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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MICHAEL BRIONEZ, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, et al., Defendants.	Case No. C-01-3969 CW **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR ENFORCEMENT OF COURT-APPROVED SETTLEMENT** Date: January 12, 2007 Time: 10:00 a.m. [Hon. Claudia Wilken]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

INTRODUCTION

For the second time in the life of the Hispanic Settlement Agreement ("HSA"), Plaintiffs must turn to the Court for intervention and relief from Defendants' non-compliance with key HSA provisions, and their consequent failure to make progress toward the Agreement's stated and enforceable goal – to raise Region 5's Hispanic employment to a level commensurate with the relevant Civilian Labor Force ("CLF"). *See*, HSA, attached as Exhibit 1 to the Declaration of Denise M. Hulett ("Hulett Dec.").

Despite this Court's clear directives of nearly one year ago, Defendants continue to fall short of their obligations under both the HSA and the Court's order of March 30, 2006 ("Order"), which imposed supplemental remedial measures. Plaintiffs seek no extraordinary remedies from the Court. They seek only the benefit of the bargain they struck four years ago – Defendants' effective implementation of measures to which they agreed, measures that were designed to work in tandem to alleviate severe and persistent Hispanic underrepresentation in Region 5.

In her report of October 9, 2006, HSA Monitor Marci Seville outlined Defendants' continued failure to timely implement specific HSA provisions, and noted that they had still made "little progress in compliance with the HSA § IV.A. goal of increased Hispanic representation in the Region 5 workforce." *See* October 9, 2006 Report of the Court-Appointed Monitor ("Monitor's Report" at 1, Hulett Dec., Ex. 2). The Monitor's Report detailed a series of compelling observations that led her to this conclusion; she noted, for example, that the net increase of permanent Hispanic employees in the Region's workforce had been just 12 employees in the entire life of the HSA, and that the Region's Hispanic applicant rate still hovers around a meager 3.8 percent, indicating serious deficiencies in outreach and recruitment. Still, the Monitor also perceived that the March 2006 Order, with its "new requirement of direct reporting and accountability to the Court," has seemingly prompted the Region to approach its obligations more seriously and less lethargically than in the past. *Id.* As the HSA's expiration date nears, it is evident that Defendants respond, however reluctantly, only to judicial compulsion. Plaintiffs therefore ask the Court to again use its inherent powers to enforce the parties' agreement and its previous judgments. Specifically, Plaintiffs seek

extension of the HSA for an additional two years and enforcement of the HSA provisions with which Defendants have not complied, and additional remedial measures.

PROCEDURAL BACKGROUND

The parties entered into the HSA in June 2002. The agreement became effective in December 2002, and the parties then selected Ms. Seville to observe and oversee Defendants' compliance with their obligations. § VIII of the HSA set out a mechanism for enforcing Defendants' compliance with § IV, which includes the Hispanic representation goals. Faced with the Region's chronic foot-dragging, missed deadlines, and virtually complete failure to progress toward the HSA's parity goals, Plaintiffs filed a motion for enforcement on January 4, 2006. Defendants issued their response on January 20, 2006 and Plaintiffs replied on January 27, 2006. The parties concurrently briefed Defendants' motion to discharge their obligations under the agreement.

On March 30, 2006, the Court issued its ruling that Defendants had not substantially complied with critical provisions of the HSA, including the enforceable Hispanic representation goals set out in § IV.A.1. Order at 9, 38, Hulett Dec., Ex. 3. Specifically, the Court found that in addition to § IV.A.1., Defendants had failed to substantially comply with: 1) § IV.C., requiring them to maintain a full-time Regional Recruitment Coordinator ("RRC") "with the primary purpose of implementing the Recruitment Program set forth in § V." Order at 17-18; 2) § IV.D., requiring them to "make a good faith effort to maintain and fill the position of Region 5 Civil Rights Director." Order at 18; 3) § V.A.1., requiring them to "disseminate effectively information related to employment opportunities" and "to increase the diversity of the applicant pool by engaging in recruitment activities, both government-wide and externally." Order at 20-21; 4) § V.A.2., requiring them to "monitor all recruitment and promotion actions of Forest Supervisors and Regional Office Directors and all recruitment and promotion actions taken under their supervision." Order at 21-22; 5) § V.A.3., requiring them to "employ the Outreach and Recruitment Procedures using the Employment Outreach and Recruitment Documentation, attached as Exhibit C . . . in any action to fill a vacancy through competitive processes for a Region 5 Position." Order at 22-23; and 6) § V.B., describing the duties and responsibilities of the Regional Recruitment Coordinator.

The Court found that Defendants' breach of important HSA provisions warranted intervention, and ordered both specific enforcement of the breached § IV provisions and a number of supplemental remedies. Order at 38-39, HSA § VII.B.8. (if the Court finds that Defendants are in breach, Court may order "additional remedial measures to increase Hispanic representation subject to the availability of Region 5 Positions." The Court's March 2006 Order required the Region to:

a) contract with an effective outside recruiter;

b) continue their fire apprentice mentoring program;

c) advertise all positions as multi-grade and issue inter-disciplinary announcements whenever possible;

d) expand activities of the Central California Consortium to at least two additional locations;

e) create and fund an independent selection review position; with the occupant of the position to be selected by and supervised directly by the Monitor;

f) retain and provide data on the race and national origin of applicants for temporary fire-related positions; and

g) retain, until the end of the HSA, human resources personnel, sufficient to carry out all recruitment activities related to implementing the Agreement and this order, on each forest and in the Regional Office of Region 5. Order at 38-39.

In addition, the Court instructed the Monitor to recommend and submit a proposed reporting and enforcement procedure. On May 15, 2006, the Court approved a reporting and enforcement procedure requiring Defendants to provide reports to the Court, Plaintiffs, and the Monitor on their progress and on their implementation of the Court-ordered supplemental remedies. 5/15/06 Order, Hulett Dec., Ex. 4. On June 9, 2006, Defendants submitted their combined Progress Report on the Implementation of the Additional Remedial Measures and Hispanic Settlement Agreement Seventh Annual Report ("R5 6/9/06 Report," Hulett Dec., Ex. 5). The Region submitted its second Progress Report on Implementation of the Additional Remedial Measures and Compliance with the Hispanic Settlement Agreement on September 8, 2006 ("R5 9/8/06 Report," Hulett Dec., Ex. 6).

On October 9, 2006 the Monitor filed with the Court her report on the Region's compliance.

Plaintiffs now submit this motion pursuant to the Court-approved reporting and enforcement procedure, which permits Plaintiffs to "file their motion for enforcement or any other relief, except as to attorneys' fees, if they determine there is a need for such a motion." 5/15/06 Order at 2.

ARGUMENT

I. Defendants Remain out of Compliance with the HSA.

A. Defendants Have Failed to Make Adequate Progress Toward the Goals of HSA § IV.A.1.

The HSA's stated goal and chief purpose is to increase Hispanic representation in the Region 5 workforce, as set out in § IV.A.1. The Court's March 2006 ruling included a finding of the full enforceability of these goals, reinforcing the centrality of the goals to the parties' agreement. Order at 8-10.

The HSA provides that even if Defendants fall short of the parity goals of § IV.A, as they irrefutably have, they are not in breach if they demonstrate "substantial compliance" with § IV.B-G and § V., or any "alternative measures of implementation agreed upon by the parties." § VII.B.8. As Plaintiffs discuss more fully below, Defendants cannot claim substantial compliance; defenses under the HSA are unavailable to them, and Plaintiffs are entitled to relief from Defendants' failure to meet their obligations.

1. The Level of Hispanic Representation in Region 5 is Still Significantly Below That of the Applicable CLF.

The Monitor's most recent report, Plaintiffs' expert's report, and the Region's own data confirm that Defendants are out of compliance with § IV.A.1., which contains the goal of raising Hispanic representation to a percentage equivalent to the percentage of Hispanics in the applicable civilian labor pool in the relevant geographic area.

As the Monitor's Report noted, the Region's September 2006 Progress Report to the Court showed that Hispanic representation in the workforce crept up just .8 percentage points during the last reporting period, from 10 percent to 10.7 percent. Monitor's Report at 2-3 (citing R5 9/8/06

Report at 2).[1] From the inception of the HSA – when Hispanic representation was at 8.9 percent – through the end of the last reporting period, the Region reported a total increase of less than 2 percentage points. Monitor's Report at 3 (citing R5 9/8/06 Report at 13, Table 1). When viewed in terms of absolute numbers, the change in Hispanic representation was even more modest; as Table 1 in the Monitor's Report demonstrates, the net increase in the number of Hispanics Region 5 employees through August 2006 was just 12 employees.[2] Monitor's Report at 3-4.

In the large and critically important Forestry Technician series, GS 462, the level of Hispanic representation went from 11.8 percent in December 2002 to just 12.8 percent in August 2006, a figure far below the 31.5 percent applicable CLF percentage identified by the Court in its March 30, 2006 Order. Monitor's Report at 3 (citing R5 9/8/06 Report at 15, Table 5). Moreover, the Monitor observed that the number of Hispanics in series 462 actually declined between September 2005 and August 2006, by about seven employees. Monitor's Report at 5 (comparing data from 1/20/06 Declaration of Dr. William J. Carrington and R5 9/8/06 Report at 15, Table 5).

In addition, the Region's retention of Hispanic Student Career Employment Program ("SCEP") fire apprentices from the Spring 2004 hire, which the Monitor described as "the Region's most successful effort in recruitment of Hispanic employees," continues be quite poor. The Region has retained 101 Hispanic apprentices out of the 245 hires during the Spring 2004 push – meaning that Hispanic apprentices have experienced a 59 percent attrition rate. Monitor's Report at 9-10.

2. Unless Recruitment and Hiring Rates Increase, the Region will not Achieve the HSA's Goals for Nearly Two Decades.

Plaintiffs' expert, Dr. Louis Lanier, in his report dated November 2, 2006 ("Lanier Report"), projects the direction of Hispanic employment in the Region using Defendants' own most recent data and employing a set of exceptionally conservative assumptions. Lanier Report at ¶¶ 4-5, 19-20, Hulett Dec., Ex. 9. Dr. Lanier's report contains alternative projection scenarios of the Region 5

[1] On October 30, 2006, after the HSA Monitor filed her report with the Court, defense counsel provided her with data that purports to reflect workforce numbers through October 21, 2006, showing Hispanic representation of 11 percent. Hulett Dec. Ex. 7, Ex. 8.

[2] Defense counsel's October 30, 2006 correspondence with the Monitor reflects an additional net increase of 13 employees over the last two months. Again, because of the timing of this communication, this data has not been reviewed or verified by the Monitor.

workforce through the year 2031, 25 years from now. For the first projection, Dr. Lanier used a simple two-point linear projection, similar to the types of projections he used in his reports during the previous enforcement proceeding. Employing this projection, which assumes that changes in Hispanic representation over time will be linear and equal to the average change over the settlement period, Dr. Lanier determined that the Region would not achieve a level of Hispanic representation equivalent to the current CLF until the year 2024.[3] Lanier Report at ¶ 18, Chart 1.

The second set of projections of Hispanic representation are more sophisticated; Dr. Lanier assumes 1) that the average rate of Hispanic new hires that the Region reported between the beginning of the HSA and October 21, 2006 (13.6 percent) will hold steady; 2) that the relative attrition rates of Hispanic and non-Hispanic employees between December 22, 2002 and October 21, 2006 will remain constant; and 3) that the Region will continue to hire at the same pace as it did during the HSA period (approximately 376 new hires every year). Lanier Report at ¶ 19.

Even accepting the accuracy of Defendants' data and of the three assumptions outlined above, Dr. Lanier projects that Defendants will not achieve a level of Hispanic representation equivalent to that of the CLF within the next 25 years. Lanier Report at ¶ 21, Chart 2. This analysis leaves no doubt that absent increased Hispanic recruitment and hiring rates, achieving the goals of § IV.A.1. remains far off in the distance for Defendants and for the Region 5 workforce, even with the most generous factual predicates in place. The discussion below examines the three assumptions that Dr. Lanier made for the projection in Chart 2, and explains why they are exceptionally favorable for Defendants.

a. Hispanic Selection Rate

The Region maintains that its selection rate for Hispanic new hires between December 22,

[3] To avoid confusion, Dr. Lanier derived CLF data, from a Table prepared by Defendants, which he appended to his Report. Lanier Report at ¶ 5. From these figures Dr. Lanier obtained an overall CLF of 20.8 percent, which he used for his projections. Dr. Lanier's use of Defendants' data, and Plaintiffs' discussion here, are not a concession that Defendants have appropriately calculated the CLF comparators for Region 5 positions; Plaintiffs continue to assert that the methods they and their experts applied in their previous motion for enforcement is the better approach. For the 462 series, both parties used the 31.5 percent CLF that this court previously found to be the appropriate CLF comparator for that series.

2002 and October was 13.6 percent, and Dr. Lanier assumed that that rate would continue indefinitely. Dr. Lanier's acceptance of this hiring rate for the purposes of his report, given historical and existing shortcomings in the Region's data reporting, is extraordinarily generous. The Monitor, Plaintiffs, and Plaintiffs' experts have all previously noted serious gaps and inconsistencies in Defendants' reporting on such basic matters as numbers of applicants, permanent hires, and promotions.[4]

Unfortunately, the Monitor's Report notes continuing and serious deficiencies in the Region's data reporting, including both the AVUE and AFS applicant flow systems, casting doubt upon the reliability of applicant or selection figures provided by the Region. Monitor's Report at 14-15, 25 (citing Monitor's Ex. 4) ("the Region continues to be unable to provide complete and accurate data reports, which are essential to an evaluation of the Region's progress in recruitment and hiring of Hispanic employees.") For example, in July 2006 the Monitor submitted an information request to the Region concerning incomplete applicant flow data in the Region's June 2006 progress report to the Court. For several forests, the Region had produced no data whatsoever on applicants or selectees. Monitor's Report at 14. On July 24, 2006, the Region responded that it was "currently working on drafting a response to this question." *Id*. (citing Monitor's Ex. 8). On September 8, 2006, the Region advised the Monitor that it was "continuing to work on providing an answer to this inquiry." Monitor's Report at 15 (citing Monitor's Ex. 9). The Region subsequently forwarded to the Monitor a September 1, 2006 memorandum to Forest Supervisors, directing them to determine why only 42 selections were reported in AFS and 43 in AVUE between October 1, 2005 and March 31, 2006 – when the FOCUS system indicated that there were 435 selections/appointments during that time period. Monitor's Report at 15 (citing Monitor's Ex. 4).[5]

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[4] As the Monitor explains, the HSA obligated the Region to "develop an applicant flow system to report on applicants and selections by forest, including, among other things, the RNO data (where identified by the applicant) and whether the person was employed by Region 5, the USDA, other federal agencies, or came from outside the federal government." Monitor's Report at 14.

[5] In addition, the Region repeatedly refused to respond to the Monitor's requests for basic information on the relatively few Hispanic hires, including employees' names, position titles, series, grades, unit locations, hire dates, and whether the employee is still employed by Region 5. Monitor's Report at 15-17. Although defense counsel deemed the request "burdensome," the

Even accepting the reliability of the 13.6 percent average Hispanic hiring rate that the Defendants have proffered (in the face of the Region's persistent history of poor and inconsistent reporting), the Region has done little to indicate that the improved rate would continue absent Court supervision. Indeed, for the period immediately before the Court's Order (October 2005 through March 2006), the Region reported a Hispanic selection rate of 7.1 percent. Monitor's Report at 9 (citing R5 9/08/06 Report at 16, Table 6). If Defendants' data is to be credited, and their Hispanic selection rate since the Court's Order was truly high enough to boost the average level of Hispanic hiring to 13.6 percent – after stagnating for the first three years of the HSA – two conclusions are evident: 1) first, that the continuing involvement and supervision of the Court is critical to ensuring that Defendants take seriously their obligations; and 2) that extension of the HSA is critical to ensuring that Plaintiffs receive the benefit of their bargain, that is – three years of Defendants' compliance with their agreed-upon obligations.

b. Differential Attrition Rates

Dr. Lanier's second projection also assumes that the somewhat lower rate of Hispanic attrition to non-Hispanic attrition between December 22, 2002 and October 21, 2006 will remain constant. Lanier Report at ¶ 21, Chart 2. In an alternative projection, however, in which he assumes that Hispanic and non-Hispanic attrition rates are equivalent, he finds that the Region will never achieve parity, if it continues to hire Hispanics at the rate it professed to during the term of the agreement. See Lanier Report at ¶ 21, Chart 3.

As Dr. Lanier observes in his report, these alternative projections reveal that the Region has relied heavily on these divergent attrition rates in claiming progress toward the goals of the HSA. Lanier Report at ¶¶ 15, 22. Yet the observations of Defendants' own expert, William J. Carrington, suggests this reliance may be misplaced; in his December 2005 Report, Dr. Carrington, asserted that as more Hispanics are hired into the Region 5 workforce, their attrition rates will be higher relative

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Monitor considered the information critical "in light of the Region's sometimes conflicting and incomplete data on applicant flow and number of employees hired." Monitor's Report at 17. Defense counsel's 10/30/2006 letter to the Monitor states that the requested information was provided to the Monitor on October 16, 2006, a week after she filed her report. Hulett Dec. Ex. 7. Plaintiffs have not seen the documentation.

to non-Hispanic employees: "new hires quit at a much higher rate than do experienced employees. This pattern is one of the most well-known and widely observed phenomena in labor economics." 12/20/05 Report of William J. Carrington at 7, Hulett Dec., Ex. 10.

c. Rate of Hiring

The last of Dr. Lanier's assumptions is that, for the next 25 years and beyond, the Region will continue to hire at the same pace as it did between December 22, 2002 and October 21, 2006, when Defendants reported a total of 1429 new hires. This assumption, too, is a generous one. Although, as the Monitor noted, "the Region projects substantial numbers of future vacancies under its workforce planning process" as a result of retirements and other attrition, the Region has also experienced job decline due such factors as outsourcing of positions to private contractors. Monitor's Report at 7.

3. Defendants Continue to Present Data in a Manner That Overstates Their Progress Toward the Agreement's Parity Goals.

Defendants' most recent data, capturing a workforce snapshot as of October 21, 2006, and comparing it with data from 4 years ago, provides actual numbers for all employees, but provides only percentages for Hispanics.

Region 5 Employment of Hispanic 12/22/2002 - 10/21/06 Permanent Employees (excluding SCEPS)			
	2002	**2006**	**% Of CHANGE**
# EMPLOYEES	5249	4479	-14.6%
% HISPANIC	8.9%	11.0%	+23.6

Reproduced here from October 30, 2006 letter from Susan Ullman to Marci Seville, Table 1 - See Hulett Dec., Ex. 8, Table 1.

The "% of Change" that Defendants present would be quite dramatic if the percents in the last column were indeed comparable; instead, they are based on a transparent computational ruse. Simple multiplication provided the following third row to the table, containing *actual numbers* of Hispanics to compare to *actual numbers* in the workforce.

# HISPANIC	467	493	+5.5%

Thus, the modest four-year jump from 8.9 percent Hispanic to 11 percent Hispanic represents an actual percent increase in Hispanic employees of 5.5 percent, not 23.6 percent. It is also important to note that data contained in Defendants' 9/8/06 Progress Report, Table 1, page 13, reveals that Defendants were able to increase the number of Hispanic employees by 13 employees in the last *two months*,[6] when only ten were added during the entire first three years of the Agreement,[7] an phenomenon that augurs for close judicial scrutiny.

B. Defendants Have Not Substantially Complied with HSA § V.A.1., Requiring Them to Increase the Diversity of the Hiring Pool.

The Court's March 2006 Order found that Defendants had failed to comply with HSA § V.A.1., requiring them to "disseminate effectively information related to employment opportunities" and "to increase the diversity of the applicant pool by engaging in recruitment activities, both government-wide and externally."

When the Court ruled in March, it emphasized that Defendants did not assert they had increased the diversity of their applicant pool, nor had they provided any evidence to that effect. Based on the figures the Region provided in its September report, the current applicant pool picture appears even bleaker than it did when the Court issued its ruling. R5 9/8/06 Report at 2-3.[8] As the Monitor's Report noted, the Region's September progress report showed "a significant decline since the Region's December 2005 Report in the percentage of Hispanic applicants" for Region 5 positions. Monitor's Report at 8. Indeed, from March 2005 through September 2005, the percentage of Hispanic applicants was 10 percent, while for the period between October 2005 and

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[6] Defendants' September Progress Report, while similarly omitting actual Hispanic numbers, reflects that the August 26, 2006 workforce of 4481 was 10.7 percent Hispanic, or 470 employees. *See* R5 9/8/06 Report at 13, Table1; Hulett Dec., Ex. 6.

[7] Defendants reported an increase of 10 Hispanic employees during the original three-year span of the agreement. *See* Carrington Report at 22; Hulett Dec., Ex. 10.

[8] The Region's AVUE and AFS data are through March 2006. As of the filing date for this motion, Defendants had been unable to provide updated AVUE and AFS data, despite repeated requests from the Monitor. Indeed, Defendants asked the Monitor to agree to a brief extension to file its September 2006 progress report, so that it could provide data through August 2006. Monitor's Report at 8. Yet the September report stated that the Region would not be able to provide updated applicant flow data until September 30, 2006 – a deadline it again failed to meet. R5 9/08/06 Report at 16.

March 2006, the percentage of Hispanic applicants dropped to an astonishingly anemic 3.8 percent. Monitor's Report at 9 (citing R5 6/1/05 report at A-40, A-44); R5 9/8/06 Report at 2-3.

The HSA's strong emphasis on outreach and recruitment, including the creation of the Regional Recruitment Coordinator position, highlights the parties' understanding and accord that those activities are essential to attaining the goals of the agreement. A tiny and declining Hispanic share of the applicant pool (in California, with its continually growing Hispanic population) – more than four years after Defendants entered into the HSA – simply does not bode well for the Region's ability to diversify its workforce.

A clear conclusion emerges from Defendants' data – the Region's abysmally low Hispanic applicant numbers point to persistent and serious barriers to Hispanic recruitment. What is perhaps most disturbing is that the Region has shown itself reluctant to root out barriers for Hispanics in the areas of outreach and recruitment. As discussed in more detail below, the Region has emphasized paperwork over the spirit and purpose of the HSA's outreach and recruitment review provisions, such as the monitoring requirements of § V.A.2., and the revised Form C procedures of § V.A.3. As a consequence, Defendants have missed potential opportunities to identify barriers to Hispanic employment.

C. Defendants Have Not Substantially Complied with HSA § V.A.2., Requiring Them to Monitor All Recruitment and Promotions.

The Court's March 2006 Order found that Defendants had failed to comply with HSA § V.A.2., which requires the Region to "monitor all recruitment and promotion actions of Forest Supervisors and Regional Office Directors and all recruitment and promotion actions taken under their supervision." HSA § V.A.2.; Order at 21-22. As the Monitor observed in her October report, Defendants' review of recruitment and promotion activity remains intolerably deficient.

The Monitor's Report outlines Defendants' failure to comply with this provision, noting that as of the September 2006 report, the Region had monitored a total of 257 selections – 166 between January 2005 and March 2006, and two additional groups of 41 and 50. Monitor's Report at 24. As the Monitor wrote in her Report, this represents just a fraction of the total number of new hires and permanent selections in Region 5. According to the Region's September 2006 report, there were

1,364 new hires in Region 5 from December 2002 through August 2006, and in the five-month period between April 2006 and August 2006 alone, the Region filled 447 Region 5 permanent positions, using the "original HSA definitions." R5 9/08/06 Report, Tables 2 & 3; Monitor's Report at 24. As the Monitor observed, "[i]n light of the Region's varied and sometimes conflicting numbers on permanent hires and promotions, the Region simply has not offered a persuasive explanation as to how its monitoring of 257 selections to date has satisfied the § V.A.2 requirement of monitoring all recruitment and promotions." Monitor's Report at 25.

In her October 30, 2006 letter to the Monitor, defense counsel suggested that Defendants' centralization of hiring and implementation of certain correlative measures were "addressing" the Monitor's concerns regarding monitoring of recruitment and promotions. Hulett Dec., Ex. 7. As in the past, Defendants' correspondence with the Monitor constitutes a last-minute claim that new procedures have "addressed" non-compliance issues identified in the Monitor's report, timed to prevent the Monitor or the Court from evaluating the new claims of compliance. In the context of Plaintiffs' first motion for enforcement and the Regional Recruitment program, the Court observed that "Defendants cannot expect to be found in substantial compliance when they have implemented measures only recently and thus have been unable to determine the effectiveness of these measures." Order at 21. Similarly, in the context of Defendants' monitoring obligations, the Court noted the "Monitor's finding that Defendants' belated monitoring procedures do not constitute substantial compliance" with § V.A.2. Order at. 22. Given the lateness of the Region's assertions, the Monitor has had no opportunity to assess the effectiveness of the claimed "monitoring" or to verify the numbers, which is crucial in light of her observation of the Region's "varied and sometimes conflicting" data. Monitor's Report at 25.

Finally, and most importantly, Defendants' position on this provision demonstrates that its spirit and purpose has been completely lost in the Region's attempts at paper compliance. As the Monitor noted, the Region's "monitoring process has not included either an analysis of whether qualified Hispanic applicants are improperly screened out and fail to appear on the referral list for consideration, or an analysis of whether qualified Hispanic applicants appear on the certificate but

are not selected." (citations omitted). Monitor's Report at 23, n. 18.

D. Defendants Have Not Substantially Complied with HSA § V.A.3., Requiring Use of the Outreach and Recruitment Procedures Agreed Upon as an Alternative to Form C.

The Court's March 2006 Order found that Defendants had failed to comply with HSA § V.A.3., which requires the Region to:

> … employ the Outreach and Recruitment Procedures using the Employment Outreach and Documentation, attached as Exhibit C, or, if necessary, an alternative agreed upon by the Parties, in any action to fill a vacancy through competitive processes for a Region 5 position. Prior to the final selection for a Region 5 Position, the selection certificate and supporting paperwork will be reviewed by the unit Human Resources Officer. HSA § V.A.3.

The revised Form C is the product of long and painstaking negotiations between the parties, and was designed to provide the Unit Review Team with meaningful opportunities to monitor and review the adequacy of outreach, recruitment, and selection processes. In their September report, Defendants assert that they are now in compliance with § V.A.3.because the "Region used the Outreach and Recruitment Documentation Form (Exhibit C to the HSA) during the entire Reporting Period" and "had access to and used the race and national origin data of all applicants who elected to provide race and national origin information during the Reporting Period." R5 9/08/06 Report at 23.

The Monitor, however, found "an ongoing lack of compliance" with § V.A.3., citing numerous specific deficiencies, including: in many cases, failures by the forests to review RNO data, and to follow "Form C;" in many cases, failure to include applications for all qualified candidates in selection packets, making it impossible to determine "whether the most qualified applicant was selected or whether an opportunity to hire a qualified Hispanic was missed;" and failure to apply checkpoints and/or review RNO data for Open and Continuous announcements. Monitor's Report at 27-28.

The Monitor's Report also notes that the Region has failed to utilize the revised Form C to meaningfully assess the selection process; she writes that Defendants' "approach to the review process seems to be (with few exceptions) to identify the percentage of selection packets that have completed a particular step, rather than to use it effectively to identify situations where opportunities

for increasing Hispanic representation were missed and to address and correct that problem for future hiring situations." Monitor's Report at 28 (citing Monitor's Ex. 13A-D and Confidential Appendix Exhibits A and B).

The Monitor's Report details her correspondence with and information requests to the Region regarding her various concerns about non-compliance with § V.A.3. In June 2006, she sent the Region an information request concerning deficiencies in the reviews, as well as a recommendation that the Region issue "clear instructions to personnel conducting the review to, among other steps, identify "situations when Hispanics were on the referral list, but were not selected and the selection failed to take advantage of an opportunity to address under representation of Hispanics or otherwise help meet AEP goals and objectives. The 'post-selection review' was often not completed." The Region rejected this recommendation, responding that it "does not take steps in individual sections where a qualified Hispanic applicant is not selected." Monitor's Report at 30 (citing Exhibit 14 at 1). Yet, as the Monitor expressed in her report, "tracking of this data is fundamental in assessing whether identifiable barriers exist in the hiring of Hispanic employees." Monitor's Report at 30.

Finally, the Monitor's Report notes that "[a]ccurate and current under representation data goes to the heart of the Unit Review process and accompanying Form C … [I]f under represented groups are not properly identified …the § V.A.3 process is fundamentally flawed." Monitor's Report at 32. In spite of the critical nature of updated and reliable data in the revised Form C process, the Region has confirmed that in 2006 it used 1990 rather than 2000 CLF data. Monitor's Report at 31 (citing Monitor's Ex. 8 at 2-3). As a result of this problem, Forest Civil Rights Officers "frequently indicate on Form C that there is no under representation for Hispanic males in GS 462 – when in fact there is significant underrepresentation when compared with the 31.5 percent CLF. Monitor's Report at 32.

Consistent with Defendants' pattern, defense counsel's October 30, 2006 letter to the HSA Monitor stated that: "On October 23, the Region provided you with the documents showing that the relevant tables had been updated using data from the 2000 Census and that the updated tables had

been provided to the field." Hulett Dec., at Ex. 7. This guidance was distributed to the field on October 20, 2006. Hulett Dec., Ex. 11. As the Court has noted, Defendants' belated implementation of measures they are required to take does not constitute substantial compliance with their obligations. Order at 21.

Moreover, the Monitor's Report describes some troubling circumstances surrounding her attempts to obtain information about the Region's Affirmative Employment Plan ("AEP"), or MD-715 – from which the data that is used to assess underrepresentation on revised form C is derived. Monitor's Report at 17-20. In July 2006, the Monitor requested the Region's draft MD-715, which Defendants had said would be finalized by March 2005. Monitor's Report at 18 (citing Monitor's Ex. 7). The Region simply refused to provide the document, stating that it was under no obligation to prepare its own MD-715 – even though there is no dispute the document existed. Monitor's Report at 18. The Region also represented to the Monitor that it had not prepared workforce data tables using 2000 Census CLF number. It was only when the Monitor discovered the draft MD-715 on the Region's intranet website, and the draft clearly referred to such data tables, that the Region finally produced them – a full two months after she had made the initial request. The Region, therefore, not only continued to use outdated CLF comparators for revised Form C purposes, but it also actively obstructed the Monitor's efforts to seek information that was essential to carrying out her duties. [9]

E. Defendants Have Not Substantially Complied with HSA § V.B.2, Providing that the Regional Recruitment Coordinator will have Access to Certain Data

The Court's March 2006 Order found that Defendants had failed to comply with HSA § V.B.2., which provides that:

> The Regional Recruitment Coordinator shall have access to the following information: the number of Region 5 positions at each unit; position requirements including grade level, qualifications, and any other special requirements; the number of resumes or other application forms submitted for a particular opening; the number of applicants interviewed; the number of all applicants offered the position; the race

[9] When the Monitor did obtain the draft MD-715, she found it included assessments that the Region "did not have sufficient resources to enable the unit to conduct a thorough barrier analysis of its workforce, including the provision of adequate data collection and tracking system," and that using available data, "women and minorities are not participating at rates identified in Census 2000 data." Monitor's Report at 19 (citing Monitor's Confidential Ex. D at 3, 19).

> and national origin of the person who accepts each employment position; and the number of applications coming from persons employed by Region 5, the U.S. Department of Agriculture Forest Service nationally, the U.S. Department of Agriculture as a whole, any other federal agencies, and those coming from external applicants. The Regional Recruitment Coordinator shall have access to this information by race, national origin, and gender to the extent it is provided by the applicants. HSA § V.B.2

Plaintiffs raised similar concerns in their previous motion for enforcement and in their opposition to Defendants' motion to discharge their obligations under the Agreement. At the time, Associate Regional Forester Vicki Jackson submitted a declaration that included information on AVUE, which she defined as "an automated system which advertises vacancies on agency websites, gathers applications, documents race, sex and national origin (RSNO) information, and screens applicants." 1/13/06 Declaration of Vicki Jackson ("Jackson Dec.") at ¶ 3, Hulett Dec., Ex. 12. According to Ms. Jackson's declaration:

> In 2005, the AVUE reporting of RSNO information at the final checkpoint was not working properly. The problem was resolved in October 2005. It should also be noted AVUE was used to process and document only 77% of the permanent positions selected in the last reporting period. The remaining 23% of vacancies was documented through Region 5 Applicant Flow System (AFS), which provided RSNO information in a timely manner. *Id.*

A year later, it is evident that the significant snags with AVUE, as well as Region 5's AFS, are far from "resolved." *See* Monitor's Report at 14-15, 25 (citing Monitor's Ex. 4) ("the Region continues to be unable to provide complete and accurate data reports, which are essential to an evaluation of the Region's progress in recruitment and hiring of Hispanic employees.") As discussed more fully in Plaintiffs' discussion of Defendants' non-compliance with the workforce goals, the Region has itself acknowledged large reporting gaps in the AVUE and AFS systems, gaps that Defendants have yet to explain. Moreover, although the Region informed the Court in its September 2006 filing that AVUE and AFS data would not be "available" until September 30, 2006, as of this filing the Region has not produced any such data beyond March 2006. The serious and ongoing gaps and inconsistencies within and among the Region's various reporting systems, including AVUE and AFS, raise significant doubts as to whether critical – and accurate – data has been made available to the RRC.

II. Defendants Have Not Fully Complied with the Supplemental Remedial Measures Ordered by the Court.

A. Defendants Failed to Substantially Comply with the Court's Supplemental Remedial Order on the Apprentice Mentoring Program

In their opposition to Plaintiffs' first enforcement motion, Defendants represented to the Court that they had voluntarily initiated a mentoring program for fire apprentices. The Court took note of this program in its Order dated March 30, 2006, and stated specifically that Defendants had revised "an existing formal Mentoring Program to add a component for new employees with less than one year of service." Order at 29. The Court's Order required Defendants to continue the program for the duration of the agreement.

The Monitor later learned that the "program that the Monitor and the Court thought was currently in place for new fire apprentices had not even been announced." (emphasis in original) Monitor's Report at 33, Ex. 16 and 17. Indeed, the Region did not plan to permit SCEPS with less than one year of service to participate in the program until October 2006, when the following year's program began. At the time, the existing program contained only ten mentor-mentee pairs. Monitor's Report at 33.

Following the Monitor's communication of her strong concerns in April 2006, the Region "took steps to expand and expedite the Mentoring program." *Id.* But significant problems remained. For example, the Region required participants in the program to first attend a one-day training session, and announced a schedule beginning in May 2006. Monitor's Report at 34 (citing Monitor's Ex. 12 at 3, R5 6/9/06 Report at 5-7). In August 2006, however, the Region announced it was suspending training sessions due to fire activity, and that the training sessions would not resume until sometime after October 15, 2006. When the Monitor was told that employees would still not be permitted to participate in the program without attending the training, she conveyed to the Region her view that its actions constituted non-compliance with the Court's order. Monitor's Report at 34. It was only after the Monitor "strongly advised the Region to rethink its approach to the mentor training" that the Region decided to permit employees to participate in the program after reading the

training materials, rather than participating in the one-day session. *Id.* Still, as the Monitor noted, the consequence of the Region's process was that "a substantial number of those who enrolled in the program were unable to participate until late September 2006, almost eight months into the one-year period of the HSA extension." Monitor's Report at 35. Defendants' tardy implementation of the program – in the context of the brevity of the HSA extension and the urgent need for mentoring this group of employees – cannot constitute substantial compliance with the Court's Order.

III. Plaintiffs are Entitled to Relief From Defendants' Non-Compliance.

The HSA states that in Court proceedings to enforce compliance with Section IV, Defendants will not be found in breach, and the Court will not order further relief, if the Court finds that Defendants have substantially complied with Section IV.B through G and Section V, or any alternative methods of implementation agreed upon by the parties, and have nonetheless been unable to reach the goals of Section IV.A. HSA § VII.B.8. As Plaintiffs have demonstrated, and as the Monitor's careful review has confirmed, Defendants have no such defense available to them. The Region has not substantially complied with HSA §§ IV.A.1; V.A.1; V.A.2.; V.A.3.; V.B.2; or the Court's Supplemental Remedial Order on the Apprentice Mentoring Program.

Despite this failure to meet critical and central provisions of the agreement, the Region's September 2006 report touts hastened progress since the Court's Order – and indeed, the Monitor has observed that although there are continued shortcomings, the Court's vigilance has prodded the Region to move "more expeditiously in its HSA compliance that during the prior years of the Agreement." Monitor's Report at 1. Yet, if Defendants' data are to be believed, their accelerated (though still limited) progress in the seven months since the Court's order dramatically highlights their staggering failures to comply for the first three years of the HSA – when levels of Hispanic representation were virtually stagnant.

In negotiating the HSA, the parties painstakingly bargained over specific measures to remove

barriers to Hispanic employment in Region 5. As the Monitor confirmed and as Plaintiffs have argued, the Region implemented many of these provisions only after the Court intervened, and continues to fall short on many others. Plaintiffs deserve an opportunity to see whether the measures for which they bargained – and with which Defendants agreed to comply for three years, not merely one – will yield fruit. In short, they are entitled to the benefit of their bargain.

Plaintiffs seek an additional two-year extension of the HSA, and continued enforcement of both its provisions and the Court's supplemental remedial measures. [10] The Court has three bases on which it may grant Plaintiffs this relief – the language of the HSA itself; its inherent power to enforce compliance with a judicially-approved agreement; and its inherent power to modify a settlement agreement when changed circumstances threaten to thwart its purpose, as is the case here. Each of these avenues available to the Court is discussed below.

A. The Court has the Authority to Order an Extension of the Agreement and Other Relief Under the "Additional Remedial Measures" provision of the HSA.

Where Defendants are in breach, the HSA provides that the Court may order specific enforcement of the provisions contained in Section IV.B through G, as well as "additional remedial measures to increase Hispanic representation subject to the availability of Region 5 Positions." (emphasis added). In the Order of March 30, 2006, the Court stated that the HSA's specific provision regarding a one-year extension limits the Court's ability to extend the HSA without modifying it. Respectfully, Plaintiffs urge this Court to review this issue and reconsider that the Court's authority to extend the decree inheres in the provision authorizing "additional remedial measures" – a provision for which the parties bargained at arms-length and on which both parties voluntarily agreed. Plaintiffs have never viewed the language regarding a one-year extension as a

[10] Of the supplemental remedial measures that the Court ordered in March, the Monitor found that the Region had put a number of them in place, but that it was too early to discern whether they were producing results. Extension of the agreement is even more warranted in light of these findings by the Monitor.

limitation, any more than they view the clause that immediately precedes it (regarding specific enforcement of IV.B.-G.) as a limitation. Although the HSA provides that the Court may specifically enforce IV.B – G if Defendants are found in breach, that does not mean that the Court would be barred from, for example, specifically enforcing a provision contained in Section V. The Court's power to do so would derive from the HSA's broad "additional remedial measures" language. The same is true for the HSA's language on extension. This Court possesses the authority to interpret the terms of the HSA, and it may properly interpret "additional remedial measures" to permit an additional two-year extension of the agreement. *See Keith v. Volpe*, 784 F.2d 1457 (9th Cir. 1986) (district court's construction of consent decree entitled to broad deference).

B. The Court's Inherent Authority to Enforce its own Judgments Permits it to Order an Extension and Other Relief.

As Plaintiffs argued in their first enforcement action and as this Court noted in its March 30, 2006 Order, the Court has the inherent power to enforce this agreement. Order a 25. *TNT Marketing, Inc. v. Agresti*, 796 F.2d 276, 278 (9th Cir. 1986) ("district court had inherent power to enforce the agreement in settlement of litigation before it"); *Spallone v. United States*, 493 U.S. 265, 276 (1990) ("[C]ourts have inherent power to enforce compliance with their lawful orders ....") (internal quotations and citation omitted). Indeed, the parties' stipulation and Court's provision for briefing and hearing of this motion for enforcement implicitly contemplates and accepts this inherent authority. *See* May 15, 2006 Order (permitting Plaintiffs to "file their motion for enforcement or any other relief, except as to attorneys' fees, if they determine there is a need for such a motion." For the Court's compliance enforcement power to be meaningful, however, the Court must also have the power to provide Plaintiffs a remedy. *Frew v. Hawkins*, 540 U.S. 431, 440 (2004) ("Federal courts are not reduced to approving consent decrees and hoping for compliance."); *United States v. Paradise*, 480 U.S. 149, (1987)(internal quotation marks omitted) (district court's enforcement order supported "by the societal interest in compliance with the judgments of federal courts. The relief at issue was imposed upon a defendant with a consistent history of resistance to the District Court's orders, and only after the Department failed to live up to its court-approved commitments.").

Defendants' non-compliance – most acute during the first three years of the agreement – has deprived Plaintiffs of the benefit of their bargain. In light of Defendants' disregard of their obligations for a large portion of the HSA's term, an additional two-year extension is fitting, necessary, and appropriate. It is settled that the Court's power to enforce includes a power to extend, if necessary to effectuate the parties' bargain. *See United States v. Local 359, United Seafood Workers*, 55 F.3d 64, 69 (2d Cir. 1995) (holding that "it was well within the district court's inherent power" to extend parts of a consent judgment decree as an exercise of the court's compliance enforcement power); *Holland v. N.J. Dep't of Corrections*, 246 F.3d 267, 283 (3d Cir. 2001) (compliance enforcement power may be used to extend a decree in circumstances where "such compliance enforcement is essential to remedy the violation and thus provide the parties with the relief originally bargained for in the consent order."). The Court may properly order relief for Plaintiffs using its inherent powers to enforce compliance, without modifying the agreement.

C. Significant Changes in the Region's Human Resources Operations and Hiring and Recruitment Processes Justify the Court's Use of its Modification Powers.

Although Plaintiffs' view is that the Court need not modify the agreement to extend, modification is proper and justified given significant changes in the processes the Region uses to recruit for and fill positions. Because these processes are of obvious relevance to the parties' agreement, and because they are so vast in scale, the Monitor has continually expressed concern about them. They formed an important basis for her recommendation that the HSA continue, under Court supervision, beyond February 2007. Monitor's Report at pp. 35-37.

This Court previously found that the Forest Service's consolidation of all human resources personnel in Albuquerque, New Mexico "could classify as a significant changed circumstance" warranting modification of the HSA, but that modification was unnecessary at that time. Order at 26. Instead, this Court ordered Defendants to retain sufficient human resource personnel to implement the Agreement. The impending move of the human resources personnel was crucial because of its impact on the Region's ability to conduct recruitment, and because the Region's failure to engage in effective recruitment and diverse hiring put it in non-compliance with core

provisions of the HSA. *See* Monitor's 10/29/05 Report at 19-47, Hulett Dec., Ex.13.

Since the entry of this Court's March 30, 2006 order, the Region has significantly changed its hiring processes, engaged in wholesale abandonment of previous recruitment and hiring strategies under the HSA, and instituted new and completely unproven systems. Plaintiffs take no position at this time on whether or not those changes will be efficacious, but contend that the drastic and far-reaching changes warrant modification by extension to determine whether the new procedures will eliminate barriers to the underrepresentation of Hispanics.

Some of the changes found by the Monitor to be significant are:

- The establishment of a Regional Selection Team, consisting of Forest Supervisors who rotate through the Regional Office for two week periods and take responsibility for all permanent selections at GS-12 and below, a system described by the Regional Forester as a "new method of doing business," and issued with the advisement "Do not expect this new selection process to mirror the previous process."
- The elimination of the Forest Human Resources Officer Position and the creation of the Human Resources Recruitment Specialist, with concomitant personnel transfer, hiring, and training;
- The abandonment of the Regional Outreach and Recruitment team, previously responsible for fire recruitment activities;
- The Creation of a "Regional Employment Center" with "virtual" employees who physically function on the forests, but report to the Regional Office;
- New Standard Operating Procedures for a Revised Regional Recruitment Plan, issued on September 14, 2006, set forth the new roles for the various personnel involved in the new processes.
- The core of the new HR structure and hiring system, the newly created Employment Center in the Regional Office, will be disbanded when the HR operation moves to New Mexico in 2007. *See* Monitor's 10/29/06 Report at 35-38.

Plaintiffs believe that the significant changes in the Region's recruitment and hiring policies,

practices and procedures constitute significant factual changes that warrant modification of the agreement, as articulated in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). A two-year extension is "suitably tailored" to resolve the issues created by the recently implemented and untested changes by giving the parties and the court additional time to test the efficacy of the measures. *See Keith*, 784 F.2d at1460.

However, Plaintiffs also note that the paradigmatic *Rufo* scenario, in this and other Circuits, involve efforts by defendants to escape their obligation under a consent decree. In *Rufo*, the defendants to a consent decree covering the administration of Suffolk County jail sought modification of the decree to permit double-bunking due an unexpected increase in prison population. *Rufo*, 502 U.S. at 376. The district court denied the motion for modification under FRCP 60(b), holding that the defendants had not made a showing of a "grievous wrong" brought about by unforeseen circumstances – the standard for modification under *United States v. Swift & Co.*, 286 U.S. 106 (1932). On review, the issue before the Supreme Court was the standard that governs a motion for modification of a consent decree under Federal Rule of Civil Procedure 60(b). *Rufo*, 502 U.S. at 378-79. Rule 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding" under certain circumstances. Plainly, only defendants to a consent decree would seek "relief" from its obligations. Each of the cases cited by the Supreme Court as examples of "changed factual conditions" that warrant a consent decree modification involve motions by a defendant to terminate the consent decree or lessen its obligations. The same holds true for most modification cases in this Circuit. See, e.g., *United States v. Asarco Inc*., 430 F.3d 972 (9th Cir. 2005); *Jeff D. v. Kempthorne*, 365 F.3d 844, 855 (9th Cir. 2004). While the Ninth Circuit has applied the *Rufo* standard to a plaintiff's proposed modification of a consent decree, *See Hook v. Arizona*, 120 F.3d 921, 925 (9th Cir. 1997) (reversing District Court's modification of consent decree to permit prisoners to have "hot pots"), that decision merely restated the language of the *Rufo* standard without considering whether a different standard should apply. *Id.* at 925.

Although the large-scale and sweeping changes to the Region's recruitment and hiring

processes satisfy the *Rufo* standard, Plaintiffs believe it is appropriate to apply a somewhat more relaxed standard for a party that is seeking modification merely to receive the benefit of its bargain. The Third Circuit in *Holland v. N.J. Dep't of Corrections*, in considering whether the district court could extend a consent decree in an employment discrimination suit, noted that a court can modify an agreement in response to a plaintiff's request "upon making a finding that conditions have changed so that the 'basic purpose of the original consent decree' has been 'thwarted,' . . . meaning that 'time and experience have demonstrated' that 'the decree has failed to accomplish the result' that it was 'specifically designed to achieve.'" *Holland*, 246 F.3d at 284. (internal citations omitted). The court rejected the defendant's contention that the stricter *Rufo* standard applied to the requested extension because that case "set the standard for cases in which the defendant seeks to have a decree modified . . . ." *Id.* at 284 n.16. "The Supreme Court has set a more rigorous standard for defendants seeking modification because defendants usually seek modification 'not to achieve the purposes of the provisions of the decree, but to escape their impact.'" *Id.* at 284 (citing *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 249 (1968)).

Given the significant and recent changes in hiring and recruitment processes, and the Region's minimal progress toward the workforce goals, Plaintiffs have demonstrated that the HSA has failed to achieve the purpose for which it was designed to achieve, and extension by modification is warranted. Whether held to the stricter *Rufo* standard or a more relaxed standard that takes into account that the Plaintiffs seek to receive the benefit of their three-year bargain – rather than to escape their obligations – modification by extension is a necessary and appropriate remedy.

CONCLUSION

If the months since the Court's March 30, 2006 order have confirmed anything, it is this: the Court's continuing supervision is essential to ensure that Defendants finally meet the obligations they have undertaken, and that the HSA's intention is finally realized. After spending the first three years of the HSA dismissing the stated purpose of the agreement as merely "aspirational," it is evident that the Court's specific finding that the goals are enforceable, as well as the Court's supervision, delivered to Defendants a wake-up call – a clear message that the HSA is not a mere

piece of paper setting out the parties' hopes and aspirations, but rather a source of binding duties. Still, as the Monitor noted and as Plaintiffs have demonstrated, Defendants remain out of compliance with important mandates of the agreement. Moreover, they have made only "limited progress," in the Monitor's words, toward the goals of increasing Hispanic representation in the Region V workforce. § IV.A.1. Monitor's Report at 1. This limited progress is unsurprising given that Defendants failed to approach their obligations seriously until taken to task by this Court, just seven months ago.

A two-year extension would provide time to see results from HSA provisions with which Defendants should have begun to comply in December 2002 – as well as the supplemental remedial measures that the Court ordered in March. The two-year extension that Plaintiffs seek, and which the Court has the power to provide, is neither undue nor disproportionate. The requested relief is no more and no less than is required to provide Plaintiffs the benefit of their bargain.

Dated: November 3, 2006

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