The Honorable MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TRUEBLOOD *et al*. Plaintiffs, v. WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES *et al*, Defendants.	NO. C14-1178 MJP DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTIONS FOR CONTEMPT – DKT NOS. 240 AND 254

Plaintiffs request that this Court find the Department of Social and Health Services (Department) in contempt. As a remedy, Plaintiffs request the equivalent of injunctive relief. However, because the Department has not only made all reasonable efforts to comply, but has demonstrated extraordinary efforts to comply, a finding of contempt is inappropriate. Even if the Court were to find the Department in contempt, the requested remedies are legally inappropriate and ineffectual when the Department has recently opened 96 beds. The Department files this brief in response to both of Plaintiffs' contempt motions, Dkt. #240 and Dkt. #254.[1]

[1] Besides citing two different parts of this Court's April 2, 2015 order, Plaintiffs' motions are substantially identical and request the same relief, and the Department's responses to both motions are substantially similar. A combined response serves judicial economy, and avoids the unnecessary submission of duplicative documents.

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I. STATEMENT OF FACTS

A. The Department Has Opened Ninety-Six Beds, More Than The Ninety Needed To Eliminate The Backlog And Reach Compliance

It is an unchallenged fact that 90 additional beds are needed to reduce the backlog and reach compliance with the Court's order. Dkt. #164 (long-term plan), Dkt. #234 (revised long-term plan). As of today, the Department is operating 96 new beds that did not exist at the time of the April 2, 2015 Order. This includes 24 new beds at Yakima, 30 new beds at Maple Lane, 27 new beds at ESH, and 15 new beds at WSH. The full use of these beds has been partially limited by the temporary restraining orders entered by this Court, and challenges presented by third parties, including criminal defense attorneys, superior court judges, and jail transport staff. Staff vacancies at WSH have further limited admissions to some beds at WSH. Declaration of James Alan Polo (Polo Decl.) ¶ 13. The Department's aggressive efforts to open these 96 new beds required large amounts of work and coordination. Declaration of Carla Reyes (Reyes Decl.) ¶ 5.

B. Trends In Wait Times For Competency Restoration Demonstrate Substantial Progress Since April 2015 And Recent Dramatic Reductions In Wait Times

In every sphere – in-jail evaluation, inpatient evaluation, and inpatient restoration – improvement has occurred since this Court entered its order in April of 2015.

	April 2015	May 2016	Reduction
In-Jail Evaluations	21.1	10.4	-10.7 Days
Inpatient Evaluations	45.1	17.5	-27.6 Days
Inpatient Restorations	39.2	26.5	-12.7 Days

Declaration of Thomas Kinlen (Kinlen Decl.) ¶ 9. These reductions are persistent and sustained over recent months. Reyes Decl. ¶ 25, Attach E at 8.

In January, the Department argued that dramatic reductions in in-jail evaluation wait times were imminent because needed resources had recently become operational, which would

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bring about a rapid reduction in wait times. Dkt. #174 at 4. The Department's position was correct. Average wait times for in-jail evaluations dropped from 19 days to 9.7 days in only two months. Reyes Decl. ¶ 25, Attach E at 10. Because the Department has recently opened 96 beds, the same dramatic reduction in wait times can be expected. The wait times at ESH are demonstrative; as of the end of March 2016 the average wait times were 69.2 days for inpatient evaluations, and 45.2 days for restoration. Dkt #241-1. As of May 2016 the average wait times are 12.5 days for inpatient evaluations, and 12.8 days for restoration admissions, revealing a dramatic reduction in just two months' time. Kinlen Decl. ¶ 11. The fact that wait times for inpatient evaluation and restoration at ESH were reduced by 81% and 71% respectively in just a two-month period is contrary to Plaintiffs' factual assertions that the Department has "now failed for more than a year to even come close to complying with this Court's Orders." Id.; Dkt. #240 at 11; Dkt. #254 at 12.

C. The Department Achieved All Of The Specific Actions Directed By The Court's February 8 Order

In its February 8 Order, the Court directed the Department "to take specific actions recommended by the Court Monitor." Dkt. #186 at 10. The Court directed that more than 40 specific actions be taken. Id. at 10–17. The Department has complied with each and every one of these specific actions. Dkt. #241-1 at 4–5; Reyes Decl.¶¶ 4, 25, Attach. E at 3-5. The only specific action that did not occur on the Court's schedule was the execution of contracts for diversion providers, which was dependent on third-party contractors. Reyes Decl. ¶ 23, Attach E at 5. All four contractors have fully executed their contracts, and have begun recruiting staff, drafting policies and procedures, and convening workgroups in order to begin accepting referrals by July 1, 2016. Declaration of Ingrid Lewis (Lewis Decl.) ¶¶ 14–15.

D. Hospital Capacity At ESH Was Expanded To Nearly Double of Planned Capacity.

As of April 2016, ESH is operating 27 new forensic beds for competency restoration and inpatient evaluation. Reyes Decl. ¶¶ 3, Attach E at 16. The Department had originally

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planned to open only 15 beds at ESH, *see* Dkt. #176-3 at 21, but as opening beds at WSH became increasingly difficult, the Department capitalized on ESH's physical renovations and successful hiring, increasing the capacity to 27 beds. Reyes Decl. ¶ 3. Due to this extraordinary effort, instead of the "especially egregious" wait times noted by the Court in its February 8 order, Dkt. #186 at 4, wait times for inpatient services in Eastern Washington are greatly reduced and nearing the seven-day mandate.

E. The Department Has Opened And Staffed Two Entirely New Facilities In Less Than Twelve Months

Opening new treatment facilities is a complex and challenging endeavor. *See* Dkt. #201-206 (the Department's TRO Response detailing only a portion of the extensive work done to open the Yakima Restoration facility); Dkt #210-1 at 9 (Court Monitor's experts commenting about Yakima that "[a] great deal of expense and time has gone into this program"). Over the last year, the Department has opened two completely new facilities with the singular goal of serving class members - Yakima and Maple Lane - requiring funding, planning, permitting, soliciting vendors, negotiating contracts, hiring, accreditation, licensing, training, and more. Id.; *see also* Reyes Decl. ¶¶ 25-28. These two alternative facilities alone brought 54 new beds online.

F. Additional Improvements In Wait Times Continue To Be Frustrated By Third Parties

Although the "forensic mental health system cannot function efficiently without the help of all of its participants," *see* Dkt #131 at 20, utilization of the alternative facilities has been frustrated by third parties. For example, criminal defense attorneys for class members have actively opposed the transfer of their clients to Yakima, preferring instead to litigate the issue in Superior Court. Dkt. #195 and #196. Related problems with court orders are the most "time consuming barrier" to the full use of Yakima. Dkt. #241-1 at 16–17. The Department continues to strive to overcome these barriers through education, advocacy, outreach, and much more. Lewis Decl. ¶¶ 3–6.

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G. The Department Created And Staffed An Entirely New State Office In A Year

In order to ensure proper structure and oversight beyond this litigation, the Department successfully lobbied the legislature to create and fund the Office of Forensic Mental Health Services (OFMHS), and worked over the last year to hire the staff for this office. Reyes Decl. ¶ 3. The fully-staffed Office now includes five doctorate level professionals, data and technology staff, liaison and outreach staff, other mental health professionals, and support staff. Id. With Dr. Tom Kinlen as the Director, the Office is not only working to reach ultimate compliance with this Court's mandates, but is also looking into the future to address other systemic issues. Kinlen Decl. ¶ 4. The Office will not only help the Department reach compliance, but will ensure that gains are maintained, wider system complexities are addressed, and the quality of care and system processes are improved. Id.

II. ARGUMENT

A. Adjudication Of The Contempt Motions Is Premature

Plaintiffs erroneously focus on the Department's actions in its appeal, rather than giving due deference to the legal conclusions in the Ninth Circuit's opinion. The Ninth Circuit gave two specific orders to the district court: 1) vacate the portion of the injunction with respect to in-jail evaluations; and 2) modify the permanent injunction consistent with its opinion. A full reading of the opinion clearly indicates this modification will impact the entire injunction, not just that portion which has been vacated.

First, the due process analysis outlined by the Ninth Circuit applies to all competency evaluations, not just in-jail competency evaluations; thus, the injunction must be modified accordingly. This Court cannot ignore constitutional maxims directed by a Court of higher authority simply on the basis of Plaintiffs' interpretation of what was appealed by the State.

Second, the Ninth Circuit found the injunction as a whole had two other deficiencies: 1) it was an abuse of discretion for this Court to measure the time requirements based on signature of the court order, rather than receipt; and 2) the injunction excludes the possibility of

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extensions for non-clinical reasons. These other deficiencies are not exclusive to in-jail evaluations. This Court should not rule on the issues of contempt for any class member, regardless of whether he or she has been ordered to receive a competency evaluation or restoration services, until the Court first appropriately modifies the injunction, and fully adjusts the benchmarks with which the Department must comply.

B. Plaintiffs Have The Burden Of Establishing The Department Is In Contempt

"The standard for finding a party in civil contempt is well settled: [t]he moving party has the burden of showing by clear and convincing evidence that the [non-moving party] violated a specific and definite order of the court." F.T.C. v. Affordable Media, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999) (quoting Stone v. City & Cty. of San Francisco, 968 F.2d 850, 856 n.9 (9th Cir.1992) (citations omitted)). The contempt " 'need not be willful,' and there is no good faith exception to the requirement of obedience to a court order." In re Dual–Deck Video Cassette Recorder Antitrust Litig., 10 F.3d 693, 695 (9th Cir.1993). "But a person should not be held in contempt if his action appears to be based on a good faith and reasonable interpretation of the court's order." Id. (internal formatting and quotation marks omitted).

Substantial compliance with a court order is a defense to an action for civil contempt. Gen. Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1379 (9th Cir. 1986). "If a party has taken 'all reasonable steps' to comply with the court order, technical or inadvertant violations of the order will not support a finding of civil contempt. Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 891–92 (9th Cir. 1982). A party is also excused from complying with a court order if it is unable to comply. F.T.C, 179 F.3d at 1239. This Circuit has found a failure to take "every reasonable step" to comply when there was " 'little conscientious effort on the part of the appellants to comply with those orders . . . .' " Stone, 968 F.2d at 857, *as amended on denial of reh'g* (Aug. 25, 1992) (citing to Sekaquaptewa v. MacDonald, 544 F.2d 396, 406 (9th Cir. 1976)).

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The Department has taken all reasonable efforts to reach compliance with the Court's injunction. The Court, in specifying more than 40 specific actions in its February 8 Order that the Department must take by May 27, created a road map for what reasonable steps were necessary for the Department to take in pursuit of compliance. These tasks were derived by the Court directly from the recommendations of the Monitor, Dkt. #186 at 11, and the Department has achieved all of these tasks as directed by the Court. As demonstrated by the extraordinary efforts detailed in this response and the monthly reports, the Department has achieved substantial compliance with this Court's orders.

C. Plaintiffs' Requests For Relief Are Inapposite To A Proper Contempt Remedy

Civil contempt sanctions are employed for two purposes: to coerce the defendant into compliance with a court's order, and to compensate the complainant for losses sustained. United States v. United Mine Workers of America, 330 U.S. 258, 303-304 (1947); Shuffler v. Heritage Bank, 720 F.2d 1141, 1147 (9th Cir.1983); Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 778 (9th Cir. 1983). The Supreme Court has identified two acceptable types of fines for civil contempt: (1) per diem fines imposed each day a contemnor fails to comply with an affirmative court order, and (2) fixed fines suspended pending future compliance with a court order. International Union, United Mine Workers v. Bagwell, 512 U.S. 821, at 829–30 (1994) (citing United Mine Workers, 330 U.S. at 303–04 as an example of a permissible civil suspended fine where the court suspended a civil contempt fine for 30 days to provide the contemnor an opportunity to fully comply with a temporary restraining order). "Generally, the minimum sanction necessary to obtain compliance is to be imposed." Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 514 (9th Cir. 1992); *see also* Spallone v. United States, 493 U.S. 265, 280 (1990); Shillitani v. United States, 384 U.S. 364, 371 (1966) (court must use "the least possible power adequate to the end proposed").

Sanctions which are designed to coerce compliance are by their very nature " 'conditional' sanctions; they only operate if and when the person found in contempt violates

the order in the future." Whittaker Corp., 953 F.2d at 517–18; In re Magwood, 785 F.2d 1077, 1082 (D.C. Cir.1986). If a sanction operates whether or not a party remains in violation of the court order, it does not coerce compliance. Whittaker, 953 F.2d at 517–518. Sanctions imposed in civil contempt proceedings must always give to the alleged contemnor the opportunity to bring himself into compliance, the sanction cannot be one that does not come to an end when he repents his past conduct and purges himself. Id. at 518 (citing to Lance v. Plummer, 353 F.2d 585 (5th Cir. 1965)); *see also* United Mine Workers, 330 U.S. at 829.

While Plaintiffs argue that Federal courts have broad remedial powers to address noncompliance, Dkt. 240 at 11, the authority they cite demonstrate that such authority was used under very different circumstances. Stone, 968 F.2d at 856 (upholding expansion of powers after party failed to comply with consent decree after *nearly a decade*); Brown v. Plata, 563 U.S. 493, 514-15 (2011) (expansive powers invoked after serious constitutional violations persisted for *more than 12 years* and remained uncorrected); Nat'l Org. For the Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 542 (9th Cir. 1987) (answering only the limited question of whether appointment of a special master, who had only powers of observation, was appropriate under the "exceptional condition" provision of Fed R. Civ. P. 53(b)). All of these cases are easily distinguished from this case, where the Department has made extraordinary effort to open beds and decrease wait times over a much shorter period.

Here, Plaintiffs completely fail to take into account this legal framework that constrains what remedy may be employed in a contempt proceeding. Plaintiffs' proposed remedies will not terminate upon purging of contempt because they are really permanent injunctions. Most of the proposed remedies are actions already undertaken by the Department, or have only a tenuous and speculative connection to improving wait times. All of Plaintiffs' requests for relief should be denied.

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1. "Establish benchmarks to open beds at the state hospitals."

The Department continues its work to address the issues at WSH raised by CMS. Reyes Decl. ¶¶ 6-21. These issues directly impact staff and patient safety, as well as the efficacy of treatment provided at the hospital. If the census is increased in a hospital that already suffers from vacancies, adding more beds stretches the existing treatment staff even thinner, which in turn leads to higher caseloads, a more dangerous environment for both patients and staff, and severely compromises patient treatment and decreases the ability of the hospital to recruit and retain quality staff because of staff burnout. Polo Decl. ¶ 6.

It has been repeatedly suggested that expanding capacity at WSH is as simple as hiring the staff and filling the 30 beds originally slated for ward F3. Reyes Decl. ¶ 21. This suggestion disregards the reality that WSH has systemic, long-term deficiencies in the provision of safe, quality care that will require systemic, long-term solutions beyond simply the addition of staff. Id. As part of the structured Systems Improvement Agreement signed on June 3, 2016 by the Department and CMS, the required Root Cause Analysis will identify the depth and breadth of actions necessary to ensure safe, quality care is provided at WSH. In the meantime, expansion of bed capacity at this time is not only ill-advised but dangerous—posing a significant risk to the health and welfare of all patients and staff at WSH. Id. This is a risk the Department cannot and will not take. Id. As such, when it became clear that the risks posed by expanding capacity at WSH were too great, the Department moved forward with contingency planning at a second alternate restoration facility at Maple Lane. Id. With this additional capacity, further expansion for forensic capacity at WSH is not anticipated to occur until WSH has fulfilled its commitment to meet the Conditions of Participation and to ensure the safe

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provision of quality care. Id. Once this standard has been met, the Department will consider a plan for expansion of forensic bed capacity at WSH. Id.

Plaintiffs make no attempt to explain why these beds at WSH are needed in addition to the 96 new beds already opened. Plaintiffs cite to outdated comments made by the Monitor in August 2015 and January 2016, Dkt. #254 at 8, but completely fail to account for the recent bed openings reported over the last several months at Yakima, Maple Lane, and ESH. Plaintiffs portray the strategy to open Maple Lane during the CMS problems as an obstinate refusal to plan for any bed expansion, but completely fail to acknowledge that during this last six months the Department has opened more beds than were ever planned. This request is only explained by their objection to the use of Yakima and Maple Lane, and as an attempt to stop use of those facilities even though they failed to obtain that relief during TRO proceedings. Forging ahead with opening beds at WSH, to the detriment of staff and patient safety, negatively impacting treatment, and resulting in termination of the CMS provider agreement, cannot be considered the "reasonable" effort required for substantial compliance.

2. "Diversify the pool of clinicians providing competency services."

Through negotiation with state employee unions, the Department has already secured the ability to contract with physicians, Advanced Registered Nurse Practitioners (ARNPs) and Physician Assistants (PAs) to provide services on forensic wards at WSH. Declaration of Rick Hall (Hall Decl.) ¶ 4. The negotiation also allowed for the use of tele-psychiatry. Id.

Plaintiffs portray the Departments efforts as a rejection of the Court Monitors long-standing recommendations, Dkt. #240 at 9, but this greatly misrepresents what the Monitor recommended. The recommendations Plaintiffs cite to are clearly specific to in-jail evaluations and are unrelated to either inpatient evaluation or restoration. Dkt. #171 at 31-32.

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Plaintiffs purposefully use the term "competency services" in their request for relief in order to obscure this distinction. Dkt. #240 at 9–10.

Finally, the Department hired all the staff necessary to open the 96 needed beds so immediate diversification beyond what the Department is already pursuing is unnecessary.

3. "Initiate meaningful labor negotiations."

The Department has repeatedly and successfully negotiated with state employee unions regarding matters that relate to compliance with this Court's injunction. Hall Decl. at ¶¶ 3–4; Declaration of Victoria Roberts (Roberts Decl.) ¶ 5. Plaintiffs offer little specifics about what the outcomes would be expected from "meaningful labor negotiations[,]" Dkt. #254 at 9, and fail to carry their burden as to why this is an appropriate contempt remedy.

4. "Implement diversion programming."

The Department has pursued diversion solutions to address the wait times for competency services in Washington State. Plaintiffs argue that a "robust diversion program" would "free up substantial . . . resources" for admitting class members, but cite to no evidence to support this claim nor do they provide any detail of what, in their opinion, a "robust" diversion program would look like. The Legislature made statutory changes and provided funding for diversion programming. Lewis Decl. ¶¶ 9–10. As previously explained, this diversion funding ultimately amounted to less than what was planned, and the Department made a decision to provide more meaningful funding to a handful of counties, rather than diluting the funding so much as to have no impact on diversion programming. Lewis Decl. ¶ 10; *see also* Dkt. #237. The diversion pilot projects are in process and all four counties have fully executed contracts. Lewis Decl. ¶ 14. All Contractors have begun recruiting staff for their respective projects, drafting policies and procedures, and convening multidisciplinary workgroups in order to begin accepting referrals into the programs beginning July 1, 2016. Lewis Decl. ¶ 15. There have been discussions to have programs present at statewide conferences in order to share ideas and resources with other communities. Id. In

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addition, the Governor's Office is hiring a consultant to perform community stakeholder interviews regarding diversion needs. Id. The consultant's recommendations and report will be shared with the community by end of year. Id. The State is already diligently pursuing diversion programming and Plaintiffs' mere assertions about a hypothetical (and unsupported by evidence) diversion model do not support this Court entering effectively injunctive relief requiring different diversion programming.

5. "Implement a robust triage protocol."

The Department has instituted a two phase triage protocol in order to provide services to class members in high need of more immediate competency services. *See* Reyes Decl. ¶¶ 20-22, Attachs. B–D. The Department entered into a two-phase process in part due to the speed at which the Court ordered a triage protocol be implemented. Dkt. #186. The initial phase was designed to provide some ability to triage cases in the interim while additional triage staff are hired. Phase two takes a more aggressive approach to triaging individuals and is scheduled to begin July 1, 2016. Reyes Decl. ¶ 20, Attach. B. In phase one, there have been seven triage referrals, all of which have been submitted by jail mental health staff or medical personnel who knew and treated the individuals. Declaration of Anthony O'Leary (O'Leary Decl.) ¶ 4. All referrals are reviewed the same day as received. Id. To date, all but one of the referrals have been approved for expedited admission. O'Leary Decl. ¶ 5. The Department has already developed and implemented an appropriate triage program.

III. CONCLUSION

This Court should decline to find the Department in contempt. Even if the Department has not achieved complete compliance with all parts of the injunction, dramatic progress has been achieved. The Department has achieved this progress because all reasonable efforts were made to reach compliance. Taking all reasonable efforts to reach compliance constitutes the defense of substantial compliance, making a finding of contempt inappropriate. Even if this Court finds that contempt is appropriate, any remedy must be consistent with the law.

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RESPECTFULLY SUBMITTED this 6th day of June 2016.

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CERTIFICATE OF SERVICE

Amber L. Leaders, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I hereby certify that on this 6th day of June 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 6th day of June 2016, at Olympia, Washington.

/s/ Amber L. Leaders

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