UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 3:00-CV-210-S
	)	
SUNRISE CHILDREN'S SERVICES, INC., F/K/A KENTUCKY BAPTIST HOMES FOR CHILDREN, INC., *et al.*,	)	**Electronically Filed**
	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL WITH PREJUDICE AND APPROVAL OF SETTLEMENT AGREEMENT AS A CONSENT DECREE

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Plaintiffs Alicia M. Pedreira, Paul Simmons, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant (collectively, "Plaintiffs") respectfully move for voluntary dismissal of this action with prejudice and incorporation of the parties' settlement agreement into the Court's order of dismissal as a consent decree. Counsel for Defendants Vicki Yates Brown Glisson, Secretary of the Kentucky Cabinet for Health and Family Services, and John Tilley, Secretary of the Justice and Public Safety Cabinet (together, the "Commonwealth Defendants"), and counsel for Sunrise Children's Services, Inc., formerly known as Kentucky Baptist Homes for Children, Inc. ("Sunrise"), received notice of this motion and were asked whether they consent to the requested relief, but they did not respond.

INTRODUCTION

This Court should—once again—grant Plaintiffs' motion for voluntary dismissal of this action with prejudice and incorporate the Settlement Agreement into the Court's order of dismissal. The Court already granted this relief once, finding the Settlement Agreement—by which the Commonwealth Defendants agreed to certain reforms of Kentucky's public childcare program to ensure compliance with the First Amendment's Establishment Clause—to be consistent with the public interest and not unfair to Sunrise. Mem. Opinion (Doc. # 527). In its opinion, the Court rejected Sunrise's argument that the requested order retaining jurisdiction over the Settlement Agreement was "tantamount to a Consent Decree." *Id*. at 10-12. The Court nevertheless concluded that the Settlement met the standards for a consent decree because it was "legal, not a product of collusion, nor contrary to the public interest." *Id*. at 6.

Sunrise appealed and the Sixth Circuit vacated this Court's dismissal order on the sole ground that the dismissal order is a consent decree. *Pedreira v. Sunrise Children's Servs., Inc.* ("*Pedreira II*"), 802 F.3d 865, 872 (6th Cir. 2015), *cert. denied*, 2016 WL 561747 (U.S. May 23,

2016) (No. 15-1021). The Sixth Circuit remanded for further proceedings so that this Court may decide—in a clear holding, not just a statement that could be viewed as dicta—whether the Settlement is "fair, adequate, and reasonable, as well as consistent with the public interest." *Id.* (internal quotation marks and citation omitted). It is. The Settlement Agreement delivers important statewide reforms to prevent the use of taxpayer funds to support religious indoctrination, coercion, and proselytization of—as well as religious discrimination against—children in the Commonwealth's public child-care system. In its prior ruling, this Court recognized the reasonableness of the Settlement Agreement and lack of unfairness to Sunrise, finding the Settlement is "no[t] contrary to the public interest." Mem. Opinion at 6 (Doc. # 527).

Further, although the Sixth Circuit "flag[ged] one concern" for this Court to consider on remand—namely, whether the Settlement unfairly "single[d] out" Sunrise by exposing it to "special monitoring" (*Pedreira II*, 802 F.3d at 872)—Plaintiffs and the Commonwealth Defendants already have addressed that concern. Promptly after the Sixth Circuit's decision, Plaintiffs and the Commonwealth Defendants amended the Settlement Agreement to eliminate any purported "singling out" of Sunrise. Under the Settlement Agreement as amended, there is no "special monitoring" of Sunrise. Rather, the Commonwealth Defendants will provide monitoring materials to Plaintiffs' counsel only for those childcare providers that are the subject of a state investigation over religious complaints. Thus, although Plaintiffs firmly maintain that the Settlement Agreement—as originally executed—was reasonable, fair, and did not unfairly "single out" Sunrise, the amended Settlement Agreement dispels any such concerns.

Finally, although Kentucky's newly-elected Governor has indicated that he will oppose this motion and the underlying Settlement Agreement—and is apparently directing the Commonwealth Defendants to do so as well—this Court should not countenance any such

politically driven about-face, especially after a decade and a half of litigation and years of settlement negotiations and indeed settlement performance. The Commonwealth Defendants signed a binding contract, the Settlement Agreement, in which they agreed not only to undertake the important reforms to the Commonwealth's childcare system, but also to support voluntary dismissal before this Court. Any attempt by the Commonwealth Defendants to renege on that agreement following the recent gubernatorial election, would be a flagrant breach of that contract. The Commonwealth Defendants have—for years—represented that the Settlement Agreement is reasonable, fair, and consistent with the public interest. The Commonwealth Defendants unreservedly sought this Court's approval of the Settlement Agreement in 2013 and 2014, and then defended this Court's decision on appeal to the Sixth Circuit, urging the Sixth Circuit to conclude that the Agreement was fair, reasonable, and consistent with the public interest. The Settlement Agreement remains fair, reasonable, and consistent with the public interest. In fact, in light of its amendment, the Settlement has become only *more* fair and *more* reasonable since this Court previously incorporated it into the original dismissal order. Further, it is unclear whether the Governor, as opposed to the Kentucky Attorney General, can properly speak for the Commonwealth Defendants in this matter. In all events, any transparent, politically driven U-turn by the Commonwealth Defendants should be rejected.

Because the Settlement Agreement is fair, adequate, reasonable, and consistent with the public interest, the Court should grant Plaintiffs' motion, voluntarily dismiss this action with prejudice, and incorporate the Settlement Agreement into its order of dismissal as a consent decree. And if it finds one necessary, this Court should schedule an evidentiary hearing through which Plaintiffs can demonstrate the adequacy, reasonableness, and fairness of the Settlement Agreement.

BACKGROUND & PROCEDURAL HISTORY

A. Plaintiffs' Establishment Clause Funding Claim

Plaintiffs are four Kentucky taxpayers. Sunrise is a private, religiously affiliated organization that contracts with the Commonwealth of Kentucky to provide services for children in the Commonwealth's custody. Sunrise operates residential facilities for children and also facilitates foster-care placements. Since 2000, Sunrise has received more than $100 million in state funds.

Plaintiffs commenced this action in 2000, asserting that the Commonwealth Defendants violated the Establishment Clause by funding Sunrise.[1] Since that time, the issue of Plaintiffs' standing has been litigated extensively, with the Sixth Circuit twice confirming that Plaintiffs have standing as state taxpayers to assert their Establishment Clause funding claim. *See Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 579 F.3d 722, 732-33 (6th Cir. 2009) ("*Pedreira I*"); *Pedreira II*, 802 F.3d at 870.

In discovery, Plaintiffs uncovered extensive evidence of religious proselytization, coercion, and discrimination at Sunrise facilities. For instance, Plaintiffs received the results of an independent third-party's one-on-one exit interviews with children leaving Sunrise residential facilities or foster-care placements. *See* KBHC Exit Interview Results, Doc. ## 274-2, 274-3. Over the five-year period for which Plaintiffs received these interview results, at least 85 different children—including children at every Sunrise residential facility and in every foster-care region statewide—complained of religious misconduct. *See id.* Notably, all of these

[1] Plaintiffs also asserted claims against Sunrise for unlawful discrimination against actual and potential employees on the basis of religion in violation of the Kentucky Civil Rights Act and Title VII of the Civil Rights Act of 1964. Doc. # 1. The Court dismissed these employment-discrimination claims on July 23, 2001 (Doc. ## 53, 54), and the Sixth Circuit upheld that dismissal in 2009. *Pedreira I*, 579 F.3d 722.

complaints post-date the filing of this lawsuit, covering a time when Sunrise knew that its religious practices would be scrutinized. *See id.* The children's complaints include:

- Child "was not allowed to practice own religion. They tried to more or less force me to become a Christian."
- Child "did not have a choice when or when not to attend religious services. Required, if you didn't go you had to clean up or go to group."
- Child "was not allowed to choose when or when not to attend a religious service because 'had to do some type of Bible study during that time or get consequences.'"
- Child "did not have a choice when or when not to attend religious services because 'forced to go to church [or] would be dropped to level 1 and sit in chair.'"
- Child "was not allowed to practice own religion. Child state[s] you had to go or you got in trouble."
- Child "did not have a choice when or when not to attend religious services. 'If you did not go you got into trouble.'"
- Child "did not have a choice when or when not to attend religious services. Child states made to go to specific church, restrictions if you resist."
- Child reported that "if you did not go to church you had [to] s[i]t out in the van."

Id.

Discovery revealed additional misconduct by Sunrise. In letters soliciting donations and other support from churches and church parishioners, Sunrise repeatedly referred to its foster families as "in-home missionaries" and stated that Sunrise foster parents "are not performing social work — they are performing Kingdom work." KBHCPOD29049 (Doc. # 522-8); *see also id.* ("In 2008, Sunrise placed a special focus on our foster families as 'in-home missionaries.'"); *id.* at KBHCPOD 29051 ("Individuals and families across Kentucky have the opportunity to become foster parents, or 'in-home missionaries.'"); *id.* at KBHCPOD 29052 ("Are you called to become an in-home missionary as a foster parent through Sunrise Children's Services? You can provide children in need with the hope and healing that comes only through the love of Christ.");

id. at KBHCPOD 29054 (Sunrise places children "in our foster or 'In-Home Missionaries' homes."); *id.* at KBHCPOD 29056 ("These 'in-home missionaries' are willing to care for the kids . . . ."); *id.* at KBHCPOD 29057 ("Consider joining this group of in-home missionaries.").

B. The Settlement Agreement

On March 12, 2013, after more than a year of extensive negotiations with the assistance of the Magistrate Judge, and thirteen years after this case was filed, Plaintiffs and the Commonwealth Defendants executed the Settlement Agreement, which consensually resolved all claims between them. *See* Settlement Agreement (attached as **Exhibit A**) (also at Doc. # 502-2). Sunrise was involved in some of the negotiations, but it is not a party to the Agreement.

The Settlement Agreement seeks to prevent Sunrise and every other publicly funded private residential facility and private foster-care placement agency statewide ("private childcare providers" or "providers") from engaging in religious indoctrination, proselytization, and coercion of—as well as religious discrimination against—children in Kentucky's public childcare system. To do so, the Agreement requires the Commonwealth Defendants to make various modifications to their procedures for providing care to children through these private providers, including Sunrise. *Id.* § 2. Among other modifications, the Commonwealth Defendants must make certain changes to their standard two-year agreements with private providers, referred to as the "PCC Agreements." The Commonwealth Defendants included the agreed-upon changes in the PCC Agreements that they entered into with private providers—including Sunrise—in mid-2014. *Id.*

The Settlement Agreement forbids private childcare providers from:

- "discriminat[ing] in any manner against any child based on the child's religious faith or lack of religious faith or the child's failure to conform to any religious tenet or practice";

- "requir[ing], coerc[ing], or pressur[ing] any child in any manner to attend religious services or instruction or to otherwise engage in or be present at any activity or programming that has religious content";
- "impos[ing] any form of punishment or benefit based on a child's voluntary decision as to whether to participate in or attend any religious service or instruction or any other activity or programming that has religious content";
- "proselytiz[ing] any child in any religious beliefs"; and
- "requir[ing] any child to pray or to participate in any form of prayer, or to attend any form of prayer that is organized, led, or otherwise sponsored or promoted, by the Agency."

Id. § 2(f). Providers also are barred from placing religious items in children's rooms without their consent, and religious materials are to be given only to children who request such materials. *Id.* § 2(e). And providers must offer comparably attractive non-religious activities to children who do not wish to attend any religious services that are made available to children who desire such services. *Id.* § 2(d)(ii).

Additionally, before placing a child with a religiously affiliated private provider, the Commonwealth Defendants must inform children and parents of the proposed provider's religious affiliation, and if the child or parent objects, the Commonwealth Defendants must endeavor to provide an alternative placement, except in special circumstances. *Id.* § 2(a). During intake and placement, the Commonwealth Defendants also must prepare records, to be given to providers, concerning children's religious preferences. *Id.* §§ 2(a), (c). Further, the Commonwealth Defendants and private providers are required to inform children, parents, and guardians of the protections created by the Settlement Agreement, and of contact information for a state official to complaint to if a child, parent, or guardian believes these provisions have been violated. *Id.* § 2(b). The Commonwealth Defendants must also provide employees of private

childcare providers with written training materials relating to the Agreement's provisions, and the providers are required to ensure that all their employees read these materials. *Id.* § 2(g).

The Settlement Agreement requires the Commonwealth Defendants to monitor *all* private childcare providers, including Sunrise, to ensure that they are not religiously proselytizing or coercing the children in their care, and are otherwise complying with the terms mandated by the Agreement. *Id.* § 3. Each child, before leaving a placement, is to complete an anonymous exit survey relating to the child's religious experiences at that placement. *Id.* § 2(h). State employees also must interview children about the same issues at least annually. *Id.* § 2(i). The Commonwealth Defendants' monitoring also includes review of religious-activity logs that private providers must maintain. *Id.* § 2(d)(iii).

The Settlement Agreement requires the Commonwealth Defendants, in certain circumstances, to notify the Office of Inspector General ("OIG") within the Cabinet for Health and Family Services of reports—obtained through the settlement-mandated monitoring—concerning religious coercion, discrimination, or proselytization by private providers. *Id.* §§ 2(h), (i). The Commonwealth Defendants must then notify Plaintiffs' counsel of the results of any OIG investigation into such reports. *Id.* § 3(b). With respect to any provider subject to an OIG investigation, the Commonwealth Defendants must provide monitoring materials to Plaintiffs' counsel. *Id.*

Under the Settlement Agreement as originally executed, the Commonwealth Defendants agreed to provide to Plaintiffs' counsel all monitoring materials concerning children placed at Sunrise for seven years, even if Sunrise was not the subject of an OIG investigation. *Id.* § 3(a).

Plaintiffs and the Commonwealth Defendants agreed to enforce the Settlement Agreement exclusively in this Court. *Id.* § 9. To ensure access to the federal forum, the

Agreement provided for the parties—Plaintiffs and the Commonwealth Defendants—to seek voluntary dismissal of this action with prejudice through an order incorporating the Agreement and retaining jurisdiction to enforce it. *Id*. § 6. Plaintiffs also released any claims based on conduct before the effective date of the Agreement (*id*. § 7), and agreed to mandatory informal dispute resolution with respect to any claims based on future conduct for a period of seven years (*id*. § 10).

C. This Court's Decision Granting Voluntary Dismissal

On September 20, 2013, after the Settlement Agreement was executed and finalized, Plaintiffs moved to voluntarily dismiss this action with prejudice pursuant to the Agreement. Doc. # 512. Sunrise opposed Plaintiffs' motion (Doc. # 514), and also simultaneously filed its own motion to dismiss, arguing that Plaintiffs lacked state-taxpayer standing (Doc. # 513).

The Commonwealth Defendants filed their own, separate response in *support* of Plaintiffs' motion in which they rebutted each one of Sunrise's arguments. Doc. # 521; *see also* Doc. # 522 (Plaintiffs' reply). The Commonwealth Defendants urged this Court to grant dismissal and incorporate the Settlement Agreement into the dismissal order, describing the Settlement as an "attempt to remedy the alleged constitutional violations identified in Plaintiffs' Complaints by strengthening already existing provisions ensuring that children's religious rights are being protected and reasonably accommodated, without proselytization or coercion. Again, the Settlement Agreement actually *preserves* the relationship that was threatened by the litigation, while attempting to ensure that taxpayer funds (directly or indirectly) are not used in violation of the Establishment Clause." Comm. Defs.' Resp. at 9 (Doc. # 521) (emphasis in original).

On June 30, 2014, this Court granted Plaintiffs' motion to voluntarily dismiss, and denied Sunrise's motion to dismiss for lack of standing. Doc. # 527. The Court's order of dismissal incorporated the Settlement Agreement and retained jurisdiction to enforce it. Doc. # 528.

In its Memorandum Opinion, the Court first observed that, because Sunrise was not, and could never be, a party to any Establishment Clause claim, Sunrise's arguments that it would be "unduly burdened or unfairly impacted by the settlement are unavailing." Mem. Opinion at 6 (Doc. # 527). The Court nevertheless went on to address the heart of Sunrise's objections: "In any event, we address a number of [Sunrise's] contentions herein to illustrate that this Settlement, negotiated at arms-length, is legal, not a product of collusion, ***nor contrary to the public interest***." *Id*. (emphasis added); *see also id*. at 14 (finding that "even under the judicial approval framework for consent decrees, the court would find that the agreement . . . operates to further the objectives of the law upon which the complaint is based") (internal quotation marks and citation omitted). Accordingly:

- The Court found that the Agreement does not subject Sunrise to a "Hobson's Choice"; rather, it presents Sunrise with a "business choice," as Sunrise and all other child-care providers may choose whether to enter into PCC contracts with the Commonwealth. *Id*. at 7.

- The Court found that the Agreement does not "single out" Sunrise because "[t]he plaintiffs also seek review of documentation concerning any other facility with whom a complaint is lodged concerning religious choice." *Id*. at 8.

- The Court found that the Agreement does not expose Sunrise to "public stigma" because, in the Agreement itself, the Commonwealth Defendants categorically deny any and all liability for its dealings with Sunrise. *Id*. at 7-8.

- The Court found that the Agreement's document-disclosure provisions are designed to permit monitoring of the Commonwealth Defendants (not Sunrise)—"[t]hat is, whether the Commonwealth defendants are advising, conferring, and documenting, as required by the Agreement." *Id*. at 8.

The Court also held that the Settlement Agreement was not "tantamount to a consent decree" because it did not require judicial approval and continual monitoring, it precluded contempt findings, and it limited enforcement to specific performance. *Id*. at 10-12.

Finally, the Court held that Plaintiffs have state taxpayer standing, and thus denied Sunrise's motion to dismiss for lack of standing. *Id*. at 12-15.

D. The Sixth Circuit's Decision on Appeal

Sunrise appealed this Court's dismissal order, arguing again that Plaintiffs lacked standing and that the Settlement Agreement was improper. Plaintiffs and the Commonwealth Defendants filed a joint brief in the Sixth Circuit, arguing that Plaintiffs have standing and that this Court's dismissal order was proper. *See* Brief of Appellees (Doc. # 36) (App. No. 14-5879, 6th Cir.). Plaintiffs and the Commonwealth Defendants thus represented to the Sixth Circuit that the Settlement Agreement "is eminently fair, adequate, reasonable, and consistent with the public interest." *Id*. at 42.

In October 2015, the Sixth Circuit affirmed the denial of Sunrise's motion to dismiss for lack of standing. *Pedreira II*, 802 F.3d at 870. The Sixth Circuit, however, held that this Court's dismissal order incorporating the Settlement Agreement is, in fact, a consent decree. *Id*. at 871-72. Accordingly, the Sixth Circuit held that this Court must confirm that the Settlement Agreement is "fair, adequate, and reasonable, as well as consistent with the public interest." *Id.* at 872 (quoting *United States v. Lexington-Fayette Urban Cty. Gov't*, 591 F.3d 484, 489 (6th Cir. 2010)). Although the Sixth Circuit observed that this Court "did go on briefly to address in dicta whether the agreement was fair to Sunrise," the Sixth Circuit nevertheless vacated the dismissal order in light of this Court's prior conclusion that the order was not a consent decree. *Id*. at 872. The Sixth Circuit remanded the case to this Court to "first address these questions in earnest."

Id. The Sixth Circuit did not "express any opinion as to the matters discussed by [this Court] in its dicta concerning the decree's fairness to Sunrise." *Id*.

The Sixth Circuit did "flag one concern" for this Court to consider on remand: whether the Settlement "singles out Sunrise by name for special monitoring," and thus "subjects Sunrise to unique reputational harm." *Id*. The Sixth Circuit stated that a consent decree "that did not, directly or indirectly, single out Sunrise in this manner would stand on different ground than the decree as it comes to us here." *Id*.[2]

E. The Amendment to the Settlement Agreement

On November 18, 2015, shortly after the Sixth Circuit's decision, Plaintiffs and the Commonwealth Defendants executed an amendment to the Settlement Agreement for the express purpose of alleviating the potential "concern" identified by the Sixth Circuit of "singling out" Sunrise for "special monitoring." *See* First Am. to Settlement Agreement at Recitals B, C (attached as **Exhibit B**). In the Amendment, Plaintiffs and the Commonwealth Defendants agreed to eliminate all monitoring provisions that applied to Sunrise alone. The parties agreed that the Commonwealth Defendants will now provide monitoring materials only for those child care providers who are the subject of a state investigation concerning the provider's religious practices. *Id*. § 1 (modifying Sec. 3(a)). For each such provider, the Commonwealth Defendants will provide to Plaintiffs' counsel the same types of monitoring materials that they had to provide concerning Sunrise under the original Agreement. *Id*. Thus, the Settlement Agreement as amended contains no "special monitoring" of Sunrise.

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[2] Judge Black (sitting by designation) dissented, stating his belief that the order incorporating the Settlement Agreement was not a consent decree, that this Court already "found that the settlement agreement was fair," and that this conclusion was "no abuse of discretion." *Pedreira II*, 802 F.3d at 873 (Black, J., dissenting).

Additionally, in the Amendment, Plaintiffs and the Commonwealth Defendants "agree[d] to file a joint motion" in this Court requesting approval of the Settlement Agreement as amended, dismissal of the suit with prejudice, incorporation of the Settlement Agreement into the Court's order of dismissal, and retention by the Court of jurisdiction to enforce that order. *Id.* § 2. The Parties also "agree[d] to cooperate and take any additional actions as may be reasonably necessary to obtain such relief." *Id.*

Finally, in the Amendment, Plaintiffs and the Commonwealth Defendants agreed that, other than the terms changed by the Amendment, "all terms of the Settlement Agreement shall remain in full force and effect, and the Parties shall continue to comply with the Settlement Agreement, as amended herein, including during the pendency of any further proceedings in, or relating to dismissal of, the Lawsuit." *Id.* § 4.

F. The Commonwealth Defendants' Apparent U-Turn

Sunrise petitioned for rehearing on the issue of Plaintiffs' standing, and the Sixth Circuit denied the petition on November 12, 2015. The Sixth Circuit then granted Sunrise's motion to stay the mandate to permit Sunrise to file a petition for a writ of certiorari to the Supreme Court (Doc. # 51 (App. No. 14-5879, 6th Cir.)), and Sunrise filed its cert petition in February 2016.

On April 11, 2016, Plaintiffs' counsel received a letter from the Office of the Kentucky Governor, Matt Bevin. *See* Letter from M.S. Pitt. (April 11, 2016) (attached as **Exhibit C**). In that letter, the Governor's Office stated that, in light of the recent change in administration, the Governor's Office had undertaken a "fresh appraisal of pending litigation, including this case." *Id.* at 1. The Governor's Office stated that it has now concluded that the Settlement Agreement is no longer binding on the Commonwealth, and that the Governor's Office does not believe the Settlement Agreement is fair, reasonable, or consistent with the public interest. *Id.* at 2. The

Governor's Office stated that it does not believe the Settlement Agreement "can or should be pursued on remand to the district court." *Id*. at 4. Two days later, on April 13, 2016, the Governor's Office filed a brief in the Supreme Court, purportedly on behalf of the Commonwealth Defendants, in *support* of Sunrise's cert petition on the issue of Plaintiffs' standing, taking positions directly contrary to what the Commonwealth Defendants had previously asserted to this Court and the Sixth Circuit. *See Sunrise Children's Servs, Inc., v. Glisson*, Brief of Kentucky Respondents in Support of Petitioner (Apr. 13, 2016) (No. 15-1021).

On April 21, 2016, Plaintiffs responded to the letter from the Governor's Office, rejecting that office's arguments, declaring the Commonwealth Defendants in breach of the Settlement Agreement, and informing the Governor's Office that Plaintiffs would move forward with seeking approval of the Settlement Agreement in this Court, as required by that Agreement's express terms. *See* Letter from D. Bergman (Apr. 21, 2016) (attached as **Exhibit D**).

On May 23, 2016, the Supreme Court denied Sunrise's cert petition. *See Sunrise Children's Servs., Inc. v. Glisson*, No. 15-1021, 2016 WL 561747 (U.S. May 23, 2016). The Sixth Circuit issued the mandate on May 26, 2016. Doc. # 55 (App. No. 14-5879, 6th Cir.).

Accordingly, in compliance with the Settlement Agreement as amended, Plaintiffs are hereby filing a motion for approval of the Settlement Agreement and dismissal of the suit.

ARGUMENT

I. The Settlement Agreement Should Be Approved as a Consent Decree

A. Standards for Approval of Consent Decree

The Sixth Circuit has held that an order incorporating the Settlement Agreement and retaining jurisdiction to enforce it would be a consent decree. *See Pedreira II*, 802 F.3d at 872. "The criteria to be applied when a district court decides whether to approve and enter a proposed

consent decree, are whether the decree is fair, adequate, and reasonable, as well as consistent with the public interest." *Lexington-Fayette*, 591 F.3d at 489 (internal quotation marks and citation omitted). In applying this standard, the Sixth Circuit has emphasized that "public policy generally supports a presumption in favor of voluntary settlement of litigation," and that this presumption is "particularly strong" when one of the parties that negotiated and entered into the consent decree is a government entity. *Id*. at 490 (internal quotation marks omitted).

While a district court's decision to adopt a court-enforceable settlement is reviewed for abuse of discretion (*United States v. Cty. of Muskegon*, 298 F.3d 569, 581 (6th Cir. 2002)), the Sixth Circuit has reversed when district courts refused to enter consent decrees that satisfied the standards set forth above. *See, e.g.*, *Lexington-Fayette*, 591 F.3d at 491 (reversing district court's disapproval of consent decree that was fair and reasonable, where disapproval was based on reasons in tension with policy underlying relevant statute); *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351-52 (6th Cir. 1986) (reversing district court's refusal to enter settlement as a result of baseless demands made by a party to the lawsuit but not the settlement).

Other circuits similarly have followed the maxim that "a district court should be chary of disapproving" a consent decree agreed to by the settling parties. *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 890 (7th Cir. 1985); *see also, e.g.*, *United States v. North Carolina*, 180 F.3d 574, 581-82 (4th Cir. 1999) (reversing district court's disapproval of consent decree); *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1356 (9th Cir. 1990) (reversing district court's refusal to enter consent judgment because district court incorrectly concluded that settlement was illegal); *Donovan v. Robbins*, 752 F.2d 1170, 1183 (7th Cir. 1985) (reversing district court's decision to deny, for invalid reasons, entry of consent decree); *SEC v. Randolph*, 736 F.2d 525, 530 (9th Cir. 1984) (reversing district court's disapproval of consent decree where

court improperly substituted its judgment on whether settlement was in public interest for judgment of settling government agency).

B. The Settlement Agreement Is Fair, Adequate, Reasonable, and Consistent with the Public Interest

The Settlement Agreement meets—and exceeds—the governing criteria: It is fair, adequate, reasonable, and consistent with the public interest. The Agreement delivers important reforms to prevent the use of public funds to support religious indoctrination, coercion, and proselytization of—as well as religious discrimination against—children in Kentucky's public childcare system. Indeed, in its prior dismissal order, this Court found that the Settlement Agreement was legal, not unfair to Sunrise, and "no[t] contrary to the public interest." The same conclusion applies equally, if not more so, today.

Because the Court is already intimately familiar with the terms of the Settlement Agreement (*see* Mem. Opinion at 2-5 (Doc. # 527); *supra* 6-9), Plaintiffs will not belabor its provisions here. Suffice it to say the Agreement delivers important reforms to prevent the use of public funds to support religious indoctrination, coercion, and proselytization of—as well as religious discrimination against—children in Kentucky's public childcare system. The Agreement mandates that *all* private childcare providers statewide must agree—through their contract with Kentucky (the PCC Agreement)—not to engage in such conduct. The Agreement requires *the Commonwealth Defendants* to monitor providers' compliance, and it establishes

mechanisms for the Commonwealth Defendants to do so.[3] The Agreement establishes an additional layer of monitoring for any provider found to have engaged in prohibited conduct. In sum, the Settlement Agreement ensures that taxpayer dollars are not used to support religious indoctrination or proselytization of children, and prevents public funding of private childcare providers that permeate their programming with religion. This is eminently fair, adequate, reasonable, and consistent with the public interest.

Moreover, the Settlement Agreement, as amended, eliminates all monitoring that would apply to Sunrise alone, and thus alleviates the only potential concern flagged by the Sixth Circuit. Under the original Settlement Agreement, for a period of seven years, all of Sunrise's monitoring materials were to be made available to Plaintiffs' organizational counsel on an annual basis to help ensure the Commonwealth Defendants' compliance with the Settlement Agreement with respect to Sunrise. *See* Ex. A § 3(a). While this Court previously concluded that such monitoring was not unfair to Sunrise (*see* Mem. Opinion at 6 (Doc. # 527)), the Sixth Circuit "flag[ged]" this issue as a "concern" with the Settlement Agreement. *Pedreira II*, 802 F.3d at 872. The Sixth Circuit noted the Settlement Agreement "singles out Sunrise by name for special monitoring," which Sunrise has contended "subjects Sunrise to unique reputational harm." *Id.*

[3] As a key part of this monitoring, each child before leaving a placement will complete an anonymous exit survey relating to the child's religious experiences at that placement. Ex. A § 2(h). As described above, a similar program that had interviewed children identified numerous instances where young people placed with Sunrise complained about being forced to attend Baptist services or said that they were not permitted to attend services of other faiths. But that program was cancelled in 2008. *See* Doc. ## 274-2 and 274-3. In addition to exit surveys, the Commonwealth Defendants' monitoring of Agencies will include review of religious-activity logs maintained by Agencies (Ex. A § 2(d)(iii)), periodic surveys of children conducted by state social workers (*id.* § 2(i)), and other materials prepared by the Commonwealth Defendants in connection with intake and placement of children in the system (*id.* §§ 2(a), (c)).

The Sixth Circuit stated that "[a] decree that did not, directly or indirectly, single out Sunrise in this manner would stand on different ground than the decree as it comes to us here." *Id.*

The Settlement Agreement as amended does not single out Sunrise, directly or indirectly, for any special monitoring. Rather, it places Sunrise on equal footing with all other providers in the Commonwealth. The Commonwealth Defendants have agreed to provide to Plaintiffs' counsel monitoring materials for *only* those providers that are the subject of a state investigation concerning the provider's religious practices. *See* Ex. B at § 1 (modifying Sec. 3(a)). If any provider, including Sunrise, is or becomes the subject of such an investigation—which would be based only on evidence adduced *after* the Effective Date of the Settlement Agreement—that provider's monitoring materials will be provided to Plaintiffs' counsel. *Id.* The same trigger for monitoring applies equally to all childcare providers in the Commonwealth. *Id.*

In fact, uniform monitoring of all childcare providers who become subject to a state investigation was a component of the original Settlement Agreement. This Court recognized as much in its prior opinion, correctly rejecting Sunrise's unfairness argument by observing that "plaintiffs also seek review of documentation concerning *any other facility with whom a complaint is lodged* concerning religious choice . . . [T]he Commonwealth defendants have agreed to permit the plaintiffs to monitor the Commonwealth defendants' compliance with the agreed procedures in its future dealings, if any, with *any and all PCC-contracting entities*, including Sunrise." Mem. Opinion at 8 (Doc. # 527) (latter emphasis added). In the amendment, the parties agreed to (a) drop all Sunrise-specific monitoring, and (b) expand the types of

monitoring materials provided to Plaintiffs' counsel after there is an investigation of a childcare provider. Ex. B at § 1 (modifying Sec. 3).[4]

Accordingly, while Plaintiffs continue to agree with this Court's prior conclusion that the original Settlement Agreement did not unfairly single out Sunrise, the Agreement as amended removes any potential doubt as to fairness. The Agreement now treats all providers equally.

C. The Commonwealth Defendants' Apparent U-Turn Is In Direct Violation of the Settlement Agreement and Should Be Rejected

For a three-year period following more than a decade of litigation, the Commonwealth Defendants urged this Court and then the Sixth Circuit to dismiss this case and incorporate the Settlement Agreement into the dismissal order. In so doing, the Commonwealth Defendants specifically represented that the Settlement Agreement "***is eminently fair, adequate, reasonable, and consistent with the public interest***." Brief of Appellees (Doc. # 36) (No. 14-5879, 6th Cir.) (emphasis added). Now, it appears Kentucky's newly-elected Governor opposes this motion and the underlying Settlement Agreement, and is apparently directing the Commonwealth Defendants to do the same. This Court should reject this transparently political U-turn.

The Settlement Agreement is a binding and enforceable contract, signed by the Commonwealth Defendants. It mandates that—after the Settlement Agreement's Effective Date—the parties to the Agreement jointly seek this Court's dismissal of this suit with prejudice, incorporation of the Agreement into the dismissal order, and retention of jurisdiction to enforce

[4] In the original Settlement Agreement, when there was an investigation into a non-Sunrise provider, the Commonwealth Defendants would provide monitoring materials to Plaintiffs' counsel only for those children who made or were the subjects of any complaints that triggered the investigation. Ex. A § 3(a). In the amended Settlement Agreement, when there is an investigation into any provider, the Commonwealth Defendants will provide monitoring materials to Plaintiffs' counsel for all children placed with that provider. Ex. B § 1 (modifying Sec. 3(a).

the order. Ex. A § 6(a). Moreover, although the Sixth Circuit vacated this Court's prior order incorporating the Settlement Agreement into its dismissal order, the Sixth Circuit did *not* purport to vacate the Agreement itself. It merely remanded the case to this Court for a decision on whether the Agreement is adequate, fair, reasonable, and consistent with the public interest. *See Pedreira II*, 802 F.3d at 872. Further, in the Amendment, the parties reaffirmed their obligation to seek this Court's approval of the Settlement Agreement, as amended, after the Sixth Circuit issued its mandate. Ex. B § 2. Thus, the Commonwealth Defendants are obligated to support approval of the Settlement Agreement.

To the extent the Commonwealth Defendants refuse to support court approval of the Settlement Agreement as amended, they are in breach of that Agreement. As a remedy for that breach, Plaintiffs are entitled to specific performance—*i.e.*, an order compelling the Commonwealth Defendants to support court approval of the Settlement Agreement. *See* Ex. A § 9. Additionally, the Commonwealth Defendants are liable for Plaintiffs' attorneys' fees incurred in enforcing the Settlement Agreement because the Commonwealth Defendants' breach is willful and intentional; Plaintiffs reserve all rights to seek such fees at an appropriate time. *Id*.

Moreover, although the Governor's Office now objects to the Settlement, it is not clear whether that office has the authority to speak for the Commonwealth Defendants in this matter. Kentucky law provides that it is the Kentucky Attorney General (an elected official in his own right), and not the Kentucky Governor, who represents Kentucky state agencies and officials (such as the Commonwealth Defendants) in civil litigation:

> The Attorney General is the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions, and the legal adviser of all state officers, departments, commissions, and agencies. . . . [He] shall also commence all actions or enter his

> appearance in all cases, hearings, and proceedings in and before all other courts, tribunals, or commissions in or out of the state, and attend to all litigation and legal business in or out of the state required of him by law, or in which the Commonwealth has an interest, and *any litigation or legal business that any state officer, department, commission, or agency may have in connection with, or growing out of, his or its official duties,* except where it is made the duty of the Commonwealth's attorney or county attorney to represent the Commonwealth.

Ky. Rev. Stat. Ann. § 15.020 (emphasis added); *see also* Kentucky Attorney General's Office Website, at "Office of Civil and Environmental Law," *available at* http://ag.ky.gov/civil/civil-enviro/Pages/default.aspx ("The Office of Civil and Environmental Law represents Kentucky state agencies and officials who are parties in civil or administrative actions."). Accordingly, the Court should simply disregard the arguments presented by Kentucky Governor's Office.

* * *

The existing, voluminous record in this case amply supports a finding that the Settlement Agreement is fair, adequate, reasonable, and consistent with the public interest. This finding is supported not only by this Court's prior conclusions, but also by the Commonwealth Defendants' own prior representations as to the virtue of the Settlement Agreement. However, if the Court does not believe it can grant this motion based on the existing record, Plaintiffs would be entitled to and would request an evidentiary hearing. *See Pedreira II*, 802 F.3d at 872 (noting that the district court "must allow anyone affected by the decree to present evidence and have its objections heard") (internal quotation marks and citation omitted). At such a hearing, Plaintiffs

would have an opportunity to present evidence to the Court demonstrating that the Settlement Agreement is fair, adequate, reasonable, and consistent with the public interest.[5]

CONCLUSION

After more than a decade of hard-fought litigation, Plaintiffs and the Commonwealth Defendants reached a commonsense settlement that consensually resolves the only claim remaining in the case—Plaintiffs' Establishment Clause claim against the Commonwealth Defendants. The Settlement Agreement ensures that taxpayer dollars are not used to support religious indoctrination or proselytization of children, and prevents public funding of private childcare providers that operate in a pervasively sectarian manner. And the Amendment to the Settlement Agreement eliminates any purported "special monitoring" of Sunrise. This is eminently fair, adequate, reasonable, and consistent with the public interest. Accordingly, the Court should grant the present motion and dismiss Plaintiffs' claims with prejudice, incorporate the Settlement Agreement into its order of dismissal, and retain jurisdiction to enforce it.

[5] For example, in its letter to Plaintiffs, the Governor's Office took the position that the Amendment to the Settlement Agreement is invalid because it was allegedly "executed by an attorney without express authority from her client." Ex. C at 2. But the Settlement Agreement was executed by Mona Womack, the Deputy General Counsel of the Kentucky Cabinet for Health and Family Services. *See* Ex. A. Ms. Womack has appeared in this matter as counsel of record for the Commonwealth Defendants since mid-2014 (Doc. # 536), and appeared as counsel of record in the most recent Sixth Circuit appeal. In the event the Governor's Office maintains its position before this Court, Plaintiffs would request an opportunity to take discovery (prior to any evidentiary hearing) into the circumstances surrounding the execution of the Amendment, including all communications between Ms. Womack, her clients, and any other persons concerning the Amendment. Those communications have been put squarely in issue by the Governor's Office. Plaintiffs would then request an opportunity to present evidence to the Court to demonstrate that the Amendment was, in fact, validly executed.

Dated: June 27, 2016

Respectfully submitted,

/s/ David B. Bergman

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2016, I electronically filed this document with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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