UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA KELLY, et al., Plaintiffs-Appellees, vs. TIMOTHY WENGLER; CORRECTIONS CORPORATION OF AMERICA, Defendants-Appellants.	No. 13-35972 District Court No. 1:11-cv-00185-EJL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

The defendants ("CCA") appeal from a District Court decision holding them in contempt for violating a court-ordered settlement agreement. (ER 3–26.) Accordingly, this Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. When a District Court incorporates the parties' stipulated settlement agreement into its order dismissing the case, and when the parties expressly stipulate in that agreement that the District Court judge "shall have authority to enforce the terms of this agreement in his capacity as a Federal District Court Judge," may the court then enforce that settlement agreement through contempt?

2. Are contempt sanctions civil, rather than criminal, if they only impose *prospective* obligations on the contemnor to comply with the court's prior order, to have its future compliance checked by an independent monitor, and to pay predetermined fines for future violations?

3. May a federal court hold a defendant in civil contempt if the defendant fails to undertake all reasonable efforts to comply with a core provision of a court-ordered settlement agreement—to fully staff Idaho's largest prison—and instead leaves mandatory security posts vacant at the prison for thousands of hours, while lying about it by fabricating false records reflecting full staffing?

STATEMENT OF THE CASE

This lawsuit is an effort to remedy Corrections Corporation of America's deliberate indifference to prisoner safety at the Idaho Correctional Center (ICC), Idaho's largest prison. As the class action complaint stated: "It's impossible for ICC to provide prisoners with adequate protection from assault—or to timely intervene when an assault has commenced—with as few guards as ICC has on its staff." (ER 787 at ¶ 25.) In September 2011, the parties reached a settlement agreement. (ER 642–645.) The Corrections Corporation of America (CCA) agreed to fully staff ICC, according to the mandatory staffing pattern made a part of CCA's contract with the State of Idaho, plus add an additional three guards on top of that. (ER 642 at ¶ 4.) Pursuant to the parties' stipulated settlement agreement, the District Court ordered the case dismissed, expressly incorporating the stipulation, with the settlement agreement attached. (ER 639–645.)

Yet, in April 2013, it was disclosed publicly that in direct contravention of CCA's obligations, over 4,700 hours of *mandatory* security staff posts went vacant at ICC in 2012. (ER 342.) What is more, CCA covered up the vacancies by falsifying its records. (*See* ER 478 at 146:19–147:11.) Discovery conducted by Appellees also revealed that there were thousands of additional vacant hours in mandatory posts at ICC; indeed, CCA only looked into seven months of 2012, and

almost exclusively at the nightshifts alone. (ER 204–211.) Mandatory security posts were still going vacant when the contempt trial began. (*See* ER 391–393.)

Because CCA so egregiously violated the Settlement Agreement's core provision, the appellees moved the district court to hold CCA in contempt. (ER 616–633.) Following a 26-day discovery period and a 2-day trial (*see* ER 36), the court held CCA in civil contempt, citing its "persistent failure to fill required mandatory positions" and noting that CCA had "lied to" the State. (ER 25.) As a remedy, the court extended the term of the court-ordered Settlement Agreement, appointed an independent monitor to check CCA's compliance going forward, and imposed a prospective fine of $100 for excessive vacant mandatory posts totaling more than 12 hours in a single month. (ER 22–24.) CCA appealed.

STATEMENT OF RELEVANT FACTS

The Idaho Correctional Center ("ICC"), located in Kuna, Idaho, was opened in 2000 and contains 2100 beds. Since the day it opened, it has been operated by Corrections Corporation of America ("CCA"), a for-profit company, under a contract with the Idaho Department of Correction ("IDOC"). (*See* ER 663.)

An amended complaint was filed in this litigation on February 21, 2011. (ER 658–724.) The 67-page complaint accused CCA of deliberate indifference to prisoner safety and claimed that, as a result of this indifference, prisoners at ICC were exposed to an unnecessarily high risk of assault from other prisoners. The

complaint detailed thirty injurious assaults at ICC that, plaintiffs alleged, could easily have been prevented by staff.

A main cause of the excessive violence at ICC, the complaint alleged, was the inadequate number guards: "It's impossible for ICC to provide prisoners with adequate protection from assault—or to timely intervene when an assault has commenced—with as few guards as ICC has on its staff." (ER 666 at ¶ 23; *see also* ER 666 at ¶ 23 ("CCA refuses to provide funds for, and Warden Wengler refuses to hire and train, a sufficient number of correctional officers."); 701 at ¶ 257 ("There have been numerous assaults in the ICC dining hall. ICC supervisors fail to assign enough staff to monitor the dining hall . . . ."); 702 at ¶ 263 ("Due to the chronic understaffing, the assault was not observed or halted by ICC staff."); 719 at ¶ 375 ("Had L-Pod been adequately staffed, the Pod Control officer could have assisted Williams immediately.").) In their prayer for injunctive relief, Plaintiffs' first request was for an order requiring CCA "to hire an adequate number of staff." (ER 723.)

In September 2011, the parties met with a judicial mediator, Hon. David O. Carter, and engaged in three days of intense negotiations. The effort proved successful, and on September 16, 2011, the parties signed two documents, a Settlement Agreement (ER 642–645) and a Stipulation for Dismissal. (ER 640-41.)

The Stipulation for Dismissal provides that the court may dismiss the case "pursuant to the Settlement Agreement attached as Exhibit A, which is hereby incorporated by the Court." (ER 641.) Four days later, the District Court entered an order dismissing the case "pursuant to the Stipulation of Dismissal, which is hereby incorporated by the Court." (ER 639.)

The Settlement Agreement resolved the prisoners' central concerns about inadequate staffing. In the Agreement, CCA guaranteed it would fully staff ICC consistent with the mandatory staffing pattern contained in CCA's contract with the State of Idaho, plus add three guards on top of that. (ER 642 at ¶ 4.) Under this contract, CCA was mandated to provide 58 correctional officers on the 12-hour day shift, and 35 correctional officers on the 12-hour night shift. (*See* SER 125–131.) Paragraph 4 of the Settlement Agreement provides:

> CCA will agree to comply with the staffing pattern pursuant to CCA's contract with the Idaho Department of Correction ("IDOC"). In addition, CCA agrees to increase the staffing pattern to include a minimum of three additional correctional officers to be utilized at the discretion of the warden to enhance the overall security of the facility.

(ER 642.) As the District Court subsequently noted, the Settlement Agreement was "designed to rectify" staffing inadequacies alleged in the complaint.[1] (ER 465 at 94:8–23.)

[1] CCA spends over five pages of its brief recounting the procedural history of this case, including a prior incarnation of this litigation filed by prisoner Marlin Riggs *pro se*. (Appellants' Replacement Opening Brief at 3–8.) Some of CCA's

A. The Post-Judgment Proceedings

In December 2012, counsel for the prisoners obtained a letter from an anonymous whistleblower warning that CCA was listing guards on ICC's daily staffing reports (which were submitted to IDOC) as working mandatory posts during times when those workers were not even in the building. (ER 372–373 at 465:9–466:9.) By listing these "ghost workers," CCA made it appear that ICC was fully staffed when it was not. Plaintiffs' attorneys sent a copy of the letter to counsel for IDOC and notified CCA of the ghost worker issue. (ER 372–373 at 465:9–466:9; 390 at 537:8–14.)

IDOC promptly requested that CCA provide detailed staffing records for an IDOC audit. (ER 372–373 at 465:17–466:5, 467:2–15.) CCA, in the meantime, hired lawyers it knew to do a parallel investigation, which they limited to April–October 2012, and only to the nightshift. (ER 205; 476 at 138:6–19; 477 at 141:6–22.)

CCA concluded its investigation less than four months later and issued a press release on April 11, 2013, that admitted only that there were "some inaccuracies" in its staffing records. (ER 342.) CCA never publicly confessed to

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statements are inaccurate. However, none of these historical facts are relevant to the issues on appeal. CCA apparently realizes this, for it does not include any of those facts in its Statement of Relevant Facts. (*Id.* at 9.) Appellees see no need to discuss wholly irrelevant matters, and therefore will not be commenting on CCA's inaccuracies.

the enormous number of staff vacancies that had occurred nor to the fact that its employees had fabricated official documents on a daily basis.

On the same day that CCA issued its press release, IDOC issued a press release that was more revealing that CCA's. (ER 343.) The IDOC release reported that CCA had failed to fill more than 4,700 hours of mandatory security staff posts during just a seventh-month period in 2012. (*Id*.) The IDOC release also revealed that CCA had covered up these thousands of vacancies by falsifying the records it had submitted to IDOC. (*See* ER 478 at 146:19–147:11.)

Four thousand seven hundred hours of violations was alone clear evidence that CCA was in contempt of court. Plaintiffs' counsel, moreover, spoke with one former and two current security officers at ICC and learned that those 4,700 hours were just the tip of an iceberg. Counsel obtained affidavits from these three officers, which indicated that the likely number of missing hours of guard duty since the signing of the Settlement Agreement in September 2011 exceeded 20,000. (ER 595–611.) Based on what was already admitted by CCA and IDOC and what the three officers added, Appellees moved the district court to hold CCA in civil contempt pursuant to Rule 70 of the Federal Rules of Civil Procedure. (ER 616–633.)

Following a 26-day discovery period and a 2-day trial (*see* ER 36), the court held CCA in civil contempt, citing CCA's "persistent failure to fill required

mandatory positions" and noting that CCA had "lied to" the State. (ER 25.) There is abundant evidence in the record to support those conclusions.

CCA's own internal investigation report (ER 204–333) revealed that mandatory night posts at ICC were going unfilled over 5 percent of the time throughout the summer of 2012. (ER 210; ER 479 at 150:2–6.) More than 4,700 hours of mandatory posts went completely unstaffed between April and October 2012, averaging more than 800 hours of missing guards a month just in the nightshift. (ER 210–211.) When CCA's investigators looked at just one month of dayshift records—May 2012—they found understaffing exceeding 150 mandatory post hours. (ER 211.) When they later checked the June 2012 dayshift, they found 300 vacant mandatory hours. (ER 483–484 at 167:19–172:7.) After finding so many vacancies in the dayshift during just two months, CCA decided not to measure dayshift understaffing for any other months. (ER 211.)

Top administrators at ICC had been aware for years of staffing problems and persistent vacancies. The Warden of ICC, Defendant Timothy Wengler, admitted that he knew before the Settlement Agreement was signed in September 2011 that he was having trouble filling all the mandatory posts. (ER 466 at 99:25–100:3.) Wengler's Chief of Security, Shane Jepsen, whose job it was to ensure that the mandatory posts were filled each day, repeatedly told Wengler about difficulties in filling mandatory posts (ER 339; 467 at 102:18–103:4; 468 at 106:13–17; 508 at

267:12–23; 508–509 at 268:17–269:4; 509 at 269:10–20). Moreover, IDOC had issued CCA a "notice of breach" six months before the parties signed the Settlement Agreement for "non-compliance with contractually required staffing." (ER 334.) Jepsen sent Wengler a memo in November 2010 specifically warning, as the District Court pointed out, that some officers were listed on staff rosters "as working two to three posts during a shift without explanation as to how this could be possible." (ER 10 (citing ER 339).) A month later, in December 2010, IDOC sent Wengler a memo warning him about additional staff shortages. (ER 336–338.) IDOC specifically criticized ICC for placing non-security employees in security posts and pointed out that ICC's staff rosters showed employees assigned to multiple posts on the same day. (*Id.*) In June 2011, IDOC sent another memo, this time to a CCA Vice President, documenting five recent incidents where CCA had failed to fill a mandatory security post. (ER 334.) As the District Court found, CCA "had ample reason over the past two years to proactively check that they were in compliance with staffing requirements for mandatory positions." (ER 8–9.)

These problems persisted after the Settlement Agreement was signed in September 2011, as Wengler was well aware. The same practice that IDOC had deplored in its notice of breach—using supervisors and case managers to fill correctional officer posts—continued. Wengler admitted that due to a shortage of

guards, ICC had to fill a mandatory post with either a supervisor or a case manager several times each week. (ER 10; ER 465–466 at 95–97.) Similarly, Jepsen continued to report to Wengler that ICC needed more staff, and Jepsen even reported these shortages to the Managing Director at CCA headquarters. (ER 506–507 at 260:10–263:20.) Significantly, CCA's internal investigation confirmed that ICC's "senior management, including the Warden and Assistant Wardens, were aware of acute personnel shortages in the spring, summer, and fall of 2012." (ER 207; ER 477 at 144:2–9; *see also* ER 512 at 284:13–14 ("Everybody knew there had been issues with staffing."); ER 508–509 at 268:17–269:4.)[2]

There were many easy steps that Wengler and other CCA officials could have taken to ensure compliance with Paragraph 4 that they failed to take. For instance, neither Wengler nor anyone from CCA headquarters checked at any time to ensure that the prison was fully staffed, despite the Settlement Agreement's requirements. (ER 406 at 599:18–24; 452 at 41:24–42:7.) CCA's Managing Director for ICC admitted that he made no attempt to confirm that mandatory posts were being filled and did not ask anyone else for such verification. (ER 415 at 634:6–15; 496 at 218:20–219:10.) Moreover, despite continued complaints from

[2] In an effort to show that Warden Wengler discharged his duties, CCA's brief informs this Court that Wengler conducted weekly meetings with staff. (*See* Appellants' Replacement Opening Brief at 16.) CCA fails to mention, however, that in was during these meetings that Chief Jepsen kept reporting to Wengler that he did not have enough guards to fill all the mandatory posts. (ER 508–509 at 268:17–269:4.)

his Chief of Security and notices of noncompliance from IDOC, Wengler failed to hire as many guards as he was authorized to hire. (ER 16 (citing SER 173–180); ER 470 at 113:7–116:8.) Wengler did not even instruct his staff to inform him when vacancies were occurring on their units. (ER 426 at 679:3–11.) Nor did Wengler ever ask a supervisor or a guard whether they knew of staff vacancies. (ER 457 at 63:19–22; 453 at 45:9–46:4.) Wengler admitted that most housing units at ICC have three or fewer Correctional Officers, so a vacancy would be difficult to miss. (ER 453 at 45:18–46:4; *see also* ER 15 (finding, in District Court decision, that "[a] missing officer is more noticeable in this context than if one were trying to spot the missing officer in a prison layout with 20 mandatory floor officer posts in a single building").)

As the District Court noted, "Warden Wengler testified he did not check at any point in 2012 for vacancies 'specifically,' nor did he ever walk around the prison and compare the staff roster to the officers on required posts. (ER 17 (quoting ER 452 at 41:24–42:7).) When asked if he felt he met the expectations of his job when it came to filling the mandatory posts, Wengler testified that "to the extent of going back and checking more often on the people that were responsible for it, no." (ER 17 (quoting ER 474 at 131:10–13).) "[T]his responsibility to

check on mandatory staffing posts," the court determined, "falls higher than Wengler's subordinates; it falls on him, and it falls on CCA." (ER 17.)[3]

The evidence is clear, moreover, that Wengler and CCA officials not only bear responsibility for the vacancies, they also are culpable for the near-daily fabrications of official reports that concealed those vacancies. ICC's staffing logs were doctored virtually every day to make it appear that ICC was fully staffed. (ER 207, 213–333; 478 at 146:19–147:11; 374 at 471:9–17). Many of these falsified logs showed vacancies in mandatory posts right on their face, apparent to anyone who would examine them. (ER 374 at 471:18–472:1.) Over a dozen times in 2012, for instance, the three so-called "Warden's Utility" positions, specifically required by the Settlement Agreement, were documented as vacant. (ER 375 at 475:12–20; 181–203.) Many logs listed the same person as working two posts simultaneously, an obvious red flag. (ER 478 at 146:19–147:1; ER 204–333.)

Compelling testimony was provided by two former ICC employees, Juane Sonnier and Annette Mullen. Sonnier, a former Addictions Treatment Counselor at ICC, worked in a housing unit containing 96 prisoners. (ER 515 at 294:22–295:5; 517 at 301:4–5.) Three guards were assigned to that unit, but at least one and sometimes all three posts were vacant 70 to 80 percent of the time, and

[3] Both CCA's Managing Director and Warden Wengler conceded that they each had a responsibility to ensure that the mandatory posts were fully staffed. (*See* ER 500 at 234:20–235:7; 449 at 31:14–18 and 32:16–22.)

Sonnier feared for her safety as a result. (ER 515 at 296:9–15; 516 at 298:22–299:6 and 298:10–21; 517 at 301:4–5.) At least three times a week, there would be no Correctional Officer in sight to let Sonnier out when she needed to leave. (ER 516 at 300:12–23; 516 at 297:4–20; 515–516 at 300:24–301:5.) She frequently complained to her supervisors about the lack of staff but her complaints were ignored and she was asked not to report the problem any higher. (ER 517 at 302–304; 516 at 297:16–20; 519 at 310:18–311:8 and 312:4–20.)

Annette Mullen was employed at ICC for more than four years, first as a Correctional Officer and then promoted to a Correctional Counselor (equivalent to a Sergeant). (ER 521 at 319:6–22.) Mullen testified that ICC was understaffed nearly every day. (ER 521 at 319:7–11; 523 at 325:10–326:14; 359 at 412:3–413:12.) Mullen worked in the same 96-prisoner unit as Sonnier, and she, too, complained to her supervisors about the fact that mandatory guard posts were constantly vacant. (ER 523–526.) She even emailed CCA's "Ethics Hotline" to report persistent understaffing.[4] (ER 358 at 406:11–407:18.) The District Court found both Sonnier's and Mullen's testimony credible and expressly relied on it in its decision holding CCA in contempt. (ER 14–15.) "Mullen testified credibly,"

[4] Prior to Mullen's testimony, CCA claimed that no one from ICC had reported understaffing on CCA's Ethics Hotline. *See* Appellants' Replacement Opening Brief at 17 n.7. However, after Mullen testified that she had done so, CCA's counsel assured Judge Carter that he would check. (ER 358 at 407:12–18.) Notably, CCA's counsel introduced no evidence refuting Mullen's testimony.

the court found, "that she saw regular, glaring absences in 2012, and complained frequently to her superiors to try to fix the problem." (ER 14.) Staffing shortages at ICC were, the court noted from Mullen's testimony, "common knowledge at the prison." (*Id.*)

Mullen and Sonnier explained, based on their professional experience, why adequate staffing is important to deter violence at ICC. Prisoners behaved better when officers were present, Sonnier testified. (ER 520 at 316:4–12.) Mullen testified that officer presence resulted in less gang activity, less violence, and less injury when violence did occur. (ER 526 at 338:1–12, 339:6–17, and 339:19–340:6.) The supervisor of IDOC's Contract Prison Oversight Unit, with 24 years of experience at IDOC, and who issued a report in 2008 about excessive violence at ICC, agreed. (ER 366 at 441–444.) He testified that staff presence generally reduces the likelihood of violence. (ER 383 at 508:23–509:5.) CCA's own numbers bear this out: an internal ICC report, introduced into evidence by Appellees, showed that violence at the prison increased by 18 percent in 2012—the year that staff vacancies were rampant—compared to 2011. (SER 165, 172; ER 472 at 121:24–122:20.)[5]

[5] Oddly, in its opening brief on page 30, CCA claims that violence at ICC decreased from 2011 to 2012. Yet CCA's own records show an 18 percent increase, from 173 incidents to 205. (SER 165, 172.) As Wengler admitted in his testimony: "**Q.** So violence in 2012 went up, according to this document? **A.** That indicator there would say that, yes." (ER 472 at 122:18–20).

B. Thousands of Hours of Vacancies Occurred Just Prior to the Hearing

CCA's opening brief at page 21 states that in the spring of 2013, soon after CCA and IDOC issued their press releases, CCA adopted a remedial plan that required administrators at ICC to ensure that all mandatory posts were filled. (*See also* ER 415 at 634:6–15; 426 at 679:3–11; 405 at 595:24–597:11; 407 at 604:10–605:2 and 605:11–18). As part of this plan, CCA ordered staff at ICC to keep accurate records of vacancies in mandatory posts (ER 405 at 595:24–597:11).

The resulting documentation, which Appellees obtained in discovery, was extremely harmful to CCA. This documentation showed that even a month before the hearing—the most recent reports available—vacancies in mandatory posts ranged from 18 to 41 hours *every day*. (SER 1–131; ER 375–376 at 477:24–481:2; 377–378 at 485:4–487:22.) Indeed, staffing data that CCA provided to IDOC and an IDOC report analyzing that data suggest that there were 3,600 hours of vacancies in mandatory posts in the three months leading up to the contempt hearing. (ER 377–378 at 485:23–486:6; 378 at 486:21–488:21.) One CCA document showed that due to guard shortages, CCA had to shut down some mandatory posts just two weeks before the hearing. (ER 178; 393 at 547:1–9.) Thus, whatever remedial plan CCA had installed, it was woefully deficient.

C. The District Court Imposed Three Appropriate Civil Sanctions

The District Court found that CCA had violated the court-ordered settlement routinely, perhaps every single day since the September 20, 2011, order. (*See* ER 21 (expressing the court's "serious doubt that there was ever compliance with Paragraph 4").) Appellees proved that understaffing "has been a problem from the beginning of the settlement period . . . through to the present." (ER 16.) The problems were not merely ongoing, CCA had done next to nothing to rectify them, and the court found that they would probably take considerable time to resolve. (*Id.*)

The court imposed three appropriate civil sanctions in an effort to coerce CCA to fully comply with the Settlement Agreement in the future and to ensure that prisoners would receive the benefit of their agreement with CCA. First, the court established a schedule of fines for future violations. (No fines were imposed for any of the thousands of hours of violations that had occurred.) (ER 24.) Second, the court appointed an independent monitor who would report directly to the court regarding CCA's future compliance. (ER 23.) Lastly, the court extended the duration of the Settlement Agreement by two years. (ER 22.) These sanctions were appropriate, and indeed modest, given the scope and duration of CCA's breaches and CCA's efforts to conceal those breaches.

SUMMARY OF THE ARGUMENT

The parties could not have made it more clear that the District Court was to enforce their Settlement Agreement. Right in the Agreement itself, they said that the District Court judge "shall have authority to enforce the terms of this agreement in his capacity as a Federal District Court judge." (ER 643 at ¶ 15(C).) The District Court then expressly incorporated the parties' stipulation and the attached Settlement Agreement into its own order, dismissing the case "pursuant to" them. (ER 639.) The parties even included language in their Agreement from the Prison Litigation Reform Act that was only necessary for court-enforceable settlements and consent decrees. When the parties had a prior dispute about the Agreement, CCA went to the District Court, not a state court, to interpret the Agreement's terms.

The District Court's sanctions for CCA's failure to comply with the staffing requirements of the court-ordered settlement were prospective only. The prospective fines, independent monitoring of future compliance, and extension of the court's order did not punish CCA for anything in the past, but merely sought to coerce CCA to finally staff ICC at the safe, contractually required levels identified in the Settlement Agreement. The contempt, therefore, was a civil one, as there is no criminal aspect to those prospective remedies.

Finally, of course, CCA's violations of the staffing requirements were so constant (persisting from the very beginning of the settlement period), so massive (thousands upon thousands of hours of vacant, mandatory security posts, continuing right up to the contempt trial), and so avoidable (the warden and CCA headquarters officials never even checked to see if mandatory posts were going vacant) that the District Court's civil contempt finding was amply justified.

ARGUMENT

I. STANDARDS OF REVIEW

CCA appeals three rulings of the District Court. Each has a specific standard of review. First, CCA appeals the District Court's conclusion that the court retained jurisdiction to enforce the parties' Settlement Agreement. Jurisdiction is a question of law reviewed *de novo*. *Kirkland v. Legion Ins. Co.*, 343 F.3d 1135, 1140 (9th Cir. 2003) ("We review *de novo* whether the district court had jurisdiction to enforce the settlement agreement."); *see also Arata v. Nu Skin Int'l, Inc.*, 96 F.3d 1265, 1268 (9th Cir. 1996).

Second, CCA appeals the District Court's interpretation of the Settlement Agreement. A district court's interpretation of a federal decree is a question of law reviewed *de novo*. *Nehmer v. Veterans Admin.*, 284 F.3d 1158, 1160 (9th Cir.

2002) ("This court reviews *de novo* a district court's interpretation of a [federal] decree." (citing *Gates v. Gomez*, 60 F.3d 525, 530 (9th Cir. 1995).)[6]

Third, CCA appeals the District Court's finding that CCA committed a civil contempt of court when CCA, in virtually daily contravention of the Agreement, failed to fill thousands of hours of guard posts. The standard of review of a finding of civil contempt is abuse of discretion. *FTC v. EDebitPay, LLC*, 695 F.3d 938, 943 (9th Cir. 2012) ("We review a district court's civil contempt order for abuse of discretion."). A district court's underlying factual findings are reviewed for clear error. *Id*. (citing *FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999)).

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE KELLY SETTLEMENT AGREEMENT IS AN ENFORCEABLE FEDERAL COURT DECREE

In *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), the Court held that post-judgment enforcement of a settlement agreement "is more than just a continuation or renewal of jurisdiction, and hence requires its own basis for jurisdiction." *Id*. at 378. Some settlement agreements create enforceable federal decrees and are thus subject to the court's contempt powers, whereas others are

[6] This Court should defer to Judge Carter's interpretation of the Settlement Agreement, given that he facilitated the parties' three-day negotiations, consented to enforce the Agreement, and extensively monitored its implementation. *See Nehmer*, 284 F.3d at 1160 (explaining that where a district court has provided "'extensive oversight of the decree from the commencement of the litigation to the current appeal,'" the Ninth Circuit will "'give deference to the district court's interpretation'" of it (quoting *Gates*, 60 F.3d at 530)).

enforceable only in state court under state contract law. *See id*. at 382; *see also Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992). There are two methods, the Court explained, whereby a settlement agreement can become a federally enforceable decree. Enforcement jurisdiction may be furnished "by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." *Kokkonen*, 511 U.S. at 381.

The Ninth Circuit has found a number of settlement agreements to create federally enforceable decrees post-*Kokkonen*. *See, e.g.*, *Arata*, 96 F.3d at 1268; *Flanagan v. Arnaiz*, 143 F.3d 540 (9th Cir. 1998). In the case at bar, enforcement jurisdiction exists under both the "incorporation" and the "retention of jurisdiction" options. As the District Court explained, "[h]ere, the parties did both: they put a provision in the Settlement Agreement to retain the authority of the Court (Judge Carter) to adjudicate disputes, and they kept the Settlement Agreement as a filed court document, which they agreed to have the Court (Judge Lodge) incorporate into the Order of Dismissal." (ER 32–33.)

A. The "incorporation" option

After three days of negotiations, the parties signed two documents: a Settlement Agreement (ER 642–645) and a Stipulation for Dismissal (ER 640–641). The Stipulation unambiguously states in whole as follows:

> The parties to this Stipulation, by and through their attorneys of record, hereby stipulate and agree **that an order shall be entered dismissing this case with prejudice, pursuant to the Settlement Agreement attached as Exhibit A, which is hereby incorporated by the Court.** The parties have resolved the issue of attorney's fees and costs.

(ER 640–641 (emphasis added).) The Stipulation for Dismissal, with the Settlement Agreement attached to it, was then submitted to Judge Lodge. Judge Lodge issued an Order for Dismissal on September 20, 2011. (ER 639.) The Order states in whole as follows:

> The matter having come before the Court on stipulation between these parties filed in this matter; and the Court having found good cause;
>
> IT IS HEREBY ORDERED that the above-entitled action is **dismissed with prejudice, pursuant to the Stipulation of Dismissal, which is hereby incorporated by the Court.** The parties have resolved the issue of attorney's fees and costs.

Id. (emphasis added).

A stronger case under *Kokkonen*'s "incorporation" option could hardly be imagined. CCA *stipulated* to the entry of an order dismissing the case "pursuant to the Settlement Agreement." This Agreement was then attached to a Stipulation for

Dismissal, and the Stipulation was then "incorporated by the Court." This precisely tracks *Kokkonen*'s "incorporation" option for acquiring enforcement jurisdiction.

CCA makes a far-fetched argument. CCA points out that in *Kokkonen*, the Court stated that a district court acquires enforcement jurisdiction "by incorporating the terms of the settlement agreement in the order." 511 U.S. at 381. According to CCA, the court below failed to incorporate "the terms" of the Settlement Agreement when it attached the *entire* agreement to the order. *See* Appellants' Replacement Opening Brief at 41 (arguing that enforcement jurisdiction is lacking because the Order for Dismissal "did [not] expressly incorporate 'the terms' of the settlement agreement.")

The argument that a court must quote *haec verba* from a document rather than incorporate that document by reference "border[s] on the frivolous." *Dean v. Coughlin III*, 804 F.2d 207, 215 (2d Cir. 1986); *see also Cameron Int'l Trading Co. Inc., v. Hawk Importers, Inc.*, 501 Fed. App'x 36, 37 (2d Cir. 2012) (holding that district court satisfied the requirements of *Kokkonen* "when it so-ordered" the parties' agreement, without reciting its terms); *Ramirez v. Barclays Capital Mortg.*, No. CV F 10-1039 LJO SKO, 2010 WL 2605696, at *4 (E.D. Cal. 2010) ("[A] written instrument . . . may be pleaded in *haec verba* by attaching a copy as an exhibit and incorporating it by proper reference."); *James T. ex rel. A.T. v. Troy*

Sch. Dist., 407 F. Supp. 2d 827, 831 (E.D. Mich. 2005) (finding that the requirements of *Kokkonen* were met by the "incorporation of settlement terms by reference" to an attached document "incorporated into the [dismissal] order.").

Judge Carter correctly found that CCA "makes too much of 'terms' as a magic word." (ER 32.) It is a matter of hornbook law that "[w]here a writing refers to another document, that other document, or the portion to which reference is made, becomes constructively part of the writing, and in that respect the two form a single instrument." 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS, § 30:25 (4th. ed.). Here, the Stipulation referred to the Settlement Agreement, and thus when Judge Lodge incorporated the Stipulation, he incorporated both documents.

Settlement agreements and consent decrees in federal litigation are considered contracts and, as such, must be interpreted consistent with contract law of the states in which they were signed. *Jeff D. v. Otter*, 643 F.3d 278, 284 (9th Cir. 2011) ("The construction and enforcement of the consent decrees, where the parties are residents of Idaho and the underlying agreements were entered in that state, is governed by the contract law of Idaho as well as familiar contract principles."); *see also Gates*, 60 F.3d at 530 ("A consent decree is construed with reference to ordinary contract principles of the state in which the decree is signed."). The *Kelly* Settlement Agreement was signed in Idaho. Under Idaho

law, as soon as CCA and Appellees stipulated that the Settlement Agreement would be attached to the Stipulation for Dismissal, those two documents became one. *See Charpentier v. Welch*, 259 P.2d 814, 816 (Idaho 1953) ("[T]his court has held many times that where several instruments are executed at the same time as parts of one transaction, they are to be construed together as the whole contract between the parties."). Thus, under both Idaho and federal rules of interpretation, the Settlement Agreement was made part of the order of dismissal when the court incorporated the document to which the Agreement was attached.

CCA cites five cases in support of its argument that the *Kelly* Settlement Agreement fails the "incorporation" test. However, in none of these cases did the district court incorporate the parties' settlement agreement into its dismissal order. Rather, all five cases fully support (by factual comparison) Appellees' position in this appeal. *See O'Connor v. Colvin*, 70 F.3d 530, 532 (9th Cir. 1995); *Hagestad v. Tragesser*, 49 F.3d 1430, 1433 (9th Cir. 1995); *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002); *In re Phar-Mor, Inc. Securities Litigation*, 172 F.3d 270 (3rd Cir. 1999); and *Scelsa v. City of N.Y.*, 76 F.3d 37 (2d Cir. 1996). For instance, this Court held in *O'Connor*, that the district court lacked jurisdiction to enforce the parties' settlement agreement because nowhere in the court's order of dismissal was there an incorporation of the agreement. 70 F.3d at 532. Here, the reverse is true. Similarly, this Court held in *Hagestad*, that the district court lacked

jurisdiction to enforce the parties' settlement agreement because "the Dismissal neither expressly reserves jurisdiction nor incorporates the terms of the settlement agreement." 49 F.3d at 1433. However, the Court also stated that "[t]he situation would be quite different" had the district court incorporated the agreement in its order of dismissal. *Id*. The instant case presents that "quite different" situation.

CCA also relies on *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002), *In re Phar-Mor, Inc. Securities Litigation*, 172 F.3d 270 (3rd Cir. 1999), and *Scelsa v. City of N.Y.*, 76 F.3d 37 (2d Cir. 1996). *See* Appellants' Replacement Opening Brief at 40–42. However, those cases stand for the principle that merely referencing—without incorporating—a settlement agreement in an order of dismissal is insufficient to confer enforcement jurisdiction. That shortcoming is not present here. Thus, Judge Carter was correct when he interpreted the Settlement Agreement as being federally enforceable under *Kokkonen*'s "incorporation" option.

B. The "retention of jurisdiction" option

A second, independent ground for federal enforcement of the *Kelly* Settlement Agreement is the fact that the District Court retained jurisdiction to enforce the decree. Paragraph 15 of the Settlement Agreement creates a three-step dispute resolution process. The first step requires Plaintiffs (Appellees herein) to notify CCA "in writing of the specific grounds and facts upon which Plaintiffs

allege non-compliance with identified provisions of the agreement," after which a meeting will occur between counsel. (ER 642–645 at ¶15.) "If the dispute remains unresolved," the parties proceed to the next step, in which they "meet with the ADR Coordinator for the US District Court for the District of Idaho within three (3) business days to attempt to resolve the dispute." (*Id*.) "If the dispute remains unresolved" after this meeting, the parties proceed to the final step: Plaintiffs "shall submit the dispute to the Honorable David O. Carter, who shall have authority to enforce the terms of this agreement *in his capacity as a Federal District Court Judge*." (*Id*. (emphasis added).)

There is no way to reasonably interpret Paragraph 15 of the Settlement Agreement other than to conclude that the district court retained jurisdiction to enforce the Settlement Agreement. As Judge Carter noted, the parties stipulated "to authority vested in the Court to enforce [their] promises." (ER 34); *see also* ER 31 (noting that the parties agreed to have Judge Carter enforce the agreement "not merely as an arbitrator, but as 'a Federal District Court Judge.'").) Similarly, Judge Lodge, who signed the Order for Dismissal, has interpreted his action as retaining enforcement jurisdiction. (*See* ER 593–94 ("The Court has retained post-dismissal jurisdiction over this case.").)

Here, as in *Nehmer v. U.S. Dept. of Veterans Affairs*, 494 F.3d 846, 861 (9th Cir. 2007), "the plain language" of the Agreement stipulates to ancillary

jurisdiction. *See also Flanagan*, 143 F.3d at 545 (holding that where, as here, the district court incorporated into its dismissal order the parties' agreement to present their dispute to the district court, the court acquired exclusive jurisdiction to resolve any such disputes). Therefore, Judge Carter was correct in holding that the Settlement Agreement is federally enforceable under *Kokkonen*'s "retention of jurisdiction" option.

C. Additional Compelling Evidence: The PLRA Provision

The first numbered paragraph in the *Kelly* Settlement Agreement contains the following pregnant passage: "The parties stipulate that the terms of this agreement extend no further than necessary to satisfy the requirements of 18 U.S.C. § 3626(a)(1)(A)." (ER 642–645 at ¶ 1.) Section 3626(a)(1)(A) is a provision of the Prison Litigation Reform Act ("PLRA"). The parties' invocation of § 3626(a)(1)(A) of the PLRA is compelling evidence that the Settlement Agreement is an enforceable federal decree.

The PLRA describes two methods by which prison officials can settle a lawsuit filed against them by a prisoner: a "consent decree" or a "private settlement agreement." *See* 18 U.S.C. §§ 3626(c)(1) and (2) (respectively). A consent decree is federally enforceable. *See id.* § 3626(c)(1). A private settlement agreement, on the other hand, is limited to remedies "available under State law." *Id.* § 3626(c)(2); *see also* § 3626(g)(6) (defining a "private settlement agreement" as "an

agreement entered into among the parties that is not subject to [federal] judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled").

A federal court must make certain findings if it wishes to create a consent decree. Section 3626(c)(1) states: "(1) Consent decrees.—In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a)." Subsection (a) states in relevant part: "The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id.* § 3626(a)(1)(A).

As Judge Carter explained, the fact that the parties invoked § 3626(a)(1)(A) and *not* § 3626(c)(2) or § 3626(g)(6) is compelling evidence that the Settlement Agreement is federally enforceable. (ER 34–35.) This invocation would make no sense unless the parties intended to create a federally enforceable decree. Indeed, CCA makes an admission against interest in this regard. On pages 45–46 of its brief, CCA explains why the Settlement Agreement invokes § 3626(a)(1)(A): "The purpose of this provision, however, was to limit the extent of any relief afforded in the event of a breach." Thus, CCA sought to benefit from the PLRA. Yet the

PLRA's limitation on relief applies only to agreements that are federally enforceable in the first place; the only remedies available in the event of a breach of a private settlement agreement are those "available under State law." *Id.* § 3626(c)(2). Therefore, the Agreement's invocation of § 3626(a)(1)(A) is compelling evidence that the Settlement Agreement is federally enforceable.

D. Additional Compelling Evidence: The 12/16/11 Minute Order

A few weeks after the Settlement Agreement was signed, Appellees' counsel Stephen Pevar asked counsel for CCA, Kirtlan Naylor, for copies of certain documents that CCA was required by the Agreement to create. Mr. Naylor asked Judge Carter whether CCA had any duty to supply documents to Mr. Pevar in addition to supplying them to the court monitor. Judge Carter responded on December 16, 2011, by issuing a Minute Order entitled "Clarifying Terms of Settlement Agreement." (ER 636–637.) Judge Carter stated: "It was not the intent of the Court for any of the other attorneys, including Dan Struck [a CCA attorney] or Stephen Pevar, to be directly or indirectly involved in the monitoring." (ER 636.)

Judge Carter's Minute Order is significant in this context for three reasons. First, the very fact that CCA solicited a ruling from Judge Carter demonstrates that CCA viewed the Settlement Agreement as enforceable by Judge Carter. Had CCA

viewed the Settlement Agreement as a *private* agreement, CCA would have sought an interpretation from an Idaho state court.

Second, the fact that Judge Carter resolved CCA's inquiry on the merits demonstrates Judge Carter's understanding that the Settlement Agreement was an order of the court and not just a private contract. Lastly, the Minute Order illustrates the extent to which Judge Carter was actively involved in monitoring the Settlement Agreement from its inception. This is relevant in considering whether to defer to Judge Carter's interpretation of the Agreement as creating a federally enforceable decree. *See Nehmer*, 284 F.3d at 1160; *Gates*, 60 F.3d at 530.

In sum, the Settlement Agreement is federally enforceable based on four irrefutable facts. First, the parties attached the Agreement to the Stipulation for Dismissal, stipulated that both documents would be "incorporated by the court," and the court's Order for Dismissal incorporated the Stipulation. (ER 639–641.) Second, the Settlement Agreement authorizes Judge Carter to resolve disputes "in his capacity as a Federal District Court Judge," thus consenting to retention of jurisdiction. (ER 643 at ¶ 15(C).) Third, the Settlement Agreement invokes § 3626(a)(1)(A), a statute this is relevant only to federally enforceable decrees. Lastly, two months after signing the Settlement Agreement, CCA requested a clarification from Judge Carter—and not from an Idaho state court—as to the

construction of the parties' Agreement, thereby evidencing CCA's understanding that Judge Carter retained enforcement jurisdiction.

Judge Carter, who was intimately familiar with the purpose and scope of the Settlement Agreement, determined that the Agreement is federally enforceable under both *Kokkonen* options. Judge Carter's determination should be affirmed.

III. CCA COMMITTED A CONTEMPT OF COURT

After receiving extensive briefing and conducting a two-day evidentiary hearing, Judge Carter concluded that CCA was "in civil contempt of the Settlement Agreement." (ER 3–4.) The standard of review of a finding of civil contempt is abuse of discretion. *FTC v. EDebitPay, LLC*, 695 F.3d at 943. A district court's underlying factual findings are reviewed for clear error. *Id.*; *see also Affordable Media*, 179 F.3d at 1239. Here, then, the findings made by Judge Carter are entitled to deference and can only be disturbed if they are clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

As in all other civil proceedings, the plaintiff in a civil contempt proceeding under Rule 70 has the initial burden of proof. The plaintiff must (1) identify a court order that creates a specific and definite duty on the defendant, and (2) demonstrate by clear and convincing evidence that the defendant failed to perform that duty. The burden then shifts to the defendant to prove an inability to comply. *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002) ("'The standard for finding a

party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply.'" (quoting *Affordable Media*, 179 F.3d at 1239)); *see also Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992); *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987) ("[A] party can escape contempt by showing that he is unable to comply."); *N.L.R.B. v. Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9th Cir. 1973) ("the respondent must show 'categorically and in detail' why he is unable to comply." (citation omitted)).

A defendant can prove an inability to comply by showing that it took "all the reasonable steps within its power to insure compliance." *Hook v. Arizona Dept. of Corrections*, 107 F.3d at 1403 (9th Cir. 1997) (quoting *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 403–04 (9th Cir. 1976)); *see also In re Crystal Palace*, 817 F.2d at 1365. The defendant must prove that it made a "conscientious effort" to fulfill its duties. *Stone*, 968 F.2d at 857 (quoting *Sekaquaptewa*, 544 F.2d at 406).

In a civil contempt proceeding, unlike a criminal contempt proceeding, the defendant's subjective intent is immaterial, and good faith is therefore not a defense. The civil plaintiff need not prove that the defendant's failure to comply

was willful or intentional. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1948); *Stone*, 968 F.2d at 856 ("Intent is irrelevant to a finding of civil contempt and, therefore, good faith is not a defense."); *In re Crystal Palace*, 817 F.2d at 1365 (holding that the defendant's proffered good faith defense to a civil contempt action "has no basis in law").

Here, Appellees easily satisfied their burden of proof. First, they identified a court order that creates specific and definite duties that CCA must perform. Paragraph 4 of the *Kelly* Settlement Agreement states in unambiguous terms:

> CCA will agree to comply with the staffing pattern pursuant to CCA's contract with the Idaho Department of Correction ("IDOC"). In addition, CCA agrees to increase the staffing pattern to include a minimum of three additional correctional officers to be utilized at the discretion of the warden to enhance the overall security of the facility.

(ER 642 at ¶ 4.) CCA's contract with IDOC identifies the number of correctional officers that must be assigned each shift at ICC and where they must be assigned. (SER 125–164.) These are the "mandatory posts." (ER 367–369 at 445:8–453:18.) Paragraph 4 of the Settlement Agreement also requires CCA to hire three additional officers to enhance security. (ER 642.) Thus, Paragraph 4 sets forth a specific and definite duty. CCA does not contend otherwise.

Next, Appellees proved by clear and convincing evidence that CCA substantially violated their duties under Paragraph 4. CCA's own admissions prove that CCA violated Paragraph 4 thousands of times and that, to the best of

CCA's knowledge, these violations likely occurred *every single day* and "lasted nearly as long as the duration of the Settlement Agreement." (ER 22.)

The evidence, Judge Carter concluded, "clearly and convincingly shows Defendants' failure to comply with the Settlement Agreement" because CCA "regularly fell short of their obligation to staff positions that are mandatory under their contract with the Idaho Department of Correction (IDOC)." (ER 4–5.) CCA's failure to comply was "persistent," the District Court found, "along with a pattern of CCA staff falsifying rosters to make it appear that all posts were filled." (ER 4.) The District Court concluded that CCA's repeated violations constituted a material breach of the court order, holding that "Defendants have deprived Plaintiffs of a key provision of the Settlement Agreement, one that Defendants promised to meet, and that was bargained for as a condition of resolving this case." (ER 4.) The District Court further found that "there is an element of willfulness from higher ups in (1) not verifying compliance with the Settlement Agreement when they had ample reason to do so, . . . and (2) not fixing record-keeping problems when they promised to, and when the harm (multiple posting) had already been raised [by IDOC]." (ER 23.)

CCA makes two challenges to the District Court's contempt ruling. First, CCA argues that even if CCA persistently, flagrantly, and substantially violated Paragraph 4, it does not matter. All that matters, CCA argues, is whether these

repeated breaches of the court order increased the level of violence at ICC. *See* Appellants' Replacement Opening Brief at 55 (arguing that the Ninth Circuit should reverse the decision below because "all of the evidence presented at the contempt hearing displayed [that] the intent of the Settlement Agreement—to eliminate inmate assaults—was not affected *by the breach*." (emphasis added)).

Appellees have two responses to this contention. First, CCA would have this Court abandon the well-settled test of civil contempt and fashion an entirely new test that *completely ignores* whether a defendant repeatedly and substantially violated a specific and definite court order. Under CCA's test, a defendant can make numerous promises, breach all of them, and then require the victim to prove that those violations undermined some overarching goal of the settlement. As Judge Carter explained in rejecting CCA's argument below, CCA "overly simplifies the relief Plaintiffs sought, and it ignores that the Settlement Agreement makes clear what is a significant breach. Defendant CCA agreed to 'comply with the staffing pattern' in its contract with IDOC and to add three correctional officers. *That is not a qualified commitment;* it does not provide the sort of leeway that CCA now seeks." (ER 19–20 (emphasis added).)

What this Court stated in *In re Bennett* bears repeating: "'The standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a

specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply.'" 298 F.3d at 1069 (quoting *Affordable Media*, 179 F.3d at 1239). Thus, CCA makes a fundamental error in claiming that it must be exonerated—despite violating Paragraph 4 of the Settlement Agreement thousands of times and then lying about it—unless Appellees can prove that CCA's numerous breaches increased the level of violence at ICC.[7] CCA's new test must be rejected.

Second, even if proof of increased violence is necessary—which it is not—CCA would still lose. CCA's internal records, which Appellees introduced during the contempt hearing, shows that the level of violence increased from 2011 to 2012 *by 18%*. (SER 165, 172 (recording 173 incidents of violence in 2011 and 205 incidents in 2012); ER 472 at 121:24–122:20.) As Warden Wengler conceded at trial, "violence in 2012 went up." (ER 472 at 122:18–20.)[8]

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[7] If this Court were to adopt CCA's new test, it would render the entire Settlement Agreement unenforceable. For instance, Paragraph 6 of the Agreement requires CCA to "comply with IDOC Standard Operating Procedure ('SOP') with respect to inmate discipline." CCA would now be free to violate Paragraph 6 with impunity because Appellees could never prove that failing to comply with the SOP caused an increase in prisoner violence.

[8] Thus, CCA's claim that violence was unaffected by these staffing shortages is contrary to the evidence. It also defies logic. Every court to consider the question has recognized that adequate staffing of a prison deters violence. *See Lemire v. California Dept. of Corrections and Rehabilitation*, 726 F.3d 1062, 1076 (9th Cir. 2013); *Lopez v. LeMaster*, 172 F.3d 756, 761-62 (10th Cir. 1999). The person in charge of IDOC's supervision of ICC testified similarly. ER 383 at 508:23–509:5.

As *In re Bennett* makes clear, CCA's argument is erroneous at its core. Appellees bargained for, and CCA agreed to provide, a certain number of guards on duty. Therefore, CCA's actions must be judged solely on whether CCA took all reasonable steps to ensure that the guards mandated by Paragraph 4 were where they were supposed to be.

CCA claims, as its second argument, that CCA took all reasonable steps to comply with Paragraph 4. The undisputed facts prove otherwise. Indeed, the following admission from Warden Wengler is dispositive:

> **Q.** Was there anything that prevented you from complying with the Court Order?
> THE COURT: Answer the question.
> THE WITNESS [Warden Wengler]: No, sir.

(ER 451 at 39:14–17.)

Wengler's conclusion in this regard is certainly correct. As discussed earlier, CCA failed to take the following five easy reasonable steps, any one of which could have resulted in CCA fully compling with its Paragraph 4 obligations:

1. Not once did Defendant Wengler tour ICC specifically looking for vacancies in mandatory posts. (ER 452 at 41:24–42:7; 474 at 131:10–13.)

Placing vulnerable prisoners within reach of violent prisoners without staff protection would allow "the state of nature [to] take its course." *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

2. At no time did Wengler ask officers who worked in the housing units if they were aware of vacancies in mandatory posts on their units. (ER 457 at 63:19–22; 453 at 45:9–46:4.)

3. Wengler did not train or instruct his staff to notify him when they observed a vacant mandatory post. (ER 426 at 679:3–11.)

4. Wengler failed to hire as many guards as he was authorized to hire. (ER 16 (citing SER 173–180); ER 470 at 113:7–116:8.)

5. Wengler was aware that there were so few guards, ICC constantly needed to fill mandatory posts with case managers and supervisors. Yet he did not take effective corrective action. (ER 466 at 99:25–100:3; ER 339; 467 at 102:18–103:4; 468 at 106:13–17; 508 at 267:12–23; 508–509 at 268:17–269:4; 509 at 269:10–20; ER 334; ER 339; ER 336–338; ER 423 at 666:3–17; ER 506–507 at 260:10–263:20.)

On numerous occasions, the Ninth Circuit has affirmed findings of civil contempt where, as here, a defendant failed to take one or more reasonable steps to comply with a court order, even where the defendant had made some effort to comply. *See Hook*, 107 F.3d at 1403 (affirming civil contempt where defendant "did not demonstrate he took all the steps he could to avoid violating the district court's orders"); *N.L.R.B. v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1419 (9th Cir. 1994) (similar); *Stone*, 968 F.2d at 853-54 (affirming city's civil contempt for

failing to reduce the population of its jail as required by a court order, despite the city's creation of a remedial plan and some implementation of it, due to the city's failure to prove it had taken all reasonable steps to comply); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1479 (9th Cir. 1992) (affirming civil contempt where defendant made no "affirmative showing" that it had taken all reasonable steps to comply with the court order); *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1146-47 (9th Cir. 1983) (similar); *Sekaquaptewa*, 544 F.2d at 404 (affirming civil contempt where the efforts to comply undertaken by the defendant proved "ineffective" and other reasonable steps were not taken).

CCA contends that the Ninth Circuit should excuse their repeated and prolonged violations of the Settlement Agreement based on *Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885 (9th Cir. 1982). CCA's reliance on *Vertex* is misguided. The plaintiff in *Vertex* sought to hold the defendant in contempt of court based on "only one violation" of the order that was cured as soon as the defendant became aware of it. *Vertex*, 689 F.2d at 892. Here, in sharp contrast, Appellees have proven (1) that CCA breached the court order thousands of times on virtually a daily basis for twenty months, (2) that these violations persisted months after IDOC's April 2013 press release and even continued to occur after the contempt motion was filed, (3) that there were many reasonable steps CCA could have taken to comply with the court order that were not taken,

and (4) that these violations were substantive, not technical. Thus, CCA did not engage in anything remotely akin to the single violation at issue in *Vertex*, nor did CCA fix the breach with anything approaching the speed and finality as the defendant in *Vertex*.

Appellees met their burden of proof in the district court. CCA failed to meet theirs. Appellees demonstrated by clear and convincing evidence that Paragraph 4 of the Settlement Agreement sets forth a specific and definite duty that CCA repeatedly violated. CCA failed to prove that Warden Wengler and other CCA administrators took all reasonable steps to comply with Paragraph 4. Accordingly, Judge Carter's decision finding CCA in civil contempt should be affirmed.

IV. THE SANCTIONS IMPOSED BY THE DISTRICT COURT WERE APPROPRIATE CIVIL SANCTIONS, NOT CRIMINAL SANCTIONS

Every federal court has the inherent authority to protect the integrity of its orders and provide an effective remedy to the victim of contumacious misconduct. This is true of orders based on the consent of the parties. "Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, that decree may be enforced." *Frew v. Hawkins*, 540 U.S. 431, 432 (2004); *see also Rufo*, 502 U.S. at 381; *Nehmer*, 494 F.3d at 860; *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986). A federal court may "grant the relief that is necessary to effect compliance with its decree." *McComb*, 336 U.S. at 193–94. "District courts have broad equitable power to order appropriate

relief in civil contempt proceedings," and the remedies they deem necessary will be overturned only for abuse of discretion. *SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003); *see also Shuffler v. Heritage Bank*, 720 F.2d at 1148.

Appellees were already investigating allegations that CCA was violating Paragraph 4 when IDOC confirmed in its April 11, 2013 press release (ER 342) that CCA had committed thousands of hours of such violations during a seven-month span in 2012. Two months after IDOC's press release, after conducting further investigations and securing affidavits from one former and two current ICC employees, Appellees filed a Rule 70 motion to hold CCA in civil contempt based on material violations of Paragraph 4. (ER 616–633).

Throughout the proceedings below, Appellees identified this case as seeking only civil (and not criminal) contempt, and it was clear to Judge Carter that this was the only question at issue. (*See* ER 8 (noting that civil contempt "is the only form of contempt at issue here"); ER 27 ("Plaintiffs seek a hearing and discovery on whether Defendant Corrections Corporation of America (CCA) should be held in civil contempt for violating the Settlement Agreement.").)

CCA claims, however, that "[t]he contempt finding was criminal in nature." Appellants' Replacement Opening Brief at 47. CCA further claims that because the proceedings were "criminal in nature," Judge Carter was required to apply the "beyond a reasonable doubt" burden of proof applicable to criminal contempt

proceedings rather than the "clear and convincing" burden applicable to civil contempt proceedings. (*Id*. at 47-51.)[9]

Whether contempt is civil or criminal turns on the "character and purpose" of the court's sanction. *Int'l Union, United Mine Workers of America v. Bagwell,* 512 U.S. 821, 827 (1994); *see also United States v. Powers*, 629 F.2d 619, 627 (9th Cir. 1980) ("The difference between criminal and civil contempt is in the intended effects of the court's punishment.") If the purpose of the sanction is to punish the contemnor, the contempt is criminal, whereas if the purpose of the sanction is either to coerce compliance in the future or compensate the victim, the contempt is civil. Criminal contempt is punitive; civil contempt is remedial. As the Supreme Court has explained:

> Criminal contempt sanctions are punitive in nature and are imposed to vindicate the authority of the court. *United States v. Mine Workers*, 330 U.S. 258, 302 (1947). On the other hand, sanctions in civil contempt proceedings may be employed "for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *Id*. at 303-04.

Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 443 (1986). Similarly, the Ninth Circuit has stated:

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[9] "In a civil contempt action the proof of the defendants' contempt must be clear and convincing, a higher standard than the preponderance of the evidence standard in most civil cases, but less than the beyond the reasonable doubt standard of criminal contempt proceedings." *United States v. Powers*, 629 F.2d 619, 626 n.6 (9th Cir. 1980) (citing *United States v. Rizzo*, 539 F.2d 458 (5th Cir. 1976)); *see also In re Bennett*, 298 F.3rd at 1069.

> Whether contempt is criminal or coercive civil is determined by the purpose of the sanction. If the sanction is intended to punish past conduct, and is imposed for a definite amount or period without regard to the contemnor's future conduct, it is criminal. If the sanction is intended to coerce the contemnor to comply with the court's orders in the future, and the sanction is conditioned upon continued noncompliance, it is civil.

Richmark Corp., 959 F.2d at 1481.

An obvious example of a civil sanction is a predetermined fine that the court announces it will impose for any future noncompliance. An obvious example of a criminal sanction is a fixed fine that the contemnor cannot avoid or purge. *See Bagwell*, 512 U.S. at 829 ("Thus, a 'flat, unconditional fine' totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance." (quoting *Penfield Co. of Cal. v. SEC*, 330 U.S. 585, 588 (1947)).

In fashioning an appropriate remedy, federal courts should take into account "the character and magnitude" of the violation. *United Mine Workers*, 330 U.S. at 304; *General Signal Corp.*, 787 F.2d at 1380. The magnitude of CCA's violations of the Settlement Agreement was seismic, both with respect to the *duration* of those violations (from virtually the inception of the Settlement Agreement and lasting twenty months) and its *scope* (thousands of hours of vacant posts), during which time employees of CCA *lied* about the number of guards on duty.

Judge Carter imposed three sanctions. Given the character and magnitude of CCA's violations of the court order, the sanctions imposed were entirely appropriate and, if anything, restrained. The three sanctions were (1) predetermined fines for future noncompliance, (2) extension of the Settlement Agreement for two more years, and (3) appointment of a compliance monitor at CCA's expense. All three sanctions were remedial.

1. The Fines for Future Noncompliance were an Appropriate Civil Sanction

Judge Carter created a schedule of predetermined fines in the event that CCA continued to violate Paragraph 4 of the Settlement Agreement:

> The Court rules as follows: Any vacant mandatory post hours over 12 hours (the duration of one shift) in one month will lead to a fine of $100 per hour over that 12th hour. The Court's decision is based on a principle of escalating sanctions if a lower amount does not work. If CCA continues to fall short of the staffing requirements, it should expect to see escalating fines in the future.

(ER 24.) Notably, no fine was imposed on CCA for the thousands of hours of violations that had occurred in the past.

Where, as here, a fine "is conditioned upon continued noncompliance, it is civil." *Richmark Corp.*, 959 F.2d at 1481. Judge Carter did not impose a flat or unconditional fine, and thus he did not impose a criminal fine. *See Bagwell*, 512 U.S. at 829; *Richmark Corp.*, 959 F.2d at 1481.

At least five decisions of the Ninth Circuit are directly on point. *See Koninklijke Philips Electronics N.V. v. KXD Technology, Inc.*, 539 F.3d 1039, 1042 (9th Cir. 2008) (rejecting a contemnor's claim that a fine of $10,000 per day for any future violation was a criminal sanction due to the fact that "the defendants could avoid the fine by complying with the terms of the injunction."); *Stone*, 968 F.2d at 856 (affirming "sanctions of $300 per day per inmate for each day after January 1, 1992 that the City violated the order" on the grounds that the defendants could avoid the fines by compliance, and noting that a district court has "wide latitude" in fashioning a remedy); *Richmark Corp.*, 959 F.2d at 1481 (rejecting the contemnor's claim, similar to CCA's here, "that the contempt sanction against it, although nominally a coercive civil sanction, was really criminal in nature" where the fine would be imposed only for continued noncompliance); *Hook*, 107 F.3d at 1400, 1404 (affirming "a coercive fine of $10,000 per day for future noncompliance"); *A-Plus Roofing*, 39 F.3d at 1419 (upholding a fine of "$500 per day for future violations"). Not one of these cases is cited in CCA's brief.

CCA contends that "[t]he $100 per vacant hour sanction" imposed by Judge Carter is "inflated" and "punitive." (Appellants' Replacement Opening Brief at 49.) CCA, however, can avoid incurring any monetary fine by complying with the court order. That makes the sanction civil and not criminal, as the five cases cited above make clear. As Judge Carter stated, if CCA is assessed a fine for future

misconduct, "CCA has no one to blame but itself." (ER 24 at n.27.)[10] Thus, the predetermined fines Judge Carter scheduled in the event that CCA continued to violate the Settlement Agreement are coercive and remedial, not punitive.[11]

2. Extending the Agreement for Two Years Was an Appropriate Civil Sanction

The *Kelly* Settlement Agreement was set to expire on September 20, 2013, two years from the date of its enactment. (*See* ER 644 at ¶ 16.) It would have been patently unfair to the Appellees, however, if the Agreement expired on that date, given that CCA had violated the Agreement for virtually its entire existence and had concealed those transgressions by lying about the number of guards on duty, thus preventing Appellees from seeking relief for those violations any sooner.

Judge Carter concluded that in order for Appellees to receive the benefit of their bargain with CCA, the Settlement Agreement needed to be extended for two more years. As the Court explained:

> The Court agrees with Plaintiffs that they have not received a key provision of the Settlement Agreement, and that this failure has lasted nearly as long as the duration of the Settlement Agreement. . . . The Court rejects Defendants' contentions that the most

[10] The Ninth Circuit has stated that in setting a coercive civil fine, "the district court should ordinarily take [the contemnor's] financial position into account." *Richmark Corp.*, 959 F.2d at 1481. Given CCA's yearly profits in the millions, the fines imposed by Judge Carter are modest. In any event, what is dispositive is that CCA can avoid the fines by complying with the court order.

[11] This Court can take judicial notice of the fact that, as the district court's docket reflects, CCA has not had to pay one penny in fines. Thus, the coercion worked.

> significant problems occurred within seven months, and thus only a seven-month extension would be appropriate. . . . The evidence outlined above makes clear [and] this Court concludes the vacancies extended well beyond the seven month period, and that one reason the truth is hard to find is that Defendant kept records that obscured who was working at what posts and at what times. . . . For the above reasons, the Court finds that this [two-year] extension narrowly draws the proposed relief to correct the violation.

(ER 22–23.)

The Supreme Court has held that a federal court has the inherent authority to modify a court order, including one based on consent of the parties, due to changed circumstances, and to impose additional obligations on the defendant in order to ensure implementation of the order. *Rufo*, 502 U.S. at 384; *see also United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); *Hook*, 120 F.3d at 924 (citing *Rufo* and holding that a consent decree may be modified due to changed circumstances).

One of the most frequent modifications federal courts make is to extend the deadline of a court order based on a finding that the defendant had not fulfilled, or cannot fulfill, its obligations prior to expiration of the order. *See Thompson v. U.S. Dept. of Hous. & Urban Dev.*, 404 F.3d 821, 827 (4th Cir. 2005); *David C. v. Leavitt*, 242 F.3d 1206, 1212 (10th Cir. 2001); *Holland v. New Jersey Dep't of Corr.*, 246 F.3d 267, 283-84 (3d Cir. 2001); *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1019-20 (6th Cir. 1994); *see also Labor/Cmty. Strategy Ctr. v. Los Angeles County Metro. Transp. Auth.*, 564 F.3d 1115, 1123 (9th Cir. 2009) (holding that a federal court has the authority to extend a deadline but

affirming the district court's decision not to exercise that authority because the defendant demonstrated that it had "complied fully with its numerous obligations under the decree").

As just noted, the District Court concluded that Appellees have yet to receive a key provision of the Settlement Agreement. This conclusion is well supported by the facts. Accordingly, extending the deadline of the Agreement to enable Appellees to obtain the benefit of their bargain was well within the latitude of civil remedies available to the court.[12]

3. <u>Appointing a Monitor was an Appropriate Civil Sanction</u>

"Federal courts repeatedly have approved the use of special masters to monitor compliance with court orders and consent decrees." *Stone*, 968 F.2d at 859 n.18 (citations omitted). In *Stone*, this Court affirmed the appointment of an independent monitor "to investigate, report, and recommend actions the City should take to ensure compliance" with a consent decree after jail officials had been accused of violating a consent decree. *Id.* at 852.

After finding that CCA had engaged in twenty months of contemptuous conduct, during which time CCA lied about and sought to cover up their violations, Judge Carter determined that an independent monitor should be appointed to assure CCA's future compliance. Due to the degree to which CCA had successfully

[12] As it turns out, CCA's contract to operate ICC was not renewed by Idaho and CCA will be leaving ICC on June 30, 2014.

concealed their breaches in the past and the number of tasks required to adequately monitor CCA's efforts in the future, Judge Carter determined that an independent monitor who would report directly to the court was essential. Judge Carter explained:

> The Court agrees with Plaintiffs that an independent monitor is an appropriate resolution here. Checking compliance necessarily involves examining a set of staffing rosters, going over time-entry records, and other random audit methods (such as in-person checks). . . . This duty is most fairly handled by a monitor with a direct obligation to this Court and to the terms of the Settlement Agreement.

(ER 23.)

Appointing an independent monitor to assess CCA's compliance was well within the latitude of Judge Carter's discretion. *See Stone*, 968 F.2d at 859 n.18; *Hoptowit v. Ray*, 682 F.2d 1237, 1263 (9th Cir. 1982) (affirming the use of a special master in prison litigation to confirm compliance with a court order). CCA could not be trusted to monitor itself. Although a state agency, IDOC, had oversight responsibilities, CCA has found it easy to pull the wool over IDOC's eyes. Besides, the court, not IDOC, is responsible for ensuring CCA's compliance with the Settlement Agreement. It was therefore not an abuse of discretion to appoint a qualified monitor.

4. CCA's Additional Argument Lacks Merit

CCA claims that during the two-day contempt hearing, "[b]oth Plaintiffs and the Settlement Judge focused—if not dwelled—on conduct that was not a breach of the Settlement Agreement, including general allegations of 'inadequate staffing' or 'staffing challenges,' lax record keeping, filling mandatory security posts with supervisors and case managers (who had the requisite security training), not conducting a broader staffing investigation, and not including more details of its findings in its press release." (Appellants' Replacement Opening Brief at 49.) Appellees' response to this argument is two-fold.

First, every one of the issues flagged by CCA materially relates to compliance with Paragraph 4 of the court-ordered settlement. In order to determine whether CCA took all reasonable steps to fill the mandatory posts and to determine an appropriate remedy, it was necessary to examine CCA's record keeping (which indeed was lax), explore any challenges CCA faced in hiring and maintaining staff, determine how frequently CCA assigned supervisors and case managers to fill security posts, determine whether CCA failed to conduct reasonable internal investigations that would have revealed ICC's massive staffing shortages, and determine if CCA can be trusted to self-report the truth. Therefore, if Appellees and Judge Carter "dwelled" on those subjects, they did so for good

reason. Indeed, had CCA dwelled on those subjects during 2012 and taken appropriate remedial action, the contempt motion would have been unnecessary.

Second, and more importantly, CCA's argument misses the point. The issue on appeal is whether Appellees have shown that CCA violated a specific and definite court order and, if so, whether CCA then proved it was unable to comply. *See In re Bennett*, 298 F.3d at 1069. CCA seeks to divert the Court's attention away from the issue on appeal for an obvious reason.

CCA deserved to be held in contempt of court after committing thousands of violations of the court order. The three civil sanctions imposed by Judge Carter were well within the court's wide latitude of discretion for CCA's flagrant, persistent, and substantial violations.

CONCLUSION

The decision below should be affirmed.

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Date: June 4, 2014

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on June 6, 2014.

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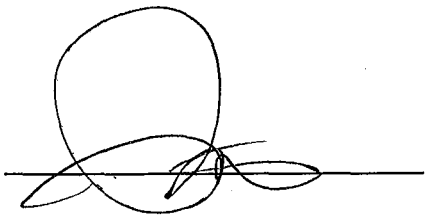

Date: 6/6/2014

STATEMENT OF RELATED CASES

Another case also called *Kelly v. Wengler* is pending before this Court under No. 14-35199. That case is an appeal from the District Court's award of attorneys' fees to the appellees, after they prevailed by having CCA held in contempt for its rampant understaffing at ICC. CCA's opening brief in that case is currently due on June 23, 2014.