UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

Favian Busby, Russell Leaks, and Joseph Nelson *on their own behalf and on behalf of those similarly situated*, Petitioners-Plaintiffs, v. Floyd Bonner, Jr., *in his official capacity*, Shelby County Sheriff, and the Shelby County Sheriff's Office, Respondents-Defendants.	Civil Action No. 2:20-cv-2359-SHL-atc

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO ENFORCE AND TO MODIFY THE CONSENT DECREE

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PRELIMINARY STATEMENT

Less than a week after the Court approved the Consent Decree (the "Decree") agreed to by the parties in this matter (ECF No. 209), and without demonstrating that people detained in the Shelby County Jail (the "Jail") are adequately protected from COVID-19, Defendants informed Plaintiffs that they believe the protections negotiated by the parties in this case have terminated.

It is plain that the intent of the Decree is to ensure that medically vulnerable detainees in the Jail are sufficiently protected so long as COVID-19 presents a threat to their health and safety. *See* Approved Consent Decree, ECF No. 161-2, at ¶ 13 (contemplating a ventilation expert to evaluate whether "air quality within the Jail is safe as it relates to COVID-19"); ¶ 20 (discussing social distancing measures and a determination by the independent inspector as to whether population levels are safe vis-à-vis COVID-19); ¶ 22 (empowering Plaintiffs' counsel to seek swift judicial resolution of any matters which "pos[e] an immediate and serious risk to the health and safety of Plaintiffs or Class or Subclass members"). The fact that the Decree is to terminate only upon the implementation of an adequate vaccination program or "a declaration by the CDC and the Tennessee Department of Health that the COVID-19 pandemic is over and/or has ended" makes clear the parties' intent that the Decree should run until detainees at the Jail are afforded adequate protections from the virus. *Id.* at ¶ 28. Indeed, the Court confirmed this framing and intent in its April 12 Order Granting Final Approval of the Class Action Settlement, noting that at the core of this litigation lies a desire to "protect as much as possible Plaintiffs' safety while detained in the Shelby County Jail ('the Jail') during the current pandemic caused by COVID-19." ECF No. 209, at 1.

One day after the Court issued its order, Defendants issued a public press release claiming this suit had been "dismissed" and indicating the Decree would terminate two days later, on

April 15, once the first doses of COVID-19 vaccines were offered to people in the Jail. *See* SCSO Press Release, attached as Exhibit A. After Plaintiffs' counsel inquired about the press release the next day, Defendants confirmed by e-mail and in a subsequent meet and confer that they believed, and continue to believe, the Decree has concluded. *See* E-mail Correspondence Between Parties re: *Busby v. Bonner*, attached as Exhibit B.[1]

To the contrary, Defendants have not satisfied the requirements of the Decree, and their position that the Decree no longer applies—or may imminently cease to apply—threatens the health and safety of the many hundreds of people held in the Jail. As an initial matter, there is scant evidence that Defendants have made adequate efforts to offer and administer the vaccine, including by offering educational materials and non-punitive incentives. As a result, an extraordinarily low number of detainees in the Jail overall have received the vaccine. Court-appointed Independent Inspector Michael Brady's first report, issued on April 11, 2021, previewed that vaccination hesitancy would be a significant problem at the Jail, indicating a vaccine refusal rate thus far of 75% in the Jail. *See* First Inspection Report of Michael Brady, attached as Exhibit C, at 28. During a meet and confer on April 16, Defendants informed Plaintiffs that approximately 200 people, out of the approximately 1900 people confined in the Jail, received a vaccine on April 15, suggesting an even higher refusal rate approaching 90%. At a subsequent meet and confer on May 6, Defendants indicated the number was basically unchanged, with 229 detainees having taken their first dose.

In other respects, too, Defendants have failed to comply with the Decree. In particular, Defendants have not met their obligations with respect to adopting or responding to the

[1] The parties have conferred twice regarding Defendants' position as to when the Decree will terminate. Defendants have agreed only to treat the Decree as operative during the dispute resolution period between the parties on this question. *See* Ex. B at 15.

recommendations of the ventilation expert, as mandated by Paragraph 13 of the Decree, or the recommendations of Mr. Brady, as mandated by Paragraph 10 of the Decree.

Moreover, Defendants have severely curtailed counsel's access to information from our detained clients about vaccine administration: Defendants have eliminated Plaintiffs' access to the hotline that had been put in place to permit Class Members to discuss the settlement and the Decree with Plaintiffs' counsel, which has left counsel with limited visibility into Defendants' compliance with the terms of the Decree.

Plaintiffs hereby move this Court to enforce the Decree by (1) ordering that Defendants offer adequate educational materials and non-punitive incentives to increase the vaccination rate in the Jail in order to comply with the Decree; (2) ordering Defendants to make best efforts to adopt the recommendations of the Independent Inspector in his April 11, 2021 report and in his forthcoming reports; (3) ordering Defendants to make best efforts to adopt the recommendations of the Ventilation Expert; (4) ordering Defendants to reinstate the toll-free number that permits Class Members to speak with their counsel regarding Defendants' compliance with the Consent Decree; (4) making a finding that the Decree has not terminated because Defendants have not implemented an adequate vaccination program and Class Members presently remain unsafe in the Jail; and (5) clarifying that the language "offered and administered" in termination provision (b) of Paragraph 28 of the Decree means that vaccinations must be fully administered in accordance with Centers for Disease Control ("CDC") guidelines for the given vaccine, including guidelines for the number of doses, schedule of administration of doses, and aftercare; and that robust vaccine education efforts should be implemented in all housing units of the Jail, offers of vaccination should be made regularly and as frequently as possible to all people in the Jail, vaccines should be

made available within two days after a request, and non-punitive incentives for vaccination should be offered.

Further, in light of Defendants' apparent maneuvering toward a premature termination of the Decree, and to ensure the parties' intent to protect Class and Subclass Members is effectuated, Plaintiffs hereby move the Court to exercise its broad equitable powers to modify the portion of the Decree that contemplates termination pursuant to a COVID-19 vaccine program to add a clause ensuring protections for the Class and Subclass Members as detailed below:

> This Decree will terminate upon the earliest of either (a) a declaration by the CDC and the Tennessee Department of Health that the COVID-19 pandemic is over and/or has ended, or (b) an FDA-approved COVID-19 vaccine is offered to and **fully** administered according to FDA **and CDC** guidelines to all detainees housed at the Jail for a period of more than fourteen (14) days and who accept a vaccination, along with educational materials about the vaccine and non-punitive incentives to take the vaccine**, so long as the vaccine program is demonstrated by a showing to the Court to result in lasting abatement of the threat COVID-19 poses to Class and Subclass members. While the parties may agree that "lasting abatement" has been achieved at any point, the Decree will terminate pursuant to section (b) of this Paragraph upon a showing to the Court followed by the Court's approval that for a consecutive three-month period 80% of the detainee population in the Jail has been fully vaccinated against COVID-19, or upon a finding by the Independent Inspector that vaccination levels and other COVID-19-related health and safety measures have accomplished the goal of keeping Class and Subclass members sufficiently safe**.

PROCEDURAL AND FACTUAL HISTORY

I. The Litigation

On June 10, 2020, the Court certified a Class and Subclass of medically vulnerable and disabled individuals detained pre-trial at the Jail who were at increased risk of serious injury or death from COVID-19, based on guidance from the CDC. ECF No. 38. On August 7, 2020, the Court denied Plaintiffs' emergency motion for habeas relief, but registered significant concerns about whether medically vulnerable and disabled detainees were in fact safe from COVID-19 in the facility. ECF No. 124. In its opinion, the Court outlined multiple "grave areas of concern" and

expressed "doubts . . . as to whether the conditions at the Jail are legally sufficient." In particular, the Court wrote that "[c]oncerns persist as to the lack of testing, social distancing, and isolation and quarantine measures at the Jail, not to mention the persistent failure to consider detainees' medical conditions when making bond decisions." *Id.* at 20–21.

II. The Settlement

Following the Court's August 7 Order and with substantial discovery requests pending, the parties engaged in mediation and reached a resolution of the case on December 22, 2020, and shortly thereafter informed the Court. ECF No. 160. Eleven days prior, on December 11, 2020, the FDA issued the first emergency authorization for a COVID-19 vaccine manufactured by Pfizer-BioNTech.[2]

On January 28, 2021, the Court preliminarily approved the parties' settlement and proposed Consent Decree. ECF No. 162. In so doing, the Court emphasized that the Decree "imposes multiple protective measures for Plaintiffs moving forward, which were the focus of this litigation from the beginning," *id.* at 5, and that the Decree resolved "pressing concerns regarding the adequacy of safety measures at the Jail," in the face of the "unprecedented crisis in need of urgent resolution" COVID-19 presents, *id.* at 7.

At the start of the notice period, Defendants set up a toll-free number that allowed people in the Jail to call Plaintiffs' counsel to discuss the settlement. At the first-scheduled fairness hearing, the Court identified deficiencies in the notice, because information was posted in a portion of housing areas in the Jail that was difficult for detainees to access. ECF No. 176. During the amended notice period, each pre-trial detainee housed in the Jail was handed a One-Page Notice,

[2] U.S. Food & Drug Administration, *Pfizer-BioNTech COVID-19 Vaccine*, https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/pfizer-biontech-covid-19-vaccine#:~:text=On%20December%2011%2C%202020%2C%20the,years%20of%20age%20and%20older.

which contained a short description of the Class, explained that a settlement had been reached, and explained that people in the Jail were entitled to read other papers that would explain the agreement more fully. *See* One-Page Notice, ECF No. 180-1. The notice also provided information on how to object to the settlement and provided the toll-free number to call Plaintiffs' counsel "if you have any questions about the Agreement." *Id.* The Jail also made packets available to people in the Jail containing the full Settlement Agreement and a Detailed Notice, which more fully summarized the Agreement. *See* Proposed Plan for Distributing Notice, ECF No. 180-2, at 1–2. The Detailed Notice Form stated that "If the Court enters the Consent Decree, but you feel the Jail is not following the terms outlined below, you can call the lawyers for the Class" at the toll-free number. Detailed Notice Form, ECF No. 161-5, at 2.

III. Post-Settlement Conduct

A. Ventilation Expert

Pursuant to Paragraph 13 of the Decree, the parties conferred numerous times in January and February 2021 about the appointment of a ventilation expert. Plaintiffs provided Defendants with multiple extensions of time to provide evidence that ventilation in the Jail was satisfactory under even pre-pandemic standards, yet Defendants refused and relied entirely on manufacturer's assertions from a scientifically suspect company selling ionizer devices. Pls.' Notice Pursuant to ¶ 13, attached as Exhibit D. On March 22, 2021, pursuant to the Decree, Plaintiffs asked mediator John Golwen to appoint a ventilation expert. On April 6, 2021, Mr. Golwen appointed Jeff Haltom as the ventilation expert. Letter from J. Golwen to Parties, attached as Exhibit E. The parties met collectively with Mr. Haltom on April 9, 2021, to discuss his appointment to determine whether the air quality and ventilation in the Jail are safe with respect to COVID-19. On May 3, Mr. Haltom informed the parties that he believed the Jail would need to undergo certain testing in order for him to be able to assess the adequacy of ventilation in the facility. Defendants have not responded

to Mr. Haltom's testing recommendation or conducted the testing, which—under Paragraph 13 of the Decree—was due May 17, 2021. E-mail Correspondence Between Parties and Jeff Haltom re: *Busby v. Bonner* Status Update, attached as Exhibit F. Instead, Defendants assert that Mr. Haltom's suggested testing plan is not a "recommendation" within the meaning of Paragraph 13 of the Decree. Ex. B at 7.

B. Mr. Brady's First Inspection

On March 17, 2021, Independent Inspector Brady conducted an initial visit of the Jail pursuant to the Decree. Mr. Brady issued his first report on April 12, 2021. Ex. C. Mr. Brady raised a number of serious concerns with the safety of Class and Subclass Members in the Jail, including, among others:

- The Jail "does not have the ability to properly social distance inmates in the higher security levels" and should therefore reduce its population "by up to 50% in order to achieve social distancing consistent with CDC guidelines in order to effectively prevent/mitigate serious illness or death in the inmate population. Time is of the essence given the high vaccine refusal rate which is approximately 75%. . . . [A]t the time of my inspection only 22 inmates had been vaccinated."

- "The Shelby County Jail and Wellpath should create a comprehensive, culturally competent vaccine education program for current and future inmates that will demonstrate to the inmate population that the vaccines are safe and effective. Until the majority of inmates have been vaccinated at the Shelby County Jail, the prevention/mitigation effect is de minimis."

- "The Court Expeditor function is completely ineffective in presenting Class and Subclass member healthcare information to the Court for them to consider [alternatives to detention in the Jail]. . . . [T]he manner in which data is collected, presented, and preserved is dysfunctional and unreliable. Less than 1% of the Class and Subclass healthcare information has been submitted to the Court for consideration. This is a serious problem that places Class and Subclass members at an unreasonable risk of serious illness or death while in the Shelby County Jail."

- "Contract tracing occurs in silos in the Shelby County Jail, and there is a significant reliance on schedules and self-reporting of exposure . . . . As a result, there is a serious risk of missing individuals who have been exposed to the Covid-19 virus, and an inadvertent introduction of the virus into the jail or the community."

Id. at 28–29. Under the Decree, Defendants were obligated to either implement the recommendations made by Mr. Brady or explain in writing "why, despite their best efforts to do so, Defendants will not or cannot adopt" the recommendations by April 26, 2021. On that date, Defendants submitted their responses to Mr. Brady's recommendations. Defs.' Resps. to Mike Brady's Recommendations From His March 3, 2021, Jail Inspection, attached as Exhibit G. In several of these responses, Defendants did not meaningfully engage with Mr. Brady's recommendation, instead stating, for example, that they "disagree[d]" with a recommendation or that they already "endeavor[]" to satisfy a recommendation—without explaining any specific efforts since the inspection or acknowledging that they are not succeeding at such endeavors.

Mr. Brady's inspection report references data he was provided upon request during his inspection. Ex. C at 30. Plaintiffs' counsel asked to receive the data referenced and any other documentation provided by the Jail Expeditor consistent with Paragraph 8 of the Decree. E-mail Correspondence Between Parties re: Request for data produced to Mr. Brady, attached as Exhibit H. Only once it became clear that Plaintiffs planned to file this motion imminently did Defendants furnish the documentation, in a last-ditch effort to keep this matter from reaching the Court. *Id.* at 1.

IV. Final Approval of the Settlement and Defendants' Claim That the Consent Decree Had Terminated

The Court entered final approval of the settlement and Decree on April 12, 2021. ECF No. 209.

The very next day, the Shelby County Sheriff's Office issued a press release entitled "COVID-19 CLASS ACTION LAWSUIT DISMISSED." Ex. A. The press release stated that "[t]he final action to be taken pursuant to the Consent Decree is to offer and administer the COVID-19 vaccine to detainees. This will be accomplished on Thursday, April 15, with either the

Pfizer or Moderna vaccine to be administered to every detainee in the Jail who has requested it." *Id.*

On April 14, 2021, Plaintiffs' counsel e-mailed counsel for Defendants asking for more information on the representations in the press release. *See* Ex. B at 18–19. Plaintiffs also informed counsel for Defendants that the hotline had received no calls since April 2 and asked them to confirm the hotline was still available or to reinstate it if it was no longer operational. *Id.* Counsel for Defendants informed counsel for Plaintiffs that they believed the Decree would terminate the following day, April 15, pursuant to a single attempt to offer the first dose of a two-dose vaccine to people in the Jail. *Id.* at 17. Defendants also provided Plaintiffs' counsel with the educational materials they planned to distribute in the Jail.[3] Jail Vaccine Materials, attached as Exhibit I.

On April 16, the parties held a meet and confer, during which Defendants informed Plaintiffs that about 200 people in the Jail had been given one dose of a two-dose vaccination the previous day. Plaintiffs asked what incentives were being offered to encourage vaccinations in the Jail, and Defendants cited none. Plaintiffs indicated during that conversation that the educational materials from the Jail—which they had been asking to review for some time—appeared inadequate. *See* Ex. I. Defendants indicated they would consider using materials provided by Plaintiffs and requested that Plaintiffs write a letter to people in the Jail encouraging them to get vaccinated. Defendants also reiterated their view that once the first dose of the Pfizer vaccine was offered on April 15, the Decree was terminated. Later on April 16, Plaintiffs asked if Defendants would join in a motion to modify Paragraph 28 in light of the Jail's low vaccination rate thus far.

[3] The parties conferred previously on April 7, 2021, during which time Plaintiffs' counsel—in an effort to collaborate with Defendants' counsel to devise an effective vaccination plan—requested information about Defendants' plans to provide vaccinations at the Jail, including any educational efforts or incentives offered. Defendants did not respond to this request until the day before vaccinations were to begin, affording Plaintiffs' counsel no opportunity to weigh in on the initial education and incentive plans, which were woefully deficient.

Ex. B at 15–16. On April 19, Defendants rejected that request and invoked the dispute resolution process of the Decree, notwithstanding that they continued to hold the view that the Decree had terminated as of April 15. Ex. B 14–15.

A. Defendants' Account of the Vaccination Program

On April 23, Plaintiffs offered a host of suggestions to improve vaccination efforts at the Jail, including, among other things, improved educational materials, town halls with outside medical experts who were likely to be more trusted than Jail staff or contractors to answer questions, and meaningful incentives for vaccination, such as increased recreational time or a commissary bonus. *Id*. at 12–14. Plaintiffs also suggested the Jail make preemptive efforts to address what can often be severe vaccine side effects, as opposed to waiting for detainees to make sick calls. *Id.* In addition, Plaintiffs proposed a schedule for updates on the Jail's vaccination levels, so that the parties could continue to work together to refine the vaccination program and improve rates of vaccination. *Id.*

On April 26, Defendants delivered to Plaintiffs their responses to the findings and recommendations from the Independent Inspector. Ex. G. Their responses indicated that Defendants were using some of the educational materials Plaintiffs had suggested. *Id.* at 3. The response also indicated the Jail would, as Plaintiffs suggested, hold town halls to discuss vaccines, but did not adopt Plaintiffs' request to include outside experts in those town hall meetings.[4] *Id.* In addition, the response noted that, as an incentive to receive the vaccine, people in the Jail who agreed to do so would receive fresh fruit the day of or day after their vaccination. *Id.* at 4.

[4] During a later conference, Defense counsel clarified that the town hall meetings had not yet commenced as of May 6, 2021. Plaintiffs' counsel asked if a member of their team could attend these town halls and Defendants denied that request.

On April 30, Defendants responded to Plaintiffs' proposed vaccination program suggestions, Ex. B at 11–12, which was followed by a meet and confer on May 6. In those discussions, Plaintiffs provided a draft letter to the Jail from Plaintiffs' counsel encouraging vaccination. Defendants also stated that, as of April 29, a total of 229 people in the Jail had been vaccinated.

B. Our Clients' Account of the Vaccination Program

The individuals living in the Jail tell a very different story. As detailed in the attached declarations:

- Detainees received almost no information about the vaccinations at the time they were offered, including such basic questions as which vaccine was being administered and potential side effects, risks, and benefits of the vaccine. Declaration of Mario Bowser, attached as Exhibit J, ¶ 6; Declaration of Favian Busby, attached as Exhibit K, ¶ 4; Declaration of Calvin Kelly, attached as Exhibit L, ¶ 9.
- They have had no opportunities to speak with or ask questions of medical professionals and have not even received fact sheets about vaccines. Busby Decl. ¶ 6; Declaration of Terrell Minniweather, attached as Exhibit M, ¶¶ 5, 9; Declaration of Jeffery Rose, attached as Exhibit N, ¶¶ 9, 11; Bowser Decl. ¶ 15.
- The only educational material they reliably report having received is a video featuring President Barack Obama, Charles Barkley, and Shaquille O'Neal. For multiple reasons, detainees do not find this video persuasive. Minniweather Decl. ¶ 6; Kelly Decl. ¶ 7.
- Some people in the Jail have observed information about vaccines posted on the wall, but note that it is posted behind the pod officer's desk, which is difficult to see because detainees are not allowed in that area. Bowser Decl. ¶ 7; Kelly Decl. ¶ 8. In other words, vaccine information has been posted in the same areas as the class notice information the Court previously found deficient.
- People detained in the Jail have not personally been offered and have not witnessed others being offered or receiving incentives to take the vaccine. Busby Decl. ¶ 7; Rose Decl. ¶ 13; Minniweather Decl. ¶ 4; Bowser Decl. ¶¶ 5, 10; Kelly Decl. ¶ 3.
- Detainees report no immediate follow-up care for those experiencing symptoms post-vaccination. Rather, they must put in a sick call to receive medication, which can take days. Busby Decl. ¶ 7; Kelly Decl. ¶¶ 4, 11.

- Our clients report a number of different concerns that have led them not to get vaccinated and note that these concerns are a frequent topic of conversation among detainees and pod officers in the Jail. Rose Decl. ¶ 8; Minniweather Decl. ¶ 7; Bowser Decl. ¶ 14.

C. The Toll-Free Hotline

On April 23, Plaintiffs followed up on their earlier request that Defendants reinstate the toll-free number so that Plaintiffs' counsel could communicate directly with Class Members, particularly with respect to the administration of vaccinations. Ex. B at 13. Defendants have taken the position that the toll-free number was only meant to operate during the notice period and have reiterated their view that the Decree terminated on April 15. Despite numerous requests and extensive discussion about the benefits of the hotline in facilitating contact with Class and Subclass Members during the parties' May 6 conference, Defendants have not reinstated the hotline and have provided no reason for their refusal to do so. *See* Ex. B 3, 7.

As a result, in order to gather information from detainees about administration of vaccinations and other conditions in the Jail, Plaintiffs' counsel must travel (sometimes significant distances) to the Jail and visit with individual clients.

V. Evolving Knowledge of COVID-19 Vaccines and the Jail Setting

When the parties negotiated the termination provisions of the Decree, which was finalized on December 22, 2020, they believed that Paragraph 28 as written would ensure that the protections of the Decree would run until detainees in the Jail no longer faced a threat due to COVID-19. The public health understanding of the COVID-19 vaccines has evolved since then, including with respect to the jail setting, underscoring the importance of robust efforts to encourage vaccination by detainees and jail staff, widespread and easy availability, and trusted messengers.[5]

[5] Further, as discussed below, Plaintiffs would not have agreed to the present language in Paragraph 28 if they had known Defendants would interpret it so opportunistically as to attempt to terminate the Decree upon provision of the vaccine to less than 11% of the Jail.

On December 31, 2020, the World Health Organization issued guidance indicating that the percentage of the population required to have immunity from COVID-19 to end the pandemic was not yet known, but that eradication of the threat posed by other diseases has required immunity levels of 80% (as with polio) to 95% (as with measles). World Health Org., *Coronavirus Disease (COVID-19): Herd Immunity, Lockdowns and COVID-19* (Dec. 31, 2020), https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19.

On February 16, 2021, the CDC issued guidance on "Frequently Asked Questions" regarding COVID-19 vaccines and correctional and detention centers. CDC, *COVID-19 Vaccine FAQs in Correctional and Detention Centers* (Feb. 16, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/vaccine-faqs.html. Among other things, the CDC stressed that it continues to "strongly recommend" that correctional facilities "continue using all the tools available to help stop transmission" even after the vaccine has been administered. *Id.* On March 6, 2021, a group of doctors published a study in the *New England Journal of Medicine* stressing that "several factors suggest that vaccination alone will not be enough to stop carceral outbreaks" of COVID-19. Benjamin A. Barsky, et al., *Vaccination plus Decarceration – Stopping COVID-19 in Jails and Prisons*, New England Journal of Medicine (Mar. 6, 2021), https://www.nejm.org/doi/full/10.1056/NEJMp2100609. The article goes on to explain that, in large urban U.S. jails—the setting with the highest reproduction rate of COVID-19 *anywhere in the world*—the "effectiveness of vaccines is considerably diminished":

> In this setting, even a vaccine with 90% efficacy will leave many people at ongoing risk for Covid-19, given the extraordinarily high rate of transmission in jails and prisons attributable to rampant overcrowding, inadequate testing and health care, high-volume daily inflow and outflow of staff and detainees, lack of personal protective equipment, and normalized systematic neglect of the welfare of incarcerated people.

Id. In summary, "Reliance on vaccination alone thus seems unlikely to achieve necessary reductions in Covid-19 transmission in incarcerated populations." *Id.* On April 2, 2021, the CDC issued a report on a study of the willingness of incarcerated and detained persons to accept a COVID-19 vaccination. Marc Stern, Alexandra Piasecki, Lara Struck, et al., *Willingness to Receive a COVID-19 Vaccination Among Incarcerated or Detained Persons in Correctional and Detention Facilities—Four States, September-December 2020*, CDC (Apr. 2, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7013a3.htm. That study showed that the vaccine refusal rate was 45%—30 percentage points lower than the vaccine refusal rate at the Jail reported by the Independent Inspector and approximately 45 percentage points lower than the refusal rate in the Jail on May 6. *Id.*; Ex. C at 28. The vaccine acceptance rate in the study was also 45%, with an additional 10% willing to consider using the vaccine—a rate 20–30 percentage points higher than that reported by the Independent Inspector and 35–45 percentage points higher than the acceptance rate in the Jail as of April 15. *See* Stern et al., *supra*; Ex. C at 28. The most common reason for vaccine hesitation among incarcerated people was wanting to hear more information about the vaccines. *See* Stern, et al., *supra*.

An April 6, 2021 article from the Johns Hopkins Bloomberg School of Public Health suggests that "we would need at least 70% of the population to be immune to keep the rate of infection down ('achieve herd immunity') without restrictions on activities." Johns Hopkins School of Public Health, What is Herd Immunity and How Can We Achieve it With COVID-19? (Apr. 5, 2021), https://www.jhsph.edu/covid-19/articles/achieving-herd-immunity-with-covid19.html. However, this study did not contemplate the vaccination rate necessary to achieve "herd immunity" in a carceral setting, which may well be higher, as highlighted in the *New England Journal of Medicine* piece. Thus, at present, the vaccination rate needed to achieve "herd

immunity," or, at a minimum, a rate of vaccination necessary to ensure the abatement of the threat of COVID-19 in the jail setting, is still unknown and subject to continuing scientific study. Whatever the precise necessary vaccination rate may be, it is plain that the rate in the Jail is nowhere close to it. Even for a carceral setting, the vaccine acceptance rate in the Jail is incredibly low. *See, e.g.*, Elizabeth T. Chin, et al., New England Journal of Medicine, *Correspondence* (May 12, 2021), https://www.nejm.org/doi/full/10.1056/NEJMc2105282?query=featured_home (noting a 66.5% acceptance rate in California prisons); Becky Sullivan, *All Federal Inmates to be Offered Vaccine By Mid-May, BOP Says*, NPR (April 16, 2021), https://www.npr.org/2021/04/16/988237102/all-federal-inmates-to-be-offered-vaccine-by-mid-may-bop-director-says (66% of federal prisoners offered vaccines accepted at least one dose).

ARGUMENT

I. Defendants Have Failed to Meet the Requirements for Terminating the Consent Decree and Have Undermined the Consent Decree's Operation

The Decree provides two avenues for termination:

> (a) a declaration by the CDC and the Tennessee Department of Health that the COVID-19 pandemic is over and/or has ended, or (b) an FDA-approved COVID-19 vaccine is offered to and administered according to FDA guidelines to all detainees housed at the Jail for a period of more than fourteen (14) days and who accept a vaccination, along with educational materials about the vaccine and non-punitive incentives to take the vaccine.

Approved Consent Decree, ECF No. 161-2, at ¶ 28. The Decree further requires that "Upon termination of this Decree pursuant to this Paragraph, the parties shall inform the Court and the Court shall enter a final judgment of dismissal." *Id.*

"[S]ince consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts." *Brown v. Neeb*, 644 F.2d 551, 557 (6th Cir. 1981) (citing *United States v. Motor Vehicle Mfrs. Ass'n of U. S., Inc.*, 643 F.2d 644, 648 (9th Cir. 1981)). "The terms of a consent decree, unlike those of a simple contract, however, have unique

properties. . . . The binding substantive commands of a consent decree are embodied within decree's 'four corners.'" However, "[i]f the language of the decree is ambiguous . . . the court's interpretation of its substantive commands may depart from the 'four corners.'" *Id.* (citations omitted). "[A] consent decree should be construed to preserve the position for which the parties bargained." *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013 (6th Cir. 1994) (citing *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir. 1992)).

A. Defendants Have Violated the Decree in Their Implementation of the Vaccination Program at the Jail

Despite the undeniable ineffectiveness of the Jail's administration of vaccines to detainees, Defendants inexplicably claimed that they satisfied their obligations under the Decree by providing a vaccine to a small fraction of the Jail's population.

In order to reach this conclusion, Defendants espouse an untenable interpretation of their obligations under the Decree. First, the plain language "offered to," along with the expressed joint intent of the parties to achieve high rates of vaccine acceptance, means more than a single, generalized offer to a shifting population. And the Decree also requires that when Defendants offer the vaccine, the offer be accompanied by "non-punitive incentives to take the vaccine." Decree at ¶ 28. During the April 16 meet and confer, Plaintiffs' counsel asked what incentives were being offered; Defendants listed none. After Plaintiffs alerted Defendants to the Decree's requirement of incentives, Defendants stated that they began offering fresh fruit to people in the Jail on the day of or day after a vaccination. *See* Ex. G at 3–4. Defendants have not implemented the more substantial incentives suggested by Plaintiffs, such as increased recreational time, commissary funds, or at minimum providing detainees with a small supply of Tylenol prophylactically after vaccination to aid with common symptoms such as aches and fever.

Second, Paragraph 28 contemplates termination only after Defendants provide educational materials about the COVID-19 vaccines. It is self-evident that educational materials must be appropriate to the audience and provide thorough and accurate information. Despite Plaintiffs' requests to collaborate with Defendants on the educational materials to be provided in the Jail, Defendants' initial educational materials were woefully inadequate, offering no information about the contents, efficacy, or side effects of the vaccines. *See* Ex. I. After Plaintiffs urged Defendants to consider new materials, the Jail agreed to provide educational materials suggested by Plaintiffs. However, during the April 16 and May 6 meet and confers, Defendants could not definitively state whether materials had been handed out to individual detainees, and Class Members have reported that detainees are not receiving the materials.[6] Plaintiffs also urged Defendants to hold town halls with outside medical personnel. Defendants have indicated they plan to hold town halls, *see id.*, but they will be with Wellpath medical personnel. Defendants have not revealed when the town halls will take place, and they denied Plaintiffs' counsel's request to participate in such meetings.

The explicit requirements for incentives and educational materials in the Decree make clear the parties' underlying assumption for any termination of the Decree through vaccination: that the vaccination effort result in widespread immunity. Unfortunately, in the absence of adequate education and incentive efforts, people in the Jail have proved hesitant to take the vaccine. The Independent Inspector previewed this problem in his April 11 report, which reported a 75% refusal rate among detainees. Ex. C at 28. In fact, the problem is even worse, as Defendants' counsel explained at the April 16 meet and confer that when vaccines were offered on April 15, only approximately 200 detainees received a first dose, suggesting that less than 11% of detainees are accepting the vaccine. On May 6, after Defendants said they would offer a fresh fruit incentive

[6] As the Court will recall, a handout as compared to posting materials on walls near guard stations was the solution to deficient notice during the class settlement approval process earlier in this case. ECF No. 176.

and explained plans for improved educational materials, vaccination levels remained essentially unchanged.

Further, Defendants have undermined Plaintiffs' ability to follow what is happening to Class Members inside the Jail by shutting off the toll-free number by which Class Members could call their attorneys. The hotline was frequently used by Class Members when it was in operation. Multiple Class Members could dial it at once and have their calls sent to different lawyers, making it easier for Plaintiffs' counsel to schedule and manage responsibilities across the team. As visiting the Jail during the pandemic can be constrained and difficult, this window into Jail-wide practices was extremely important for monitoring conditions in the Jail.

While Plaintiffs' counsel are struggling to learn about their clients' safety, Defendants are hastening to terminate the Decree as soon as possible. Under Defendants' interpretation of the Decree, it is subject to termination as soon as one dose of any vaccine (including vaccines that require two doses for complete administration) is offered to detainees one time, even if no detainee accepts it.[7] Such an interpretation of Defendants' obligations would not protect Class Members

[7] Even under the narrow reading Defendants endorse, termination would still be inappropriate. Paragraph 28 requires that vaccines be "offered to and administered according to FDA guidelines . . . [.]" Per the FDA, the Pfizer vaccine requires two doses of vaccine three weeks apart. U.S. Food & Drug Admin., *Fact Sheet for Healthcare Providers Administering Vaccine, Emergency Use Authorization of the Pfizer-Biontech COVID-19 Vaccine to Prevent Coronavirus Disease 2019*, https://www.fda.gov/media/144413/download. The Moderna vaccine requires two doses of vaccine one month apart. U.S. Food & Drug Admin., *Fact Sheet for Healthcare Providers Administering Vaccine, Emergency Use Authorization of the Moderna COVID-19 Vaccine to Prevent Coronavirus Disease 2019*, https://www.fda.gov/media/144637/download. In addition, Paragraph 28 only permits termination if Defendants provide an "FDA-approved" COVID-19 vaccine. Strictly speaking, no such vaccine exists: currently available COVID-19 vaccines have received Emergency Use Authorization, not approval, from the FDA. U.S. Food & Drug Admin., *Emergency Use Authorization for Vaccines Explained*, https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained (distinguishing emergency use from approval); Eliana Block, WUSA9, *VERIFY: What's the Difference Between Emergency Use Authorization and FDA approval?*, https://www.wusa9.com/article/news/verify/emergency-use-authorization-fda-approval-vaccines-fact-check/65-7391e595-cee0-4a00-8468-194a6e0a21a4 (last updated Apr. 13, 2021) (noting that EUA generally requires about two months of clinical data, and approval six months).

Defendants have also not fulfilled their obligations under the Settlement Agreement, as they have not yet paid Plaintiffs' counsel the agreed upon $84,790.31 as reimbursement for their costs incurred in connection with this case. *See* Settlement Agreement, ECF No. 161-3, at 2–3.

and would thus severely undermine the purpose of the Decree. As a result, Plaintiffs ask the Court to enforce the Decree by ordering the relief sought in the accompanying motion.

B. Defendants Have Violated Multiple Other Provisions of the Decree

The inadequate vaccination program is not the only respect in which Defendants have flouted the Decree.

The Decree requires Defendants "to implement the recommendations of the Ventilation Expert; or, within fourteen (14) days of receiving the written advice of the Ventilation Expert, to explain to the Ventilation Expert, Independent Inspector, and Plaintiffs' counsel in writing why it will not or cannot despite using its best efforts to do so." ¶ 13.

Despite diligent efforts by Plaintiffs' counsel to ensure that Mr. Haltom is empowered to assess the ventilation and air quality in the Jail, Defendants have not—to Plaintiffs' knowledge—taken any steps to facilitate or permit the testing recommended by Mr. Haltom on May 3. Nor have they issued a written explanation as to "why [they] will not or cannot despite using [their] best efforts to do so" within the allotted time. Instead, Defendants quibble with Plaintiffs' counsel by confusing the scope of Mr. Haltom's charge and selectively reading Paragraph 13 of the Decree to assert that Mr. Haltom's recommendation that the Jail undertake certain testing of the ventilation rates is no "recommendation" at all. Ex. B at 7. After several months of dialogue between the parties regarding the ventilation expert and multiple extensions afforded to Defendants, Defendants have given no indication that they intend to accept even the recommendations provided by the expert for testing the ventilation in the Jail—much less his findings and recommendations with respect to the adequacy of the air quality. Defendants should be required to do so, as required by the Decree.

Likewise, Defendants have given the back of the hand to Mr. Brady's findings and recommendations from his first inspection. For example, Mr. Brady's first recommendation was that the Jail population "needs to be reduced by up to 50% in order to achieve social distancing consistent with CDC guidelines." Ex. C at 28. Defendants responded by saying they "disagree" with his recommendation and offering a perfunctory list of the Court Expeditor's duties. Ex. G at 2. Of course, under the Consent Decree, the Jail's opinions about the Inspector's recommendations are wholly irrelevant. Mr. Brady's report also detailed why simple reliance on the Jail Expeditor is insufficient, as his second finding detailed that the Expeditor is "severely understaffed" and that, shockingly, "[l]ess than 1% of the Class and Subclass healthcare information has been submitted to the Court for consideration." Ex. C at 28. In response to Mr. Brady's recommendation that the Jail add "at least two additional positions to the office of the Court Expeditor," Defendants only said they would offer "staff support" for the Expeditor. Ex. G at 6. There was no explanation for what support that would be, if it would entail Mr. Brady's recommendation of two additional staff members, or, if not, why adding those staff members was not possible despite Defendants' best efforts.

Discussions with Class and Subclass Members reveal that the Jail's response to Mr. Brady's recommendations has been even worse. For example, in response to Mr. Brady's recommendation that the Jail implement a mandatory overtime program to ensure sufficient staffing for increased recreational time, the Jail wrote that it already had such a program and that the Jail "endeavors to provide detainees recreational time via access to the rooftop yards and/or dayrooms on a daily basis." *Id.* at 7. Based on reports from Class and Subclass Members, those endeavors have utterly failed, as multiple people in the jail do not receive recreational time each day or have been granted access to the roof only once in the past year. *See* Ex. K ¶¶ 8,9; Ex. M

¶ 8; Ex. J ¶ 12; Ex. L ¶ 10. Tellingly, one person in the jail indicates that the only day in the past month that he was allowed outdoor recreation was the date of Mr. Brady's inspection. Ex. K ¶ 9.

Defendants' response to Mr. Brady also indicated the Jail would be employing town halls, improved educational materials, and offering fresh fruit to educate and encourage people in the Jail to get vaccinated. Ex. G at 3–4. But again members of the Class and Subclass tell a different story. Several people in the Jail indicate they have seen no outreach but an unpersuasive video. *See* Ex. M ¶ 6. They indicate no incentives for vaccination are being offered—not even the meager fresh fruit Defendants described in their response. *Id.* ¶ 4. People in the Jail either do not know about any written educational materials, *see id.* ¶ 9; *see also* Ex. K ¶ 7, or the materials are kept in places where Class and Subclass Members cannot adequately review them, Ex. J ¶ 7.

These are just the reports from people Plaintiffs' counsel was able to reach in their most recent visit to the Jail. A wider canvass of the Jail would no doubt reveal more shortcomings, but such communication with Class and Subclass Members has been impeded by Defendants' decision to cut off access to the toll-free number detainees had previously used to reach class counsel. Without that number, it is extremely difficult for Plaintiffs' counsel to monitor Defendants' compliance with the Consent Decree, even while the limited information that is available gives cause for grave concern.

II. The Court Should Modify the Termination Provision of the Consent Decree

To avoid future litigation on premature termination efforts, Plaintiffs also move the Court to modify the Decree to comport with the parties' intent to provide adequate protection to detainees in the Jail. *See* ECF No. 209, at 1. Such a modification would be within the Court's power, would be appropriate in light of growing understanding regarding the difficulties in administering

vaccines in the Jail, and would effectuate the parties' intent to protect detainees in the Jail from COVID-19 until those protections are no longer needed.

A. The Court Has Broad Equitable Power to Modify the Termination Provision of the Decree Under Rule 60(b)(5)

Under the Court's traditional equitable power, it may modify an order granting injunctive relief when changed circumstances warrant such relief. This is because a "court must find prospective relief that fits the remedy to the wrong or injury that has been established." *Salazar v. Buono*, 559 U.S. 700, 718 (2010) (citing *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) ("A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need."")). It is well-settled that "courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them." *Vanguards*, 23 F.3d at 1018 (internal quotation marks omitted) (citing *Sarabia v. Toledo Police Patrolman's Ass'n,* 601 F.2d 914, 917 (6th Cir. 1979)).

Because prospective relief "is drafted in light of what the court believes will be the future course of events, . . . a court must never ignore significant changes in the law or circumstances underlying an injunction lest the decree be turned into an 'instrument of wrong.'" *Salazar*, 559 U.S. at 714–15 (citing C.A. Wright, A.R. Miller & M. Kane, 11A Fed. Prac. & Proc. Civ. § 2961 (2d ed. 1995) (quoting *Swift & Co.*, 286 U.S. at 115)). Federal Rule of Civil Procedure 60(b)(5) codifies the courts' inherent authority to modify or vacate the prospective effect of their decrees. Rule 60(b)(5) provides, "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding . . . [when] . . . applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). As the Supreme Court explained in *Rufo v. Inmates of Suffolk Cty. Jail*, Rule 60(b)(5) applies to consent decrees because, while a "consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in

nature[,] . . . it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo*, 502 U.S. 367, 378 (1992); *see also Frew v. Hawkins*, 540 U.S. 431, 437, 440 (2004) ("Consent decrees have elements of both contracts and judicial decrees" and may be modified under Rule 60(b) if "it is no longer equitable that the judgment should have prospective application") (citation omitted). Indeed, upon approval, the injunctive quality of consent decrees "compels" the presiding court to: "1) retain jurisdiction over the decree during the term of its existence; 2) protect the integrity of the decree with its contempt powers; and 3) modify the decree should 'changed circumstances' subvert its intended purpose." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) (internal citations omitted).

Applying these principles to a case involving the conditions of pretrial detainees, the *Rufo* Court explained that a "flexible approach" to modification is particularly appropriate to consent decrees in institutional reform cases 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 (citations omitted).

Modification of the Decree is warranted based on the facts of this case. In *Rufo*, the Supreme Court laid out a two-part inquiry for determining whether modification of a consent decree pursuant to Rule 60(b)(5) is appropriate:

> [A] party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance.

502 U.S. at 383. The moving party "may meet its initial burden by showing either a significant change either in factual conditions or in law." *Id.* at 384. Modifications may be warranted when "enforcement of the decree without modification would be detrimental to the public interest." *Id.*

at 384–85 (citations omitted). There is no requirement to demonstrate that such changed circumstances were "unforeseen or unforeseeable" at the time the parties agreed to the decree's terms. *Id.* Importantly, modification of a consent decree may also be justified if it is necessary to achieve the overall goals of performance intended by the decree. *Vanguards*, 23 F.3d at 1020 (finding noncompliance with performance goal is a "significant change in circumstances which warrants revision of the consent decree").

The Sixth Circuit empowers presiding courts to modify a consent decree upon mere "identif[ication of] a defect or deficiency in its original decree which impedes achieving its goal, either because experience has proven it less effective, disadvantageous, or because circumstances and conditions have changed which warrant fine-tuning the decree." *Heath v. De Courcy*, 888 F.2d 1105, 1110 (6th Cir. 1989). "A modification will be upheld if it furthers the original purpose of the decree in a more efficient way, without upsetting the basic agreement between the parties." *Id.* Specifically, such a modification can even extend the time for termination of the decree, for reasons including that the group designed to be benefited by the decree has not participated at a high enough rate to meet the decree's overall goals. *Vanguards*, 23 F.3d at 1020–21 (extending decree for two years because an insufficient number of minority employees were seeking promotion to meet an overall promotion goal); *see also Phila. Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1120–1121 (3d Cir. 1979) (modification acceptable where State could not find sufficient clients to meet decree targets).

B. Public Health Guidance, Changed Circumstances, and the Need for Clarification Justify the Modification

Since the original language of the Decree was negotiated in December 2020, much more is known about the inability of vaccine offers alone to abate the threat of COVID-19 in jails.

As detailed in Part V, *supra*, considerable public health guidance issued since December 2020 stresses the importance of ongoing protections in carceral settings notwithstanding the availability of vaccine doses. *See, e.g.*, CDC, *COVID-19 Vaccine FAQs in Correctional and Detention Centers* ("strongly recommend[ing]" that even after vaccines are administered, "correctional and detention facilities . . . continue using **all the tools** available to help stop transmission . . . **even people who have received the COVID-19 vaccine**.") (emphasis in original); Barsky, et al. ("several factors suggest that vaccination alone will not be enough to stop carceral outbreaks" of COVID-19" and accordingly "even a vaccine with 90% efficacy will leave many [detained] people at ongoing risk for Covid-19, given the extraordinarily high rate of transmission in jails and prisons[.]").

These concerns are exacerbated by the rise of new variants of the virus. The CDC lists five Variants of Concern ("VOCs") that have been detected in the United States. CDC, *About Variants of the Virus that Causes COVID-19* (updated Apr. 2, 2021) https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html. These VOCs appear more contagious than the original virus, which may lead to more cases, and in turn "put more strain on healthcare resources, lead to more hospitalizations, and potentially more deaths." *Id.* This danger will be particularly acute in jails, though most facilities currently do not regularly screen for them. *See* Eddie Burkhalter, et al., *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. Times (Apr. 10, 2021) https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html. For similar reasons, another district court in the Sixth Circuit recently held that vaccination clinics alone would be insufficient to end its inquiry into whether the conditions in a Michigan Jail violated the Jail population's rights in light of COVID-19. *Malam v. Adducci*, No. 20-10829, 2021 WL 1658689, at *2 (E.D. Mich. Apr. 27, 2021).

Since the Decree was negotiated, we have also learned more about the particular challenges of vaccine hesitancy in the U.S. population, and particularly among incarcerated populations, as summarized, *supra*. *See* CDC, *Willingness to Receive a COVID-19 Vaccination Among Incarcerated or Detained Persons* (fewer than 45% of incarcerated persons surveyed expressing willingness to receive a vaccine, with even larger problem among African Americans, participants aged 18–29 years old, and those in jails as compared to those in prisons).

The fact that the acceptance rate of vaccinations in the Jail is hovering below 11% is itself a changed circumstance that supports Plaintiffs' request for modification. It is clear that vaccine efforts thus far have not resulted in the scale of protection the parties would have expected when they negotiated the terms of the Decree. New public health guidance, real-world data not available at the time the Decree was drafted, and Mr. Brady's April 12 report demonstrate that merely offering the vaccine in the manner undertaken by Defendants is insufficient to keep Class and Subclass Members safe. Insofar as the Decree could be read to end as soon as the first dose of a two-dose vaccine is simply offered to people in the Jail, it would be deficient. *Heath*, 888 F.2d at 1110. This alone provides the Court sufficient authority to modify the Decree to reflect current public health guidance and to effectuate its intent.

Finally, Defendants' conduct since the Decree was entered into supports Plaintiffs' request. Before implementing, or even responding to, the numerous detailed recommendations put forth in Mr. Brady's report, Defendants rashly announced via press release that a single, opaque vaccination event on April 15 was to serve as their "final action" under the Decree. Ex. A. They likewise refuse to cooperate with the requests and recommendations from the ventilation expert. The Jail's decision to turn off the toll-free number by which Class Members could reach their attorneys paired with their rush to declare the Decree terminated suggests a desire to escape judicial

oversight and an effort to shirk their responsibilities to implement expert recommendations (or provide explanation why despite their best efforts they cannot) to keep the Jail population safe. In sum, if Defendants do not understand the language and intent of the Decree as negotiated to oblige them to provide meaningful, robust and science-based ventilation and other health and safety precautions including an effective vaccine education effort, it is apparent that the language needs clarification.

C. Modification Would Effectuate the Decree's Purpose of Protecting Class and Subclass Members

"[A] consent decree should be construed to preserve the position for which the parties bargained." *Vanguards*, 23 F.3d 1013 (citing *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir. 1992)). The Court may "fine-tun[e]" such a decree if it identifies "a defect or deficiency in its original decree which impedes achieving its goal." *Heath*, 888 F.2d at 1110.

The purpose of the Decree is undeniably to ensure sufficient protections vis à vis COVID-19 for Class and Subclass Members until those protections are no longer needed. To that end, the Decree terminates upon the earlier of an official public health declaration that the COVID-19 pandemic has ended or an adequate vaccine program is implemented in the Jail. While the parties all hope that the end of the pandemic is close at hand, it is not yet time to cease the protections so painstakingly negotiated for, nor to disregard the findings from Mr. Brady's thorough inspection report or short-change the work of the ventilation expert. Plaintiffs' proposed modification will ensure the Decree achieves its intended purpose of providing protections and oversight until they are no longer needed because the threat COVID-19 poses to Class and Subclass Members is adequately abated.

D. Plaintiffs' Proposed Modification Is Appropriate

In light of the above, Plaintiffs' requested termination modification is reasonable and limited, serving simply to confirm the clear intent of the parties that the Decree's protections run until the threat COVID-19 poses to the health and safety Class and Subclass Members has ended. This can be achieved by amending Paragraph 28 as follows:

> This Decree will terminate upon the earliest of either (a) a declaration by the CDC and the Tennessee Department of Health that the COVID-19 pandemic is over and/or has ended, or (b) an FDA-approved COVID-19 vaccine is offered to and **fully** administered according to FDA **and CDC** guidelines to all detainees housed at the Jail for a period of more than fourteen (14) days and who accept a vaccination, along with educational materials about the vaccine and non-punitive incentives to take the vaccine**, so long as the vaccine program is demonstrated by a showing to the Court to result in lasting abatement of the threat COVID-19 poses to Class and Subclass members. While the parties may agree that "lasting abatement" has been achieved at any point, the Decree will terminate pursuant to section (b) of this Paragraph upon a showing to the Court followed by the Court's approval that for a consecutive three-month period 80% of the detainee population in the Jail has been fully vaccinated against COVID-19, or upon a finding by the Independent Inspector that vaccination levels and other COVID-19-related health and safety measures have accomplished the goal of keeping Class and Subclass members sufficiently safe**.

Plaintiffs submit that this modification is appropriate in light of changed circumstances regarding the insufficiency of vaccinations to protect detainees in the Jail and Defendants' apparent unwillingness to adhere to the language and spirit of the Decree as drafted. This modification furthers the public interest by ensuring that the Decree's protections will run until they are no longer needed, which will serve to both protect Plaintiffs' rights and the public health of the surrounding community.

CONCLUSION

For all of the above reasons, Plaintiffs respectfully request that the Court enforce the Decree by ordering that Defendants offer adequate educational materials and non-punitive incentives to increase the vaccination rate in the Jail, make best efforts to adopt the

recommendations in Mr. Brady's reports and the recommendations of the Ventilation Expert, and reinstate the toll-free number that permits Class Members to speak with their counsel regarding Defendants' compliance with the Consent Decree; making a finding that the Decree has not terminated; and clarifying that the language "offered and administered" in termination provision (b) of Paragraph 28 of the Decree means that vaccinations must be fully administered in accordance with CDC guidelines for the given vaccine.

Plaintiffs further request that the Court modify Paragraph 28 of the Decree to add language ensuring that it will not terminate until vaccines and other health and safety measures have sufficiently abated the threat COVID-19 poses to Class and Subclass Members.

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Respectfully submitted,

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* Application for admission *pro hac vice* forthcoming

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on Defendant via the Court's ECF system on this the 19th day of May, 2021.

/s/ Meredith Borner