
APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VICTOR ANTONIO PARSONS; SHAWN JENSEN; STEPHEN SWARTZ; SONIA RODRIGUEZ; CHRISTINA VERDUZCO; JACKIE THOMAS; JEREMY SMITH; ROBERT CARRASCO GAMEZ, JR.; MARYANNE CHISHOLM; DESIREE LICCI; JOSEPH HEFNER; JOSHUA POLSON; CHARLOTTE WELLS; ARIZONA CENTER FOR DISABILITY LAW, *Plaintiffs-Appellees*, v. CHARLES L. RYAN, Warden, Director, Arizona Department of Corrections; RICHARD PRATT, Interim Division Director, Division of Health Services, Arizona Department of Corrections, *Defendants-Appellants*.	Nos. 16-17282 17-15352 D.C. No. 2:12-cv-00601-DKD

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Plaintiffs-Appellants,

v.

CHARLES L. RYAN, Warden, Director, Arizona Department of Corrections; RICHARD PRATT, Interim Division Director, Division of Health Services, Arizona Department of Corrections,
Defendants-Appellees.

Nos. 17-15302

D.C. No. 2:12-cv-00601-DKD

OPINION

Appeal from the United States District Court
for the District of Arizona
David K. Duncan, Magistrate Judge, Presiding

Argued and Submitted October 18, 2017
San Francisco, California

Filed December 20, 2018

Before: Sidney R. Thomas, Chief Judge,
and J. Clifford Wallace and
Consuelo M. Callahan, Circuit Judges.

App. 3

Opinion by Judge Wallace;
Partial Concurrence and Partial Dissent by
Chief Judge Thomas;
Partial Concurrence and Partial Dissent by
Judge Callahan

COUNSEL

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Donald Specter (argued), Rita K. Lomio, Corene Kendrick, Alison Hardy, and Mae Ackerman-Brimberg, Prison Law Office, Berkeley, California; Amy Fettig (argued) and David C. Fathi, ACLU National Prison Project, Washington, D.C.; Amelia M. Gerlicher and Daniel C. Barr, Perkins Coie LLP, Phoenix, Arizona; Kathleen E. Brody, ACLU Foundation of Arizona, Phoenix, Arizona; Rose A. Daly-Rooney and Maya Abela, Arizona Center for Disability Law, Tucson, Arizona; for Plaintiffs-Appellees.

OPINION

WALLACE, Circuit Judge:

In March 2012, prisoners in the custody of the Arizona Department of Corrections (ADC), together with

the Arizona Center for Disability Law, brought a civil rights class action against senior ADC officials alleging systemic Eighth Amendment violations in Arizona's prison system. The inmates alleged that ADC's policies and practices governing health care delivery in ADC prisons and conditions of confinement in ADC isolation units expose them to a substantial risk of serious harm to which Defendants are deliberately indifferent. On the eve of trial, the parties signed a settlement agreement (Stipulation) by which Defendants agreed to comply with more than 100 "performance measures" designed to improve the ADC health care system and reduce the harmful effects of prisoner isolation. Since the action settled, the parties have engaged in several disputes over Defendants' alleged non-compliance with the performance measures, which has required the assigned magistrate judge to issue various rulings interpreting and enforcing the Stipulation. These rulings are the subject of the consolidated appeals now before us.

I.

The Stipulation went into effect on February 25, 2015, the date on which Magistrate Judge David Duncan granted final approval. Consistent with the district court's earlier class certification order, *Parsons v. Ryan*, 289 F.R.D. 513 (D. Ariz. 2013), *aff'd*, 754 F.3d 657 (9th Cir. 2014), the Stipulation defines one class and one subclass. The class is defined as "[a]ll prisoners who are now, or will in the future be, subjected to the medical, mental health, and dental care policies and

practices of the ADC." Stipulation ¶ 3. This covers approximately 33,000 inmates in 10 state-operated prisons. The subclass is defined as "[a]ll prisoners who are now, or will in the future be, subjected by the ADC to isolation, defined as confinement in a cell for 22 hours or more each day or confinement in [five enumerated] housing units." *Id.* This isolation subclass covers the approximately 3,000 inmates in ADC custody classified as "maximum custody."

The Stipulation requires Defendants to comply with 103 health care performance measures at each of the 10 state-operated prisons. The performance measures obligate Defendants to adopt certain standards and practices across a wide spectrum of health care categories, including diagnostic services, preventative services, mental health, and access to care. For example, Performance Measure 13 provides that "[c]hronic care and psychotropic medication renewals will be completed in a manner such that there is no interruption or lapse in medication." Performance Measure 33 mandates that "[a]ll inmates will receive a health screening by an LPN [licensed practical nurse] or RN [registered nurse] within one day of arrival at the intake facility." Defendants are required to measure and report their compliance with the health care performance measures on a monthly basis.

The Stipulation also requires Defendants to comply with nine performance measures specific to "maximum custody" inmates. For example, pursuant to Maximum Custody Performance Measure 1, all maximum custody inmates housed at the ADC's maximum

custody facilities must be offered a minimum number of hours of out-of-cell time per week. As with the health care performance measures, Defendants must measure and report their compliance with the maximum custody performance measures on a monthly basis.

The performance measures require Defendants to meet or exceed a certain threshold rate of compliance based upon how long the Stipulation has been in effect. For example, for the first 12 months after the Stipulation went into effect, Defendants were required to meet or exceed a 75 percent rate of compliance. Stipulation ¶¶ 10, 20. For the second 12 months, the required threshold increased to 80 percent. *Id.* Defendants' duty to measure and report on a particular performance measure terminates if (1) the performance measure meets the required compliance threshold for 18 months out of a 24-month period and (2) the performance measure has not been out of compliance for three or more consecutive months within the previous 18-month period.

The Stipulation also provides the process by which the parties resolve disputes over compliance. In the event Plaintiffs believe Defendants are in non-compliance with one or more of the performance measures, Plaintiffs must first provide Defendants a written statement describing the alleged non-compliance, to which Defendants must provide a written response. Stipulation ¶ 30. The parties must then meet and confer in an attempt to resolve the dispute informally and, if informal efforts fail, participate in formal mediation. *Id.* ¶¶ 30, 31. If the dispute is not resolved through formal

mediation, either party may file a motion to enforce the Stipulation in the district court. *Id.* ¶ 31.

Finally, the Stipulation explains the nature and scope of the magistrate judge's authority to resolve disputes arising out of the Stipulation. The relevant provision, Paragraph 36, provides as follows:

> In the event the Court finds that Defendants have not complied with the Stipulation, it shall in the first instance require Defendants to submit a plan approved by the Court to remedy the deficiencies identified by the Court. In the event the Court subsequently determines that the Defendants' plan did not remedy the deficiencies, the Court shall retain the power to enforce this Stipulation through all remedies provided by law, except that the Court shall not have the authority to order Defendants to construct a new prison or to hire a specific number or type of staff unless Defendants propose to do so as part of a plan to remedy a failure to comply with any provision of this Stipulation. In determining the subsequent remedies the Court shall consider whether to require Defendants to submit a revised plan.

Stipulation ¶ 36.

The appeals now before us are from various rulings of Magistrate Judge Duncan (acting on behalf of the district court) interpreting and enforcing the Stipulation. The first appeal involves Plaintiffs' challenge to the district court's ruling that the Stipulation

precludes the court from ordering Defendants to develop a general staffing plan as a remedy for Defendants' non-compliance. The second appeal concerns Defendants' challenge to the magistrate judge's order dated November 10, 2016, in which he ordered Defendants to use "all available community health care services" to meet their obligations under the Stipulation. The final appeal concerns Defendants' challenge to the magistrate judge's interpretation of the Stipulation's subclass to include inmates classified as "close custody." For the reasons set forth below, we affirm the district court's November 10, 2016 order, but reverse the other two rulings.

II.

We review de novo the district court's interpretation of a stipulation of settlement. *See Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989). "[W]e defer to any factual findings made by the district court in interpreting the settlement agreement unless they are clearly erroneous." *City of Emeryville v. Robinson*, 621 F.3d 1251, 1261 (9th Cir. 2010).

We review the district court's enforcement of a settlement agreement for abuse of discretion. *Wilcox v. Arpaio*, 753 F.3d 872, 875 (9th Cir. 2014). Under abuse-of-discretion review, we will reverse only if the district court made an error of law, or reached a result that was illogical, implausible, or without support in the record. *United States v. Hinkson*, 585 F.3d 1247, 1261-63 (9th Cir. 2009).

III.

Before turning the merits, we consider first the issue of subject matter jurisdiction over all three appeals. *See Munoz v. Mabus*, 630 F.3d 856, 860 (9th Cir. 2010). After three and a half years of litigating this case, Defendants move to dismiss the appeals on the ground that Magistrate Judge Duncan did not have jurisdiction to enter the orders at issue. "We review de novo whether a magistrate judge has jurisdiction," *Wilhelm v. Rotman*, 680 F.3d 1113, 1118 (9th Cir. 2012), recognizing that "our appellate jurisdiction depends on the proper exercise of magistrate judge jurisdiction," *Anderson v. Woodcreek Venture Ltd.*, 351 F.3d 911, 911 (9th Cir. 2003).

The Federal Magistrates Act, 28 U.S.C. §§ 631-39, governs the jurisdiction and authority of federal magistrate judges. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1118 (9th Cir. 2003). The Act provides that "[u]pon consent of the parties, a full-time United States magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court." 28 U.S.C. § 636(c)(1). Thus, two requirements must be met before a magistrate judge may properly exercise civil jurisdiction: (1) the parties must consent to the magistrate judge's authority and (2) the district court must "specially designate[ ]" the magistrate judge to exercise jurisdiction. *Columbia Record Prods. v. Hot Wax Records, Inc.*, 966 F.2d 515, 516 (9th Cir. 1992). We conclude both of these requirements were satisfied here.

First, Defendants do not dispute they voluntarily consented to the magistrate judge's jurisdiction. After settling the case, the parties filed a joint motion to refer the case to Magistrate Judge Duncan in which they stated "[p]ursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, the parties hereby consent to have Magistrate Judge David Duncan conduct all further proceedings in this case." This is sufficient to demonstrate Defendants' explicit, voluntary consent to the magistrate judge's jurisdiction. *See Anderson*, 351 F.3d at 915; *Gomez v. Vernon*, 255 F.3d 1118, 1125-26 (9th Cir. 2001).

Second, the district court "specially designated" Magistrate Judge Duncan to exercise jurisdiction. In our decision in *Columbia Record Productions*, we suggested that designation generally derives from an "individual district judge." 966 F.2d at 516-17; *see also Hill v. City of Seven Points*, 230 F.3d 167, 168-69 (5th Cir. 2000) (equating "special designation" to "[t]he district court's order of reference"). That is what occurred here. On October 22, 2014, District Judge Diane Humetewa entered a written order referring the case to Magistrate Judge Duncan and directing the clerk of court to reassign the case accordingly. Thus, Magistrate Judge's Duncan designation was effective, and he had jurisdiction to enter the orders from which the parties appeal.

Defendants contend Magistrate Judge Duncan lacked jurisdiction because the parties "hand-picked" him, thereby disregarding the district court's case assignment procedures. Citing the Seventh Circuit's

decision in *Hatcher v. Consolidated City of Indianapolis*, 323 F.3d 513 (7th Cir. 2003), Defendants argue that "magistrate judge assignment is a matter for the court to decide, not the parties," and therefore the district judge's referral of the case to the parties' hand-picked choice was invalid. *Id.* at 518.

Hatcher does not control the outcome here. In *Hatcher*, the parties entered into a settlement agreement by which they agreed to refer an unresolved legal fees issue to a named magistrate judge. *Id.* at 514-15. The Seventh Circuit concluded that the parties' referral to a specific magistrate judge via settlement agreement could not be carried out because it disregarded the district court's procedures for assigning magistrate judges. *Id.* at 517-19. Here, by contrast, it was the district court itself that referred the case to Magistrate Judge Duncan, not the parties. Although the parties specifically requested referral to Magistrate Judge Duncan, they did not proceed on the authority of their own "referral" as in *Hatcher*. Rather, they proceeded based on the district court's designation by written order. This judicial designation validates the referral here, and differentiates it from the invalid referral in *Hatcher*. Therefore, Defendants' reliance on *Hatcher* is unavailing.

Defendants also argue the district judge was precluded from referring the case specifically to Magistrate Judge Duncan because the District of Arizona's Local Rules require that magistrate judges be assigned by automated random selection. But although the Local Rules provide for magistrate judge jurisdiction

"when the case is . . . randomly assigned by the Clerk to a Magistrate Judge upon the filing of the case," the Rules also allow for magistrate judge jurisdiction "when a case is initially assigned to a District Judge and thereafter the case is reassigned to a Magistrate Judge with the District Judge's approval." LRCIV 72.2(a)(13). There is nothing in the Rules that requires "reassign[ment] to a Magistrate Judge with the District Judge's approval" to occur by automated random selection. Rather, the phrase "with the District Judge's approval" implies that the reassignment decision is one of discretion, not random assignment. The broader structure of the Rules confirms this reading. *See* LRCIV 3.7(a)(1) (stating that the Clerk of Court must initially assign civil cases by automated random selection and in a manner that does not permit the parties to choose a particular judge "[u]nless otherwise provided in these Rules or ordered by the Court"); LRCIV 73.1(d) (stating, in part, that cases assigned to a magistrate judge by random automated selection "shall remain with the Magistrate Judge to whom assigned unless otherwise ordered by the Court"). Therefore, we reject the argument that the district court's referral of the case to Magistrate Judge Duncan violated the Local Rules.

We conclude Magistrate Judge Duncan's jurisdiction was proper. Defendants' motion to dismiss the appeals for lack of jurisdiction is denied.

IV.

We turn now to Plaintiffs' appeal from the district court's February 3, 2017 order in which the court concluded that the Stipulation precluded it from ordering Defendants to develop a plan to increase staffing. The district court reasoned that such a plan would violate the Stipulation's provision "that the Court shall not have the authority to order Defendants . . . to hire a specific number or type of staff." Plaintiffs contend this interpretation violates the plain language of the Stipulation and runs contrary to principles of contract interpretation.

A.

As a preliminary matter, we address briefly Defendants' jurisdictional challenge to this appeal. Defendants argue this appeal is untimely because Plaintiffs filed it more than 30 days after the district court stated during a September 2016 status hearing that the Stipulation bars the court from issuing a general staffing order. This argument is groundless. The main purpose of the September 2016 status hearing was to evaluate the effectiveness of Defendants' remediation plan, not to resolve definitively a dispute about whether the Stipulation allows the district court to issue a general staffing order. The magistrate judge did not purport to resolve this issue conclusively until the parties briefed it, after which he issued a written order on February 3, 2017, denying Plaintiffs' motion for an order requiring Defendants to develop a staffing plan. It is this order

that is the relevant decision for starting the appeals clock. *See Campbell Indus., Inc. v. Offshore Logistics Int'l Inc.*, 816 F.2d 1401, 1404 (9th Cir. 1987) ("Only when a judge acts in a manner which clearly indicates an intention that the act be final, and a notation of that act has been entered on the docket, does the time for appeal begin to run."). Plaintiffs filed their notice of appeal on February 17, 2017, well within 30 days of the February 3 order. Therefore, the appeal is timely. *See* Fed. R. App. P. 4(a)(1)(A).

B.

We proceed now to the merits. Our interpretation of the Stipulation is governed by "principles of local law which apply to interpretations of contracts generally." *Jeff D.*, 899 F.2d at 759. Here, we apply Arizona contract law because the parties entered into the Stipulation in Arizona, Defendants are senior officials of the Arizona Department of Corrections, and the Stipulation concerns the policies and practices of the Arizona prison system. *See Kelly v. Wengler*, 822 F.3d 1085, 1095 (9th Cir. 2016); *Jeff D.*, 899 F.2d at 759-60.

"The purpose of contract interpretation is to determine the parties' intent and enforce that intent." *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593 (Ct. App. 2009). To determine the parties' intent, we "look to the plain meaning of the words as viewed in the context of the contract as a whole." *Earle Invs., LLC v. S. Desert Med. Ctr. Partners*, 242 Ariz. 252, 255 (Ct. App. 2017). "If the contractual language is clear,

we will afford it its plain and ordinary meaning and apply it as written." *Liberty Ins. Underwriters, Inc. v. Weitz Co., LLC*, 215 Ariz. 80, 83 (Ct. App. 2007).

Here, the Stipulation is clear on the limits of the district court's authority to enforce the Stipulation. The relevant provision, Paragraph 36, provides that "the Court shall retain the power to enforce this Stipulation through all remedies provided by law, except that the Court shall not have the authority to order Defendants to . . . hire a specific number or type of staff unless Defendants propose to do so as part of a plan to remedy a failure to comply with any provision of this Stipulation." Stipulation ¶ 36. Under this provision, the district court could not, for example, order Defendants to hire 20 additional employees at the Yuma facility or 10 additional registered nurses at the Tucson facility.

However, Paragraph 36 does not, by its plain language, preclude the district court from ordering Defendants to develop and implement a plan to increase staffing in general. Such a general staffing order would not, without more, violate the Stipulation because Defendants would retain discretion over the *specific* number and type of personnel to hire pursuant to such an order. For example, Defendants could develop a plan that relied on a small number of new hires, while emphasizing structural reforms to the prison health care delivery system. Or, Defendants could develop a plan that relied on significant increases in hiring in one specific job category, while leaving other staffing levels in place. Regardless of Defendants' specific decisions, the

key is that a general staffing order would not bind Defendants to "hire a specific number or type of staff" dictated by the district court. That decision would remain within Defendants' discretion. Therefore, we conclude the plain language of the Stipulation permits the district court to order Defendants to develop a general staffing plan. The district court's contrary conclusion was error.

Defendants make two arguments for why the district court's interpretation of the Stipulation is correct. First, Defendants advance the position the district court accepted below: that an order to develop a plan to increase staffing in general is the "functional equivalent" of an order requiring a specific number and type of staff. We disagree. A general staffing order by the district court would *not* intrude upon Defendants' discretion to determine the "specific number or type of staff" they believe is appropriate. As explained earlier, Defendants could develop a plan that places more emphasis on structural changes than on new hires, or a plan that limits new hires to a specific job category. Although it is true that a general staffing order would require Defendants to make staff hiring part of the solution, it would preserve Defendants' discretion to determine the number and type of staff to hire as part of that solution. Accordingly, we reject the argument that a general staffing order is the "functional equivalent" of an order to hire a specific number and type of staff.

Second, Defendants contend we must defer to the district court's interpretation because that interpretation

was based on the district court's first-hand understanding of the parties' intent. But Defendants' reference to the district court's understanding of the parties' intent is to a statement the court made during a status hearing months before the court's written order. We do not review oral statements from the bench on a matter later committed to writing; we review instead the written order entered by the district court. *Playmakers LLC v. ESPN, Inc.*, 376 F.3d 894, 896 (9th Cir. 2004) ("Where the record includes both oral and written rulings on the same matter, 'we review the written opinion and not the oral statements.' ") (internal quotation marks omitted). In his written order, the magistrate judge concluded he could not enter a general staffing order on the ground that such an order would necessarily involve ordering a specific number or type of staff. This order—which followed briefing by the parties—makes no mention of the district court's understanding of the parties' intent. Under these circumstances, we will not treat the district court's earlier oral remarks as a basis for its later written decision. *Ellison v. Shell Oil Co.*, 882 F.2d 349, 352 (9th Cir. 1989) ("Oral responses from the bench may fail to convey the judge's ultimate evaluation. Subsequent consideration may cause the district judge to modify his or her views."). Therefore, we reject Defendants' attempt to invoke the district court's first-hand understanding of the parties' intent as a basis for its interpretation.

In sum, we conclude the district court erred in interpreting the Stipulation as precluding it from ordering Defendants to develop and implement a plan to

increase staffing in general. We therefore reverse the district court's February 3, 2017 order. Consistent with our ruling, the district court may, in future proceedings, consider whether a general staffing order that does not require Defendants to hire a specific number or type of staff is an appropriate remedy for Defendants' non-compliance.

V.

We turn now to Defendants' appeal from the district court's November 10, 2016 order requiring Defendants to "use all available community healthcare services" to ensure compliance with certain performance measures ("Outside Provider Order" or "OPO").

The district court entered the Outside Provider Order to remedy Defendants' non-compliance with certain performance measures that require inmates to receive health care services within prescribed time frames. For example, Performance Measure 37 provides: "Sick call inmates will be seen by an RN within 24 hours after an HNR [Health Needs Request form] is received (or immediately if identified with an emergent need, or on the same day if identified as having an urgent need)." Defendants' compliance rates with this and related performance measures were as low as 34 percent at the time the district court entered the OPO.

After giving Defendants an opportunity to remedy their non-compliance under their own remediation

plan, the district court entered the OPO. The OPO provides:

> Defendants shall use all available community health care services including, but not limited to, commercial pharmacies, community-based practitioners, urgent care facilities, and hospitals (collectively, "Outside Providers") to provide the health care services required in the Stipulation's Performance Measures. This shall happen immediately following the expiration of the time-frame detailed in each PM. For example, if a PM requires Defendants to provide an inmate with a specific type of care within 24 hours (or 14 days), then Defendants shall have this inmate seen by an appropriate Outside Provider in hour 25 (or day 15).
>
> The Court notes that these requirements only apply when Defendants are not able to comply with the Stipulation's Performance Measures using the procedures detailed in their remediation plan. In other words, if Defendants can comply with the Stipulation without using Outside Providers, then they are under no obligation to use Outside Providers.

The district court did not abuse its discretion in issuing the Outside Provider Order. After finding Defendants in substantial non-compliance with certain performance measures, the district court properly ordered Defendants to submit a remediation plan, and then approved that plan despite the court's skepticism that it represented a serious solution. The district court then gave Defendants three months to demonstrate

compliance, and later granted them additional time to comply even as the data indicated "a serious failure to be even close on a number of the performance measures." Finally, only after the latest data showed that Defendants remained in substantial non-compliance did the district court issue the OPO. In light of the district court's strict adherence to the dispute resolution procedure outlined in the Stipulation and careful consideration of the record, we conclude the district court did not abuse its discretion in issuing the OPO.

Defendants' challenge the OPO on several grounds. First, Defendants argue the OPO effectively re-writes the Stipulation to require 100 percent compliance with the performance measures, rather than 80 percent. As an example, Defendants point to the OPO's impact on Performance Measure 37, which requires sick call inmates to be seen by an RN within 24 hours of submitting a health needs request form. Pursuant to the OPO, Defendants must ensure sick call inmates not seen by an RN within 24 hours are seen within 25 hours. In Defendants' view, the difficulty of tracking inmate-provider contact after hour 24 effectively forces Defendants to ensure all inmates are seen within 24 hours, lest they risk violating the OPO.

We disagree. Although the OPO requires Defendants to use outside providers if Defendants cannot otherwise treat inmates within the prescribed time frame, it does not, in fact, change the threshold for substantial compliance. The threshold for substantial compliance remains 80 percent. In other words, the OPO is simply

a remedy to address Defendants' non-compliance, it does not change what constitutes compliance for purposes of avoiding judicial enforcement. So long as Defendants meet or exceed the 80 percent benchmark provided in the Stipulation, the OPO has no effect. Therefore, we disagree with the notion that the OPO effectively requires 100 percent compliance.

Second, Defendants argue that the district court abused its discretion by entering the OPO without considering alternative remedies. Not so. Not only does the record indicate the district court considered alternatives on its own accord, *see, e.g.*, Transcript of November 9, 2016 status hearing, District Ct. Dkt. 1765 at 9 (stating that the OPO is "the only [remedy] that I have been able to conclude that could work"), the court also stressed that Defendants should identify alternatives as soon as it became clear their preferred plan was not working. Defendants did not do so. Although Defendants now point out they have developed an "open-clinic concept" that has led to increased compliance with one of the performance measures, Defendants made no mention of this plan until *after* the district court issued the OPO. We will not fault the district court for failing to adopt a partial solution that Defendants did not timely propose.

Third, Defendants contend the OPO creates an "unprecedented" security risk by requiring Defendants to transport "hundreds of inmates on a daily basis" to outside medical facilities. We reject this argument because it relies on a premise not supported by the record. Although the OPO requires Defendants to use

outside providers if Defendants cannot otherwise comply with the performance measures, the OPO does not require Defendants to transport a specific number (or any number) of inmates to outside facilities. As the district court pointed out, Defendants can avoid transporting inmates offsite by bringing outside providers to the prisons, or by simply hiring more healthcare providers to work within the prison system. Defendants can also avoid transporting inmates offsite by making greater use of information technology to provide clinical care remotely, or by adopting internal changes—such as the open clinic concept Defendants are currently implementing—that ensure compliance with the Stipulation. In light of the considerable discretion Defendants have in deciding how to connect inmates with outside providers, the presumption that the OPO requires large-scale transportation of inmates offsite is unwarranted.

Fourth, Defendants argue the OPO imposes an "impossible" logistical burden because the potential volume of inmate transports would require vehicles and staff beyond Defendants' current resources. This argument is similar to the argument regarding "security risks" addressed above, and fails for the same reason—the OPO does not require any specific number of inmates to be transported offsite. As explained above, if Defendants prefer not to transport inmates offsite, they have alternatives for ensuring inmates receive the care to which they are entitled. Thus, we reject Defendants' argument that the OPO is excessively burdensome. *Cf. Armstrong v. Schwarzenegger*, 622 F.3d

1058, 1071 (9th Cir. 2010) ("A demonstration that an order [issued to vindicate the federal rights of prisoners] is burdensome does nothing to prove that it was overly intrusive.").

Finally, Defendants argue that the district court erred in certifying the OPO as compliant with the Prisoner Litigation Reform Act (PLRA). Under the PLRA, a court may not order "any prospective relief [with respect to prison conditions] unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). Defendants assert the OPO does not comply with the PLRA because the district court never determined that a constitutional violation occurred.

Defendants are incorrect. In approving the Stipulation, the district court held "[b]ased upon the entire record in this case and the parties' Stipulation" that the Stipulation was "necessary to correct the violations of the Federal right of the Plaintiffs." This conclusion necessarily required a finding of a constitutional violation—that is, if there were no violation of a federal right, there would be nothing for the Stipulation to "correct." Therefore, the district court found the requisite constitutional violation in granting the initial prospective relief in this case.

Nor do we accept Defendants' suggestion that the district court was required to make *new* findings of a constitutional violation before entering the OPO. The

district court issued the OPO to enforce compliance with the Stipulation (which the parties agreed was necessary to correct violations of Plaintiffs' federal rights); it did not issue the OPO as prospective relief in response to new violations of federal rights. That is, the same constitutional violations upon which the Stipulation rests are the same violations the OPO is intended to remedy. Accordingly, the district court was not required to make new findings of a constitutional violation before enforcing the Stipulation with the OPO.

In sum, we conclude the district court did not abuse its discretion in issuing the Outside Provider Order.

VI.

The final issue before us involves the district court's December 23, 2016 order ("Close Custody Order"), in which the court interpreted the subclass to include all close custody inmates not otherwise participating in a prison jobs program. Defendants contend the district court erred in adopting this interpretation because the amount of out-of-cell time offered to close custody inmates places them outside the definition of the subclass.

The Stipulation defines the subclass as follows:

> All prisoners who are now, or will in the future be, subjected by the ADC to isolation, defined as confinement in a cell for 22 hours or more each day or confinement in the following

> housing units: Eyman-SMU I; Eyman-Browning Unit; Florence-Central Unit; Florence-Kasson Unit; or Perryville-Lumley Special Management Area.

Stipulation ¶ 3.

At the time the Stipulation went into effect, the five housing units in the subclass definition made up the entirety of Arizona's maximum custody prison facilities.

In October 2016, Plaintiffs sought records for two inmates housed in Florence-Central and Eyman-SMU I to assess compliance with the maximum custody performance measures. In response, Defendants informed the district court that although the inmates in question were housed at those units, they were classified as "close custody," rather than maximum custody. Defendants explained that close custody inmates are offered at least 15.5 hours of out-of-cell time per week, placing them outside the definition of the subclass and therefore outside the coverage of the maximum custody performance measures. The district court found to the contrary, concluding that "close custody inmates are subject to substantially similar conditions as maximum custody inmates and, therefore, are part of the Subclass." Defendants appealed.

A.

As a threshold matter, we address Plaintiffs' argument that the district court's Close Custody Order was

insufficiently "final" and therefore not appealable under 28 U.S.C. § 1291.

We generally have jurisdiction over only final decisions of the district courts. 28 U.S.C. § 1291. A "final decision" is typically "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *United States v. Washington*, 761 F.2d 1404, 1406 (9th Cir. 1985) (citation omitted). Under the collateral order doctrine, however, an order that does not strictly end the litigation may nonetheless be considered sufficiently final when it is "too important to be denied review and too independent of the merits of the case to require deferral of review." *Plata v. Brown*, 754 F.3d 1070, 1075 (9th Cir. 2014) (citation and internal quotation marks omitted). "To warrant review under the collateral order doctrine, the order must '(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.'" *Id.* (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)).

We have jurisdiction to review the Close Custody Order under the collateral order doctrine. The Order is conclusive in that it is the district court's final determination of whether close custody inmates are part of the isolation subclass. The Order involves "an important issue completely separate from the merits" because it decides a question of law not connected to the merits of Defendants' liability for Eighth Amendment violations. Finally, the Order is "effectively unreviewable on appeal" because Defendants' good-faith

compliance with the Order would, in effect, deprive Plaintiffs of the opportunity to challenge it. If Defendants comply with the Close Custody Order, Plaintiffs would have no reason to move to enforce it, which would close off the most likely avenue for appeal indefinitely. Accordingly, we conclude we have jurisdiction over Defendants' appeal from the Close Custody Order.

Plaintiffs' first argument to the contrary is that the Close Custody Order is not "final" because it does not require Defendants "to take, or refrain from taking, any action whatsoever." That is incorrect. The district court's ruling requires Defendants to apply the maximum custody performance measures to close custody inmates when, prior to the Close Custody Order, those performance measures applied only to maximum custody inmates. Thus, by extending the application of the maximum custody requirements to close custody inmates, the Close Custody Order does, in fact, require Defendants to take action.

Plaintiffs also argue the Close Custody Order is not "final" because it only asks the parties to take the intermediate step of developing a plan for implementing the court's interpretation of the subclass. This argument misreads the Order. The district court's request that the parties develop a plan for implementation was in reference to the classification of a subset of inmates who work 20 hours per week as part of a prison jobs program—inmates the court found were not members of the subclass. The district court did not ask the parties to develop a plan concerning its ruling that all close custody inmates not in the jobs program

are part of the subclass. It is this latter ruling that Defendants challenge. Therefore, Plaintiffs' reliance on the district court's request that the parties develop a plan does not make the Close Custody Order any less "final" for purposes of our jurisdiction.

B.

We turn now to the merits. Defendants argue the district court erred in interpreting the subclass to include close custody inmates offered 15.5 hours or more out-of-cell time each week.

In interpreting the subclass to include close custody inmates, the district court concluded that "close custody inmates are subject to substantially similar conditions as maximum custody inmates, and therefore, are part of the Subclass." This was error. The touchstone for inclusion in the subclass is not "substantially similar conditions" but rather the amount of isolation experienced by inmates. The subclass is defined as inmates who are confined in a cell for 22 hours or more each day (i.e., inmates who receive less than 14 hours of out-of-cell time each week). Therefore, by concluding that inmates offered 15.5 hours of out-of-cell time each week fall within the subclass, the district court effectively rewrote the subclass definition. The parties set the benchmark for inclusion in the subclass at 14 hours; the district court cannot unilaterally move that benchmark to 15.5 hours. *See Isaak v. Mass. Indem. Life Ins. Co.*, 623 P.2d 11, 14 (Ariz. 1981) ("It is not within the power of [a] court to 'revise, modify, alter,

extend, or remake' a contract to include terms not agreed upon by the parties.") (citation omitted).

Plaintiffs contend the district court did not err in interpreting the subclass because Defendants did not prove that inmates who are offered 15.5 hours or more out-of-cell time per week actually take the time offered. For example, Plaintiffs assert that out-of-cell activities offered to close custody inmates include visitation and religious services, but that the record does not show that all such inmates receive visitors or participate in religious services. On this ground, Plaintiffs argue the district court was correct to conclude that out-of-cell time offered to close custody inmates is merely "theoretical," and therefore an insufficient basis for treating close custody inmates differently than maximum custody inmates.

We disagree. The subclass definition turns on the amount of time an inmate is "confine[d] in a cell" each day. Confinement, of course, connotes a lack of control over whether to leave a particular place. *See* Oxford English Dictionary (online ed. 2018) (defining "confinement" as "the fact or condition of being confined, shut up, or kept in one place"). On this understanding, an inmate given an opportunity to participate in out-of-cell activities cannot be considered "confined" in a cell during that time even if the inmate may theoretically decide not to take advantage of the opportunity. *See* Judith Resnik et al., Time-In-Cell: *Isolation and Incarceration*, 125 Yale L.J. F. 212, 219 (2016) (characterizing prisoner isolation as a condition of confinement in which *opportunities* for social contact, "such as

out-of-cell time for exercise, visits, and programs," are restricted). For example, a close custody inmate who is offered 15 hours of out-of-cell time per week for education, but turns it down, is in a much different position than a maximum custody prisoner who does not have that option.

The broader structure of the Stipulation supports this reading: many of the provisions relating to maximum custody inmates require Defendants to *offer* inmates a minimum amount of out-of-cell time, not compel inmates to take that time. *See* Stipulation ¶¶ 22, 24-26. This framing of the out-of-cell-time requirement makes perfect sense: although Defendants can control whether to provide meaningful opportunities to inmates for out-of-cell activities, it cannot control whether an inmate's individual preferences, family situation, or subjective motivations will lead or allow the inmate to take advantage of the time offered. Here, Defendants have shown that close custody inmates are offered meaningful opportunities for weekly out-of-cell time that far exceeds 14 hours per week, including for education, library visits, recreation, dinner, showers, religious group worship, and visitation. This is sufficient to place these inmates outside of the subclass.[1]

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[1] In his partial dissent, Chief Judge Thomas emphasizes that the district court could have plausibly found that the list of out-of-cell opportunities potentially available to close custody inmates may not have *actually* been available to many of these inmates. *See* Partial Dissent at 34. The Chief Judge states, for example, that not all close custody inmates will be able to take advantage

Plaintiffs next argue the plain language of the subclass definition supports the district court's reading because that language refers not only to hours confined in a cell, but also to confinement in five specific housing units. Plaintiffs contend that the reference to specific housing units means any inmate housed in those units is part of the subclass regardless of how much out-of-cell time the inmate receives.

We reject this interpretation. Although the subclass refers to inmates housed in specific units, this reference merely captures what was known to the parties and the court at the time the court certified the

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of visitation hours or participate in programming for which the number of slots is limited. *Id.*

We do not dispute that not all close custody inmates will be able to, or want to, take advantage of every offered opportunity for out-of-cell activity. But the fact that there may be variances in the extent to which close custody inmates can take advantage of out-of-cell opportunities does not support the district court's conclusion that these inmates are, as a class, subject to the same conditions as maximum custody inmates. For one thing, the opportunity not to be confined itself provides inmates a degree of control and agency that is absent when no such opportunity exists. As stated above, a close custody inmate who is offered 15 hours of out-of-cell time per week for education, but does not take it, experiences much different confinement conditions than a maximum custody inmate who does not have that option. Furthermore, as explained above, Defendants cannot control whether a close custody inmate has the ability or desire to take advantage of out-of-cell time offered, and so this cannot be the touchstone for defining the subclass. A definition of the subclass that turned in large part upon the subjective motivations or individual preferences of an inmate is not a definition that could meaningfully separate inmates who are "isolated" from those who are not. Accordingly, we disagree with the Chief Judge's analysis.

subclass: that the enumerated housing units composed all of the maximum custody facilities in the Arizona prison system. Thus, enumeration of the maximum custody facilities in the subclass did not expand the subclass to include close custody inmates; it simply reflected the focus of the subclass on those inmates subjected to the most isolating conditions of confinement.

Adopting Plaintiffs' interpretation would lead to absurd results. Under Plaintiffs' reading, a close custody inmate who received 40 hours of out-of-cell time per week, but happens to be located at one of the maximum custody facilities such as Florence-Central, would nonetheless be subjected to the maximum custody performance measures. Those performance measures, however, require Defendants to offer inmates between 7.5 to 22.5 hours of out-of-cell time per week. Under Plaintiffs' interpretation, then, a close custody inmate offered 40 hours of out-of-cell time per week would only need to receive a portion of that time for Defendants to comply with the Stipulation. Such a result would directly undercut one of the fundamental aims of the agreement—to reduce inmate isolation. We therefore reject the argument that an inmate's mere location in a housing unit, rather than the amount of time confined in a cell, suffices to place the inmate within the subclass. *See Bryceland v. Northey*, 160 Ariz. 213, 216 (Ct. App. 1989) ("We will interpret a contract in a manner which gives a reasonable meaning to the manifested intent of the parties rather than an interpretation that would render the contract unreasonable.").

VII.

For the foregoing reasons, we affirm the district court's November 10, 2016 Outside Provider Order; reverse the district court's February 3, 2017 ruling that the Stipulation precludes it from issuing a general staffing order; and reverse the district court's December 23, 2016 ruling that close custody inmates are part of the subclass. Consistent with this opinion, the district court may, in the future, consider ordering Defendants to develop and implement a plan to increase staffing in general as a remedy for Defendants' noncompliance. In addition, offering close custody inmates 15.5 hours or more out-of-cell time per week is sufficient to place these inmates outside of the subclass for purposes of monitoring compliance with the Stipulation.

The parties shall bear their own costs on appeal. Any pending motions are **DENIED**.

AFFIRMED in part, REVERSED in part, and REMANDED.

THOMAS, Chief Judge, concurring in part and dissenting in part:

I concur in the majority's conclusions as to the staffing appeal and the outside providers appeal. I also concur in the majority's conclusion that we have jurisdiction over the Close Custody Order appeal. However, I part ways from the majority in its conclusion that the Close Custody Order was an abuse of discretion. The

Close Custody Order was based on factual findings that were plausible in light of the evidence presented by Defendants. I would affirm the district court.

I

Defendants appeal from the district court's December 23, 2016 Close Custody Order and from the district court's February 6, 2017 order denying their motion for relief under Federal Rule of Civil Procedure 60(b). We review for an abuse of discretion the district court's enforcement of the settlement agreement in the Close Custody Order, *Doi v. Halekulani Corp.*, 276 F.3d 1131, 1136 (9th Cir. 2002), and the denial of the Rule 60(b) motion, *Delay v. Gordon*, 475 F.3d 1039, 1043 (9th Cir. 2007). Abuse of discretion review presents a high threshold for appeal on questions of fact. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").

II

The district court did not abuse its discretion. In its November 8, 2016 order, the district court held that the subclass would thereafter consist of inmates who are subjected to isolation, defined as containment in a cell for 22 hours or more each day (i.e., less than 14 hours of out-of-cell time each week). The district court

asked Defendants to present competent, admissible evidence demonstrating that the close custody inmates in enumerated housing units were not subject to these conditions.[1]

On November 22, 2016, Defendants presented to the district court a list of activities that were "offered" to close custody inmates each week. In its December 23, 2016 Close Custody Order, the district court concluded that Defendants had "provided a theoretical explanation of what close custody inmates may experience without showing that any particular inmate actually has experienced these out-of-cell options." By contrast, the district court concluded that Defendants had provided sufficiently detailed and specific evidence that 276 close custody inmates worked in different positions for, on average, 30 hours per week. Defendants had provided job titles and the number of inmates working in each position. The district court concluded that these inmates experienced different confinement conditions than the maximum custody inmates, and

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[1] Defendants and the majority note that the district court asked Defendants to present evidence that the close custody inmates were subject to "substantially different" conditions than the maximum custody inmates. Defendants and the majority contend that this impermissibly expanded the subclass. We need not reach this issue. As discussed *infra*, the district court concluded that Defendants did not present sufficient evidence that close custody inmates were offered more than 14 hours of out-of-cell time each week—thereby placing them within the subclass definition agreed to by Defendants. The district court did not need to find that close custody inmates were subject to "substantially similar conditions" as maximum custody inmates; it found that they were subject to the *same* conditions.

thus, they would not be considered members of the subclass.

The district court's conclusions are plausible in light of the record. As Plaintiffs argue, some of the activities in Defendants' list of offerings may not have actually been made available to many of the close custody inmates. For example, Defendants list visitations as an offered activity, but many inmates may not have any visitors. Defendants list visits to the store to pick up purchases as an offered activity, but many inmates may not have any money to make purchases at the store (and thus may not be allowed to go pick up purchases). Some of the programming activities that Defendants list—such as "Re-Entry," "Substance use/AA," and "Cognitive Behavior"—have a limited number of slots, and thus would not be made available to all inmates. Given these limitations, the district court concluded that Defendants' list of possible activities was not sufficient to show that any particular inmate is actually offered more than 14 hours of out-of-cell time each week.[2] This conclusion was not implausible in

[2] Defendants argue that they could not produce such evidence, because they had no reason to monitor activities of the close custody inmates prior to the district court's December 23, 2016 order clarifying that such inmates were part of the subclass. This is unpersuasive. Prior to the district court's November 8, 2016 order asking Defendants to produce such evidence, the subclass had unambiguously encompassed *all* inmates in the five enumerated housing units. This included all the close custody inmates at issue here. Defendants were responsible for monitoring the activities of those inmates. It is only when the district court began to pare down the subclass to include only inmates subject to isolation that the membership of the close custody inmates in

light of the record. Therefore, I do not believe the district court abused its discretion in ruling that close custody inmates were part of the subclass. For this reason, I respectfully dissent from the majority's contrary holding, but concur in all other respects.

CALLAHAN, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's conclusion as to subject matter and appellate jurisdiction for the three appeals. I also concur in the majority's conclusion that the district court erred in interpreting the subclass to include all close custody inmates not otherwise participating in a prison jobs program (Part VI of the majority opinion). However, I cannot agree with the majority's disposition of the staffing appeal and the outside providers appeal (Parts IV and V, respectively). I would affirm the district court's February 3, 2017 staffing order and reverse the district court's November 10, 2016 outside providers order.

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the subclass came into question. The district court contracted, rather than expanded, the subclass definition. Further, the argument that inmates might decide not to take advantage of opportunities is irrelevant to the district court's finding that the Defendants had not presented sufficient evidence that any close custody inmate was *actually offered* more than 14 hours of out-of-cell activities each week.

I.

The district court's role in this case is purely to interpret and enforce the terms of the Stipulation. Although the Stipulation authorizes the district court to remedy non-compliance, at the bargaining table, the parties removed one particular "tool," as the district court put it, from the court's "remedial toolbox." The Stipulation expressly prohibits the court from "order[ing] Defendants to . . . hire a specific number or type of staff unless Defendants propose to do so as part of a plan to remedy a failure to comply with any provision of this Stipulation." The majority concludes that although the Stipulation prevents the district court from ordering Defendants to hire a specific number of staff, the court may order Defendants to increase staffing in general. I cannot agree. Instead, I agree with the district court's interpretation of the Stipulation that the court may not do indirectly what the Stipulation prohibits it from doing directly.

The majority states that a general staffing order would preserve Defendants' discretion to determine the exact number and type of staff to hire. But, assuming the court has the power to issue a general staffing order, the court presumably would not (and, arguably, could not) approve a proposed staffing plan unless it were to deem the plan adequate. Certainly, a vague statement by Defendants that they would "increase" staffing in some undisclosed way would not be deemed adequate. Rather, the adequacy of a general staffing order could not be determined without considering the number and type of staff. Additionally, under the

majority's rationale, if Defendants' compliance were to remain unsatisfactory after an increase in staff, nothing would prevent the court from again deeming staffing inadequate and again ordering a "general" staffing increase. This process could continue until the court finally deems staffing adequate. Perhaps other than being much more costly, such a protracted process—whereby the court effectively tells Defendants to "keep trying" over-and-over until they have sufficiently increased staffing—bears no meaningful difference from directly ordering Defendants to hire a specific number of staff.

I agree with the district court that an order to develop a plan to increase staffing in general is the "functional equivalent" of an order requiring a specific number and type of staff, which the Stipulation prohibits. I would thus affirm the district court's February 3, 2017 order.

II.

I cannot agree with the majority's decision to affirm the outside providers order. The majority rejects Defendants' argument that the order effectively requires 100 percent compliance, contrary to the 80 percent benchmark provided in the Stipulation. But the majority's interpretation of the order conflicts with Judge Duncan's own interpretation of his order. At the November 9, 2016 hearing where Judge Duncan announced his intention to order Defendants to use outside providers, he stated that he was requiring 100

percent compliance. Likewise, in his order denying Defendants' Rule 60(b) motion, Judge Duncan characterized the outside providers order as "requir[ing] Defendants to pursue 100% compliance." I would defer to Judge Duncan's own interpretation of his order and agree with Defendants that such a ruling erroneously modifies the Stipulation.

Its issuance of the outside providers order one day after orally announcing the intended decision also prevented the district court from adequately taking into account the security risks created by ordering Defendants to transport hundreds of inmates on a daily basis to outside medical facilities. In my view, the majority is too quick to dismiss this concern.

I would thus reverse the district court's November 10, 2017 outside providers order.

III.

For the foregoing reasons, I would affirm the staffing order and reverse the outside providers order.[1] I otherwise concur in the majority's opinion.

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[1] The majority's reversal of the staffing order warrants vacatur of the outside providers order. The majority's decision fails to account for the fact that the staffing order and the outside providers order were interrelated. It is plain from the record that the district court viewed an order to increase staffing as the "preferred" remedial measure and issued the outside providers order only because it interpreted the Stipulation as preventing the issuance of a staffing order. In the outside providers order, before stating that it would require Defendants to use outside providers, the district court observed that, under its interpretation of the

Stipulation, "the most efficient and effective tool"—the power to order increased staffing—had been removed "from the Court's remedial toolbox." Judge Duncan also stated at the November 9, 2016 hearing that ordering Defendants to use outside providers was "not as preferred as some other tools" but that the other tools had been "taken out of my toolbox." Because the majority is reversing the district court's decision as to the staffing order, thereby placing that tool back in Judge Duncan's "remedial toolbox," prudence dictates that the outside providers order be vacated. Of course, on remand, nothing prevents the district court from revisiting its prior remedial decisions to consider anew possible remedies in light of the reversal of the staffing order.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Victor Antonio Parsons, et al., Plaintiffs, v. Charles L. Ryan, et al., Defendants.	No. CV-12-0601-PHX-DKD **ORDER**

Pending before the Court is Defendants' Motion for District Court Judge to Vacate Magistrate Judge Referral (Doc. 2825) and Plaintiffs' response (Doc. 2839). For the foregoing reasons, the Defendants' motion is denied.

Citing 28 U.S.C. § 636(c)(4) and Federal Rule of Civil Procedure 73(b)(3), Defendants attack Judge Duncan's subject matter jurisdiction over this action and request that the referral of this action be vacated for extraordinary circumstances. Defendants allege that under *Hatcher v. Consolidated City of Indianapolis*, 323 F.3d 513 (7th Cir. 2003), their explicit agreement to Judge Duncan's jurisdiction in October 2014 is invalid. Judge Duncan has addressed this argument, but the undersigned agrees that *Hatcher* is factually and legally distinguishable from this case. Defendants' position is also foreclosed by the Supreme Court's

decision in *Roell v. Withrow*, 538 U.S. 580, 587 (2003), because while there does not appear to be any defect in the process by which Judge Duncan became involved in this case, and even if there was one, it was cured by the parties' explicit consent to his jurisdiction in their standalone joint motion at Doc. 1186 ("Pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, the parties hereby consent to have Magistrate Judge David Duncan conduct all further proceedings in this case[.]").

The Court notes the inconsistency and ambiguity in the language employed in the parties Stipulation (Doc. 1185 ¶ 35) and their consent motion. In the Stipulation, the parties refer to a reservation of jurisdiction by the District Court over all disputes between and among the parties. The parties also state that "this stipulation shall not be construed as a consent decree" without further explanation. (*Id.*) While somewhat ambiguous, the parties subsequently clarified their intent to consent to Judge Duncan's jurisdiction. (Doc. 1186). That unambiguous agreement to consent to Judge Duncan therefore supersedes the parties' Stipulation.

As a consequence, the transfer of this case consistent with the parties' consent extinguished this Court's jurisdiction over this matter. The motion to vacate the Magistrate Judge referral is therefore denied.

Accordingly, **IT IS ORDERED denying** Defendants' Motion for District Court Judge to Vacate Magistrate Judge Referral (Doc. 2825).

Dated this 5th day of June, 2018.

/s/ Diane J. Humetewa
Honorable Diane J. Humetewa
United States District Judge

APPENDIX C

U.S. District Court

DISTRICT OF ARIZONA

Notice of Electronic Filing

The following transaction was entered on 5/19/2018 at 12:08 PM MST and filed on 5/19/2018

Case Name: Parsons et al v. Ryan et al
Case Number: 2:12-cv-00601-DKD
Filer:
WARNING: CASE CLOSED on 02/25/2015
Document Number: 2826(No document attached)

Docket Text:

Defendants have filed a motion seeking the return of the case to Judge Humetewa pursuant to 28 U.S.C. § 636(c)(4) based upon the extraordinary circumstances of the undersigneds disability retirement. This text only order does not address that issue which is properly before the District Judge. This Order addresses the Defendants jurisdictional argument and the request to stay matters presently before the undersigned. Hatcher v. Consolidated City of Indianapolis, 323 F.3d 513 (7th Cir. 2003), is neither controlling authority and, in any event, is not persuasive given that it does not address the factual scenario presented here. This action was referred to the undersigned to conduct a settlement conference (Docs. 961, 968). After that referral, and successful negotiation of the Stipulation, the parties explicitly consented to the

undersigned continuing to exercise jurisdiction over this action pursuant to 28 U.S.C. § 636(c) to promote the interests of judicial economy and efficiency (Doc. 1186). Moreover, there is no statutory or Ninth Circuit authority precluding such assignment. Accordingly, the undersigned rejects Defendants jurisdictional argument and affirms all rulings, briefing schedules, and pending matters set for hearing until an order to the contrary issues. Ordered by Magistrate Judge David K Duncan. (DKD) (This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry.)

[Service List Omitted]

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Victor Antonio Parsons, et al., Plaintiffs, v. Charles L. Ryan, et al., Defendants.	No. CV-12-0601-PHX-DKD **ORDER**

Defendants moved for Rule 60(b) relief from the Court's November 10, 2016 Order ("Outside Provider Order"). (Doc. 1779) Defendants frame their argument in two parts: (1) the Court's order impermissibly modified the Stipulation's timeframe and compliance rates and (2) the Court did not appreciate the ensuing logistical and security issues and they should be permitted to present testimony on this matter. (Doc. 1779, 1821 at 5, 7) Before briefing on this motion was complete, Defendants filed a Notice of Appeal. (Doc. 1817) The Court retains jurisdiction of this matter under Federal Rule of Appellate Procedure 4(a)(4)(B)(i).

Procedural Background and Jurisdiction. As an initial matter, the Court notes that, without explanation, Defendants have formulated their motion as one for relief under Rule 60(b)(1), (4), and (6). (Doc. 1779 at 2) As Plaintiffs' note, these sections of Rule 60(b) are

mutually exclusive and subject to different standards. (Doc. 1806 at 8) Defendants do not explain or justify their attempt to use multiple subsections and do not analyze their claim under any particular standard. (Docs. 1779, 1821) Instead, they argue that "Plaintiffs do not dispute that Defendants may appropriately challenge the Court's November 10, 2016 order under Fed. R. Civ. P. 60. Therefore, there is not jurisdictional basis to not consider Defendants' Motion." Doc. 1821 at n. 1.

First, the Court notes that any perceived waiver by Plaintiffs does not eliminate the Court's duty to ensure the procedural jurisdictional propriety of Defendants' pending motion. On first review, it appears that Federal Rule of Civil Procedure 60(b) may not be the most appropriate vehicle for challenging the Court's order because this matter is not post-judgment in the traditional sense of the word because no judge or jury entered judgement and the challenged order is not necessarily "final" as contemplated by Rule 60(b).[1] 28 U.S.C. § 1291; *Catlin v. US.*, 324 U.S. 229, 233 (1945) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.").

Nevertheless, the Court has concluded that the parties are entitled to some mechanism for the Court to review its orders interpreting the Stipulation. *U.S. v. Washington*, 761 F.2d 1404, 1406 (9th Cir. 1985).

[1] Because the underlying Order is already on appeal, this Court invites the Court of Appeals to consider the paucity of guidance about the particular procedural landscape of a case where, like here, the Court is overseeing the enforcement of an on-going settlement.

Accordingly, the Court will assume that Defendants' motion under Rule 60(b) is proper when, as here, the Court's Order is an exercise of its remedial authority pursuant to Paragraph 36 of the Stipulation.[2] (Doc. 1185 at 14-15)

However, Defendants have attempted to bootstrap their argument into multiple subsections of Rule 60(b) without any explanation or analysis. (Doc. 1779 at 2:1) This will not suffice. Defendants have not explained how the Outside Provider Order is a void judgment and so the Court concludes that Defendants are not entitled to relief under Rule 60(b)(4) which, by its plain language, is limited to "void judgments." Defendant's motion also does not explain which subsection of Rule 60(b)(1)—mistake, inadvertence, surprise, or excusable neglect—would apply and so the Court will consider this claim waived. (Doc. 1779) Accordingly, the Court will construe Defendants' motion as one for relief under Rule 60(b)(6)'s catch-all provision. Thus, the question is whether Defendants have shown "extraordinary circumstances" such that they are entitled to relief. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

Application of Order. Before evaluating Defendants' arguments, it is worth reiterating the scope of the Outside Provider Order. (Doc. 1754 at 4) The Court is not ordering Defendants to use Outside Providers in the first instance. The Court expects Defendants can and should use all of their internal resources first and

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[2] Motions for Reconsideration under LRCiv. 7.2(g) may be a more appropriate vehicle to request the Court's review of its other orders.

foremost to comply with the Stipulation. Using internally available resources should provide the most expeditious and effective care to Class Members. Some of these resources are described by Defendants' remediation plans. Other resources, like hiring sufficient staff, are not in a remediation plan but remain a viable solution that Defendants can (and probably should) implement on their own. It is only when Defendants' internal resources are insufficient that the Court's Order to use Outside Providers takes effect. In other words, if Defendants comply with the Stipulation using on-site resources, then the Court's Order on Outside Providers would not apply. It is only when Defendants cannot provide on-site resources to Class Members that the Court's Order on Outside Providers becomes applicable.

The Stipulation was not modified.[3] Defendants claim that the Court cannot mandate 100% compliance with the Stipulation because the Stipulation only requires that Defendants meet the substantial compliance

[3] A parallel argument emerged in and out of footnotes. Defendants argue that "a 100% compliance rate is simply not possible" and "that impossibility is why Defendants could not and did not agree to it." Doc. 1779 at 7, n.3. Plaintiffs argue that this is tantamount to an admission of deliberate indifference. Doc. 1806 at 12. Defendants counter that "the reality [is] that medical staff do not know in real time what percentage of inmates are seen within the required timeframes" and could not knowingly or intentionally do so. (Doc. 1821 at 4) These arguments raise the specter of a constitutional claim against both sets of Defendants or a breach of contract claim by the State against Corizon. Because neither claim is before the Court, these arguments will remain footnoted.

thresholds, currently set at 80% and soon to rise to 85%. (Doc. 1779 at 5) Plaintiffs counter that the Stipulation requires Defendants to provide 100% compliance and that the Stipulation's definition of "substantial compliance" only describes the trigger for the Stipulation's enforcement measures not the cap for the Court's involvement. (Doc. 1806 at 10-13)

Both parties use the plain language of Paragraphs 8, 9, and 10 of the Stipulation to bolster their arguments. (Doc. 1185 at 3-4) After extensive consideration and analysis, the Court has concluded that these three paragraphs use the terms "compliance" and "substantial compliance" in contradictory ways that cannot be reconciled simply by reference to the plain language. Accordingly, the Court must turn to the Stipulation's intent. *See*, *e.g.*, Williston on Contracts 4th, §§ 32:7, 32:9.

As the Court has repeatedly explained, the Court understands that the Stipulation requires 100% compliance with the performance measures and that the graduated compliance rates are the trigger for the imposition of a remediation plan. (Doc. 1767 at 17-19) Put another way, the Court understands that the Stipulation requires 100% compliance and, therefore, its Order on Outside Providers requires Defendants to pursue 100% compliance.

Defendants' argument that the Stipulation only requires 80% compliance conflates the Defendants' obligation to provide healthcare with the Court's authority to require them to do so. In other words, there is a

delta between the Court's authority and the Stipulation's requirement: the Court cannot impose remedial measures if Defendants fall below the Stipulation's 100% requirement but satisfy the Stipulation's substantial compliance percentages. Here, the Court has not exceeded its authority to impose remedial measures because the facilities and performances measures at issue were undoubtedly below the requisite threshold.[4]

Defendants again raise the argument that the directive to use Outside Providers violates the Stipulation's limitation on the Court's ability to order Defendants to "hire a specific number or type of staff." Outside Providers are community healthcare providers who are not on Defendants' payroll. (Docs. 1754 at 4, 1767 at 10-11) This is categorically different than ordering an increase in staffing. Defendants' argument departs from the plain understanding of simple words in our language. No person obtaining a prescription at a pharmacy or seeing a doctor at an emergency room or urgent care is "hire[ing]" that healthcare provider.

Risk flowing from the Court's Order. Finally, Defendants argue that the Court's Order creates a heretofore-ignored level of risk and cost which the Court cannot appreciate without testimony. (Docs. 1779 at 7-10, 1779-1) Again, the Court notes that by timely

[4] It is undisputed that the Court has not imposed or threatened sanctions for compliance rates above the Stipulation's substantial compliance thresholds. As a result, it is unclear whether Defendants have suffered any harm sufficient to establish standing to pursue this claim.

providing the requisite care, the Defendants have had, and continue to have, the ability to avoid the Court-ordered use of Outside Providers. Moreover, the Court issued its Order after it had balanced the risk and cost that could arise from its Order against the health and well-being of Class Members, individuals to whom Defendants have a contractual duty under the Stipulation. The Defendants entered into the Stipulation to resolve a lawsuit which alleged extreme indifference to the healthcare needs of the Plaintiff Class – allegations which included loss of life and permanent injury. The inability of Defendants to meet the healthcare requirements of their own Stipulation, as supported by Plaintiffs' submissions showing continued Class Member harm, shows that the Court is addressing a risk to health and safety by means that are necessary and balanced notwithstanding Defendants claim of other security risks. Defendants can address those risks in both instances. They can adequately address the healthcare requirements of those within their care or they will need to accomplish that task using the only reasonable alternative available to the Court – providing those services via Outside Providers. The Court must focus on achieving the requirement of the Stipulation with the tools available to it.

Compliance with PRLA [sic]. When drafting the Stipulation, the parties requested reference to the language found in 18 U.S.C. § 3626(a)(1)(A) and the Court affirmed that the relief provided therein "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right and is the least

intrusive means necessary to correct the violation of the Federal right." (Docs. 1185 at ¶ 36; Doc. 1458 at 6, Attachment 1). ("PLRA findings")

Plaintiffs, in response to the Court's first exercise of its authority under Paragraph 36 of the Stipulation, moved to modify the Court's Order under Federal Rule of Civil Procedure 60(a) so that the Court could add PLRA findings. Noting that the Ninth Circuit has not explicitly ruled on the necessity of any such findings, Plaintiffs moved to correct the order in an abundance of caution. (Doc. 1806 at 18) Subsequently, Defendants filed a Notice of Appeal, thereby limiting this Court's ability to make any such modification. (Doc. 1817) Plaintiffs suggest that the Court should refer to PLRA findings in this Order thereby rendering their motion moot. The Court will adopt this suggestion.

Conclusion. As described above, the Court concludes that Defendants have not met their burden for demonstrating "extraordinary circumstances" such that they are entitled to relief under Federal Rule of Civil Procedure 60(b)(6). The Court further concludes that its Order on Outside Providers was narrowly drawn, extended no further than necessary to correct the violation of the Federal right, and was the least intrusive means necessary to correct the violation of the Federal right as required by 18 U.S.C. § 3626(a)(1)(A).

IT IS THEREFORE ORDERED that Defendants' Motion for Relief as a Motion for Reconsiderations is denied. (Doc. 1779)

IT IS FURTHER ORDERED that Plaintiff's Motion to Modify the Order under Federal Rule of Civil Procedure 60(a) is denied as moot. (Doc. 1806)

Dated this 6th day of February, 2017.

/s/ David K. Duncan
David K. Duncan
United States Magistrate Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Victor Antonio Parsons, et al., Plaintiffs, v. Charles L. Ryan, et al., Defendants.	No. CV-12-0601-PHX-DKD **ORDER**

The Stipulation, negotiated by both parties, states that "the Court shall not have the authority to order Defendants to construct a new prison or to hire a specific number or type of staff. . . ." (Doc. 1185 at 13-14) At issue is the scope of the Court's remaining authority and whether, as Plaintiffs assert, the Court can order general hiring.

Plaintiffs compare the broad construction ban with the specific hiring ban and argue that the only way to give meaning to all of the words in that clause is to conclude that the Court is prohibited from ordering any new prison construction but only certain kinds of hiring. Thus, Plaintiffs conclude that the Court has retained the authority to order Defendants to implement a general staffing plan. (Docs. 1790, 1882)

Defendants counter that the "specific number or type of staff" is the functional equivalent of all hiring

and, therefore, the correct reading of the Stipulation is that the Court is prohibited from ordering them to complete any kind of hiring. (Doc. 1842)

The Court concludes that Defendants have the better argument. The only way to determine whether Defendants have hired sufficient staff to comply with a general staffing order is to determine whether a sufficient number and type of staff have been hired. Thus, a general hiring order, even without any specificity about the number or type of staff to be hired, would, in distillation, necessarily violate the Stipulation's proscription. Accordingly, this portion of Plaintiffs' motion will be denied.

To advance their interpretation of the Court's staffing power, Plaintiffs argue that the Court should exercise its retained equitable authority to modify the Stipulation under Rule 60(b)(5). (Doc. 1790) The Court declines to do so here. The parties agreed to resolve their dispute by a settlement memorialized in the Stipulation. It is fair and just to impose a very high burden to vary from its agreed-upon terms.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Modify Stipulation Under Federal Rule of Civil Procedure 60(b)(5) and For Further Relief is denied. (Doc. 1790)

Dated this 3rd day of February, 2017.

/s/ David K. Duncan
David K. Duncan
United States Magistrate Judge

APPENDIX F

WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Victor Antonio Parsons, et al., Plaintiffs, v. Charles L. Ryan, et al., Defendants.	No. CV-12-0601-PHX-DKD **ORDER**

Following the December 14, 2016 Status Hearing, the Court took several matters under advisement. There are also several motions pending before the Court. This Order addresses some of these outstanding matters.

Calculating Dates

The Court has issued two Orders addressing how to calculate whether Defendants are compliant with the Stipulation's requirement that certain PMs occur at regular intervals. (Docs. 1673, 1754) Defendants have asked for further clarification, noting that the Court's previous Orders have not clarified the question of how to document the months in between mandated appointments which, in turn, depends on how far the look-back period must go. (Doc. 1774) As Defendants

requested, the Court will illustrate using PM 77 which states in full:

> Mental health treatment plans shall be updated a minimum of every 90 days for MH-3A, MH-4, and MH-5 prisoners, and a minimum of every 12 months for all other MH-3 prisoners.

Doc. 1185-1 at 13, 31. The Court concludes that, if the month under review does not require any health care, the monitor must look back two visits. The oldest reviewed visit is the baseline and will be used to determine if the most recent visit was timely. If the most recent visit was timely, then the intervening months are compliant. If the most recent visit was untimely (measured by looking to the previous visit), then the intervening months are non-compliant.

To illustrate this, Inmate PM77 is classified as MH-3A (or MH-4 or MH-5), his previous two appointments were on May 14 and August 24, and his records are reviewed in September. The May appointment date shows that the August appointment was untimely. Because the August appointment was beyond the three month interval required by PM 77, his September record must be marked as non-compliant.[1] By contrast, if his previous two appointments were May 24 and August 14, then his August appointment was timely and his September record must be marked as compliant.

If the parties continue to need interpretation and examples of how to calculate dates, the Court remains

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[1] The Court notes that his October record would also be non-compliant and his November visit must occur by November 14 in order to be considered compliant. *See* Doc. 1754 at 2.

amenable to providing guidance in situations not addressed by the Court's prior instructions.

Performance Measure 78. At the December 14, 2016 Hearing, the Court took under advisement the parties' dispute over enforcement of PM 78 which, by its plain language, is inextricably intertwined with PM 77.

In the Stipulation, the parties agreed to the following protocol for PM 78:

> Each record that it reviewed for treatment plan compliance [under PM77] will also be reviewed for a face-to-face SOAPE note dated the same date.

(Doc. 1185-1 at 31) The parties disagree about the universe of records to review under PM 78. Plaintiffs argue that the Stipulation requires that every PM 77 record also be subject to PM 78 review. (Doc. 1755 at 17) Defendants counter that the monitors should limit their review to the subset of PM 77 records where a visit occurred. (Doc. 1782 at 12-13)

The Court understands the logic of Defendants' position and agrees with Plaintiffs that the Stipulation requires "each record" to be reviewed. Accordingly, the Court concludes that each record from PM 77 must be reviewed for compliance with PM 78. If a treatment plan exists, that inmate's record must be marked as compliant or not complaint [sic] with PM 78's requirements. If no treatment plan exists, that inmate's record

must be marked as n/a (or some other comparable notation).

Performance Measure 27.

At the December 14, 2016 Status Hearing, the Court took under advisement the parties' dispute about how to determine compliance with PM 27. The PM states:

> Each ASPC facility will conduct monthly CQI meetings, in accordance with NCCHC Standard P-A-06.

(Doc. 1185-1 at 21) The protocol for determining compliance is:

> Monthly CQI meeting minutes. Monthly CQI minutes will be provided by the contracted vendor.

(*Id.*) It is undisputed that NCCHC Standard P-A-06 ("The Standard") requires quarterly meetings that address certain topics.

The parties cannot agree how to resolve the tension between the monthly meetings required by the plain language and the quarterly meetings required by The Standard. Defendants' position is that they are compliant when they conduct monthly meetings and only one meeting per quarter must contain all of the topics required by The Standard. (Doc. 1782 at 7) Plaintiffs argue that the Stipulation requires monthly meetings which are only compliant if they meet the requirements of The Standard. (Doc. 1755 at 10-11)

The Court concludes that the Stipulation requires monthly meetings where the content is dictated by The Standard.[2]

Close Custody.

The Court ordered Defendants to provide "competent, admissible evidence demonstrating that (1) the enumerated facilities no longer house maximum custody inmates and (2) the conditions of close custody are substantially different from maximum custody such that close custody inmates would not otherwise qualify for protection under DI-326." (Doc. 1745 at 2) In response, Defendants described various out-of-cell opportunities that are available to close custody inmates and argue that this increase means that their conditions are substantially different from maximum custody inmates.[3] (Doc. 1775 at 4-11) Defendants have also informed the Court that Florence Central CB 1, 3, and 4 housed maximum custody inmates at the time of the Stipulation but now only house close custody inmates. (Doc. 1808 at 4)

Plaintiffs counter that the definition of subclass has two parts: those in maximum custody "or" those housed in specific units and they are entitled to review

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[2] Defendants do not explain, nor does the Monitoring Guide capture, how a monthly review by a monitor could accurately capture quarterly compliance. *See* Doc. 17601 at 47.

[3] Defendants also indicate that they are developing a maximum custody reduction plan. (Doc. 1775 at 12-14) It appears that they are not seeking relief based on the development of this plan but are instead notifying the Court of this plan. (Doc. 1808 at 5-6)

records for both categories of inmates. They also argue that the Defendants have not provided sufficient evidence to support their claim that close custody inmates have substantially different conditions than maximum custody inmates. (Doc. 1792)

The Court agrees that Defendants have only described the potentially available programming available to close custody inmates at a subset of the units enumerated in the subclass definition. In other words, Defendants have provided a theoretical explanation of what close custody inmates may experience without showing that any particular inmate actually has experienced these out-of-cell options. This is not sufficient to show that inmates classified as close custody are subject to substantially different conditions than maximum custody inmates. As a result, the Court concludes that close custody inmates are subject to substantially similar conditions as maximum custody inmates and, therefore, are part of the Subclass.

Defendants provide a different type of information about a subset of close custody inmate when they state that there are currently 276 close custody inmates who work in 20 different positions for, on average, 30 hours per week. (Doc. 1775 at 11) Defendants provide the job title and how many inmates work in that position. The specificity of this information makes it clear that a close custody inmate who works in this program does, in fact, experience substantially different conditions than the Subclass. Accordingly, any close custody inmate who works at least 20 hours a week in the job program described by Defendants will not be

considered a member of the Subclass. The Court acknowledges that this raises additional questions such as how many weeks of work are required and does 20 hours/week mean an average or a minimum? The Court asks the parties to meet-and-confer to develop a workable solution and, if that cannot be done, to notify the Court so that a definition can be developed.

IT IS THEREFORE ORDERED that the Monitoring Guide shall be updated to reflect compliance for PMs 27, 77, and 78 as described herein.

IT IS ORDERED that any inmate classified as close custody who works at least 20 hours/week is not a member of the Stipulation's Subclass. Within 21 days of the date of this Order, the parties shall notify the Court that they have developed a methodology for implementing this Order or that they require the Court's assistance to do so.

IT IS ORDERED that all close custody inmates who are not part of the above-mentioned job program are members of the Stipulation's Subclass.

Dated this 23rd day of December, 2016.

/s/ David K. Duncan
David K. Duncan
United States Magistrate Judge

APPENDIX G

WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Victor Antonio Parsons, et al., Plaintiffs, v. Charles L. Ryan, et al., Defendants.	No. CV-12-00601-PHX-DKD **ORDER**

The outstanding issues from the November 9, 2016 Status Conference are addressed below.

1. Date Calculations and Performance Measure 86.

The parties have informed the Court that they cannot resolve their impasse about every "X" days and PM 86 and that this dispute is not covered by their pending meet-and-confer about the Monitoring Manual. (Docs. 1717, 1718, 1719, 1731, 1732)

After a careful review of the parties' briefing, the Court appreciates the nuances left untouched by the earlier Order. (Doc. 1673) To expand on the issues, the Court revives hypothetical Inmate PM86, whose medication was discontinued on January 10 and is, therefore, reclassified. (*Id.* at 6) First, it appears that the

parties do not agree on when to start measuring PM 86: when his medication was discontinued or when he was reclassified. Under its plain language, PM 86 applies to MH-3D prisoners "for a minimum of six months after discontinuing medication." (Doc. 1185-1 at 14, 32) Accordingly, the start date for calculating compliance is the date that medication is discontinued.

As previously noted, Inmate PM86 discontinued medication on January 10 and, therefore, must be seen by a mental health clinician by April 10 and again by July 10. If he was seen by April 10 and his record is selected for review in May or June, then it is compliant with PM 86 in May and June even though he was not seen in those months. (*Id*.) However, this explanation does not address the situation where Inmate PM86 is seen on April 15 (i.e., untimely) and his record is selected for review in May or June. How should compliance be assessed for May and June? Nor does it resolve when his second visit is due: July 10 or July 15? Another hypothetical not explicitly decided by the Stipulation is the result when Inmate PM86 is seen on March 15 (i.e., ahead of schedule). Is his second visit due on June 15 or July 10?

Because the parties have not been able to answer these questions, the Court does so as follows. As noted above, measuring compliance for Inmate PM86 starts on January 10. If Inmate PM86 is seen by a mental health clinician on April 10, his April, May, and June records are compliant without any additional visits.

In contrast, if Inmate PM86 is seen by a mental health clinician on April 15 (or any other day after April 10), his April, May, and June records are not

compliant. And his second visit must occur by July 10 (i.e., 90 days from when he should have been seen the first time). If Inmate PM86 is instead seen on March 15 (or any date ahead of the April 10 deadline), then his March, April, and May records are compliant without any additional visits. And his second visit must occur by June 15 (i.e., a minimum of 90 days after he was first seen).

Although this timing analysis is based on the language of Performance Measure 86, the Court expects that this same structure for monitoring compliance will be applied to other performance measures with similar issues. However, if these additional hypotheticals do not address all of the scenarios confronting the parties, they may submit additional scenarios for the Court's consideration.

2. Potentially Outstanding Items.

The Court asks both parties to provide an update on the following matters:

- Performance Measure 85 and reclassification of inmates from MH-3D to MH3E;
- Maximum custody notebook document production issues;
- Production of documents demonstrating Defendants' response to raw CGAR data; and
- Status of "Access to Videos & Electronic Medical Records" (Doc. 1506) and the provision of paper medical records.

If these issues remain outstanding, the Parties shall so advise the Court. The Court further notes that Plaintiffs did not respond to Defendants' proposed reporting procedures for demonstrating compliance with Paragraphs 12, 14, and 15 of the Stipulation. (Doc. 1703) The Court will provide Plaintiffs an opportunity to do so at the same time as the update on the above noted matters.

3. Remediation Plans.

First Remediation Plan. At the May 18, 2016 status conference, the Court ordered Defendants to submit a remediation plan for a delineated list of facilities and performance measures ("First Non-Compliant PMs"). (Docs. 1582, 1583). Defendants did so ("First Remediation Plan"). (Doc. 1608) After providing Defendants with notice of its concerns, the Court adopted the First Remediation Plan. (Doc. 1619)

The Court has reviewed the data from three months of Defendants' operations under the First Remediation Plan. (Docs. 1739, 1743) After reviewing this information, the Court has "determine[d] that the Defendants' [First Remediation] plan did not remedy the deficiencies" for the First Non-Compliant PMs. (Stipulation at ¶36)

The Court has "the power to enforce this Stipulation through all remedies provided by law."[1] (*Id.*)

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[1] There are, of course, express limitations on this power and, as the Court has repeatedly noted, these limitations have

Accordingly, the Court will require Defendants to use the health care services in the community to ensure compliance with the First Non-Compliant PMs. Specifically, Defendants shall use all available community health care services including, but not limited to, commercial pharmacies, community-based practitioners, urgent care facilities, and hospitals (collectively, "Outside Providers") to provide the health care services required in the Stipulation's Performance Measures. This shall happen immediately following the expiration of the time-frame detailed in each PM. For example, if a PM requires Defendants to provide an inmate with a specific type of care within 24 hours (or 14 days), then Defendants shall have this inmate seen by an appropriate Outside Provider in hour 25 (or day 15).

The Court notes that these requirements only apply when Defendants are not able to comply with the Stipulation's Performance Measures using the procedures detailed in their remediation plan. In other words, if Defendants can comply with the Stipulation without using Outside Providers, then they are under no obligation to use Outside Providers. Defendants also remain free to remediate deficiencies through the obvious and efficient measure denied to the Court ("the Court shall not have the authority to order Defendants to . . . hire a specific number or type of staff unless Defendants propose to do so as part of a plan to remedy a failure to comply with any provisions of the Stipulation" Stipulation at pp. 13-14) (emphasis added).

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removed staffing increases—the most efficient and effective tool—from the Court's remedial toolbox.

However, the current data show that Defendants have not been able to meet the Performance Measures by using their current procedures or by adopting the First Remediation Plan. Accordingly, the Court must order these additional measures to ensure compliance with the First Non-Compliant PMs. The Court considered and rejected requiring the Defendants to submit a revised plan because of its concerns, expressed earlier on the record, about Defendants' grasp of the problem at hand, the failure, abject in some cases, of its first remediation plan to deliver compliance, and the health and safety danger posed by continued failures to meet the Performance Measures. See Stipulation at ¶36: "In determining subsequent remedies the Court shall consider whether to require Defendants to submit a revised plan."

Second Remediation Plan. Pursuant to the Court's Order, Defendants submitted a remediation plan for PM 47, 80, 94 ("Second Remediation Plan"). (Doc. 1709, 1729, 1739) At the November 9, 2016 status conference, Defendants informed the Court that, depending on the PM and facility, the changes detailed in the Second Remediation Plan were implemented between April and August 2016. Defendants requested another 60 days with the Second Remediation Plan to determine whether it is sufficient to establish compliance. The Court will provide Defendants with those additional 60 days and will determine the sufficiency of the Second Remediation Plan then.

IT IS ORDERED that the Parties shall employ the timing convention explained by the Court in this Order.

IT IS ORDERED that 14 days from the date of this Order, both parties shall inform the Court of the status of the above-listed potentially outstanding items. Further, Plaintiffs shall respond to Defendants' proposal detailed in Doc. 1703.

IT IS ORDERED that, effective thirty days from this Order, when Defendants are not able to comply with the requirements of the Stipulation's Performance Measures using their current procedures, Defendants shall use all available community health care services including, but not limited to, commercial pharmacies, community-based practitioners, urgent care facilities, and hospitals to provide the health care services required in the Stipulation's Performance Measures for the facilities listed in the First Remediation Plan for which the August data demonstrated compliance below the 80% benchmark.

Dated this 10th day of November, 2016.

/s/ David K. Duncan
David K. Duncan
United States Magistrate Judge

APPENDIX H

Attachment 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Victor Antonio Parsons, et al., Plaintiffs, v. Charles L. Ryan, et al., Defendants.	No. CV-12-0601-PHX-DKD **ORDER RE: SETTLEMENT**

Based upon the entire record in this case and the parties' Stipulation (Doc. 1185), the Court hereby finds that the relief set forth therein is narrowly drawn, extends no further than necessary to correct the violations of the Federal right, and is the least intrusive means necessary to correct the violations of the Federal right of the Plaintiffs.

The Court shall retain the power to enforce this Stipulation through all remedies provided by law, except that the Court shall not have the authority to order Defendants to construct a new prison or to hire a specific number or type of staff unless Defendants propose to do so as part of a plan to remedy a failure to comply with any provision of this Stipulation.

Dated this 18th day of February, 2015.

/s/ David K. Duncan
David K. Duncan
United States Magistrate Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Victor Antonio Parsons, et al., Plaintiffs, vs. Charles L. Ryan, et al., Defendants.	No. CV-12-0601-PHX-DKD **ORDER**

This matter is before the Court on the parties' Joint Motion to Refer Remainder of Case to Magistrate Judge Duncan and to Refer Case to Magistrate Judge Buttrick for Mediation (Doc. 1186). The parties assert in the motion that they consent to the reassignment of this case to Magistrate Judge David Duncan pursuant to 28 U.S.C. § 636(c) and Rule 73 of the Federal Rules of Civil Procedure. The parties request that Judge Duncan conduct all further proceedings in this case "because his constructive participation in the settlement negotiations has provided him with a unique ability to effectuate the parties' intent in any future proceedings." Based on the parties' consent, the first part of the motion will be granted.

With respect to the parties' request to refer the case to Magistrate Judge Buttrick to mediate any future disputes about compliance, the Court declines to

do so at this stage. In light of the reassignment of this matter to Judge Duncan, any requests to refer the matter to a magistrate judge for mediation of future disputes should be directed to Judge Duncan when, and if, such disputes arise.

IT IS THEREFORE ORDERED:

That the Joint Motion to Refer Remainder of Case to Magistrate Judge Duncan and to Refer Case to Magistrate Judge Buttrick for Mediation (Doc. 1186) is **GRANTED** in part and **DENIED** in part without prejudice, as set forth above;

That, pursuant to the parties' written consent in the Joint Motion, the Clerk of Court shall reassign this matter to Magistrate Judge David Duncan for all further proceedings; and

That the pending motion at doc. 1188 will be decided by Judge Duncan.

Dated this 22nd day of October, 2014.

/s/ Diane J. Humetewa
Diane J. Humetewa
United States District Judge

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTOR ANTONIO PARSONS; et al., Plaintiffs-Appellees, v. CHARLES L. RYAN, Director, Arizona Department of Corrections and RICHARD PRATT, Interim Division Director, Division of Health Services, Arizona Department of Corrections, Defendants-Appellants.	No. 16-17282 D.C. No. 2:12-cv-00601-DKD District of Arizona, Phoenix ORDER (Filed Mar. 14, 2019)
VICTOR ANTONIO PARSONS; et al., Plaintiffs-Appellants, v. CHARLES L. RYAN, Director, Arizona Department of Corrections and RICHARD PRATT, Interim Division Director, Division of Health Services, Arizona Department of Corrections, Defendants-Appellees.	No. 17-15302 D.C. No. 2:12-cv-00601-DKD District of Arizona, Phoenix

VICTOR ANTONIO PARSONS; et al., Plaintiffs-Appellees, v. CHARLES L. RYAN, Director, Arizona Department of Corrections and RICHARD PRATT, Interim Division Director, Division of Health Services, Arizona Department of Corrections, Defendants-Appellants.	No. 17-15352 D.C. No. 2:12-cv-00601-DKD

Before: THOMAS, Chief Judge, and WALLACE and CALLAHAN, Circuit Judges.

The panel has voted to deny Plaintiff-Appellees' Petition for Rehearing and Rehearing En Banc. The full court has been advised of the petition and no judge of the court has requested a vote on rehearing en banc. This petition is therefore **DENIED.** Chief Judge Thomas would grant the petition.

The panel has also voted to deny Defendant-Appellants/Appellees' Petition for Panel Rehearing and Rehearing En Banc. The full court has been advised of the petition and no judge of the court has requested a vote on rehearing en banc. This petition is therefore also **DENIED.** Judge Callahan would grant the petition in part.

No further petitions for rehearing will be entertained. The mandate shall issue forthwith.

APPENDIX K

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Victor Parsons; Shawn Jensen; Stephen Swartz; Dustin Brislan; Sonia Rodriguez; Christina Verduzco; Jackie Thomas; Jeremy Smith; Robert Gamez; Maryanne Chisholm; Desiree Licci; Joseph Hefner; Joshua Polson; and Charlotte Wells, on behalf of themselves and all others similarly situated; and Arizona Center for Disability Law, Plaintiffs, v. Charles Ryan, Director, Arizona Department of Corrections; and Richard Pratt, Interim Division Director, Division of Health Services, Arizona Department of Corrections, in their official capacities, Defendants.	No. CV 12-00601-PHX-DJH **JOINT MOTION TO REFER REMAINDER OF CASE TO MAGISTRATE JUDGE DUNCAN AND TO REFER CASE TO MAGISTRATE JUDGE BUTTRICK FOR MEDIATION**

Pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, the parties hereby consent to have Magistrate Judge David Duncan conduct all further proceedings in this case, including proceedings to determine the

fairness of the settlement pursuant to Fed. R. Civ. P. 23(e), and any other proceedings contemplated by the settlement in this case. The parties request that the Court refer this matter to Magistrate Judge Duncan because his constructive participation in the settlement negotiations has provided him with a unique ability to effectuate the parties' intent in any future proceedings.

The Stipulation filed herewith contemplates that any future disputes about compliance issues be subject to mediation before a Magistrate Judge before enforcement proceedings are initiated. The parties hereby request that the Court refer the case to Magistrate Judge John Buttrick for such mediation.

October 14, 2014

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APPENDIX L

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Victor Parsons; Shawn Jensen; Stephen Swartz; Dustin Brislan; Sonia Rodriguez; Christina Verduzco; Jackie Thomas; Jeremy Smith; Robert Gamez; Maryanne Chisholm; Desiree Licci; Joseph Hefner; Joshua Polson; and Charlotte Wells, on behalf of themselves and all others similarly situated; and Arizona Center for Disability Law, Plaintiffs, v. Charles Ryan, Director, Arizona Department of Corrections; and Richard Pratt, Interim Division Director, Division of Health Services, Arizona Department of Corrections, in their official capacities, Defendants.	No. CV 12-00601-PHX-DJH **STIPULATION**

Plaintiffs and Defendants (collectively, "the Parties") hereby stipulate as follows:

I. INTRODUCTION AND PROCEDURAL PROVISIONS

1. Plaintiffs are prisoners in the custody of the Arizona Department of Corrections ("ADC"), an agency of the State of Arizona, who are incarcerated at one of the state facilities located in the State of Arizona, and the Arizona Center for Disability Law ("ACDL").

2. Defendants are Charles Ryan, Director of ADC, and Richard Pratt, Interim Division Director, Division of Health Services of ADC. Both Defendants are sued in their official capacities.

3. The Court has certified this case as a class action. The class is defined as "All prisoners who are now, or will in the future be, subjected to the medical, mental health, and dental care policies and practices of the ADC." The subclass is defined as "All prisoners who are now, or will in the future be, subjected by the ADC to isolation, defined as confinement in a cell for 22 hours or more each day or confinement in the following housing units: Eyman—SMU 1 [sic]; Eyman—Browning Unit; Florence—Central Unit; Florence—Kasson Unit; or Perryville—Lumley Special Management Area."

4. The purpose of this Stipulation [sic] to settle the above captioned case. This Stipulation governs or applies to the 10 ADC complexes: Douglas, Eyman, Florence, Lewis, Perryville, Phoenix, Safford, Tucson, Winslow and Yuma. This Stipulation does not apply to occurrences or incidents that happen to class members while they do not reside at one of the 10 ADC complexes.

5. Defendants deny all the allegations in the Complaint filed in this case. This Stipulation does not constitute and shall not be construed or interpreted as an admission of any wrongdoing or liability by any party.

6. Attached to this Stipulation as Exhibit A is a list of definitions of terms used herein and in the performance measures used to evaluate compliance with the Stipulation.

II. SUBSTANTIVE PROVISIONS

A. Health Care.

7. Defendants shall request that the Arizona Legislature approve a budget to allow ADC and its contracted health services vendor to modify the health services contract to increase staffing of medical and mental health positions. This provision shall not be construed as an agreement by Plaintiffs that this budgetary request is sufficient to comply with the terms of this Stipulation.

8. Defendants shall comply with the health care performance measures set forth in Exhibit B. Clinicians who exhibit a pattern and practice of substantially departing from the standard of care shall be subject to corrective action.

9. **Measurement and reporting of performance measures:** Compliance with the performance measures set forth in Exhibit B shall be measured and

reported monthly at each of ADC's ten (10) complexes as follows.

a. The performance measures analyzed to determine ADC substantial compliance with the health care provisions of this Stipulation shall be governed by ADC's MGAR format. Current MGAR performance compliance thresholds used to measure contract compliance by the contracted vendor shall be modified pursuant to a contract amendment to reflect the compliance measures and definitions set forth in Exhibit B.

b. The parties shall agree on a protocol to be used for each performance measure, attached as Exhibit C. If the parties cannot agree on a protocol, the matter shall be submitted for mediation or resolution by the District Court.

10. The measurement and reporting process for performance measures, as described in Paragraph 9, will determine (1) whether ADC has complied with particular performance measures at particular complexes, (2) whether the health care provisions of this Stipulation may terminate as to particular performance measures at particular complexes, as set forth in the following sub-paragraphs.

a. **Determining substantial compliance with a particular performance measure at a particular facility:** Compliance with a particular performance measure identified in Exhibit B at a particular complex shall be defined as follows:

i. For the first twelve months after the effective date of this Stipulation, meeting or exceeding a seventy-five percent (75%) threshold for the particular performance measure that applies to a specific complex, determined under the procedures set forth in Paragraph 9;

ii. For the second twelve months after the effective date of this Stipulation, meeting or exceeding an eighty percent (80%) threshold for the particular performance measure that applies to a specific complex, determined under the procedures set forth in Paragraph 9;

iii. After the first twenty four months after the effective date of this Stipulation, meeting or exceeding an eighty-five percent (85%) threshold for the particular performance measure that applies to a specific complex, determined under the procedures set forth in Paragraph 9.

b. **Termination of the duty to measure and report on a particular performance measure:** ADC's duty to measure and report on a particular performance measure, as described in Paragraph 9, terminates if:

i. The particular performance measure that applies to a specific complex is in compliance, as defined in sub-paragraph A of this Paragraph, for eighteen months out of a twenty-four month period; and

ii. The particular performance measure has not been out of compliance, as defined in sub-paragraph A of this Paragraph, for three or more consecutive months within the past 18-month period.

c. The duty to measure and report on any performance measure for a given complex shall continue for the life of this Stipulation unless terminated pursuant to sub-paragraph B of this Paragraph.

11. Defendants or their contracted vendor(s) will approve or deny all requests for specialty health care services using InterQual or another equivalent industry standard utilization management program. Any override of the recommendation must be documented in the prisoner's health care chart, including the reason for the override.

12. Defendants or their contracted vendor(s) will ensure that:

a. All prisoners will be offered an annual influenza vaccination.

b. All prisoners with chronic diseases will be offered the required immunizations as established by the Centers for Disease Control.

c. All prisoners ages 50 to 75 will be offered annual colorectal cancer screening.

d. All female prisoners age 50 and older will be offered a baseline mammogram screening at age 50, then every 24 months thereafter

unless more frequent screening is clinically indicated.

13. Defendants or their contracted vendor(s) will implement a training program taught by Dr. Brian Hanstad, or another dentist if Dr. Hanstad is unavailable, to train dental assistants at ADC facilities about how to triage HNRs into routine or urgent care lines as appropriate and to train dentists to evaluate the accuracy and skill of dental assistants under their supervision.

14. For prisoners who are not fluent in English, language interpretation for healthcare encounters shall be provided by a qualified health care practitioner who is proficient in the prisoner's language, or by a language line interpretation service.

15. If a prisoner who is taking psychotropic medication suffers a heat intolerance reaction, all reasonably available steps will be taken to prevent heat injury or illness. If all other steps have failed to abate the heat intolerance reaction, the prisoner will be transferred to a housing area where the cell temperature does not exceed 85 degrees Fahrenheit.

16. Psychological autopsies shall be provided to the monitoring bureau within thirty (30) days of the prisoner's death and shall be finalized by the monitoring bureau within fourteen (14) days of receipt. When a toxicology report is required, the psychological autopsy shall be provided to the monitoring bureau within thirty (30) days of receipt of the medical examiner's report. Psychological autopsies and mortality

reviews shall identify and refer deficiencies to appropriate managers and supervisors including the CQI committee. If deficiencies are identified, corrective action will be taken.

B. Maximum Custody Prisoners.

17. Defendants shall request that the Arizona Legislature approve a budget to allow ADC to implement DI 326 for all eligible prisoners. This provision shall not be construed as an agreement by Plaintiffs that this budget request is sufficient to comply with the terms of this Stipulation.

18. Defendants shall comply with the maximum custody performance measures set forth in Exhibit D.

19. **Measurement and reporting of performance measures:** Compliance with the performance measures set forth in Exhibit D shall be measured and reported monthly as follows.

a. The performance measures analyzed to determine ADC substantial compliance with the Maximum Custody provisions of this Stipulation shall be governed by the protocol used for each performance measure attached as Exhibit E. If the parties cannot agree on a protocol, the matter shall be submitted for mediation or resolution by the District Court.

20. The measurement and reporting process for performance measures, as described in Paragraph 19, will determine (1) whether ADC has complied with

particular performance measures at particular units, (2) whether the Maximum Custody provisions of this Stipulation may terminate as to particular performance measures at particular units, as set forth in the following sub-paragraphs.

a. **Determining substantial compliance with a particular performance measure at a particular unit:** Compliance with a particular performance measure identified in Exhibit D at a particular unit shall be defined as follows:

   i. For the first twelve months after the effective date of this Stipulation, meeting or exceeding a seventy-five percent (75%) threshold for the particular performance measure that applies to a specific unit, determined under the procedures set forth in Paragraph 19;

   ii. For the second twelve months after the effective date of this Stipulation, meeting or exceeding an eighty percent (80%) threshold for the particular performance measure that applies to a specific unit, determined under the procedures set forth in Paragraph 19;

   iii. After the first twenty four months after the effective date of this Stipulation, meeting or exceeding an eighty-five percent (85%) threshold for the particular performance measure that applies to a specific unit, determined under the procedures set forth in Paragraph 19.

b. **Termination of the duty to measure and report on a particular performance measure:** ADC's duty to measure and report on a particular performance measure, as described in Paragraph 19, terminates if:

   i. The particular performance measure that applies to a specific unit is in compliance, as defined in sub-paragraph A of this Paragraph, for eighteen months out of a twenty-four month period; and

   ii. The particular performance measure has not been out of compliance, as defined in sub-paragraph A of this Paragraph, for three or more consecutive months within the past eighteen-month period.

c. The duty to measure and report on any performance measure for a given unit shall continue for the life of this Stipulation unless terminated pursuant to sub-paragraph B of this Paragraph.

21. Seriously Mentally Ill (SMI) prisoners are defined as those prisoners who have been determined to be seriously mentally ill according to the criteria set forth in the ADC SMI Determination Form (Form 1103-13, 12/19/12), which is attached hereto as Exhibit F and is incorporated by reference as if fully set forth herein. For purposes of this Stipulation, "intellectual disabilities," as defined by the current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM), shall be added to the list of qualifying diagnoses on Form 1103.13. This definition shall govern this Stipulation notwithstanding any future modification

of Form 1103.13 or ADC's definition of "Seriously Mentally Ill." All prisoners determined to be SMI in the community shall also be designated as SMI by ADC.

22. ADC maximum custody prisoners housed at Eyman-Browning, Eyman-SMU I, Florence Central, Florence-Kasson, and Perryville-Lumley Special Management Area (Yard 30) units, shall be offered out of cell time, incentives, programs and property consistent with DI 326 and the Step Program Matrix, but in no event shall be offered less than 6 hours per week of out-of-cell exercise. Defendants shall implement DI 326 and the Step Program Matrix for all eligible prisoners and shall maintain them in their current form for the duration of this Stipulation. In the event that Defendants intend to modify DI 326 and the Step Program Matrix they shall provide Plaintiffs' counsel with thirty (30) days' notice. In the event that the parties do not agree on the proposed modifications, the dispute shall be submitted to Magistrate Judge David Duncan who shall determine whether the modifications effectuate the intent of the relevant provisions of the Stipulation.

23. Prisoners who are MH3 or higher shall not be housed in Florence Central-CB5 or CB7 unless the cell fronts are substantially modified to increase visibility.

24. All prisoners eligible for participation in DI 326 shall be offered at least 7.5 hours of out-of-cell time per week. All prisoners at Step II shall be offered at least 8.5 hours of out-of-cell time per week, and all

prisoners at Step III shall be offered at least 9.5 hours of out-of-cell time per week. The out of cell time set forth in this paragraph is inclusive of the six hours of exercise time referenced in Paragraph 22. Defendants shall ensure that prisoners at Step II and Step III of DI 326 are participating in least one hour of out-of-cell group programming per week.

25. In addition to the out of cell time, incentives, programs and property offered pursuant to DI 326 and the Step Program Matrix for prisoners housed at maximum custody units specified in ¶ 24 above, ADC maximum custody prisoners designated as SMI pursuant to ¶ 21 above, shall be offered an additional ten hours of unstructured of out of cell time per week; an additional one hour of out-of-cell mental health programming per week; one hour of additional out of cell pyschoeducational programming per week; and one hour of additional out of cell programming per week. Time spent out of cell for exercise, showers, medical care, classification hearings or visiting shall not count toward the additional ten hours of out of cell time per week specified in this Paragraph. All prisoners received in maximum custody will receive an evaluation for program placement within 72 hours of their transfer into maximum custody, including to properly identify all SMI prisoners.

26. If out of cell time offered pursuant to ¶¶ 24 or 25 above is limited or cancelled for legitimate operational or safety and security reasons such as an unexpected staffing shortage, inclement weather or facility emergency lockdown, Defendants shall make

every reasonable effort to ensure that amount of out of cell time shall be made up for those prisoners who missed out of cell time. The out of cell time provided pursuant to paragraph 24 above, may be limited or canceled for an individual prisoner if the Warden, or his/her designee if the Warden is not available, certifies in writing that allowing that prisoner such out of cell time would pose a significant security risk. Such certification shall expire after thirty (30) days unless renewed in writing by the Warden or his/her designee.

27. Defendants shall maintain the following restrictions on the use of pepper spray and other chemical agents on any maximum custody prisoner classified as SMI, and in the following housing areas: Florence-CB-1 and CB-4; Florence-Kasson (Wings 1 and 2); Eyman-SMU I (BMU); Perryville-Lumley SMA; and Phoenix (Baker, Flamenco, and MTU).

a. Chemical agents shall be used only in case of imminent threat. An imminent threat is any situation or circumstance that jeopardizes the safety of persons or compromises the security of the institution, requiring immediate action to stop the threat. Some examples include, but are not limited to: an attempt to escape, ongoing physical harm or active physical resistance. A decision to use chemical agents shall be based on more than passive resistance to placement in restraints or refusal to follow orders. If the inmate has not responded to staff for an extended period of time, and it appears that the inmate does not present an imminent physical threat,

additional consideration and evaluation should occur before the use of chemical agents is authorized.

b. All controlled uses of force shall be preceded by a cool down period to allow the inmate an opportunity to comply with custody staff orders. The cool down period shall include clinical intervention (attempts to verbally counsel and persuade the inmate to voluntarily exit the area) by a mental health clinician, if the incident occurs on a weekday between 8:00 a.m. and 4:00 p.m. At all other times, a qualified health care professional (other than a LPN) shall provide such clinical intervention. This cool down period may include similar attempts by custody staff.

c. If it is determined the inmate does not have the ability to understand orders, chemical agents shall not be used without authorization from the Warden, or if the Warden is unavailable, the administrative duty officer.

d. If it is determined an inmate has the ability to understand orders but has difficulty complying due to mental health issues, or when a mental health clinician believes the inmate's mental health issues are such that the controlled use of force could lead to a substantial risk of decompensation, a mental health clinician shall propose reasonable strategies to employ in an effort to gain compliance, if the incident occurs on a weekday between 8:00 a.m. and 4:00 p.m. At all other times, a qualified health care professional (other than a

LPN) shall propose such reasonable strategies.

e. The cool down period may also include use of other available resources/options such as dialogue via religious leaders, correctional counselors, correctional officers and other custody and non-custody staff that have established rapport with the inmate.

28. All maximum custody prisoners shall receive meals equivalent in caloric and nutritional content to the meals received by other ADC prisoners.

III. MONITORING AND ENFORCEMENT

29. Plaintiffs' counsel and their experts shall have reasonable access to the institutions, staff, contractors, prisoners and documents necessary to properly evaluate whether Defendants are complying with the performance measures and other provisions of this Stipulation. The parties shall cooperate so that plaintiffs' counsel has reasonable access to information reasonably necessary to perform their responsibilities required by this Stipulation without unduly burdening defendants. If the parties fail to agree, either party may submit the dispute for binding resolution by Magistrate Judge David Duncan. Defendants shall also provide, on a monthly basis during the pendency of the Stipulation, copies of a maximum of ten (10) individual Class Members' health care records, and a maximum of five (5) individual Subclass Members' health care and institutional records, such records to be selected by Plaintiffs' counsel. The health care records shall

include: treatment for a twelve (12) month period of time from the date the records are copied. Upon request, Defendants shall provide the health care records for the twelve months before those originally produced. In addition, Defendants shall provide to Plaintiffs on a monthly basis a copy of all health care records of Class Members who died during their confinement at any state operated facility (whether death takes place at the facility or at a medical facility following transfer), and all mortality reviews and psychological autopsies for such prisoners. The records provided shall include treatment for a twelve (12) month period prior to the death of the prisoner. Upon request, Defendants shall provide the health care records for the twelve months before those originally produced. The parties will meet and confer about the limit on the records that Plaintiffs can request once the ADC electronic medical records system is fully implemented.

30. In the event that counsel for Plaintiffs alleges that Defendants have failed to substantially comply in some significant respect with this Stipulation, Plaintiffs' counsel shall provide Defendants with a written statement describing the alleged non-compliance ("Notice of Substantial Non-Compliance"). Defendants shall provide a written statement responding to the Notice of Substantial Non-Compliance within thirty (30) calendar days from receipt of the Notice of Substantial Non-Compliance and, within thirty (30) calendar days of receipt of Defendants' written

response, counsel for the parties shall meet and confer in a good faith effort to resolve their dispute informally.

31. In the event that a Notice of Substantial Non-Compliance pursuant to ¶ 30 of this Stipulation cannot be resolved informally, counsel for the parties shall request that Magistrate Judge John Buttrick mediate the dispute. In the event that Magistrate Judge Buttrick is no longer available to mediate disputes in this case, the parties shall jointly request the assignment of another Magistrate Judge, or if the parties are unable to agree, the District Judge shall appoint a Magistrate Judge. If the dispute has not been resolved through mediation in conformity with this Stipulation within sixty (60) calendar days, either party may file a motion to enforce the Stipulation in the District Court.

32. Plaintiffs' counsel and their experts shall have the opportunity to conduct no more than twenty (20) tour days per year of ADC prison complexes. A "tour day" is any day on which one or more of plaintiffs' counsel and experts are present at a given complex. A tour day shall last no more than eight hours. No complex will be toured more than once per quarter. Tours shall be scheduled with at least two weeks' advance notice to defendants. Defendants shall make reasonable efforts to make available for brief interview ADC employees and any employees of any contractor that have direct or indirect duties related to the requirements of this Stipulation. The interviews shall not unreasonably interfere with the performance of their duties. Plaintiffs' counsel and their experts shall be able to have confidential, out-of-cell interviews with

prisoners during these tours. Plaintiffs' counsel and their experts shall be able to review health and other records of class members, and records of mental health and other programming, during the tours. Plaintiffs' counsel and their experts shall be able to review any documents that form the basis of the MGAR reports and be able to interview the ADC monitors who prepared those reports.

33. With the agreement of both parties, Plaintiffs may conduct confidential interviews with prisoners, and interviews of ADC employees or employees of ADC's contractors, by telephone.

34. Defendants shall notify the Ninth Circuit Court of Appeals of the settlement of this case and of their intention to withdraw the petition for rehearing en banc in case number 13-16396, upon final approval of the Stipulation by the District Court. Defendants agree not to file a petition for writ of certiorari with the United States Supreme Court seeking review of the Ninth Circuit's judgment in case number 13-16396.

IV. RESERVATION OF JURISDICTION

35. The parties consent to the reservation and exercise of jurisdiction by the District Court over all disputes between and among the parties arising out of this Stipulation. The parties agree that this Stipulation shall not be construed as a consent decree.

36. Based upon the entire record, the parties stipulate and jointly request that the Court find that

this Stipulation satisfies the requirements of 18 U.S.C. § 3626(a)(1)(A) in that it is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right of the Plaintiffs. In the event the Court finds that Defendants have not complied with the Stipulation, it shall in the first instance require Defendants to submit a plan approved by the Court to remedy the deficiencies identified by the Court. In the event the Court subsequently determines that the Defendants' plan did not remedy the deficiencies, the Court shall retain the power to enforce this Stipulation through all remedies provided by law, except that the Court shall not have the authority to order Defendants to construct a new prison or to hire a specific number or type of staff unless Defendants propose to do so as part of a plan to remedy a failure to comply with any provision of this Stipulation. In determining the subsequent remedies the Court shall consider whether to require Defendants to submit a revised plan.

V. TERMINATION OF THE AGREEMENT.

37. To allow time for the remedial measures set forth in this Stipulation to be fully implemented, the parties shall not move to terminate this Stipulation for a period of four years from the date of its approval by the Court. Defendants shall not move to decertify the class for the duration of this Stipulation.

VI. MISCELLANEOUS PROVISIONS

38. Information produced pursuant to this Stipulation shall be governed by the Amended Protective Order (Doc. 454).

39. This Stipulation constitutes the entire agreement among the parties as to all claims raised by Plaintiffs in this action, and supersedes all prior agreements, representations, statements, promises, and understandings, whether oral or written, express or implied, with respect to this Stipulation. Each Party represents, warranties and covenants that it has the full legal authority necessary to enter into this Stipulation and to perform the duties and obligations arising under this Stipulation.

40. This is an integrated agreement and may not be altered or modified, except by a writing signed by all representatives of all parties at the time of modification.

41. This Stipulation shall be binding on all successors, assignees, employees, agents, and all others working for or on behalf of Defendants and Plaintiffs.

42. Defendants agree to pay attorneys' fees and costs incurred in the underlying litigation of the subject lawsuit in the total amount of $ 4.9 million. Defendants agree to deliver payment of $ 1 million within 14 days of the effective date of the Stipulation, and $ 3.9 million by July 15, 2015. The parties agree that payment of these fees and costs represents full

satisfaction of all claims for fees and costs incurred through the effective date of the Stipulation.

43. In the event that Plaintiffs move to enforce any aspect of this Stipulation and the Plaintiffs are the prevailing party with respect to the dispute, the Defendants agree that they will pay reasonable attorneys' fees and costs, including expert costs, to be determined by the Court. The parties agree that the hourly rate of attorneys' fees is governed by 42 U.S.C. § 1997e(d).

44. Plaintiffs' counsel shall be compensated for work reasonably performed or costs incurred to monitor or enforce the relief set forth in this Stipulation up to $ 250,000 per calendar year. In exchange for Plaintiffs' agreement to a cap on the amount of fees, Defendants shall not dispute the amount sought unless there is an obvious reason to believe that the work was unreasonable or the bill is incorrect. The amount of $ 250,000 will be prorated for the portion of the calendar year between the effective date of the Stipulation and the start of the next calendar year. Plaintiffs' counsel shall submit an invoice for payment quarterly along with itemized time records and expenses. Defendants shall pay the invoice within thirty (30) days of receipt. This limitation on fees and costs shall not apply to any work performed in mediating disputes before the Magistrate pursuant to paragraphs 22, 29, and 31 above, or to any work performed before the District Court to enforce or defend this Stipulation.

Dated this 9th day OCTOBER, 2014.

APPROVED:

/s/ Charles Ryan Date: 10-9-14
Charles Ryan,
Director, Arizona
Department of Corrections

/s/ Richard Pratt Date: 10/9/14
Richard Pratt
Interim Division Director,
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APPENDIX M

28 U.S.C. § 636(c)(1)

(c) Notwithstanding any provision of law to the contrary –

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

18 U.S.C. § 3626(a)(1)(A)

(a) Requirements for relief. –

(1) Prospective relief. – (A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.