UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OSCAR SALAZAR, *et al.*,	)	
Plaintiffs,	)	
	)	**C.A. No. 93-452 (GK)**
v.	)	
DISTRICT OF COLUMBIA, *et al.*,	)	
Defendants.	)	

THE DISTRICT OF COLUMBIA'S OPPOSITION TO PLAINTIFFS' MOTION FOR MODIFICATION OF THE SETTLEMENT ORDER

INTRODUCTION

Plaintiffs seek a second bite at the proverbial apple, moving to obtain a virtually identical order from the Court as the one they sought through their motion for a preliminary injunction. Plaintiffs do not explain why they did not consolidate their two motions, but regardless of the procedural vehicle the plaintiffs invoke, the bottom line is the same: the Court has terminated its oversight over the eligibility portion of this case and should not reinstate it.[1]

As demonstrated in its opposition to plaintiffs' motion for a preliminary injunction, which the District adopts and incorporates by reference in opposition to the instant motion, the District has worked responsibly to navigate the challenges it has encountered in implementing the Affordable Care Act (ACA), both in terms of proactively identifying technical issues and solving them. Since that filing, the District has experienced significant success in implementing

[1] Plaintiffs' LCvR 7(m) statement suggests that undersigned counsel prevented plaintiffs from filing this motion sooner. That suggestion is not accurate. When plaintiffs advised the District that they intended to seek a modification of the Settlement Order, they requested a response within 24 hours rather than the ten days Paragraph 80 of the Settlement Order affords. The District objected to plaintiffs' request to the extent it shortened this period, but the District nevertheless provided its response expeditiously as plaintiffs requested. (*See* Email from Bradford C. Patrick to Kathleen L. Millian dated January 28, 2016, Ex. K.)

strategies approved by the United States Centers for Medicare and Medicaid Services (CMS). As of February 24, 2016, the District has reduced the case processing backlog of initial applications to zero, and as of February 23, 2016, it has reduced the number of renewals affected by the "stuck/malformed" issue to zero, and only 67 initial applications were affected by the "stuck/malformed" defect. And the District has enjoyed another month of success in conducting passive renewals of D1 MAGI beneficiaries and is aware of no backlog affecting renewals or any issue impeding the mailing or processing of notices. Far from demonstrating an urgent need for the Court to reinstate the terminated subject matters, the record reinforces that the District is able to address massive challenges, including those presented by the ACA's new eligibility framework, responsibly and without judicial supervision.

PROCEDURAL AND FACTUAL BACKGROUND

The procedural and factual history relevant to this motion is recounted in the District's Opposition to Plaintiffs' Motion for a Preliminary Injunction. (ECF No. 2077.) Because the Court indicated in a conference call with the Parties on February 19, 2016 that it would consider these motions concurrently, the District does not repeat the relevant history, but instead adopts and incorporates the history recounted in its Opposition to Plaintiffs' Motion for a Preliminary Injunction by reference. (*Id.* at 2-15.)

Several factual developments have occurred since the District's opposition was filed. In its opposition to the motion for a preliminary motion, the District described three outstanding technical challenges in the transition from its legacy eligibility system, the Automated Client Eligibility Determination System (ACEDS), to the DC Access System (DCAS): a case processing backlog affecting initial applications for Medicaid eligibility, technical problems causing certain renewals to be "stuck/malformed," and similar issues causing certain initial

applications to be "stuck/malformed." (*Id.* at 13-14.) In the few weeks since the District's last filing, it has reduced these problems dramatically. As of February 24, 2016, zero individuals were in the case processing backlog (down from 1,247 individuals on January 11, 2016), and as of February 23, 2016, zero renewals were affected by the "stuck/malformed" defect (down from less than 10 on January 14, 2016), and 67 initial applications were affected by the "stuck/malformed" issue (down from 1,408 on January 11, 2016). (Declaration of Claudia Schlosberg in Support of the District of Columbia's Opposition to Plaintiffs' Motion for Modification of the Settlement Order, Ex. J (Second Schlosberg Decl.), at ¶¶ 4-5.) The District continues its work to reduce the "stuck/malformed" applications to zero.

The District also has taken steps to reduce the risk that these problems will recur, successfully resolving many of the underlying defects that caused cases to become backlogged in the first place. (*Id.* at ¶¶ 6-10.) Four other root causes of problems have been identified and will be resolved in an upcoming update to DCAS, but in the meantime caseworkers have been provided additional training and guidance to navigate any new or remaining "stuck/malformed" cases while managers continue to receive reports to track pending cases. (*Id.* at ¶ 6.) In addition, the District has also implemented automated batch processes through which initial applications with no outstanding verifications required—referred to as "Bucket 6" in plaintiffs' motion (Mot. at 7 n.2)—are automatically activated with Medicaid coverage. (Second Schlosberg Decl. at ¶ 7.)

Passive renewals for D1 MAGI beneficiaries have enjoyed another month of success as well. The District processed approximately 7,000 MAGI renewals for beneficiaries who are due to renew their eligibility in March 2016. Of those, the District was able to passively renew 59% of the beneficiaries. (*Id.* at ¶ 12.) The District is not aware of any issue causing a backlog of renewals, nor is it aware of any issue that is impeding the processing or mailing of notices. (*Id.* at

¶¶ 13, 16.) Indeed, the District samples notices on a regular basis for quality control to ensure accuracy, correct notice logic, and adherence to policy guidelines. (*Id.* at ¶ 17.)

ARGUMENT

I. Plaintiffs Have Not Demonstrated that Prospective Application of the Court's February 29, 2009 and October 18, 2013 Orders Is No Longer Equitable.

Rule 60(b)(5) of the Federal Rules of Civil Procedure contains three bases for relief: [1] where the challenged order or judgment "has been satisfied, released, or discharged; [2] it is based on an earlier judgment that has been reversed or vacated; or [3] applying it prospectively is no longer equitable." Plaintiffs invoke Rule 60(b)(5)'s third clause, which permits modification of a prospective judgment or order where the moving party demonstrates that there has been a significant change in facts or law and the proposed modification is suitably tailored to those changed circumstances. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992).[2]

A. The Challenged Orders Do Not Have Prospective Application Because the Court Terminated Its Oversight in These Areas.

Although plaintiffs do not address the threshold inquiry, "an order or judgment may be modified under … Rule 60(b)(5) only to the extent that it has 'prospective application.'" *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988). Judgments and orders "may also be prospective only in part, in which case Rule 60(b)(5) could permit modification only of the portion of the judgment that has prospective effect." *Keepseagle v. Vilsack*, ___ F. Supp. 3d ___, No. 99 Civ. 3119 (EGS), 2015 WL 4510837, at *19 (D.D.C. July 24, 2015) (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 42, 431 (1855)). "That a court's action

[2] Plaintiffs question whether, as the beneficiaries of the Settlement Order, their request for modification should be held to the standard announced in *Rufo* or the less demanding standard described in *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968). (Mot. at 13 n.3.) The D.C. Circuit applies *Rufo* to modification requests sought by plaintiffs, and this Court should follow suit. *Pigford v. Veneman*, 292 F.3d 918, 925 (D.C. Cir. 2002).

has continuing consequences, however, does not necessarily mean that it has 'prospective application' for the purposes of Rule 60(b)(5)." *Twelve John Does*, 841 F.2d at 1139. The test developed by the D.C. Circuit to determine if a challenged order has prospective application asks "whether it is 'executory' or involves 'the supervision of changing conduct or conditions.'" *Id.*

Plaintiffs style their motion as a request to modify the Settlement Order, but that characterization is misleading. Plaintiffs' motion does not seek any relief from the Settlement Order itself, rather it seeks relief from this Court's February 24, 2009 and October 18, 2013 Orders inasmuch as they terminated oversight of Sections II and III of the Settlement Order. Indeed, in attempting to marshal evidence in support of their claim of changed circumstances throughout their motion, plaintiffs rely on alleged factual developments that have occurred since the February 24, 2009 and October 18, 2013 Orders. (Mot. at 6 ("Since this Court last issued orders reducing defendants' obligations under sections of the Settlement Order in February 2009 and October 2013, there have been significant changed circumstances concerning defendants' compliance with federal law that justify modification of the Settlement Order to protect the plaintiff class." (internal citations omitted); *id.* at 6 (comparing developments in application processing since February 24, 2009); *id.* at 9 (describing changes that allegedly occurred after the Court's October 18, 2013 order in the context of renewals).)

Without question, the Court's February 24, 2009 and October 18, 2013 Orders have no prospective effect. They terminated provisions of the consent decree that formerly existed and relieved the District from any remaining obligations in this case in the realm of eligibility determinations. Courts around the country have held that orders dismissing claims are not prospective within the meaning of the rule. *See, e.g.*, *Twelve John Does*, 841 F.2d at 1139 (order reinstating defendant did not satisfy Rule 60(b)(5) because dismissal had no prospective effect);

Coltec Industries, Inc. v. Hobgood, 280 F.3d 262, 272 (3d Cir. 2002); *Gibbs v. Maxwell House*, 738 F.2d 1153, 1555-56 (11th Cir. 1984) ("That plaintiff remains bound by the dismissal is not a 'prospective effect' within the meaning of Rule 60(b)(5)"); *Dowell v. Bd. of Educ. of Oklahoma City Public Sch.*, 782 F. Supp. 574, 578-79 (W.D. Okla. 1992) ("For any post–1987 developments that Plaintiffs believe are discriminatory, they must bring a new action alleging a new constitutional violation, not move under Rule 60(b)(5) to add further relief for their initial 1961 claim.").

To permit modification of the February 24, 2009 and October 18, 2013 Orders on the grounds that the Court retains oversight responsibilities for distinct provisions of the Settlement Order related to EPSDT would be at clear odds with Rule 60(b)(5)'s purposes. Because of the heightened separation-of-powers concerns implicated in such litigation, courts overseeing institutional reform consent decrees interpret Rule 60(b) in a manner that ensures that "'responsibility for discharging the State's obligations is returned promptly to the State and its officials' when the circumstances warrant." *Horne v. Flores*, 557 U.S. 433, 450 (2009) (quoting *Frew v. Hawkins*, 540 U.S. 431, 442 (2004)). The Court has already performed this function with respect to the eligibility requirements that are the focus of plaintiffs' motion by terminating Sections II and III of the Settlement Order and returning control over Medicaid eligibility determinations to the District. Plaintiffs' attempt to impose new obligations in these areas—after the Court has found that the District should be relieved from oversight—is incompatible with the goal of restoring responsibility over state executive functions as quickly as possible.

In contrast to the wealth of authorities standing for the proposition that a court lacks jurisdiction over terminated portions of a consent decree (*See* DC Opp. to Pl.'s Mot. for a Preliminary Injunction, at 16-21), plaintiffs cite only a single outlier. *Hadix v. Caruso*, 461 F.

Supp. 2d 574 (W.D. Mich. 2006). *Hadix* is a long-running class action concerning conditions at prisons operated by the State of Michigan. In 2001, the court terminated provisions of the consent decree concerning mental health services but retained supervision of provisions concerning general medical treatment. In 2006, however, following the death of two inmates who received inadequate medical and mental health care, the *Hadix* plaintiffs filed a motion under Fed. R. Civ. P. 60(b)(6) to impose injunctive relief related to mental health services. In addition to the two deaths, plaintiffs' expert "discovered many instances of medical treatment failure which were causally related to inadequate psychological and psychiatric services." *Id.* at 583. Indeed, the court found "a large number of complicated cases with interdisciplinary problems that unfortunately [we]re being regularly mistreated and/or ignored by staff. … Cases which can be described by the disciplines as either medical or mental health [we]re described by the competing disciplines as within the ken of the other, and no attempt [was] made to coordinate care." *Id.* at 598. The court therefore ordered "the development of a plan that insists upon coordination of care between the disciplines." *Id.*

Although the District believes *Hadix* was decided wrongly, the 2006 decision nevertheless is distinguishable, as shown by *Hadix*'s own history. Here, the issues concerning the EPSDT services provided to children, documented in this Court's liability findings and memorialized in the Settlement Order, are not caused by the eligibility process that is the focus of plaintiffs' motion. That causal relationship was critical to the *Hadix* court's decision in 2006. It found that "many of the repeated and recurrent problem cases … concern the cracks between medical care and mental health care. Without a system that effectively addresses both areas, Eighth Amendment constitutional health care violations will continue as a by-product of unconstitutional mental health care." Indeed, more recently in the litigation, the *Hadix* court has

refused to reopen dismissed portions of the consent decree that did not bear on the open health care provisions. *Hadix v. Johnson*, No. 80 Civ. 73581, 2014 WL 4678252, at *2 (E.D. Mich. Sept. 18, 2014) (denying motion to reopen provisions regarding the possession of legal papers and directing former class member to file a new lawsuit).

The basis for plaintiffs' motion is more akin to the situation presented to the *Hadix* court in 2014 rather than in 2006, in that the terminated provisions plaintiffs seek to revive here have little if anything to do with the active provisions of the Settlement Order. To begin with, children entitled to EPSDT services are only one segment of the overall Medicaid population. Plaintiffs have come forward with no evidence or even a proffer concerning the extent to which children who would be entitled to EPSDT services, as opposed to adults, are affected by the alleged eligibility issues.[3] In any event, whether an initial application for Medicaid benefits is processed within 45 days has no bearing on the District's ability to achieve an adequate participant ratio for well-child visits, to advise children or their caretakers regarding the need for and importance of EPSDT services, to train providers of EPSDT services, or its ability to offer transportation and scheduling assistance as required by Sections V and VI of the Settlement Order. Nor can plaintiffs advance any reasonable argument that the District's compliance with its EPSDT obligations is frustrated by an alleged lack of advance notice before terminating Medicaid benefits in the context of renewal. The issues that are the subject of plaintiffs' motion are not inextricably intertwined with the District's remaining obligations under the Settlement Order, as was the case in the 2006 *Hadix* decision.

[3] In the event that the Court credits plaintiffs' argument that eligibility issues affect the provision of EPSDT services, plaintiffs' proposed modifications would not be suitably tailored because they purport to provide relief for all Medicaid beneficiaries and are not limited to individuals eligible for EPSDT services. *See Rufo*, 502 U.S. at 391.

In addition, a review of the 2006 *Hadix* decision cited by plaintiffs indicates that the state did not present the court with the extensive case law detailed by the District. *Id.* at 588 (noting that the state cited only three cases, only one of which stood for the proposition cited). And importantly, the Sixth Circuit did not pass on the district court's authority to grant relief in these circumstances. It ultimately remanded the decision in light of intervening factual developments that were likely to either moot the dispute imminently or result in a negotiated agreement by the parties, preserving the state's ability to appeal the issue. 248 Fed. Appx. 678, 682 (6th Cir. 2007). *Hadix* is therefore of little help to plaintiffs' position.

Plaintiffs' reliance on a footnote from the Court's decision terminating Section III, simply stating that "members of the plaintiff class can also contact Plaintiffs' counsel, as they have been doing over the years, to obtain legal assistance," does not give the order prospective application. (ECF No. 1886, at 9 n.1.) Plaintiffs contend that the Court intended to retain jurisdiction over Section III through this footnote. (Mot. at 14 n.4.) That suggestion is refuted thoroughly in the remainder of the Court's decision, which found the provisions of Section III should be terminated and the District relieved of complying with them. *See Segar v Mukasey*, 508 F.3d 16, 24 (D.C. Cir. 2007) (rejecting interpretation of a footnote that was at odds with the balance of the document). The footnote mentions no further oversight role for the Court or conditions the District was required to satisfy in the realm of Medicaid renewals to end that oversight. Had it, the District would have considered an appeal of the order. Simply put, the footnote does not authorize plaintiffs' counsel to monitor the District's implementation of the Affordable Care Act. Nor does the footnote grant plaintiffs' counsel any enforcement mechanism. The Court simply acknowledges that plaintiffs' counsel remain free to serve any clients they choose in other fora or litigation.

Permitting jurisdiction in these circumstances would defeat the rationale behind terminating segregable portions of a consent decree. *See Bobby M. v. Chiles*, 907 F. Supp. 368, 371 n.8 (N.D. Fla. 1995) (after partial termination of consent decree, the appropriate remedy to redress new violations is to file a new lawsuit); *Hadix*, 2014 WL 4678252, at *2 (denying motion by inmate to enforce terminated provisions of partially-terminated consent decree, directing filing of new lawsuit). If this Court's Orders terminating Sections II and III of the Settlement Order are to have meaning, plaintiffs cannot continue monitoring the manner in which the District determines Medicaid eligibility. Otherwise, it would have been pointless for the Court to have terminated those Sections in the first place, as both before and after termination plaintiffs unilaterally could haul the District into this Court at their whim to air their grievances, monitor compliance, and seek relief from the Court. Particularly as to Section II, where the parties agreed that the District satisfied the exit criteria, permitting ongoing jurisdiction to enforce those dismissed terms deprives the District of the benefit of the bargain it negotiated: ending judicial oversight and plaintiffs' enforcement powers in exchange for meeting agreed-upon metrics. *See EEOC v. Local 40*, 76 F.3d 76, 81 (2d Cir. 1996) ("If we were to enforce this consent decree against Local 40 twelve years after its expiration, we would be depriving the union of the benefit of its bargain."); *United States v. Overton*, 834 F.2d 1171, 1174 (5th Cir. 1987) (municipality would lose the benefit of its bargain were the Court to enforce provisions of consent decree after municipality satisfied exit criteria).

The Court's February 24, 2009 and October 18, 2013 Orders have no prospective application. Rule 60(b)(5) does not permit plaintiffs to modify these orders to reinstate Court oversight of the District's implementation of the ACA's eligibility framework.

B. Plaintiffs Have Not Demonstrated a Significant Change in Circumstances Cognizable Under Rule 60(b)(5).

Further, plaintiffs cannot demonstrate a significant change in circumstances since the Court terminated Sections II and III of the Settlement Order. Under Rule 60(b)(5), relief is not warranted simply because the facts have changed in some respect; the movant may not rely on changed facts that were foreseeable. *Agostini v. Felton*, 521 U.S. 203, 215-216 (1997) (Rule 60(b)(5) motion should not be granted where party could foresee the circumstances relied upon); *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 386 (1992) ("modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree"). "In short, the moving party must demonstrate a significant and unanticipated change in facts." *Coleman v. Brown*, 922 F. Supp. 2d 1004, 1027 (N.D. Cal. 2013); *see also United States v. Western Elec. Co., Inc.*, 43 F.3d 1198, 1204 (D.C. Cir. 1995) (noting that district court adhered to *Rufo* in asking "whether a significant and unanticipated change in factual conditions had occurred").

1. Processing of Initial Applications

With respect to initial applications for Medicaid eligibility, the changed fact alleged by plaintiffs is that the District allegedly no longer is in compliance with Medicaid regulations requiring it to process applications within 45 days. This does not amount to a changed circumstance within the meaning of *Agostini* because it is not an unanticipated development.

The Settlement Order plainly reflects the parties' understanding that compliance with the various Sections may occur on differing timelines. For that reason, the parties agreed to separate termination provisions for each Section of the Settlement Order or group of Sections, each with its own specified criteria that would justify termination of the Section. (Settlement Order ¶¶ 74-78.) The parties thus understood that, as the District achieved compliance with certain

requirements, Court oversight could cease in some areas while continuing in others. Importantly, the parties did not agree on any mechanism that would permit plaintiffs to reinstate oversight in a dismissed Section if they believed that the District had fallen out of compliance with legal requirements after the Court's termination. The absence of such provision reflects the parties' understanding that if plaintiffs believed that noncompliance by the District recurred while other Sections remained active, whatever remedies plaintiffs would have would lie outside this lawsuit.

In recognition of this basic principle, the Court terminated Section II of the Settlement Order, not based on a finding that the District never again would experience issues with timely processing Medicaid applications, but based upon the District's ability to satisfy the negotiated exit criteria, which required that the District achieve compliance standards agreed upon by the parties for three consecutive years. (Settlement Order ¶ 74; Minute Order dated Feb. 24, 2009.) The District performed its share of the bargain struck by the parties—plaintiffs do not contend otherwise—and was entitled to, and received, dismissal of Section II. The parties did not agree that the District could be forced to resume Court oversight on the issue at some point of plaintiffs' choosing.

And while the District vigorously contests plaintiffs' contention that future noncompliance with timeliness provisions could constitute changed circumstances under *Rufo* and *Agostini*, the District has continued its work in implementing the ACA's eligibility framework as it concerns initial applications. When the District opposed plaintiffs' motion for a preliminary injunction on January 15, 2016, the District reported that 1,247 individuals remained in its case processing backlog, which was down from the approximately 12,000 individuals affected by the issue when the problem initially was discovered. (ECF No. 2077-1 at ¶¶ 66, 71.) Through the District's diligence, and with guidance from CMS, as of February 24, 2016, the case

processing backlog was reduced to zero. (Second Schlosberg Decl. at ¶ 4.) In addition, the District reported in its opposition to the motion for a preliminary injunction that a host of technical issues had caused certain cases to be "stuck/malformed," meaning any caseworker who attempted to conduct a manual review of the application would not be able to do so. When the problem was self-identified by the District in October 2015, it initially believed there were 2,112 applications affected by the "stuck/malformed" issue. By January 11, 2016, the District had reduced this number to 1,408. As of February 23, 2016, only 67 applications appear to be "stuck/malformed" and the District continues working to further reduce this figure to zero as well.[4] (Second Schlosberg Decl. at ¶ 5.)

The limited number of initial applications affected by these issues is dwindling out of existence, regardless of whether this Court grants or denies plaintiffs' various motions. And the District has taken proactive steps to prevent these issues from recurring in the future by identifying and resolving the root causes and creating automated batch processes to eliminate or reduce the need for manual review. (*Id.* at ¶¶ 6-10.) These circumstances do not justify a modification of the Court's February 24, 2009 Order terminating Section II of the Settlement Order.

2. Renewals

Unlike Section II of the Settlement Order, the Court terminated Section III under its authority pursuant to Rule 60(b)(5), concluding that the ACA's renewal provisions "are in direct conflict with the renewal process in Section III." (ECF No. 1886, at 6.) Since the Court's termination of Section III, there have been no unanticipated factual changes that warrant relief

[4] The District additionally acknowledged that the "stuck/malformed" issue affected a smaller number of renewals. As discussed below, the number of "stuck/malformed" renewals has been reduced to zero.

under Rule 60(b)(5). That the District, like virtually every other jurisdiction in the country, experienced its share of technical issues in developing systems with respect to its implementation of the ACA's eligibility requirements was hardly "unanticipated." *Id.* Indeed, the Court was fully aware when it terminated Section III that "implementation will undoubtedly be both rocky and fairly long in coming." (ECF No. 1886, at 6.) Plaintiffs' apparent belief that the Court's prediction has come true is not a basis for relief from that Order. *Agostini*, 521 U.S. at 216 ("That these predictions of additional costs turned out to be accurate does not constitute a change in factual conditions warranting relief under Rule 60(b)(5)."); *Keepseagle v. Vilsack*, 2015 WL 4510837, at *21 ("Rule 60(b)(5) requires truly changed circumstances, not a difference in degree of what was expected that renders a judgment less efficient …").

In any event, the District's process for conducting annual renewals of Medicaid benefits is working well. The crux of plaintiffs' complaints with respect to renewals was that the District had temporarily ceased conducting passive renewals for MAGI beneficiaries. Notwithstanding the undisputed fact that CMS approved of the temporary mechanisms the District employed to re-determine eligibility, the District now successfully has implemented the necessary functionality to resume passive renewals for MAGI beneficiaries, which will continue in the future. The District passively renewed 63% of D1 MAGI beneficiaries who were due to renew in February 2016 and 59% of those due to renew in March 2016. (Second Schlosberg Decl. at ¶ 12.) In other words, these beneficiaries' Medicaid benefits were renewed without any action on their part. And the District has reduced the "stuck/malformed" problems that affected some renewals—less than ten at the time it opposed plaintiffs' motion for a preliminary injunction—to zero. (*Id.* at ¶ 5.) From the beneficiary's perspective, this is a drastic improvement over the

process that existed before the Court vacated Section III and one that does not warrant reinstatement of Court oversight.

Because plaintiffs have failed to show a significant change in circumstances, the Court need not proceed further in the Rule 60(b)(5) analysis. *In re Black Farmers Discrimination Litigation*, 950 F. Supp. 2d 196, 200 (D.D.C. 2013) ("Where no significantly changed circumstances have been shown, disregarding the terms of the carefully negotiated Settlement Agreement in a manner that benefits the plaintiffs, over the defendant's objections, would be inconsistent with Rule 60(b), with *Rufo*, and with the 'contractual character' of the Settlement Agreement as approved by the related Order and Judgment.") (citations omitted).

C. The Proposed Modifications Are Not Suitably Tailored

Even if plaintiffs were able to demonstrate the existence of significantly changed circumstances, the proposed modification is not at all reasonably tailored. *See Rufo*, 502 U.S. at 391. "A change in circumstances is not a free pass to rewrite a consent decree; rather 'the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances.'" *Keepseagle v. Vilsack*, 2015 WL 4510837, at *21 (quoting *Rufo*, 502 U.S. at 391).

Plaintiffs' proposed modifications paint with too broad a brush. The District has acted responsibly in self-identifying technical problems and solving the root causes while minimizing effects on beneficiaries. Importantly, the District has done so using protocols approved by CMS. Plaintiffs request that the Court bypass CMS and instead mandate that the District bring all processing of renewals to an abrupt halt indefinitely. That plaintiffs disliked the temporary process approved by CMS does not justify bringing renewals to a standstill, particularly because

it would virtually eliminate the District's ability to terminate coverage for individuals who are not eligible or entitled to Medicaid benefits at heavy costs to the District's taxpayers.

Similarly untailored is plaintiffs' proposal that the Court order provisional Medicaid eligibility for any applicant whose application exceeds 45 days. The District has worked tirelessly and successfully to resolve the technical problems affecting some initial applications. And it has done so successfully, reducing the case processing backlog to zero and reducing the "stuck/malformed" initial applications to 67. (Second Schlosberg Decl., at ¶ 5.) To put those figures in perspective, the District processes approximately 5,000 initial applications for Medicaid per month. (*Id.* at ¶ 21.) The sweeping approach plaintiffs propose is out of proportion with the scope of the limited nature of remaining issues affecting initial applications, which are actively monitored by the District.

II. The Court Should Not Grant Relief Under Fed. R. Civ. P. 60(b)(6).

Rule 60(b)(6) is a catch-all provision that permits a court to grant relief from its orders in "extraordinary circumstances." *Ackermann v. United States*, 340 U.S. 193, 198 (1950). "Rule 60(b)(6) 'should be only sparingly used' and may not 'be employed simply to rescue a litigant from strategic choices that later turn out to be improvident.'" *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007) (quoting *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980)). It does not provide relief where a party seeks relief from a "considered choice." *Ackermann*, 340 U.S. at 198; *Salazar v. District of Columbia*, 633 F.3d 1110, 1122 (D.C. Cir. 2011).

In an earlier appeal in this case, the D.C. Circuit found that where the challenged order has prospective application, relief should be obtained through Rule 60(b)(5) rather than Rule 60(b)(6). *Id.* ("Where the claim is that the application of an order is prospectively inequitable,

Rule 60(b)(5) is available. It is where a judgment has no prospective application and the neglect is inexcusable that Rule 60(b)(6) provides the only avenue for relief.") (internal citations and footnote omitted). Thus, the Court should only evaluate plaintiffs' motion under Rule 60(b)(6) if it agrees with the District that the February 24, 2009 and October 18, 2013 Orders lack prospective application.

With respect to the February 24, 2009 Order dismissing Section II of the Settlement Order, it is the direct result of plaintiffs' "considered choice" in bargaining over the Settlement Order. Plaintiffs freely negotiated and agreed to terminate Section II once the District satisfied the specified exit criteria. *See Ackermann*, 340 U.S. at 198. And plaintiffs agreed that the District had done so. (ECF No. 1443.) They should be held to that choice. They may not now rely on Rule 60(b)(6) as a basis to reinstate issues relating to the processing of initial Medicaid eligibility applications. *See Twelve John Does*, 841 F.2d at 1142 (reversing district court's decision to reinstate dismissed party under Rule 60(b)(6)).

Moreover, extraordinary circumstances are not present here. Plaintiffs are not without a forum to litigate their allegations; they simply may not do it here as part of this case. *See Hawaii Cnty. Green Party v. Clinton*, 124 F. Supp. 2d 1173, 1185 (D. Haw. 2000) ("It can hardly be 'extraordinary' in an ever-changing world that years after a case is found moot, facts arise that would support a new lawsuit or even (arguably) the claims rejected in the first lawsuit."); c*f. Aikens v. Ingram*, 652 F.3d 496, 512 (4th Cir. 2011) (relief under Rule 60(b)(6) was appropriate where plaintiff would be precluded from filing a new lawsuit). And the state of the District's implementation of the ACA's eligibility framework does not approach the extraordinary circumstances required to permit relief under Rule 60(b)(6). The District has taken every conceivable action to identify and correct any technical issues with its eligibility systems, all the

while operating under CMS's guidance. And the District has systems in place to monitor its eligibility systems to avoid or minimize any effect on beneficiaries in the future. In addition, the District successfully deployed passive renewals for D1 MAGI beneficiaries going forward, allowing thousands of beneficiaries to renew their eligibility with no action on their part and has instituted enhanced outreach activities to ensure that beneficiaries who are required to complete and return forms to retain coverage know that they must do so. More individuals than ever before are enrolled in Medicaid and are retaining coverage. These are not the type of extraordinary circumstances that warrant revisiting the Court's decisions to terminate the eligibility sections of the consent decree. To the contrary, they highlight the District's ability to responsibly manage the eligibility process without judicial oversight.

III. Rule 60 Provides the Exclusive Mechanism to Modify an Order in This Case.

A court administering a consent decree has only two sources of authority to modify the decree: the terms of the decree itself and Rule 60. *Pigford v. Veneman*, 292 F.3d 918, 923 (D.C. Cir. 2002) (citing *Bd. of Trustees of Hotel & Rest. Employees Local 25 v. Madison Hotel, Inc.*, 97 F.3d 1479, 1484 n.8 (D.C. Cir. 1996)). The D.C. Circuit has rejected the notion that courts retain equitable discretion beyond these sources. *Id.* at 924 ("district courts enjoy no free-ranging 'ancillary' jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order") (citing *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 381 (1994)); *accord Pigford v. Vilsack*, 777 F.3d 509, 514 (D.C. Cir. 2015).

Plaintiffs incorrectly cite a 2011 opinion of the D.C. Circuit in this case to suggest that, contrary to *Pigford*, the Court possesses inherent authority to modify the Settlement Order. (Mot. at 3 (citing *Salazar v. District of Columbia*, 633 F.3d at 1116-17).) But plaintiffs cite the Circuit's opinion out of context. The cited portion indeed describes the historical equitable power

of a court to modify its orders or judgments, but it did so in explaining that Rule 60(b) was adopted in order to codify the body of case law interpreting the authority of a court to modify its orders. 633 F.3d at 1114-16. Indeed, as the Circuit noted, "Rule 60(b) does not provide a new remedy at all, but is simply the recitation of pre-existing judicial power." *Id.* at 1115 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 234–35 (1995)). Nothing in the opinion permits a court sitting in equity to exceed Rule 60(b) in determining whether or to what extent a consent decree should be modified.

Therefore, if the Court lacks inherent authority beyond what is permitted under Rule 60(b), the source of any additional authority must be the Settlement Order itself. *Pigford v. Veneman*, 292 F.3d at 924-25 ("Who would sign a consent decree if district courts had free-ranging interpretive or enforcement authority untethered from the decree's negotiated terms?"). But the Settlement Order provides that "the general body of federal law governing motions to modify orders in contested matters pursuant to Rule 60(b) of the Federal Rules of Civil Procedure shall apply" to motions for modification. (Settlement Order ¶ 72.) This provision is not an expansion of the Court's powers to modify at all. It merely clarifies that modification requests must meet Rule 60(b). *Cf. Sierra Club v. Meiburg*, 296 F.3d 1021, 1033 (11th Cir. 2002) ("We do not read these boilerplate provisions as giving the district court any more power to modify the decree than it already had under Rule 60(b)(5) of the Federal Rules of Civil Procedure, as explicated by the Supreme Court in [*Rufo*].").

Thus, Rule 60(b) provides the exclusive means to modify the Settlement Order in this case.

CONCLUSION

The District demonstrated in opposing plaintiffs' motion for a preliminary injunction that emergency injunctive relief is not warranted, both on the merits and because of jurisdictional defects. Plaintiffs' repackaged Motion for Modification of the Settlement Order fares no better and therefore should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OSCAR SALAZAR, *et al.*,	)	
Plaintiffs,	)	
v.	)	**C.A. No. 93-452 (GK)**
DISTRICT OF COLUMBIA, *et al.*,	)	
Defendants.	)	

ORDER

Upon consideration of plaintiffs' Motion for Modification of the Settlement Order (ECF No. 2093) and the District of Columbia's Opposition, it is

ORDERED that plaintiffs' Motion is **DENIED**.

_____
Hon. Gladys Kessler
Senior United States District Judge