IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS REMICK, et al., on behalf of themselves and all others similarly situated,	:	**No. 2:20-cv-01959-BMS**
Plaintiffs-Petitioners,	:	
v.	:	
CITY OF PHILADELPHIA; and BLANCHE CARNEY, in her official capacity as Commissioner of Prisons,	:	
Defendants-Respondents.	:	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CONTEMPT AND SANCTIONS

I. INTRODUCTION

Plaintiffs filed a Motion for Contempt and Sanctions on December 1, 2021 (ECF No. 113), alleging that Defendants had failed to comply with this Court's Order of September 14, 2021 (ECF No. 93), with respect to correctional officer staffing and out-of-cell time requirements. That Order mandated an increase in the PDP correctional officer staffing to the FY 2022 budget level, and necessary overtime and pay increases to ensure adequate staffing to allow for the then-current minimum of three hours of daily out-of-cell time for the general population. The Order provided for increased out-of-cell time as of November 6, 2021, to a minimum of 5 hours for persons in vaccinated units, 4 hours for persons in non-quarantine housing units, 3 hours for persons in quarantine units, and 1 hour for persons in segregation units, and further increases by one hour for each of these different housing units by December 22, 2021. ECF No. 93 ¶¶ 3-4.[1]

[1] Along with the filing of this Reply Memorandum, Plaintiffs today are filing a Motion to File Second Amended Complaint and Amended Motion for Class Certification (solely to add named

As alleged in the Motion for Contempt, and as Plaintiffs are prepared to prove at the hearing scheduled for February 2, 2022, Defendants have, for the period from September 14, 2021 to December 31, 2021, been in substantial, and at times total, non-compliance with these out-of-cell time requirements, and they have failed to provide the correctional officers staffing required by the Order. Defendants' Response ("D Response") seeks to show "substantial compliance" where none exists and presents no cognizable legal defenses to the Contempt Motion.

II. FACTUAL ISSUES

Defendants spend considerable space referencing their efforts to operate the PDP during the COVID-19 pandemic, including adoption of policies and practices initially advocated by Plaintiffs' counsel that are otherwise mandated by state law, the federal Constitution, and this Court's Orders. Plaintiffs seriously dispute the suggestion that Defendant's efforts have brought the PDP into compliance with the Court's Orders and Constitutional requirements, but the Motion for Contempt is limited to the discrete issues of staffing and out-of-cell time.[2] Thus, the fact that the City may have provided 9 million meals over the course of this litigation, D Response (ECF No. 119) at 3, or facilitated over 1.7 million minutes of telephone time to the PDP population, *id*., is entirely beside the point. So, too, are the questions of whether Defendants complied with previous Orders of the Court, *id*. at 4-6, the resolution of the prior

---

plaintiffs), Plaintiffs' Response to the City's Motion to Vacate the Order of September 14, 2021, and Plaintiffs' Motion for a Preliminary Injunction based on the allegations in the Second Amended Complaint.

[2] The other issues are relevant with respect to the Plaintiff's Second Amended Complaint, Amended Motion for Class Certification, and Motion for Preliminary Injunction filed on January 7, 2022.

Motion for Contempt, *id*. at 8-9, and compliance or not with Orders on programs and family visitation. *Id.* at 11-12.

The only relevant factual representations in the long introductory section of Defendants' Response are those that directly relate to actual out-of-cell time under the Order, *id*. at 12-13 (and referenced Exhibits). As Plaintiffs will present and prove at the hearing on February 2, 2022, the Deputy Warden reports for the past few months reflect substantial and systemic non-compliance, and, for some housing units, periods of total non-compliance, with this Court's September 14, 2021 Order. *See* Exhibit A (Deputy Warden Certifications on out-of-cell time for December 24-27, 2021); Exhibit B (summary chart of out-of-cell time for the period of time covered by the September 14 Order).

Put simply, the issue for this Court on the Motion for Contempt is not what the PDP has done (or not done) in other areas of jail operations—general compliance on some issues does not excuse a failure to follow court orders on other matters. Moreover, "good faith efforts" are not a defense to contempt. *See Robin Woods Inc. v. Woods*, 28 F.3d 396, 399 (3d Cir. 1994) (holding that "willfulness is not a necessary element of civil contempt"); *Harley-Davidson, Inc. v. Morris*, 19 F.3d 142, 148–49 (3d Cir. 1994) ("evidence . . . regarding . . . good faith does not bar the conclusion . . . that [the defendant] acted in contempt.).

III. ARGUMENT

A. Legal Standards and Substantial Non-Compliance

The parties agree on the applicable legal standards for determining contempt. Plaintiffs have the burden of proving contempt by clear and convincing evidence, and Defendants can

defend based on an affirmative showing of "substantial compliance," but good faith efforts are not an excuse for non-compliance.[3]

B. Factual Issues on Compliance

On the issue of out-of-cell time requirements, Defendants assert a single defense: that their Deputy Warden Reports show "substantial compliance." Defendants' analysis is wrong as a matter of fact and law. They point only to some "improvement" with respect to out-of-cell time at CFCF, and, as to PICC and RCF, they concede lack of compliance, and state only that they have "work[ed] to increase recreation time . . . since the imposition of the [September 14] Order." D Response (ECF No. 119) at 16. Defendants further allege that "a majority of the incarcerated population" has received "mandated recreation," *id.* at 16-17, but not only does the data show far lower levels of compliance, *see* Exhibits A and B, there is no legal basis to claim "substantial compliance" where a bare majority of persons entitled to services under a Court Order received them. To the contrary, where thousands of pretrial persons have been denied basic mandated services, there is manifestly non-compliance for purposes of contempt. In any event, any final ruling on this issue should await the scheduled evidentiary hearing and the parties' submission of findings of fact and conclusions of law.

On the related issue of whether there has been compliance with the staffing requirements of the September 14 Order, *Defendants make no argument*. This is not surprising given the fact that Defendants have reported continued staffing levels of over 500 fewer officers than required by the Order, and even fewer correctional officers on staff as of December 2021, than were employed on September 14, 2021. Moreover, there is scant, if any evidence that their

[3] Defendants assert that while "good faith" is not a defense, it may be considered on the issue of sanctions. *See Essex Cy Jail Inmates v. Treffinger*, 18 F. Supp. 2d 445 (D.N.J. 1988). As we show below, there has not been good faith that would render sanctions unproductive.

negotiations with Local 159 have yielded significant reductions in the high absentee rates among correctional officers. Again, this will be a matter of proof at the hearing on February 2, 2022.[4]

C. The Issue of Sanctions

Defendants urge the Court to deny the request for sanctions even if there is a finding of contempt. *See* D Response (ECF No. 119) at 17-21. We respond to each argument below, but first briefly address Defendants' reliance on the Prison Litigation Reform Act ("PLRA") regarding the nature and purpose of sanctions in this case. As fully addressed in Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Response to Defendants' Motion to Vacate the Order of September 14, 2021, it is arguable that by operation of the PLRA, the mandates for out-of-cell time and adequate staffing levels set forth in that Order expired after 90 days, *see* 18 U.S.C. § 3626(a)(2). However, even if that Order remains legally effective, given Plaintiffs' pending request for a preliminary injunction on range of current constitutional claims set forth in the Amended Complaint, we do not oppose the vacating of the Order.[5] In any event, civil sanctions for compensation are still appropriate, even if "coercive" sanctions are not. We set forth proposed compensatory sanctions after we address Defendants' arguments.

[4] For good reasons, Defendants make no argument that compliance was "impossible," which is defined as "a physical impossibility beyond the[ir] control." *FTC v. Lane Labs-USA*, 624 F.3d 575, 590 (3d Cir. 2010)*; see also Harris v. City of Philadelphia*, 47 F.3d 1311, 1324-25 (3d Cir. 1995) (neither the high cost nor impracticability of compliance qualifies as impossibility).

[5] Defendants argue in the Motion to Vacate the September 14 Order that the Order was invalid due to lack of class certification and the lack of a showing that the relief ordered was "narrowly drawn, extends no further than necessary to correct the violation of a Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(b)(2). We address those arguments in our Response to Motion to Vacate, but since the Defendants do not make those arguments in their Response to the Contempt Motion, referencing the issue only in a footnote, Response (ECF 119) at 21, n. 4, we make no further arguments here.

1. Defendants Have Not Acted in Good Faith and This Defense Cannot Bar Sanctions

Defendants argue that "good faith" efforts are relevant on the issue of sanctions, *see, Essex Cy Jail, supra*. Whatever the scope of that entirely equitable doctrine, it is inapplicable here given the persistent and systemic failures to provide court-ordered out-of-cell time. Defendants' assertions that the City has been making "efforts" to meet the out-of-cell time requirements, D Response (ECF 119) at 17, and that the times have somewhat improved at one facility (CFCF) do not show good faith, as these "efforts" are far too little and far too late, with thousands of incarcerated persons being denied mandated out-of-cell time on a weekly basis.

Further, Defendants' failure to hire and retain an adequate staff of correctional officers, is an institutional failure that has caused these and other constitutional infringements. *See* Plaintiff's Motion for Preliminary Injunction. Plaintiffs raised the issue of the lack of sufficient correctional officer staffing in the summer of 2020, and the Commissioner responded that the problem was time-limited and attributable to vacation schedules. Since that time, Defendants have failed to act with the urgency and resources needed to address this critical problem, leaving the PDP more than 500 officers short of the authorized level under the current budget, and continuing to operate a jail system where the lack of officers and staff and the high rate of absenteeism leaves incarcerated persons at a high risk of denial of fundamental rights and personal safety.

2. Plaintiffs Are Not Seeking an Improper "Prisoner Release Order"

In the settlement of the prior Contempt Order, the parties agreed that the monetary sanctions should be directed, in equal amounts, to the Philadelphia Community Bail Fund ("PCBF") and the Philadelphia Bail Fund ("PBF"). Both bail funds raise money from tax-deductible contributions and use the funds to post bail for people in PDP custody who cannot

afford to pay bail. Plaintiffs propose the same structure for the sanctions for this Motion at a time when there were grounds for coercive and compensatory sanctions, and continue to do so, along with other options for the Court's consideration.

Defendants argue that any such order would violate the PLRA, D Response (ECF No. 119) at 18, as having the purpose and effect of releasing persons from custody without a three-judge panel. This argument cannot be valid if judicial contempt power is to remain a remedial measure in prison litigation. Virtually all monetary sanctions, including payments made directly to incarcerated persons, could be used to pay bail, secure legal counsel to effectuate a release, or a host of other ways in which the payments or relief could lead to the release of persons pre-trial. Defendants provide no authority for such a broad and absurd reading of the PLRA. While the PLRA places some limits on a court's remedial powers relating to prospective relief, 18 U.S.C. § 3626(a)(1)(C), it does not bar sanctions for civil contempt for violations of court orders.

Defendants' argument also directly contradicts its Proposed Order submitted in connection with the Order of September 14, 2021. In that proposal, attached as Exhibit C, Defendants *agreed* with Plaintiffs that any sanctions imposed based on a contempt finding for a violation of the Order should "be guided by the terms of the previous Settlement Agreement of June 22, 2021." Exhibit C, para. 9. Given that the Agreement *directed* the payments to the Bail Funds. we think it fair to ask whether the City, in its Proposed Order, was advocating a position that would violate the PLRA.

Nevertheless, should the Court determine that such payments would violate the PLRA, Plaintiffs propose that monetary fines to compensate those in custody be in the form of direct payments to them, or to provide for additional programs and services at the PDP that are not

required by the Constitution or Court orders. As noted, these issues are better addressed by the Court and the parties following the hearing on contempt.

3. Civil Compensatory Sanctions are Essential to Uphold the Rule of Law and to Provide Fair Redress for the Violations of the Rights of Incarcerated Persons Under the September 14 Order

Defendants' arguments that sanctions would not serve the purposes of civil contempt are far off the mark. First, the fact that the funds for such payments would come from the operating budget of the City (as is true in every case in which the City is held contempt), is entirely irrelevant. This is especially true here, where Defendants' stated rationale is that such payments would only make it more difficult to pay for other City programs and services, both within and outside the PDP. On this approach, the City could never be sanctioned for contempt, no matter how egregious, since any monetary payments would have that potential adverse effect. Moreover, Defendants ignore the fact that their failure to hire and maintain the authorized level of correctional officers (well over 500 unfilled positions and unauthorized absences that are not compensated), has "saved" the City of Philadelphia millions of dollars in unpaid salaries over the past two years.

Second, Defendants make an entirely undeveloped argument that without a certified class only two named plaintiffs could be entitled to any compensation for the non-compliance on out-of-cell time and staffing issues. D Response (ECF No. 119) at 20-21 & n.4. For the reasons fully detailed in Plaintiffs' Response to the Motion to Vacate the September 14 Order, this argument is both false and waived. From the very beginning of this litigation, with Plaintiffs' Motion for Class Certification still pending, the parties and the Court *treated every issue in the case, contested or not, as one that impacted every incarcerated person.* Defendants have consented or not objected in all or part to numerous orders of the Court that directly impacted and benefited

every person at PDP, *see* ECF Nos. 35, 58, 59, 62, 63, 81, regularly filed Reports and Declarations that addressed system-wide and class-based issues, and expressly recognized that all COVID and related issues had to be addressed and remedied in each facility and for all incarcerated persons. Indeed, the only argument that Defendants have made on the merits of the contempt petition is that the Deputy Warden Reports show substantial compliance when measured by the total out-of-cell time for *all* incarcerated persons.

Finally, the Order of September 14, 2021 is explicit in its reach to all incarcerated persons and the Court's intent of ensuring that all persons benefit from its provisions. Yet, at the time of the submissions of proposed orders that led to the September 14th Order, Defendants made no argument or proposal that would have limited the scope and application of that Order to two named plaintiffs. To the contrary, Defendants' proposal, Exhibit C, anticipated application of all mandates to all incarcerated persons. Even more significantly, Defendants did not seek reconsideration or modification of the September 14th Order or appeal it to the Third Circuit. In these circumstances, the City's argument regarding lack of class certification is meritless. It is a fundamental tenet that a party may not defend a contempt action on grounds that it did not assert and appeal at the time of the entry of the order. *See Marshak v. Treadwell*, 595 F.3d 478, 486 (3d Cir. 2009) ("[T]he validity of the order may not be collaterally challenged in a contempt proceeding for violating the order."); *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 628, 637 (3d Cir. 1982) (allowing a civil contemnor to raise any "substantive defense to the underlying order by disobeying it, [would mean that] the time limits [of] Fed. R. App. P 4(a) would easily be set to naught").

Moreover, the necessity of class certification as a predicate to court-ordered class relief (enforceable by contempt) is not absolute. By their very nature, preliminary injunctions and

temporary restraining orders are often entered well before a hearing can be held on a class certification motion. Further, a filing of a motion for class certification, as was done here at the start of this litigation, ECF No. 2, preserves the class status of all claims in the Class Complaint, even if named plaintiffs lose their personal standing due to release from custody because of the transitory nature of these types of claims. *See Cy. of Riverside v. McLaughlin,* 500 U.S. 44, 52 (1991); *Gayle v. Monmouth Cy. Corr. Inst.*, 838 F.3d 297 (3d Cir. 2016); *Richardson v. Bledsoe*, 829 F.3d 273 (3d Cir. 2016); *Sourovelis v. City of Philadelphia*, 103 F. Supp. 3d (E.D. Pa. 2015). And where the parties intend that court orders or other relief be applied on a class basis and where relief for the named plaintiffs will also benefit putative class members, the injunctive relief is not limited to named plaintiffs. *See Easyriders Freedom F.I.G.H.T. v. Hannigan,* 92 F.3D 1486, 1500–02 (9th Cir. 1996) (upholding injunction based on the Fourth Amendment that limits the powers of police to enforce traffic laws to *all* motorcyclists and not limited to the named plaintiffs, without class certification, as such an order is necessary to give the prevailing parties the full relief to which they are entitled; allegations of violations based official policy and practice are sufficient to support the wide scope of relief).

In light of the Court's "broad discretion to fashion a sanction that will achieve full remedial relief," *see John T. v. Del. Cty. Intermediate Unit*, 318 F.3d 545, 554 (3d Cir. 2003), the Court should consider a range of options for compensatory sanctions. First, that contempt fines be paid by the City in equal amounts to the Philadelphia Community Bail Fund and the Philadelphia Bail Fund. Second, payments directly to those who were incarcerated in the period of September 14, 2021 to the date of the contempt order. Third, allocating funds to PDP programs and services, to be agreed upon by the parties and the Court, that are not otherwise constitutionally required.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs move the Court to find the City of Philadelphia in civil contempt and assess sanctions in an amount to be determined and allocated to designated persons, organizations, or programs at PDP based on further hearings and submissions by the parties.

Respectfully submitted,

/s/ Su Ming Yeh
Su Ming Yeh (PA 95111)
/s/ Matthew A. Feldman
Matthew A. Feldman (PA 326273)
/s/ Grace Harris
Grace Harris (PA 328968)
/s/ Sarah Bleiberg
Sarah Bleiberg (PA 327951)
PENNSYLVANIA INSTITUTIONAL LAW PROJECT
718 Arch St., Suite 304S
Philadelphia, PA 19106
(215)-925-2966
smyeh@pailp.org
mfeldman@pailp.org
gharris@pailp.org
sbleiberg@pailp.org

/s/ David Rudovsky
David Rudovsky (PA 15168)
/s/ Jonathan H. Feinberg
Jonathan H. Feinberg (PA 88227)
/s/ Susan M. Lin
Susan Lin (PA 94184)
KAIRYS, RUDOVSKY, MESSING, FEINBERG, & LIN, LLP
718 Arch Street, Suite 501S
Philadelphia, PA 19106
(215) 925-4400
drudovsky@krlawphila.com
jfeinberg@krlawphila.com
slin@krlawphila.com

/s Bret Grote
Bret Grote (PA 317273)
/s Nia Holston
Nia Holston (PA 327384)
/s Rupalee Rashatwar
Rupalee Rashatwar (FL 1011088)*
ABOLITIONIST LAW CENTER
PO Box 31857
Philadelphia, PA 19104
(412) 654-9070
bretgrote@abolitionistlawcenter.org
nia@alcenter.org
rupalee@alcenter.org

/s/ Will W. Sachse
Will W. Sachse (PA 84097)
/s/ Benjamin R. Barnett
Benjamin R. Barnett (PA 90752)
/s/ Mary H. Kim
Mary H. Kim*
/s/ Nicolas A. Novy
Nicolas A. Novy (PA 319499)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-2496
Will.Sachse@dechert.com
Ben.Barnett@dechert.com
Mary.Kim@dechert.com
Nicolas.Novy@dechert.com

* indicates counsel who will seek admission or *pro hac vice* admission

Attorneys for Petitioners/Plaintiffs

DATE: January 7, 2022

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2022, I electronically filed the foregoing reply in support of Plaintiffs' motion for contempt and sanctions with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to all attorneys of record.

Dated: January 7, 2022

/s/ Nia O. Holston