IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

CLIFFORD EUGENE DAVIS, JR., *et al.*, Plaintiffs	)	
and	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor	)	C.A. NO. 56-1662-D
	)	Hon. James J. Brady
v.	)	
	)	Hon. Magistrate Docia L. Dalby
EAST BATON ROUGE PARISH SCHOOL BOARD, *et al.*, Defendants.	)	

UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION TO ENFORCE CONSENT DECREE

In 1996, this Court approved a new desegregation plan and consent decree ("decree"), finding that it did not contain any "unreasonable, illegal, [or] unconstitutional" provisions. 8/1/96 Hearing Tr. at 78 [docket no. 882]. Now, three years before the decree allows, the East Baton Rouge Parish School Board ("EBR" or "Board") moves for unitary status, arguing that the decree's time provision is illegal and unconstitutional. In so moving, EBR seeks to end this case without having adequately implemented the required magnet programs, eliminated the required temporary buildings, or completed the required school construction and improvements. Because neither the law nor the public policy favoring consent decrees permits such a result, the

United States moves to enforce the decree's time provision and to preclude EBR from unilaterally moving for unitary status.[1]

BACKGROUND

In the spring of 1996, EBR, with its attorneys' and consultants' assistance, drafted a desegregation plan to replace the mandatory student assignment plan then in effect. 8/1/96 Hearing Tr. at 6. The plan was made available to the public for review and comment, and EBR modified the plan in response to comments it received. Id. at 6-7. The Board unanimously approved the revised plan and authorized its attorneys, together with Board members, to negotiate with the plaintiff parties in an attempt to reach agreement on the plan. Id. at 7. Following numerous meetings and extensive discussions, the Board and the plaintiff parties agreed on a final plan that was then incorporated into a consent decree. Id. at 7-8. The Board unanimously approved the decree. Id. at 8.

The Board submitted the decree to the Court for approval, and on August 1, 1996, the Court held a fairness hearing. The system superintendent and the Board president testified in favor of the plan, representing to this Court and the parties that EBR was committed to the plan's success, that the Board understood its obligations under the plan, and that the community supported

[1]This motion deals exclusively with the question of whether EBR may move for unitary status at this time. The United States believes that EBR fails to meet the standard for unitary status at this time and will file a response to EBR's motion in accordance with the schedule set by the Court.

the plan. Id. at 10 (Testimony of Dr. Gary Mathews), 32-33 (Testimony of Dr. Press Robinson). Although acknowledging that its previous "orders have not been fully complied with, or followed, in many instances," the Court approved the plan, finding that the plan and the Board's testimony in support of it demonstrated a "gradual changing of attitude" by the Board to fulfill its duty to desegregate. Id. at 75-79.

The decree replaced the prior mandatory student assignment plan with a voluntary plan. Desegregation would be accomplished through the Board's implementation of a comprehensive magnet program offering unique and enhanced curricula to attract white students to predominantly black schools, and on intensifying recruitment of M-to-M transfers. EBR agreed, among other things, to implement 25 new magnet programs, to enhance facilities and resources at historically neglected black schools, and to eliminate most of the system's temporary buildings ("t-buildings").[2]

The decree sets forth specific deadlines for many of those actions. For instance, the decree requires EBR to eliminate at least 75% of the current t-buildings "by the eighth year" of the plan, decree at 6; eliminate 14 racially identifiable schools "by the end of the third year of implementation of this plan," id. at

[2]The t-building provision incorporates a long-standing order to eliminate t-buildings, which the Court found EBR had used to increase enrollments at segregated schools rather than transfer students to increase desegregation. Davis v. E. Baton Rouge Parish Sch. Bd., 514 F. Supp. 869, 875 (M.D. La. 1980).

7; and to spend at least $3 million annually for enhancing racially identifiable black schools, with this amount "substantial[ly] increase[d] thereafter for the remaining years of the life of this Consent Decree," id. at 3.[3]

Subsequent orders have imposed further obligations on EBR. In 1998, parish voters approved a tax plan to renovate schools, construct classroom additions and build new schools on a schedule ending in the 2004-05 school year – a schedule developed by EBR based on the consent decree time frame.[4] EBR developed the tax plan in part to fulfill its obligations under the decree to enhance the racially identifiable black schools. The Court approved the tax plan in two orders. 4/27/99 Order [docket no. 1037]; 12/13/99 Order [docket no. 1161]. Under the tax plan schedule, numerous racially identifiable black schools, many of which house magnet programs, have not yet been renovated or rebuilt.[5]

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[3]The decree designates 33 schools as "Y-factor" schools that are to receive increased staff and instructional resources, and physical facility enhancements. Decree at 3, App. A at 29-38. Thirteen Y-factor schools also house magnet programs. Id., App. A. at 1-21.

[4]The renovations include roof repair and replacement, HVAC replacement, fixing various building and fire code violations, and Internet wiring. Twenty-five schools are to receive four-classroom additions ("quads"), and four schools are to be rebuilt as new schools.

[5]As of January 2002, these schools included:

- Forest Heights, Glen Oaks Middle, Park, and Scotlandville High (roof replacement);

(continued...)

Because of the plan's ambitious scope, to allow the parties to focus on implementation and avoid premature disputes over unitary status, and to provide sufficient time for the new programs to take root and eliminate the remaining vestiges of the former dual system, the parties agreed to a procedure and time frame for concluding this case once the plan had been implemented. Specifically, the decree states that:

> the school district may unilaterally move for unitary status upon the conclusion of the eighth school year following the implementation year of the plan. At any time after the conclusion of the fifth school year following the initial implementation of the plan, a joint motion for unitary status may be filed by all of the litigants with the Court.

Decree at 7. Thus, treating the 1996-97 school year as the plan's implementation year, the decree precludes EBR from unilaterally moving for unitary status until the end of the 2004-05 school year, at the earliest.

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[5](...continued)

- Eden Park, Harding, Magnolia Woods, North Highlands, Westdale, and Winbourne (HVAC replacement);
- Greeneville and Prescott (code violations);
- Banks, Dalton, and Melrose (roof and HVAC replacement);
- Capitol High and Glen Oaks High (roof and HVAC replacement, technology);
- McKinley Middle (roof replacement, technology);
- Istrouma Middle (roof replacement, code violations);
- Glen Oaks Park and Howell Park (roof replacement, quad);
- Highland, Lanier and Nicholson (roof and HVAC replacement, quad);
- Istrouma High, Scotlandville Middle (roof and HVAC replacement, technology, code violations);
- Merrydale and Polk (roof replacement, code violations);
- Progress (roof and HVAC replacment, code violations);
- Ryan (HVAC replacement, code violations); and
- Capitol Middle (new school).

ARGUMENT

It is not disputed, nor has EBR addressed, whether the Court may determine sua sponte EBR's unitary status. The Court has the discretion to make that determination, consistent with its inherent power under Article III to consider jurisdictional issues at any time. As more fully explained below, however, the Court should not exercise that discretion here as significant actions remain to be performed under the Court's orders.

Moreover, the Court's jurisdiction is not at issue here. Rather the issue is whether EBR may unilaterally move for unitary status notwithstanding the decree's time provision. It cannot, for three reasons.

First, the decree's time provision prevents EBR from unilaterally moving for unitary status at this time. The time provision is valid and enforceable as part of a judicially approved settlement between the parties. See U.S. Mem., Argument, § I, infra.

Second, the provision should not be modified or deleted. The parties negotiated the provision based on circumstances that are either unchanged or were expressly contemplated. EBR thus fails to satisfy the standard for unilaterally modifying the decree. See id., § II, infra.

Finally, and in any event, the motion is premature. EBR developed both the decree and the 1998 tax plan. But EBR has not yet fully complied with the decree or the orders approving the tax plan. EBR therefore has failed to comply with the Court's

orders for a reasonable period of time as required to achieve unitary status. See id., § III, infra.

I. The Decree's Time Provision is Legal and Enforceable

Public policy favors settlements of lawsuits. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 881 (1994); Marek v. Chesny, 473 U.S. 1, 10 (1985); see Fed. R. Civ. P. 68 (offer of judgment rule). Accordingly, to foster settlements, courts adhere to two basic principles, both premised on the view that the parties to a lawsuit are best positioned to evaluate the risks of their respective cases, and to decide what outcome short of a favorable trial ruling is acceptable.[6]

The first principle respects parties' ability to devise mutually acceptable remedies to constitutional violations. Patterson v. Newspaper & Mail Deliverers' Union, 13 F.3d 33, 38 (2nd Cir. 1993) (stating it is "important to provide all concerned with an incentive to enter into constructive settlements so that protracted litigation can be avoided and

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[6]The Supreme Court has aptly described the dynamic behind consent decrees and other settlements:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

useful remedies developed by agreement, rather than by judicial command"). Consent decrees are essentially contracts embodying an agreement by the parties. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986).[7] Courts thus accord parties broad latitude in negotiating a consent decree so long as the resulting decree relates to the alleged – or, in this case, proven – violation of federal law. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 389 (1992).

This latitude includes the parties' ability to define a consent decree's effective period because they "typically will be the most knowledgeable as to the reasonable length of time necessary to determine whether the decree has had its desired effect." Alexander v. Britt, 89 F.3d 194, 201 (4th Cir. 1996). And parties in school desegregation cases routinely do so, with the courts' blessing. See, e.g., Lee v. Butler County Bd. of Educ., 183 F. Supp. 2d 1359, 1363 (M.D. Ala. 2002) (consent decree providing that motion to dismiss could not be filed until three years after decree's approval); Johnson v. Bd. of Educ. of Champaign Unit Sch. Dist. No. 4, ___ F. Supp. 2d ___, 2002 WL 181776, *30 (C.D. Ill. Jan. 29, 2002) (approving consent decree in which parties agreed to 2009 expiration date); Lee v. Autauga

[7]The key difference from an ordinary contract is that a consent decree requires judicial approval to take effect, meaning that a court must find the decree reasonable, fair and legal. United States v. City of Miami, 614 F.2d 1322, 1333 (5th Cir. 1980). Here, the Court held a fairness hearing, taking testimony from EBR officials and interested members of the public, before approving it in its entirety, including the time provision.

County Bd. of Educ., 59 F. Supp. 2d 1199, 1203-04 (M.D. Ala. 1999) (consent decree with three-year provision); Berry v. Benton Harbor Sch. Dist., 184 F.R.D. 93 (W.D. Mich. 1998) (approving consent decree that precluded defendant from moving for unitary status until three years after plan's implementation); see also NAACP v. Duval County Sch., 273 F.3d 960, 963 n. 9 (11th Cir. 2001) (parties agreed in consent decree that "unitary status shall not be achieved until [defendant] maintains three years of racial equality in all areas of school operation").

The second principle is finality. This principle recognizes that parties will be motivated to avoid the uncertainties of litigation through settlement only if they can be reasonably certain that the resulting agreement will be judicially enforced if the opposing party fails to comply. Alexander, 89 F.3d at 201 ("ignoring the parties' agreement in a consent order. . . . would reduce (if not destroy) the incentive for parties to enter into consent decrees in the first place"); see Gonzales v. Galvin, 151 F.3d 526, 531 (6th Cir. 1998) ("A consent decree, although in effect a final judgment, is a contract founded on the agreement of the parties . . . It should be construed to preserve the position for which the parties bargained") (citations omitted); see also Rufo, 502 U.S. at 389-90 (noting importance of finality as an incentive for parties to negotiate settlements).

Both principles apply here to uphold the decree's time provision. The provision is entitled to finality because EBR, in consenting to the decree, agreed to be bound by the provision and

significant actions remain to be performed under the decree and the tax plan, such as eliminating t-buildings and renovating and rebuilding racially identifiable black schools.

Further, the parties acted well within their discretion in agreeing to a time provision as part of the decree. EBR could have rejected the provision. It could have insisted on a shorter time frame or no time provision at all. Or it could have accelerated implementation of the decree and tax plan. But EBR did none of those things. Instead, EBR proposed a time frame for implementation upon which the parties ultimately agreed and relied. Having agreed to the time provision, EBR "should be held to [its] bargain." Alexander, 89 F.3d at 200.

In seeking to nullify the time provision, EBR makes four erroneous arguments, each addressed below. See EBR Memorandum in Support of Unitary Status Motion ("EBR Mem.").

A. The Time Provision Does Not Conflict with Dowell or Freeman.

EBR argues that the time provision conflicts with the Supreme Court's pronouncement in Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991), and Freeman v. Pitts, 503 U.S. 467 (1992), that judicial supervision in school desegregation cases should end when the school district has eliminated the effects of the former dual system to the extent practicable. See EBR Mem. at 46. But neither case restricts parties' ability to define a consent decree's effective period.

Dowell presented the question of when a school district was entitled to dissolution of an open-ended injunction that had been in effect for 16 years. In holding that compliance with the injunction for a "reasonable period of time" was one prerequisite for dissolution, the Supreme Court expressly recognized that such compliance was wholly consistent with the temporary nature of judicial supervision:

> Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that necessary concern for the important values of local control of public school systems dictates that federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.

Dowell, 498 U.S. at 248 (internal quotation omitted).

Freeman involved an open-ended consent order that had been in effect for 17 years and presented the question of whether judicial supervision may be incrementally withdrawn over school district operations as they become unitary. In answering yes to that question, the Supreme Court made clear that district courts retained the discretion to terminate supervision in an "orderly" and "gradual" manner:

> [A] court [must] provide an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance. A transition phase in which control is relinquished in a gradual way is an appropriate means to this end.

Freeman, 503 U.S. at 490.

Thus, far from prohibiting parties from agreeing to a fixed time provision, the Supreme Court, in its recent school desegregation opinions, has simply held that good faith

compliance for a reasonable period is one element of the unitary status standard. Parties, in resolving a case, can define for themselves that reasonable period and that orderly and gradual manner as post-Dowell and Freeman cases approving consent decrees or measuring compliance with them demonstrate. See U.S. Mem. at 8-9, supra; see also Alexander, 89 F.3d at 201 (refusing to void decree's six-year sunset provision when defendant moved to terminate decree after two years).

B. EBR Cannot Achieve Unitary Status Without First Fully Complying with the Decree and Court Orders.

EBR argues that the Court must ignore the time provision if EBR has in fact already attained unitary status. EBR Mem. at 46. This argument treats whether EBR is unitary and whether EBR has complied with the decree and orders as separate questions when they are not. For as Dowell holds, full implementation of the decree and compliance with the Court's orders for a reasonable period are prerequisites to achieving unitary status. Dowell, 498 U.S. at 249-50.

EBR acknowledges that it has not yet implemented the decree with respect to eliminating t-buildings and racially identifiable schools. Nor has EBR fulfilled its obligations under the 1998 tax plan. These facts alone defeat EBR's motion. But even if, arguendo, EBR could satisfy the unitary status standard without fully implementing the decree, EBR remains bound by the decree's obligations because parties, in resolving a lawsuit, can agree "to do more than the Constitution itself requires [and] more than

what a court would have ordered absent a settlement." Rufo, 502 U.S. at 389; see Butler County Bd. of Educ., 183 F. Supp. 2d at 1365 ("in addition to [the] constitutional standards, the Butler County School Board was also required to comply with the contractual requirements of the 1998 consent decree which set forth the steps the board was to take to attain unitary status," including time provision) (emphasis added).

C. The Time Provision Does Not Create Subject Matter Jurisdiction.

EBR next argues, analogizing to the principle that parties cannot create subject matter jurisdiction by consent, that the time provision impermissibly grants the Court jurisdiction when it no longer exists. EBR Mem. at 47. EBR's analogy fails. No party disputes that the Court has jurisdiction to hear this case, which involves a violation of the Fourteenth Amendment. This Court having found a violation, 498 F. Supp. 580 (M.D. La. 1980), the "scope of [its] equitable powers to remedy [the violation] is broad, for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971). And the Court's approval of the decree and its time provision is a valid exercise of that broad remedial power. South v. Rowe, 759 F.2d 610, 613 (7th Cir. 1985) (holding that time provision cannot be considered an illegal restriction of court's subject matter jurisdiction when decree has been judicially approved).

D. There Is a Federal Interest in Desegregating the EBR System.

EBR finally argues that it "quite possibly" lacked the authority to agree to the time provision because it does not serve any federal interest. EBR Mem. at 48. EBR cites to a wholly inapposite case for this proposition, Evans v. City of Chicago, 10 F.3d 474 (7th Cir. 1993) (en banc). In Evans, the Seventh Circuit vacated an injunction after reversing the district court's holding that defendant's underlying conduct was unconstitutional. Thus, because the challenged conduct did not violate federal law, there was no federal interest in enjoining it. Evans, 10 F.3d at 480-81. Here, EBR has been found by the district court and the court of appeals to have operated an illegally segregated school system. Davis v. E. Baton Rouge Parish Sch. Bd., 721 F.2d 1425 (5th Cir. 1983) (affirming Court's liability ruling and remedial plan).

II. The Time Provision Should Not Be Modified

EBR argues in the alternative that the time provision should be deleted from the decree because "it was negotiated and implemented in circumstances that have since substantially changed and on assumptions that have simply not come to pass." EBR Mem. at 48. EBR is wrong.

A. The Standard for Modification.

Unilateral requests to modify consent decrees are evaluated under an exacting standard. While courts should "exercise flexibility" in considering requests for modification, "it does

not follow that a modification will be warranted in all circumstances." Rufo, 502 U.S. at 383. Rather, a consent decree may be modified over a party's objection only when "it is no longer equitable that the judgment should have prospective application, not when it is no longer convenient to live with the terms of [the decree]." Id. (internal quotations omitted). Consistent with this standard, this Court has denied a prior EBR motion to modify, stating that "the fact the provision which was agreed upon is difficult to implement, or even more difficult to implement than the party seeking modification anticipated, does not justify a change." 6/1/98 Order [docket no. 960] (denying EBR's request to relocate middle school gifted program).

Accordingly, a party seeking to modify a consent decree must show that a "significant change in circumstances" makes "compliance with the decree substantially more onerous." Rufo, 502 U.S. at 383-84. Furthermore, when the party seeking modification relies on events actually anticipated when it entered into the decree, it bears a "heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking." Id. at 385.

"[I]n deciding whether to modify . . . a desegregation decree, a school board's compliance with previous court orders is obviously relevant." Dowell, 498 U.S. at 249. This principle takes into account that consent decrees affording injunctive relief result from the court's equitable powers. Thus, where, as

here, a party seeking modification has failed to fully comply with the consent decree, it is in no position to unilaterally modify the decree. See R.C. v. Nachman, 969 F. Supp. 682, 689 (M.D. Ala. 1997), aff'd without published opinion, 145 F.3d 363 (11th Cir. 1998) (denying defendant's request to modify consent decree when defendant "has not lived up to its end of the bargain but nevertheless asks that it be relieved of its obligations").

Even if a party is able to show a changed circumstance, the proposed modification will not be automatically adopted. Rather, the court must determine whether the proposed modification is "suitably tailored to the changed circumstance." Rufo, 502 U.S. at 391. The proposed modification must further the decree's objectives and "not create or perpetuate a constitutional violation." Id. In demonstrating that a proposed modification is suitably tailored, a party must show it has engaged in "reasoned exploration of other feasible alternatives that would maintain rather than impair the integrity of the consent decree." Inmates of Suffolk County Jail v. Rufo, 148 F.R.D. 14, 24 (D. Mass.), aff'd, 12 F.3d 286 (1st Cir. 1993).

B. EBR Fails to Show that Modification Is Warranted Here.

EBR proffers two bases for deleting the time provision: (1) the system's white student enrollment has declined since – and because of – the decree's entry, and (2) fewer private school students have returned to the system than expected under the decree. EBR Mem. at 49. Neither basis constitutes an unforeseen change in circumstance as defined by Rufo.

As EBR concedes, its white student enrollment has been declining since 1975, five years before the Court's liability ruling and 21 years before the decree's entry. See EBR Mem. at 37. Furthermore, to attribute this decline to the decree (or the desegregation case in general), EBR must ignore its expert demographer's opinion attributing the decline to a "predictable demographic transition in which the proportion of white residents is declining and the proportion of black residents is rising." 10/27/99 Report of Dr. Charles Tolbert.[8] Nor did EBR expect this decline to be offset by students returning from private schools. The decree shows that EBR projected only 611 white student returns from private schools, barely more than 1% of the EBR system's total enrollment. Decree, App. A, Exhs. 8, 9, 10. Ultimately, while the parties hoped that EBR would be able to reverse the long decline in student enrollment, they recognized that it might continue, as demonstrated by the decree provision permitting a new desegregation plan if enrollment "stabilization" has not been accomplished. Decree at 7.

Moreover, EBR fails to show how the alleged change in circumstance precludes performance under the decree. If anything, fewer students should make it easier for EBR to eliminate t-buildings and to comply with the decree's enrollment

[8]EBR submitted Dr. Tolbert's report in support of its unsuccessful October, 1999 motion to approve an enrollment compliance plan. See Exhibit 11 to EBR's Memorandum in Support of Motion for Approval of Actions in Connection with Enrollment During the Fall of 1999 [docket no. 1143].

limits. And even if the alleged change satisfied the Rufo standard, EBR's proposed modification, deletion of the time provision so that EBR can move now to end this case, is not suitably tailored given the significant remedial work that remains to be done under the decree and the tax plan, and EBR's failure to show that it has carefully considered alternatives that "maintain rather than impair" the decree's integrity. Rufo, 148 F.R.D. at 24.

III. EBR's Motion is Premature

In any event, EBR's unitary status motion is premature and should be denied as such. To be declared unitary, EBR has the burden of establishing that it has complied in good faith with the Court's orders for "a reasonable period of time" and has eliminated the vestiges of past segregation to the extent practicable. Freeman, 503 U.S. at 492; Dowell, 498 U.S. at 248.

EBR's motion falls at the first hurdle. Outstanding obligations remain under the decree and other court orders. EBR itself acknowledges that it has not yet fulfilled the t-building obligation, stating only that it is "on track" to be completed. EBR Mem. at 30-31. EBR has not yet eliminated the 14 racially identifiable schools required by the decree. Nor has EBR completed the school renovations and construction, much of it designated for racially identifiable black schools and Y-factor schools, set forth in the 1998 tax plan orders. See U.S. Mem. at 4 & nn. 4-5, supra.

Furthermore, EBR has completed or begun other actions only in the past few months. EBR implemented changes to the magnet programs for the current school year, after the Court rejected EBR's objection to the Magnet Improvement Committee's report. 3/16/01 Order [docket no. 1504]; 4/16/01 Order [docket no. 1526]. Despite repeated orders declaring that the decree's enrollment limits were binding, EBR only began complying with the limits in the fall of 2001, after the Fifth Circuit rejected EBR's appeal of the issue. Despite repeated orders requesting a t-building elimination plan, EBR did not submit one until April, 2001, and the Court approved that plan in July. 7/25/01 Order [docket no. 1596].[9]

"No court has held that compliance for such a short period constitutes compliance for a 'reasonable period.'" Alexander, 89 F.3d at 201 (involving compliance with orders for "little more than a year"). Instead "[o]nly compliance for substantially longer periods has been regarded as significant evidence of good faith compliance." Id. (citing cases); see Dowell v. Bd. of Educ. of Okla. City Pub. Schs., 8 F.3d 1501, 1512 (10th Cir. 1993) (holding that good faith compliance from 1977 to 1985 satisfied reasonable period requirement). EBR's outstanding obligations under the decree and tax plan, coupled with its compliance for less than a year with other key decree provisions,

[9]In each instance, to elicit an adequate plan from EBR, the Court had to ask the monitors, Drs. William Gordon and Percy Bates, to oversee and direct EBR's efforts.

precludes a finding that EBR has complied with the Court's orders for a reasonable period and permits the Court to reject EBR's motion on its face.

CONCLUSION

EBR's motion for unitary status should be denied as premature and stricken. Significant actions remain to be performed under the decree and tax plan, and EBR has not complied with the decree or Court's orders for a reasonable period of time. The decree's time provision is valid and should be enforced without modification. In short, EBR should be held to its bargain.

Respectfully submitted,

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Dated: April 3, 2002

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I hereby certify that on April 3, 2002, I served copies of the foregoing to counsel of record by facsimile and by first class U.S. mail, postage prepaid, addressed to:

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