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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JESSE HERNANDEZ et al., on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

COUNTY OF MONTEREY; MONTEREY
COUNTY SHERIFF'S OFFICE;
CALIFORNIA FORENSIC MEDICAL
GROUP, INCORPORATED, a California
corporation; and DOES 1 to 20, inclusive,

Defendants.

Case No. CV 13 2354 BLF

**DECLARATION OF VAN
SWEARINGEN IN SUPPORT OF
PLAINTIFFS' MOTION TO
ENFORCE THE SETTLEMENT
AGREEMENT AND WELLPATH
IMPLEMENTATION PLAN**

Judge: Beth Labson Freeman
Date: August 24, 2023
Time: 9:00 a.m.
Crtrm.: 3

1 I, Van Swearingen, declare:

2 1. I am an attorney duly admitted to practice before this Court. I am a partner
3 in the law firm of Rosen Bien Galvan & Grunfeld LLP (“RBGG”), counsel of record for
4 Plaintiffs. I have personal knowledge of the facts set forth herein, and if called as a
5 witness, I could competently so testify. I make this declaration in support of Plaintiffs’
6 Motion to Enforce the Settlement Agreement and Wellpath Implementation Plan.

7 2. Working under my direction and supervision, Ms. Ellen Brancart, a paralegal
8 in my office, calculated the post-settlement average daily population for Monterey County
9 Jail (“MCJ” or “Jail”). Ms. Brancart calculated that the period spanning August 18, 2015
10 to April 26, 2023 is 2,809 days. Ms. Brancart then used publicly-available Board of State
11 and Community Corrections data to obtain the midyear in-custody population figures for
12 the years 2015 (884 people), 2016 (894 people), 2017 (863 people), 2018 (876 people),
13 2019 (875 people), 2020 (655 people), 2021 (875 people), and 2022 (863 people).
14 Because Board of State and Community Corrections data for 2023 is not yet available, she
15 used inmate daily count sheets produced to Plaintiffs by the County of Monterey
16 (“County”) to calculate the average daily Jail population for March 2023 (897 people).

17 3. Working under my direction and supervision, Ms. Yesenia Murillo, a
18 paralegal in my office, used the autopsy reports and death notifications produced by the
19 County and Defendant Wellpath, Inc. (“Wellpath,” formerly California Forensic Medical
20 Group or “CFMG,” and collectively, “Defendants”) and compiled a list of the twenty-four
21 in-custody deaths at the Jail since the Court approved the Settlement Agreement on
22 August 18, 2015 (Dkt. 494). In calculating the death rate of people incarcerated at the Jail,
23 I determined that we should not include one individual who died in hospice care while
24 technically in the Jail’s custody, leaving the total count of in-custody deaths since
25 August 18, 2015 at twenty-three.

26 4. Mr. Ben Hattem, an associate in my office working under my direction and
27 supervision, averaged the aforementioned in-custody population figures to obtain the
28 average daily post-settlement Jail population over the applicable 2,809 day period (854

1 people). Mr. Hattem then divided the number of in-custody deaths (23 deaths) by the
 2 number of days between the Settlement approval date (August 18, 2015) and April 26,
 3 2023 (2,809 days). The resulting figure was multiplied by the number of days in a year
 4 (365.25) to arrive at 2.99 deaths per year at the Jail. Dividing that figure by the average
 5 post-settlement in-custody population (854 people) and then multiplying by 100,000
 6 results in an annual in-custody death rate of 350.4 deaths per 100,000 people. This is the
 7 same methodology used by the Bureau of Justice Statistics to calculate death rates in other
 8 jails. *See* Bureau of Just. Stats., U.S. Dep't of Just., *Mortality in Local Jails, 2000–2019*,
 9 at 34 (2021), <https://bjs.ojp.gov/content/pub/pdf/mlj0019st.pdf>. Performing the same
 10 calculations with regard to the nine people who have died by suicide at the Jail since
 11 August 18, 2015 yields an annual in-custody suicide rate of 137.1 suicides per 100,000
 12 people. The Bureau of Justice Statistics has determined that the average annual death rate
 13 in local jails across the country is 167 deaths per 100,000 people. *See id.* at 1. The Bureau
 14 of Justice Statistics has also determined that the average annual suicide rate in jails in
 15 California was 42 suicides per 100,000 people for the period of 2015-2019. *See* Bureau of
 16 Just. Stats., U.S. Dep't of Just., *Suicide in Local Jails and State and Federal Prisons, 2000–2019*,
 17 at 12 tbl.3 (2021), [https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document](https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sljsfp0019st.pdf)
 18 [/sljsfp0019st.pdf](https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sljsfp0019st.pdf).

19 5. Pursuant to Paragraph 48 of the Settlement Agreement, my firm informed
 20 Defendants' counsel by letter dated December 16, 2022 that the Court-appointed neutral
 21 monitors have consistently found Defendants to be noncompliant with the requirements of
 22 the Settlement Agreement and Implementation Plans. *See* Dkt. 494 at 25. A true and
 23 correct copy of the December 16, 2022 letter is attached hereto as **Exhibit 1**. Because of
 24 the upcoming holidays, Plaintiffs' letter offered to extend Defendants' response deadline to
 25 January 25, 2023, instead of the 30 days provided by Paragraph 48 of the Settlement
 26 Agreement. *Id.* Counsel for Monterey County responded on January 25, 2023. Counsel
 27 for Wellpath did not provide a written response by that date. After follow-up emails from
 28 Mr. Hattem and myself on January 27 and February 14 requesting a response, Counsel for

1 Wellpath responded on February 14, writing that “The County’s responses to your letter
 2 sets [*sic*] forth much of Wellpath’s position as well.” A true and correct copy of this email
 3 exchange is attached hereto as **Exhibit 2**.

4 6. After meeting and conferring with Wellpath’s counsel on February 15, 2023,
 5 Plaintiffs presented their concerns for mediation before Magistrate Judge Nathanael
 6 Cousins on February 17 and April 7, 2023. Plaintiffs’ counsel asked to meet and confer
 7 with Wellpath’s counsel again prior to the April 7, 2023 mediation, but Wellpath refused
 8 to meet and confer. Following the mediation on April 7, 2023, Judge Cousins determined
 9 that the parties were unable to resolve through mediation the issues raised in Plaintiffs’
 10 motion to enforce the Settlement Agreement and Implementation Plans. *See* Dkt. 771.

11 7. Ms. Cara E. Trapani, an associate in my office, informed the medical, mental
 12 health, dental, and ADA monitors by email on April 10, 2023 about a news article that
 13 indicated J.H. had died at the Jail on April 7. [REDACTED]
 14 [REDACTED]
 15 [REDACTED]

16 [REDACTED] Wellpath’s counsel did not respond to either monitor’s email. True and correct
 17 copies of Dr. Barnett and Dr. Winthrop’s emails are attached hereto as **Exhibit 3** and
 18 **Exhibit 4**. On April 21, 2023, an assistant in the office of Wellpath’s counsel sent some of
 19 J.H.’s medical records by email to me and to the neutral monitors for medical and dental
 20 care, but not the neutral monitor for mental health care. A true and correct copy of that
 21 email is attached as **Exhibit 5**.

22 I declare under penalty of perjury under the laws of the United States of America
 23 that the foregoing is true and correct, and that this declaration is executed at San Anselmo,
 24 California this 11th day of May, 2023.

25 
 26 _____

27 Van Swearingen
 28

Exhibit 1



101 Mission Street, Sixth Floor
San Francisco, California 94105-1738
T: (415) 433-6830 ▪ F: (415) 433-7104
www.rbgg.com

Ben Hattem
Email: BHattem@rbgg.com

December 16, 2022

VIA ELECTRONIC MAIL ONLY

Susan K. Blitch
Senior Deputy County Counsel
Office of the County Counsel
County of Monterey
168 West Alisal Street, 3rd Floor
Salinas, CA 93901-2439
blitchsk@co.monterey.ca.us

Peter Bertling
Bertling Law Group
15 West Carrillo Street, Suite 100
Santa Barbara, CA 93101
peter@bertlinglawgroup.com

Re: *Hernandez et al. v. County of Monterey, Monterey Sheriff's Office, California Forensic Medical Group, Inc.*, No. CV-13-2354 BLF (N.D. Cal.)
Non-Compliance with Settlement Agreement and Implementation Plans
Our File No. 1187-10

Dear Counsel:

Pursuant to Paragraph 48 of the Settlement Agreement, we write to inform you that “Plaintiffs’ counsel believes that Defendants are not substantially complying with ... the acts required by [the] Settlement Agreement [and] the Implementation Plans.” Settlement Agreement, Dkt. 494 at ECF 25. The Court approved the parties’ Settlement Agreement and adopted it as an order more than seven years ago. *Id.* at 4. Since then, the County and Wellpath (formerly “CFMG,” collectively “Defendants”) have failed to meet their court-ordered obligations to improve conditions of confinement at the Monterey County Jail (the “Jail”).

The neutral monitors in all five areas—medical care, mental health care, dental care, safety and security, and disability access—have repeatedly found Defendants noncompliant with the Settlement Agreement and Implementation Plans. The monitors’ most recent reports continue to show systemic noncompliance. Many of the areas of noncompliance identified in the monitors’ latest reports reflect longstanding problems at the Jail. The monitors have repeatedly recommended measures that Defendants could

Susan K. Blich
Peter Bertling
December 16, 2022
Page 2

take to bring these areas into compliance with the Settlement Agreement and Implementation Plans. Defendants have nonetheless failed to come into compliance.

Historically, Defendants have not taken necessary steps to improve conditions at the Jail as required by the parties' agreements and the Court's orders. For instance, the all-parties summit in May 2020, precipitated by our February 2020 letter under Paragraph 48 of the Settlement Agreement, resulted in a stipulation and court order to develop corrective action plans (CAPs). Defendants did not abide by the timelines for developing those CAPs and resisted both engagement in the CAP process and the recommendations of the neutral monitors. As a result, the CAPs were not finalized until September 2021. As evidenced by the neutral monitors' recent reports, Defendants' compliance with the CAPs has been inconsistent and Defendants remain non-compliant with a majority of their court-ordered obligations. The Court's order in June 2022 for enhanced monitoring and mentoring by the neutral monitors, which followed our January 2022 letter under Paragraph 48, has been met with some resistance from Defendants and has already required the intervention of Judge Cousins.

As the neutral monitors' reports make clear, Defendants' continued and widespread non-compliance with the Settlement Agreement and Implementation Plans puts people incarcerated in the Jail at substantial risk of serious harm. Monterey has disproportionately high in-custody suicide and death rates as compared to other jails in California. The monitors' reports reflect that Defendants are making insufficient progress toward compliance in many of the areas in which Defendants have been persistently noncompliant. At times, and as observed by the neutral monitors, compliance has recently deteriorated.

This letter therefore notifies you that we "believe[]" that Defendants are not substantially complying with" each of the requirements of the Settlement Agreement and Implementation Plans with which the neutral monitors have found Defendants currently noncompliant. *See* Settlement Agreement, Dkt. 494 at ECF 25. The "facts supporting [our] belief" that Defendants are noncompliant with these requirements are the noncompliance findings in the neutral monitors' most recent reports, which are enclosed here. *Id.* Defendants have been found noncompliant with many if not all of these requirements in previous reports by the neutral monitors as well.

The Settlement Agreement requires that "Defendants shall investigate the allegations [in this letter] and respond in writing within 30 days." *Id.* Accordingly, please respond in writing no later than January 15, 2023, to let us know how Defendants intend to come into immediate and durable compliance with the requirements of the

Susan K. Blitch
Peter Bertling
December 16, 2022
Page 3

Settlement Agreement and Implementation Plans with which Defendants were found noncompliant in the neutral monitors' most recent reports. Given the upcoming holidays, we are amenable to extending your response time by an additional ten days to January 25, 2023, upon request.

We will consider Defendants' written response in good faith. However, given the magnitude and persistence of Defendants' non-compliance, we anticipate needing to file an enforcement motion with the District Court to resolve this matter. Please let us know your availability to present these issues to Judge Cousins. Alternatively, please let us know whether Defendants consent to bypass the use of the mediator and brief these issues directly with the Court, with prior notice to Judge Cousins. *See id.* at ECF 26.

Thank you for your anticipated prompt attention to these issues.

Sincerely,

ROSEN BIEN
GALVAN & GRUNFELD LLP

/s/ Ben Hattem

By: Ben Hattem

BCH:cn

Enclosures: Neutral Monitor Reports

cc: Dr. Bruce Barnett
Dr. James Vess
Richard Bryce
Terri McDonald
Dr. Vivian Winthrop

Exhibit 2

From: [Peter Bertling](#)
To: [Van Swearingen](#); [Ben Hattem](#)
Cc: [Susan K. Blitch](#)
Subject: Re: Hernandez: Paragraph 48 Letter re: Non-Compliance with Settlement Agreement and Implementation Plans
Date: Tuesday, February 14, 2023 2:22:57 PM

[EXTERNAL MESSAGE NOTICE]

Hi Van:

I am available to discuss this matter with you tomorrow. However, there have been several discussions about these issues since your December 16, 2022 letter. The County's responses to your letter sets forth much of Wellpath's position as well. In addition, Wellpath has kept your firm updated on the status of recruitment and staffing at MCJ. This was actually one of the first issues we discussed with Caroline during her recent jail tour.

What time are you and Ben available tomorrow? What specifically do you believe we need to discuss?

Regards,



Peter Bertling
ATTORNEY & COUNSELOR



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From: Van Swearingen <VSwearingen@rbgg.com>
Date: Tuesday, February 14, 2023 at 2:08 PM
To: Ben Hattem <BHattem@rbgg.com>, Peter Bertling <peter@bertlinglawgroup.com>
Cc: "Susan K. Blitch" <blitchsk@co.monterey.ca.us>
Subject: RE: Hernandez: Paragraph 48 Letter re: Non-Compliance with Settlement Agreement and Implementation Plans

Hi Pete. Wellpath did not respond to our December 16 letter nor to the below email. Please let us know your availability before this Friday to meet and confer by phone. Thanks.

Van

From: Ben Hattem <BHattem@rbgg.com>

Sent: Friday, January 27, 2023 3:59 PM

To: Peter Bertling <peter@bertlinglawgroup.com>; Van Swearingen <VSwearingen@rbgg.com>

Cc: Susan K. Blitch <blitchsk@co.monterey.ca.us>

Subject: RE: Hernandez: Paragraph 48 Letter re: Non-Compliance with Settlement Agreement and Implementation Plans [IMAN-DMS.FID40388]

Hi Pete,

We have not yet received Wellpath's response to our December 16 letter. Under paragraph 48 of the Settlement Agreement, you are required to investigate the allegations in our letter and respond in writing within 30 days. We extended the deadline for your response to January 25 at your request. That deadline has passed, and you are currently in violation of the Settlement Agreement. Please let us know when we will receive your response.

Thank you,

Ben Hattem
Associate Attorney



101 Mission Street, Sixth Floor
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(415) 433-6830 (telephone)
(415) 433-7104 (fax)
bhattem@rbgg.com

From: Ben Hattem

Sent: Friday, December 16, 2022 4:40 PM

To: Peter Bertling <peter@bertlinglawgroup.com>; Van Swearingen <VSwearingen@rbgg.com>

Cc: Susan K. Blitch <blitchsk@co.monterey.ca.us>

Subject: RE: Hernandez: Paragraph 48 Letter re: Non-Compliance with Settlement Agreement and Implementation Plans [IMAN-DMS.FID40388]

Hi Pete,

We agree to the extension until January 25. We will consider Wellpath's response in good faith, but in light of the magnitude and persistence of Defendants' noncompliance we think there is a high likelihood that this will require an enforcement motion. As to the specific orders, the Settlement Agreement generally authorizes all remedies permitted by law or equity, and we think it's premature at this time to speculate beyond that.

Thanks, and Happy Holidays to you too.

All best,
Ben

From: Peter Bertling <peter@bertlinglawgroup.com>
Sent: Friday, December 16, 2022 4:14 PM
To: Ben Hattem <BHattem@rbgg.com>; Van Swearingen <VSwearingen@rbgg.com>
Cc: Susan K. Blitch <blitchsk@co.monterey.ca.us>
Subject: Re: Hernandez: Paragraph 48 Letter re: Non-Compliance with Settlement Agreement and Implementation Plans [IMAN-DMS.FID40388]

[EXTERNAL MESSAGE NOTICE]

Hi Ben:

Thank you your letter.

Wellpath requests that your grant them an extension until January 25, 2023, to respond to your letter. Will you also please clarify whether it is your intention to file a Motion to Enforce despite any response you receive from Wellpath? Will you also identify what specific orders you contemplate asking Judge Freeman to issue in order to enforce compliance with the Implementation Plan?

I appreciate Van and Susan bring this issue to the attention of Judge Cousins and believe it will be beneficial for us to discuss this matter with him before Plaintiffs file any Motion to Enforce.

Happy Holidays.

Regards,


ATTORNEY & COUNSELOR



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From: Ben Hattem <BHattem@rbgg.com>

Date: Friday, December 16, 2022 at 10:56 AM

To: "Susan K. Blitch" <BlitchSK@co.monterey.ca.us>, Bertling Law Group
<peter@bertlinglawgroup.com>

Cc: "Bruce Barnett, MD, JD" <bbpmdjd@aol.com>, James Vess
<james.vess@correctionalpsychconsult.com>, Richard Bryce <richardbryce@me.com>, Terri
McDonald <terrimcdonald02@gmail.com>, Viviane Winthrop
<winthropdentalconsulting@gmail.com>, Monterey County Jail Team
<MontereyCountyJailTeam@rbgg.com>

Subject: Hernandez: Paragraph 48 Letter re: Non-Compliance with Settlement Agreement and
Implementation Plans [IMAN-DMS.FID40388]

Dear Susan and Pete:

Please find attached Plaintiffs' letter pursuant to Paragraph 48 of the Settlement Agreement
notifying you that "Plaintiffs' counsel believes that Defendants are not substantially complying with
... the acts required by [the] Settlement Agreement [and] the Implementation Plans." Settlement
Agreement, Dkt. 494 at ECF 25.

Sincerely,

Ben Hattem
Associate Attorney



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(415) 433-6830 (telephone)
(415) 433-7104 (fax)
bhattem@rbgg.com

Exhibit 3
Filed Conditionally
Under Seal
Per Civ. L.R. 79-5(f)

Exhibit 4
Filed Conditionally
Under Seal
Per Civ. L.R. 79-5(f)

Exhibit 5

Cara Trapani

From: Stephanie Aguiniga <stephanie@bertlinglawgroup.com>
Sent: Friday, April 21, 2023 9:43 AM
To: Bpbmdjd; Viviane Winthrop; Cara Trapani; Van Swearingen; Blitch, Susan K. x5161; Ellen x5358 Lyons
Cc: Peter Bertling
Subject: Hernandez [REDACTED] Records
Attachments: [REDACTED] Records.pdf
Importance: High

[EXTERNAL MESSAGE NOTICE]

Hello:

Attached please find records for [REDACTED] Password to follow in separate email.

Best,
Stephanie



Stephanie S. Aguiniga | Assistant
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