

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 TODD ASHKER, et al.,
5 Plaintiffs,
6 v.
7 EDMUND G. BROWN, et al.,
8 Defendants.

Case No. 09-cv-05796-CW

ORDER ADOPTING REMEDIAL PLANS
AND GRANTING STAY OF
ENFORCEMENT OF REMEDIAL PLANS

(Docket No. 1097)

9
10 This case was brought by a class of prisoners who had been
11 placed in the Security Housing Unit (SHU) in Pelican Bay State
12 Prison for ten years or more. The prisoners alleged that
13 placement in the SHU, including solitary confinement, for that
14 length of time amounted to cruel and unusual punishment. The
15 case resulted in a Settlement Agreement addressing the policies
16 and practices of the California Department of Corrections and
17 Rehabilitation (CDCR). Subsequently, Plaintiffs alleged, and the
18 Court found, that Defendants were in violation of the Settlement
19 Agreement. Pursuant to Court orders issued on July 3, 2018,
20 Docket Nos. 1028, 1029, both parties were to submit proposed
21 remedial plans. Before the Court are Plaintiffs' proposed
22 remedial plans, along with Defendants' Motion to Stay the Court's
23 July 3, 2018 orders. Plaintiffs oppose the Motion to Stay.
24 Having considered the papers, the Court adopts the remedial plans
25 identified below and grants Defendants' motion to stay the
26 enforcement of the remedial plans pending appeal.

27 BACKGROUND

28 On July 3, 2018, the Court issued two orders, finding, on de

1 novo review of the Magistrate Judge's orders, that Defendants
2 violated the parties' Settlement Agreement in two ways. Docket
3 Nos. 1028, 1029. First, the Court found that Defendants violated
4 the Settlement Agreement with regard to out-of-cell time. Docket
5 No. 1028 (Out-of-Cell Time Order). The Court found that
6 Plaintiffs were not receiving out-of-cell time greater than what
7 they received in the SHU or "consistent with the CDCR's
8 regulations and practices with respect to Level IV general
9 population inmates." Id. at 1. The Court separately found that
10 Defendants were violating the Settlement Agreement by not
11 providing certain class members with exercise and leisure
12 activities in groups in that Defendants placed these class
13 members on "walk-alone" status. Docket No. 1029 (Walk-Along
14 Status Order) at 1. The Court ordered the parties to meet and
15 confer and attempt to agree upon joint remedial plans to rectify
16 these violations. If they did not agree, the parties were to
17 submit separate proposals for each violation, and the Court would
18 evaluate and adopt the appropriate remedial plans.

19 On July 31, 2018, Defendants filed their notice of appeal of
20 these July 3, 2018 orders, and a motion to stay further
21 proceedings to the extent they related to these orders, pending
22 appeal. Docket No. 1054. On August 16, 2018, the Court denied
23 Defendants' motion to stay, finding that Defendants would not
24 suffer irreparable harm because the orders merely required
25 proposals for remedies at the time. Docket No. 1070 (Order
26 Denying Stay) at 2-3. In its Order Denying Stay, the Court noted
27 that, upon receiving the remedial plan proposals, it might "delay
28 implementation of any remedial plan until after the Ninth Circuit

1 rules on Defendants' appeals." Id. at 3. At the parties'
2 request, the Court granted extensions of the deadline to submit
3 the proposals until November 9, 2018. Docket Nos. 1083, 1092.

4 Plaintiffs moved to dismiss Defendants' appeal for lack of
5 jurisdiction. On October 19, 2018, the Ninth Circuit denied
6 Plaintiffs' motion without prejudice, noting that Plaintiffs can
7 re-raise their jurisdiction argument in their briefs. Docket No.
8 1091. On October 30, 2018, Defendants filed their current motion
9 to stay these proceedings, arguing that the Ninth Circuit's
10 denial of Plaintiffs' motion to dismiss without prejudice and
11 acceptance of the case on the merits means that the Court has
12 been stripped of its jurisdiction and must stay any matters
13 related to the July 3, 2018 orders. Docket No. 1097. Defendants
14 also moved to continue the November 9, 2018 deadline to submit
15 remedial plans. Docket No. 1098. The Court denied Defendants'
16 motion to continue the November 9, 2018 deadline. Docket No.
17 1102. On November 9, 2018, Plaintiffs submitted their proposals.
18 Docket No. 1106 (Plaintiffs' Proposed Remedial Plans).
19 Defendants declined to submit proposed remedial plans because
20 they believed the Court has been stripped of its jurisdiction.
21 Docket Nos. 1104, 1105 (Defendants' Statements). In this Court's
22 view, Defendants' appeal was premature and burdensome, given that
23 this Court had not yet decided on remedies. Accordingly, the
24 Court will provide its decision on remedies at this time, without
25 the benefit of proposed plans from Defendants, so that the Court
26 of Appeals will have the option to review them in a single
27 proceeding and the remedies can be effected more quickly, if
28 affirmed.

DISCUSSION

I. Defendants' Failure to Provide Remedial Plans

Defendants' reason for violating the Court's July 3, 2018 orders requiring the parties to submit proposed remedial plans is unavailing. "If a person to whom a court directs an order believes that order is incorrect[,] the remedy is to appeal, but absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk . . . contempt even if the order is ultimately ruled incorrect." Britton v. Co-op Banking Group, 916 F.2d 1405, 1410 (9th Cir. 1990), quoting Maness v. Meyers, 419 U.S. 449, 458 (1975). Further, "the rule that a notice of appeal will divest a court of jurisdiction is not absolute. For example, a trial court retains jurisdiction to take actions that preserve the status quo during the pendency of an appeal And absent a stay or supersedeas, the court also retains jurisdiction to implement or enforce the judgment or order but may not alter or expand upon the judgment." In re Rains, 428 F.3d 893, 904 (9th Cir. 2005) (holding that a bankruptcy court had jurisdiction to enforce a settlement agreement and judgment while the order approving the settlement agreement was on appeal) (internal citations and quotations omitted). Here, the Court ordered Defendants to submit remedial plans for the Court's consideration. Defendants' subsequent appeal of these orders did not strip the Court of jurisdiction to enforce the orders, which were made before the appeal.

Defendants' argument that the Ninth Circuit's denial of Plaintiffs' motion to dismiss for lack of jurisdiction signaled

1 that Defendants need no longer obey the Court's orders does not
2 change this result. In any event, the Ninth Circuit denied
3 Plaintiffs' motion to dismiss without prejudice, and explicitly
4 noted that it would consider the jurisdictional argument at the
5 merits stage. Thus, the jurisdictional issue has not been
6 addressed by the Ninth Circuit.

7 Defendants also argue that the Court's July 3, 2018 orders
8 merely found that Defendants breached the Settlement Agreement
9 but did not specifically find "material noncompliance" with the
10 Agreement. Thus, Defendants argue, the Court was not entitled to
11 issue remedial orders. Docket Nos. 1104 at 3 & 1105 at 4. This
12 also fails. Although the Court used the words "violation" and
13 "does not comply," instead of "material noncompliance" or
14 "substantial noncompliance," the Court found violations of the
15 Settlement Agreement under paragraphs fifty-two and fifty-three.
16 However, for purposes of clarification, the Court notes that the
17 breach found in its Out-of-Cell Time Order was materially
18 noncompliant pursuant to paragraphs fifty-two and fifty-three of
19 the Settlement Agreement, and the breach found in its Walk-Along
20 Status Order was substantially noncompliant pursuant to paragraph
21 fifty-three.

22 II. Evaluation of the Proposed Remedial Plans

23 Because Defendants have failed to abide by the Court's
24 orders and have refused to submit their own proposed remedial
25 plans, the Court will rule based on Plaintiffs' plans and its own
26 familiarity with this litigation.

1 A. Out-of-Cell Time Remedial Plan

2 Defendants argue there were no allegations or findings of
3 federal rights violations. This argument fails. Plaintiffs
4 raised in their out-of-cell time motion that Defendants breached
5 the Settlement Agreement by not allowing more out-of-cell time
6 than when Plaintiffs were in the SHU, see Docket No. 424-2
7 (Settlement Agreement), ¶¶ 25, 52, in violation of the Eighth
8 Amendment. Paragraph fifty-two of the Settlement Agreement
9 provides that if Plaintiffs demonstrate material noncompliance
10 with the terms of the Agreement, then for the purposes of
11 Plaintiffs' enforcement motion only, Plaintiffs will have also
12 demonstrated a violation of a federal right. The Court found
13 material noncompliance pursuant to paragraph fifty-two of the
14 Settlement Agreement. A plan to remedy a violation of a federal
15 right must be consistent with the Prison Litigation Reform Act
16 (PLRA), requiring "that such relief is narrowly drawn, extends no
17 further than necessary to correct the violation of the Federal
18 right, and is the least intrusive means necessary to correct the
19 violation of the Federal right." Armstrong v. Brown, 768 F.3d
20 975, 983 (9th Cir. 2014) (quoting 18 U.S.C. § 3626(a)(1)).
21 Plaintiffs also seek relief under paragraph fifty-three, which
22 would allow them to seek enforcement of the Agreement upon proof
23 of substantial noncompliance.

24 Plaintiffs propose the following remedial plan:

25 "All class members who have been transferred to General
26 Population prisons and remain there must be accorded an
27 amount of time out of their cells that is meaningfully
28 greater than when they were in the SHU, consistent with
CDCR's legitimate security needs. CDCR shall have
discretion as to how to implement this general remedy,

1 with Plaintiffs and Plaintiffs' expert entitled to at
2 least one year of monitoring and documentation."

3 Plaintiffs' Proposed Remedial Plans at 1. Plaintiffs proposed a
4 few suggestions for more out-of-cell time, including meals in the
5 dining hall, or work, educational or vocational programs, but did
6 not propose that these be required as part of the plan. Instead,
7 they asked the Court to allow Defendants discretion on how best
8 to provide more out-of-cell time for Plaintiffs while balancing
9 legitimate security concerns. The Court finds that this proposal
10 is narrowly tailored, extends no further than necessary to remedy
11 the violation and is the least intrusive remedy.

12 Plaintiffs also propose that CDCR provide documentation and
13 monitoring of out-of-cell time. CDCR would be ordered to produce
14 (1) a list of all class members assigned to Level IV prisons,
15 including the date of placement and current location; (2)
16 individualized logs, movement sheets, or other documentation that
17 would provide information on the location and activity of the
18 out-of-cell time of each class member, to be provided daily for
19 the first two months of implementation, and thereafter reduced to
20 once a month; (3) for each Level IV prison where class members
21 are housed, monthly documentation of any lockdowns or
22 modifications and the reasons for the lockdown or modification;
23 (4) for each Level IV prison where class members are housed,
24 monthly documentation for each elimination or restriction of yard
25 or day room time and the reasons for it;¹ and, (5) no interference
26 with Plaintiffs' counsel's documentation efforts. Id. at 4.

27 _____
28 ¹ Plaintiffs' request here does not specify Level IV prisons
where class members are housed; however, the Court assumes that
was the intent and so limits it.

1 Plaintiffs have also proposed a monitoring system overseen
2 by Plaintiffs' counsel. Id. at 3-4. The monitoring system would
3 require (1) Defendants' and Plaintiffs' counsel to participate in
4 a conference call every three months during the time of the
5 monitoring;² (2) counsel to meet with Magistrate Judge Illman
6 every six months, starting six months from the date of the Order,
7 to assess the progress; (3) CDCR to facilitate quarterly calls
8 between Plaintiffs' counsel and class representatives to discuss
9 the progress of implementing the out-of-cell time remedial plan;
10 and (4) monitoring for one year, with Plaintiffs having the right
11 to seek extensions, each not to exceed twelve months. Id. at 3.

12 Plaintiffs also propose to retain an expert on prison
13 systems and out-of-cell time for prisoners in high security
14 units, in order to monitor Defendants' compliance consistent with
15 security concerns. Id. at 4-5. Plaintiffs propose that the
16 expert would be authorized to conduct visits with reasonable
17 notice, or without notice in exigent circumstances, to speak with
18 staff and inmates, and to have access to relevant data and
19 documentation. Id. Plaintiffs also propose a provision to
20 prohibit Defendants from retaliating against class
21 representatives, class members, or other prisoners due to their
22 participation in the remedial process. Id. at 5.

23 The Court finds Plaintiffs' proposed documentation and
24 monitoring system, and their request for an expert and a
25 retaliation provision, to be minimally intrusive, narrowly
26

27 ² Plaintiffs also propose that class representatives be
28 present on these calls. The Court does not adopt this
requirement.

1 tailored and consistent with the requirements of the Settlement
2 Agreement. Settlement Agreement, ¶¶ 37-39 (provisions outlining
3 the data and documents to be provided), id. ¶ 54 (retaliation
4 provision). The plan would require Defendants to incur some
5 additional costs to implement the remedy, including time spent
6 producing necessary documentation and paying expert fees, but
7 these requirements are not overly burdensome. For these reasons,
8 the Court adopts and will order the enforcement of Plaintiffs'
9 out-of-cell time remedial plan as stated in the Order Adopting
10 Out-of-Cell Time Plan filed concurrently herewith.

11 B. Walk-Along Status Remedial Plan

12 Pursuant to the Settlement Agreement, the Court can also
13 enforce a remedy for substantial noncompliance with the
14 Agreement. Settlement Agreement, ¶ 53. The Court found a
15 violation of the Settlement Agreement under paragraph fifty-three
16 with regard to walk-alone status. Defendants were in substantial
17 noncompliance when they placed "a substantial percentage of
18 Plaintiffs" in the Restricted Custody General Population (RCGP)
19 on walk-alone status, which deprived them of the mandated
20 "increased opportunities for positive social interaction"
21 including "[time] in small group yards . . . and leisure time
22 activity groups." See Settlement Agreement, ¶ 28. The Court,
23 like Plaintiffs, defines a "group" as consisting of more than one
24 person.

25 The Court finds reasonable Plaintiffs' proposal that
26 individuals may choose to opt into walk-alone status. Their
27 proposal allows individuals opting in the opportunity to reassess
28 their decision every six months by requiring voluntary walk-alone

1 prisoners to re-sign the waiver every six months to be retained
2 in walk-alone status.

3 However, Plaintiffs' walk-alone status remedial plan is
4 unacceptable to the extent it apparently would not allow
5 Defendants to place any class member in walk-alone status for any
6 length of time unless the prisoner voluntarily chose walk-alone
7 status. This fails to provide CDCR sufficient discretion to
8 determine whether a prisoner should be categorized as a walk-
9 alone if reasonably necessary for safety purposes.

10 In order to allow Defendants discretion to determine if
11 walk-alone status is necessary, the Court will require the
12 Institution Classification Committee (ICC) to determine whether a
13 RCGP prisoner should be in walk-alone status. For each prisoner
14 placed without a waiver in walk-alone status, the ICC will
15 provide to the prisoner and to Plaintiffs' counsel, to the extent
16 possible without disclosing information that could create a
17 security breach, its reasons for the finding. Currently,
18 Defendants have only three groups with seven to nine inmates in
19 each group. Defendants have not shown why smaller groups could
20 not be established for certain individuals. Thus, the ICC's
21 decision should explain why a walk-alone prisoner cannot exercise
22 or recreate in any group, even a group of two, if necessary. The
23 ICC must produce its finding to the prisoner and Plaintiffs'
24 counsel for review within seven days of the ICC's determination.
25 The prisoner may challenge the ICC's finding and have it reviewed
26 by the Departmental Review Board (DRB). Prior to the DRB
27 proceedings, a staff assistant shall be provided to help the
28 prisoner prepare and present his case. The DRB will also provide

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1 to Plaintiffs' counsel and the prisoner a separate statement with
2 its review of the ICC decision and its own finding, within seven
3 days of the DRB's determination.

4 Because Defendants have stated that walk-alone status is
5 merely temporary, to allow them to determine which group is most
6 suitable to place a prisoner, the decision to place a prisoner in
7 walk-alone status must be reassessed by the ICC and the DRB every
8 two months.

9 Plaintiffs' walk-alone status remedial plan would require
10 Defendants to ensure that walk-alone prisoners, whether voluntary
11 or otherwise, have "ordinary General Population privileges, and
12 have alternatives for social contact." Plaintiffs suggest
13 alternative social interaction with non-inmate individuals like
14 teachers or volunteers if an inmate cannot be placed into an RCGP
15 group. These alternative social contacts are consistent with
16 paragraph twenty-eight of the Settlement Agreement. However,
17 unlike their out-of-cell time remedial plan proposal, Plaintiffs
18 do not clarify that these were intended as suggestions.
19 Nonetheless, the Court takes these proposals as suggestions.
20 Defendants shall have discretion on implementing the alternative
21 social interactions, consistent with safety concerns.

22 Lastly, Plaintiffs seek to monitor the status of each RCGP
23 prisoner for one year, with Plaintiffs having the right to seek
24 extensions, each not to exceed twelve months.

25 The Court finds that, with modifications, Plaintiffs' walk-
26 alone status remedial plan is narrowly tailored, minimally
27 intrusive and reasonable based on the finding that prisoners
28 subject to walk-alone status were denied time in small group

yards and leisure time activity groups. The Court ADOPTS the walk-alone status plan as modified in the Order Adopting Walk-Alone Status Plan filed concurrently herewith.

III. Defendants' Motion to Stay

The Court GRANTS Defendants' motion to stay implementation of the remedial plans until after the Ninth Circuit's decision on Defendants' pending appeal. See Order Denying Stay at 3.

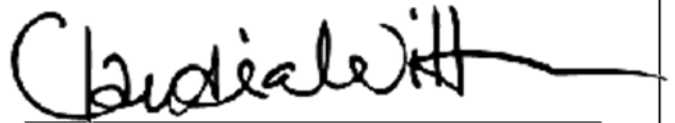
CONCLUSION

For the foregoing reasons, the Court hereby orders the following:

- (1) The Court adopts Plaintiffs' Out-of-Cell Time remedial plan and ORDERS Defendants to take all steps necessary to implement and comply with the plan as set forth in the Court's order filed concurrently herewith; and,
- (2) The Court adopts Plaintiffs' walk-alone status remedial plan as modified and ORDERS Defendants to take all steps necessary to implement and comply with the plan as set forth in the Court's order filed concurrently herewith; and,
- (3) The Court GRANTS Defendants' motion to stay the enforcement of these remedial plans pending appeal.

IT IS SO ORDERED.

Dated: December 7, 2018



CLAUDIA WILKEN
United States District Judge

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Northern District of California