**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>THE STATE OF GEORGIA, *et. al*,<br><br>Defendants. | ) | CIVIL ACTION NO.<br>1:09-CV-119-CAP |

**_AMICI'S_ RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS AND REQUEST FOR DISAPPROVAL OF SETTLEMENT AGREEMENT**

In their motions to dismiss, Defendants contend that the settlement agreement signed by the U.S. Department of Justice (DOJ) and Georgia in January 2009 (agreement) precludes the relief being sought by DOJ. *Amici* agree with DOJ that the agreement has no such effect.

*Amici* write separately to affirm that, even if the agreement had the preclusive effect claimed by Defendants, this Court is not required to give the agreement continuing legal effect. This Court cast considerable doubt on the validity and adequacy of the agreement when it dismissed the motion for entry of

the agreement, Sept. 30, 2009 Order at 2 [Dkt. 29] (dismissing the motion because "the DOJ has indicated it no longer agrees with the motion" and ordering the State and DOJ to continue meeting with the *Amici* to address their objections to the agreement), and the Court has long hesitated to give final approval to the agreement. *See, e.*g., Feb. 11, 2009 Order [Dkt. 9] (adopting the agreement as temporary order of the Court *pending final approval* after the *Amici* filed objections to the agreement) (emphasis added); Oct. 9, 2009 Order [Dkt. 34] (noting that the agreement had only been "temporarily adopted" and ordering the parties "to continue to work towards resolution"); Transcript of Proceedings Held on Feb. 16, 2010 [Dkt. 67] ("I have hesitated and put off as adopting [the agreement] as a final Order of the Court . . . .").[1] The time has come, *Amici* submit, for the Court to declare the agreement a nullity. The Court has ample power to reject the agreement and, because the agreement is a wholly inadequate remedy for the legal violations confirmed by DOJ, the Court should do so. The agreement gives Georgia too long to cure legal violations, it neither includes nor

[1] The Department of Justice agrees that the "status of the Agreement in this case is unclear" and has made clear that it does "not intend to pursue a renewed motion to enter the Agreement." *See* Memorandum of Law in Support of the United States' Motion for Immediate Relief [Dkt. 55] at 3-4.

requires a meaningful plan of action, it virtually ignores the needless hospitalization of thousands of Georgians, and it makes no provision for meaningful judicial oversight.[2] Giving the agreement this Court's imprimatur is contrary to the public interest, especially if, as Defendants claim, the pendency of the agreement bars DOJ from pursing effective relief on behalf of people confined to state hospitals.

*Amici* have attached to this response declarations from three national experts – a former director of Georgia's Division of Mental Health, Mental Retardation and Substance Abuse,[3] a nationally-respected disability rights litigator, and the executive director of the Georgia Advocacy Office – comprehensively describing

[2] *Amici* know of no Georgia organization that supports the agreement. Although they know better, Defendants have asserted that NAMI National and NAMI-GA support the agreement. While this was true initially, they have been part of the group of *Amici* opposing the agreement and represented by the Bazelon Center since May 2009.

[3] The Division is now called the Department of Behavioral Health and Developmental Disabilities.

the inadequacies of the agreement.[4] *Amici* would welcome the opportunity to present to the Court live testimony from these experts.

## I. THE COURT HAS A DUTY TO REVIEW THE SETTLEMENT

Defendants are correct that *United States v. Miami*, 614 F.2d 1322 (5th Cir. 1980),[5] addresses the Court's task in this case. Br. in Support of Defendants' Motion to Enforce the Settlement Agreement [Dkt. 62] at 15-19; Defendants' Reply Br. [Dkt. 80] at 3; Defendants' Motion to Dismiss and Brief in Support [Dkt. 81] ("In support of this motion, Defendants hereby incorporate by reference the arguments in the Brief in Support of Defendants Motion to Enforce the Settlement Agreement [dkt. 62] and Reply Brief [dkt. 80]."). However, the case does not

[4] The declarations more fully describe these individuals' background and experience. The declaration of Steve Schwartz, who has nearly four decades of experience working on cases involving institutional conditions and community integration, is attached as exhibit 1. The declarations of Ruby Moore (executive director of the Georgia Advocacy Office) and John Gates (former director of Georgia's Division of Mental Health, Mental Retardation and Substance Abuse), attached to this filing as exhibits 2 and 3, were previously filed. *See* March 2, 2009 Objections by the Georgia Advocacy Office [Dkt. 11] , Ex. 3 (Declaration of Ruby Moore); April 21, 2009 Reply of *Amici* to the United States' and Georgia's Response to the Concerns of the Georgia Advocates [Dkt. 20], Ex. 2 (Declaration of John Gates).

[5] Decisions from the former Fifth Circuit prior to October 1, 1981 are binding precedent in the 11th Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

support Defendants' arguments. Instead, the case stands firmly for the proposition that this Court has the authority and the obligation to review the adequacy and fairness of the settlement agreement between DOJ and Georgia.

*U.S. v. Miami* concerned a settlement agreement between DOJ and the City of Miami. The Court of Appeals recognized that the case was not "ordinary litigation" in which "one private party [brings suit] against another private party." 614 F.2d at 1330. In such "ordinary" cases, the Court declared, a settlement "will not affect the rights of any other persons" and [i]f the parties can agree to terms, they are free to settle the litigation at any time, and the court need not and should not get involved." *Id*. In cases, like this one, however, where "the interests of individuals and organizations other than those approving the settlement may be implicated," and particularly where those third parties object to the agreement, a district court has a different and more active role. *Id.* at 1331. When the public interest is at stake, a court may not take "a totally 'hands-off' attitude toward the settlement reached," *id.* at 1331, and instead should not accept a settlement that is unfair, inadequate, unreasonable, or contrary to public policy. *Id.* at 1330-33; *accord Janus Films Inc. v. Miller*, 801 F.2d 578, 582 (2nd Cir. 1986) (""The court has a larger role … where a consent judgment or a settlement judgment resolves . .

. suits affecting the public interest" and "[i]n such cases, the court must be satisfied of the fairness of the settlement.") (internal citations omitted); *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78, 85 (D. Me. 1988) ("There are certain special situations, however where a trial court may be required to take a more active role in approving settlement agreements. . . . [In] any suits affecting the public interest, a court must determine that the settlement is fair, adequate and reasonable.") (internal quotations omitted).

In *U.S. v. Miami*, the district court vacated an approved consent decree after objections were filed by third parties impacted by the agreement. *Miami*, 614 F.2d at 1327. The district court held hearings where it raised concerns with the proposed decree based on those objections. The court required the parties to address those concerns before approving a revised agreement. *Id*. Here, as in *U.S. v. Miami*, impacted third parties have raised substantial objections to the agreement that must be addressed for the matter to be fairly, adequately and reasonably resolved.

The court's duty to evaluate the fairness and adequacy of agreements impacting the public interest, as set forth in *U.S. v. Miami*, applies with full force to cases, like this one, brought under the Civil Rights of Institutionalized Persons

Act (CRIPA). *See, e.g.*, *United States v. Pennsylvania*, 160 F.R.D. 46, 48 (E.D. Pa. 1994) (finding a CRIPA settlement agreement "fair, adequate and reasonable" where it, among other things, provided for community placement of residents and the appointment of a court monitor and panel of experts to oversee compliance); *United States v. Michigan*, 680 F. Supp. 928, 946-49 (W.D. Mich. 1987) (finding a CRIPA settlement agreement was not "fair, adequate and reasonable" based on considerations of "the fairness of the decree to those affected, the adequacy of the settlement . . . , and the public interest.").

It is irrelevant that DOJ and Defendants have not characterized the agreement as being a consent order or judgment. Defendants have asked this Court to give its imprimatur to the agreement and, in so doing, to deny relief sought by DOJ. As *U.S. v. Miami* makes clear, this Court may not give the agreement legal effect if it is unfair, inadequate, unreasonable, or contrary to public policy. *Miami,* 614 F.2d at 1330-33; *accord Michigan*, 680 F. Supp. at 945 ("judicial approval of a settlement agreement places the power and prestige of the court behind the compromise struck by the parties").[6]

[6] Similarly, a district court "enjoys broad discretion in determining whether to allow a voluntary dismissal under Rule 41(a) (2)." *Pontenberg v. Boston Scientific*

Throughout this proceeding, the Court has recognized its role in evaluating the adequacy and fairness of the agreement. The Court adopted the Agreement only as a "temporary order … pending final approval." [Dkt. 9] The Court invited *Amici* to file a summary of their concerns [Dkt. 3] and directed the parties to respond to those concerns. [Dkt. 10 and 11] . The Court also directed "all of the interested parties to meet … in order to . . . attempt to reach a resolution amongst themselves." [Dkt. 16].[7] Moreover, the Court indicated it would allow *Amici* to present witnesses on the adequacy and fairness of the agreement at the previously scheduled hearing on DOJ's motion for a preliminary injunction. Tr. of Proceedings Held on Feb. 16, 2010 [Dkt. 67] at 21-25. Defendants have now squarely asked the Court to give the agreement legal effect. The Court should decline the invitation. If this Court believes it cannot make a determination on

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*Corp.*, 252 F.3d 1253, 1255 (11th Cir. 2001). In "exercising its broad equitable discretion, [a court] must weigh the relevant equities and do justice." *Id.*; *accord McCants v. Ford Motor Co., Inc.*, 781 F.2d 855, 857 (11th Cir. 1986).

[7] The parties and *Amici* met on May 14, 2009. The United States and *Amici* believed an agreement was reached at that meeting for the State to develop an implementation plan, expand community services, and report regularly to the Court. The State apparently had a different view. *See* June 12, 2009 Joint Status Report [Dkt. 26], and September 30, 2009 Joint Status Report [Dkt. 30].

this record, it has the authority to "hold whatever hearings [it] deems necessary to garner that information," *Miami*, 614 F.2d at 1333, and *Amici* are prepared to present witnesses about the inadequacy and unfairness of the agreement.

## II. THE AGREEMENT IS WHOLLY INADEQUATE TO REDRESS THE DOCUMENTED HARM, UNFAIR TO THE INDIVIDUALS CONFINED IN THE STATE HOSPITALS, UNREASONABLE AND CONTRARY TO PUBLIC POLICY

*Amici* have discussed the agreement's deficiencies in various filings,[8] and the attached affidavits comprehensively describe why the agreement should be rejected. Below, *Amici* summarize their chief concerns.

First, the agreement gives Georgia far too long to come into compliance with basic legal protections. *See*, Declaration of Steve Schwartz (Schwartz Dec.), attached as Ex. 1, at ¶¶ 23-24 (Agreement has "very generous time frame[s]"); Declaration of Ruby Moore (Moore Dec.), attached as Ex. 2, at ¶¶ 20-21 ( "lack of urgency" in the Agreement's deadlines); Declaration of John Gates, attached as Ex.

[8] *See, e.g.* March 2, 2009 Objections to the Settlement Agreement by Cynthia Wainscott and Other Georgia Advocates [Dkt. 10]; Objections to the Settlement Agreement by the Georgia Advocacy Office [Dkt. 11]; April 21, 2009 Reply of Amici to the United States' and Georgia's Response to the Concerns of the Georgia Advocates [Dkt. 20]; April 21, 2009 Reply of Georgia Advocacy Office to the United States' and Georgia's Response to the Concerns of the Georgia Advocates [Dkt. 23]; Sept. 30, 2009 Joint Status Report of the United States and *Amici Curiae* [Dkt. 30].

3, at ¶ 5 (Agreement's time frames "are far too long given the life-and-death situation in the hospitals). According to the parties, the agreement gave Defendants a full year before they had to provide basic safety protections to individuals at significant risk of death or serious injury. *See, e.g.*, Br. in Support of Defendants' Motion to Enforce the Settlement Agreement [Dkt. 62] at 5 (one year compliance for agreement's provisions regarding choking and aspiration, suicide risk assessment and prevention, prevention of patient on patient assault, and implementation of emergency medical codes); United States Response to Defendants' Motion to Enforce the Settlement Agreement [Dkt. 72] at 6 (same). Additionally, at least according to Defendants, Georgia may take an additional four years to come into compliance with the agreement's other provisions. Br. in Support of Defendants' Motion to Enforce the Settlement Agreement [Dkt. 62] at 5 ("Georgia has five years, until January 2014, to come into substantial compliance with the requirements of the Settlement Agreement."). *Amici* believe it would be unconscionable to allow Georgia five years before being required to respect basic rights of individuals confined to state hospitals. *Accord* Schwartz Dec. at ¶ 24 ("[T]he five year drop dead date for ending the Agreement, regardless of whether

the Psychiatric Hospitals have improved an iota, create perverse incentives for perpetuating federal law violations.").

Second, the agreement does not contain or require a concrete plan for remedying the harms and rights violations found in the hospitals. *See, e.g.*, Gates Dec. at ¶¶ 6-8 (The Agreement "lacks a specific plan for remedying the identified problems. It is a document with well-intentioned promises of a vague sort. There are no specific goals, benchmarks for improvements or target dates for making changes."); Moore Dec. at ¶¶ 12-15 ("The breadth of necessary changes quite clearly calls for a plan. . . . The Agreement, however, requires no planning by the State, does not require that any plan be submitted or approved, and with few exceptions, sets no deadlines for implementation of any of its requirements) (emphasis in original); Schwartz Dec. at ¶ 22 ("[T]he Agreement leaves it to the State to decide how, when and through what means it will cure the very constitutional violations that it created and perpetuates to this day, and even to measure whether it has done so."). Despite its many pages and seeming substance, the agreement in reality does little more than restate the constitutional law applicable to Georgia's hospitals. *See Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (state must operate its public institutions in accord with recognized

professional standards). To the extent it imposes substantive obligations, the agreement merely recites accepted professional standards.[9] *See* Schwartz Dec. at ¶ 22. However, it neither provides nor requires a roadmap or plan for ensuring those standards are met. The result has been that, 18 months after the agreement was signed, substandard care and needless institutionalization continue to be the norm, as DOJ has confirmed. A meaningful implementation plan is required if hospital residents' rights are to be protected, but Defendants insist that no such plan is required by the agreement. Using the agreement as a shield, Defendants deny that they have an obligation to develop an implementation plan acceptable to DOJ or even to this Court.

Third, the Agreement provides virtually no relief for Defendants' violations of residents' rights under the Americans with Disabilities Act (ADA), as recognized in *Olmstead v. L.C.*, 527 U.S. 521 (1999). *See, e.g.*, Gates Dec. at ¶¶ 10-11 ("The Settlement Agreement must be improved to address one of the major underlying causes of the problems related to the hospitals – the lack of community-

[9] In addition, it is unclear whether contempt sanctions are available for violations of standards set forth in the agreement. *See, e.g.*, Schwartz Dec. at ¶ 24. Both DOJ and the Defendants have at times raised questions about the availability of such sanctions.

based services to support people who are or could be discharged from the hospital."); Schwartz Dec. at ¶¶ 15-21 ("The glaring absence of remedies required to comply with the ADA renders this Agreement inconsistent with federal law and a substantial departure from accepted professional standards for providing mental health services to persons with psychiatric disabilities); Moore Dec. at ¶ 9 ("[T]he proposed remedies do not adequately address the serious problems in Georgia's state psychiatric and developmental services institutions and the attendant harm to people with disabilities in the institutions who are waiting for appropriate discharge planning and community services."). The Governor's own Mental Health Service Delivery Commission found in December 2008 that 60% of the people presently in Georgia's state hospitals could be served in their communities if services were expanded and stressed the need to expand crisis services, case management, supportive housing, and other community services. United States' Motion for Immediate Relief [Dkt. 55], Exh. 26 at 6-7. Yet, nowhere in the agreement is there any provision for an expansion of community services. This failing not only ignores hospital residents' rights under the ADA and *Olmstead*, but also dooms any effort to redress the harms in the hospitals. *See, e.g.*, Gates Dec. at ¶ 11 ("In my experience, the best way to improve the conditions within the

hospitals is to ensure that there are adequate community-based services for people who do not need a hospital level of care."); Schwartz Dec. at ¶ 26 (The Agreement "is not reasonably likely to improve conditions in [the psychiatric] facilities, and certainly will have no impact on the likelihood that the resident[s] will remain unnecessarily segregated."). As the *Amici* have emphasized, census reduction is essential to correcting the problems that afflict Georgia's hospitals. Admission and readmission rates remain unacceptably high; the hospitals continue to be overcrowded, understaffed, and overburdened; and, as a result, hospital residents continue to be at risk.

Finally, the agreement has no provision for meaningful judicial oversight. The agreement anticipates little active role for the Court. *See* Moore Dec. at ¶ 10, 16-19 ("The Settlement Agreement provides no effective mechanism for the Court, as guardian of the rights of individuals who are currently being detained at the hospitals, often illegally and unnecessarily, to be informed on compliance challenges or to be assured that compliance has been achieved."); Gates Dec. at ¶ 9 ("Relying on Georgia in large part to monitor itself is unacceptable."). The parties apparently intended for the case to be dismissed as soon as the Court approved the agreement, and for the Court to have no future role unless requested. There would

be no regular reports to the Court, no status hearings, and as a result no opportunity for the Court to inquire about or influence the provision of basic protections and services to people confined to the state hospitals. *See* Schwartz Dec. at ¶¶ 24, 25 ("I have been a party to a wide range of remedial orders and settlements, and have reviewed hundreds more in my role as litigation consultant to disability lawyers throughout the country. These orders and settlements employ a wide range of procedures designed to facilitate compliance and rectify federal law violations. But rarely have I seen a settlement that has such lax enforcement procedures and has such a low probability of achieving meaningful reforms."). Concomitantly, the agreement makes no provision whatsoever for informing stakeholders of either progress or barriers. It is neither fair nor reasonable that the Court and stakeholders should play so little a role in addressing so monumental a problem.

## III. CONCLUSION

For these reasons, *Amici* respectfully request that this Court deny Defendants' Motion to Dismiss and Motion to Enforce the Settlement Agreement. In doing so, the Court should reject the settlement agreement as unfair, inadequate and contrary to public interest and refuse to approve any agreement that does not address the concerns raised by the *Amici*.

## LOCAL RULE 7.1D CERTIFICATION

In accordance with Local Rule 7.1D, Amici's counsel certifies that this brief has been prepared in 14-point Times New Roman font in compliance with Local Rule 5.1.

Respectfully submitted this 15th day of July, 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of July, 2010, I electronically filed the foregoing AMICI'S RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS AND REQUEST FOR DISAPPROVAL OF SETTLEMENT AGREEMENT with the Clerk of Court using the CM/ECF system which automatically serves notification of such filing to all counsel of record.

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