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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RALPH COLEMAN, et al.,

Plaintiffs,

v.

EDMUND G. BROWN, Jr., et al.,

Defendants.

Case No. Civ S 90-0520 LKK-JFM

**PLAINTIFFS' REPLY TO
DEFENDANTS' RESPONSE TO
ORDER TO SHOW CAUSE AND
PLAINTIFFS' EVIDENTIARY
OBJECTIONS REGARDING
DEFENDANTS' EXPERT REPORTS
AND DECLARATIONS**

Judge: Hon. Lawrence K. Karlton
Date: March 27, 2013
Time: 1:30 p.m.
Crtrm.: 4

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT.....	2
I. DEFENDANTS ADMIT THAT THEIR COUNSEL DIRECTED AND WERE PRESENT FOR <i>EX PARTE</i> INTERVIEWS WITH REPRESENTED PARTIES	2
A. TERMINATION WAS THE PURPOSE OF THE EXPERT CONSULTATION FROM THE BEGINNING AND THE EXPERTS DID NOT LEVEL WITH EITHER THE COURT OR WITH THE REPRESENTED PRISONERS THEY INTERVIEWED	3
B. FRCP RULE 26 DOES NOT EXCUSE USE OF EXPERT WITNESSES TO CIRCUMVENT THE REPRESENTED PARTY RULE.....	5
C. DEFENDANTS CANNOT ARROGATE TO THEMSELVES THE RIGHT TO VIOLATE THIS COURT’S PRIOR DISCOVERY ORDERS	5
D. THERE IS NO COMPARISON BETWEEN THE SECRET INTERVIEWS OF PLAINTIFF CLASS MEMBERS, AND PLAINTIFFS’ COUNSEL’S CONTACTS WITH HIGH OFFICIALS OF STATE GOVERNMENT	6
II. PLAINTIFFS AND THE COURT HAVE BEEN PREJUDICED BY THE SECRET INSPECTIONS AND THE <i>EX PARTE</i> COMMUNICATIONS BECAUSE THEY UNDERMINE THE FAIRNESS AND INTEGRITY OF THE PROCEEDINGS	8
III. THE COURT SHOULD EXCLUDE DEFENDANTS’ EXPERT REPORTS AS A SANCTION FOR THEIR IMPROPER CONDUCT	11
IV. DEFENDANTS’ RESPONSE FAILS TO REHABILITATE THEIR EXPERTS’ LACK OF RELIABLE METHODOLOGY	12
A. DEFENDANTS’ EXPERTS USE “DELIBERATE INDIFFERENCE” TO STATE LEGAL CONCLUSIONS, NOT OPINIONS ABOUT ULTIMATE FACTS.....	12
B. DEFENDANTS’ RESPONSIVE BRIEF CONFIRMS THAT DEFENDANTS’ TERMINATION EXPERTS HAVE NO CONSISTENT DEFINITION OF “DELIBERATE INDIFFERENCE”	13
CONCLUSION.....	14

TABLE OF AUTHORITIES

Page

CASES

<i>Cont'l Ins. Co. v. Superior Court</i> , 32 Cal. App. 4th 94 (App. Ct. 1995)	8
<i>Doyle v. Ill. Central Rr. Co.</i> , 2009 U.S. Dist. LEXIS 8917 (9th Cir. 2009)	8
<i>Fink v. Gomez</i> , 239 F.3d 989 (9th Cir. 2001)	11, 12
<i>Gomez v. Vernon</i> , 255 F.3d 1118 (9th Cir. 2001)	11, 12
<i>Heflin v. Stewart County</i> , 958 F.2d 709 (6th Cir. 1992)	13
<i>Lewis v. Telephone Emps. Credit Union</i> , 87 F.3d 1537 (9th Cir. 1996)	11
<i>Mitchell v. Cate</i> , No. 2:08-CV-1196 JAM-EFB (E.D. Cal. Oct. 17, 2012)	5
<i>Perez v. Boston Hous. Auth.</i> , 379 Mass. 703 (1980)	3, 7
<i>Truitt v. Superior Court</i> , 59 Cal. App. 4th 1183 (App. Ct. 1997)	2
<i>United States v. Lopez</i> , 4 F.3d 1455 (9th Cir. 1993)	11

STATUTES

28 U.S.C. § 1927	12
------------------------	----

RULES

Cal. Rules of Prof. Conduct, Rule 2-100	7
Cal. Rules of Prof. Conduct, Rule 2-100(A)	2
Cal. Rules of Prof. Conduct, Rule 2-100(C)(1)	7
Fed. R. Civ. P. 11(b)	6

1	Fed. R. Civ. P. 26.....	5
2		
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

INTRODUCTION

The Court should strike the Defendants' termination experts' testimony. Defendants have failed to discharge the Order to Show Cause ("OSC"). Defendants do not even try to excuse or justify their violation of the Court's orders regarding prison inspections. They arrogated to themselves the authority to decide that the Court's orders do not apply when they find them inconvenient or too expensive. (Defs. Response to OSC, 3/25/13, Docket No. 4499 ("Response") at 6:17-19.) The clear ethical obligation of counsel to refrain from *ex parte* communication with represented parties on disputed subjects is also waved off as not applicable whenever California officials find themselves inconvenienced by it. In an attempt to justify their gross abuse of their unfettered access to class members because of the nature of a custodial setting, Defendants invent a completely unsupported rule that ethical "standards regarding such communications are relaxed" during the remedial phase of an institutional class action. (Response at 2, 3 & 4.) In direct violation of this Court's Order to Show Cause, Defendants failed to answer this Court's direct question regarding the presence of defense counsel in prisoner interviews. (OSC, Docket No. 4414 at 3.) Defense counsel signed two self-serving declarations, both of which are silent on their presence during the defense experts' interviews with prisoners. (Docket Nos. 4498, 4496.) Instead of addressing the Court's question, Defendants include one artfully-phrased sentence in their filing that sidesteps the question, but admits that counsel were present, and thus were fully complicit, in the *ex parte* interviews by their consultants. (Response at 6:11-13.)

Defendants' response to the evidentiary objections does not remedy the defects in their expert reports and in the non-expert declarations of Rick Johnson, Tim Belavich, Diana Toche and Laura Ceballos. Plaintiffs do not here repeat the evidentiary objections but incorporate by reference the corrected objections filed at Docket No. 4423. In Section IV of this Reply, Plaintiffs address the attempt to rehabilitate Dr. Scott by through a new declaration purporting to cure the termination experts' use of the legal conclusion "deliberate difference."

ARGUMENT

I. DEFENDANTS ADMIT THAT THEIR COUNSEL DIRECTED AND WERE PRESENT FOR *EX PARTE* INTERVIEWS WITH REPRESENTED PARTIES

In argument but not in their declarations, defense counsel admits that they “were present while the experts were inspecting and interacting with inmates.” (Response at 6:11.) Defendants then assert that counsel “did not participate in any of the interactions with inmates, nor overhear any of the conversations,” as if orchestrating *ex parte* contacts through intermediaries somehow cured the violation. The ethical rules could not be clearer: An attorney may not communicate with the represented party regarding the subject matter of litigation, either directly or through intermediaries. *See* Cal. Rules of Prof. Conduct, Rule 2-100(A) (“a member shall not communicate directly or indirectly about the subject of the representation”); *Truitt v. Superior Court*, 59 Cal. App. 4th 1183, 1187-88 (App. Ct. 1997).

Defendants’ artful phrasing of their answer, admitting that counsel were present, but claiming that counsel did not themselves participate in the interviews with represented parties, sidesteps this Court’s direct question: “Defendants shall also address whether any defense counsel were present during any of the defense experts’ interviews with prisoners.” (Order to Show Cause at 3.) Although they tried to sidestep it, the Defendants have answered the Court’s question in the most damning possible way—they were present for, directed and condoned indirect communication with represented parties on the subject matter of the litigation. (*See* Declaration of Michael W. Bien in Reply to Defendants’ Response to Order to Show Cause re: Defendants’ Expert Reports and Declarations, Dkt No. 4522 (hereinafter “Bien Decl.”) Ex. 4 (Deposition Testimony of Jacqueline Moore) (“Moore Dep.”) at 55:24-56:14; Bien Decl. Ex. 6 (Deposition Testimony of Steve Martin) (“Martin Dep.”) at 37:15-22 (both testifying to the presence of Deputy Attorneys General at the institutions during the experts’ tours); Bien Decl. Ex. 7 (email from Deputy Attorney General McKinney informing experts that “*we* will be joined on next week’s site visits by Jeffrey Beard” (emphasis added) and that he would “see [the experts] on Monday”).)

Defendants’ unsupported and novel assertion that ethical standards regarding communications of opposing counsel with represented parties are “relaxed” in the context of institutional class actions is unavailing. (Response at 2, 4 & 7.) In fact, the single case Defendants cite in their *post hoc* attempt to justify defense counsel’s actions is a 1980 Massachusetts Supreme Court case discussing the propriety of a Judge’s *ex parte* contact with his Special Master and the parties, and noting that, “[i]n the absence of an understanding with the parties about such encounters,” even the Judge’s *ex parte* communications constituted “misbehavior” that “should not have taken place.” *Perez v. Boston Hous. Auth.*, 379 Mass. 703, 741-42 (1980). Furthermore, Defendants’ attempt to link the applicability of Rule 2-100 to the particular phase of litigation is squarely preempted by the comments to the Rule, which explicitly state, “As used in paragraph (A), ‘the subject of the representation,’ ‘matter,’ and ‘party’ are not limited to a litigation context.”

A. TERMINATION WAS THE PURPOSE OF THE EXPERT CONSULTATION FROM THE BEGINNING AND THE EXPERTS DID NOT LEVEL WITH EITHER THE COURT OR WITH THE REPRESENTED PRISONERS THEY INTERVIEWED

Defendants’ Response claims that the termination experts were retained for some sort of neutral evaluation of the mental health system, rather than specifically for litigation purposes. Under oath, however, the experts told the truth: From day one, their job was to support the Defendants’ litigation purposes. (Bien Dec. Ex. 1 (Deposition Testimony of Joel Dvoskin) (“Dvoskin Dep.”) at 18:14-16, 150:17-155:14, Ex. 2 (Dvoskin contract, Scope of Work ¶ 1); Ex. 3 (Deposition Testimony of Charles Scott) (“Scott Dep.”) at 20:16-22 (“This litigation was clearly discussed”).)

From start to finish, the expert’s work was a litigation project, directed toward the showing necessary for a PLRA termination showing. At their first meeting in October 2011, defense counsel “briefed” the experts on defense counsel’s view of the problem—not that prisoner patients were lacking access to mental health care—but instead that the *Coleman* judge did not like the State or the Attorney General, and that the Special Master

1 monitored too many things and spent too much money. (Bien Decl. Ex.1 (Dvoskin Dep. at
 2 150:17-155:14; 183:17-184:10); Ex. 4 (Moore Dep. at 19:7-22:18).) By July 2012, the
 3 first ten prison tours (then all of the tours that they had planned) had been complete for two
 4 months already, and the Attorney General summoned the termination experts to
 5 Sacramento to present their findings—and to present them specifically in the terms
 6 required by the PLRA for a termination motion. (Bien Decl. Ex. 5 [DEXP 000021-22]
 7 (Email from Patrick McKinney to Termination Experts, etc. (“[Y]ou will proceed to write
 8 reports addressing whether there are systemic constitutional violations in the delivery of
 9 mental health care . . .”).)

10 A full month after the Deputy Attorney General’s email summoning the experts to
 11 present their termination findings after ten prison tours, the same Defendants told this
 12 Court that Plaintiffs’ request for expert inspections of the prisons was “premature” and
 13 should be denied until at least March 2013. (Docket No. 4226; Docket No. 4423 at 2-3.)
 14 No amount of pretzel logic about how the “premature” inspections concerned mental
 15 health care at a certain population level, versus just mental health care *per se*, can change
 16 the simple fact that the Defendants misled the Court about expert inspections being
 17 “premature.” (Response at 8-9.)

18 In addition to misleading this Court, Defendants’ experts also misled the class
 19 members whom they interviewed outside the presence of counsel. While Defendants try to
 20 obfuscate the point in a cloud of irrelevant deposition excerpts, (Response at 9-10), they do
 21 not and cannot deny that their experts made no effort to disabuse the prisoner interviewees
 22 of the common misconception that the experts were “Coleman,” that is were with the
 23 *Coleman* Special Master’s monitoring team:

24 Q. They were used to being talked to?

25 A. Yeah. I mean, when I would walk through the yard, they would
 sometimes say, “Oh, she’s with Coleman.”

26 Q. Who would say that?

27 A. The inmates. I mean, if they saw a suit, that was their assumption.

28 Q. Did any inmates ever mistake you for being with the special master
 team for Coleman?

A. I never asked them what they thought.

(Bien Decl. Ex. 4 (Moore Dep. at 57:18-60:5); *see also* Ex. 6 (Martin Dep. at 72:5-73:10).)

B. FRCP RULE 26 DOES NOT EXCUSE USE OF EXPERT WITNESSES TO CIRCUMVENT THE REPRESENTED PARTY RULE

Defendants ask this Court to rewrite Rule 26 of the Federal Rules of Civil Procedure into some sort of federal abrogation of the rule against indirect communication with represented parties. The only authority they offer for this remarkable proposition is an unpublished magistrate judge order. That order, Docket No. 131 in *Mitchell v. Cate*, No. 2:08-CV-1196 JAM-EFB (E.D. Cal. Oct. 17, 2012), says absolutely nothing about experts interviewing represented parties outside the presence of counsel. The Supreme Court and Congress, in enacting the 2010 changes to Rule 26 of the Federal Rules of Civil Procedure, did not abrogate *sub silentio* the attorney ethics rules of the 50 states governing represented party communications.

C. DEFENDANTS CANNOT ARROGATE TO THEMSELVES THE RIGHT TO VIOLATE THIS COURT'S PRIOR DISCOVERY ORDERS

Defendants have decided for themselves that this Court's prior orders regarding expert tours no longer apply to them. (Response at 7, Docket No. 4050.) The only excuse they offer is that violating the order and the rules of ethics "conserved taxpayer money." (Response at 6:17-18.) They never explain exactly how the secret inspections "conserved taxpayer money." If, in fact, the law allowed Defendants to prevail in a termination motion by relying on secret inspections in which only their side gets to see the places, processes, persons and records scrutinized, then certainly that form of "justice" would be cheap. This Court's discovery orders, however, are grounded in the common sense principle that this kind of shortcut never turns out to be cheap. The past two-and-a-half months of round-the-clock discovery and litigation confirms that this Court's discovery orders were correct. Properly conducted, noticed inspections could have allowed a far more expeditious and economical determination of the termination motion.

If Defendants believed that the October 2007 discovery order was "antiquated" or

1 no longer applied, the proper thing to do would have been to seek clarification or
 2 reconsideration of the order. What is not proper is to wait until *after* the secret tours are
 3 complete, and the harm to the parties cannot be undone. Defendants acknowledge, as they
 4 must, that the parties were addressing the subject of renewed expert tours in briefing in
 5 August 2012, regarding Defendants' contentions that the population cap should be raised
 6 on the grounds that Defendants believed that they could provide constitutional care at a
 7 higher population. (Response at 8-9.) That would have been the time for Defendants to
 8 come forward with questions regarding the applicability of the Court's prior orders
 9 requiring notice of expert tours. Instead, as noted above, they told the Court to deny
 10 Plaintiffs' request for expert inspections and discovery on the grounds that any such
 11 investigation would be "premature" until March 2013.

12 Defendants' additional "defense" that the Office of the Attorney General and
 13 CDCR in-house counsel should be excused from their misconduct because "no counsel
 14 from [the time of trial in] 1995 remain for Defendants" (Response at 8), a statement
 15 unsupported by any evidence,¹ only further demonstrates that these public officials have
 16 lost touch with their professional responsibilities as officers of the Court. *See* Fed. R. Civ.
 17 P. 11(b).

18 **D. THERE IS NO COMPARISON BETWEEN THE SECRET**
 19 **INTERVIEWS OF PLAINTIFF CLASS MEMBERS, AND**
 20 **PLAINTIFFS' COUNSEL'S CONTACTS WITH HIGH OFFICIALS**
 21 **OF STATE GOVERNMENT**

22 Defying credulity, Defendants find a parallel between these two situations:
 23 Situation 1: A prisoner with serious mental illness is approached on the prison yard or in
 24 the infirmary by a phalanx of prison officials, state attorneys, and their experts and
 25 questioned about the state of his or her mental health care, with no ability to consult with

26 ¹ Although this "defense" has no legal significance, it is also blatantly unsupported by the
 27 facts: Bruce Slavin, one of the lead counsel for the State defendants at trial, remains
 28 employed by the AG's Office. <http://members.calbar.ca.gov/fal/Member/Detail/115192>.

1 counsel, and no assurance regarding how the officials responsible for his daily well-being
 2 will respond to what he says. Situation 2: The California Secretary of Corrections, an
 3 attorney with decades of experience, appointed by the Governor of California and
 4 confirmed by the Senate, and his Undersecretary, a non-attorney, albeit also with years of
 5 experience at high levels of government, take a call or meeting with an attorney
 6 representing inmates in an ongoing class action, with full knowledge of in-house counsel
 7 and the Attorney General's office, and full opportunity to consult with counsel in
 8 preparation for or response to the meeting. (Cate Decl. ¶ 2, Docket. No. 4497; Hoshino
 9 Decl. ¶ 2, Docket. No. 4495; Bien Decl. ¶ 6.)

10 The ethical rules governing attorney conduct, however, specifically distinguish
 11 between unlawful communication with a represented party, and communication with a
 12 government official. Rule 2-100 of the California Rules of Professional Conduct expressly
 13 allows counsel to communicate with "a public officer," Rule 2-100(C)(1), such as the
 14 Secretary and Undersecretary of Corrections. Moreover, even though the letter of the Rule
 15 would allow for unfettered communication with the Secretary and Undersecretary,
 16 Plaintiffs' counsel has been scrupulously careful to make sure that such communications
 17 are undertaken with the knowledge and consent of CDCR counsel. (Bien Decl. ¶ 6.)

18 Without any applicable authority, Defendants propose a novel theory of
 19 "relaxation" of the rules of ethics in the remedial stage of institutional litigation cases to
 20 allow defense counsel to orchestrate *ex parte* contacts with represented prisoner class
 21 members. The case they cite, however, *Perez v. Boston Housing Authority*, 379 Mass. at
 22 741-42, concerns *ex parte* communications by the presiding judge with his own special
 23 master, and with party representatives in the special master's presence. It says nothing to
 24 condone *ex parte* contacts between counsel with an adverse counsel's clients. Defendants
 25 cannot seriously contend that interviews of prisoner class members by adverse counsel and
 26 their experts are comparable to either interviews by a judge or court-appointed monitor on
 27 the one hand, or conversations between public officials at the highest level and Plaintiffs'
 28 counsel, on the other. Rather, Defense counsel took advantage of their unique access to

1 plaintiff class members in the custodial prison setting, as well as the familiarity of many
 2 class members with the *Coleman* Special Master's monitoring team, to conduct improper
 3 interviews with Plaintiff counsel's clients. In fact, Defendants' abuse of their control over
 4 class members and secrecy motive is further evidenced by Defendants' failure to include a
 5 list of the names of prisoners they interviewed in their expert reports, preventing Plaintiffs'
 6 counsel from following up with clients. (*See* Bien Decl. ¶ 15.)

7 **II. PLAINTIFFS AND THE COURT HAVE BEEN PREJUDICED BY THE**
 8 **SECRET INSPECTIONS AND THE *EX PARTE* COMMUNICATIONS**
 9 **BECAUSE THEY UNDERMINE THE FAIRNESS AND INTEGRITY OF**
 10 **THE PROCEEDINGS**

11 Defendants contend that the standard the Court should apply in deciding whether or
 12 not to exclude their expert reports as a sanction for Defense counsel's violation of the
 13 ethical rules and Court orders is whether or not "Defendants derive[ed] any
 14 misinformation, damaging admission, or unfair benefit" from Defense counsel's actions.
 15 (Response at 5:8-10.) Defendants cite only inconclusive dicta in a footnote of a California
 16 court of appeal's decision for this standard, but, regardless, leave out a very important part
 17 of the appellate court's observation: the same sentence Defendants quote in part continues
 18 by asking in the alternative whether the violation "impacted the fairness of the trial or the
 19 integrity of the judicial system." *Cont'l Ins. Co. v. Superior Court*, 32 Cal. App. 4th 94,
 20 111 n.5 (App. Ct. 1995); *see also Doyle v. Ill. Central Rr. Co.*, 2009 U.S. Dist. LEXIS
 21 8917 at *20 (9th Cir. 2009) (factors to consider regarding sanctions include whether
 22 wrongdoing prejudiced party or hindered administration of justice). While Plaintiffs were
 23 clearly prejudiced by Defendants' actions and Defendants derived obvious benefits, as
 24 explained below, Defendants' ethical violations also undermined the fairness and integrity
 25 of the proceedings before this Court and the Court's ability to evaluate the evidence
 26 presented. One purpose of the adversarial process, including discovery and ethical rules, is
 27 to allow the each side to test each other's evidence so that the Court (or factfinder) can
 28 gain as objective a view as possible of the facts. Defendants' covert inspections and
 interviews inhibit Plaintiffs' counsel from fully exploring and testing their evidence, and

1 this prejudices not only Plaintiffs, but this Court.

2 Defendants' covert actions compromised Plaintiffs' ability to fully test the validity
3 of defense experts' methods and conclusions. (Bien Decl. ¶¶ 15-16.) Mr. Bien's
4 declaration describes the manner in which Defendants' stealth tours and nonspecific joint
5 expert report obstructed Plaintiffs' counsel from developing a full record. (*Id.*) For
6 example, some of the defense experts' conclusions purport to be based on prisoner medical
7 records that they reviewed. In addition to Defendants' failure to disclose which individual
8 records their experts reviewed, even were they now identified, the medical records as they
9 existed when Defendants' experts reviewed them, between February 2012 and November
10 2012, will never exist again in the state in which the experts reviewed them. Nor will the
11 conditions at each prison visited by Defendants' experts, which were not simultaneously
12 viewed by Plaintiffs' counsel or experts.

13 By contrast, when Plaintiffs' experts toured the prisons, they were followed
14 everywhere by a group of defense attorneys and officials who were able to see everything
15 they saw. Even in the instances where Plaintiffs' counsel and their experts availed
16 themselves of the right to interview clients confidentially, defense counsel and their clients
17 were close enough at hand to learn the name and the CDCR number of the prisoner
18 interviewed. (Bien Decl. ¶ 17; Galvan Decl. Dkt. No. 4365-1 ¶¶ 3-4.) Moreover, even if
19 defense counsel neglected to keep track of who Plaintiffs' experts interviewed, Plaintiffs
20 provided a complete summary of the cases reviewed with Plaintiffs' experts' reports, in
21 contrast to Defendants' opaque expert report. Defense counsel, their clients, and their
22 experts thereby had every opportunity to review the records of those prisoners, and
23 interview those prisoners' clinicians, and the 55 witness declarations they filed with their
24 Reply shows that they, in fact, extensively exercised their ability to do so. For example,
25 one of Defendants' declarants went so far as to contest Mr. Haney's description of the odor
26 of a cell he observed during an inspection. (Reply Decl. Sanders, Docket No. 4433, ¶ 3.)
27 Defendants' covert tours robbed Plaintiffs' counsel and their experts of similar opportunity
28 to contest evidence, and to present a picture to the Court of the actual circumstances of

1 Defendants' inspections, including, for example, the actual locations visited, events that
 2 were witnessed (and reported or omitted in the experts' reports), time that was spent in
 3 each facility by experts, and manner in which questions were asked of staff and prisoners.
 4 Defendants contend that because Plaintiffs had the opportunity to depose the experts,
 5 Plaintiffs were not prejudiced by the *ex parte* communications with represented parties, or
 6 by the violation of this Court's discovery orders. This contention is false. Plaintiffs were
 7 prejudiced both in terms of prejudice to individual class members, and in terms of
 8 counsel's ability defend against Defendants' termination motion. For example, the *ex*
 9 *parte* interviews deprive represented prisoners of the ability to consult with counsel
 10 regarding possible jeopardy to pending criminal proceedings or appeals when they make
 11 unprivileged statements to the agents of the Attorney General's office. (Bien Decl. ¶ 15.)
 12 Defendants' termination consultant on discipline and use of force testified that he would
 13 not have hesitated to elicit uncounseled statements from inmates facing criminal charges.
 14 (Bien Decl. Ex. 6 (Martin Dep. at 73:11-74:18).) In terms of counsel's ability to defend
 15 against the termination motion, Plaintiffs' counsel cannot possibly recreate full knowledge
 16 of defense experts' year of prison inspections throughout the state through a deposition in a
 17 conference room. As detailed in Plaintiffs' Evidentiary Objections, defense experts failed
 18 to even describe their methodology in their joint report, and were not able to do much
 19 better in their depositions.

20 Contrary to Defendants' Response at page 8, Plaintiffs' expert tours did not violate
 21 the principle that discovery should proceed with a common factual baseline. First,
 22 Defendants submit a misleading declaration that implies that defense counsel were
 23 outnumbered on Plaintiffs' tours, and falsely accuses Plaintiffs' counsel of conducting *ex*
 24 *parte* interviews with staff. (Vorous Decl., Docket No. 4496 ¶ 4.) Both the implication
 25 and the accusation are untrue. (Bien Decl. ¶ 17.) Second, Plaintiffs' experts were always
 26 accompanied by multiple defense counsel and officials who observed everything Plaintiffs'
 27 experts observed, including which inmates they interviewed, and took copies of every
 28 document that Plaintiffs' experts asked for. (*Id.*; Galvan Decl., Docket No. 4365-1 ¶¶ 3-4.)

1 Defendants had complete and contemporaneous access to the factual baseline of Plaintiffs’
 2 experts’ tours.

3 **III. THE COURT SHOULD EXCLUDE DEFENDANTS’ EXPERT REPORTS AS**
 4 **A SANCTION FOR THEIR IMPROPER CONDUCT**

5 The Court has inherent power to exclude Defendants’ expert evidence as a sanction
 6 for this misconduct. *Fink v. Gomez*, 239 F.3d 989, 991-92 (9th Cir. 2001) (court’s inherent
 7 power is both broader and narrower than other means of imposing sanctions and extends to
 8 a full range of litigation abuses when litigant engages in bad faith or willful disobedience
 9 of court order); *Lewis v. Telephone Emps. Credit Union*, 87 F.3d 1537, 1558-59 (9th Cir.
 10 1996) (recognizing “as part of a district court’s inherent powers the broad discretion to
 11 make discovery and evidentiary rulings conducive to the conduct of a fair and orderly
 12 trial” including “the power to exclude testimony of witnesses whose use at trial would
 13 unfairly prejudice an opposing party”) (internal quotations omitted). In *Gomez v. Vernon*,
 14 255 F.3d 1118 (9th Cir. 2001), the Ninth Circuit sanctioned counsel from the Idaho
 15 Attorney General’s office, who “improperly acquired and used privileged and confidential
 16 litigation materials belonging to inmate litigants.” *Id.* at 1122. The Court found that
 17 “Department counsel’s actions in this case do not pass even the most lenient ethical ‘smell
 18 test.’ They knowingly disregarded advice from the bar counsel and bypassed questions of
 19 ethics in an effort to gain advantage in [the] litigation.” *Id.* at 1134. Similarly, in the
 20 instant case, Defense counsel ignored decades of discovery precedent in this very case,
 21 explicit court orders about joint expert tours, violated one of the most basic rules of
 22 professional conduct (*see, e.g., United States v. Lopez*, 4 F.3d 1455, 1458-59 (9th Cir.
 23 1993)), and deliberately misrepresented their actions to Plaintiffs’ counsel and the three-
 24 judge court. Defendants’ weak attempt in their Response to parse their representations and
 25 behavior before the three-judge court and this Court meet the very definition of
 26 sanctionable action established by the Ninth Circuit: “[W]e hold that an attorney’s
 27 reckless misstatements of law and fact, when coupled with an improper purpose, such as
 28 an attempt to influence or manipulate proceedings in one case in order to gain tactical

1 advantage in another case, are sanctionable under a court's inherent power." *Fink*, 239
 2 F.3d at 994.

3 Exclusion of the expert reports derived from Defendants' misconduct is appropriate
 4 here, where Defendants have the option of bringing a new PLRA termination motion next
 5 year, premised upon evidence gathered in accordance with the Rules of Professional
 6 Conduct, the Federal Rules of Civil Procedure, and court orders, but Plaintiffs and the
 7 Court have no mechanism to fully ameliorate prejudice to the current proceeding caused
 8 by Defense counsel's unethical conduct.

9 Additionally, the Court may also sanction Defendants for costs, expenses and
 10 attorney's fees, pursuant to 28 U.S.C. § 1927, which authorizes sanctions against an
 11 attorney who "multiplies the proceedings in any case unreasonably and vexatiously."
 12 *Gomez*, 255 F.3d at 1134-35; *see also Fink*, 239 F.3d at 991. Although Defendants
 13 illogically attempt to allocate responsibility to Plaintiffs for the additional expenditure of
 14 money and resources resulting from their bad actions, in reality, Defendants' covert
 15 operation has already resulted and likely will result in unnecessary litigation and discovery
 16 proceedings, and the waste of public funds. Plaintiffs were forced to conduct separate
 17 expert tours at the last minute (which at least doubled the State's cost because Defendants
 18 sent counsel and client representatives on those tours), and Defendants, Plaintiffs, and the
 19 Court are now spending time and resources litigating the issue of Defendants' improper
 20 conduct. As in *Gomez*, the conduct of the State lawyers in callously disregarding the rights
 21 of prisoner class members in this case "exemplifies antagonism toward prisoner litigation
 22 at the cost of constitutional rights and legal ethics." 255 F.3d at 1122.

23 **IV. DEFENDANTS' RESPONSE FAILS TO REHABILITATE THEIR**
 24 **EXPERTS' LACK OF RELIABLE METHODOLOGY**

25 **A. DEFENDANTS' EXPERTS USE "DELIBERATE INDIFFERENCE"**
 26 **TO STATE LEGAL CONCLUSIONS, NOT OPINIONS ABOUT**
 27 **ULTIMATE FACTS**

28 Contrary to Defendants' Response at 11, their termination experts do not use the
 term "deliberate indifference" as a non-legal code for a factual conclusion. Instead, they

1 retreat to this legal conclusion whenever they encounter facts that are inconvenient for
 2 Defendants' litigation objectives. In the goal-oriented "science" of the termination experts
 3 there are no inadequacies in care, staffing or resources that can justify denying the
 4 termination motion, because all such inadequacies, no matter how severe, fall under the
 5 termination experts' vague and undefined threshold of "deliberate indifference." Instead
 6 of systemically analyzing the data that they collected, the termination experts simply made
 7 an overall review of the general shape of the data "in my head," (Bien Ex. 3 (Scott Dep. at
 8 31:5-32:23), and it always confirms the built-in bias—no deliberate indifference.

9 Defendants' new declaration from Dr. Scott does not cure this obscurantist use of
 10 the term "deliberate indifference," but just makes it worse. Dr. Scott declares that the
 11 words "deliberate indifference" comprise not just a legal term, but also a specialized term
 12 of art in forensic psychiatry. (Scott Reply Decl., Docket No. 4479, ¶ 2.) He provides no
 13 definition of what this term of art means, via references to the psychiatric literature or any
 14 other means. It is just a scientific term that means something to him. Defendants attempt
 15 to compare Dr. Scott's use of the term to its use in a Sixth Circuit case, *Heflin v. Stewart*
 16 *County*, 958 F.2d 709 (6th Cir. 1992). In *Heflin*, the court permitted expert use of the term
 17 deliberate indifference "in the way an ordinary layman would to described such conduct,"
 18 not, as Dr. Scott would have it, as an obscuring scientific term of art encompassing
 19 standards he never explains, and which conveniently maps precisely onto the legal
 20 conclusion that is the exclusive province of this Court.

21 **B. DEFENDANTS' RESPONSIVE BRIEF CONFIRMS THAT**
 22 **DEFENDANTS' TERMINATION EXPERTS HAVE NO**
 23 **CONSISTENT DEFINITION OF "DELIBERATE INDIFFERENCE"**

24 Defendants' Response is incoherent in defense of the termination experts' biased
 25 and supported conclusions. "Deliberate indifference" has as many meanings as necessary
 26 to achieve the litigation objection. On page 11 of the Response, the measure is, briefly,
 27 Dr. Scott's "very basic concept in forensic psychiatry,"—so basic apparently that he need
 28 never define it. By page 22 of the Response, what is "basic" 11 pages before is now a
 sliding scale, based on comparisons with other state correctional systems. Under this

1 definition, as long as California is in the middle or upper tier of state systems, based on
 2 standards of comparison that are never revealed, but are made only against the handful of
 3 states that the termination experts know anything about, then the system is constitutional.
 4 This free-floating usage of the term “deliberate indifference” further confirms that it has no
 5 scientific meaning for these experts, and that their use of it is not helpful to the Court, but,
 6 rather, is a blatant attempt to cloth mere sloganeering in a pseudo-scientific disguise.

7 CONCLUSION

8 For the foregoing reasons, as well as the reasons stated in the Plaintiffs’ corrected
 9 evidentiary objections (Docket No. 4423), the Defendants’ termination expert reports
 10 should be excluded. The specific sections of the non-expert declarations of Rick Johnson,
 11 Tim Belavich, Diana Toche and Laura Ceballos identified in Plaintiffs’ evidentiary
 12 objections should be excluded for the reasons stated therein.

13 The Court should find that Defendants have failed to discharge the March 18, 2013
 14 Order to Show Cause, in that they have failed to show cause why their expert reports
 15 should not be stricken, and based on that finding the Court should strike the Joint Report of
 16 Drs. Dvoskin, Moore and Scott (Docket No. 4275-5), and the separate report of Mr. Martin
 17 (Docket No. 4279). In addition, Defendants’ response contains disturbing admissions that
 18 defense counsel orchestrated improper *ex parte* contacts with represented parties outside of
 19 the presence of counsel. In light of these admissions, the Court should issue a further
 20 Order to Show Cause directing Defendants to identify all counsel involved and why such
 21 counsel should not be sanctioned for their improper conduct.

22
 23 DATED: March 26, 2013

Respectfully submitted,
 ROSEN BIEN GALVAN & GRUNFELD LLP

24
 25 By: /s/ Michael W. Bien
 26 Michael W. Bien

27 Attorneys for Plaintiffs
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