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' AND THE COMMONWEALTH DEFENDANTS' JOINT MOTION FOR VOLUNTARY DISMISSAL WITH PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a)(2), Plaintiffs Alicia M. Pedreira, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant (collectively, "Plaintiffs") and Defendants Eric Friedlander, in his official capacity as the Secretary of the Cabinet for Health and Family Services, and Justice Mary Noble, in her official capacity as the Secretary of the Justice and the Public Safety Cabinet (collectively, the "Commonwealth Defendants"; together with Plaintiffs, the "Parties") jointly and respectfully move to voluntarily dismiss this action in its entirety with prejudice.

INTRODUCTION AND RELEVANT BACKGROUND

As the Court well knows, this lawsuit is more than twenty years old. In 2012—after years of motions practice, appeals, and discovery disputes—the Parties entered into a settlement agreement under which the Commonwealth Defendants agreed to make certain changes to their agreements with private childcare providers (known as PCC agreements) to protect the religion-related rights of children in the Commonwealth's care. At the Parties' request, the Court dismissed the case with prejudice, incorporated the settlement agreement into its order of

dismissal, and retained jurisdiction to enforce the agreement. DN 527. The Sixth Circuit vacated that decision, holding that this Court should have analyzed the settlement under the standards applicable to a consent decree, which the dismissal order was because "the court expressly retained jurisdiction to enforce compliance with the settlement's terms; and by incorporating the settlement into the court's own dismissal order, the court gave its imprimatur to the settlement's terms." *Pedreira v. Sunrise Children's Servs.*, 802 F.3d 865, 871 (2015). On remand, this Court declined to enter the settlement as a consent decree, concluding that while Kentucky law prohibited certain provisions of the agreement from being implemented unless they were incorporated in new or modified regulations, the agreement contemplated implementation of those provisions without enactment of such regulations. DN 588. The Sixth Circuit affirmed last year. 826 F. App'x 480 (2020).

On January 29, 2021, Plaintiffs and the Commonwealth Defendants executed a new settlement agreement ("2021 Settlement") (attached as Exhibit 1) that cures each of the defects of the prior agreement and fully disposes of Plaintiffs' claims. Under the 2021 Settlement, the Commonwealth Defendants have agreed to pursue new regulations in good faith and in accordance with the laws governing the Commonwealth's rulemaking process, and the relevant provisions of the agreement do not take effect unless and until such regulations are adopted, which fully cures the defect identified in the Sixth Circuit's 2020 decision. *See Pedreira*, 826 F. App'x at 495-96. Further, the Parties do *not* seek to have this Court retain jurisdiction to enforce the 2021 Settlement's terms; nor do the Parties seek to have the Court incorporate the 2021 Settlement as part of the Court's order of dismissal, which cures the defect identified in the Sixth Circuit's 2015 decision. *See Pedreira*, 802 F.3d at 871. Unlike the prior agreement, the 2021 Settlement is a purely private contract between Plaintiffs and the Commonwealth Defendants, binding on the parties to it alone, and it will not be incorporated into any order of the Court or

subject to ongoing jurisdiction or supervision of any kind by the Court. Instead, all the Parties ask is that the Court enter an unqualified order of voluntary dismissal with prejudice. The 2021 Settlement is thus fully consistent with this Court's and the Sixth Circuit's prior decisions. It also marks the end of this long-running litigation and any dispute between the Parties.

Sunrise has no legitimate basis to oppose this motion. For one, this Court has previously recognized—and the Sixth Circuit has agreed—that the Court cannot force Plaintiffs to litigate claims that they wish to voluntarily dismiss *with prejudice*. *See* DN 527 at 5, 6 & n.5, 9 (discussing *Smoot v. Fox*, 340 F.2d 301, 302-03 (6th Cir. 1964)); *Pedreira*, 802 F.3d at 871; *see also* DN 505 at 3; DN 572 at 11; DN 603 at 1. That holding alone requires granting this motion. Beyond that, as this Court already held, Sunrise has no legally cognizable interest in forcing this decades-old litigation to proceed against the wishes of the Parties and in the face of a binding settlement agreement. DN 527 at 6; *see also* DN 505 at 3; DN 572 at 11; DN 603 at 1. The 2021 Settlement does not impose *any* legal duties or obligations on Sunrise, and there is no longer any claim in the case against Sunrise. Indeed, as Sunrise admits, it has "refused to sign" the private childcare agreement offered to it by the Commonwealth. DN 630 at 2. And the Commonwealth is no longer placing any children with Sunrise. DN 625 at 2. To the extent Sunrise opposes any regulations that the Commonwealth Defendants eventually propose or enact, Sunrise can raise its objections through the rulemaking process or in any other manner permitted under Kentucky law.

After twenty years, this litigation is finally over. There is no remaining dispute between Plaintiffs and the Commonwealth Defendants—or between Plaintiffs and Sunrise. And there is nothing left for this Court to do but to enter an order of dismissal with prejudice and to direct the Clerk to close the case. This motion for voluntary dismissal with prejudice should be granted.

ARGUMENT

1. Under Rule 41(a)(2) of the Federal Rules of Civil Procedure, after an answer or a motion for summary judgment has been filed, and absent a stipulation by all parties who have appeared, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." But under controlling Sixth Circuit precedent, where, as here, a plaintiff requests dismissal of an action in its entirety *with prejudic*e, a court has no discretion to deny the request. *Smoot v. Fox*, 340 F.2d 301 (6th Cir. 1964). "For [over] fifty years, the Sixth Circuit and district courts therein have interpreted the discretionary language in [Rule 41] to apply *only* where the plaintiff has moved to dismiss the case *without* prejudice. . . . [W]hen the plaintiff has moved to dismiss the Complaint *with* prejudice, the district court *must* dismiss the Complaint." *D & M Millwork, Inc. v. Elite Trimworks Corp.*, 2:08-0101, 2010 WL 547154, at *2 (M.D. Tenn. Feb. 10, 2010) (citing *Smoot*, 340 F.2d at 302-03) (emphasis added).

In *Smoot*, the Sixth Circuit explained: "No case has been cited to us, nor have we found any, where a plaintiff, upon his own motion, was denied the right to dismiss his case with prejudice." *Id.* "We know of no power in a trial judge to require a lawyer to submit evidence on behalf of a plaintiff, when he considers he has no cause of action or for any reason wishes to dismiss his action with prejudice, the client being agreeable." *Id.* at 303. Indeed, as this Court already recognized in this case, "[d]ismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties. An adjudication in favor of the defendants, by court or jury, can rise no higher than this." DN 527 at 5-6 (quoting *Smoot*, 340 F.2d at 302).

The Sixth Circuit in *Smoot* explained why it makes no sense to deny a plaintiff's motion to voluntarily dismiss an action in its entirety with prejudice, as Plaintiffs are doing here. Litigation is time-consuming and expensive, and "a trial with an unwilling plaintiff, even if it

could be enforced, would be an expensive luxury. Our District Courts are over-crowded with pending cases . . . . Our district judges have no time to conduct useless trials." 340 F.2d at 303. The Sixth Circuit thus held that it is "an abuse of discretion . . . to deny [a] plaintiff's motion for dismissal of [an] action[] with prejudice." *Id.* As far as Plaintiffs and the Commonwealth Defendants are aware, since the Sixth Circuit's decision in *Smoot*, neither the Sixth Circuit nor any district court in the Sixth Circuit has ever denied a plaintiff's Rule 41(a)(2) motion seeking voluntary dismissal of an action in its entirety with prejudice.[1] And this Court previously rejected Sunrise's contention that some exception to *Smoot* might exist. *See* DN 527 at 6 n.5.

Nor do this Court's or the Sixth Circuit's prior opinions in this case prevent the Court from dismissing this case with prejudice under *Smoot*. Unlike the prior agreement, the 2021 Settlement is not a consent decree under the Sixth Circuit's 2015 decision because it does not

[1] *See Burpo v. Algoma Steel Corp.*, 772 F.2d 905, 1985 WL 13565, at *2 n.3 (6th Cir. 1985) ("Smoot upheld a plaintiff's prerogative to dismiss with prejudice.") (unpublished table decision); *Miami Valley Fair Hous. Ctr., Inc. v. Steiner & Assocs., Inc.*, 3:08-CV-150, 2012 WL 4052024, at *2 (S.D. Ohio Sept. 13, 2012) ("Sixth Circuit case law establishes that the Court must grant a plaintiff's motion pursuant to Rule 41(a)(2) to voluntarily dismiss its claims against a defendant with prejudice."), *report and recommendation adopted sub nom. Miami Valley Fair Hous. Ctr., Inc. v. Comm'r of Soc. Sec.*, 3:08-CV-150, 2012 WL 4757875 (S.D. Ohio Oct. 4, 2012); *Jernigan v. CL Bros. Trucking, Inc.*, 2:06-CV-53, 2010 WL 2389548, at *6 (E.D. Tenn. June 8, 2010) ("'[A] court has no discretion and must grant the motion . . . .'") (quoting *York v. Ferris State Univ.*, 36 F. Supp. 2d 976, 979 (W.D. Mich. 1998)); *Michigan Millers Mut. Ins. Co. v. Fidelity & Deposit Co. of Maryland*, No. 1:09-cv-596, 2010 WL 4684006, at *1 (W.D. Mich. Oct. 21, 2010) ("The Sixth Circuit has held that if a plaintiff moves for voluntary dismissal with prejudice, the district court must grant the request."); *Warner v. DSM Pharma Chems. N. Am., Inc.*, 1:07-CV-302, 2009 WL 1347162, at *3 (W.D. Mich. May 13, 2009) ("It is generally considered to be an abuse of discretion for a court to deny a request for voluntary dismissal with prejudice."), *aff'd*, 452 F. App'x 677 (6th Cir. 2011); *Lum v. Mercedes Benz, USA, L.L.C.*, 246 F.R.D. 544, 545 (N.D. Ohio 2007) ("It generally is considered an abuse of discretion for a court to deny a plaintiff's request for voluntary dismissal with prejudice."); *Degussa Admixtures, Inc. v. Burnett*, 471 F. Supp. 2d 848, 851 (W.D. Mich. 2007) (same), *aff'd*, 277 F. App'x 530 (6th Cir. 2008); *RMS Servs.-USA, Inc. v. Houston*, 06-15585, 2007 WL 1058922, at *1 (E.D. Mich. Apr. 4, 2007); *Bridgeport Music, Inc. v. London Music, U.K.*, 345 F. Supp. 2d 836, 841 (M.D. Tenn. 2004) ("[I]t is an abuse of discretion for a Court to refuse to grant such a dismissal with prejudice . . . ."), *aff'd*, 226 F. App'x 491 (6th Cir. 2007); *United States v. Estate of Rogers*, 1:97-CV-461, 2003 WL 21212749, at *1 (E.D. Tenn. Apr. 3, 2003) ("If a plaintiff moves under Rule 41(a)(2) to voluntarily dismiss its complaint with prejudice, the district court must grant the motion."), *aff'd sub nom. United States v. Alpha Med., Inc.*, 102 F. App'x 8 (6th Cir. 2004).

provide for the Court to "retain jurisdiction to enforce compliance with [its] terms" or to "incorporat[e] the settlement into the court's own dismissal order." *Pedreira*, 802 F.3d at 865. And, unlike the prior agreement, the 2021 Settlement raises no state-administrative-law problems. The 2021 Settlement expressly provides that the Commonwealth Defendants will initiate the process of enacting or modifying regulations to implement the settlement's terms, and it expressly recognizes that the Commonwealth Defendants cannot guarantee the promulgation of any regulation. *See* 2021 Settlement § 6. As Sunrise recognizes, the rulemaking process will be subject to public notice and comment, and "it is literally impossible for [the] Commonwealth Defendants to assert now that the proposed regulations are sure to be adopted." DN 630 at 6-7. But Plaintiffs have agreed to dismiss this lawsuit *now* and *with prejudice* in exchange for the Commonwealth Defendants' agreement to pursue those regulations in good faith and in compliance with Kentucky law. *Smoot* is thus directly on point and controlling, and the Court must grant Plaintiffs' motion for voluntary dismissal with prejudice.

2. Even if dismissal were not compelled by *Smoot*, Sunrise has no basis to object to the voluntary dismissal of this case with prejudice. As this Court previously held:

> Although it earnestly desires to receive its "day in court," Sunrise has no ground to prevent the voluntary dismissal with prejudice of this action. The Establishment Clause claim, the only claim stated in the Second Amendment Complaint, was brought against the Commonwealth defendants, and Sunrise has asserted no claims here. Despite the fact that this Establishment Clause claim was premised upon certain factual allegations concerning Sunrise's actions while under contract with the Commonwealth, relief for the purported Establishment Clause violation was sought as against the Commonwealth defendants only. No such claim could be maintained against Sunrise. Thus Sunrise's suggestions that it is unduly burdened or unfairly impacted by the settlement are unavailing.

DN 527 at 6.[2] All of that remains true today.

[2] Although the Court's prior order was vacated by the Sixth Circuit, the court of appeals upheld this Court's reasoning with regard to Sunrise's interests and its inability to prevent

Footnote continued on next page

If anything, Sunrise's interests in this litigation are even *less* concrete than when the Court and the Sixth Circuit issued their prior opinions. The 2021 Settlement does not "single[] out Sunrise by name for special monitoring" or "subject[] Sunrise to unique reputational harm," as the Sixth Circuit feared the first version of the prior agreement might. *See Pedreira*, 802 F.3d at 872. And Sunrise has refused to sign the PCC agreement offered by the Commonwealth, DN 630 at 2, and the Commonwealth is no longer placing any children with Sunrise, DN 625 at 2.

More fundamentally, dismissal with prejudice is the *same relief* that Sunrise requests in its pending summary-judgment motion. *See Pedreira*, 802 F.3d at 870 ("A dismissal with prejudice 'operates as a final adjudication on the merits and has a res judicata effect.'" (quoting *Warfield v. AlliedSignal TBS Holdings, Inc.*, 267 F.3d 538, 542 (6th Cir. 2001))); DN 527 at 5-6 ("Dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties. An adjudication in favor of the defendants, by court or jury, can rise no higher than this." (quoting *Smoot*, 340 F.2d at 302)). As the Sixth Circuit noted in 2015, "[w]hat Sunrise appears to want is not merely an order from the district court dismissing this case with prejudice, but a published opinion from this court holding the plaintiffs' claims invalid as a matter of law." *Id.* at 871. But, as the Sixth Circuit concluded before, Sunrise is simply not entitled to a decision on the merits now that Plaintiffs have settled their claims against the Commonwealth Defendants and seek to voluntarily dismiss this lawsuit with prejudice. *See id.* ("That the district court did not posture this case for such an opinion was not an abuse of discretion.").

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voluntary dismissal of this litigation *with prejudice*. *See* 802 F.3d at 870-71. Rather, the Sixth Circuit's opinion was based entirely on its holding that the prior settlement was a consent decree. *See* 802 F.3d at 872. As explained above, the 2021 Settlement is not a consent decree.

Finally, to the extent that Sunrise has substantive or procedural objections to any regulations that the Commonwealth Defendants eventually propose or adopt, it will be free to raise those objections through the avenues provided for in Kentucky's rulemaking process. As Sunrise recognizes, "the Commonwealth Defendants' proposed regulations will be subjected to a period of public notice and comment." DN 630 at 6 (citing KRS 13A.270). Sunrise will be free to participate in that process, if it chooses, including by submitting comments on any proposed regulations. Furthermore, any regulations the Commonwealth Defendants do approve will be subject to oversight by the Kentucky legislature. *Id.* at 7 (citing KRS 13A.290; KRS 13A.331). The proper manner for Sunrise to raise its objections is by participating in this rulemaking process, not by attempting to force Plaintiffs and the Commonwealth Defendants to continue to litigate a suit that they have settled.

CONCLUSION

For the foregoing reasons, the Court should grant this motion and enter an order of voluntary dismissal with prejudice.

Dated: February 23, 2021

Respectfully submitted,

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