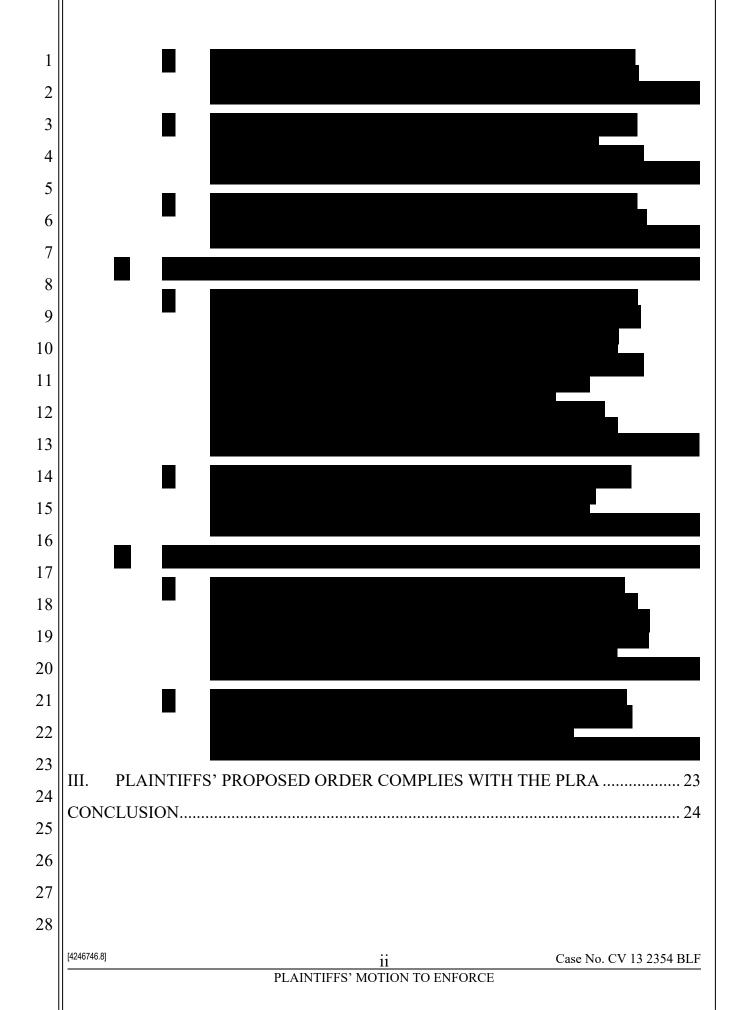
1 2 3 4	MICHAEL W. BIEN – 096891 ERNEST GALVAN – 196065 VAN SWEARINGEN – 259809 CARA E. TRAPANI – 313411 CAROLINE E. JACKSON – 329980 BEN HATTEM – 335232 ROSEN BIEN	AVRAM D. FREY (admitted pro hac vice) AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC. 39 Drumm Street San Francisco, California 94111-4805
5	GALVAN & GRUNFELD LLP 101 Mission Street, Sixth Floor San Francisco, California 94105-1738	Telephone: (415) 621-2493 Facsimile: (415) 255-8437 Email: afrey@aclunc.org
6 7	Telephone: (415) 433-6830 Facsimile: (415) 433-7104 Email: mbien@rbgg.com	
8	egalvan@rbgg.com vswearingen@rbgg.com	
9	ctrapani@rbgg.com cjackson@rbgg.com bhattem@rbgg.com	
10	ERIC BALABAN (admitted pro hac vice)	
11	NATIONAL PRISON PROJECT of the AMERICAN CIVIL LIBERTIES UNION	
12 13	915 15th Street N.W., 7th Floor Washington, D.C. 20005-2302 Telephone: (202) 393-4930	
14	Facsimile: (202) 393-4931 Email: ebalaban@aclu.org	
15	Attorneys for Plaintiffs	
16		
17	UNITED STATES D	DISTRICT COURT
18	NORTHERN DISTRIC	T OF CALIFORNIA
19	JESSE HERNANDEZ et al., on behalf of themselves and all others similarly situated,	Case No. CV 13 2354 BLF
20	Plaintiffs,	PLAINTIFFS' NOTICE OF MOTION AND MOTION TO ENFORCE THE SETTLEMENT
21   22	v.	AGREEMENT AND WELLPATH IMPLEMENTATION PLAN
23	COUNTY OF MONTEREY; MONTEREY COUNTY SHERIFF'S OFFICE;	Judge: Hon. Beth Labson Freeman
24	CALIFORNIA FORENSIC MEDICAL GROUP, INCORPORATED, a California	Date: August 24, 2023 Time: 9:00 a.m.
25	corporation; and DOES 1 to 20, inclusive,	Crtrm.: 3
26	Defendants.	
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28		

Case No. CV 13 2354 BLF

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7	Bureau of Just. Stats., U.S. Dep't of Just., Suicide in Local Jails and State and Federal Prisons, 2000–2019 (2021)
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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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#### NOTICE OF MOTION

PLEASE TAKE NOTICE that on August 24, 2023, at 9:00 a.m., or as soon

thereafter as the matter may be heard, Plaintiffs will and hereby do move the Court for an

order enforcing the Settlement Agreement and Wellpath Implementation Plan in this case

California Forensic Medical Group, Inc. or "CFMG") is noncompliant with the Settlement

Agreement and Wellpath Implementation Plan, and requiring: (1) Defendant Wellpath to

(2) Defendant Wellpath to show cause after six months why contempt fines should not be

Plaintiffs' motion is based on the accompanying Memorandum of Points and

regarding medical care, mental health care, and dental care. Plaintiffs request that the

Court enter an order finding that Defendant Wellpath, Inc. ("Wellpath," formerly

come into compliance with the Settlement Agreement and Implementation Plans;

issued for any requirements with which it remains noncompliant; and (3) continued

Authorities in Support of Plaintiffs' Motion to Enforce, the Declarations of Cara E.

Trapani, Van Swearingen, and Erick Stewart in support thereof, Plaintiffs' [Proposed]

Order Granting Plaintiffs' Motion to Enforce, any oral argument, and the entire record in

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

For more than seven and a half years, Wellpath has defied its Court-ordered

obligations and provided systemically inadequate care to people incarcerated at the

Monterey County Jail (hereafter "MCJ" or "Jail"). The result of Wellpath's persistent

noncompliance with this Court's orders and its own remedial plan is a death rate at the Jail

more than twice the national average and a suicide rate more than three times the average

monitoring and contempt sanctions until Wellpath comes into compliance.

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this action.

for California jails.

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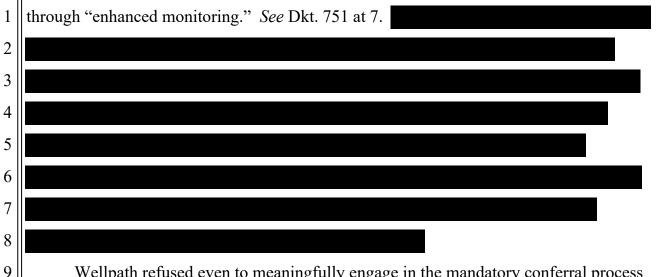
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3	The resulting deficiencies in
4	medical, mental health, and dental care cause daily pain and suffering, including serious
5	medical and dental complications, untreated chronic illnesses, suicide attempts, and deaths
6	This Court must intervene and order Wellpath to finally meet its remedial obligations.
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20	In May 2020, this Court entered a stipulated order extending the length of its
21	jurisdiction over this litigation and requiring Wellpath to develop "corrective action plans
22	to remedy all the areas for which the neutral monitors have found Defendants to be not in
23	substantial compliance." Dkt. 671 at 5.1 When compliance had not improved two years
24	later, the Court issued another stipulated order on June 3, 2022, again extending the period
25	of its jurisdiction over this litigation, and affording the neutral monitors greater power to
26	provide training and supervision to Wellpath's overworked and under-supported line staff
27	

All citations to documents filed on the Court's docket refer to ECF page numbers.

[4246746.8]

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Wellpath refused even to meaningfully engage in the mandatory conferral process before this motion, failing to respond in writing to Plaintiffs' letter regarding Wellpath's noncompliance, as required by the Settlement Agreement, *see* Dkt. 494 at 25-26, and refusing to meet and confer about Plaintiffs' settlement offers. The Settlement Agreement allows this Court to use "all ... remedies permitted by law or equity" to compel compliance with the terms of the Settlement Agreement and Implementation Plans. *See id.* at 25. Wellpath's ongoing refusal to comply with this Court's orders, coupled with the continued harms to incarcerated people, shows that only the threat of monetary sanctions will force Wellpath to take its obligations seriously.

Plaintiffs hereby seek an order: (1) confirming the monitors' findings of noncompliance with the 44 provisions of the Settlement Agreement and Wellpath Implementation Plan identified in Section II, *infra*; (2) ordering Wellpath to come into full and permanent compliance with each of those provisions; (3) instructing the neutral monitors to evaluate Wellpath's compliance with these provisions after six months; (4) ordering Wellpath to show cause why fines of \$25,000 per provision should not be imposed for each provision with which Wellpath remains noncompliant at that time; (5) requiring continued neutral monitor evaluations of Wellpath's compliance twice per year in the course of their regular monitoring duties; and (6) imposing ongoing fines of \$25,000 per noncompliant provision after each monitoring period until Wellpath fully and durably corrects its noncompliance with the Court's order.

#### FACTUAL AND PROCEDURAL BACKGROUND

A. By the Parties' Agreement and the Court's Orders, Wellpath Must Provide Minimally Adequate Medical, Mental Health, and Dental Care

Plaintiffs are a class of all persons incarcerated at the Jail and a subclass of individuals with disabilities. Dkt. 431 at 50. Plaintiffs brought suit in 2013, challenging inadequate medical, mental health, and dental care, safety and security issues at the Jail, and problems with disability access. See id. at 1-2, 6-8. In April 2015, the Court entered a preliminary injunction in favor of Plaintiffs, finding "significant evidence that Defendants' policies and practices constitute deliberate indifference to Plaintiffs' serious medical needs." Dkt. 406 at 21. In August 2015, the Court approved the parties' Settlement Agreement and ordered Defendants to comply with its terms. Dkt. 494 at 4. The Court retained jurisdiction and power to enforce the agreement and found that it satisfied the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(a)(1)(A). Dkt. 494 at 4. The Court also ordered the parties to develop Implementation Plans that would be "enforceable by the Court as part of the Settlement Agreement." *Id.* The plans were required to contain detailed mandates in specific subject areas "to ensure that the class is not exposed to substantial risks of serious harm." *Id.* at 13. The Court approved and adopted these Implementation Plans with some modifications in May 2016. See Dkt. 549; see also Dkt. 528-1 (County Implementation Plan); Dkt. 532 (Wellpath Implementation Plan).

The Court appointed neutral monitors in August 2016. The Orders of Reference require each monitor to determine whether Defendants are "substantially complying" with the Settlement Agreement and Implementation Plans. *See* Dkts. 563, 658, 744, and 753.<sup>3</sup>

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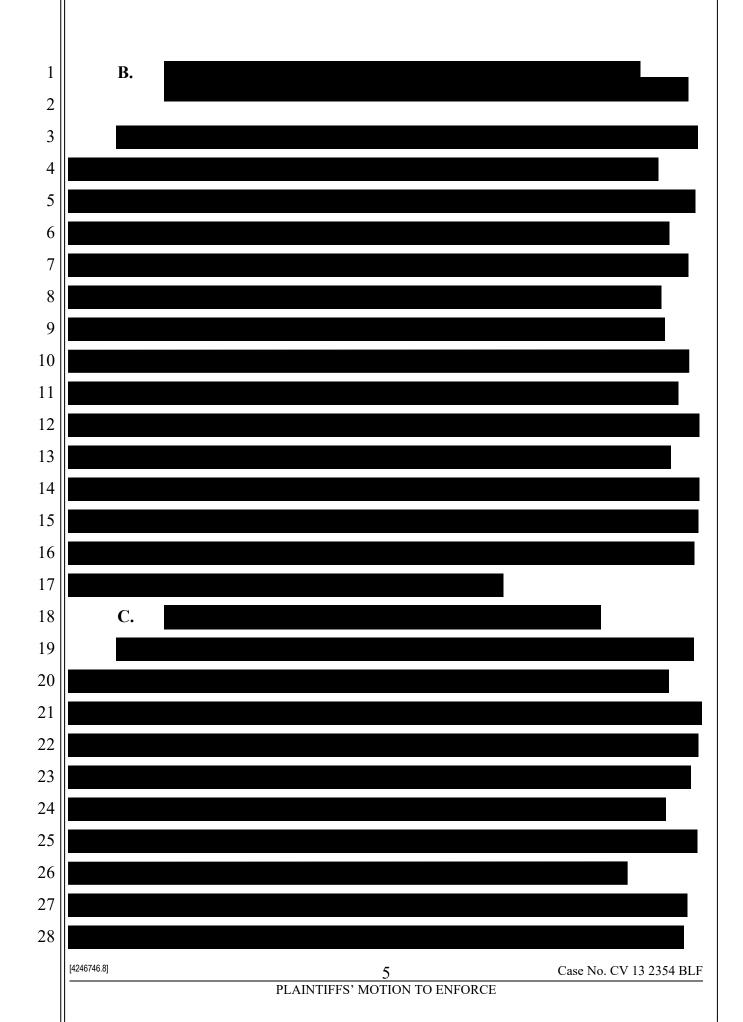
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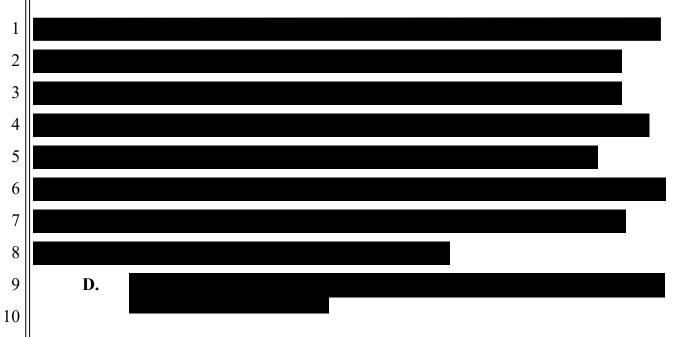
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<sup>&</sup>lt;sup>2</sup> "Substantial compliance' means adherence to the requirements of the Settlement Agreement and Implementation Plans in all material respects, recognizing that 100% compliance is not required." Dkt. 494 at 10.

<sup>&</sup>lt;sup>3</sup> There are multiple orders of reference because several monitors have been replaced since implementation began. *See* Trapani Decl. ¶¶ 3-4.





Twenty-three people have died at the Jail since the parties entered the Settlement Agreement on August 18, 2015<sup>4</sup>—including J.H., who died on April 7, 2023, and who is the second person to die in custody this year. Nine of these twenty-three deaths were suicides. *See* Decl. of Van Swearingen ("Swearingen Decl.") ¶¶ 3-4. This count of suicides omits D.S. and R.L., both of whom died of acute water intoxication after compulsive, excessive drinking of water, a symptom of their mental illness. The Jail's annual death rate since the Settlement Agreement is 350 deaths per 100,000 people, more twice the national average.<sup>5</sup> Excluding D.S. and R.L., the Jail's annual suicide rate since the Settlement Agreement is 137 suicides per 100,000 people, more than three times the average for jails in California.<sup>6</sup>

The Jail's death and suicide rates are rising. More than half of the post-Settlement suicides have occurred since 2021.

https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sijsfp0019st.pdf.

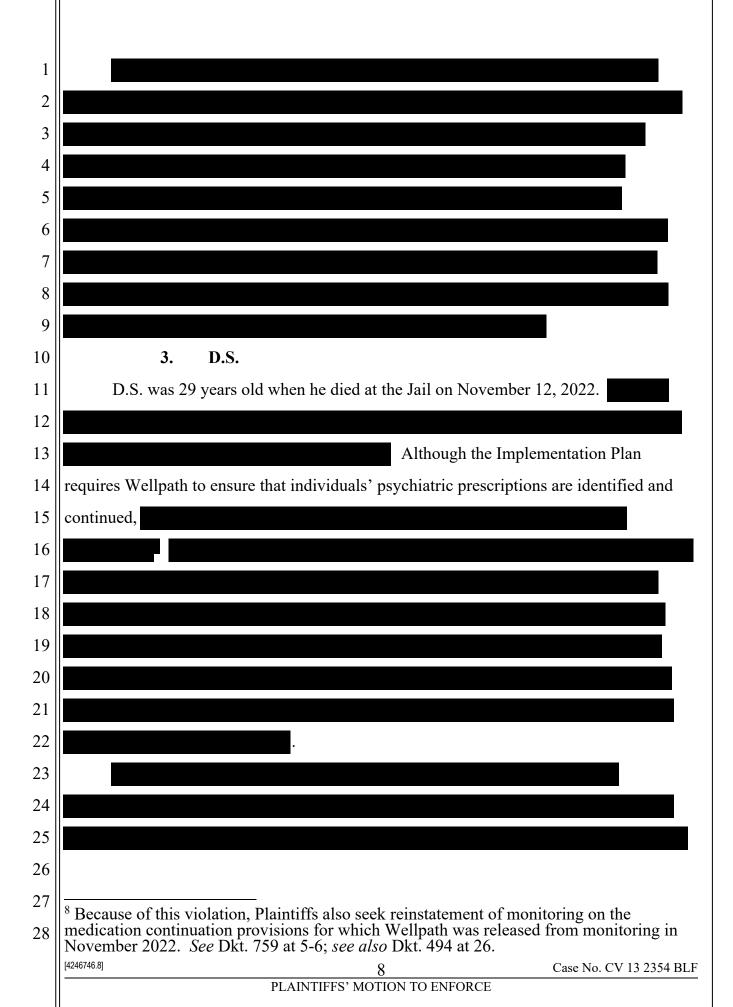
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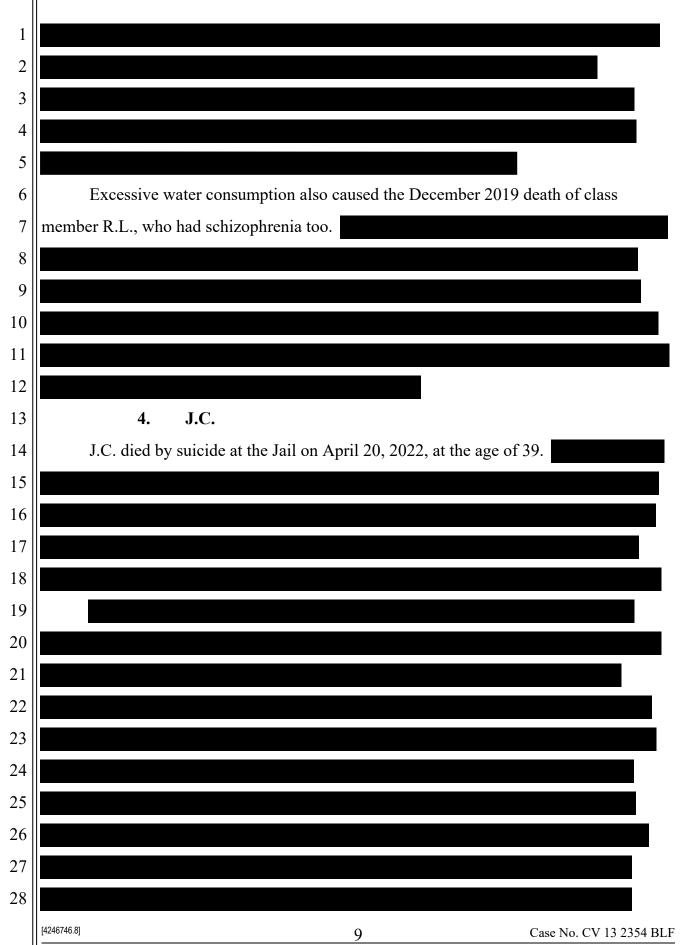
<sup>&</sup>lt;sup>4</sup> This count of deaths omits an individual who died in September 2022 while in the Jail's custody, but who was transferred to hospice care several months before his death.

<sup>&</sup>lt;sup>5</sup> See Bureau of Just. Stats., U.S. Dep't of Just., *Mortality in Local Jails*, 2000–2019, at 1 (2021), <a href="https://bjs.ojp.gov/content/pub/pdf/mlj0019st.pdf">https://bjs.ojp.gov/content/pub/pdf/mlj0019st.pdf</a>. The methodology used to calculate the death and suicide rates given here mirror that of the Bureau of Justice Statistics. *Compare id.* at 34 with Swearingen Decl. ¶¶ 2-4.

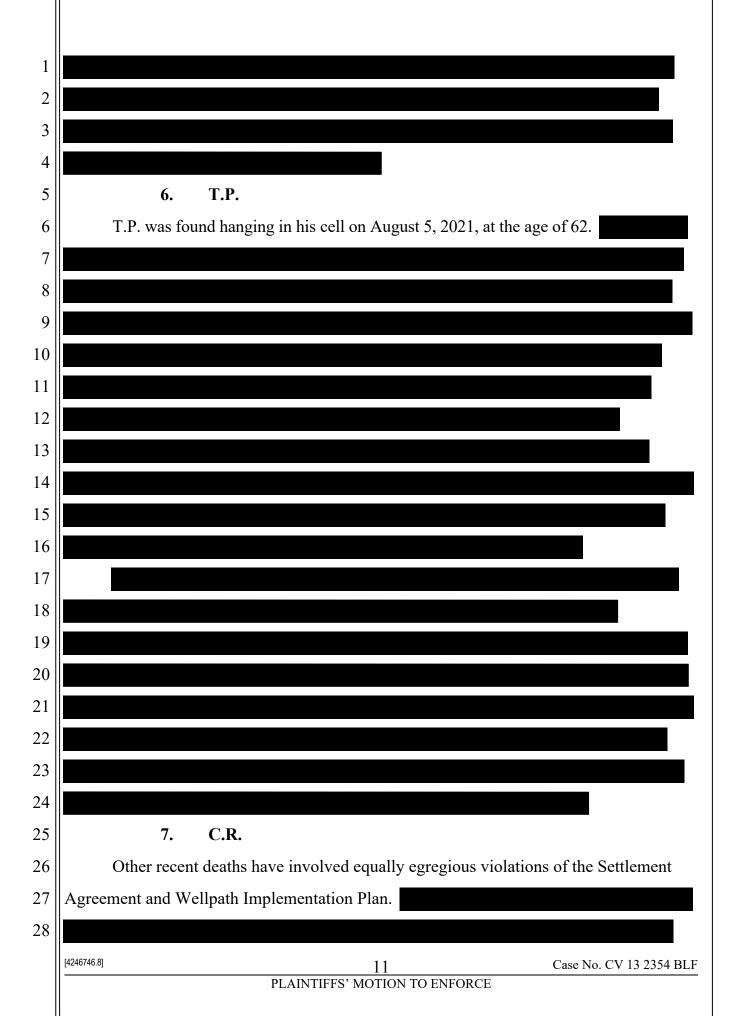
<sup>&</sup>lt;sup>6</sup> See Bureau of Just. Stats., U.S. Dep't of Just., Suicide in Local Jails and State and Federal Prisons, 2000–2019, at 12 tbl.3 (2021), <a href="https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sljsfp0019st.pdf">https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sljsfp0019st.pdf</a>.

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6	1. Ј.Н.
7	J.H. died at the Jail on the afternoon of April 7, 2023. According to Erick Stewart, an
8	incarcerated person who lived in J.H.'s cell block, J.H. had trouble breathing at night and
9	used a CPAP machine before he was transferred to the Jail from a facility in another state.
10	See Decl. of Erick Stewart ¶¶ 4-5. J.H. requested a CPAP machine weeks before he died,
11	but Wellpath refused to provide him one. <i>Id.</i> On the night before his death, J.H. woke up
12	gasping for air, and told Mr. Stewart in the morning that he felt he had nearly died. <i>Id.</i> ¶ 6.
13	J.H. was found nonresponsive in his cell a few hours later. Id. ¶¶ 8-12.
14	2. M.M.
15	M.M. committed suicide on January 4, 2023, at the age of 45.
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20	The Implementation Plan states that psychosis, anger, drug
21	dependency, being under the influence, and being charged with a serious crime are all
22	signs of suicide risk, see Dkt. 532 at 134-35,
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27 28	<sup>7</sup> Wellpath cut off the neutral monitors' access to J.H.'s medical records after his death and did not provide any of his records to counsel or the neutral monitors until April 21, 2023. Swearingen Decl. ¶ 7. Counsel and the monitors are continuing to review the documents Wellpath has produced.
	[4246746.8] 7 Case No. CV 13 2354 BLF





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5	Wellpath's Implementation Plan puts time limits on the use of safety cells to avoid
6	the real harm caused by days on end in a padded box with only a hole in the floor for a
7	toilet. See Dkt. 532 at 73. A person sick enough to need that level of isolation for more
8	than 24 hours is too sick for the Jail and must be transferred to a hospital. The solution is
9	not to stop using Level 1 watch to avoid hospital transfers; it is to use Level 1 watch as
0	needed and to send patients who require a higher level of care to the hospital for proper
1	care, as the Implementation Plan mandates.
2	5. S.G.
3	S.G. was 39 years old when he died at the Jail on September 24, 2021.
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	9 See Dkt. 718 at 1-3 (discussing September 2021 outbreak). [4246746.8] 10 Case No. CV 13 2354 BLI



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Deaths are only the worst consequences of Wellpath's disregard for the Court's orders and the needs of people at the Jail. For every person who dies because of Wellpath's deficient treatment, many more endure serious harm. This death and suffering alone justifies an order from this Court to enforce the Settlement Agreement and Wellpath Implementation Plan.

#### LEGAL STANDARD

A party may be held in civil contempt when, after receiving notice, it fails to take all reasonable steps within its power to comply with a specific and definite judicial order. See, e.g., Parsons v. Ryan (Parsons II), 949 F.3d 443, 454 (9th Cir. 2020); Melendres v. Penzone, No. CV-07-2513, ECF No. 2681 at 1-2 (D. Ariz. Aug. 12, 2021). A district court has "wide latitude in determining whether there has been a contemptuous defiance of its order[s]." Gifford v. Heckler, 741 F.2d 263, 266 (9th Cir. 1984). The moving party bears the initial burden of establishing by clear and convincing evidence that the contemnors violated a specific and definite order of the Court. Donovan v. Mazzola, 716 F.2d 1226, 1240 (9th Cir. 1983). The burden then shifts to the contemnors to produce evidence explaining their noncompliance. Id. The contemnor must show that it "performed 'all reasonable steps within [its] power to insure compliance' with the court's orders." Stone v. City & County of San Francisco, 968 F.2d 850, 856 (9th Cir. 1992) (quoting Sekaquaptewa v. MacDonald, 544 F.2d 396, 404 (9th Cir. 1976)); see also id. at 856 n.9.

In addition, the Supreme Court "has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued." *United States* v. N.Y. Tel. Co., 434 U.S. 159, 172 (1977). These include civil contempt sanctions, which

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"may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard." *UMW v. Bagwell*, 512 U.S. 821, 827 (1994). When contempt takes the form of a monetary fine for noncompliance, "it is civil only if the contemnor is afforded an opportunity to purge"—that is, to come into compliance with the court's order before the fine is issued. *See id.* at 829. To that end, the Ninth Circuit has recognized that civil contempt sanctions "generally take the form of conditional fines." *Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 629 (9th Cir. 2016).

Along with the mandatory notice and opportunities to be heard and to purge, "[c]oercive sanctions may only be imposed 'after a reasoned consideration' of 'the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.""

Parsons II, 949 F.3d at 457 (quoting Shuffler v. Heritage Bank, 720 F.2d 1141, 1148 (9th Cir. 1983)); see also United States v. UMW, 330 U.S. 258, 303-04 (1947). This obligation is satisfied when the court "document[s] Defendants' failures to comply" with the court's prior orders "and explain[s] that the sanctions were warranted to 'address Plaintiffs' injuries resulting from [Defendants'] noncompliance." Parsons II, 949 F.3d at 457 (third alteration in original).

## **ARGUMENT**

# I. THE SETTLEMENT AGREEMENT EMPOWERS THE COURT TO ISSUE PLAINTIFFS' PROPOSED ORDER TO COMPEL WELLPATH'S COMPLIANCE

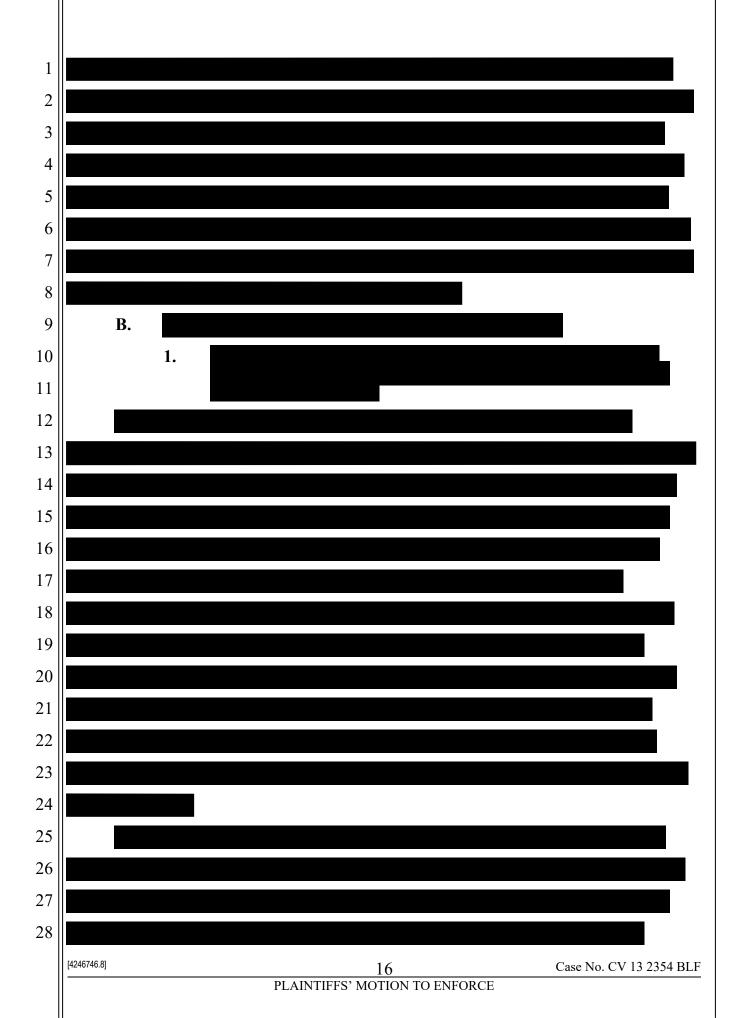
In its August 18, 2015 Order granting final approval of the parties' Settlement Agreement and incorporating the agreement with "the full force and effect of an order of this Court," the Court expressly retained "the power to enforce this Agreement through all remedies provided by law." Dkt. 494 at 4; *accord Parsons II*, 949 F.3d at 454. The Court further ordered that the terms of Wellpath's Implementation Plan (Dkt. 532) are enforceable as "part of the Settlement Agreement." Dkt. 494 at 4. By the terms of the Settlement Agreement, its provisions and the provisions of the Implementation Plans are orders of this Court. The Court has authority to enforce these orders by all means necessary

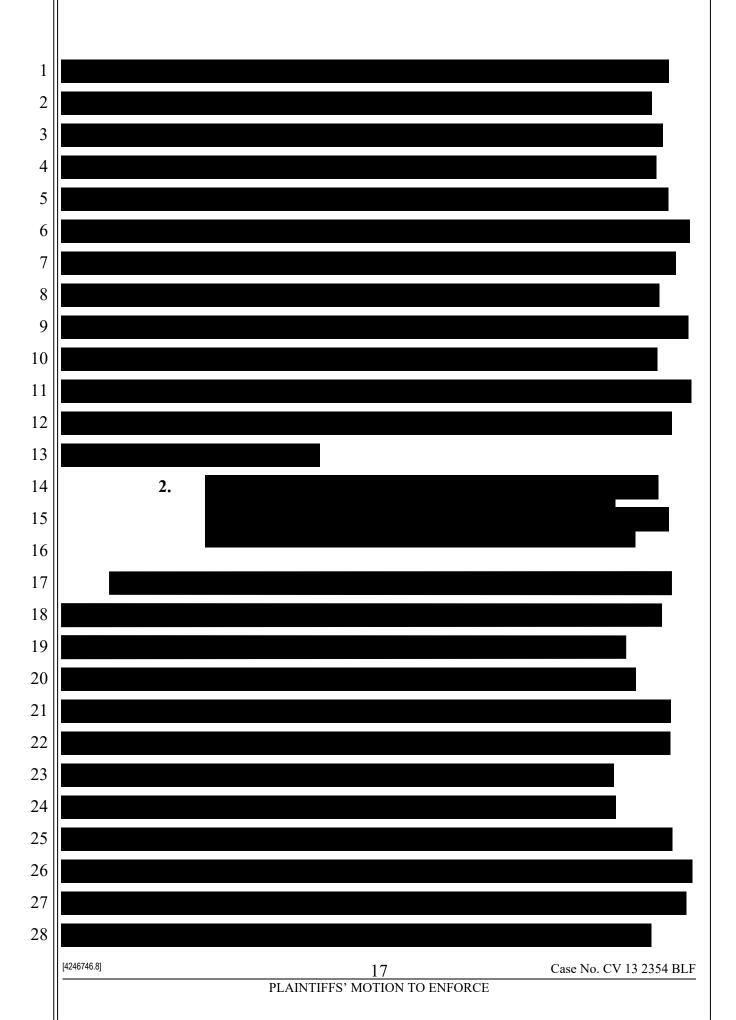
1 and appropriate to prevent their frustration. See N.Y. Tel. Co., 434 U.S. at 172; Parsons II, 2 949 F.3d at 455. 3 The Settlement Agreement imposes only two procedural requirements before 4 enforcement remedies like contempt sanctions may be imposed. Both conditions are 5 satisfied here. First, Plaintiffs must notify Defendants of the basis for their belief that Defendants are out of compliance, confer with Defendants, and present the issue for 6 7 mediation if Defendants do not provide a satisfactory response. Dkt. 494 at 25-26. Plaintiffs 8 submitted notice to Wellpath on December 16, 2022 and mediated their concerns with Judge 9 Cousins in accordance with the Settlement Agreement. See Swearingen Decl. ¶¶ 5-6. 10 Second, the Settlement Agreement requires that if the Court finds noncompliance, it should first instruct Defendants "to submit a plan for approval by the Court to remedy the 11 12 deficiencies identified by the Court" before imposing additional remedies. Dkt. 494 at 25. 13 This procedural requirement has been exhausted as well. 14 , the Court ordered Wellpath in May 2020 to create Corrective 15 Action Plans ("CAPs") "to remedy all the areas for which the neutral monitors have found 16 17 Defendants to be not in substantial compliance" and to submit these plans to the monitors for 18 approval. Dkt. 671 at 5-6. The Court ordered Wellpath to draft the CAPs within 30 days 19 and implement them within 90 days. *Id.* at 6. For more than a year thereafter, Wellpath 20 failed to finalize the CAPs. See Dkt. 751 at 3. Instead, Wellpath contested their finality for 21 months after the monitors approved the plans, preventing the CAPs from being finalized until September 2021.<sup>10</sup> 22 23 Plaintiffs' Proposed Order addresses areas of noncompliance that have 24 already been included in the remedial process set forth in the Settlement Agreement, and for 25 which Wellpath's CAPs "did not remedy the deficiencies." See Dkt. 494 at 25. 26 27 <sup>10</sup> True and correct copies of the CAPs created by Wellpath and approved by Drs. Barnett, Winthrop, and Hughes as a result of the Court's May 29, 2020 Order are attached to the 28 Declaration of Cara E. Trapani filed herewith. See Trapani Decl. at Exs. 16, 36, 49.

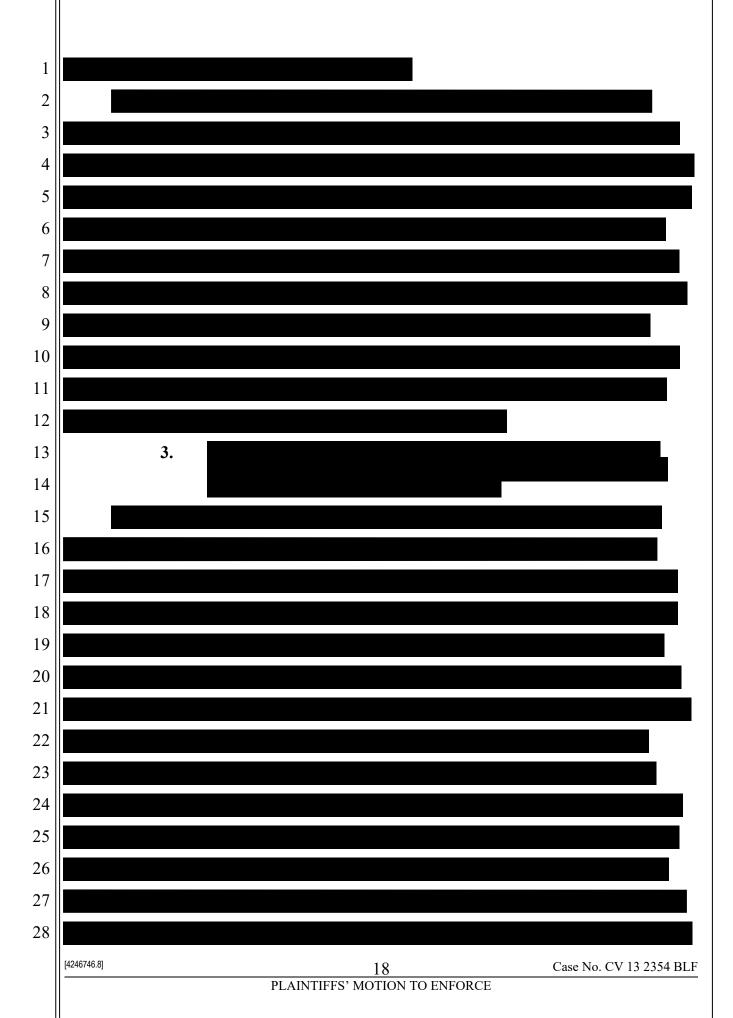
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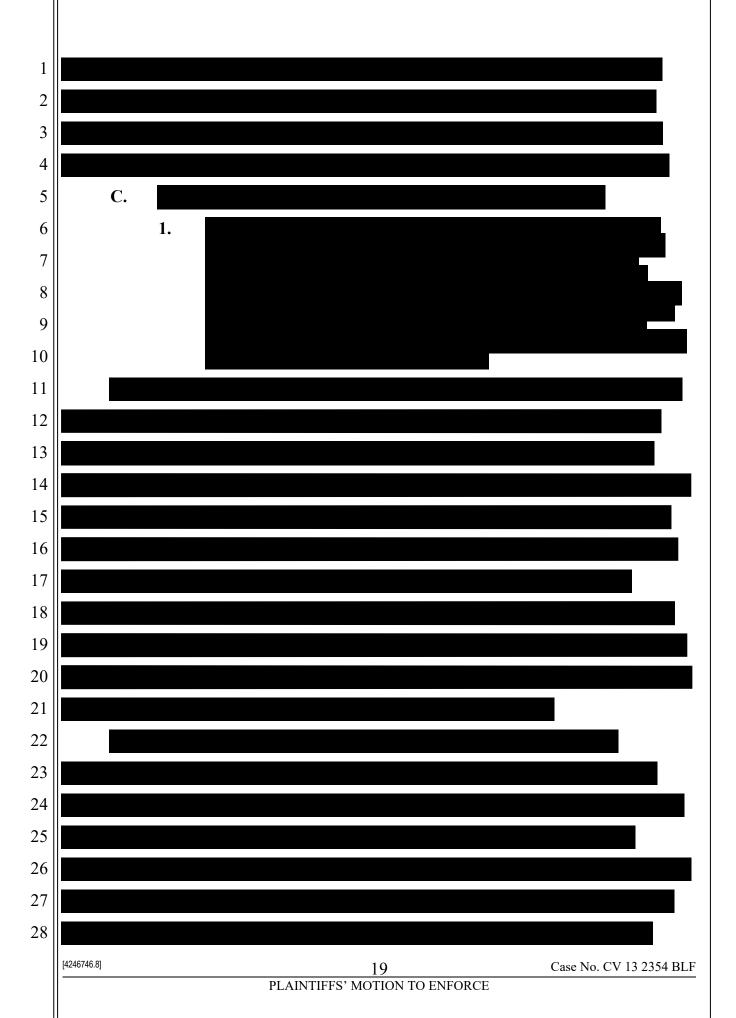
Plaintiffs' Proposed Order appropriately affords Wellpath every chance required by law and by the Settlement Agreement to correct its longstanding noncompliance with its Court-ordered obligations before any fines would be levied for its violations of the Settlement Agreement and Wellpath Implementation Plan. With those procedures observed, the Ninth Circuit has upheld the authority of a district court to issue contempt sanctions to address noncompliance with the terms of a settlement with jurisdictional and enforcement provisions identical in all relevant ways to the provisions of the Settlement Agreement in this matter. See Parsons II, 949 F.3d at 454-55. II. Α. 

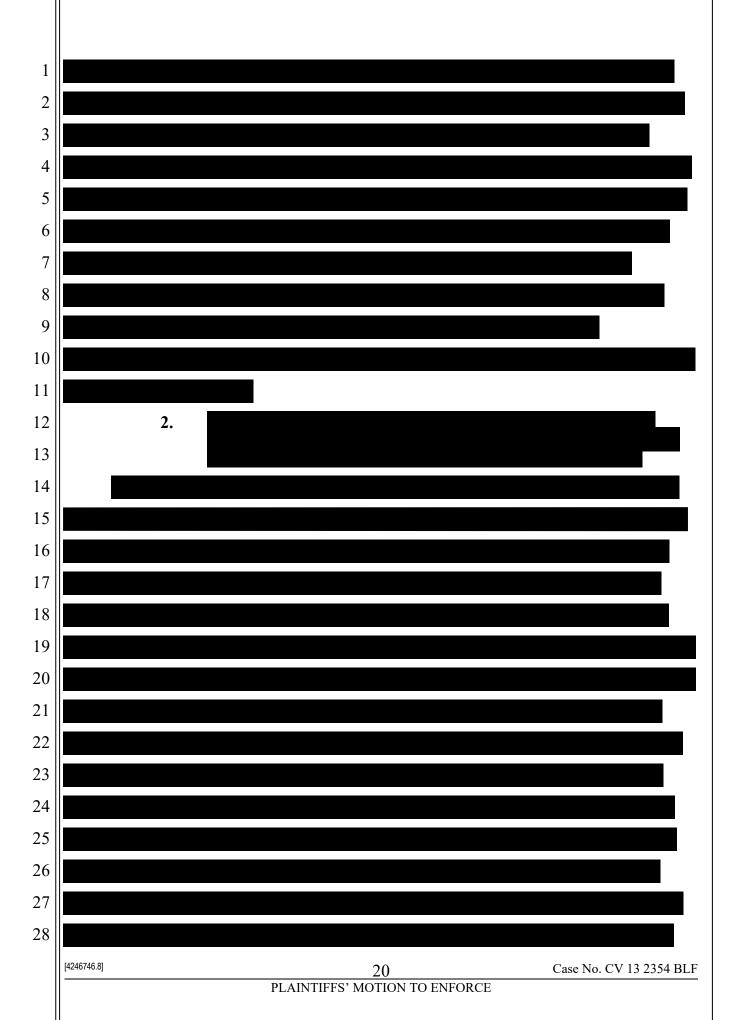
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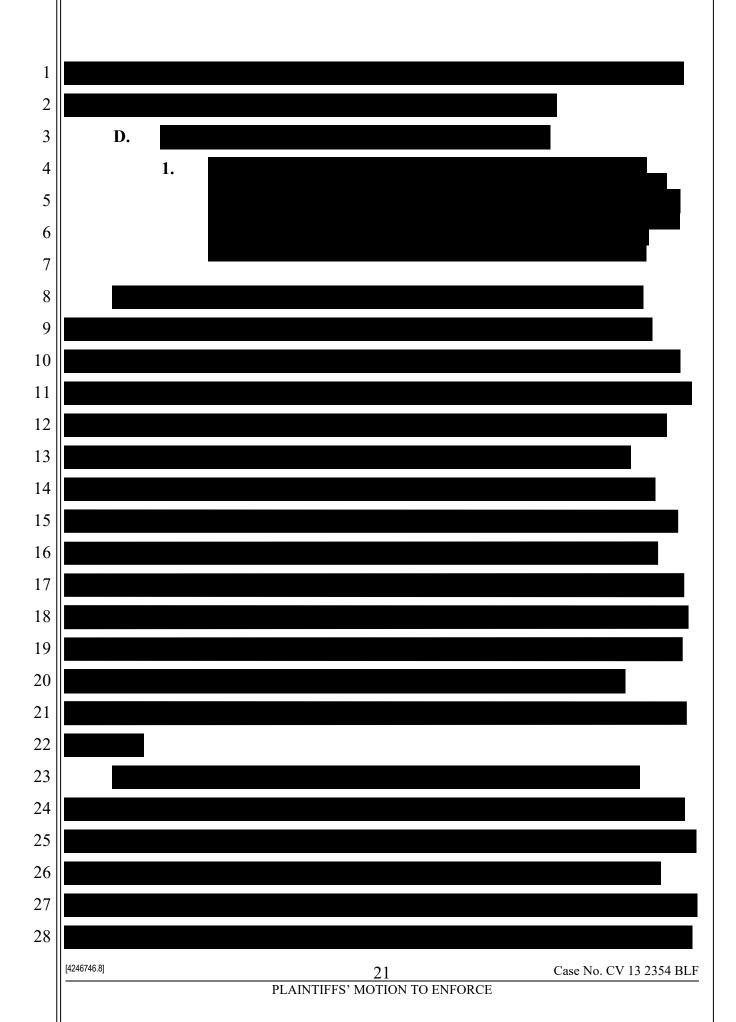


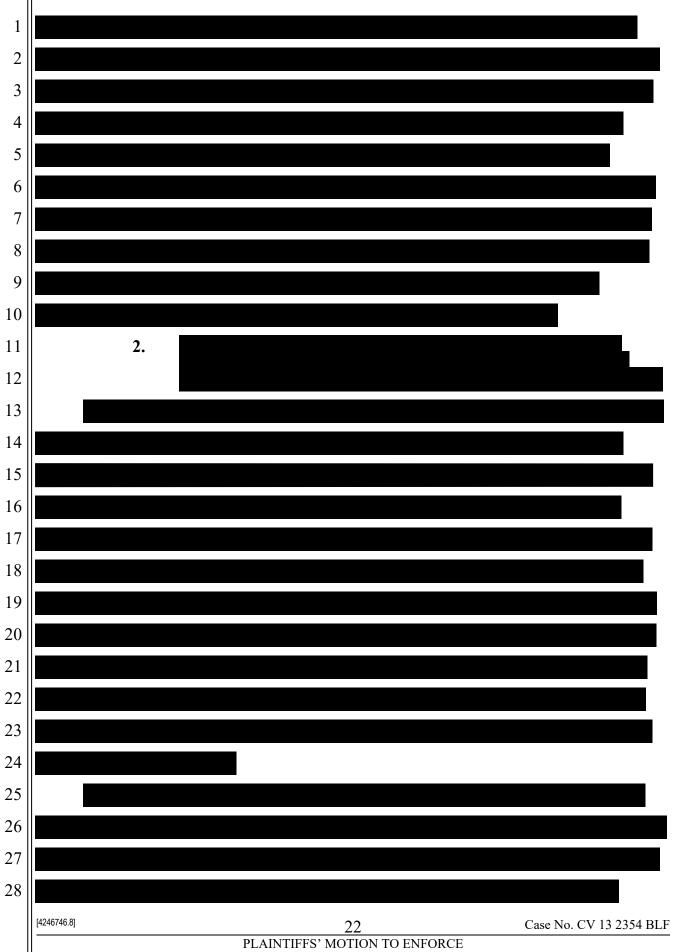












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# III. PLAINTIFFS' PROPOSED ORDER COMPLIES WITH THE PLRA

Under the PLRA, prospective relief addressing prison or jail conditions must be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). The Court found that the Settlement Agreement satisfied this requirement for enforcement purposes, *see* Dkt. 494 at 4, and the Ninth Circuit has held that orders necessary "to enforce compliance" with a stipulated remedy comply with the PLRA when the underlying stipulation meets the PLRA's requirements, *Parsons v. Ryan (Parsons I)*, 912 F.3d 486, 501 (9th Cir. 2018).

In light of Wellpath's persistent noncompliance and demonstrated unwillingness to make the changes it must make to achieve compliance, the contempt sanctions that Plaintiffs seek are necessary to enforce the Settlement Agreement and IPs. Moreover, because the sanctions specifically target requirements with which Wellpath has been consistently noncompliant for most or all of this litigation, they are narrowly tailored to addressing the most egregious and sustained violations of Plaintiffs' rights. Finally, because less intrusive remedies like the orders to create CAPs and allow the monitors to conduct enhanced monitoring and mentoring have failed to produce compliance with these requirements, and because Wellpath's noncompliance is causing urgent and ongoing harm to individuals in the Jail's custody, the civil contempt sanctions outlined in Plaintiffs' proposed order are the least intrusive means necessary to correct Wellpath's continued violations of Plaintiffs' federal

1	rights. See Armstrong v. Brown, 768 F.3d 975, 986 (9th Cir. 2014).	
2	CONCLUSION	
3	3 Plaintiffs respectfully request that the G	Court enter the proposed order filed herewith.
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5	5 DATED: April 26, 2023 Respec	etfully submitted,
6	6 ROSE	N BIEN GALVAN & GRUNFELD LLP
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