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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12 OAKLAND DIVISION

14 **JOHN ARMSTRONG, et al.,**
 15
 Plaintiffs,
 16
 v.
 17
 18 **EDMUND G. BROWN JR., et. al.,**
 19
 Defendants.

C 94-2307 CW

**DEFENDANTS' EVIDENTIARY
 OBJECTIONS AND REQUEST TO
 STRIKE THE EXPERT DECLARATION
 OF PABLO STEWART, AND EXHIBITS
 3-5 AND PARAGRAPH 7 TO THE
 DECLARATION OF CORENE
 KENDRICK IN SUPPORT OF
 PLAINTIFFS' REPLY TO
 DEFENDANTS' OPPOSITION TO
 PLAINTIFFS' MOTION FOR A
 FURTHER ENFORCEMENT ORDER
 AND CONTEMPT ORDER**

Date: May 16, 2013
 Time: 2:00 p.m.
 Dept: 2
 Judge: The Honorable Claudia Wilken

1 Defendants object to, and request that this Court strike and disregard, the Declaration of
2 Pablo Stewart, M.D. [ECF Doc. No. 2274], and three inmate declarations attached as Exhibits 3-5
3 to the Declaration of Corene Kendrick in Support of Plaintiffs' Reply to Defendants' Opposition
4 to Plaintiffs' Motion for a Further Enforcement Order and for an Order Holding Defendants in
5 Contempt of Court [ECF Doc. No. 2273]. These four declarations consist of new evidence
6 submitted with Plaintiffs' reply that could have been submitted with Plaintiffs' motion. The
7 Stewart declaration must also be excluded because the declarant is not qualified as an expert on
8 the subject of effective communication with hearing-impaired individuals. And the Stewart and
9 inmate declarations, and paragraph seven of the Kendrick declaration, must also be excluded on
10 additional evidentiary grounds detailed below.

11 **Objections to the Declaration of Pablo Stewart, M.D.**

12 1. Defendants object to the Stewart declaration in its entirety because it is improper
13 expert witness testimony. Stewart has not demonstrated in his declaration that he is an expert on
14 the subject of what constitutes effective communication with hearing-impaired individuals, which
15 is the issue before the Court. Consequently, Stewart's testimony violates Federal Rule of
16 Evidence 702 because he is not qualified as an expert on effective communication with hearing-
17 impaired individuals based on his knowledge, skill, experience, training or education.
18 Fed.R.Evid. 702; *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

19 2. Defendants object to the Stewart declaration in its entirety because it is improper
20 reply evidence that must be disregarded and stricken. Plaintiffs' counsel retained Stewart to
21 analyze "CDCR's policy not to provide sign language interpreters to assist deaf prisoners in
22 communicating with Licensed Psychiatric Technicians for the rounds in Administrative
23 Segregation Units and Secure Housing Units." (Stewart Decl. ¶ 18.) But on February 28, 2013,
24 Plaintiffs moved this Court to hold Defendants in contempt of court for their January 2013 policy,
25 developed jointly with the receiver appointed in *Plata v. Brown*, whereby psychiatric technicians
26 conduct rounds in administrative segregation and security housing units without a sign language
27 interpreter. Plaintiffs should have submitted the Stewart declaration with their opening papers,
28

1 rather than waiting to file this declaration after Defendants filed their opposition, because it
2 concerns the basis for Plaintiffs' motion and is not simply a response to Defendants' opposition.

3 The Ninth Circuit and other courts have consistently held that new evidence introduced
4 with reply papers should not be considered without providing the opposing party an opportunity
5 to respond. See *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (“[w]here new evidence
6 is presented in a reply to a motion for summary judgment, the district court should not consider
7 the new evidence without giving the [non-]movant an opportunity to respond” (citations
8 omitted); *Mercado v. Sandoval, Inc.*, No. 2:08-CV-02648-GEB-EF, 2009 WL 2031715 at * 1
9 (E.D. Cal. July 9, 2009) (court did not consider new evidence raised for the first time in reply
10 because “[t]he reply brief is not intended to be the brief that shows for the first time the movant's
11 evidentiary support for the relief sought in the movant's opening brief”); *In re Hansen Natural*
12 *Corp. Securities Litigation*, 527 F.Supp.2d 1142, 1150 n. 2 (C.D. Cal. 2007); *Davenport v. M/V*
13 *New Horizon*, No. C 01-0933, 2002 WL 32098289 at * 3 (N.D. Cal. Dec. 18, 2002). The
14 prohibition on submitting untimely evidence is particularly warranted when, as here, Plaintiffs
15 seek the extraordinary remedies of an order holding Defendants in contempt of court, and new
16 state-wide injunctive terms, based on the late-filed expert declaration.

17 3. Defendants object to paragraph 22 of the Stewart declaration because it is irrelevant
18 to the issue of whether there is sufficient effective communication between psychiatric
19 technicians and hearing-impaired inmates during rounds under Defendants' current policy.
20 Fed.R.Evid. 401-402 and 702-703. Defendants object to paragraph 22 at 8:25-27 for a lack of
21 foundation because Dr. Stewart is not an expert on effective communication with hearing-
22 impaired inmates. Fed.R.Evid. 702-703; see also *Daubert* 509 U.S. 579.

23 4. Defendants object to paragraphs 23 through 28 of the Stewart declaration, and Exhibit
24 C, because of a lack of foundation and relevance. The general efficacy of Defendants' mental
25 health care program is not before the Court. Instead, the sole issue in Plaintiffs' motion, as to
26 mental health care, is whether licensed psychiatric technicians sufficiently communicate with
27 hearing-impaired inmates during rounds under CDCR's current policy. Stewart does not indicate
28 whether any hearing-impaired inmate-patients committed suicide while being housed in

1 administrative segregation or segregated housing. Therefore these statements are not relevant and
2 lack foundation. Fed.R.Evid. 401-402 and 702-703; *see also Daubert* 509 U.S. 579.

3 5. Defendants object, for lack of foundation, to the statement in paragraph 29 of the
4 Stewart declaration that the “purpose of these mental health rounds” includes “evaluating the
5 inmate-patients’ symptoms.” The *Coleman* Program Guide relied on by Plaintiffs does not state
6 that psychiatric technicians “evaluate” inmate-patients during rounds. Fed.R.Evid. 702-703; *see*
7 *also Daubert* 509 U.S. 579.

8 6. Defendants object to paragraphs 33 through 36 because this testimony lacks
9 foundation and is improper expert testimony. Stewart has not demonstrated he is an expert
10 concerning what constitutes effective communication between psychiatric technicians and
11 hearing-impaired individuals. His opinions are inadmissible. Fed.R.Evid. 702-703; *see also*
12 *Daubert* 509 U.S. 579.

13 7. Defendants object to the statements in paragraphs 38, 40 and 41 because of a lack of
14 relevance. Stewart alleges that sign language interpreters were not provided for various clinical
15 evaluations and encounters, counselor sessions and group therapy sessions, and meetings with
16 social workers that occurred concerning certain hearing-impaired inmate-patients. But the issue
17 before the Court is whether psychiatric technicians are effectively communicating as necessary
18 with hearing impaired inmate during rounds, not whether sign language interpreters should have
19 been utilized during other types of encounters. Fed.R.Evid. 401-402.

20 8. Defendants object to paragraph 42 for a lack of foundation and because it is improper
21 expert testimony. Stewart has not demonstrated that he is an expert on effective communication
22 with hearing-impaired individuals. Therefore, he has no basis for his opinion that, under the
23 policy developed by the receiver in *Plata v. Brown* and CDCR “deaf prisoners cannot
24 communicate effectively” and “their risk of harm is significantly greater than prisoners who can
25 communicate verbally.” Fed.R.Evid. 702-703; *see also Daubert* 509 U.S. 579.

26 **Objections to Exs. 3-5 to the Declaration of Corene Kendrick in Support of Reply.**

27 1. Defendants object to the three inmate declarations at Exhibits 3-5 of the Kendrick
28 reply declaration because of their improper submission as reply evidence. *See* authority cited

1 above in support of similar objection to the Stewart declaration. The declarations address issues
2 raised in Plaintiffs' opening brief, and therefore Defendants are deprived of an adequate
3 opportunity to address Plaintiffs' newly submitted evidence.

4 2. Defendants also object to the three inmate declarations because they state that they
5 were written for the inmates by sign language interpreters. (Kendrick Reply Decl., Ex. 3 ¶ 9; Ex.
6 4 ¶ 13; Ex. 5 ¶ 12.) But the interpreters are not identified and have not submitted declarations
7 concerning the accuracy of their translations and their qualifications as interpreters. Therefore,
8 the inmates' declarations violate Federal Rules of Evidence 604 and 901 and should be excluded.
9 *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 659 (N.D. Cal. 1994) ("Witness testimony
10 translated from a foreign language must be properly authenticated and any interpretation must be
11 shown to be an accurate translation done by a competent translator."); *Sun v. Governmental*
12 *Authorities on Taiwan*, No. C 94-2769 SI, 2011 WL 114443, at *7 (N.D. Cal. 2001) (striking
13 translated evidence when there was nothing to indicate "who did the translations and the
14 translator's competency.")

15 3. The inmates' statements to the interpreter/authors of the declarations are hearsay and
16 should be excluded under Federal Rule of Evidence 802.

17 4. Defendants also object to the inmate declaration at Exhibit 4, paragraph 10 of the
18 Kendrick reply declaration, which states that "[w]hen I was in SATF in 2012, I only saw a
19 psychologist once a week. Sometimes the appointments would be cancelled or postponed
20 because the interpreter had so many other prisoners to help." This paragraph should be excluded
21 because it lacks foundation, assumes facts not in evidence, and is not relevant to the issue of
22 psychiatric technician rounds. This inmate gives no basis for his statement about why
23 appointments might be cancelled or postponed.

24 **Objection to Paragraph 7 of the Kendrick Reply Declaration.**

25 1. Defendants object to paragraph 7 of the Kendrick reply declaration because it
26 mischaracterized the evidence. The declaration states that D. Chandler, an instructor,
27 "acknowledges that the prisoner was moved back to ABE I level 'because of the difficulty of the
28 Reading assignments in ABE II and that being in the same class with other ASL students would

1 facilitate greater access to ASL interpretation of lessons and tutoring.” But Ms. Kendrick omits
2 the key phrase preceding her quoted passage, and thereby distorts the evidence she cites. This
3 passage states that D. Chandler reviewed the inmate’s ABE I placement that “had been made at
4 [the inmate’s] request[.]” (Kendrick Reply Decl. Ex. 2 at 3.) The complete exhibit makes clear
5 that the inmate had requested his lower-level placement. (*Id.*)

6 Dated: April 11, 2013

Respectfully Submitted,

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9 JAY C. RUSSELL
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10 *s/Jay M. Goldman*
11 JAY M. GOLDMAN
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CERTIFICATE OF SERVICE

Case Name: **Armstrong v. Edmund G.
Brown, Jr., et al.**

No. **C 94-2307 CW**

I hereby certify that on **April 11, 2013**, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANTS' EVIDENTIARY OBJECTIONS AND REQUEST TO STRIKE THE
EXPERT DECLARATION OF PABLO STEWART, AND EXHIBITS 3-5 AND
PARAGRAPH 7 TO THE DECLARATION OF CORENE KENDRICK IN SUPPORT OF
PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION
FOR A FURTHER ENFORCEMENT ORDER AND CONTEMPT ORDER**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **April 11, 2013**, at San Francisco, California.

D. Criswell
Declarant

s/ D. Criswell
Signature

40685972.doc