IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al., Plaintiffs, v. ARNOLD SCHWARZENEGGER, et al., Defendants.	NO. C01-1351 TEH CLASS ACTION ORDER TO SHOW CAUSE RE CIVIL CONTEMPT AND APPOINTMENT OF INTERIM RECEIVER

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INTRODUCTION

In the four years since this case was filed, which includes the year and a half that this Court has been meeting with the parties on a regular basis, two things have become ever increasingly clear: (1) the Governor has appointed, and the State has hired, a number of dedicated individuals to tackle the difficult task of addressing the crisis in the delivery of health care in the California Department of Corrections ("CDC"), and, (2) despite the best efforts of these individuals, little real progress is being made. The problem of a highly dysfunctional, largely decrepit, overly bureaucratic, and politically driven prison system, which these defendants have inherited from past administrations, is too far gone to be corrected by conventional methods.

The prison medical delivery system is in such a blatant state of crisis that in recent days defendants have publicly conceded their inability to find and implement on their own solutions that will meet constitutional standards. The State's failure has created a vacuum of leadership, and utter disarray in the management, supervision, and delivery of care in the Department of Corrections' medical system.

Defendants have devised a long-term strategy to contract out health care management and much of the delivery of care. However, full implementation of that plan is, by defendants' own estimates, years away. In the meantime, roughly 162,000 prisoners are being subjected to an unconstitutional system fraught with medical neglect and malfeasance. Defendants themselves have conceded that a significant number of prisoners have died as a direct result of this lack of care, and it is clear to the Court that more are sure to suffer and die if the system is not immediately overhauled.

In light of this crisis and defendants' concession that the constitutional violations will not be corrected for a long time to come, the Court is compelled to take it upon itself to construct a remedy that will cure the violations as soon as possible. Having considered the range of options available, the Court believes that the appointment of an interim receiver to manage the CDC's delivery of health care services may be necessary. Therefore, the Court issues this Order requiring defendants to show cause why a receiver is not the appropriate remedy and, if not, why not. Defendants also shall address the issue of contempt, which may be procedurally necessary as a predicate to the appointment of a receiver.

BACKGROUND

Plaintiffs filed this class action on April 5, 2001, alleging that defendants were providing constitutionally inadequate medical care at all California state prisons. Defendants agreed to enter a consent decree and to implement comprehensive new medical care policies and procedures at all institutions. *See* June 13, 2002 Stipulation for Injunctive Relief. The Stipulated Injunction provides: "The Court shall have the power to enforce the Stipulation through specific performance and all other remedies permitted by law." It also provides that it "shall be binding upon, and faithfully kept, observed, performed and be enforceable by and against the parties." Defendants also agreed to the court appointment of medical and nursing experts to assist with the remedial process. *See* June 13, 2002 Order Appointing Experts.

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Since entry of the Stipulated Injunction in June 2002, the most notable characteristic of this case has been defendants' failure to achieve any substantial progress in bringing the medical care system even close to minimal constitutional standards. Given the scale of the California prison system, defendants were ordered to implement new policies and procedures on a staggered basis, with seven prisons to complete implementation in 2003, and five additional prisons for each succeeding year until state-wide completion is achieved. To date, not a single prison has successfully completed implementation.

Even more disturbing, the court experts submitted a report on July 16, 2004 which found an "emerging pattern of inadequate and seriously deficient physician quality in CDC facilities." July 16, 2004 Report (part 2) at 1. For example, the Report described a situation in which a retired surgeon made "serious life-threatening mistakes on a continual basis." The Report also identified various systemic problems, including inadequate peer review and the need for greater centralization of physician supervision, credentialing and discipline.

In response, defendants agreed to address the very serious – literally life and death – issues identified in the Report through a Stipulated Order Re Quality of Patient Care and Staffing, which this Court approved on September 17, 2004 ("Patient Care Order"). The Patient Care Order requires defendants to engage an independent entity to (a) evaluate the competency of physicians employed by the CDC and (b) provide training to those physicians found to be deficient.[1] It also requires defendants to undertake certain measures with respect to the treatment of high-risk patients, to develop proposals regarding physician and nursing classifications and supervision, and to fund and fill Quality Management Assistance Teams ("QMAT") and other support positions. Defendants essentially have failed to meet the terms of the Patient Care Order, and the few QMAT doctors available have had to be diverted to

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[1] Unfortunately, the Union of American Physicians and Dentists ("UAPD") has resisted efforts to improve the quality of its member physicians and to remove those who are incompetent or unwilling to meet professional standards. On May 2, 2005, the UAPD filed suit in the Superior Court of Sacramento County attempting to block defendants' efforts in this regard.

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provide care and supervision on a crisis basis rather than engaging in the evaluation and training roles for which they were hired.

In an effort to bring the maximum degree of attention and focus to this problem, the Court has been meeting with the parties on a monthly basis. In February 2005, the Court requested that the court experts provide a verbal report as to their findings thus far. The report was shocking. The experts reported that they observed widespread evidence of medical malpractice and neglect. When they attempted to review a backlog of 193 death records, the experts encountered prisons where the inmates' medical records could not even be located. Among the records they were able to review, the experts found 34 of the deaths highly problematic, with multiple instances of incompetence, indifference, neglect, and even cruelty by medical staff. As just one example among many, a prisoner was identified with extremely high blood pressure, was placed on medication in 2002, and was not seen again for a year and a half, at which point he was found unconscious and then died. The experts concluded that the widespread problems they observed resulted from a combination of physician error and "a totally broken system."

Following the experts' verbal report, the Court decided to visit one of the prisons to gain a first-hand understanding of the situation. The Court toured San Quentin prison on February 10, 2005. To provide some context, San Quentin was supposed to have been "rolled out" over a year earlier (i.e. it was in the first group of institutions scheduled to achieve compliance in 2003), and it has been the subject of a number of past federal and state court orders. Nonetheless, the result of the tour was horrifying. Even the most simple and basic elements of a minimally adequate medical system were obviously lacking. For example, the main medical examining room lacked any means of sanitation – there was no sink and no alcohol gel – where roughly one hundred men per day undergo medical screening, and the Court observed that the dentist neither washed his hands nor changed his gloves after treating patients into whose mouths he had placed his hands. There can be no excuse for such failures, especially given the risk of infection that is obvious even to a lay

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person. It does not take a budget change proposal, a strategic plan, or the hiring of new personnel to keep a medical room sanitary.

Further, the Outpatient Housing Unit (OHU) is far too small for San Quentin's population. San Quentin has a rated capacity of 3,317 individuals, but currently houses approximately 6,000 men. The OHU has 32 cells, but 22 are reserved for mental health patients, and of the 10 remaining for medical purposes some are permanently used for disabled inmates. This near non-existence of OHU beds is unquestionably insufficient, especially given that San Quentin processes approximately 400 new prisoners per week, some of whom are unstable and need continuous monitoring. Moreover, the OHU was in deplorable condition. The cells were dirty, the nursing station is beyond sight or sound of the cells, and there is no examination room on the unit so that examinations are often performed on the cell floors or even through the food slots.

The pharmacy was in almost complete disarray (with unlabeled cardboard boxes piled in no particular order, antiquated and dirty computers, wiring suspended like a drunken spider's web, and extremely frustrated nurses and technicians), and there was an obvious shortage of medical supervisory and line staff. Additionally, the overcrowding mentioned above has resulted in prisoners being housed en masse (over 350 prisoners in double-bunks from wall to wall) in what was once a gymnasium, and along the first-floor corridors of five-tier units where they are subjected to having feces and urine flung at them from above, and where water continually seeps from the walls and collects in pools on the floors. It is beyond the Court's understanding how the State of California could allow an institution to sink into such deplorable condition.

Subsequently, the court experts issued two reports detailing the problems at San Quentin based on their extensive reviews of the institution. These reports have been made a matter of public record. In short, the experts "found a facility so old, antiquated, dirty, poorly staffed, poorly maintained, with inadequate medical space and equipment and over-crowded that it is our opinion that it is dangerous to house people there with certain medical

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conditions and is also dangerous to use this facility as an intake facility." Medical Experts' Report on San Quentin, April 8, 2005, at 2. The reports include numerous detailed examples of medical neglect and malfeasance. As just one example, the experts found a stack of hundreds of health services request forms on a nurse's desk waiting to be logged, triaged, or prioritized; many of these were for medication refill. The triage nurse position had been vacant for over a month, during which time the forms simply accumulated. The contract nurse assigned to the area commented, "Some of these guys are either dead or better, one of the two." Nursing Experts' Report on San Quentin, April 9, 2005, at 4.

The experts thus concluded with respect to San Quentin that "overall compliance with the Stipulated Order and subsequent Court Orders was non-existent." *Id.* In fact, the experts stated that "there has been indifference to beginning the process required in the Stipulated Order." *Id.* Unfortunately, the court experts' recent informal report to the Court indicates that many of the issues identified in the February visits of the experts and the Court have yet to be adequately addressed. The experts further have advised the Court that while San Quentin may be the worst of the 32 state prisons in terms of the condition of the physical plant, it is paralleled by a number of other prisons in terms of physician and nurse vacancies, incompetent medical staff, lack of supervision, and all other aspects of medical care delivery.[2]

The Court has held two status conferences with the parties subsequent to the San Quentin tour. The Court has encouraged defendants to treat this situation as a state of emergency, to break out of the "business as usual" mind-set, and to take extreme measures to break through any bureaucratic or other barriers that are preventing implementation of the Stipulated Order. The Court also explained that it has a mandate to ensure that the Constitution is respected, and that on the strata of constitutional priorities, the preservation of

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[2] In just the past week, the court experts informally reported that their recent visit to Pleasant Valley State Prison revealed alarming deficiencies on a scale similar to San Quentin.

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life is the highest. At the March status conference, the Court instructed the parties to meet and confer, including the experts if necessary, to construct a plan for defendants to meet their deadlines and provide sufficient resources to meet their obligations under the Stipulated Injunction. The parties were unable to devise the requested plan, and defendants explained that doing so was an impossible task for them.

Nevertheless, defendants provided the Court with a document entitled "Strategies to Improve Program Compliance: Inmate Medical Service Program," dated April 2005. The document includes numerous damning admissions. Defendants state that the "current vacancy rate in upper management positions within the Health Care Services Division's Field Management Branch [is] now approximately 80 percent." Additionally, the Department lacks regional administrators who would provide clinical oversight to doctors and nurses in the field. Furthermore, "areas such as budget, personnel, contracts, procurement, information systems, physical plant, and space issues [] continue to pose fundamental barriers to compliance." The document also refers to CDC medical care as a "broken system." *Id.* at 6.

Unfortunately, while recognizing the depth of the problem, defendants' Strategies document fails to exhibit the force of will necessary to tackle the problem. Instead, it is fraught with the same kind of ineffective measures that have proven so inadequate over the past years. Most of the proposed actions in the document are followed by highlighted caveats such as: "*Implementation is contingent on Governor's approval, funding availability, and legislative approval.*" (emphasis in original) These kind of contingency statements are prime examples of the depth and breadth of the problem at hand.

Other elements of the Strategies document are equally elusive. Defendants state that they will develop plans or proposals, with no indication of when the plans would be effectuated. The document also is vague and insufficiently detailed, has time periods that are excessively long, and fails to address how defendants will approach the critical task of removing incompetent medical staff from patient care.

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Defendants have conceded at the recent status conferences that the most they are able to do at this point is to attempt to institute some "stop gap" measures, and even some of those appear beyond their capability. Moreover, defendants' representatives have publicly acknowledged that defendants are unable to correct the problem on their own, and that unconstitutional conditions will remain until an outside entity is hired to take over. Defendants have devised a plan to contract out health care management services, at headquarters and the institutions level, to a private entity. However, the process of identifying and selecting an appropriate entity or entities (assuming that such entities exists, are willing to take on the task, and will charge an amount the state is willing to pay) will, by defendants estimate, take at least eighteen months, and defendants have no estimate as to when the new entity will actually be able to make the changes necessary to show an improved standard of care in the prison system. Further, in this Court's experience, defendants' estimates for completing tasks have been consistently unreliable. In the meantime, prisoners continue to unnecessarily die, suffer, and go unattended.

POTENTIAL REMEDIES

The courts have long recognized that while lawful incarceration necessarily operates to deprive prisoners of certain rights and privileges they otherwise would enjoy in free society, prisoners do not lose all their civil rights. Rather, fundamental civil rights follow the prisoner through the prison gate. As the Supreme Court has held:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g. food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the ... Due Process Clause.

DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-200 (1989); *see also Johnson v. California*, __ U.S. __, 125 S.Ct. 1141, 1149-50 (2005) (stating that Eighth Amendment claims of cruel and unusual punishment in prison are judged under the

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"deliberate indifference" standard, rather than the lower standard of whether the state's actions were "reasonably related" to "legitimate penological interests"); *Toussaint v. McCarthy*, 926 F.2d 800, 801 (9th Cir. 1990), *cert. denied* 502 U.S. 874 (1991) (even those prisoners at "the bottom of the social heap ... have, nonetheless, a human dignity and certain rights secured by the Constitution of the United States"); *Madrid v. Gomez*, 889 F.Supp. 1146, 1244-45 (N.D. Cal. 1995).

First and foremost among these rights is the preservation of life and the prevention of needless death, which necessarily requires an adequate system for the delivery of health care services. When prisoners are dying due to the neglect or incompetence of doctors and other medical staff employed by the state, as the facts thus far compellingly indicate in this case, there can be no doubt but that the Constitution is being violated. In light of these violations, it is the duty of the Court to find an effective remedy.

Federal courts possess "whatever powers are necessary to remedy constitutional violations."[3] *Stone v. City and County of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992), citing *Hutto v. Finney*, 437 U.S. 678, 687 n. 9 (1978). This equitable power includes the capacity to appoint a receiver. *See Dixon v. Barry*, 967 F.Supp. 535, 550 (D.D.C. 1997); *Bracco v. Lackner*, 462 F.Supp. 436, 455-56 (N.D. Cal. 1978); *Newman v. Alabama*, 466 F.Supp. 628, 635 (M.D. Ala. 1979). At the same time, federal courts must be mindful of the interests of state and local authorities in managing their own affairs. As such, they must exercise restraint, using the least possible power adequate to the end proposed. *See, e.g., Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) (before intruding on local authority, district court

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[3] "A consent decree is enforceable as a judicial decree and 'is subject to the rules generally applicable to other judgments and decrees.'" *Labor/Cmty Strategy Ctr. v. Los Angeles Metro. Transp. Auth.*, 263 F.3d 1041, 1047 (9th Cir. Aug. 31, 2001), citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992). Indeed, a federal court's power to enforce a consent decree is no less than the power to enforce any other judgment. *Stone*, 968 F.2d at 861 n.20 ("The respect due the federal judgment is not lessened because the judgment was entered by consent").

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must assure itself that no lesser alternatives are adequate to the task). On balance, the Ninth Circuit has held that "where federal constitutional rights have been traduced, principles of restraint, including comity, separation of powers and pragmatic caution dissolve..." *Stone*, 968 F.2d at 861.

The Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626(a)(1)(A), which governs this case, recognizes these competing concerns. The Act codifies the Court's authority to issue prospective relief that fully remedies a constitutional violation, while mandating that the relief not be overly broad. The relevant language of the PLRA is as follows:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A). The Second Circuit, however, recently held that "the deference due prison administrators by courts is implicated primarily by questions relating to institutional security of a type not raised" in the context of health-related conditions. *Benjamin v. Fraser*, 343 F.3d 35, 52 (2nd Cir. 2003).

Thus far, the Court has relied on a combination of specific court orders, reports from the court experts, and regular supervision through monthly status conferences in an effort to facilitate an effective remedy in this case. The Court proceeded in this fashion to display its confidence in the new team assembled by the Governor, and to give defendants the maximum amount of deference and flexibility to meet the objective of complying with constitutional standards by the means and methods that they, with their institutional background and experience, deem appropriate. As the background provided above shows, defendants have failed to demonstrate that they have the will and capacity to make the necessary changes. Therefore, the Court must consider more drastic remedial measures, as discussed below.

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A. Receivership

Courts are empowered to appoint receivers to take over state or local institutions if necessary to enforce a court order. *See Dixon v. Barry*, 967 F.Supp. 535 (D.D.C. 1997) (appointing receiver for Commission on Mental Health Services); *Newman*, 466 F.Supp. at 635-36 (appointing receiver for Alabama State Prisons, stating: "The extraordinary circumstances of this case dictate that the only alternative to non-compliance with the Court's orders is the appointment of a receiver for the Alabama prisons."); *Shaw v. Allen*, 771 F.Supp. 760, 762 (S.D. W.Va. 1990) ("Where more traditional remedies, such as contempt proceedings or injunctions, are inadequate under the circumstances a court acting with its equitable powers is justified, particularly in aid of an outstanding injunction, in implementing less common remedies, such as a receivership, so as to achieve compliance with a constitutional mandate."); *Gary W. v. Louisiana*, 1990 WL 17537, *17, *28-33 (E.D. La. Feb. 26, 1990) (appointing receiver to oversee state children's services agencies where court's mandates were continually met with "a dismal record of non-compliance and management by crisis"); *Turner v. Goolsby*, 255 F.Supp. 724, 730 (S.D. Ga. 1966) (state superintendent appointed receiver for county school system); *The Judge Rotenberg Educ. Cntr., Inc. v. Comm'r of the Dep't of Mental Retardation*, 677 N.E.2d 127 (Mass. Supreme Court 1997) (appointing receiver of state Department of Mental Retardation); *Wayne County Jail Inmates v. Wayne County Chief Executive Officer*, 444 N.W.2d 549, 556 (Mich. App. 1989).

The case law reflects that courts resort to the appointment of receivers when two essential conditions are met: there is a grave and immediate threat or actuality of harm to plaintiffs, and the use of less extreme measures of remediation have been exhausted or prove futile. Additionally, courts have considered the following related factors: (1) whether continued insistence that compliance with the Court's orders would lead only to confrontation and delay; (2) whether there is a lack of leadership to turn the tide within a reasonable period of time; (3) whether there is bad faith; (4) whether resources are being

wasted; and (5) whether a receiver is likely to provide a relatively quick and efficient remedy. *See Dixon*, 967 F.Supp. at 550; *District of Columbia v. Jerry M.*, 738 A.2d 1206, 1213 (D.C. Ct. App. 1999) (reversing appointment of receiver based on trial court's consideration of only the single factor of defendant's historical failure to comply with court mandates).

As discussed above, the deaths and irreparable injury to prison inmates that are ongoing in the prison system are unparalleled in terms of the gravity of harm. The Court recognizes that it has not let as many years pass as in some other cases where contempt and other methods have been used over the course of many years and even longer than a decade.[4] But the Court firmly believes that the proper measure of futility is not one that can be calculated simply in chronological terms, but rather is one that should be measured qualitatively in the present moment. By that measure, we are at a point of maximum futility in this case, where the State has publicly confessed its inability to grapple with the problem in any appreciable systemic manner for what is likely to be years to come. *See, e.g.*, *Gary W.*, 1990 WL 17537, *32 ("In instances of justifying [receivership], the courts have typically found a lack of leadership that could be expected to improve conditions within a reasonable period of time, systemic deficiencies in administrative, organizational, and fiscal structures, institutional inertia, and similar indicia of bureaucratic morass.") The Court does not believe that the Constitution can reasonably be construed to require the court to sit idly by while people are needlessly dying. Rather, the Court believes it has the discretion – indeed, the

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[4] The Court also notes that receivership is not the most extreme remedy conceivable. In *Crain v. Bordenkircher*, 376 S.E.2d 140, 142 (Supreme Court W.Va. 1988), the court issued a "rule to show cause" for the appointment of a receiver to oversee the funding and construction of a new prison (costing roughly $50 million, despite the court's recognition of the state's "great economic distress"), stating that such appointment would be "clearly a lesser evil than ... [the prisoners'] release from the penitentiary because of unconstitutional conditions of confinement." *See also Feliciano v. Colon*, 1990 WL 83321, *10 (D. Puerto Rico 1990) (placing defendants on notice that their failure to cure contempt could subject them to "compensatory fines," "coercive fines," "accelerated award of good time to prisoners to reduce population density," and "the imposition of a receivership.")

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duty – to take immediate action in a manner coextensive with the degree of ongoing and persistent harm. *See, e.g.*, *Gary W.*, 1990 WL 17537, *30 ("[T]he responsibility of this Court is 'clear and compelling: to use its broad and flexible equitable powers to implement a remedy that, while sensitive to the burdens that can result from a decree and the practical limitations involved, promises, '*realistically to work now.*'") (emphasis in original), quoting *Green v. County School Bd.*, 391 U.S. 430, 439 (1968); *see also Swann v. Charlotte-Mecklenberg Bd. of Ed.*, 402 U.S. 1, 16 (1971) (the scope of relief must be determined by the nature of the violation); *Feliciano*, 1990 WL 83321, *11 (less than four years following stipulation to increase the size of prison cells, the court concluded: "[I]t is neither the function nor the intention of this court to hold a gun to the head of any of the defendants in this litigation; it should be equally clear, however, that this court of equity will not suffer a wrong of such constitutional magnitude ... to go any longer without an adequate remedy," including a possible receivership). While some courts may have waited inexplicably long periods of time before appointing a receiver, *see e.g. Gary W.*, 1990 WL 175337, at *28 (receiver appointed after 15 years of failed remedies), the mistakes of those cases, and the attendant loss of years of critical services, need not, and shall not, be repeated here.

B. <u>Civil Contempt</u>

The Court does not believe that a contempt finding is necessarily a prerequisite to the appointment of a receiver. *See, e.g.*, *Gary W.*, 1990 WL 17537 at *30 ("[T]his court concludes that an Order holding the defendants in contempt is not an adequate remedy ... [since] such measures 'promise only confrontation and delay.'") (quoting *Newman*, 466 F.Supp. at 635). Determining whether to proceed with a contempt finding will depend, at least in part, on the testimony proffered at the evidentiary hearings, and whether defendants continue to appear incapable of curing the constitutional violations short of implementing

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their long-term plan.[5] In the event that contempt becomes appropriate, this Order ensures that defendants have been put on legally adequate notice.

Under well-settled law, civil contempt occurs when a party disobeys a court order "by failure to take all reasonable steps within the party's power to comply." *Go-Video, Inc. v. The Motion Picture Assoc. of Am.*, 10 F.3d 693, 695 (9th Cir. 1993). Initially, the evidence must show, by a clear and convincing standard, that the alleged contemnors violated a specific and definite order of the Court. *Id.*; *Stone*, 968 F.2d at 856, n. 9. The burden then shifts to the contemnors "to demonstrate why they were unable to comply." *Id.* To satisfy this burden, contemnors must show that they took "every reasonable step to comply." *Id.*; *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 404 (9th Cir. 1976) (issue is whether defendants have performed "all reasonable steps within their power to insure compliance").

The purpose of civil contempt is remedial, not punitive. As such, the failure to comply need not be wilful or intentional, and good faith is not a defense. *Go-Video*, 10 F.3d at 695; *Stone*, 968 F.2d at 856. Indeed, intent is irrelevant. *Id.* Where every reasonable effort has been made to comply, however, a few technical or inadvertent violations will not support a finding of contempt. *Go-Video*, 10 F.3d at 695; *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986). Nor is contempt appropriate if the party's action is "based on a good faith and reasonable interpretation" of the decree. *Go-Video*, 10 F.3d at 695.

Here, the Court identifies the following specific and definite provisions of the Court's prior orders which defendants have failed to meet:

<u>June 13, 2002 Stipulation and Order</u>

1. Paragraph 5, regarding institutions listed for roll-out in 2003 and 2004; and

2. Paragraph 6 regarding nurse staffing, treatment protocols, and a priority ducat system.

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[5] It is the Court's present perception that at least a portion of defendants' problem has been an inability to adequately penetrate and motivate an intransigent and resistant bureaucracy that has long been in place.

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September 17, 2004 Stipulated Order re Quality of Patient Care and Staffing

1. Paragraphs 1 through 12 regarding the establishment and implementation of an effective Quality Improvement in Correctional Medicine (QICM) program. The Court recognizes that, though delayed, defendants did successfully contract with U.C. San Diego to run the QICM program. However, implementation has been bogged down, and there appears little to no prospect that defendants can meet their obligations in a timely fashion;

2. Paragraphs 14 through 16 regarding the identification and treatment of high-risk patients;

3. The portions of Paragraphs 17 and 18 requiring the interim hiring of central office and regional medical and nursing directors;

4. Paragraph 21 regarding the completion of a credentialing policy; and

5. Paragraph 24 regarding hiring for at least nine Quality Management Assistant Teams (QMAT) positions. The Court is aware that while most of the QMAT positions have been filled, those individuals have been redirected to providing non-QMAT services at particular institutions, thereby leaving the QMAT process in abeyance.[6]

ORDER

Given the deplorable state of affairs in the California prison medical delivery system, and the judicial power – indeed obligation – to remedy the situation, as discussed above, the Court is compelled to move forward as expeditiously as possible in this case, within the constraints of due process and fundamental fairness. The Court sets forth the following procedure.

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[6] Plaintiffs have not yet had the opportunity to identify any other provisions of the Court's previous orders upon which a contempt finding might be based. If plaintiffs wish to identify any such provisions, they may do so by submitting an ex parte motion to supplement the OSC, with no hearing, to be filed and served by May 17, 2005.

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The parties already have been informed at previous status conferences that the Court is considering various options for further judicial intervention, including contempt and the appointment of a receiver. However, because the injunction in this case is the result of a settlement rather than a trial, the Court does not yet have any factual findings upon which to base further remedial orders. Therefore, the Court has raised with the parties the desirability of creating an evidentiary record upon which to ground any further remedial action. In an effort to avoid delay, the Court instructed the parties to meet and confer and present a plan for conducting evidentiary hearings, so that the hearings and the OSC can move forward in tandem. The parties have presented the Court with a proposal to present testimony from the court experts and a limited number of defendants' representatives on May 31, June 1-2, and June 7-9, 2005. The Court has accepted this proposal, and now formally confirms that these sessions will proceed from 8:30 a.m. to 1:30 p.m. each of those days. The parties shall file a joint pre-hearing statement by May 25, 2005 identifying the order of witnesses and the subject matter of the testimony for each witness.

Following the notice provided by this OSC, and the evidentiary hearings, defendants will be given an opportunity to respond to the OSC, and plaintiffs will have a subsequent opportunity to reply to defendants' submission. The Court then will issue a ruling, including findings of fact and conclusions of law. If the Court finds it necessary to appoint a receiver, the Court will instruct the parties to submit a list of candidates, and the Court will assemble its own list. Subsequently, after conferring with the parties, the Court will select the receiver and define the receiver's powers.[7]

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[7] *See, e.g., Dixon*, 967 F.Supp.2d at 555-56 (D.D.C. 1997) (receiver granted broad power to implement consent decree, including full contractual and personnel power); *Shaw*, 771 F.Supp. at 764 (granting authority to oversee county jail that ordinarily rested with sheriff, including power to appoint personnel and enter contracts); *Reed v. Rhodes*, 500 F.Supp. 363, 397-98 (D.C. Ohio 1980), *aff'd in part, rev'd in part* 635 F.2d 556 (6th Cir. 1980) (receiver granted authority to direct all department personnel; hiring, firing, and transfer authority; and to issue instructions to superintendent regarding policies, budget, and regulations).

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While it is premature at this stage to discuss the role of a receiver, should one be appointed the Court wishes to make clear that any such appointment would be limited to the area of health care delivery and the scope of the appointment will not extend beyond that field. The state officials in charge of operating all non-medical aspects of the Department of Corrections will retain their full powers.[8] The temporal scope of the receivership would be limited as well. The receivership will be terminated at such time as the Court becomes satisfied that defendants, either by themselves or by engaging outside contractors, are both willing and able to meet and maintain constitutional standards.

By proceeding in the manner described above, the Court intends to move as quickly as possible toward a realistic, effective, and constitutionally adequate remedy in this case, while at the same time providing defendants with sufficient notice so that they can fully and properly address the issues. The Court recognizes that if time were not of the essence, and if plaintiff class members were not literally dying as the days and months of non-compliance pass, it might wait until conclusion of the hearings to issue this OSC. With this recognition, the Court advises the parties that it will remain flexible and that the procedures described herein are subject to alteration at the parties' request and as the Court deems fit. Moreover, with respect to the substantive remedy itself, the Court encourages all parties to think as creatively as possible, and the Court will remain open to all reasonable alternatives.

In conclusion, with good cause appearing, defendants are hereby ORDERED TO SHOW CAUSE on July 11, 2005 at 10:00 a.m., why a receiver should not be appointed to manage health care delivery for the Department of Corrections until defendants prove that they are capable and willing to do so themselves or by contracting with an outside entity, and why they should not be held in civil contempt of this Court's prior orders, as specified above. Any response by defendants to this Order to Show Cause must be filed and served by June

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[8] There may be occasions where medical care remedial measures conflict or intersect with custodial or other non-medical interests. In these circumstances, the Court will resolve all such matters in a manner as least intrusive as possible on the non-medical interests.

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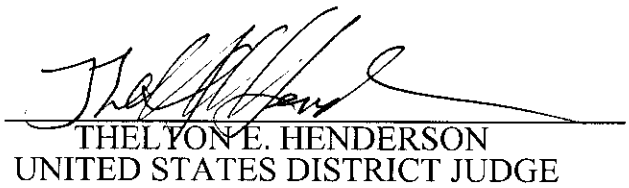
22, 2005; plaintiffs shall have until July 6, 2005 to file and serve a reply to defendants' submission.

IT IS SO ORDERED.

DATED 5/10/05



THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California