, as here, plaintiffs seek modification under Rule 60(b)(5). Neither *Rufo* nor *Thompson* imposes an "exceptional [or extraordinary] circumstances" requirement for Rule 60(b)(5) relief; indeed, *Rufo* specifically *rejected* the argument that modification in institutional reform litigation may be granted only upon "a clear showing of grievous wrong." 502 U.S. at 377, 393.[10]

Defendants' other arguments fare no better. They contend that a party seeking modification must show it is subject to an "adverse judgment" (ECF 709 at 27), but the sole case they cite imposes no such requirement. *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 411 (4th Cir. 2010), says only that "Rule 60(b) provides that a court may relieve a party from an adverse judgment if the party shows [one of the circumstances set forth in the Rule];" it does not say that an adverse judgment is a prerequisite to Rule 60(b) relief. As Defendants concede, it makes little sense to speak of an "adverse judgment" in a case that has been settled. Unsurprisingly, neither *Rufo* nor *Thompson*, both of which involved modification of settlement agreements rather than litigated judgments, mention any "adverse judgment" requirement.

Next, Defendants argue that Plaintiffs must show a "meritorious defense" as a prerequisite to modification under Rule 60(b)(5). ECF 709 at 27, 29. But this requirement applies only when a party who has lost a litigated judgment seeks to modify that judgment; the party is then required

[10] Defendants incorrectly cite *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988), for the proposition that "relief under Rule 60(b) 'should only be applied in "extraordinary circumstances."'" ECF 709 at 30. In fact, the quoted language refers to Rule 60(b)(6), not to Rule 60(b) as a whole.

to show that it had a "meritorious defense" *to the substantive claim on which judgment was entered against it*. *See Nat'l Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 265 (4th Cir. 1993) (concluding that defendant against whom summary judgment had been granted had "a good defense to the [underlying] claim"); *Compton v. Alton S.S. Co.*, 608 F.2d 96, 102 (4th Cir. 1979) (party seeking relief under Rule 60(b) must "assume the burden of showing a meritorious defense against the claim on which judgment was entered" against it). Once again, this requirement has no application (and indeed, makes no sense) when modification of a settlement agreement is sought, and neither *Rufo* nor *Thompson* make any mention of it.

Finally, having first argued that Plaintiffs' motion is premature (see Part III, *infra*), Defendants make the extraordinary argument that Plaintiffs' request for modification comes too late because Defendants' noncompliance has been so widespread and longstanding. ECF 709 at 28-29. Defendants fault Plaintiffs for not pursuing their 2018 enforcement motion, but in response to that motion, Defendants blamed their noncompliance on their medical contractor, ECF 616 at 8 ("Defendants have been long aware of Wexford's inability to perform adequately under *Duvall*"); stated that they were discharging Wexford and hiring a new contractor, *id.* at 10-11, and agreed to develop a plan for compliance. *Id.* at 20. They also agreed to a two-year extension of the term of the Settlement Agreement. *Id.* Under these circumstances, it was entirely reasonable for Plaintiffs to rely on Defendants' earnest assurances of forthcoming compliance—although it is now abundantly clear that such reliance was misplaced.

III. Notice Was Not Required Prior to Filing the Motion, and Even if it Were, Defendants Have Had Ample Notice of the Issues Raised in Plaintiffs' Motion.

Defendants argue that Plaintiffs had to give notice pursuant to Paragraph 49 of the Settlement Agreement prior to filing their motion. ECF 709 at 10-12. Under the plain language of that provision, Defendants are wrong.

A federal court construing a settlement agreement applies the contract law of the forum state. *See, e.g., United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236-37 (1975) ("[S]ince consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts . . ."); *Bradley v. Am. Household, Inc.*, 378 F.3d 373, 380 (4th Cir. 2004) ("Motions to enforce settlement agreements draw upon standard contract principles."); *Lopez v. XTEL Const. Group, LLC*, 796 F. Supp. 2d 693, 699 (D. Md. 2011) (same). Under Maryland contract law, the agreement's plain language is conclusive. "It is well settled that Maryland follows the objective law of contracts." *Gen. Motors Acceptance Corp. v. Daniels,* 492 A.2d 1306, 1310 (Md. 1985). "[W]hen the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed." *Id.*

Paragraph 49(a) provides as follows:

> If, *prior to any finding of substantial compliance by a Monitor*, Plaintiffs assert that Defendants are not in compliance with one or more of the obligations under this Settlement Agreement, Plaintiffs shall provide Defendants with a written notice to that effect.

ECF 541-2 at 20 (emphasis added). Mehdi Azimi, Ph.D., is the Monitor for the physical plant provisions of the Settlement Agreement. *Id.* at 13, ¶ 32. On September 28, 2018, Dr. Azimi made a finding of substantial compliance with these provisions, set forth in Paragraph 26 of the Settlement Agreement. *See* Fathi Decl. Exh. 1 at 3. This finding was repeated in his April 2, 2019 report. *See id.* Exh. 2 at 3. Accordingly, the notice provision of Paragraph 49(a) is no longer in effect.

Even if that provision remained in effect, it would not bar consideration of Plaintiffs' motion. First, Paragraph 49(a) requires notice only prior to a "motion for enforcement." ECF 541-2 at 20, ¶ 49(b). Since Plaintiffs' motion seeks modification as well as enforcement, that provision

is no bar to consideration of Plaintiffs' motion. *See* ECF 702 at 1 (invoking the Court's "authority under Fed. R. Civ. P. 60(b) to modify the Settlement Agreement"); ECF 702-1 at 19-22 (same).

More fundamentally, Defendants conspicuously claim no prejudice from Plaintiffs' alleged failure to provide notice. Nor could they, as their own compliance report of February 28, 2020—nearly five months before Plaintiffs filed their motion—conceded noncompliance with *each and every medical and mental health provision* of the Settlement Agreement. ECF 675-3 at 14-15. A notice from Plaintiffs simply reciting Defendants' concessions of noncompliance back to them would serve no useful purpose, and to require such "notice" would elevate form over substance.

After Plaintiffs' motion was filed on July 17, 2020, the motion was stayed by consent of the parties on July 31. ECF 686. The parties held a telephonic settlement conference with Magistrate Judge Sullivan on September 23, 2020, lasting approximately 1.6 hours; a second settlement conference was held on October 2, 2020, also lasting approximately 1.6 hours. Fathi Decl. ¶ 4. On October 28, 2020, Plaintiffs gave notice to the Court that settlement negotiations were at an impasse, and asked the Court to schedule further proceedings on Plaintiffs' motion. ECF 699. Pursuant to the schedule approved by the Court (ECF 700), Plaintiffs filed their renewed motion for enforcement on November 20, 2020 (ECF 702, 702-1), and Defendants (after obtaining an extension, ECF 707) responded on January 4, 2021. ECF 709.

In other words, after the filing of Plaintiffs' initial motion on July 17, 2020, which set out Defendants' noncompliance in great detail, the motion was stayed, and Defendants had *five and a half months* before they were required to respond. During that time, the parties conducted extensive discussions with Magistrate Judge Sullivan regarding Defendants' noncompliance, and Plaintiffs filed a renewed motion providing additional detail on Defendants' noncompliance. Under these circumstances, Defendants cannot possibly show any prejudice from Plaintiffs' failure

to provide notice. Plaintiffs' initial motion—filed more than four months before their renewed motion—was the functional equivalent of the 30-day notice that Defendants incorrectly claim is required, and provided them ample notice of their noncompliance. Under these circumstances, the Court can, and should, excuse any technical noncompliance with any notice requirement. *See B & P Enters. v. Overland Equip. Co.*, 758 A.2d 1026, 1040–41 (Md. Ct. Spec. App. 2000) (excusing failure to provide notice of breach of contract when the opposing party had actual notice of its breach and suffered no prejudice from the lack of notice).

CONCLUSION

Four and a half years of abject failure is enough. The Court should grant Plaintiffs' Motion to enforce the Settlement Agreement, and should extend its term for two years, to June 22, 2024, so that there is some chance that Plaintiffs will, at long last, receive the benefits Defendants promised them years ago.

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Respectfully submitted,

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