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

JOHN ARMSTRONG, et al.,

Plaintiffs,

v.

EDMUND G. BROWN, JR., et al.,

Defendants.

No. C 94-2307 CW

ORDER DENYING
MOTION FOR
CONTEMPT, DENYING
AS MOOT MOTION TO
STRIKE AND
MODIFYING
PERMANENT
INJUNCTION
(Docket Nos. 2024
and 2135)

_____ /

Plaintiffs move for an order to show cause why Defendants should not be held in civil contempt for violating the January 18, 2007 Injunction and to hold Defendants in contempt. Defendants oppose the motion. Having considered the papers filed by the parties and their arguments at the hearing, the Court DENIES Plaintiffs' motion. The Court also MODIFIES the 2007 Injunction.

BACKGROUND

In a series of orders between 1996 and 2002, the Court found that Defendants' treatment of prisoners with disabilities violated the American with Disabilities Act (ADA) and section 504 of the Rehabilitation Act. On January 3, 2001, Defendants issued the amended Armstrong Remedial Plan (ARP) setting forth their own plans and policies to come into compliance with their obligations under these federal laws. Docket No. 681. On March 21, 2001, the Court issued a Permanent Injunction ordering Defendants to comply with the ADA and section 504 in eight specific areas previously litigated by the parties. Docket No. 694.

1 On January 18, 2007, this Court held that Defendants were not
2 yet in compliance with the ADA, section 504, the Permanent
3 Injunction or the ARP. Docket No. 1045. The Court found that
4 "Plaintiffs have demonstrated that defendants continue to violate
5 the rights of prisoners with disabilities under the ADA and
6 Rehabilitation Act" and described in detail its factual findings
7 of Defendants' ongoing and systemic violations of class members'
8 rights, including failure to provide safe accessible housing to
9 prisoners with mobility impairments, denial of sign language
10 interpreters to prisoners who need them, confiscation of medically
11 prescribed assistive devices, and late and inadequate disability
12 grievance responses and systems. Id. at 2-4. The Court
13 specifically found that some institutions responded chronically
14 late to class members' grievances regarding accommodations and
15 that other institutions simply did not process and address such
16 grievances at all. Id. at 4. These failures persisted despite
17 the Court's prior orders requiring Defendants to provide
18 reasonable accommodations and violated the ARP developed by
19 Defendants.

20 The Court entered an injunction, requiring Defendants to take
21 certain steps to address the ongoing rights violations.
22 Injunction, Docket No. 1045. To ensure that repeated violations
23 would be identified and addressed, the Court ordered, among other
24 things,

25 Within 120 days of the date of this Order, defendants,
26 in cooperation with the Office of the Inspector General
27 and the Receiver in Plata v. Schwarzenegger, shall
28 develop a system for holding wardens and prison medical
administrators accountable for compliance with the
Armstrong Remedial Plan and the orders of this Court.
This system shall track the record of each institution

1 and the conduct of individual staff members who are not
2 complying with these requirements. Defendants shall
3 refer individuals with repeated instances of non-
4 compliance to the Office of Internal Affairs for
5 investigation and discipline, if appropriate.

6 Id. at 7.

7 On November 21, 2008, Defendants issued a memorandum entitled
8 "Expectations for Staff Accountability and Non-compliance of the
9 Disability Placement Program" (DPP). Godbold Decl. ¶ 3, Ex. 1.
10 Plaintiffs allege that this memorandum sets forth "Defendants'
11 sole means of implementing" the accountability tracking
12 requirements of the 2007 Injunction. Mot. at 4. The memorandum
13 states, "In order to provide the documentation to meet the Court's
14 Injunction related to staff conduct, the following recording and
15 reporting protocols shall be implemented." Id. at 2. If a
16 supervisor or manager observes violations of the DPP or if staff
17 misconduct is alleged or reported by others, including "staff,
18 inmate interviews, submitted via CDC Form 602 - Inmate/Parolee
19 Appeal or CDCR Form 1824 - Request for Reasonable Modification or
20 Accommodation," or is found through "other fact-finding efforts,"
21 the supervisor or manager is required to "prepare and forward a
22 memorandum to the Employee Disciplinary Officer/Employee Relations
23 Officer (EDO/ERO) in the Employee Relations Office," setting forth
24 the details of the misconduct. Id. The EDO/ERO is then to
25 forward this information to the appropriate Hiring Authority,
26 which is either the warden of the institution or the Health Care
27 Manager, who is to determine "what action should be taken" and
28 whether the involvement of the Office of Internal Affairs (OIA) is
warranted. Id. at 2-3. The Hiring Authority's decision is to be
"entered on the DPP Employee Non-Compliance Log." Id. at 3. Each

1 month, the logs compiled at each institution are produced to
2 Plaintiffs' counsel. Id.; Godbold Decl. ¶ 4.

3 On July 13, 2010, the parties filed a joint status conference
4 statement, stating in relevant part,

5 Plaintiffs are concerned that the staff accountability
6 program, required by this Court's January 18, 2007
Injunction, is not working as intended.

7 Under Defendants' November 21, 2008 memorandum governing
8 accountability procedures, supervisors are required to
9 forward a memo to the Employee Relations Officer when
they "discover" -- via direct observation, prisoner
10 complaint, or reports by others -- that staff has
"fail[ed] to fulfill their responsibilities in regards
11 to the DPP." The Employee Relations Officer submits the
information to the Hiring Authority, and the Hiring
12 Authority is then to determine whether/what action to
take. Once the Hiring Authority has made its
13 determination, the Employee Relations Officer "shall
enter the decision in the DPP Employee Non-Compliance
Log."

14 Despite this direction, the non-compliance logs for
15 several institutions are completely blank for the entire
period of February 2009 through April 2010. The logs
16 for many other institutions are empty for months at a
time, and the logs for still others have very few
17 entries.

18 The lack of entries exist even where Plaintiffs have
produced reports alleging numerous and serious
19 violations of the Remedial Plan.

20 Without waiving any legal rights, Defendants have agreed
to put together a training module to ensure that staff
21 are properly investigating potential violations and
noting the investigations in the accountability logs.

22 The parties have agreed to meet on July 27 at 10:00 to
23 discuss the contents and status of such training.

24 Docket No. 1729, at 2-3.

25 In February 2011, Defendants required all institutional
26 staff, except staff working under the authority of the Receiver
appointed by the court in Plata v. Brown, to complete a training
27 module on the accountability procedures. Martinez Decl. ¶ 4. The
28

1 training consisted of written materials summarizing the procedures
2 and a quiz regarding the materials. Id., Ex. C.

3 Between April 2011 and December 2011, Plaintiffs submitted
4 allegations of more than 150 violations of the Armstrong Remedial
5 Plan to Defendants, which were not reported on the corresponding
6 DPP Employee Non-Compliance Logs provided by Defendants to
7 Plaintiffs. Godbold Decl. ¶¶ 7-57, Exs. 3-53; Evenson Decl.
8 ¶¶ 3-5.¹

9 On January 18, 2012, Plaintiffs sent Defendants a letter,
10 stating

11 Based on a review of the non-compliance logs produced
12 since completion of the training (April 2011 - November
13 2011), plaintiffs' counsel remains seriously concerned
14 about the incompleteness and inconsistency of the non-
15 compliance logs. Despite additional staff training,
16 logs at nine institutions remaining entirely blank even
17 though clear Armstrong violations have been identified
18 through monitoring at those prisons. Though logs at the
19 remaining institutions are not blank, at least 17 other
20 prisons fail to document violations which plaintiffs'
21 counsel identified in monitoring reports.

22 Godbold Decl. ¶ 6, Ex. 2. Plaintiffs attempted to discuss
23 solutions to these issues during a February 3, 2012 meeting.
24 Defendants refused to comment on plans to address these issues and
25 stated that they would respond in writing by March 1, 2012.

26 ¹ In their opposition, Defendants argue that Plaintiffs'
27 counsel's monitoring letters are inadmissible hearsay offered to
28 prove the truth of the allegations of violations contained in the
letters, and that they do not qualify for any exception to the
hearsay rule. Opp. at 12-13. Plaintiffs do not offer these
letters to establish that Defendants had in fact violated the
Armstrong Remedial Plan, but rather to establish that the fact
that Plaintiffs had submitted allegations of such violations to
Defendants between these dates, which did not appear on the DPP
Employee Non-Compliance Logs. Accordingly, the Court OVERRULES
Defendants' objections to these documents.

1 Godbold Decl. ¶ 6. Defendants had not responded as of March 22,
2 2012. Id.

3 On March 22, 2012, Plaintiffs filed the instant motion,
4 alleging that Defendants have failed to comply with the quoted
5 portion of the 2007 Injunction. The parties subsequently
6 stipulated to extend the briefing and hearing schedule on the
7 motion.

8 In March 2012, Defendants required all managerial and
9 supervisory staff at the prisons, except staff working under the
10 authority of the Receiver appointed by the court in Plata v.
11 Brown, to complete again the training module on the accountability
12 procedures. Calderon Decl. ¶ 2.

13 On May 10, 2012, Defendants filed their opposition to
14 Plaintiffs' motion.²

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17 ² With their opposition, Defendants filed under seal a
18 separate 120-page document, entitled "Appendix of Defendants'
19 Objections to Plaintiffs' Evidence on Plaintiffs' Motion for an
20 Order to Show Cause and a Contempt Order," and setting forth 270
evidentiary objections to Plaintiffs' evidence. Docket No. 2117.
In their reply, Plaintiffs object to this appendix of objections
and move to strike it.

21 Civil Local Rule 7-3(a) requires that, for an opposition to a
22 motion, "[a]ny evidentiary and procedural objections to the motion
23 must be contained within the brief or memorandum." Civil Local
24 Rule 7-4(b) provides that, unless "the Court expressly provides
otherwise pursuant to a party's request made prior to the due
date, briefs or memoranda filed with opposition papers may not
exceed 25 pages of text."

25 Between their opposition brief and their separate appendix of
26 evidentiary objections, Defendants have filed a total of 143 pages
27 in opposition to Plaintiffs' motion, without at any point seeking
28 leave of the Court to exceed twenty-five pages. Accordingly, the
Court GRANTS Plaintiffs' request to strike Defendants' appendix of
evidentiary objections. The Court will only consider the
opposition brief itself.

1 On May 24, 2012, Plaintiffs filed their reply in support of
2 their motion.

3 On May 31, 2012, Defendants filed objections to Plaintiffs'
4 reply evidence.³

5 On June 1, 2012, Plaintiffs filed a revised proposed order
6 for the instant motion.⁴

7 LEGAL STANDARD

8 A district court has the inherent authority to enforce
9 compliance with its orders through a civil contempt proceeding.
10 International Union, UMWA v. Bagwell, 512 U.S. 821, 827-28 (1994).
11 A contempt sanction is considered civil if it "is remedial, and
12 for the benefit of the complainant." Id. A contempt fine is
13 considered civil and remedial if it either "coerce[s] the
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16 ³ Defendants request that the Court strike portions of the
17 reply declaration of Penny Godbold, arguing that these sections of
18 her declaration improperly contain conclusions and argument or
19 misstate the evidence in the record. Because the Court has not
20 relied on the Godbold reply declaration in resolving this motion,
21 Defendants' request is OVERRULED AS MOOT.

22 ⁴ On June 4, 2012, Defendants filed an administrative motion
23 to strike Plaintiffs' revised proposed order, arguing that the
24 proposed order is actually a sur-reply brief offering additional
25 argument in support of their motion. Docket No. 2135.

26 The Court notes that Plaintiffs appear to have revised their
27 proposed order to incorporate the arguments they raised in their
28 reply brief. Defendants allege that the revised proposed order
"improperly argues, after all briefing has been completed, that
this Court should change the nature of the proceedings, by
abandoning their motion for an order to show cause," by arguing
that "an order to show cause" is "not necessary because Plaintiffs
do not contest Defendants' evidence." Mot. to Strike 2 & n.1
(emphasis in original). However, Plaintiffs make this argument on
pages thirteen through fifteen of their reply brief.

Because the Court finds that the revised proposed order is
not material to the outcome of this motion and does not rely upon
it in ruling, the Court DENIES Defendants' motion as MOOT.

1 defendant into compliance with the court's order, [or] ...
2 compensate[s] the complainant for losses sustained." United
3 States v. United Mine Workers, 330 U.S. 258, 303-304 (1947).

4 "The standard for finding a party in civil contempt is well
5 settled: The moving party has the burden of showing by clear and
6 convincing evidence that the [non-moving party] violated a
7 specific and definite order of the court." FTC v. Affordable
8 Media, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999) (quoting Stone v.
9 City & Cnty. of San Francisco, 968 F.2d 850, 856 n.9 (9th
10 Cir.1992)). The contempt "need not be willful, and there is no
11 good faith exception to the requirement of obedience to a court
12 order." In re Dual-Deck Video Cassette Recorder Antitrust Litig.,
13 10 F.3d 693, 695 (9th Cir. 1993). "But a person should not be
14 held in contempt if his action appears to be based on a good faith
15 and reasonable interpretation of the court's order." Id.
16 (internal formatting and quotation marks omitted). "'Substantial
17 compliance' with the court order is a defense to civil contempt,
18 and is not vitiated by 'a few technical violations' where every
19 reasonable effort has been made to comply." Id. (citing Vertex
20 Distrib., Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 891
21 (9th Cir. 1982)).

22 Thus, the Court may grant a motion for an order of contempt
23 if it finds that Defendants (1) violated the court order,
24 (2) beyond substantial compliance, (3) not based on a good faith
25 and reasonable interpretation of the order, (4) by clear and
26 convincing evidence. Id. Once the moving party has met its
27 burden, the burden "shifts to the contemnors to demonstrate why
28 they were unable to comply" with the court order. Stone, 968 F.2d

1 at 856 n.9 (citing Donovan v. Mazzola, 716 F.2d 1226, 1240 (9th
2 Cir. 1983)). "They must show they took every reasonable step to
3 comply." Id. (citing Sekaquaptewa v. MacDonald, 544 F.2d 396, 406
4 (9th Cir. 1976)).

5 DISCUSSION

6 Plaintiffs request that Defendants be held in civil contempt
7 because they have reported "hundreds of violations of the Remedial
8 Plan and instances of staff member misconduct" to Defendants and
9 "Defendants have failed to track these reported instances of staff
10 member non-compliance, or to refer repeated instances of non-
11 compliance to the OIA." Mot. at 3. Plaintiffs acknowledge that
12 Defendants have developed a tracking mechanism, but argue that it
13 has not been effective, that many institutions are not complying
14 with it and that Defendants' training on this mechanism has been
15 insufficient. Id. at 5.

16 Defendants do not dispute that they did not track allegations
17 of rights violations. Instead, they argue that the 2007
18 Injunction does not require them to log allegations of
19 non-compliance or to investigate such allegations and instead only
20 requires them to log instances in which they found that an
21 employee had in fact violated a class member's rights. Thus, they
22 contend that, although their November 2008 accountability program
23 mandates tracking of allegations of non-compliance that were
24 ultimately not substantiated, which they admit they have failed to
25 do, they cannot be held in contempt for this failure because the
26 information was not required by the 2007 Injunction. Defendants
27 further argue that, if the 2007 Injunction does require them to
28 conduct an investigation into allegations of non-compliance and to

1 report the outcome of each such investigation, including those
2 that were not substantiated, then the order is ambiguous and
3 unenforceable through civil contempt sanctions. Finally,
4 Defendants aver that they have been acting pursuant to a good
5 faith interpretation of the Injunction as not requiring this.

6 The Court finds that Defendants' interpretation of the 2007
7 Injunction fatally undermines any effectiveness that the relevant
8 requirements would have had in addressing the ongoing violations
9 identified in that order. The Court required Defendants to
10 "develop a system for holding wardens and prison medical
11 administrators accountable for compliance with the Armstrong
12 Remedial Plan and the orders of this Court," and to track both
13 "the record of each institution and the conduct of individual
14 staff members who are not complying with these requirements."
15 These requirements were intended to serve multiple purposes,
16 including remedying the widespread failures to respond to
17 grievances and requests for accommodations, verifying compliance
18 with the other parts of the Court's orders and the ARP and
19 ensuring that patterns of violations were identified and
20 addressed. Most importantly, these provisions required Defendants
21 to develop effective internal oversight and accountability
22 procedures to ensure that Defendants learned what was taking place
23 in their facilities, in order to find violations, rectify them and
24 prevent them from recurring in the future, without involvement by
25 Plaintiffs' counsel or the Court. Defendants are unable to
26 identify whether institutions and staff members have complied with
27 requirements, find patterns or hold wardens and medical
28 administrators accountable, if they do not determine whether

1 reports of rights violations are substantiated and record the
2 results. Simply put, investigations, including the documentation
3 of the results, are necessary to ensure that grievances are
4 addressed and to identify staff error or misconduct and
5 institutional deficiencies that violate class members' rights.
6 Defendants may not fail to investigate reports of rights
7 violations and then declare that, because they did not
8 substantiate a violation, they were not required to document it.
9 Without documentation, there is no way for the Court to know
10 whether a complaint was investigated and found unsubstantiated, or
11 was simply ignored.

12 Some of Defendants' declarations reveal that investigations
13 were not conducted into complaints of rights violations until
14 after the instant motion was filed. For example, on October 13,
15 2011, Plaintiffs' counsel submitted a monitoring report to
16 Defendants stating that, among other things, a class member had
17 reported "that his back brace was taken away following a cell
18 extraction on May 2, 2011." Godbold Decl. ¶ 9, Ex. 5, 3.
19 Defendants submit evidence that they conducted an investigation
20 into this allegation upon receipt of the instant motion and offer
21 no evidence that they investigated the report at any earlier time.
22 See Zanchi Decl. ¶¶ 2-3, 10-13 (asserting that the report was not
23 substantiated, because the class member "was not medically
24 authorized to have a back brace").

25 The Court also notes that Defendants concede that at least
26 some of the incidents at issue constituted violations of the ARP,
27 which they were required to report. See Opp. at 5 (admitting
28 twenty-six ARP violations were not logged). Defendants state that

1 they have or will amend their accountability reports to track
2 these incidents.

3 The Court finds that Defendants' own evidence submitted in
4 response to this motion reveals numerous additional incidents,
5 which do violate the ARP or other Court orders, and which
6 Defendants failed to track. In multiple incidents, Defendants
7 state that they did not log that a violation of the ARP occurred
8 because staff members did not intend to commit a rights violation
9 or because the violation was subsequently remedied. However, the
10 2007 Injunction requires that every violation be tracked,
11 regardless of whether or not it was done intentionally or based on
12 an honest mistake or unavoidable. Further, violations must be
13 tracked, even if steps are later taken to remedy the initial
14 problem.

15 For example, Defendants acknowledge that a deaf inmate
16 submitted a grievance dated September 4, 2011, stating that his
17 hearing aid was taken during a cell search that took place on
18 August 24, 2011 and asking that the hearing aid be returned or
19 that he be provided with a new one. Cavazos Decl. ¶¶ 17-18, Ex.
20 E. Defendants also admit that a later investigation revealed that
21 the hearing aid was taken during the search. Id. at ¶ 19.
22 Sometime after September 28, 2011, the inmate was seen by an
23 audiologist and given a new hearing aid. Id. at ¶ 19-21.
24 Defendants contend that they "determined that there was no
25 violation that needed to be logged" in the accountability logs,
26 because the inmate's hearing aid was removed from his cell "by
27 mistake, and there was no intention to deprive him of his hearing
28 aid," and because he was "provided a new hearing aid soon after he

1 requested one." Id. at ¶ 22.

2 In another incident, Defendants acknowledge that one
3 prisoner's Disability and Effective Communication System (DECS)
4 record shows that "his primary method of communication is American
5 sign language and that his secondary method of communication is
6 the use of written notes." Aref Decl. ¶ 6. See also Aref Decl.
7 ¶ 7, Ex. A. The ARP requires that, "for all due process
8 functions," when "sign language is the inmate's primary or only
9 means of effective communication," a qualified sign language
10 interpreter must be provided, "unless the inmate waives the
11 assistance of an interpreter, reasonable attempts to obtain one
12 are not successful, and/or delay would pose a safety or security
13 risk." ARP § II.E.2.d. Defendants attest that, on April 18,
14 2011, staff held a meeting with this prisoner to provide notice of
15 his conditions of parole, but did not have a sign language
16 interpreter present and instead used written notes to communicate
17 with him. Aref Decl. ¶ 8. Defendants do not provide evidence
18 that the inmate waived the assistance of an interpreter, they made
19 reasonable attempts to obtain an interpreter or that delay would
20 pose a safety or security risk. After Plaintiffs' counsel raised
21 this issue with Defendants, a second meeting was held on June 3,
22 2011 with the prisoner, at which a sign language interpreter was
23 present. Aref Decl. ¶ 10-11, Ex. 11. Defendants assert that they
24 concluded that no violation of the ARP occurred in the April 18,
25 2011 meeting, apparently because "the correctional counselor
26 responsible" for the meeting "believed that the use of written
27 notes was an appropriate effective form of communication," and
28 thus that the incident need not be entered into the accountability

1 logs. Id. at ¶ 15.

2 Defendants' declarations also show that they failed to
3 document violations where an inmate's grievance did not
4 specifically accuse a staff member of misconduct, even though the
5 inmate was deprived of an accommodation required under the ARP.
6 Defendants must report incidents where an inmate complains that he
7 or she was not provided with something required by the ARP, not
8 only where the class member has explicitly accused a specific
9 staff member of intentional malfeasance or another talismanic
10 phrase. Defendants also repeatedly state that they are not
11 required to track violations where they could not identify the
12 specific staff members responsible for the problem. See, e.g.,
13 Zanchi Decl. ¶¶ 8-9 ("My investigation was unable to identify the
14 specific staff members responsible for the violations. Because no
15 specific staff member could be identified as the responsible
16 party, this incident was not logged in the CCI DPP Accountability
17 Logs."). However, the fact that Defendants could not identify the
18 responsible individual does not negate the fact that an incident
19 occurred in which a class member was deprived of his rights.
20 Further, the 2007 Injunction clearly requires Defendants to track
21 institutional compliance, not just the compliance of individual
22 staff members.

23 For example, one prisoner submitted a grievance on a CDCR
24 602 form stating that he was "vision impaired [and] not receiving
25 assistance from custody in reading and writing." Cullen Decl.
26 ¶ 7, Ex. C, 3. In the response to his grievance, staff noted
27 that, during an interview about the grievance, the inmate stated
28 specifically that "staff is unwilling to assist [him] in

1 preparation of an Inmate/Parolee Appeal CDCR 602 form." Id. at 5.
2 His complaint was substantiated and the associate warden concluded
3 that "staff was not providing the proper assistance with your
4 disability needs," noting that the ARP mandated that "institution
5 staff shall provide the assistance and equipment necessary to all
6 inmates with disabilities on a case by case basis to ensure that
7 inmates, who have difficult reading and/or communicating in
8 writing . . . are provided reasonable access to forms, CCRs and
9 procedures." Id. See ARP § II.F. Defendants contend that they
10 were not required to log this because the grievance did not
11 provide "information that there was a violation of the Armstrong
12 remedial plan." Cullen Decl. ¶ 7. Even if the original grievance
13 was vague, the ensuing investigation clearly revealed that the
14 class member was alleging a violation of the ARP, and Defendants'
15 staff substantiated that there was such a violation. This
16 argument is especially disingenuous because the class member was
17 complaining that he was not provided with accommodations required
18 to help him complete this form properly, among other things. As
19 above, Defendants further aver that the inmate did not identify "a
20 specific person or persons who failed to provide" him with
21 assistance. Id.

22 The Court notes that the instant motion does not involve
23 Defendants' failure to provide appropriate accommodations; rather,
24 the Court considers whether Defendants have violated the 2007
25 Injunction's requirement that it develop an accountability system
26 to ensure compliance with the ARP and the Court's other orders.
27 On the record before it, the Court concludes that Defendants'
28 accountability system, with which they do not dispute they have

1 failed to comply, has not been effective. Although the Court
2 finds that the 2007 Injunction implicitly required Defendants to
3 include in the accountability system requirements to investigate
4 promptly and appropriately all allegations of violations,
5 regardless of the source, and to record the outcomes of the
6 investigations, including whether or not the allegations were
7 substantiated, in an abundance of caution the Court concludes that
8 the 2007 Injunction may not state this plainly enough.

9 Accordingly, the Court DENIES Plaintiffs' motion to hold
10 Defendants in contempt.

11 The Court finds the 2007 Injunction should be clarified and
12 made more detailed, to make clear what is expected of Defendants
13 and to allow Defendants to conform their future behavior to its
14 terms. The Court therefore MODIFIES the 2007 Injunction, as set
15 forth below. The modifications largely reflect the procedures
16 that were set forth in Defendants' November 21, 2008 memorandum,
17 with minimal changes. The Court makes changes in five substantive
18 areas--tracking, investigation, corrective action and discipline,
19 dispute resolution, and requirement for a protective order. The
20 Court finds that these changes are narrowly drawn, extend no
21 further than necessary to correct the violations of federal rights
22 identified in the 2007 Injunction, and are the least intrusive
23 means necessary to correct the violations of the federal rights.

24 The modifications require Defendants to track all allegations
25 of non-compliance with the ARP and the orders of this Court. The
26 modifications are similar to Defendants' own procedures. See
27 Godbold Decl. ¶ 3, Ex. 1, 2-3. This must be done regardless of
28 the source of the allegations. The only difference is that this

1 order also requires Defendants to list when the investigation was
2 initiated, the name and title of the investigator, the date the
3 investigation was completed, the result of the investigation, and
4 the number of prior allegations of non-compliance against the
5 involved employees or employees. The Court finds that tracking of
6 this additional information is necessary because Defendants have
7 not tracked or conducted violations into all reported violations,
8 and those facts will show whether Defendants are fully and
9 effectively complying with the 2007 Injunction and holding staff
10 members accountable for non-compliance. Furthermore, this Court
11 finds tracking the number of prior allegations of non-compliance
12 is necessary in order to meet the requirement in the 2007
13 Injunction that "Defendants shall refer individuals with repeated
14 instances of non-compliance to the Office of Internal Affairs for
15 investigation and discipline, if appropriate." 2007 Injunction at
16 7.

17 Like Defendants' own procedures, the modifications to the
18 Injunction set forth below also require Defendants to conduct an
19 investigation when they receive allegations of staff member
20 non-compliance. See Godbold Decl. ¶ 3, Ex. 1, 2-3. The only
21 difference is that this order requires the investigation to be
22 initiated within ten business days of receiving notice of such
23 allegation, and Defendants' internal policy does not specify the
24 timeframe for the investigation. Specifying a timeframe is
25 necessary because some of Defendants' investigations were
26 untimely, and such investigations may be less effective because of
27 the passage of time. Further, such delays extend the time in
28 which class members are deprived of accommodations set forth in

1 the ARP. Initiation of a timely investigation, within ten
2 business days, is necessary to ensure that allegations are
3 investigated while memories are fresh, the facts surrounding the
4 allegations are still in existence and the violation can be
5 remedied. Further, in order to reconcile disagreements between
6 the parties resulting from investigations, this Court finds that
7 Plaintiffs' counsel must have access to the results of the
8 investigation, including all sources of information relied on to
9 substantiate or refute the allegations. Such access is
10 consistent with the monitoring powers already granted to
11 Plaintiffs. See Remedial Order, Injunction, and Certification of
12 Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b), Docket No.
13 158, at 5 ("Plaintiffs shall be entitled to reasonable access to
14 information sufficient to monitor defendants' compliance with the
15 guidelines, plans, policies and procedures that have been approved
16 by the Court. Such monitoring shall include access to relevant
17 documents, . . . interviews or depositions of institution and
18 departmental staff. . .").

19 The 2007 Injunction requires that Defendants refer
20 individuals with repeated instances of non-compliance to the OIA
21 for investigation and discipline if appropriate. However, it does
22 not specify when and under what circumstance corrective and/or
23 disciplinary action is warranted. To be effective, an
24 accountability system must specify what discipline will result
25 from staff member violations. Accordingly, this order requires
26 that Defendants comply with the Employee Disciplinary Matrix set
27 forth in the CDCR Departmental Operations Manual, Chapter 3,
28 Article 22. See CDCR Operations Manual (2012) Personnel,

1 Training, and Employee Relations, §§ 33030.16-33030.19,
2 pp. 238-245.

3 The Court also finds it necessary to create a process for
4 resolving disputes between the parties regarding whether an
5 incident constitutes a violation of the ARP and this Court's
6 orders, in order to facilitate Defendants' compliance with the
7 2007 Injunction. Given the evidence that Defendants frequently
8 reached conclusions that no violation that needed to be documented
9 occurred, even though this was inconsistent with the ADA, the ARP
10 and the evidence, the Court will establish a process for resolving
11 disputes between the parties. This process will promote more
12 accurate decision making while not unduly burdening the resources
13 of the Court or of the State.

14 Further, the Court determines that it is necessary for the
15 parties to protect the rights of Defendants' employees. Certain
16 facts surrounding the employees who are at the center of
17 non-compliance investigations will necessarily become known by the
18 parties. Such personnel information will be disclosed through
19 complaints and reports from prisoners and again as part of the
20 tracking, investigation, disciplinary and dispute resolution
21 processes cited above. The Court finds that this will be an
22 essential part of the dispute resolution process and that a
23 protective order is necessary to protect Defendants' employees
24 from disclosure of personnel information that is not necessary to
25 the conduct of this litigation.

26 CONCLUSION

27 For the reasons set forth above, the Court DENIES Plaintiffs'
28 motion for an order holding Defendants in contempt (Docket No.

1 2024). The Court also DENIES AS MOOT Defendants' motion to
2 strike (Docket No. 2135).

3 IT IS HEREBY ORDERED THAT the following shall be substituted
4 in place of page seven, lines five through twelve of the 2007
5 Injunction:

6 Defendants, their agents and employees shall promptly take
7 all reasonable steps to comply with each provision set forth
8 below:

9 A. Tracking of All Allegations of Staff Member Non-Compliance

10 1. Defendants, their agents and employees (Defendants) shall
11 track any allegation that any employee of the Department of
12 Corrections and Rehabilitation was responsible for any member of
13 the Plaintiff class not receiving access to services, programs,
14 activities, accommodations or assistive devices required by any of
15 the following: the Armstrong Remedial Plan, the Americans with
16 Disabilities Act or this Court's prior orders. Allegations to be
17 tracked include, but are not limited to, those received from CDCR
18 staff, prisoners, Plaintiffs' counsel, administrative appeals and
19 third parties. All such allegations shall be tracked, even if the
20 non-compliance was unintentional, unavoidable, done without
21 malice, done by an unidentified actor or subsequently remedied.

22 2. The allegations shall be tracked in an electronic
23 spreadsheet that can be searched and sorted. The spreadsheet
24 shall contain at least the following information: the prison at
25 which the incident occurred, the name and CDCR number of the
26 prisoner, the date of the allegation, the name of the employee(s),
27 the date the investigation was initiated, the name and title of
28 the investigator, the date the investigation was completed, the

1 result of the investigation, the number of prior allegations of
2 non-compliance against the employee(s), and the action taken, if
3 any, as a result of the investigation, including whether the
4 incident was referred to the Office of Internal Affairs.

5 3. The spreadsheet shall be produced to Plaintiffs' counsel
6 in electronic format monthly. When the spreadsheet is produced to
7 Plaintiffs' counsel, the employees' names shall be removed and
8 shall be replaced with a unique identifier. When redacting
9 employees' names in records produced to Plaintiffs in accordance
10 with this Order, Defendants shall consistently identify an
11 individual employee by the same unique identifier.

12 B. Investigations

13 1. Defendants shall investigate all allegations of employee
14 non-compliance, regardless of whether the allegation includes the
15 name of the employee(s). Investigations shall be initiated within
16 ten business days of receiving notice of such allegations and
17 shall be completed as promptly as possible. Investigations must
18 include a review of all information necessary to determine whether
19 or not the allegation is true and shall include an interview with
20 the affected prisoner(s). The investigation must result in a
21 written report that shall list all sources of information relied
22 upon in deciding whether employee non-compliance occurred and
23 whether any other finding(s) of non-compliance against the
24 employee(s) has been sustained.

25 2. If Plaintiffs' counsel has a good faith disagreement with
26 the result of a particular investigation, they may request a copy
27 of the written report and it shall be produced. In such
28 instances, Plaintiffs' counsel shall have the right to review all

1 written documents utilized in making the determination set forth
2 in the report. Upon a showing of need, Plaintiffs' counsel shall
3 also have the right to interview individuals who provided
4 information utilized in making this determination.

5 3. When producing documents to Plaintiffs' counsel pursuant
6 to this section, Defendants shall replace employees' names with
7 unique identifiers as described in paragraph A.3.

8 C. Corrective Action and Discipline

9 1. Whenever an investigation reveals employee non-
10 compliance, Defendants must comply with procedures set forth in
11 Defendants' November 21, 2008 memorandum, "Expectations for Staff
12 Accountability and Non-Compliance of the Disability Placement
13 Program."

14 2. Defendants shall determine whether to initiate
15 disciplinary proceedings or corrective action against an employee
16 found in non-compliance, depending upon the number of prior
17 violations, the seriousness of the harm to the prisoner, and the
18 culpability of the employee. Defendants shall discipline
19 employees in compliance with the Employee Disciplinary Matrix set
20 forth in the CDCR Departmental Operations Manual, Chapter 3,
21 Article 22, Personnel, Training, and Employee Relations.

22 3. All determinations of whether to initiate disciplinary
23 proceedings or corrective action shall be produced to Plaintiffs'
24 counsel upon request. When producing these documents to
25 Plaintiffs' counsel, Defendants shall replace employees' names
26 with unique identifiers as described in paragraph A.3.

27 D. Dispute Resolution

28 1. In the event of a dispute about the production of

1 information, the results of Defendants' investigation of alleged
2 non-compliance or their decision about whether to initiate
3 corrective action, Plaintiffs' counsel shall provide notice to
4 Defendants and attempt to resolve the matter through negotiation.
5 Defendants must respond to this notice within ten business days.

6 2. If the parties are unable to resolve the dispute
7 informally, Plaintiffs' counsel may request that the Court's
8 expert review and resolve the matter. Depending on the nature of
9 the dispute, the Court's expert shall resolve disputes about the
10 production of information, determine whether non-compliance
11 occurred or, if it did, whether corrective action should be
12 initiated. When requesting review by the Court's expert,
13 Plaintiffs' counsel shall substantiate their contentions with
14 sworn declarations from the class member or members involved,
15 signed under penalty of perjury. Defendants shall produce all
16 documents requested by the Court's expert and shall make all
17 employees available for interview, on a confidential or non-
18 confidential basis as determined by the Court's expert.

19 Administrative decisions made by the Court's expert pursuant to
20 this section shall be final as between Plaintiffs and Defendants.

21 3. The parties dispute whether certain incidents set forth
22 in the pleadings constitute non-compliance with the Remedial
23 Order. Plaintiffs' counsel shall inform Defendants which
24 incidents remain in dispute and shall attempt to resolve these
25 disputes through negotiation with Defendants. If negotiations
26 fail, the disputes may be referred to the Court's expert pursuant
27 to paragraph D.2., above.
28

1 E. Protective Order

2 The parties shall negotiate an order to protect the state law
3 rights of Defendants' employees from unnecessary disclosure of
4 personnel information. All documents that contain personnel
5 information produced to Plaintiffs' counsel and the Court's expert
6 pursuant to this Order shall be covered by this protective order.
7 If the parties are unable to agree on the terms of a protective
8 order, the Court's expert will recommend one.

9 F. Notice

10 Defendants shall provide a copy of this Order to the present
11 and future individual employees who occupy the following positions
12 within the California Department of Corrections and
13 Rehabilitations:

- 14 a. the Undersecretaries of the CDCR,
- 15 b. the Director of the Division of Adult Institutions,
- 16 c. the Deputy Directors of the Division of Adult
17 Institutions,
- 18 d. the Associate Directors of the Division of Adult
19 Institutions,
- 20 e. all Wardens of adult institutions, and
- 21 f. all adult institution ADA coordinators.

22 G. Miscellaneous

23 The procedures set forth in this order or in the 2007
24 Injunction shall not apply to staff working under the authority
25 of the Receiver appointed by the court in Plata v. Brown.

26 IT IS SO ORDERED.

27 Dated: 8/22/2012



United States District Judge

28