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17  
 18 UNITED STATES DISTRICT COURT  
 19 NORTHERN DISTRICT OF CALIFORNIA

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

21 Plaintiffs,

22 v.

23 COUNTY OF MONTEREY; MONTEREY  
 24 COUNTY SHERIFF’S OFFICE;  
 CALIFORNIA FORENSIC MEDICAL  
 25 GROUP, INCORPORATED., a California  
 corporation; and DOES 1 to 20, inclusive,

26 Defendants.

Case No. 5:13-cv-02354-BLF

**PLAINTIFFS’ REPLY IN SUPPORT  
 OF PLAINTIFFS’ MOTION TO  
 ENFORCE THE SETTLEMENT  
 AGREEMENT AND WELLPATH  
 IMPLEMENTATION PLAN [ECF  
 NO. 788]**

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

## INTRODUCTION

Wellpath does not contest that it is noncompliant with the 44 Settlement Agreement and Implementation Plan provisions at issue in Plaintiffs’ Enforcement Motion (Dkt. 788). Nor does Wellpath dispute that its noncompliance has caused, and continues to cause, serious harm and death to the Plaintiff class. On May 22, 2023, another person died at the Jail. This marks the third in-custody death this year, and the fourth person to die at the Jail since November 2022. Wellpath’s arguments that it has hired four staff members—nearly all of whom are temporary hires to replace outgoing staff—and needs more time to achieve substantial compliance are factually and legally insufficient to avoid contempt sanctions. Wellpath has not, and cannot, show that it has met its burden to take all reasonable steps to cure its years-long violations of this Court’s orders. Plaintiffs’ proposed order (Dkt. 788-4) is necessary to address the ongoing harm to the Plaintiff class.

### **I. WELLPATH’S OPPOSITION FALLS WOEFULLY SHORT OF SHOWING IT HAS TAKEN ALL REASONABLE STEPS TO ENSURE COMPLIANCE**

Civil contempt fines are appropriate to compel compliance in longstanding prison and jail class actions, especially where, as here, the magnitude of the harm threatened by Wellpath’s contumacy is ever-increasing. *See Parsons v. Ryan*, 949 F.3d 443, 455 (9th Cir. 2020) (affirming contempt against prison system); *Stone v. City & Cnty. of S.F.*, 968 F.2d 850, 858-59 (9th Cir. 1992) (affirming contempt for noncompliance in jail conditions case). To avoid contempt, Wellpath needed to show it was not at fault for its persistent violations of the Court’s orders for the past seven years—that it took “all reasonable steps within [its] power to insure compliance”—and still could not comply. *Stone*, 968 F.2d at 856. Wellpath has utterly failed to meet this burden. It is uncontested that Wellpath has been consistently noncompliant with the 44 provisions at issue in Plaintiffs’ Motion for most or all of this action. Wellpath provides no evidence of steps taken to comply with these requirements, let alone evidence that its noncompliance occurred in spite of its reasonable efforts. This alone is sufficient to issue Plaintiffs’ proposed order. *See Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983) (once moving party establishes

1 noncompliance with a court order, burden shifts to contemnors to show “categorically and  
2 in detail” that they took every reasonable step to comply); *Stone*, 968 F.2d 856 n.9.

3 Wellpath does not dispute or even acknowledge the evidence of noncompliance and  
4 ongoing patient harm, up to and including the most recent monitoring reports from January  
5 and March 2023. For example, Wellpath’s Opposition does not address why it is that [REDACTED]

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED] The Ninth Circuit is clear that

11 such a history of persistent noncompliance justifies contempt sections. *See Stone*, 968  
12 F.2d at 857 (“[T]he City’s history of noncompliance ... is highly relevant in finding the  
13 City in contempt”); *Hook v. Ariz. Dep’t of Corrs.*, 107 F.3d 1397, 1404 (9th Cir. 1997) (in  
14 light of “extensive history of noncompliance .... [t]he district court could not be assured  
15 the defendants would comply ... in the absence of a coercive sanction”). Wellpath’s  
16 attempt to blame COVID for its violations is disingenuous at best. *See* Dkt. 790 (hereafter  
17 “Opp.”) at 5. Wellpath was noncompliant before, during, and since the pandemic.

18 **II. WELLPATH’S STAFFING CLAIMS SIMPLY SHOW THE SAME**  
19 **TURNOVER THAT HAS PREVENTED SUBSTANTIAL COMPLIANCE IN**  
20 **THE PAST**

21 Wellpath’s central argument is that it has hired four new supervisory staff since  
22 December 2022, that corporate-level staff “regularly consult[] with” the monitors (without  
23 providing detail), and that Wellpath “reasonably believes” that “the primary issues” in  
24 Plaintiffs’ Motion will be moot by August 24, 2023. *Opp.* at 3, 5-7. The Opposition  
25 contains no evidence whatsoever to support this claim. It simply recycles the same false

26 <sup>1</sup> All citations refer to ECF page numbers. Additionally, Plaintiffs have conditionally  
27 redacted portions of this Reply Brief and the concurrently filed Reply Trapani Declaration  
28 in accord with their pending administrative motion under Civ. L.R. 79-5(f) (Dkt. 776).

1 promises this Court has previously rejected. *See, e.g.*, Dkt. 169 at 16-17 (arguing in 2014  
2 that because “CFMG [now, Wellpath] is committed to providing adequate staffing,” issues  
3 to support class certification “are now moot”). As the Ninth Circuit makes clear, “[i]ntent  
4 is irrelevant to a finding for civil contempt, and therefore, good faith is not a defense.”  
5 *Stone*, 968 F.2d at 856; *see also Donovan*, 716 F.2d at 1240; *Hook*, 107 F.3d at 1404.

6 The notion that after years of ignoring the monitors’ recommendations about how to  
7 remedy its noncompliance, Wellpath’s four new staff will miraculously achieve substantial  
8 compliance by August with the 44 provisions at issue—many of which have *never* been  
9 found substantially compliant—is wishful thinking at best. Wellpath omits key facts from  
10 its brief, including that three of the four new staff members are filling in for someone on  
11 leave or replaced staff who no longer work at the Jail, and that Ann Marie Natali (Imple-  
12 mentation Specialist), Paulette Torres (Health Services Administrator), and Linda Corfman  
13 (Director of Nursing) are all interim staff. *See* Reply Trapani Decl., Ex. 1 at 3; Decl. of  
14 Ann Marie Natali In Supp. of Wellpath Opp., Dkt. 790-7 at ¶ 1. Moreover, Wellpath had  
15 to hire these staff because of its ongoing staff retention and turnover problems, ██████████

16 ██████████ *See, e.g.*, Decl. of  
17 Cara E. Trapani ISO Pls.’ Enforcement Mot. (“Trapani Decl.”), Dkt. 788-1 at Ex. 11 (11th  
18 Medical Report) at 18; *id.*, Ex. 28 (6th Mental Health Report) at 15; *id.*, Ex. 45 (8th Dental  
19 Report) at 8. The new staff described in the Opposition are simply the current hiring wave  
20 in a continued churn of Wellpath staff.

21 Even with these new staff, Wellpath remains out of compliance with its staffing  
22 obligations. *See* Reply Trapani Decl., ¶ 3 & Ex. 1 at 3. Wellpath does not argue that it is  
23 substantially compliant with staffing requirements, ██████████

24 ██████████  
25 ██████████ Wellpath has provided no evidence that its new staff have  
26 improved patient care, and such claims would be belied by the numerous instances of harm  
27 and death that have occurred as a result of Wellpath’s continued violations. *See* Section  
28 IV, *infra*. The fact that Dr. Natali, Ms. Torres, and Ms. Corfman all work more than their

1 full-time hours, *see* Opp. at 6, is evidence of understaffing and lack of corporate support at  
 2 the Jail. Wellpath itself found that its staffing shortages contributed to patients' deaths in  
 3 April 2022 and January 2023. *See* Trapani Decl., Dkt. 788-1, Ex. 60 (J.C. Suicide Safety  
 4 Gap Analysis) at 3-4; Reply Trapani Decl., Ex. 2 (M.M. M&M Report Part III) at 4.

### 5 **III. WELLPATH FAILED TO COMPLY WITH PRIOR COURT ORDERS**

6 Contrary to Wellpath's assertions, it is not in compliance with this Court's prior  
 7 orders. *See* Opp. at 8-9. It is undisputed that Wellpath is noncompliant with the 2015  
 8 Settlement Agreement and 2016 Implementation Plan. The May 29, 2020 Order required  
 9 Wellpath to "draft corrective action plans ["CAPs"] within 30 days" and "implement  
 10 [them] ... no later than 90 days from the date of this filing." Dkt. 671 at 6. Not only did  
 11 Wellpath fail to adhere—by *months*—to the 30-day creation timeline for all the CAPs (not  
 12 just the dental CAP, *contra* Opp. at 8), [REDACTED]

13 [REDACTED]  
 14 [REDACTED] Additionally, Wellpath has at times prevented the enhanced  
 15 mentoring provisions under the June 3, 2022 Order (Dkt. 751) from working—[REDACTED]

16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED]  
 19 Wellpath argues that it just needs more time to work with the monitors "through  
 20 enhanced monitoring and mentoring, to identify what specifically needs to be done for  
 21 Wellpath to achieve substantial compliance." Opp. at 13. The neutral monitors have  
 22 issued 33 reports to date, each with specific (often repeated) recommendations to Wellpath  
 23 about how to remedy its noncompliance, and Wellpath has repeatedly ignored and failed to  
 24 implement the recommendations. Wellpath's claim that it is still unaware of what it must  
 25 do to achieve substantial compliance is preposterous. The fact that the monitors are  
 26 continuing to perform monitoring and mentoring under the June 2022 Order is not a reason  
 27 to allow Wellpath to go on flouting the Court's orders and its obligation to provide  
 28 adequate care.

1 Moreover, civil contempt sanctions imposed to coerce compliance with court orders  
2 require that the contemnor have the opportunity to purge. *UMW v. Bagwell*, 512 U.S. 821,  
3 829 (1997). If Wellpath does indeed achieve substantial compliance during the cure period  
4 with any of the 44 provisions identified in Plaintiffs’ Motion, contempt fines would not be  
5 issued for that provision. *See* Pls.’ Prop. Order, Dkt. 788-4 at 6. But in considering  
6 whether to issue Plaintiffs’ proposed order, the relevant inquiry is whether Wellpath has  
7 shown that its longstanding and continued noncompliance has occurred even though it has  
8 taken all reasonable steps to comply. *Stone*, 968 F.2d at 856. Wellpath has not even  
9 attempted to meet that burden.

10 **IV. WELLPATH’S ARGUMENT THAT THE MONITORS’ REPORTS ARE**  
11 **“ANTIQUATED” SHOULD BE REJECTED; WELLPATH’S**  
12 **NONCOMPLIANCE CONTINUES TO CAUSE SUFFERING AND DEATH**

13 The Court should reject Wellpath’s specious argument that the monitors’ reports are  
14 too “antiquated” to establish current noncompliance. *See* Opp. at 12. Plaintiffs cited the  
15 most recent monitoring reports at the time of filing their Motion, all of which were issued  
16 in the last nine months. *See, e.g.*, Trapani Decl., Dkt. 788-1 at ¶ 23 & Ex. 15 (March 2023  
17 medical mentoring report); *id.*, ¶ 112 & Ex. 47 (March 21, 2023 draft 9th dental report);  
18 *id.*, ¶ 65 & Ex. 34 (November 4, 2022 9th mental health report). The Settlement  
19 Agreement requires several months’ delay between the monitors’ inspections, draft reports,  
20 and final reports to allow the monitors time to draft as well as for the parties to comment  
21 on the monitors’ draft findings. *See* Dkt. 494 at 23. Wellpath does not identify any more  
22 recent monitor reports than the ones cited in Plaintiffs’ Motion because there are none.

23 Contrary to Wellpath’s baseless claim, the monitors’ findings in the months since  
24 Plaintiffs initiated this enforcement process on December 16, 2022 show that the ongoing  
25 harm to incarcerated people has only increased. [REDACTED]

26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]

14 In April 2023, a patient was discharged in acute renal failure and close to death  
 15 because of inadequate care at the Jail. *Id.*, Ex. 4 at 4-5. That same month, Wellpath failed  
 16 to appropriately treat a patient’s profound hypothyroidism, which resulted in a near coma  
 17 and an 18-day hospital stay. *Id.*, Ex. 4 at 1. Despite the patient’s suicidal ideation and  
 18 covering himself in feces, staff failed to refer him to a physician or psychiatrist. *Id.*

19 While the monitors have issued no new final reports since Plaintiffs filed their  
 20 Motion, [REDACTED]

21 [REDACTED] On May 11, 2023, a patient suffering a  
 22 psychiatric crisis was made to wait for emergency medication because Wellpath had no  
 23 on-site psychiatrist and could not reach one by phone. *Id.* ¶ 11. A patient booked on  
 24 May 16, 2023 and housed in the infirmary was forced to lie in his own excrement and rely  
 25 on another patient to help him attend to his activities of daily life. *Id.* ¶ 12. [REDACTED]

26 [REDACTED]  
 27 [REDACTED]

28 Tragically, another person died shortly after booking on May 22, 2023. *See Reply*

1 Trapani Decl. at ¶ 5. The monitors are still evaluating this patient’s death, [REDACTED]  
2 [REDACTED]  
3 [REDACTED] The Jail’s death rate continues to skyrocket—this is the third  
4 death in 2023 alone, and the fourth in seven months. *Id.* ¶ 6. The Jail’s annual death rate  
5 since the Settlement Agreement has jumped from 350 to 361 deaths per 100,000 people  
6 since Plaintiffs filed their Motion. *Id.* The Jail is on track for its deadliest year since the  
7 Settlement Agreement was finalized in 2015. [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]

11 In sum, the neutral monitors’ findings from *this year* belie Wellpath’s specious and  
12 unsupported claim that the most recent monitoring reports “do[] not reflect Wellpath’s  
13 current compliance.” Opp. at 12. Wellpath remains noncompliant to this day.

14 **CONCLUSION**

15 The neutral monitors have repeatedly issued concrete, practicable recommendations  
16 for achieving substantial compliance, but Wellpath has failed to make progress for more  
17 than seven years. The abysmal medical, mental health, and dental care at the Jail is the  
18 direct result of Wellpath’s noncompliance. Wellpath has not met its burden to avoid  
19 contempt for its longstanding and continued noncompliance. The contempt sanctions  
20 Plaintiffs seek are necessary to finally bring Wellpath into compliance and end this cycle  
21 that harms all of the individuals incarcerated at the Jail.

22  
23 DATED: June 9, 2023

Respectfully submitted,

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By: /s/ Cara E. Trapani

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