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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Shawn Jensen, et al.,
Plaintiffs,
v.
Richard Pratt, et al.,
Defendants.

No. CV-12-00601-PHX-ROS
ORDER

In February 2015, the Court accepted the parties’ “Stipulation” as a fair, reasonable, adequate settlement under Federal Rule of Civil Procedure 23(e)(2). The Stipulation contemplated a specific period of monitoring and possible enforcement. Over the past six years, Defendants have consistently failed to meet many of the Stipulation’s critical benchmarks. Beyond these failures, Defendants have in the past six years proffered erroneous and unreliable excuses for non-performance, asserted baseless legal arguments, and in essence resisted complying with the obligations they contractually knowingly and voluntarily assumed. The Court has repeatedly used the remedies authorized by the Stipulation and often exercised forbearance rather than imposing sanctions. The remedies and tolerance by the Court have proven ineffective. Prisoners are not entitled to “unqualified access to health care.” *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). But they are entitled to “adequate medical care.” *Brown v. Plata*, 563 U.S. 493, 511 (2011). Courts should not be engaged in running prisons. *See Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989). The present situation must end.

1 (*Id.* at 5). These performance measures were also to be reported monthly to determine if
2 ADC substantially complied. Again the performance measures regarding maximum
3 custody were intended to end if Defendants achieved and maintained specified thresholds:
4 75% compliance the first 12 months, 80% the second 12 months, and 85% thereafter. Judge
5 Duncan accepted the Stipulation in February 2015. (Doc. 1458).

6 **MONITORING AND ENFORCEMENT 2016-2018**

7 After approximately one year of auditing, in April 2016, Plaintiffs filed their first
8 “Motion to Enforce Settlement.” (Doc. 1576). The auditing showed Defendants were
9 reporting compliance numbers well below the required 75% benchmark. (Doc. 1576 at 5-
10 6). Judge Duncan¹ found Defendants substantially noncompliant. (Doc. 1582). He also
11 ordered Defendants to provide a “remedial plan” regarding 12 performance measures at
12 multiple complexes. It was clear, as of May 2016, Defendants had largely failed to perform
13 their obligations across many locations. But Defendants’ remediation plan regarding most
14 of the performance measures was approved despite the Court expressing “concern” that the
15 plan would be insufficient to remedy Defendants’ failures. (Doc. 1619 at 1).

16 On August 17, 2016, Plaintiffs filed a Motion to Enforce the Stipulation regarding
17 four performance measures for a subset of locations. (Doc. 1663). Plaintiffs requested
18 Judge Duncan order “Defendants to develop a *meaningfully specific and detailed* plan to
19 permanently remedy their continued substantial noncompliance with the[se] Four
20 Performance Measures.” (Doc. 1663 at 4) (emphasis in original). Defendants argued some
21 of the low compliance figures were merely “the result of documentation issues,” they were
22 close to complying, and they would provide a plan for compliance.

23 Judge Duncan noted Defendants’ report “demonstrate[d] continued serious and
24 abject failures in compliance and d[id] not indicate that Defendants ha[d] implemented a
25 successful remediation plan,” and “[a]bsent a striking turn around it w[ould] be necessary
26 for the Court to implement aggressive compliance measures.” (Doc. 1708 at 1).

27 ¹ Magistrate Judge David Duncan handled the parties’ settlement negotiations and assumed
28 responsibility over the case after the parties agreed to the Stipulation.

1 At a status hearing on November 9, 2016, the parties discussed identified
2 performance measures and the data demonstrating continued failures to comply. (Doc.
3 1780). Defendants asked for more time to comply “to see if the current remediation efforts
4 are working” and Judge Duncan granted an additional 60 days. (Doc. 1780). An order
5 followed finding Defendants’ remediation plan failed to bring performance measures into
6 compliance and ordered Defendants to

7 use all available community health care services including, but
8 not limited to, commercial pharmacies, community-based
9 practitioners, urgent care facilities, and hospitals (collectively,
10 “Outside Providers”) to provide the health care services
11 required in the Stipulation’s Performance Measures.

12 (Doc. 1754 at 4).

13 On November 23, 2016, Defendants moved to vacate the Order arguing requiring
14 use of community health care resources violated the Stipulation. Defendants also argued
15 it was impossible to comply because they would be required to transport “dozens--if not
16 hundreds--of inmates outside the prison to community emergency rooms.”² (Doc. 1779 at
17 2). Judge Duncan denied the motion. (Doc. 1917).

18 Judge Duncan made clear he would order remedial action once compliance levels
19 dipped below the required percentage of 80%. Regarding transporting prisoners to
20 community health care providers, Judge Duncan emphasized Defendants were free to
21 provide adequate health care at the prisons, if possible. (Doc. 1917 at 5).

22 Plaintiffs filed a motion pursuant to Rule 60 of the Federal Rules of Civil Procedure
23 requesting the Stipulation be modified to allow Judge Duncan to require an increase in
24 staffing levels, arguing “an underlying assumption of the Stipulation was that the
25 Defendants would make a good faith effort to comply,” but lack of staff indicated
26 Defendants did not intend to comply. (Doc. 1790 at 15). Judge Duncan denied that motion
27 because the Stipulation precluded ordering staffing increases. (Doc. 1910 at 2). Plaintiffs

28 ² Before the motion to vacate was even fully briefed, Defendants filed a notice of appeal
regarding the requirement that they use community health care resources. (Doc. 1817).

1 appealed that Order. (Doc. 1932).

2 The parties continued to dispute the methodology for measuring compliance with
3 the Stipulation. (Docs. 1755, 1760). At the December 14, 2016, status conference, Judge
4 Duncan heard evidence of Defendants' attempts to receive partial credit despite non-
5 compliance with some of the performance measures. (Doc. 1831).³ Judge Duncan found
6 material errors in the data including incorrect compliance numbers for PM 66 in Doc. 1743.
7 And that Defendants changed the monitoring reports without a valid explanation.

8 A January 26, 2017, telephonic hearing was held regarding Corizon's inaccurate
9 audit/review process. And again the most recent numbers were found noncompliant.
10 Defendants had introduced remedial plans in April and May of 2016, with relatively
11 minimal increase in compliance. An evidentiary hearing was set.

12 Also on January 26, 2017, Judge Duncan found the open clinic model requiring
13 prisoners report to a medical unit instead of filing a Health Needs Request (HNR)
14 prevented accurate measurement of at least a dozen health care performance measures.⁴
15 The result was artificially inflated compliance.

16 At the February 8, 2017 status hearing, Judge Duncan found the worst-performing
17 measures were for prescription medication, sick visits, doctor visits, review of diagnostic
18 reports, receipt of diagnostic reports, chronic care visits, and infirmary care, and warned
19 without immediate improvement remedial action would be taken. (Doc. 1933, 1956 at 32).

20 On February 23, 2017, Plaintiffs filed a "Motion to Enforce the Stipulation"
21 regarding the maximum custody performance measures because Defendants were not
22 accurately monitoring them. Defendants said the motion was premature and argued the

23 ³ For example, Defendants unilaterally decided in their November 6, 2016 version of the
24 Monitoring Guide that they would calculate compliance by breaking down the six
25 requirements listed in PM 16 and giving partial credit for meeting some requirements but
not all of that measure. (Doc. 1756-1 at 458-459).

26 ⁴ The Stipulation contained multiple health care performance measures which measured
27 compliance against when HNRs were received. Despite the Stipulation explicitly
28 measuring compliance against when HNR forms were deposited in HNR boxes,
Defendants unilaterally without Court approval violated the Stipulation by removing the
HNR boxes.

1 monitoring showed compliance.

2 A hearing was held on March 8, 2017. Health care monitors claimed that after
3 Corizon was given preliminary compliance numbers, it was allowed to attempt to rebut the
4 monitors' findings but no written instructions or guidelines were provided to describe this
5 process. Of particular significance when prisoners were returned from the hospital no one
6 acted on the hospital's recommendations, which was required for compliance. On March
7 21, Dr. Nicole Taylor, an ADC psychologist, testified that the monitoring practices
8 regarding the mental health performance measures inflated results.

9 As of May 2017, there were a mere seven staff physicians and five psychiatrists for
10 the entire ADC prisoner population of more than 40,000. (Doc. 2071 at 64, 67, 76, 79).
11 Defendant Richard Pratt testified Corizon may well have decided to pay the fine rather than
12 fill staffing positions. (Doc. 2071 at 85). Judge Duncan emphasized managing prisons by
13 a judge was not what was contemplated in the Stipulation. (Doc. 2071 at 145).

14 At the June 14, 2017, status hearing, Judge Duncan ordered the parties to confer and
15 designate an expert qualified to assist Defendants in reaching compliance. And that all
16 future noncompliance for particular performance measures would result in "an order to
17 show cause hearing as to why a \$1,000.00 fine should not be imposed." (Doc. 2124 at 1).
18 Defendants moved for reconsideration, arguing the Order would "effectively and
19 impermissibly [rewrite] the Stipulation." (Doc. 2135).

20 At the hearing on August 8-9, 2017, Defendant Richard Pratt, Warden Jeffrey Van
21 Winkle, and Deputy Warden of Operations Norman Twyford testified. (Doc. 2233). After
22 which Judge Duncan made clear he was inclined to issue an order to show cause why
23 Defendants should not be found in contempt. He also informed the parties he would retain
24 an expert—Mr. BJ Millar from the Advisory Board—to advise him regarding staffing
25 issues.

26 Judge Duncan held omnibus hearings on September 11-13, 2017, where he set forth
27 persistent confusion, mistakes, and misrepresentations by Defendants. (Doc. 2330 at 11).
28 He said, "[t]he history of this case is filled with such mistakes and also filled with the

1 profound mistake of failing to address these performance measures.” And warned again
2 of the imposition of sanctions.

3 On October 10, 2017, Judge Duncan found “pervasive and intractable failures to
4 comply with the Stipulation” that required imposition of contempt fines for future
5 noncompliance. (Doc. 2373). He made clear “a civil contempt sanction of \$1,000 per
6 incident of non-compliance commencing the month of December 2017” might well be
7 ordered. (Doc. 2373 at 3-4). The following day, Judge Duncan found Defendants
8 substantially noncompliant with 17 additional PMs at multiple locations. (Doc. 2403).

9 On December 4, 2017, Judge Duncan officially appointed BJ Millar as a Rule 706
10 expert to address “provider staffing and retention.” (Doc. 2483 at 3). On December 20,
11 2017, Judge Duncan questioned Defendants’ and Corizon’s credibility. (Doc. 2516 at 5-
12 6). Judge Duncan said the monitoring program was probably too compromised for
13 reliability. (Doc. 2516 at 12).

14 On February 23, 2018, Defendants filed a “Motion to Disqualify Judge Duncan from
15 All Proceedings” arguing he was biased against them which was denied in May 2018.
16 (Doc. 2791).

17 The evidentiary and status hearing continued on February 27, 2018, and Dr. Jan
18 Watson, a locum tenens (temporary) primary care physician at the Eyman Complex
19 testified that while employed she learned of the possibility of monetary fines for lack of
20 medical care. (Doc. 2670 at 20-22, 31). Concomitantly one of Eyman’s clinical care
21 coordinators—Sara Neese—sent an email to Dr. Watson on September 18, 2017, asking
22 Dr. Watson to “please cancel the infectious disease consults. There are two. We do not
23 have a provider to send him to. One was approved and has been sitting there for 42 days.
24 *After 30 days we get nailed for a thousand bucks a day until they are seen.*” (Doc. 2670 at
25 23) (emphasis added). Dr. Watson continued that on September 11, 2017, Ms. Neese sent
26 an email asking her to cancel a cardiology request for a prisoner and to resubmit it later,
27 closer to November, “as we only have a 60-day window to get it processed and scheduled.
28 *If it’s past that time frame we get fined \$1,000 per day for just that one consult.*” (Doc.

1 2670 at 24-25) (emphasis added).

2 Dr. Watson testified she did not receive the customary 5 days of ADC training (Doc.
3 2670 at 33), she saw 20 patients a day, and had insufficient time to adequately address the
4 medical needs (Doc. 2670 at 34, 35-36), she was also forced to respond to emergency
5 situations (Doc. 2670 at 36-37), and medication was not timely distributed to prisoners
6 (Doc. 2670 at 39-40).

7 Regarding requests for specialist consultations, Dr. Watson said Corizon's
8 Utilization Management Committee often provided an "Alternative Treatment Plan," to
9 provide care on site which was often inadequate and required her consult requests be
10 denied. (Doc. 2670 at 56-57). In particular: a request to see an audiologist was rejected
11 and Dr. Watson was ordered to fix a prisoner's hearing aid (Doc. 2670 at 60); a request to
12 see an orthopedist because a prisoner had a fractured hand (confirmed by x-ray showing
13 the bone sticking up) was rejected because the angulation of the bone was not clear (Doc.
14 2670 at 62-63); three requests for urgent neurology consults for a prisoner with
15 uncontrolled seizures (sometimes 14 in one day) were denied (Doc. 2670 at 68-73); an
16 infectious disease consultation was cancelled for a prisoner with HIV who had a detectable
17 viral load and needed his medication regimen adjusted (Doc. 2670 at 76-82); and a consult
18 request was denied for a prisoner to see a radiation oncologist upon review of a CT scan
19 that showed possible chest nodules (Doc. 2670 at 92). Dr. Watson made clear that she
20 was not qualified to render the care requested and needed.

21 Finally, Dr. Watson testified about a prisoner who complained of chest pain and had
22 an abnormal EKG. (Doc. 2670 at 116). He was transferred to the hospital but was returned
23 to the prison. A few days later, Dr. Watson had a conversation with her supervisor, Dr.
24 Stewart, who told Dr. Watson that if the prisoner came back "keep him comfortable and
25 let him die because none of his arteries were bypassable." (Doc. 2670 at 117-118). But
26 upon review Dr. Watson read the hospital records which showed a successful bypass was
27 possible. When Dr. Watson raised an issue about care, Corizon staff accused her of not
28 doing things "the Corizon way," which she understood meant spending less time with

1 patients, ordering less medications, and ordering fewer consultations. (Doc. 2670 at 125).

2 On February 28, 2018, prisoner William Upton testified he had been diagnosed with
3 small cell B lymphoma in November 2015. (Doc. 2671 at 67). He received some
4 medication and his condition improved but his symptoms returned. (Doc. 2671 at 68-69).
5 The oncologist saw him again and wanted to restart treatment, but it was denied by Corizon.
6 (Doc. 2671 at 70). Seven months later he received the same medication and briefly
7 improved, but his symptoms quickly returned. (Doc. 2671 at 71-72). Mr. Upton did not
8 see an oncologist for another seven months when undergoing a bone marrow biopsy was
9 deemed immediately essential. (Doc. 2671 at 73-74). But Mr. Upton did not begin
10 treatment until four months later. (Doc. 2671 at 80).

11 Dr. David Robertson, a physician monitor also testified. (Doc. 2671 at 87). One of
12 his responsibilities was to conduct mortality reviews after a prisoner died to identify the
13 causes of death. Seventeen mortality reviews reviewed by Dr. Robertson included failure
14 to recognize symptoms, delay in access to care, and failure to address requests for care.
15 (Doc. 2671 at 102-103). Dr. Robertson mentioned a prisoner who died from untreated
16 metastatic cancer despite multiple urgent requests for oncology consultations. (Doc. 2671
17 at 105-109). Another prisoner died of a ruptured spleen, which Dr. Robertson said could
18 have been prevented by timely intervention. (Doc. 2671 at 115). Dr. Robertson also made
19 clear there was lack of communication among health care staff. (Doc. 2671 at 137-138).

20 A status hearing was held on March 14, 2018, at which BJ Millar and the Advisory
21 Board presented their initial data which showed a gap in health care workers in Pinal
22 County, Yuma County, and Cochise County, where the Eyman, Florence, Yuma, and
23 Douglas complexes are located. (Doc. 3240-1).

24 Hearings followed on March 26 and 27, 2018, regarding the October 10, 2017 Order
25 to Show Cause. (Docs. 2722, 2735). Defendants attempted to offer evidence of efforts to
26 bring the health care performance measures into compliance. The hearing continued on
27 April 10 and 11, 2018 at which Director Ryan testified that Corizon indemnified ADC for
28 the money spent on counsel. (Doc. 2769 at 51). He said ADC sanctioned Corizon \$5,000

1 for each noncompliant performance measure, but there was a \$90,000 monthly cap on
2 sanctions. (Doc. 2769 at 55). Ryan acknowledged that because Corizon received \$407,000
3 *each day*, the *monthly* cap on sanctions was only approximately 25% of what Corizon
4 received for each day. (Doc. 2769 at 56). Thus, Corizon should have been sanctioned
5 \$565,000 for 113 noncompliant performance measures, but the \$90,000 cap precluded it.
6 (Doc. 2769 at 58-59). Ryan claimed without explanation that the cap was a “smart business
7 decision.” (Doc. 2769 at 56-57). Finally, he said Corizon had been authorized to receive a
8 4% increase upon renewal of the contract through March 2018. (Doc. 2769 at 60).

9 On May 9, 2018, Judge Duncan said he would be retiring. (Doc. 2807 at 6).
10 Defendants then filed a motion with the District Court to vacate the Magistrate referral for
11 lack of subject matter jurisdiction which was denied by Judge Humetewa. (Doc. 2825 at
12 2).

13 Evidentiary hearings continued before Judge Duncan on May 31 and June 1, 2018.
14 (Docs. 2844, 2850). Angela Fischer, a mental health clinician (counselor) and candidate
15 for a PhD in clinical psychology, said she had worked for Corizon as a psychology
16 associate between October 2016 and March 2018. (Doc. 2875 at 13). But she left because
17 of the “the lack of quality care that the patients were receiving in the facility, and after
18 many months of trying to work on the team to try to improve that treatment, it became a
19 point where I didn’t feel like I could be effective in improving that quality.” (Doc. 2875
20 at 23). Ms. Fischer was concerned that what Defendants documented as treatment of
21 prisoners was wrong. Also, she was concerned about the lack of frequency of the care, and
22 duration of the care. She explained there was “box checking” rather than providing
23 necessary care. She said there was inadequate staffing and too much turnover. She
24 explained she was forced to choose which prisoner to treat.

25 Cecelia Edwards, a Corizon administer, testified she was concerned “with patient
26 care . . . where some of the patients were . . . getting turned away, and they were not
27 receiving treatment or allowed to put their HNR in. There w[ere] issues with a scheduler
28 [who] continually made errors . . . and people were either getting sent to the wrong place

1 or weren't getting the treatment. . . . [T]here was a lot of communication . . . [by] me to
2 'my uppers' [that] [patients] weren't receiving what they needed." (Doc. 2878 at 37). So
3 she decided to say something. (*Id.*). But after raising her concerns and agreeing to testify,
4 she learned she was being investigated by Corizon and feared she would be fired because
5 she was aware of adverse action taken against other employees who were vocal about the
6 problems.

7 On June 22, 2018, Judge Duncan issued six orders. Three critical ones follow:

- 8 1. "Order and Judgment of Civil Contempt." (Doc. 2898). Because of failure to
9 comply with numerous health care performance measures and based on 1,445
10 instances where Defendants had not performed their obligations, Defendants were
11 ordered to pay \$1,445,000. (Doc. 2898 at 23).
- 12 2. Order on Motion to Terminate Monitoring. Some health care performance measures
13 were terminated but the Court found the monitoring so unreliable that a Rule 706
14 expert was needed to determine why the results were so bad.
- 15 3. The Court found HNR boxes had been unilaterally removed by Defendants. It was
16 ordered Defendants restore the HNR boxes for monitoring as required by the
17 Stipulation. (Doc. 2901).

18 Finally, Judge Duncan ordered the parties to submit two proposed experts. He then
19 retired, the case was reassigned to the undersigned, and Defendants appealed all Judge
20 Duncan's Orders. (Docs. 2935, 2936, 2937).

21 **MONITORING AND ENFORCEMENT 2018-2021**

22 In December 2018, Dr. Marc Stern was appointed by the Court as an expert pursuant
23 to Rule 706 to address two issues. (Doc. 3089). First he was to determine why there were
24 irregularities and errors in the monitoring process required by the Stipulation. (Doc. 2900).
25 Second he was to determine why there was substantial noncompliance with critical aspects
26 of health care delivery: Access to prescription medications, diagnostic testing, routine and
27 specialty physician consultations, treatment for chronic health care problems, and
28 emergency care. (Doc. 2905).

1 In January 2019, Defendants moved to terminate all monitoring of the maximum
2 custody performance measures, and two were terminated by stipulation. Termination was
3 otherwise denied. Flaws in the monitoring process continued along with uncertainties
4 regarding Defendants' compliance with performance measures. (Doc. 3359). The Court
5 directed the parties to mediate, but mediation was unsuccessful. (Doc. 3396).

6 On May 6, 2019, the Court issued the second Order to Show Cause directing
7 Defendants to bring health care performance measures into compliance no later than July
8 1, 2019 or face a fine of \$50,000 per non-compliant performance measure. (Doc. 3235).
9 Defendants sought a stay, claiming their pending appeal of previous orders would resolve
10 whether contempt and sanctions were appropriate (Doc. 3265). The motion was denied.

11 Dr. Stern issued his report on October 2, 2019. (Doc. 3379). He recommended
12 changes to the monitoring protocols regarding requirements: screening HNRs be within 24
13 hours, sick call prisoners be seen by an RN within 24 hours after receiving an HNR, routine
14 provider referrals be addressed within 14 days, urgent provider referrals be seen within 24
15 hours, hospital's treatment recommendations be reviewed and acted on within 24 hours
16 return from inpatient hospital stay, medical providers review diagnostic reports and act
17 upon abnormal values within five days, within 14 days the reason Utilization Management
18 denied a request for specialty services be documented, within 30 days urgent specialty
19 consultations be scheduled and completed, within 60 days routine specialty consultations
20 be scheduled and completed, disease management guidelines for chronic diseases be
21 implemented, and mental health HNRs be responded to within specific timeframes. These
22 recommendations were made because Defendants' data were unreliable and resulted in
23 artificially inflated compliance.

24 As to mental health performance measures, Dr. Stern found that it is imperative
25 prisoners be actually "seen" by a mental health professional. It was disputed whether "very
26 short mental health visits (some as short as 5, 3, or 2 minutes)" should qualify as "seen."
27 Dr. Stern found because the mental health performance measures did not specify a
28 minimum length of time for a visit, Defendants could claim compliance based on markedly

1 short and ineffective interactions. After reviewing medical records Dr. Stern concluded
2 “some of the short visits are too short to be clinically effective, and in the context of the
3 cases, place patients at significant risk of substantial harm” and there was “an unfortunate
4 and glaring deficiency” in the mental health performance measures. (Doc. 3379 at 31).
5 Defendants’ documentation of visits showed a patient was deemed “‘seen,’ regardless of
6 the length of the visit.” (Doc. 3379 at 33). He found “*significant risk of serious harm*”
7 posed by this interpretation. (Emphasis in original).

8 Dr. Stern also assessed whether the “failure to successfully perform on PMs pose[d]
9 a significant risk of serious harm to patients.” (Doc. 3379 at 72). As to numerous health
10 care performance measures, he found compliance failures often did pose a substantial risk
11 of serious harm to prisoners.

12 After receiving Dr. Stern’s report, the Court informed the parties the “report
13 confirms the Court’s long-held belief that pervasive issues have precluded accurate
14 monitoring” and that “the low compliance levels reported in some instances may be
15 worse.” And the Court found the report shows Defendants’ behavior has created “a
16 significant risk of serious harm to prisoners’ health and . . . that additional funding would
17 be necessary to provide required healthcare.” (Doc. 3385 at 2). Three potential paths
18 forward were identified: Continuing to enforce the Stipulation; negotiating a new
19 settlement; or setting the case for trial and the parties were ordered to choose an option.
20 Plaintiffs chose to proceed to trial while Defendants believed more settlement negotiations
21 would work. (Doc. 3399, 3402).

22 On November 12, 2019, the Court referred the matter to settlement negotiations as
23 requested by Defendants. But briefing was ordered to address “the remedies available for
24 Defendants’ non-compliance.” (Doc. 3416 at 2). Defendants argued the only remedies
25 available were “(1) rescission; (2) specific performance; or (3) damages.”⁵ (Doc. 3435).

26 ⁵ Significantly at the Ninth Circuit, Defendants expressed the view that the only way for
27 the Stipulation to be enforced was for Plaintiffs to file a separate suit alleging breach of
28 contract or for Plaintiffs to seek rescission. (Opening Brief, Doc. 36, Appeal No. 18-
16358) (“Thus, the only ‘remedy available at law’ is to sue and seek state law remedies for

1 But Defendants’ positions were irreconcilable. Ordering “specific performance” made no
2 sense because Defendants also argued the Stipulation did not allow contempt sanctions. In
3 essence, Defendants’ position, to the Ninth Circuit and to this Court, was “specific
4 performance” was appropriate but if Defendants failed to perform, there was no remedy.

5 Shortly after the Court ordered settlement negotiations again the parties did not
6 reach a settlement. (Doc. 3469 at 1). Plaintiffs then requested the Court set the case for
7 trial. (Doc. 3469 at 3). Defendants again argued additional settlement negotiations might
8 be “beneficial” and requested the Court to order the parties to attend now a third settlement
9 conference. But in the meantime the Ninth Circuit issued a unanimous opinion resolving
10 crucial aspects of the Court’s enforcement powers and rejecting nearly all of Defendants’
11 arguments.

12 The Ninth Circuit held a district court could issue “an injunction requiring specific
13 performance” and could use “the paradigmatic coercive contempt sanction of prospective,
14 conditional fines” if Defendants did not comply. *Parsons v. Ryan*, 949 F.3d 443, 454-55
15 (9th Cir. 2020). What followed was an Order by this Court that Defendant come into
16 compliance with additional health care performance measures or they would be “required
17 to pay \$100,000 for each instance of future non-compliance.” (Doc. 3490 at 3). And the
18 Court would “pursue additional efforts to enforce the Stipulation” or rescind the Stipulation
19 and reinstate the claims and litigation. (Doc. 3495 at 1). The Court exercised restraint
20 once again. The Court did not rescind the Stipulation. Rather Defendants were allowed
21 one final attempt at compliance. (Doc. 3495 at 1).

22 The Court also provided guidance on how particular health care performance
23 measures are to be monitored. Dr. Stern’s proposed approach was adopted on determining
24 whether prisoners were “seen” by mental health professionals; if presumptive durations
25 were not met, a “mental health clinician” had to review the records and “determine whether
26 the length was meaningful and appropriate in the context of the patient’s overall care.”
27 (Doc. 3518 at 4).

28 _____
a breach of contract or for rescission.”).

1 In 2020, more disputes emerged. Plaintiffs moved to enforce the Stipulation based
2 on Defendants' failure to comply with the Stipulation, which required Defendants to
3 provide interpretive services when a prisoner was not fluent in English. Defendants
4 conceded they violated the Stipulation but argued failures to comply were harmless
5 because health care encounters were still held even though prisoners were not fluent in
6 English. The Court found this specious and in particular if a prisoner was not fluent in
7 English, continuing without interpretive services was definitive proof of Defendants'
8 noncompliance. (Doc. 3861 at 11-12). Thus, for *every* health care encounter with a
9 prisoner not fluent in English, Defendants were directed to provide either 1) "a qualified
10 health care practitioner who is proficient in the prisoner's language"; or 2) "language line
11 interpretation service." Defendants appealed the Order.

12 The 2020 disputes also involved maximum custody. In May 2020, the parties had
13 a discovery dispute regarding Plaintiffs' request for "[d]ocuments sufficient [to] show
14 average length of stay for prisoners in maximum custody units, including the average
15 length of stay in Step 1, Step 2, and Step 3 under DI 326/DO 812." (Doc. 3613 at 2-3).
16 The Court ordered Defendants to produce the requested documents, but they did not. After
17 careful review it was determined that Defendants produced incomplete and internally
18 inconsistent data, and Plaintiffs were awarded attorneys' fees. Defendants then moved for
19 Rule 60(b) relief, arguing the Court misinterpreted the Stipulation and expanded it.

20 The motion was denied. (Doc. 3861 at 1-2). The Court added if Defendants
21 believed they were not required to "implement" the Step Program Matrix they
22 acknowledged they entered into the Stipulation in bad faith. (Doc. 3861 at 2). Defendants
23 were ordered to produce evidence showing prisoners' progression through the Step
24 Program Matrix. (Doc. 3861 at 2). Defendants appealed.

25 The Court also addressed several other issues that undermined the reliability of the
26 maximum custody compliance numbers and required finding the numbers invalid. (Doc.
27 3861 at 7-12).

28

1 The Stipulation required maximum custody prisoners at Step I of DI 326/DO812⁶
2 be “offered a minimum of 7.5 hours out-of-cell time per week,” prisoners at Step II be
3 offered 8.5 hours, and prisoners at Step III be offered 9.5 hours. (Doc. 1185-1 at 38). All
4 maximum custody prisoners “who [were] eligible for participation in [DI 326/DO812 were
5 to be] offered out-of-cell time.” The record demonstrated prisoners were not offered the
6 appropriate recreation blocks consistent with their Step Level. (Doc. 3666-2 at 245). And
7 despite the offers not matching what is required, Defendants claimed compliance.
8 Plaintiffs identified many other failures. (Doc. 3775 at 36). The Court held the Stipulation
9 was complied with only if a prisoner is offered recreation in enclosures of the size
10 mandated and that Defendants’ failures clearly violated the Stipulation such that none of
11 their maximum custody compliance data was acceptable.⁷

12 Plaintiffs also moved to enforce the Court’s Order mandating Dr. Stern’s
13 recommendation regarding the length of mental health visits. In particular, Defendants
14 ignored the requirement that a mental health clinician determine whether a visit of less than
15 ten minutes was meaningful and appropriate. Rather, Defendants left the determination to
16 the compliance monitors (without mental health training) who had not reviewed the
17 prisoners’ medical records. The Court ordered a mental health professional to perform the
18 necessary evaluation. (Doc. 3861 at 13). But Defendants failed to comply, forcing
19 Plaintiffs to move for relief again.

20 Defendants had failed to comply with the previous order requiring a mental health
21 professional evaluate encounters that fall below the minimum duration threshold, so
22 Defendants were again reporting artificially inflated compliance numbers. Sadly, this may
23 have been confirmed by recent suicides. Three prisoners committed suicide between
24 January 5 and February 3, 2021 after receiving only very short mental health care

25 ⁶ This is the ADC policy implementing a multi-step system for maximum custody housing.

26 ⁷ The Court informed Defendants in its September 16, 2019 Order that Defendants’
27 selection process was not random. (Doc. 3359 at 8). The Court anticipated that at the very
28 least Defendants would initiate random samples in future months. Instead, Defendants
made no changes and ignored their contractual obligations under the Stipulation.

1 encounters.⁸ One of the mortality reviews said “failure to communicate effectively with
2 patient” was a contributing cause and that the suicide was “possibly avoidable.” (Doc.
3 3903-3 at 44).

4 Defendants admitted they ignored the Court’s Order regarding mental health review,
5 stating “ADCRR determined [mental health professional review] could not be done.”
6 (Doc. 3907 at 6). Critically, Defendants never sought reconsideration or informed the
7 Court that they could not or would not comply. Simply, they chose to violate the order and
8 Stipulation.

9 **JANUARY 2020 OSC**

10 Defendants have been found in civil contempt twice during the monitoring phase of
11 this action. The first sanction was \$1.445 million and the second was \$1.10 million.
12 Neither sanction coerced or even motivated complete compliance. Thus, the January 31,
13 2020 Order to Show Cause was the third attempt to address Defendants’ failure to comply
14 with the Stipulation in critical and significant ways. In its January 31, 2020 OSC, the Court
15 stated:

16 Defendants must bring every Performance Measure identified
17 above into immediate compliance. Defendants will be required
18 to pay \$100,000 for each instance of future non-compliance
19 with this Order. For the Performance Measures identified
20 above that were compliant in the most recent numbers,
21 Defendants must ensure those Performance Measures remain
22 compliant. If Defendants do not bring every Performance
23 Measure into compliance, or if Defendants allow any
24 previously-compliant Performance Measure to become non-
25 compliant, the Court will impose contempt sanctions unless
26 Defendants can establish they took all reasonable steps to
27 achieve compliance but still fell short. If Defendants are found
28 in contempt, the Court will impose a fine of \$100,000 per
Performance Measure per location to coerce compliance with
this Order. The fines will recur on a monthly basis until

26 ⁸ Eight people have died by suicide to date since the beginning of FY 2021 (July 1, 2020-
27 June 30, 2021). The suicide mortality rate for state prisoners between 2001-2016 was 16
28 prisoners per 100,000. Arizona’s rate is currently nearly 24 prisoners per 100,000. (Doc.
2857 at 3 n.6).

Defendants bring each Performance Measure and location into compliance.

(Doc. 3490). The chart below reflects the very minimal compliance with the relevant PMs between March and December 2020.⁹ Yellow entries are noncompliant, green are entries rounded such that they are compliant, and red entries are those noncompliant but reported inaccurately by Defendants.

PM	Location	March 2020	April 2020	May 2020	June 2020	July 2020	Aug. 2020	Sept. 2020	Oct. 2020	Nov. 2020	Dec. 2020
11	Eyman	82%	86%	82%	86%	86%	94%	82%	92%	82%	78%
11	Lewis	85%	84%	99%	81%	90%	86%	89%	90%	90%	82%
11	Winslow	93%	88%	91%	87%	92%	92%	72%	96%	86%	89%
11	Yuma	88%	94%	90%	90%	94%	90%	84%	88%	88%	92%
13	Eyman	96%	86%	98%	98%	94%	94%	60%	76%	100%	92%
13	Florence	94%	98%	84.88%	86%	90%	90%	81%	74%	100%	90%
13	Lewis	95%	95%	95%	95%	87%	87%	75%	70%	83%	90%
13	Yuma	92%	98%	98%	98%	92%	92%	76%	70%	100%	90%
35	Eyman	94%	100%	96%	N/A	87%	100%	100%	93%	100%	83%
35	Florence	96%	89%	75%	86%	83%	89%	100%	92%	100%	95%
35	Tucson	98%	95%	93%	90%	90%	75%	96%	90%	85%	82%
37	Tucson	85%	91%	85%	87%	88%	88%	82%	92%	77%	61%
37	Winslow	97%	93%	100%	93%	100%	83%	87%	93%	100%	93%
37	Yuma	92%	84%	80%	74%	92%	86%	90%	96%	90%	80%
39	Eyman	90%	86%	78%	92%	86%	94%	98%	98%	98%	86%
39	Lewis	94%	92%	90%	96%	83%	100%	99%	99%	100%	97%
39	Yuma	96%	90%	92%	84%	84%	94%	98%	96%	100%	88%
40	Eyman	91%	100%	86%	90%	68%	91%	100%	100%	100%	100%
40	Tucson	64%	100%	80%	67%	83%	100%	N/A	100%	100%	67%
42	Eyman	94%	98%	92%	98%	86%	84%	82%	96%	96%	82%
42	Lewis	84.00%	99%	93%	90%	100%	96%	94%	98%	93%	96%
44	Eyman	39%	75%	53%	53%	47%	65%	68%	63%	45%	53%
44	Florence	68%	73%	74%	81%	75%	72%	64%	85%	64%	69%
44	Lewis	84.62%	78%	77%	74%	81%	86%	70%	83%	76%	70%
44	Winslow	92%	100%	100%	75%	100%	83%	57%	67%	71%	100%
45	Tucson	94%	92%	95%	84%	95%	94%	86%	98%	97%	93%
46	Eyman	86%	90%	94%	92%	94%	94%	90%	90%	98%	80%
46	Yuma	98%	92%	88%	92%	88%	80%	94%	86%	88%	88%

⁹ PM 12, PM 19, PM 20, and PM 54 have been terminated. (Doc. 3495 at 12, 13-14).

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PM	Location	March 2020	April 2020	May 2020	June 2020	July 2020	Aug. 2020	Sept. 2020	Oct. 2020	Nov. 2020	Dec. 2020
47	Eyman	91%	97%	91%	89%	88%	86%	70%	83%	92%	83%
47	Florence	82%	89%	94%	96%	90%	70%	88%	92%	96%	90%
47	Lewis	93%	90%	91%	93%	94%	89%	78%	97%	93%	91%
47	Perryville	95%	96%	90%	97%	91%	93%	95%	90%	96%	97%
47	Phoenix	100%	75%	80%	100%	100%	100%	92%	100%	89%	100%
47	Tucson	97%	97%	100%	89%	85%	74%	88%	94%	94%	82%
47	Winslow	100%	N/A	100%	N/A	80%	67%	67%	N/A	100%	100%
49	Perryville	100%	100%	100%	100%	100%	100%	83%	100%	100%	100%
49	Tucson	92%	100%	100%	100%	100%	96%	89%	100%	71%	92%
50	Florence	40%	0%	82%	0%	50%	0%	71%	74%	70%	71%
50	Perryville	0%	0%	0%	0%	0%	0%	0%	0%	0%	83%
50	Tucson	68%	0%	69%	0%	72%	0%	0%	68%	80%	82%
51	Douglas	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
51	Eyman	34%	0%	80%	0%	58%	84%	76%	74%	0%	84%
51	Florence	58%	0%	0%	0%	77%	0%	70%	74%	0%	75%
51	Perryville	83%	0%	0%	0%	0%	0%	84%	0%	0%	83%
51	Tucson	68%	0%	77%	0%	83%	0%	0%	81%	82%	0%
51	Yuma	0%	0%	0%	0%	0%	80%	76%	82%	84%	82%
52	Eyman	71%	86%	86%	76%	74%	76%	84%	90%	80%	68%
52	Florence	81%	86%	87%	87%	89%	84.62%	84.62%	87%	87%	87%
52	Perryville	81%	91%	95%	96%	93%	89%	88%	90%	93%	93%
52	Phoenix	96%	100%	87%	100%	90%	100%	90%	100%	100%	83%
52	Tucson	86%	91%	91%	92%	90%	85%	89%	92%	91%	80%
55	Eyman	86%	86%	84%	88%	94%	86%	84%	86%	86%	78%
66	Florence	99%	100%	83%	68%	52%	48%	94%	100%	96%	95%
66	Lewis	95%	100%	84%	83%	89%	98%	100%	99%	100%	91%
66	Tucson	100%	100%	81%	81%	67%	67%	85%	93%	99%	100%
67	Lewis	99%	100%	66%	61%	74%	99%	100%	84.50%	76%	95%
67	Tucson	99%	100%	57%	72%	46%	54%	97%	89%	86%	93%
80	Lewis	100%	94%	89%	90%	98%	98%	91%	95%	92%	84%
85	Eyman	89%	75%	88%	100%	95%	85%	90%	100%	95%	84%
85	Lewis	95%	100%	87%	97%	88%	84.85%	91%	95%	88%	97%
85	Tucson	95%	97%	97%	100%	100%	83%	97%	98%	98%	97%
92	Eyman	90%	100%	95%	95%	85%	80%	100%	100%	95%	95%
92	Lewis	95%	100%	100%	95%	75%	100%	95%	90%	85%	90%
98	Douglas	100%	100%	100%	90%	67%	100%	100%	100%	100%	100%
98	Eyman	96%	92%	84%	88%	82%	86%	84%	91%	88%	86%
98	Florence	91%	86%	90%	90%	90%	98%	94%	79%	97%	89%
98	Winslow	100%	91%	100%	100%	90%	83%	84.62%	100%	100%	100%

PM	Location	March 2020	April 2020	May 2020	June 2020	July 2020	Aug. 2020	Sept. 2020	Oct. 2020	Nov. 2020	Dec. 2020
Total		18	16	25	24	26	26	30	18	19	29

In response to the January OSC, Defendants failed to clearly and accurately identify the scope of their noncompliance. They identified 178 PMs that were noncompliant, but they overlooked their previous acknowledgement that their 2020 compliance numbers for some PMs were inaccurate. (Doc. 3822 at 2). Defendants attempted to assure the Court they would either reaudit those PMs or reduce the compliance measure to 0% as a sanction. They did neither. In fact they relied on the falsified compliance numbers. The chart above reflects the sanction with which Defendants agreed to: 0% compliance for two PMs. (Doc. 3822 at 3). Defendants were noncompliant with 231 PMs, at \$100,000 per violation, for a total of \$23.1 million.

As previously held, “[b]efore finding civil contempt, a court must determine by clear and convincing evidence that: (1) a valid court order exists that is ‘specific and definite’; (2) the party had knowledge of the order, and notice of and an opportunity to be heard about the alleged noncompliance; and (3) the party failed to take ‘all reasonable steps to comply with the order.’” *Parsons v. Ryan*, No. CV-12-0601-PHX-DKD, 2018 WL 3239691, at *2 (D. Ariz. June 22, 2018) (citations omitted) (emphasis in original).

Defendants filed a written response to the OSC on July 10, 2020 but sought clarification whether it applied to only the February 2020 numbers or if they were to address February and the following months. Defendants also sought clarification whether the OSC contemplated sanctioning them for a performance measure that was compliant at some point after January 2020 but became non-compliant in later months. The Court was amazed at Defendants’ misunderstanding but explained they were to completely comply beginning March 1, 2020, reminding them “the Stipulation requires Defendants obtain an 85% compliance rate *every month for every PM at every location.*” (Doc. 3861 at 6).

Defendants incredibly maintained the Court did not adequately inform them that they would face contempt sanctions if a compliant PM fell out of compliance, they would

1 still be in contempt.

2 **A. Specific and Definite**

3 Defendants argue they were unaware that they were required to maintain
4 compliance. But the OSC clearly stated:

5 If Defendants do not bring every Performance Measure into
6 compliance, or if Defendants allow any previously-compliant
7 Performance Measure to become non-compliant, the Court will
8 impose contempt sanctions unless Defendants can establish
9 they took all reasonable steps to achieve compliance but still
10 fell short.

11 ***

12 The fines will recur on a monthly basis until Defendants bring
13 each Performance Measure and location into compliance.

14 (Doc. 3490). While Defendants acknowledge they were required to ensure the PMs
15 “remain compliant,” Doc. 3490 at 3, they claim the January OSC did not require the health
16 care PMs compliant as of January 2020 to remain compliant thereafter. (Doc. 3881 at 18).
17 Again Defendants are wrong.

18 **B. Knowledge and Opportunity to be Heard**

19 The two substantive responses to the OSC filed by Defendants do not support their
20 position that they have not had an adequate opportunity to respond. (Docs. 3656, 3881).

21 **C. All Reasonable Measures**

22 Defendants were told “COVID-19 cannot be used as a complete shield against
23 noncompliance.” (Doc. 3866 at 3). Defendants did not heed the Court’s warning.
24 Defendants’ omnibus response identified COVID-19 as the primary barrier to compliance
25 from March 1 through December 31, 2020. (Doc. 3881 at 4-14). Defendants attempt to
26 excuse 131 instances of noncompliance due to COVID-19, but in Defendants’ own
27 monthly PM charts, Defendants did not cite COVID-19 as a reason for their noncompliance
28 as to the PMs in the accompanying footnote.¹⁰

¹⁰ PM 11 at Eyman (March, May, September, November, December 2020); PM 11 at Lewis
(April June December 2020); PM 11 at Winslow (September 2020); PM 13 at Eyman
(September, October 2020); PM 13 at Florence (May, September, October 2020); PM 13

1 Even when Defendants claimed COVID-19 precluded compliance, those
2 explanations were incredible. In the contemporaneous performance measure charts
3 submitted to the Court, Defendants frequently said noncompliance was based on “poor
4 documentation,” which obviously has nothing to do with COVID-19.

5 Beyond invoking COVID-19, Defendants also argue the sample size chosen in the
6 Stipulation for evaluating certain PMs was not statistically reliable. But the sizes were
7 negotiated and voluntarily accepted by the Defendants as a part of the Stipulation.

8 Defendants also point to Arizona Governor Ducey’s elective-surgery executive
9 order, which limited access to specialty consultations, as an explanation. That Executive
10 Order 2020-32 allowed elective surgeries to resume as of May 1, 2020, yet Defendants’

11 _____
12 at Lewis (September, October, November 2020); PM 13 at Yuma (September, October
13 2020), PM 35 at Eyman (December 2020); PM 35 at Florence (July 2020), PM 35 at Tucson
14 (August, December 2020); 37 at Tucson (September, November, December 2020); PM 37
15 at Winslow (August 2020); PM 37 at Yuma (April, May, June, December 2020); PM 39 at
16 Eyman (May 2020); PM 39 at Lewis (July 2020); PM 39 at Yuma (June, July 2020); PM
17 40 at Eyman (July 2020); PM 40 at Tucson (March, May, June, July, September, December
18 2020); PM 42 at Eyman (August, September, December 2020); PM 44 at Eyman (March,
19 April, May, June, July, August 2020); PM 44 at Florence (March, April, May, June, July,
20 August, September, October, November, December 2020); PM 44 at Lewis (April, May,
21 June, July, September, October, November, December); PM 44 at Winslow (June, August,
22 September, October, November 2020); PM 46 at Eyman (December 2020); PM 46 at Yuma
23 (August 2020); PM 47 at Eyman (September, October, December 2020); PM 47 at Florence
24 (March, August 2020); PM 47 at Lewis (September 2020); PM 47 at Phoenix (April, May
25 2020); PM 47 at Tucson (August, December 2020); PM 47 at Winslow (July, August,
26 September 2020); PM 49 at Perryville (September 2020); PM 49 at Tucson (November
27 2020); PM 50 at Florence (September, October, November 2020); PM 50 at Perryville
28 (December 2020); PM 51 at Eyman (September, October 2020); PM 51 at Florence
(September, October, December 2020); PM 51 at Perryville (March, September, December
2020); PM 51 at Tucson (March, October, November 2020); PM 51 at Yuma (September,
October, November, December 2020); PM 51 at Eyman (March, June, July, August,
September, November, December 2020); PM 52 at Florence (March 2020); PM 52 at
Perryville (March 2020); PM 52 at Phoenix (December 2020); PM 52 at Tucson (December
2020); PM 55 at Eyman (May, September, December 2020); PM 66 at Florence (May,
June, July, August 2020); PM 66 at Lewis (May, June 2020); PM 66 at Tucson (May, June,
July, August 2020); PM 67 at Lewis (May, June, July, October, November 2020); PM 80
at Lewis (December 2020); PM 85 at Eyman (April 2020); PM 85 at Tucson (August
2020); and PM 92 at Eyman (August 2020).

1 noncompliance persisted throughout 2020. *See* Gov. Ducey Executive Order 2020-32,
2 available at <https://azgovernor.gov/executive-orders>. There is no explanation why outside
3 consultations were not rescheduled after the Governor’s Order was lifted or why urgent
4 specialty consultations—such as those for oncology or surgery—were not obtained at a
5 hospital.

6 Defendants also attempt to make much of COVID-19’s impact on Yuma. (Doc.
7 3881 at 8-9). But Yuma was only subject to the OSC as to six PMs and there is no
8 explanation how the COVID-19 outbreak in Yuma impeded compliance in Florence,
9 Eyman, or Tucson.

10 Defendants further maintain that staffing issues, purportedly triggered by COVID-
11 19, impeded compliance. They said Centurion continued to try to staff, recruit, and retain
12 staff. (Doc. 3881 at 13-14). As they did previously, Defendants offer no evidence or
13 discussion as to efforts to attract and retain health care staff sufficient to meet the needs of
14 Arizona prisoners. And staffing shortages are nothing new; it has been the Achilles’ heel
15 of the entire duration of the Stipulation. The Court has solicited expert assistance to
16 identify barriers to staffing and ways to attract and retain health care staff members. But
17 Defendants never stated that they employed such strategies to attract and retain staff.

18 Defendants highlight bonus payouts made between March and December 2020 as
19 evidence that “all reasonable measures” were taken to boost staffing and reduce shortages
20 caused by the pandemic. But the total amount of bonus payments, \$511,514.03, pales in
21 comparison to the approximate \$657,927.72 *per day*¹¹ that Centurion was paid between
22 March and December 2020, when the average monthly prisoner population was 39,634.¹²
23 (Doc. 3881 at 13). In short, COVID-19 does not justify or excuse Defendants’
24 noncompliance for every noncompliant PM at various complexes between March and
25 December 2020.

26 _____
27 ¹¹ See https://app.az.gov/page.aspx/en/ctr/contract_manage_public/47912 (last visited
28 May 21, 2021)

¹² See <https://corrections.az.gov/sites/default/files/REPORTS/CAG/2020/cagdec20.pdf>
(last visited May 21, 2021), taking the average of the monthly prisoner populations.

1 Defendants argue they took all reasonable measures to comply with the OSC, and,
2 if they did not, the Court should excuse noncompliance with 28 PMs because they “barely
3 missed compliance,” “noncompliance was based on a technical violation,” or third parties’
4 “inactions or omissions” caused noncompliance. (Doc. 3881 at 23). Not only does this
5 have no bearing on whether Defendants took all reasonable measures, but it again ignores
6 the 85% benchmark already forgives isolated failures. Defendants’ persistent unreasonable
7 attempts to justify noncompliant scores as “barely miss[ing] compliance” is an admission
8 by Defendants that they have violated the agreed upon Stipulation.

9 Defendants’ final argument is their overall theory of compliance. They view the
10 health care performance measures in the aggregate (103 x 10 facilities) and maintain that
11 their overall compliance during 2020 ranged between 77.78% and 94.12%. This is a sad
12 illusion. The performance measures that have been and remain noncompliant over the past
13 six years involve some of the most fundamental and critical aspects of health care that
14 formed the basis of this lawsuit in 2012, of which Defendants are very aware.

15 To illustrate, Defendants’ theory of compliance would require the Court view every
16 performance measure as equally important. One performance measure requires Defendants
17 ensure prisoners’ medical records be “legible” and include details such as the time and the
18 name of the medical provider. Tragically, at the time of the Stipulation Defendants were
19 not even maintaining legible records. Defendants were, however, able to perform this
20 requirement and the performance measure was terminated. In other words, after a few
21 years of effort, Defendants were able to perform the absolute bare minimum of maintaining
22 legible medical records. But requiring legible records cannot be compared to other
23 performance measures related to substantive care. For example, a performance measure
24 required Defendants act on discharge instructions when a prisoner was returned from an
25 inpatient hospital stay. Defendants have consistently failed to comply with this
26 performance measure. Defendants’ view that each performance measure should be viewed
27 as equally important is misguided.

28 In truth, Defendants’ arguments are unavailing because they have again failed to

1 provide “clear and convincing” evidence that they took all reasonable measures to ensure
 2 compliance. Their entire response focuses on Centurion’s limitations in light of the
 3 pandemic. But the Director, not the private health care contractor is legally responsible in
 4 Arizona for the provision of health care. Ariz. Rev. Stat. § 31-201.01(D); *West v. Atkins*,
 5 487 U.S. 42, 56 (1988) (“Contracting out prison medical care does not relieve the State of
 6 its constitutional duty to provide adequate medical treatment to those in its custody, and it
 7 does not deprive the State’s prisoners of the means to vindicate their Eighth Amendment
 8 rights.”). Defendants’ response does not establish that either Shinn or Pratt took “all
 9 reasonable measures” to urge, facilitate, and require compliance with the Stipulation with
 10 which they undertook to comply.

11 **D. Defendants Remain Noncompliant**

12 Critically, compliance numbers from January, February, and March 2021 remove
 13 any doubt whether COVID-19 was the moving force behind noncompliance in 2020. It
 14 was not. The yellow highlighted entries are noncompliant.

PM	Location	January 2021	February 2021	March 2021	April 2021
11	Eyman	84%	78%	94%	82%
13	Eyman	86%	84%	84%	80%
13	Florence	88%	65%	77%	86%
13	Lewis	69%	96%	93%	99%
13	Perryville	84%	82%	86%	79%
13	Yuma	64%	74%	78%	74%
13	Tucson	90%	94%	94%	82%
15	Eyman	80%	86%	86%	90%
35	Lewis	98%	100%	89%	75%
35	Tucson	92%	94%	91%	77%
37	Lewis	87%	91%	79%	90%
37	Tucson	64%	49%	45%	57%
37	Yuma	78%	84%	88%	90%
39	Eyman	80%	94%	92%	100%
40	Eyman	100%	100%	63%	60%
40	Florence	N/A	100%	N/A	0%
40	Tucson	100%	0%	0%	0%
42	Eyman	96%	78%	92%	90%

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PM	Location	January 2021	February 2021	March 2021	April 2021
44	Eyman	52%	56%	69%	78%
44	Florence	88%	66%	71%	61%
44	Lewis	81%	88%	66%	72%
44	Phoenix	50%	50%	100%	100%
44	Tucson	74%	60%	59%	67%
44	Winslow	55%	100%	100%	83%
46	Tucson	97%	91%	90%	82%
47	Eyman	78%	88%	90%	93%
47	Lewis	91%	74%	87%	86%
47	Perryville	73%	86%	76%	88%
47	Safford	88%	100%	75%	100%
47	Tucson	79%	83%	86%	82%
50	Florence	69%	83%	74%	81%
50	Perryville	85%	90%	80%	95%
50	Tucson	59%	93%	89%	92%
51	Eyman	76%	68%	92%	92%
51	Florence	63%	90%	87%	93%
51	Perryville	81%	76%	72%	83%
51	Tucson	80%	83%	85%	90%
51	Yuma	72%	86%	86%	80%
52	Eyman	84%	78%	74%	82%
52	Florence	78%	85%	80%	80%
52	Lewis	87%	90%	84%	79%
52	Tucson	86%	87%	88%	84%
55	Eyman	82%	84%	82%	90%
67	Tucson	98%	82%	85%	86%
72	Eyman	100%	83%	N/A	100%
80	Lewis	88%	86%	24%	43%
80	Tucson	99%	87%	17%	42%
85	Eyman	95%	97%	25%	73%
85	Florence	83%	100%	50%	100%
85	Lewis	97%	97%	24%	69%
85	Perryville	92%	83%	0%	68%
85	Tucson	98%	100%	6%	69%
85	Yuma	97%	100%	5%	85%
91	Phoenix	100%	100%	80%	100%
94	Eyman	94%	100%	82%	91%
94	Florence	93%	100%	80%	93%
94	Tucson	100%	96%	80%	92%

PM	Location	January 2021	February 2021	March 2021	April 2021
98	Eyman	80%	82%	94%	82%
98	Lewis	90%	89%	78%	89%
98	Winslow	75%	100%	100%	100%
Total Noncompliant		29	25	33	32

This plainly establishes that despite the emergence from the pandemic, Defendants remain noncompliant with some of the most fundamental and critical aspects of medical and mental health care delivery.

RESCISSION

A. Defendants Know Rescission Was Always Possible

After concluding the Stipulation represented an appropriate resolution, the Court closed this case “subject to the Court maintaining jurisdiction to supervise the enforcement of the settlement as provided in the parties’ Stipulation.” (Doc. 1458). On November 15, 2018, the Court warned Defendants their “actions raise the distinct miserable possibility that the Stipulation will have to be set aside and the parties instructed to litigate again.” (Doc. 3057 at 9). Defendants acknowledged as much when arguing before the Ninth Circuit Court of Appeals in September 2019. At oral argument, defense counsel told the Ninth Circuit this Court lacked contempt authority under the Stipulation and argued, instead, that the Court could vacate the settlement and set the case for trial. Defense counsel made this clear in response to Judge Callahan questioning Defendants’ position that the Court lacked the authority to enforce the stipulation through its contempt powers.

Judge Callahan: So the stipulation then just basically means nothing? I mean it’s just this is what we agree to and if it doesn’t work out then that’s it. The court can’t do anything?

Defendants’ Counsel: No. The court definitely has enforcement ability. First of all, if the court concludes that the parties aren’t dealing with the . . . complying with the stipulation, it can vacate the stipulation and we can go back and litigate the case.

Defendants later attempted to graft a post-hoc rationalization for their oral argument statement, saying they meant only that “state law contractual remedies . . . are available to

1 enforce noncompliance, including initiating an action in state court for breach of contract.”
2 (Doc. 3411 at 1). But that is far from what they said. Rather, Defendants represented that
3 if the Court “concludes that the parties aren’t . . . complying with the stipulation, it can
4 vacate the stipulation” and resume litigation. Defendants were very aware their failures
5 could result in the resumption of litigation.

6 Further, as Defendants were told in October 2019, after reviewing Dr. Stern’s expert
7 report, the Court identified rescission of the Stipulation as one of the three remaining
8 options. The other two—renewed settlement negotiations and further contempt
9 sanctions—have now since been repeatedly attempted but proven unsuccessful in
10 provoking compliance. And the Court recognized in February 2020 that the “record
11 supports a finding of rescission,” but elected to give Defendants “one more, but final,
12 attempt at coercive sanctions.” (Doc. 3495 at 1). As detailed above, that attempt obviously
13 failed again to bring about compliance.

14 **B. Legal Basis for Undoing Settlement**

15 In 1994, the Supreme Court addressed federal courts’ power to enforce settlement
16 agreements. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994). In
17 distinguishing between a district court enforcing a settlement agreement and reopening a
18 dismissed action because of a parties’ repudiation of a settlement agreement, the Supreme
19 Court recognized that “some Courts of Appeals have held the latter can be obtained under
20 Federal Rule of Civil Procedure 60(b)(6).” *Id.* at 377 (internal footnote omitted). The
21 Supreme Court cited the Ninth Circuit as one such circuit. *Id.* at 378 (citing *Keeling v.*
22 *Sheet Metal Workers Int’l Assn.*, 937 F.2d 408, 410 (9th Cir. 1991)). The Ninth Circuit is
23 not alone as the First, Fourth, and Sixth Circuits have also so held. *See, e.g., Delay v.*
24 *Gordon*, 475 F.3d 1039, 1044-45 & n.11 (9th Cir. 2006); *United States v. Baus*, 834 F.2d
25 1114, 1124 (1st Cir. 1987); *Fairfax Countywide Citizens Assn. v. Fairfax County*, 571 F.2d
26 1299, 1302-1303 (4th Cir. 1978); *Hinsdale v. Farmers Natl. Bank & Trust Co.*, 823 F.2d
27 993, 996 (6th Cir. 1987); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir.
28 1975). Thus, it is well-established that a party’s behavior after entering into a settlement

1 agreement can lead to the resumption of litigation.

2 The Ninth Circuit authority addressing resumption of litigation after a settlement
3 agreement cited approvingly to an older First Circuit decision. In *United States v. Baus*,
4 the First Circuit acknowledged that “[w]here the [settlement] agreement is made, as here,
5 under the eyes of the court, it is a most solemn undertaking, requiring the lawyers, as
6 officers of the court, to make every reasonable effort to carry it through to a successful
7 conclusion.” 834 F.2d 1114, 1124 (1st Cir. 1987) (quoting *Warner v. Rossignol*, 513 F.2d
8 678, 682 (1st Cir. 1975)). Nevertheless, it recognized that “[a]s a legal matter, it is well-
9 accepted that the material breach of a settlement agreement which has been incorporated
10 into the judgment of a court entitles the nonbreaching party to relief from judgment
11 under Rule 60(b)(6).” *Id.*

12 Citing *Baus*, in 1991 the Ninth Circuit upheld a district court’s vacatur of a
13 settlement agreement, finding an employer’s repudiation of a settlement agreement was an
14 “extraordinary circumstance” that justified vacating the prior order of dismissal under Rule
15 60(b)(6). *Keeling*, 937 F.2d at 410. In doing so, the Ninth Circuit explained “[i]n the usual
16 course upon repudiation of a settlement agreement, the frustrated party may sue anew for
17 breach of the agreement and may not, as here, reopen the underlying litigation after
18 dismissal.” *Id.* But when a court makes a finding “of repudiation, or ‘complete frustration,’
19 of the settlement agreement,” the court can vacate the relevant order and have the parties
20 resume litigation. *Id.* The Ninth Circuit has repeatedly cited *Keeling* for this proposition.
21 *In re Hunter*, 66 F.3d 1002, 1006 (9th Cir. 1995); *Lehman v. United States*, 154 F.3d 1010,
22 1017 (9th Cir. 1998).

23 While it has established some settlement agreements can be undone, the Ninth
24 Circuit has not elaborated on the type of behavior necessary to establish “repudiation” or
25 “complete frustration” of an agreement. Assuming the relevant principles should be drawn
26 from contract law, Defendants’ behavior over the past six years establishes constant
27 material breaches of the agreement. In the context of this case, such behavior qualifies as
28 “complete frustration” of the Stipulation.

1 Under Arizona law, determining whether a breach is material requires consideration
2 of the factors set forth in the Restatement (Second) of Contracts § 241. *Found. Dev. Corp.*
3 *v. Loehmann's, Inc.*, 788 P.2d 1189, 1197 (Ariz. 1990). The Restatement's multi-factor
4 test "is necessarily imprecise and flexible." Restatement (Second) of Contracts § 241 cmt.

5 a. The four five factors are:

6 (a) the extent to which the injured party will be deprived of the
7 benefit which he reasonably expected;

8 (b) the extent to which the injured party can be adequately
9 compensated for the part of that benefit of which he will be
deprived;

10 (c) the extent to which the party failing to perform or to offer
to perform will suffer forfeiture;

11 (d) the likelihood that the party failing to perform or to offer to
12 perform will cure his failure, taking account of all the
13 circumstances including any reasonable assurances; and

14 (e) the extent to which the behavior of the party failing to
15 perform or to offer to perform comports with standards of good
faith and fair dealing.

16 Restatement (Second) of Contracts § 241. Application of these factors to the present case
17 establish the material nature of Defendants' failures to perform.

18 **1. Plaintiffs Have Been Deprived of the Benefits of the Stipulation**

19 There is overwhelming undisputed evidence Plaintiffs have been deprived of many
20 of the core benefits of the Stipulation. The underlying claims presented were deliberate
21 indifference to Plaintiffs' healthcare, dental, and mental health needs. In the Class
22 Certification Order, the Court identified evidence regarding longstanding staffing
23 deficiencies, prolonged delays in seeing healthcare providers or receiving outside
24 consultations, inadequate mental health care, and minimal out-of-cell time for prisoners in
25 maximum custody. (Doc. 372). The Stipulation was intended to address these, and other,
26 deficiencies. Defendants' noncompliance with the Stipulation results in class members
27 still not receiving adequate health care. Indeed, Plaintiffs' are not receiving the benefit of
28 the Stipulation if there are an inadequate number of healthcare providers, prisoners cannot

1 access specialty or diagnostic care, or inadequate mental health care results in increased
2 suicides.

3 In addition, Defendants fail to fulfill basic promises made explicit in the Stipulation.
4 Plaintiffs were promised by agreement language interpretation services at every health care
5 encounter; Defendants opted not to provide such services. Plaintiffs were promised by
6 agreement a maximum custody regime where prisoners could progress from the most
7 restrictive to the least restrictive housing assignments; some prisoners have remained at
8 restrictive custody levels despite no evidence of misbehavior and Defendants, despite their
9 agreement, are adamant they have no obligation to implement a system ensuring
10 progression is available (or even keep records). Plaintiffs were promised by agreement an
11 exact number of recreation opportunities in recreation enclosures of exact size; Defendants
12 have not provided those opportunities. Plaintiffs were promised by agreement random
13 selection of individuals for monitoring; Defendants have not used a random selection
14 method. Plaintiffs were promised by agreement at least 85% performance of *every*
15 performance measure no later than two years after the Stipulation took effect. It has now
16 been six years and it is obvious Defendants will not take the steps necessary to ensure
17 compliance. And there is more.

18 Viewed as a whole, Defendants never approached their obligations under the
19 Stipulation with the required level of commitment. Almost immediately after the
20 Stipulation went into effect, Defendants began depriving Plaintiffs of the benefits they were
21 entitled. More than six years later, Plaintiffs still wait. Defendants' past conduct shows
22 they had no problem with depriving Plaintiffs of the benefits of the Stipulation and
23 Defendants' behavior undoubtedly will not end.

24 **2. Plaintiffs Cannot be Compensated for the Benefits Not Provided**

25 The Stipulation was aimed at improving medical care and decreasing the level of
26 restrictions for individuals in maximum custody. It is difficult to draw an exact line
27 between Defendants' failures to comply with the health care performance measures and
28 the harms suffered by Plaintiffs. But it is even more difficult to formulate some possible

1 compensation for Defendants' behavior. As made clear at hearings before Judge Duncan
2 and throughout subsequent proceedings, Defendants' failures to provide adequate medical
3 care have had tragic consequences. That is, Defendants' failures have led to preventable
4 deaths, possibly including suicides. Defendants' failures have also led to untold suffering
5 by individuals unable to obtain medical treatment. In these circumstances, there is no
6 plausible compensation that can be provided to Plaintiffs. The dead are not advantaged by
7 Defendants' repeated promises of better behavior in the future nor are they able to gain
8 from monetary awards. It is impossible to quantify, monetarily, the harm suffered by
9 prisoners because of a lack of adequate health care.

10 As for the maximum custody performance measures, it is similarly difficult to
11 quantify the harm caused by Defendants' failures to perform. For example, it would be
12 nonsensical to put a monetary price on each time an individual was denied the recreation
13 opportunities promised by the Stipulation. And there is no plausible compensation
14 available for Defendants' maximum custody failures.

15 Finally, there is no possible compensation available for Defendants' many other
16 failures. For example, Plaintiffs were promised language interpretation services at every
17 health care encounter. The failure to provide such services may have led to a medical
18 condition going undiagnosed and untreated. It would be impractical to identify every
19 failure and award compensation.

20 In the circumstances of this case, Defendants' constant failures to perform under the
21 Stipulation resulted in inadequate health care, excessive confinement under onerous
22 conditions, and other harms. No adequate compensation is possible for those harms.

23 **3. Defendants Will Not Suffer Forfeiture**

24 The Restatement requires the Court look to the possible "forfeiture" Defendants will
25 suffer if their breaches are deemed material. The Restatement explains the relevant inquiry
26 is the costs the breaching party has already incurred through "preparation or performance"
27 that will be "forfeited" in the event the breach is deemed material. Restatement (Second)
28 of Contracts § 241 cmt. d. Here, Defendants have invested in a reporting and monitoring

1 regime. But undoing the Stipulation will not require Defendants to forfeit those
2 investments because they must, independent of the Stipulation, monitor the private
3 healthcare contractor's compliance with national standards,¹³ which are identical to the
4 healthcare performance measures. Moreover, Defendants' choice to take inadequate
5 corrective actions indicates they are not concerned with forfeiting any investments related
6 to the Stipulation. A party interesting in avoiding a forfeiture of its investments would act
7 with a much greater sense of urgency than Defendants have ever displayed.

8 **4. Defendants Are Unlikely to Perform in the Future**

9 The past six years establish there is no reasonable timetable in which Defendants
10 will come into full compliance with the Stipulation which was contemplated by all parties
11 at the outset. Defendants' failures regarding health care performance measures have
12 resulted in millions of dollars in fines and attorneys' fees.¹⁴ Those fines did not provoke
13 Defendants to comply. The January 2020 OSC threatened seemingly significant fines if
14 Defendants did not bring specific health care performance measures into compliance. But
15 even those fines were insufficient to convince Defendants to comply.

16 The pervasive theme of Defendants' conduct throughout the course of attempted
17 enforcement of the Stipulation is indifference. Defendants have always deflected their
18 failures and employed scorched-earth tactics to oppose every attempt to resolve
19 outstanding noncompliance. Defendants' longstanding refusal to acknowledge their
20 shortcomings and identify plausible paths to compliance evidences their pattern of conduct
21 will not change. There does not appear to be a contempt sanction robust enough to coerce
22 compliance. Defendants are steadfastly unwilling to make the fundamental changes
23 necessary to comply with the Stipulation. Thus, continued attempts at enforcing the
24 Stipulation would be a significant drain on the resources of the parties, the Court, and the
25 public, for no purpose.

26 ...

27 ¹³ The standards are those issued by the National Commission on Correctional Health Care.

28 ¹⁴ As Plaintiffs point out, Defendants are indemnified from having to pay any fines themselves. (Doc. 3649-1 at 33).

1 **5. Defendants’ Behavior Establishes Lack of Good Faith and Fair**
2 **Dealing**

3 Finally, the history of Defendants’ conduct establishes a lack of good faith and fair
4 dealing. The record establishes Defendants, who were represented by competent counsel,
5 understood the terms of the Stipulation and chose to knowingly and voluntarily enter into
6 it. Defendants’ post-Stipulation behavior has involved chronic failures to perform health
7 care performance measures, falsifying records in connection with health care performance
8 measures, and refusing to correct obvious errors such as nonrandom selection processes.
9 In addition, Defendants have adopted legal positions fundamentally at odds with an
10 intention to perform under the Stipulation. For example, years after the Stipulation went
11 into effect, Defendants argued Judge Duncan lacked jurisdiction to conduct *any* activities.
12 (Doc. 2825). In other words, years into the Stipulation’s life, Defendants were desperately
13 casting about for a way to undo the Stipulation itself. More recently, defense counsel was
14 warned not to present the pandemic as a blanket excuse for noncompliance. Defense
15 counsel then presented the pandemic as a blanket excuse for noncompliance. Defendants
16 and their counsel have very little interest in performing all their obligations under the
17 Stipulation or presenting reasonable legal arguments explaining their failures. The Court
18 assumes Defendants entered the Stipulation in good faith, but they immediately abandoned
19 that allegiance in favor of persistent resistance.

20 **6. Repudiation and Complete Frustration**

21 Based on the relevant factors, Defendants’ post-Stipulation behavior establishes
22 constant material breaches of the Stipulation and the certainty of future material breaches
23 of the Stipulation. In the terms used by the Ninth Circuit, Defendants have repudiated and
24 completely frustrated the Stipulation.

25 It is true the parties expected compliance would take time. But neither Plaintiffs
26 nor the Court expected that six years after the Stipulation, the Court would be faced with
27 having to sanction Defendants for at least 229 instances of noncompliance regarding health
28 care performance measures, assessing Defendants’ refusal to comply with clear Court

1 orders regarding monitoring requirements, and beginning anew with maximum custody
2 and mental health monitoring.

3 The level of frustration of expectations, as well as the inability for monetary
4 sanctions to have effect, can be illustrated by focusing on a *single* measurement, health
5 care performance measure 44 at Eyman. That performance measure requires:

6 Inmates returning from an inpatient hospital stay or ER
7 transport with discharge recommendations from the hospital
8 shall have the hospital's treatment recommendations reviewed
and acted upon by a medical provider within 24 hours.

9 This performance measure involves inpatient hospital stays or visits to emergency rooms,
10 meaning it involves individuals with significant health care needs. Therefore, it is one of
11 the most significant indicators of how Defendants are treating prisoners most in need.

12 From January 2016 through March 2021, scores for performance measure 44 at
13 Eyman reflected the following, with the noncompliant months highlighted:

Jan-16	87%	Jan-17	50%	Jan-18	56%	Jan-19	44%	Jan-20	92%	Jan-21	52%
Feb-16	72%	Feb-17	58%	Feb-18	43%	Feb-19	40%	Feb-20	46%	Feb-21	56%
Mar-16	60%	Mar-17	50%	Mar-18	40%	Mar-19	50%	Mar-20	39%	Mar-21	69%
Apr-16	28%	Apr-17	15%	Apr-18	23%	Apr-19	50%	Apr-20	75%	Apr-21	78%
May-16	50%	May-17	80%	May-18	35%	May-19	82%	May-20	53%		
Jun-16	37%	Jun-17	96%	Jun-18	31%	Jun-19	93%	Jun-20	53%		
Jul-16	44%	Jul-17	93%	Jul-18	17%	Jul-19	79%	Jul-20	47%		
Aug-16	46%	Aug-17	100%	Aug-18	46%	Aug-19	89%	Aug-20	65%		
Sep-16	72%	Sep-17	100%	Sep-18	25%	Sep-19	95%	Sep-20	68%		
Oct-16	85%	Oct-17	89%	Oct-18	33%	Oct-19	89%	Oct-20	63%		
Nov-16	89%	Nov-17	20%	Nov-18	44%	Nov-19	82%	Nov-20	45%		
Dec-16	72%	Dec-17	11%	Dec-18	0%	Dec-19	88%	Dec-20	53%		

23 For the 52 months from January 2016 through April 2021, this performance measure was
24 compliant only 14 times. This performance measure was the subject of an early threat of
25 a contempt fine and, in fact, a contempt fine was imposed in June 2018. (Doc. 2898 at 18).
26 After that contempt fine, the performance measure was noncompliant an additional twenty-
27 seven times. This performance measure was identified in the January 2020 OSC as well.
28 Thus, as of January 2020, Defendants knew that every future noncompliant month would

1 result in a \$100,000 fine. Instead of possible fines spurring compliance, PM 44 at Eyman
2 has not been compliant for even one month after January 2020. Thus, PM 44 at Eyman
3 has now been noncompliant for fourteen straight months. There is no indication a contempt
4 fine of \$1.4 million would change things. In short, there is no evidence Defendants are
5 interested in performing their obligations under the Stipulation and it would be absurd to
6 continue down a path of trying to elicit Defendants to act differently.

7 **Plaintiffs Recognize the Stipulation has Failed**

8 Given Defendants' post-Stipulation behavior, Plaintiffs have consistently
9 recognized the need for a different approach. In response to the Court's May 2019 Order
10 to Show Cause, Plaintiffs recognized in "light of [Defendants'] ongoing intractable and
11 contumacious behavior, the time has come for this Court to take additional actions.
12 Plaintiffs ask that in addition to the monetary fine, the Court enter an injunctive order
13 pursuant to Rule 66 of the Federal Rules of Civil Procedure, appointing a receiver to
14 manage ADC's delivery of health care services to class members." (Doc. 3352 at 3). And
15 again, in responding to the Court's October 11, 2019 Order soliciting the parties'
16 preferences "regarding the future course of this case," Plaintiffs indicated their preference
17 was to set the case for trial, stating "[i]t is clear from Defendants' conduct in the past five
18 years that they have no intention of complying with all of the substantive provisions of the
19 Stipulation." (Doc. 3402 at 2). More recently, in addition to advocating for setting aside
20 the Stipulation, Plaintiffs again sought a receivership to administer the delivery of
21 healthcare to Arizona's prisoners. (Doc. 3430 at 13-14).

22 **CONCLUSION**

23 In some circumstances, a party's refusal to comply with a settlement agreement may
24 require drastic action. *See, e.g., McClendon v. City of Albuquerque*, 630 F.3d 1288 (10th
25 Cir. 2011) (discussing district court's decision to undo class action settlement eleven years
26 after acceptance). The present circumstances merit such action. This case must move
27 beyond six years of judicial attempts to enforce the Stipulation.

28 Accordingly,

1 **IT IS ORDERED** Defendants' pervasive material breaches of the Stipulation
2 justify Rule 60(b)(6) relief.

3 **IT IS FURTHER ORDERED** the Court's approval of the Stipulation under Rule
4 23(e) is **RESCINDED** and the February 15, 2015 Order (Doc. 1458) is **VACATED**. The
5 Clerk of Court shall reopen this case.

6 **IT IS FURTHER ORDERED** no later than **July 26, 2021**, the parties must confer
7 and submit a proposed schedule for discovery and preparation for trial, which must result
8 in both sides being ready for trial no later than **November 1, 2021**. Defendants must
9 provide constitutionally adequate health care in the interim.

10 **IT IS FURTHER ORDERED** the following motions are **DENIED** as moot, as
11 they pertain to the enforcement of the Stipulation: Doc. 3805, 3832, 3840, 3857, and 3901.

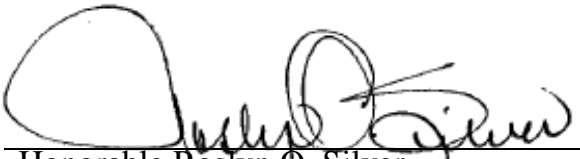
12 **IT IS FURTHER ORDERED** the Motions to Seal (Doc. 3837, 3889, 3902) are
13 **GRANTED**.

14 **IT IS FURTHER ORDERED** the Motion to Withdraw (Doc. 3867) is
15 **GRANTED**.

16 **IT IS FURTHER ORDERED** the Motion to Intervene (Doc. 3908) is **DENIED**.

17 Dated this 16th day of July, 2021.

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Honorable Roslyn O. Silver
Senior United States District Judge