

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CONSUMER ADVISORY BOARD, et al,)	
)	
Plaintiffs)	
)	
v.)	Civil No. CV-91-321-GZS
)	
BRENDA HARVEY, et al.)	
)	
)	
Defendants)	

**PLAINTIFFS’ OPPOSITION TO DEFENDANTS’
MOTION FOR RELIEF FROM JUDGMENT**

I. INTRODUCTION

It is neither necessary nor possible to recount in detail all that has preceded the Defendants’ filing of the pending Motion. It is enough to say at this point that the Motion cannot be granted on this record in light of the history. Plaintiff’s fundamental contention is that this Motion is legally untenable and ought to be denied for that reason.

It is important to have very clearly in mind what this Motion is and what this Motion is not. It is not a Motion asking this Court to find that the negotiated express conditions of this Decree have been met. The Special Master’s “Final Report” shows that the conditions have not yet been met.

Instead, in apparent violation of this Court’s scheduling and procedural orders, the Defendants abandoned the collaborative effort on which the Parties have been working for years, refused to negotiate further about a “Next Court Order” and instead asked this Court to rule that the entire Decree should be vacated. Defendants apparently intend that every one of these Class

Members will no longer have judicially enforceable rights to the services and supports they have been promised in this Consent Decree, and in large measure have been receiving, as a direct consequence of violations of their constitutional rights while incarcerated at Pineland. This is a Motion to expunge the Decree, to eliminate any of its remedial requirements. As will be made clear below, Defendants cannot demonstrate that it would be inequitable to continue delivery of services and supports to these Class Members. Indeed, the Motion makes no effort to prove the elemental facts necessary to permit the Court to grant it.

Either outcome on this Motion, of course, will leave us with the question of what to do next. The Defendants have shattered the relationship of trust and collaboration that both sides had nurtured for many years. It is difficult to imagine how that relationship can be restored after the Defendants' unilateral choice to abandon it by filing this Motion. After denial of this Motion, it will be necessary for the Court to consider additional prescriptive or directive orders to the Defendants to bring about full substantial compliance and to assure that the mechanisms of future substantial compliance meet the negotiated standards in this Decree.

It is also imperative to recognize the operational limit of any decision in Defendants' favor. If the Court grants this Motion, the only consequence will be to vacate the Consent Decree. Rule 60(b)(5) and the Motion say nothing about dismissing the case. That would leave the Parties (quite unfairly from the Plaintiffs' point of view) in the positions they occupied in 1993, after this Court refused to dismiss this Complaint and before these Parties negotiated this Decree. It would be highly prejudicial to require these Plaintiffs now to try their case, but the granting of this Motion can have no other procedural consequence than to prepare for trial on the merits.

Additionally, Plaintiffs respectfully suggest that there may be issues relating to the law of evidence. Findings made by the Special Master in Reports formally filed with the Court presumably are fact findings that may not be challenged on any ground other than staleness or change of circumstance. Both sides, presumably, have waived certain objections to those findings they might otherwise have made in a less collaborative, more adversarial, process. Those findings do not warrant granting this Motion; they require its denial to the extent they are relevant. These Defendants have failed to offer to the Court any evidence of any change of circumstance that could be sufficient to vacate the Decree under even the flexible view of Rule 60(b)(5) articulated by the Supreme Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) and *Horne v. Flores*, 557 U.S. 129 S.Ct. 2579 (2009).

Plaintiffs have done their best in the time available to present admissible evidence, such as the affidavits of (former) Commissioner Kevin Concannon, Mary Lou Dyer, Charlene Kinnelly and others that are attached as Exhibits. Plaintiffs have assumed that Defendants will stipulate to the authenticity of various e-mails, memoranda, reports and other documents appended to Plaintiffs' filing in Exhibits B, D, G, J, K and L, and Plaintiffs have no doubt that these matters are admissible notwithstanding the hearsay rule, either because they constitute verbal acts or because they constitute admissions. This evidence warrants denial of the Motion. If Defendants now want to challenge any of the evidence being submitted with this Opposition, Plaintiffs respectfully request that the Court develop and implement a process for permitting the evidentiary technicalities to be met with respect to evidence submitted herewith.

For all the reasons set forth below, as supported by the Exhibits, Plaintiffs respectfully urge the Court to deny this Motion and take whatever steps are necessary to induce or compel

these Defendants to comply with the express negotiated terms of the Community Consent Decree.

II. LEGAL ARGUMENT

Rule 60(b)(5) has three subparts. Only one has any application in this case. That part codifies the Chancery Court’s traditional and inherent power to modify or vacate a decree having prospective effect, if the party bound by that decree sustains the significant burden of showing that continued performance of the decree’s requirements will be “no longer equitable.”

Defendants’ Motion must be denied as a matter of law because: (1) Defendants failed to make any credible arguments based on equitable considerations and offered no evidence to support a determination in their favor based on the equities of this case; and (2) the Rule should not be applied to displace the contractually agreed-upon arrangements specifying the conditions and procedures for terminating the Decree. The Decree itself, and not the Rule, sets the terms and conditions for its termination. The Motion contains not one word as to why it would be “no longer equitable” to follow the negotiated Decree provisions specifically governing its termination.

If the Motion is not denied as a matter of law, it must be denied as a matter of fact because the equities of the case overwhelmingly favor the Class Members, and because Defendants have offered no evidence that continued enforcement of the Decree would be “no longer equitable.”

A. Defendants’ request for relief on the basis that the Decree has been “satisfied, released or discharged” must be denied because that provision has no application to this case.

The authority to grant relief under Rule 60(b)(5) when “the judgment has been satisfied, released, or discharged” applies only to judgments for money damages or other judgments with

no prospective effect. *Gibbs v. Maxwell House*, 738 F.2d 1153, 1155 (11th Cir. 1984)(“Rule applies only when “damages are paid before trial or a tortfeasor or obligor has paid the judgment debt.”). Because money judgments do not have prospective application they may not be set aside under Rule 60(b)(5). *In re Fine Paper Antitrust Litig.*, 840 F.2d 188, 195 (3d Cir. 1988) (“[W]hile Rule 60(b)(5) authorizes relief from judgments such as injunctions which are prospective in operation, judgments at law for damages are inherently final.”).

Relief under this part of Rule 60(b)(5) is instead proper when “a party seeks entry of satisfaction of judgment because no acknowledgment of satisfaction has been delivered due to an ongoing dispute over the judgment amount.” *Zamani v. Carnes*, 491 F.3d 990, 995 (9th Cir. 2007). Relief may also be available to enforce partial satisfaction of the judgment. *Id.* (citing *Sunderland v. City of Philadelphia.*, 575 F.2d 1089, 1090-1091 (3d Cir. 1978)). Because the Decree is an injunction with prospective application, this part of the Rule offers no basis for relief.

B. Defendants’ request for relief on the basis that it is no longer equitable to apply the Decree prospectively must be denied because Defendants’ reliance on *Horne v. Flores* is misplaced, the terms of the Decree governing termination must be honored, and Defendants have failed to meet their burden of demonstrating the requisite change of circumstances.

The only part of the Rule that is relevant to Defendants’ Motion provides that relief may be granted from a judgment when “applying it prospectively is no longer equitable.” Fed.R.Civ.P. 60(b)(5). This part of the Rule “encompasses the traditional power of a court of equity to modify its Decree in light of changed circumstances.” *Frew v. Hawkins*, 540 U.S. 431, 441 (2004). In essence, it is a codification of the inherent power of courts to modify injunctions that they have issued. *See United States v. Swift & Co.*, 286 US 106 (1932). “A continuing decree of injunction directed to events to come is subject always to adaptation as events may

shape the need.” *Id.* at 114. In *Swift*, the court concluded that a consent decree entered after years of litigation should be changed only upon a showing of “grievous wrong evoked by newly and unforeseen conditions.” *Id.* at 119.

Defendants contend, and Plaintiffs acknowledge, that recently the Supreme Court has developed a more flexible standard for permitting modification, particularly in cases involving institutional reform decrees, when changed circumstances make compliance “substantially more onerous,” “unworkable because of unforeseen obstacles,” or “harmful to the public interest.” *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). The party seeking relief has the burden of proving that changed circumstances warrant the court’s exercise of its equity powers under the rule. *Horne v. Flores*, 557 U.S. ___, 129 S.Ct. 2579, 2593 (2009). As is explained in more detail below, Defendants interpretation of *Horne* must be rejected because it completely disconnects the Rule from its origins in equity. Defendants’ Motion also makes no effort to prove any facts that would permit the Court to find that the *Rufo* standard has been met.

1. Defendants’ request for relief relies on a fundamental misinterpretation of dicta in *Horne v. Flores*.

The essence of the Defendants’ argument is that the Supreme Court pronounced a new rule in *Horne* requiring relief from judgment whenever there is no longer a continuing violation of federal law. “[A]s made clear in *Horne v. Flores*, the parties cannot use a federal court order to continue to bind defendants in the absence of an ongoing violation of federal law.”

Defendants’ Memorandum at 13. This is a clearly erroneous statement of law.

By its own terms, the decision in *Horne v. Flores* did not vacate the District Court’s injunction; it only vacated the District Court’s denial of a motion for relief from judgment under Rule 60(b)(5). It did not order the District Judge on remand to vacate the District Court injunction. The opinion provides direction for the District Judge on remand to reconsider or to

consider more fully arguments being presented by those defendants as to why that decree should be terminated. *Horne*, 129 S.Ct. at 2607.

Nowhere in *Horne* does the Supreme Court state that it is establishing a new standard, substantially altering the existing standard, or overruling any past decisions, including *Rufo*. Rather, the Supreme Court made clear it was directing the District Court to apply the standard adopted in *Rufo* to the peculiar facts of that case. When that analysis is undertaken in this case, the Court will be hard pressed to conclude that it is inequitable to continue this Consent Decree until it is terminated in an orderly fashion in accordance with its own negotiated terms.

There are multiple differences between the circumstances in *Horne v. Flores* and the circumstances in the case at bar. First and perhaps of dispositive significance, the Community Consent Decree is a consent decree. The order under attack in *Horne v. Flores* was not a consent decree, but had been entered by the District Court over the vigorous objection of the defendants. Consideration of what is equitable as between the parties to a consent decree is inherently different in centrally important respects from consideration of what may be equitable as between contesting litigants. *See* Subsection 2, *infra*.

Second, *Horne v. Flores* involved a decree that was breathtakingly prescriptive. Significantly, it ordered the appropriation and expenditure of state funds. Our Consent Decree, by contrast, sensitively recognizes that appropriations are a legislative prerogative and, therefore, with their consent, the Executive Branch Defendants in this case have been ordered by the Court only to identify and monetize the needs of the Class Members and present requests to the Governor. Our Decree does not order the Governor or the Legislature to do anything.

Third, the District Court in *Horne* entered an injunction enjoining the defendants to achieve compliance with a federal statute only by implementing specific measures of the Court's own design, which the Supreme Court found to be "drastic." *Horne*, 129 S.Ct. at 2607.

Courts must remain attentive to the fact that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or . . . flow from such a violation." *Milliken v. Bradley*, 433 U.S. 267, 282, 97 S. Ct. 2749, 53 L. Ed. 2d 745. Thus, a critical question in this Rule 60(b)(5) inquiry is whether the EEOA violation underlying the 2000 order has been remedied. If it has, the order's continued enforcement is unnecessary and improper. Pp. 10-14. *Horne*, 129 S.Ct. at 2586.

Accordingly, the question of a "continuing violation" of the EEOA became a central focus in determining whether there was a continuing need for the drastic remedy. That question is not transferable to the facts of this case, or any case involving a consent decree with contractually promised remedies that "flow from" earlier violations of federal law. To require a continuing violation of the underlying federal law in such cases would not only do violence to the contract between the parties and frustrate the federal court's authority to sustain its own decrees, it would ignore centuries of equity jurisprudence.

It is well established that a federal court may enter and enforce decrees that impose *remedial* obligations beyond the *primary* obligations directly imposed by the federal law upon which its jurisdiction rests, so long as the decree "*springs from* a federal dispute and *furtheres the objectives* of federal law." *Frew v. Hawkins*, 540 U.S. 431, 438 (2004)(emphasis added) (citing *Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986)). In *Rufo*, the court makes clear that consent decrees are enforceable federal law even when they create obligations *that go beyond* the statutory or constitutional violation that is being remedied by the decree.

Federal Courts may not order states or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated. We have no doubt that, "to save themselves the time, expense, and inevitable risk of litigation," petitioners could settle the dispute over

the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires. (Almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also more than what a court would have ordered absent the settlement. Accordingly, the District Court did not abuse its discretion in entering the agreed-upon decree, which clearly was related to the conditions found to offend the Constitution. *Rufo*, 502 U.S. at 389.

That issue did not arise in *Horne*, because the sole purpose of that judgment was to order *primary ongoing* compliance with the EEOA. There was no negotiated remedy for past violations. Had the District Court in *Horne* entered an Order requiring only specific remedial measures for previous violations for the benefit of an identified group of students, the Supreme Court probably would never have taken the case. The only obligation exceeding obligations imposed by the EEOA itself was the District Court's prescriptive plan for achieving compliance. If the District Court finds on remand that Defendants can prove that they are complying with the EEOA in a different manner, and have a viable plan of their own for a durable compliance into the future, there will be no further need for the District Court's "drastic" plan.

In contrast, there has never been any doubt in this case about the appropriateness of the Decree's remedies. Defendants contractually agreed to them and have continuously confirmed and reaffirmed them over the past 15 years. It has never been doubted and it cannot be doubted now that this is a *remedial* Decree that "flows from" the original constitutional violations and is a Federal Court Order that springs from a federal dispute and furthers the objectives of the Constitution itself by providing meaningful remedies for the victims of plainly unconstitutional treatments. Defendants do not and cannot suggest that the Class Members do not need the services and supports that are documented as needs in Defendants' own records. The fact that Defendants' original violations of the constitutional rights of the Class Members are not ongoing today is minimally necessary for Defendants to begin the argument, but is not enough to support

the granting of this Motion. “To hold otherwise would completely eviscerate the central purpose of consent decrees, which is to enable parties to avoid the expense and risk of litigation while still obtaining the greater enforceability (compared to an ordinary settlement agreement) that a court judgment provides.” *Jeff D. v. Kempthorne*, 365 F.3d 844, 852 (9th Cir. Idaho 2004)(citations omitted); *United States v. Jupiter Aluminum Corp.*, 2009 U.S. Dist. LEXIS 83807 (N.D. Ind. Sept. 14, 2009) (denying relief on a showing of no continuing violation of federal regulations, notwithstanding *Horne*) .

In simplest terms, a federal court decree entered over objection, for the sole purpose of compelling defendants to come into compliance on an ongoing basis with primary statutory obligations, is fundamentally different from a negotiated consent decree, carefully designed to provide remedies for previous constitutional violations. The Supreme Court’s insight, that a highly prescriptive District Court plan for achieving *primary* compliance may be superfluous or improper if primary compliance is in fact being otherwise achieved, is immaterial to the analysis presented by the pending Motion, which is only whether carefully negotiated *remedial* provisions may now be abandoned by these Defendants, apparently for no better reason than the misplaced hope that *Horne v. Flores* may be applied here, notwithstanding its fundamental differences.

This case does not present the federalism concerns that animated the Supreme Court’s analysis in *Horne*. Federalism and public interest concerns arise in “institutional reform litigation because such decrees ‘reach beyond the parties involved directly in the suit and impact on the public’s right to the sound and efficient operation of its institutions.’” *Rufo* 502 U.S. at 381 (citing *Heath v. DeCoursey*, 888 F.2d 1105, 1109 (6th Cir. 1989)). The judgment in *Horne* reached far beyond the few students needing English language education in one school district to

all such students in *all* Arizona school districts. The intended beneficiaries include children not yet attending school including those not yet born. The *Horne* judgment imposed detailed operational requirements on all Arizona schools for an indefinite time. The same can be said for the inmates in *Rufo*. In this case, the institution is closed and there can be no concern about federal judges meddling improperly in the management of Pineland. It is thankfully gone. Moreover, the Consent Decree does not directly reach beyond the original Parties to the case. The remedy chosen by the Parties is limited in time and scope and does not directly benefit or burden persons who are not individually identified.

The class in *Horne v. Flores* was large and potentially growing. The District Judge, at the request of the Attorney General, apparently took a case involving a single school district and issued a state-wide injunction. But apart from the geography, the members of a class of school children are constantly changing and in a relatively short period of time, all of the plaintiffs and original class members will have moved on and the decree will affect the education of persons who might not even have been born when the case began. Our Class is a closed Class of identified individuals who were unlawfully incarcerated at Pineland and who in far too many instances suffered abuse and neglect there. Their individual constitutional rights were undeniably violated. The Defendants have twice consented to the entry of Decrees in this Court to remedy those constitutional violations. The remedies were consciously designed to endure for specifically identified individuals for their lifetimes. *See* Affidavit of Commissioner Kevin Concannon, Exhibit A, ¶ 5.

There is nothing in *Horne v. Flores* which suggests that a specific remedial plan for a defined class of individuals may not require the delivery of future services and supports after the constitutional violation that precipitated the settlement has ceased. The converse of that

proposition would be facially implausible. The suggestion apparently is that a federal court may not order any form of remedy for a violation of law, except its cessation. The jurisdiction of the federal courts has never been so narrowly construed in any published opinion of any Court. *See, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388; 91 S.Ct. 1999, Harlan J. concurring (1971). In *Rufo*, the Supreme Court clearly rejected any such limitation and *Horne* essentially reaffirms *Rufo*. 520 U.S. at 389.

While the remedy for past harms in this case is in the form of in-kind future services, the prospective effect on the Defendants is limited; it is limited in scope to the specified Class Members, and is limited in time by the duration of the lives of the Class Members. At the time the Consent Decree was entered, the Class comprised a finite known group of approximately 1,300 individuals, each of whom had suffered constitutional violations at the hands of the State. In the past fourteen years, the Class has diminished almost in half to 755, the majority of whom are of advanced ages. In contrast, the prospective effects of the judgment in *Horne* and the consent decree in *Rufo*, like most institutional reform decrees and judgments, are *unlimited*. Their intended beneficiaries change from day-to-day and may increase, not decrease, in number; and the obligations can bind the State defendants in perpetuity.

Contrary to Defendants' apparent hope, *Horne v. Flores* does not automatically put an end to all of the decrees in all of the courts, whether entered by consent or after contest, to vindicate the rights of those whose rights have been violated. The most that it does in this case is to reinforce the Court's obligation to balance with care the asserted equities being advanced by these Defendants at this late date, having due regard for issues of federalism to be sure, but also having due regard to the legitimate interests of these Plaintiffs and traditional principles of reliance, estoppel and judicial finality.

At the end, this is not really a debate about *whether or not* the Department's activities with respect to these Plaintiffs should continue much longer under active Court supervision, through the Special Master or otherwise. This is a question about *when and how* the Court's active supervision will end and whether or not the promises these Defendants and their predecessors made to these Plaintiffs may now be completely abandoned because of a single 5-4 decision of the Supreme Court, remanding a quite different case for further consideration.

Because Defendants rely entirely on an erroneous interpretation of *Horne*, their Motion should be denied as a matter of law. *Horne* does not have the meaning or effect claimed by Defendants. A correct reading of the *Horne* decision is that the flexible approach established by *Rufo* is alive and well and requires a consideration of all the equities in light of all facts and circumstances. Defendants have not really made a case beyond their invocation of *Horne* as a kind of legal trump card, but Plaintiffs nevertheless review the equities in Subsection 3 below.

2. Defendants' request for relief must be denied because the Decree terms and contractual arrangements between the parties governing termination of the Decree must be honored.

The Decree specifies three conditions that must be met for this Decree to be terminated. It is this contractually agreed-upon arrangement for termination from which Defendants are truly seeking relief. Because the arrangement must be honored, the Motion should be denied. In the alternative, the Court should not grant relief unless the Defendants can show that the changed circumstances specifically make it no longer equitable to apply the arrangement negotiated by the parties for terminating the Decree. *See, Johnson v. Sheldon*, 2009 U.S. Dist. LEXIS 90050 (M.D. Fla. Sept. 30, 2009) (the Court "must honor the parties' agreement regarding how to determine when the Consent Decree should be terminated" notwithstanding the recent decision in *Horne*).

If this Motion is to be decided as a matter of fact with respect to the Defendants' assertions concerning changed circumstances, it will be imperative to consider carefully the extent to which the circumstances are external to the activities of the Parties or merely incomplete performance of the Decree itself, and it will be crucially important with respect to the contractual nature of this arrangement to consider when the asserted changes of circumstances occurred, relative in time to when the Defendants agreed in principle to the Next Court Order as part of the negotiated mechanisms of future compliance.

Defendants are bound by a judicially enforceable contract specifying the conditions set forth in Section IV(7) of the Decree for termination. They also negotiated specific agreements for satisfying those conditions. Specific arrangements were negotiated and partially performed for how the first condition ("substantial compliance in a numerical sense") and the third condition ("mechanisms of future compliance") would be met. It has long been assumed that Defendants' good faith commitment to these arrangements for satisfying two of the conditions would serve to satisfy the other condition, a "demonstrable commitment to achieving compliance."

It is well-established contract law that the parties' course of performance is highly probative of the meaning of their agreement with respect to their rights and obligations. Restatement Second of Contracts § 202(4). It is significant that, in 1998, the Defendants made another motion to terminate the Decree and to be absolved of its obligations. The Attorney General suggested, and the Plaintiffs agreed, that it would be preferable to have a professional audit done by a recognized expert, instead of burdening the Parties and the Court with days of evidentiary detail to attempt to assess the state of compliance at that time. The Parties agreed to engage Clarence J. Sundram, Esq., whose credentials and reputation cannot be questioned. Mr.

Sundram delivered his audit report in 2000. In a conference with counsel, Magistrate Judge David Cohen characterized Mr. Sundram's audit report as "this indictment." That day, the State withdrew its Motion. That day, Magistrate Judge Cohen advised counsel that he would recommend to Judge Carter that Mr. Sundram be appointed Special Master to assist the Parties to achieve compliance. That occurred, and the Order of Reference is a matter of record.

Under the guidance of the Special Master, the Parties developed standards and procedures for assessing and determining the state of compliance. The Parties agreed upon a set of certifications, capturing the truly important provisions of the Decree and setting out the basic process whereby the Commissioner would certify and offer evidence of compliance, after which the Plaintiffs could agree or bring challenges. After any challenge, the Parties would negotiate and conduct appropriate investigation or discovery, after which the Special Master would rule. This process occurred over a period of many years in a highly collaborative fashion, with no suggestion by the Defendants that the process was illegitimate or unconstitutional or illegal or inappropriate. That course of performance, as an elementary matter of contract interpretation, forecloses any argument at this point about what these Defendants are obligated to do, both as a matter of contractual promise and as a matter of authoritative interpretation of this Court's Decree, entered with consent of these Parties.

Over four years ago, the Parties began negotiations over the question of how Defendants can satisfy the third condition, having in place sufficient mechanisms of future compliance. In June 2007, the Parties reached agreement on a package of legislation and a draft Federal Court Order (referred to by the Parties as "the Next Court Order"). A detailed factual description of the course of negotiation and performance with regard to the Next Court Order is documented in Exhibit B.

This course of negotiation and partial performance establishes a contractual arrangement between the Parties for interpreting and implementing Section IV(7) of the Decree. There can be no doubt that the Class: 1) has made numerous concessions and accommodations with the Defendants over the past six years in consideration for the Defendants' agreement to the certification standards and proceedings, the legislation and the Next Court Order; 2) the Class has relied on Defendants' statements and representations about their commitment to these arrangements; and 3) and the Class Members have been unfairly prejudiced to their detriment by Defendants' disavowal of these arrangements. Had the Class known Defendants would disavow all further obligation to the class and breach their agreement, the Class would not have agreed to the legislation and would have challenged a number of findings in the certifications of the APS system, advocacy system, and the person-centered planning system.

When the Court considers the equities of this case, it must weigh the history of these proceedings; the history of continuous noncompliance; and the Defendants' inducements to gain Plaintiffs' trust in the collaborative process. Defendants not only stood by while Class Counsel sent more than one official Notice to the Class about the Next Court Order, but they reviewed and approved the Notices and actually drafted the text of one Notice. Exhibit B, ¶¶ B-14, B-22. Defendants also participated in the twelve hearings between August 10 and August 20, 2009 at which Class Members, guardians, correspondents and other interested parties asked questions and expressed concerns about the Next Court Order. *Id.*, ¶ B-22.

Only after these hearings, and a mere three weeks before the Court's already extended deadline for the Special Master's Final Report, Defendants withdrew from the final negotiations over the open provisions in the Next Court Order. Defendants abandoned these arrangements for a collaborative termination in order to ask the Court to *vacate* the Decree relieving them from *all*

obligations to the Class. Defendants' request is not only a betrayal of the long collaborative process facilitated by the Special Master, and a breach of the agreements between the Parties, it is an affront to this Court. Effectively, Defendants are saying that all of the collaborative work of the Parties and the Special Master over the last six years is irrelevant because there have been no allegations of any continuing constitutional violations during this time. Even the Special Master's audit in 2000 finding extensive deficiencies, which Magistrate Judge Cohen referred to in conference as an "indictment," would become irrelevant under Defendants' view unless those deficiencies rose to the level of continuing constitutional violations. To grant this Motion, this Court must set aside the arrangements specified in the Decree itself for its termination, *and* disregard all the agreements between the Parties as to how those conditions can be met. The thin reed upon which this extraordinary plea relies is Defendants' erroneous interpretation of *Horne v. Flores*.

3. Defendants have failed to meet their burden under any version of the applicable legal standard.

Under any reading of the decision in *Horne*, it is clear that the Supreme Court reiterated the essence of the rule in *Rufo*; the party requesting relief has the burden of proving a substantial change in circumstances that warrants the relief because continued enforcement *is no longer equitable*. "Equitable" is a historically grounded term of art. It requires the court to exercise its broad discretion to consider *all* the equities of the case. The Court "should look to a range of factors including: the circumstances leading to the decree (including the nature of a party's initial wrongdoing), the quantum of hardship on the burdened party, the duration of the burden thus far and the prospect of its continuing and the benefitted party's need for a continuation of the decree." *Lichine & Cie v. Lichine Estate Selections, Ltd.*, 45 F.3d 582, 586 (1st Cir. 1995).

When considering the alleged changed circumstances, a showing that it is no longer convenient to live with the terms of the decree is insufficient. *Rufo*, 502 U.S. at 383. Defendants provide no explanation for why continued enforcement, particularly under the limited provisions of the Next Court Order, would be harmful or how changed circumstances substantially alter the equities. Indeed, the negotiated Next Court Order would end active Court supervision, requiring only that compliance continue, and it would provide a significant barrier to renewed litigation in this Court. Defendants make no allegations and offer no evidence that future compliance would be “substantially more onerous,” “unworkable because of unforeseen obstacles,” or otherwise “harmful to the public interest.” *Id.* at 384. The changed circumstances cited by Defendants amount to little more than their own *incomplete* efforts to comply with the Decree. They offer nothing to support a finding that the Class Members no longer need or no longer deserve the services and supports they were promised. They correctly assert that the “closure of Pineland and the legal changes resulting from this litigation have dramatically changed the circumstances that brought about this case 34 years ago.” *Defendants’ Memorandum* at 9. Much progress has been made, but *partial* performance of the obligations under the Decree cannot, as a matter of law, constitute the kind of changed circumstances contemplated by *Rufo* or *Horne*. With the exception of some federal statutory changes, virtually all of the alleged factual and legal changes cited by Defendants arose only from their own incomplete implementation of the Decree. *Defendants Brief* at 6-7. Specifically, for example, the 2007 legislation was developed in this process as part of an integrated set of mechanisms of future compliance that included the Next Court Order. It was certainly not unanticipated or unforeseeable. *See Rufo*, 502 U.S. at 406. But if Defendants are in compliance and mean to continue compliance, the Next Court Order

imposes no burden at all relative to what Defendants say they are doing now. If they mean to cease compliance, the consequences can hardly be considered “equitable.”

A full consideration of the equities requires a review of the past and continuing harms suffered by Class Members, the history of Defendants’ failure to continue compliance after active supervision of the first decree ended, the long history of Defendants’ failure to comply with this Decree, their betrayal of the collaborative process and the agreed-upon termination process, the continued inadequacy of some of the present systems of services, and the likelihood of decreased compliance if the requested relief is granted.

a. Vacating the Decree would unfairly terminate the lifetime commitment made to Class Members who suffered permanent and continuing harms caused by the violations of their constitutional rights.

This case is not about some technical violation of a federal statute or regulation. It is about vulnerable people who suffered real harms when they were unconstitutionally involuntarily incarcerated in an institution characterized in the Complaint with living areas reeking of urine and feces; locked doors everywhere; sleeping areas with no privacy in which no personal possessions were allowed; bathing areas with no shower curtains or other means of ensuring privacy in which residents were in essence hosed down by staff; and no programming or contact with family or others in the outside world to provide stimulation or to relieve the endless boredom of the days. *See* 1975 Complaint, ¶27; Affidavit of Carroll Macgowan, Exhibit C, ¶¶ 5, 6, 21-23, 31, 32; Affidavit of Mary Lee, Exhibit E, ¶ 6.¹ Many Class Members suffered abuse, physical restraints, poor medical attention, and received unnecessary tranquilizing drugs.

¹ A number of affidavits contain personal information about Class Members. For that reason, the Class Members are referred to by initials. The identity of these Class Members will be made known to Defendants and the Court upon request or if necessary to respond to an evidentiary challenge.

Id; Affidavit of Nancy Thomas, Exhibit F, ¶ 7; *see also*, *Plaintiffs Objections to Final Report to the Court of the Special Master*, pp. 21-23.

Many Class Members suffered these abuses, mistreatments, indignities and inhumanities during their childhood and formative years while receiving little or none of the habilitative and educational services and experiences that are critical to a person's healthy development. Exhibit C, ¶¶ 15, 21-23; *see also* Deposition of George A. Zitnay,² Exhibit D, pp. 58, 59; 134-136.

There can be no question, and we are confident that Defendants will not dispute, that both the abuse and mistreatment and the lack of services and positive developmental experiences have resulted in life-long adverse effects for the Class Members. *Id*; Exhibit C ¶¶ 19,22,27,29,33,37; Exhibit E, ¶ 10; Affidavit of Nancy Thomas, Exhibit F, ¶8; Affidavit of Irene Firenze, Exhibit N, ¶¶ 3-6; Affidavit of Bonita Bean, Exhibit O.

To remedy the abuses and mistreatment and the permanent harms suffered, the Parties negotiated a lifetime remedy. The intent of both Decrees was to provide a set of services and supports for the Class Members that would endure for their lives. Professor David Gregory, the first Special Master, stated in his March 19, 1979, Report to the Court: "The Decree is a perpetual injunction, which is binding on the State forever unless modified by a Court of competent jurisdiction." Exhibit G, at 3. Kevin Concannon, who was Director of the Bureau of Mental Retardation from 1977 to 1980 and the Commissioner from 1980 to 1987 stated in his capacity as Commissioner, "That the Decree was a solemn perpetual commitment, that the Decree was a perpetual law, and that the Decree would be there forever." Exhibit A, ¶¶ 2 and 5. This promise was of particular importance to parents of Class Members who were rightfully very

² Mr. Zitnay's deposition, dated June 1, 1976, is 137 pages long. To avoid burdening the court with the full document, Exhibit D contains brief excerpts. The same is true of Exhibits G, J and L. The full document will be made available if desired.

concerned that their loved ones would be sent out into the community with no permanent arrangement for the delivery of services required to maintain their lives in the community. Commissioner Concannon was present in this Court in his capacity as Commissioner and Defendant when Judge Gignoux discharged the Defendants from active supervision in 1983. *Id.* at ¶ 2. The transcript is Exhibit P.

Based on similar statements and other evidence in the record, the First Circuit found that “a continuing obligation was created by the 1978 consent decree.” *Consumer Advisory Bd. v. Glover*, 989 F.2d 65, 68 (1st Cir.1993). Accordingly, the Circuit Court vacated the District Court’s dismissal of the 1991 complaint, to enforce the 1978 decree, for lack of jurisdiction. The unambiguous language in the Community Consent Decree requiring that mechanisms of future compliance be in place before the Decree can be terminated was drafted at that time and in that context. It properly reaffirms the solemn perpetual commitment and continuing obligations that cannot now, in good conscience and equity, be dissolved, vacated or avoided.

b. The long history of noncompliance and backsliding after periods of near compliance is clear evidence of the need for the continuation of Decree obligations to ensure a durable remedy.

The long history of noncompliance and the current status of only near substantial compliance after 14 years of trying is conclusive proof that Defendants have no durable remedy to offer the Class. When the parties negotiated the terms of the Decree, they agreed that the services described therein were the bare “*minimum* level of services to be provided by the Defendants to the Plaintiff Class...” Decree, § XVI(12)(emphasis added). These were not goals or hopes to which Defendants were to aspire. They were not a ceiling to be reached at some unknown date in the future, they were the floor below which Defendants’ performance should not fall. The “durable remedy” which the Supreme Court required in the *Horne* case, must, in

this case, provide reasonable assurances of the delivery of this minimum level of services to the Class.

The current state of affairs is hauntingly familiar to the circumstances when Defendants were relieved of active supervision in 1983. After five years under the Pineland Consent Decree, the Defendants had reached a level of compliance that allowed them to be discharged from active supervision in 1983. According to the Special Master at that time, further work needed to be done, but “All systems are go.” Exhibits J, 10/26/83 Letter to Judge Gignoux. Not long thereafter, instead of steadily improving, Defendants fell further out of compliance, leading to the second Complaint, filed in October 1991, which documented extensive failures in program planning, excessive use of restraints and seclusion, inadequate resource development, and inadequate professional, crisis, respite and family support services. *See* Exhibit F ¶ 10; Affidavit of Charlene Kinnelly, Exhibit I, ¶¶ 12-13; 1991 Complaint.

While Defendants have made extensive efforts to reach compliance under this Decree, deficiencies remain. Twenty-six years after the October 26, 1983 Special Master’s letter to Judge Gignoux, further work remains to be done. There is even less reason for optimism this time, because we know that circumstances are worsening, not improving. Due to the fragile fiscal environment, services are already declining and will decline further. Recent deep budget cuts coupled with the fiscal disaster looming on the horizon threaten drastic reductions in funding that would dismantle the systems in place resulting in a second period of backsliding. *See* Exhibits H and I.

If Defendants’ motion is granted, circumstances would be worse than 1983 for another reason as well. When Defendants were discharged in 1983, the Parties had arranged for mechanisms that they thought would ensure future compliance. “Since the standards in the

Decree remain in force indefinitely, the Court and the public want continuing oversight after the Office of the Special Master is terminated.” Report to the Court on the Martii Wuori Case, October 1983, Exhibit J at 16. The Consumer Advisory Board was maintained as an oversight body with an agreed-upon set of duties. *Id.* at 17 and E-56. In addition, the Parties and the Special Master “agreed on a plan for the annual auditing of Decree standards.” *Id.* at E-53. “Compliance with the standards will be checked by an audit of a third-party or parties qualified to perform such an audit.” *Id.* at 16. Under the 2007 legislation, to which Plaintiffs agreed based on Defendants’ agreement to the Next Court Order, the Consumer Advisory Board will go out of existence after the Decree is terminated and there will be no annual audits. The only times that Class Members have reliably received the services promised by the Decree were during periods of intense scrutiny by Special Masters appointed by the Court. History has shown that when that scrutiny is withdrawn, the services decline. *See* Exhibit F, ¶ 12.

If the circumstances are similar to 1983, Defendants’ current legal strategy is hauntingly similar to 1991. In response to the 1991 Complaint, Defendants filed a motion to dismiss, disavowing the solemn perpetual commitment and claiming no further obligation because the Constitutional violations had stopped. *See Consumer Advisory Board v. Glover*, 151 F.R.D. 490 (Me. DC. 1993). Defendants also sought relief under Rule 60(b)(5). Similar to the present motion, Defendants failed to cite any substantial change in circumstances that would make the continued enforcement of the Decree inequitable. *Consumer Advisory Board v. Glover*, 151 F.R.D. 496 (D.Me. 1993). Both motions were denied by the District Court. A similar Motion was brought in 1998 and withdrawn, at which time the Court appointed the current Special Master to shepherd the Defendants towards compliance. After nine years of intense

collaborative work with the Special Master, the Defendants have rewound the clock assuming the same position and presenting the same flawed arguments they did in 1991 and 1998.

In light of this history, it is difficult to imagine how these Defendants can believe that their current state of near compliance can be seen as a durable remedy for the continuing needs of these Plaintiffs.

c. Defendants' Motion does not meet the *Rufo* standard; Defendants have not shown that continued performance of the Decree "is no longer equitable."

Finally, it cannot be said too often or emphasized too much that under Rule 60(b)(5), as interpreted and applied in *Rufo*, the question before the Court is whether or not it is "no longer equitable" for these Defendants to be legally obligated to deliver the remedial services and supports required by the Community Consent Decree. In beginning that analysis, the Court should have clearly in mind that the Decree itself states clearly that its standards are only the minimum standards. A fundamental starting point for this analysis is the incontrovertible fact that the minimum services required by the Decree have never been fully delivered.

As noted elsewhere in this Memorandum, Defendants have apparently placed complete reliance on their interpretation of *Horne v. Flores* as essentially prohibiting this Court from continuing to require the Defendants to perform their commitments. Given that reliance, Defendants have not clearly stated any position with respect to the real question under Rule 60(b)(5) which is why it is no longer equitable for them to perform this Decree at least until they have complied with the Decree's express provisions governing its own termination. Defendants have not asserted that the Plaintiffs' needs have changed, such that they don't need the services. Defendants have not asked the Court to review the ancient history and conclude that the Plaintiffs never were subject to any unconstitutional imposition meriting the remedial provisions

negotiated in the Decree. Defendants have not suggested, nor would it be plausible for them to do so, that these vulnerable citizens will not indeed be more in need of the services and supports minimally required by this Decree as they age. These Defendants have not articulated any equitably cognizable ground for the suggestion that it is unfair to them to be required to continue to attempt to fulfill the obligations assumed in this Decree.

It is true that there are other Maine citizens who never suffered the indignities experienced by these Plaintiffs, because they never were incarcerated at Pineland, who are currently on waiting lists because the Maine State Government has chosen not to provide services and supports for them. Plaintiffs are not pleased that other citizens may be less well situated than they going forward. But these Defendants have not even made the case with either evidence or argument that the interests of these other citizens would equitably justify Defendants' renegeing on the promises made to the Pineland victims. The needs of those other citizens may well warrant responsive and responsible action by State officials. The predicaments of those citizens, however, do not—as a matter of equity—justify abandoning the Class Members or renegeing on solemn promises made to them years ago.

The only argument apparently being advanced by the Defendants with respect to the future inequity of continued compliance with the Decree is the idea that it is not necessary because everything will be fine. But as the record unequivocally establishes, and Defendants cannot dispute, the systems and the legislative and regulatory framework for them have never reached Decree standards. As identified in the Special Master's Final Report there remain numerous issues of noncompliance and Defendants have not achieved substantial compliance with the requirements of the Decree *despite* the intense supervision and scrutiny of the Special Master over the last nine years. Plaintiffs incorporate herein by reference their objections to the

Special Master's Final Report.³

Even if current circumstances did amount to substantial compliance today, they can, and almost certainly will, be changed almost immediately. Without the Decree or the Next Court Order, Class Members will be without the remedy contractually agreed to by Defendants and ordered by this Court. All of the evidence before the Court compels the conclusion that this would be a highly inequitable and unfair result. Defendants have offered no evidence and have made no credible argument supporting the conclusion that requiring future compliance would be in any way inequitable to the Defendants; granting the Motion most certainly would be grossly inequitable to the Class.

The long history of noncompliance and the current status of only near substantial compliance, together with the fragile fiscal environment should be sufficient to demonstrate the Class will be without any durable remedy, if Defendants are relieved of all obligations under the Decree. In addition, Defendants' own conduct has precluded the availability of a durable remedy. In 2007, Defendants refused to incorporate certain Decree requirements into State statute and have now reneged on their agreement to provide a mechanism of compliance with those requirements through the Next Court Order. *Supra*, at 15; Exhibit B. Over the past thirty years, both Plaintiffs and Defendants have always acknowledged that the Decree was not designed to benefit non-Class Members; that efforts would nevertheless be made to avoid a dual system; but that when necessary, Defendants would take all necessary steps to meet the needs of the Class when generally available program resources were insufficient to do so. Defendants' refusal to incorporate all Decree requirements into statute finally codified a dual system.

The unfortunate reality is that the resources Defendants have been willing to make

³ Because Plaintiffs' Objection to Final Report to the Court of the Special Master was recently filed on October 19, 2009, it is not attached as an Exhibit to this Memorandum.

generally available to all citizens with developmental disabilities have been, are, and always will be, insufficient to satisfy all the “minimum” standards of the Decree. A significant example is the Medicaid reimbursement schemes crafted by Defendants that do not fully enable compliance with Decree requirements. Defendants have readily and consistently acknowledged these shortcomings as well as their obligation under the Decree to find other sources of funds to meet Class Member needs. *See*, Exhibit K, ¶¶ K-1 and K-3. The potential for this problem was identified by the first Special Master thirty years ago in 1979, when Defendants first applied for Medicaid waiver funds to implement requirements of the Decree. Exhibit L, p. 2

For a Maine ICF-MR system to work properly and consistently rather than at odds with the Consent Decree, it is essential that the program be administered by those persons who are most familiar with the capacities and actual needs of retarded citizens. Otherwise, the ICF-MR program, so far from being facilitative of the purposes of the Court’s Decree, *can become a barrier* to the State’s compliance with the Court’s mandate as well as being wasteful of state, federal and private money. These results would occur, for example, if the State were to adopt State ICF-MR standards which were at variance with the Consent Decree or if state or federal regulations were construed to impose useless requirements based on *a standard other than client’s actual needs*. *Id.* at 5 (emphasis added).

If Defendants’ Motion is granted, the first Special Master’s warning will go unheeded and the *actual needs* of the Class will go unmet in the future. Future budget cuts will increase the gap between the allocated funds and the cost of compliance. Defendants will have no legal obligation to fill the gap and the Class will have no enforceable right to have their needs met. There can be no clearer evidence of the lack of a durable remedy under the existing circumstances, or of the unfair and inequitable consequences that would result from granting Defendants’ Motion.

III. CONCLUSION

For the foregoing reasons, Defendants’ Motion must be denied.

In closing it must be made explicitly clear that the Class remains willing and committed to working toward an appropriate end to the Court's active role in this case. Nevertheless, it must be said that the Class considers that the recent decision to breach agreements, to disavow representations and positions that have been maintained for decades, to jettison years of work with the Special Master, and to turn the clock back to 1991 to once again seek a complete vacation of the Decree would justify a finding of contempt. It is also bewildering because there has never been any question or doubt about the personal commitment and professionalism of Commissioner Harvey, Ms. Gallivan, Ms. Crichton, Mr. Hughes and many others in the Department with whom we have been proud to work for many years. Out of respect for them, we refrain from burdening the Court with more motions at this time and suggest instead that the complete lack of legal or factual merit in Defendants' current Motion be given due consideration in determining the course of future proceedings.

The Court has already correctly ruled that this Complaint cannot be dismissed. Plaintiffs suggest that the Court should now more specifically redirect Defendants to work with the Special Master and the Class to finalize the certification process and the Next Court Order, to permit a proper and orderly termination of the Decree in accordance with its negotiated terms. In the alternative, the Class requests that the Court include in its denial of the Motion an order directing Defendants to correct all outstanding certification deficiencies, as identified in the Special Master's Reports to the Court, and that, at a subsequent date, the Court enter the Next Court

Order submitted herewith (Exhibit M)⁴ upon receipt of a report from Special Master Sundram finding that all deficiencies have been corrected and Defendants have at last established substantial compliance with the promises of the Community Consent Decree.

Dated: November 9, 2009

/s/ Gerald F. Petruccelli,

/s/ Bruce A. McGlauflin,

/s/ James R. Crotteau

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⁴ Exhibit M differs from the Next Court Order agreed to by Defendants in May, 2007 in the following respects only: 1) the number of class members referenced on page 2 has declined from 761 to 755; 2) on page 3, the reference to a list of regulations is eliminated, because it was never developed, and replaced it with the words “currently in force”; 4) on pages 5 & 6, the Class Representative, his hourly rate, and estimated annual budget are inserted; and 5) paragraphs are renumbered for consistency. As stated above, this document is offered contingent on the finding of substantial compliance after correction of outstanding deficiencies, and the statements in Exhibit M referring to compliance are not to be construed as statements about current conditions.