

1 Today, the court is letting defendants know it intends to hold some or all of them in
2 contempt and impose civil fines as sanctions until defendants achieve compliance in delivering
3 critically necessary, long overdue staffing relief for members of the plaintiff class. As of today,
4 the amount of fines owing is \$94,912,929.00, based on the defendants' own reporting.

5 This is a tentative ruling. The court is fully prepared to make it a final formal order, but it
6 will provide defendants one last opportunity to demonstrate the ability, the will and the leadership
7 to take decisive action to address the festering problem this case represents.

8 The plaintiff class has been waiting on the state for more than 28 years. In 1995, the court
9 first found overwhelming evidence of significant and chronic understaffing among mental health
10 care service provider positions in California's prisons. In 1999, the court ordered defendants to
11 comply with designated staffing ratios. In 2002, with the violation continuing, the court ordered
12 defendants to maintain staffing levels without exceeding a 10 percent vacancy rate. In 2009, with
13 the violation still continuing, the court ordered defendants to develop a formal Staffing Plan. In
14 2017, the court ordered full compliance with the required staffing levels.

15 On February 28, 2023, the court issued its order setting out a framework for staffing
16 enforcement, including a system of fines to begin accumulating, on paper, on March 31, 2023. If
17 fines accumulated for more than three consecutive months the court said it would set the matter
18 for hearing on findings of contempt and actual payment of fines. On June 12, 2023, the court
19 found fines had accumulated for three consecutive months. In other words, faced with the threat
20 of fines, defendants still had not complied with their constitutional obligations to the plaintiff
21 class. The court set enforcement proceedings for September 29, 2023, and took evidence over
22 several days.

23 Defendants acknowledge they are required to comply with their constitutional obligations
24 to the plaintiff class. Defendants do not dispute the October 10, 2017 order is sufficiently specific
25 and definite as to its terms so as to support enforcement. They do not, and cannot, contend they
26 have actually complied in full with the October 10, 2017 order. They instead contend they have
27 achieved "actual and substantial compliance" with the 90 percent fill rate requirement across
28 some classifications in some periods of time, and assert the defenses of substantial compliance

1 and impossibility. They have not submitted sufficient evidence to meet their burden of
2 supporting those defenses.

3 One metric is important to clarify up front. The parties dispute whether the October 2017
4 order itself allows for substantial compliance through defendants' filling of allocated mental
5 health staff positions "to something less than the 90% threshold," as defendants contend it does.
6 The October 10, 2017 order requires "complete compliance with the staffing ratios in the[] 2009
7 Staffing Plan and the maximum ten percent vacancy rate required by the court's June 13, 2002
8 order." These requirements mean defendants must allocate 100 percent of the positions required
9 by the staffing ratios in the 2009 Staffing Plan and have no more than a ten percent vacancy rate
10 systemwide in any of the five classifications at issue. In other words, anything greater than a ten
11 percent vacancy rate cannot be considered substantial compliance.

12 Substantial Compliance

13 Defendants do say they've "actually complied" in a limited way: they contend that filling
14 some classifications to 90 percent for some periods of time precludes a finding of contempt as to
15 classifications that were filled to 90 percent or above during any part of the relevant period from
16 October 2018 to now. The periods defendants cite are, at best, periods of partial compliance. The
17 question is whether monetary sanctions for contempt should extend to those periods of partial
18 compliance. The answer is no. The fine structure the court has set up does not include sanctions
19 for vacancy rates below the ten percent cap.

20 Defendants also contend they are in substantial compliance with the 90 percent fill rate
21 required by the court's orders. They say (1) they have achieved at, above, or near a 90 percent fill
22 rate among the five classifications individually for various and significant periods of time; (2)
23 they "have taken all reasonable measures to improve fill rates" where they have fallen short; and
24 (3) their "failure to reach required staffing thresholds, . . . , was the inadvertent result of the
25 COVID-19 pandemic and its lasting changes on the labor economy. The first and third arguments
26 are unavailing: the first because it mistakenly assumes something "near" a 90 percent fill rate can
27 count as substantially compliant, and the third because substantial compliance is a prerequisite to
28 being let off the hook for only technical or inadvertent violations.

1 The real question is whether defendants have taken “all reasonable measures” to achieve
2 required staffing levels – and it is “all” such measures that are required. Defendants say yes, they
3 have:

- 4 ■ through twice yearly review of staffing allocations – which is commendable but not
5 sufficient;
- 6 ■ expansion of telework opportunities for mental health clinicians – a recent initiative
7 that will take at least two years to make a dent and even if fully successful will not
8 achieve compliance;
- 9 ■ “salary and financial incentives” – while sticking with a policy of offering new hires
10 the lowest salary in classification range regardless of experience or prior pay;
- 11 ■ streamlining processes for hiring – with the goal, among others, of reducing time to
12 hire from 108 to 65 days – still a noncompetitive very long time;
- 13 ■ expansion of marketing and advertising efforts;
- 14 ■ contracting with the leading national recruiter for clinicians;
- 15 ■ and contracting with registry providers, who arrange for expensive privately
16 contracted clinicians, many from out of state, and who have been unable to fill all of
17 defendants’ requests.

18 Regarding salaries, defendants have offered no evidence they have even attempted to
19 analyze what wages and benefits they would have to offer mental health clinicians to fill staffing
20 vacancies. They do not argue or show it would be impossible to raise wages and benefits, or
21 other components of employment packages such as retention bonuses or pension contributions.

22 Regarding telemental health, in which defendants put much stock, they intend to use the
23 planned expansion of telemental health to help fill existing staffing vacancies in psychologist and
24 social worker positions. At the time of hearing, they planned to start to hire telepsychology line
25 staff early this year and said it “will probably take a couple years” for the program to “reach[] its
26 full potential.” Rather than adding positions, defendants plan to redirect existing psychologist
27 and clinical social worker positions – on-site positions -- to serve in this new program, filling a
28 maximum of 100 vacancies among psychologists and social workers. CDCR has no policy to

1 prevent on-site psychologists and social workers from taking redirected telemental health
2 positions, nor has it created a pay differential for on-site psychologists and social workers similar
3 to the one it has for psychiatrists to incentivize on-site clinical services. Bottom line, the number
4 of telemental health positions currently planned will not come close to filling the current
5 vacancies among psychologists and social workers and could further weaken the in-person
6 infrastructure within prisons that is so essential to the required quality of care.

7 The court finds by clear and convincing evidence defendants have not taken all reasonable
8 steps available to them and so in this respect as well have not substantially complied with the
9 court's October 10, 2017 order.

10 Impossibility

11 During his opening statement, counsel for defendants acknowledged impossibility is not a
12 defense to defendants' Eighth Amendment obligations in this case. Impossibility is a defense to
13 civil contempt, if established. Specifically, defendants contend that statewide and nationwide
14 shortages of mental health care providers make it impossible for them to comply across all
15 categories of providers with the 90 percent minimum fill rate required by the October 10, 2017
16 order. Defendants have the burden of producing evidence that it is impossible for them to comply
17 with the court's order. To meet this burden, defendants' evidence must show "categorically and
18 in detail" why it is impossible for them to comply. This "burden is difficult to meet" and may be
19 "particularly strict" in cases where, as here, the needs of a plaintiff class "are urgent." Defendants
20 have not met their burden.

21 Defendants rely principally on the testimony of their expert witness, Dr. Greulich,
22 concerning present shortages among mental health professionals. Dr. Greulich did testify to labor
23 shortages among mental health professionals across California and the United States. She also
24 testified, however, that she does not opine it is impossible for defendants to hire psychologists,
25 medical assistants or social workers in the current labor market.

26 Fundamentally, the record before the court shows it may be more difficult or expensive
27 for defendants to fill existing mental health vacancies sufficient to comply with the 90 percent fill

28 ////

1 rate required by the court's order. But none of the evidence establishes defendants' compliance
2 with the October 10, 2017 order is impossible.

3 Defendants have not met their burden of showing that compliance with the October 10,
4 2017 order is impossible so as to avoid a finding of contempt.

5 Absence of Key Testimony

6 The court makes an additional observation. Defendants called only one named defendant
7 as a witness, Dr. Mehta, CDCR's Deputy Director for Mental Health Services. The court has no
8 doubt Dr. Mehta is a highly qualified, dedicated public servant. At hearing, Dr. Mehta testified
9 he could not think of anything else he could do "at [his] level" and "pursuant to the rules that
10 apply" to him, to fill staffing vacancies to court-ordered levels. Dr. Mehta also testified on cross-
11 examination that he did not know if it was impossible to fill the vacancies. All the other
12 defendants in this action are at higher levels of authority within CDCR or the State of California,
13 with more authority than Dr. Mehta and significantly more resources available to them. The
14 absence of any testimony from any of the other named defendants – those of you here today at the
15 highest level of California's state government -- leaves a gaping hole in the record regarding what
16 all available reasonable steps actually are and what is possible.

17 Summary Regarding Contempt

18 In sum, the court finds by clear and convincing evidence that defendants have violated and
19 continue to violate the court's October 10, 2017 order as modified, that the ongoing violation is
20 not "based on a good faith and reasonable interpretation of the order" and the violation far
21 exceeds what would be necessary for the court to find substantial compliance with the order.
22 Defendants are in contempt of court and the court is prepared if it must to issue a formal finding
23 to this effect.

24 Remedies

25 Given defendants' contumacy, it is for the court to effect compliance. Because these are
26 civil contempt proceedings, traditional equitable principles call for the imposition of coercive
27 sanctions.

28 /////

1 If it makes this order final, the court intends to impose monetary sanctions and require
2 defendants to deposit funds in the Court’s Registry to establish a fund for those sanctions. The
3 fund would be used exclusively for steps necessary to come into compliance with the court’s
4 staffing orders.

5 Through the end of September 2023, when the hearing began, a total of \$58,224,504.00 in
6 fines had accumulated, and the monthly accumulations had risen steadily. By the end of January
7 2024, the last report available prior to this order, a total of \$94,912,929.00 has accumulated. *See*
8 ECF No. 8142 at 23. This amount directly reflects defendants’ failure to comply with the court’s
9 orders to remedy constitutionally inadequate mental health staffing levels.

10 Given the length of defendants’ noncompliance and their marked lack of urgency in
11 implementing remedial steps required to achieve compliance, the court currently intends to
12 impose an initial sanction in the amount of the accumulated fines, as of today \$94,912,929.00.
13 Upon issuance of the court’s order, defendants would be directed to deposit the amount of the
14 initial sanctions into the Court’s Registry immediately. Thereafter, the court would order
15 disbursement of funds directed to achieving compliance, subject to procedures to be reviewed
16 with the parties in advance.

17 Going forward, unless otherwise ordered by the court, defendants shall continue to
18 calculate and report a monthly and accumulating total of additional fines, preparing the amount of
19 fines in accordance with the court’s January 23, 2024 Order, ECF No. 8116. Further deposits into
20 the fund would be made as ordered by the court based on these future reports made by
21 defendants.

22 In Closing

23 The court recognizes there are many CDCR employees – even if not sufficient numbers of
24 those employees -- working diligently every day to try to provide adequate mental health services
25 to class members. Some of these employees on the front lines testified at hearing: Dr. Alexandra
26 David, Chief of Mental Health at the California Medical Facility; Dr. Kelley Franceschi, Chief of
27 Mental Health at the California Health Care Correctional Facility (CHCF) between April 2021
28 and September 2023; Dr. Shelly Minor, Chief Psychologist for the Intermediate Program at

1 CHCF; and Angela Reinhold, a Supervising Licensed Clinical Social Worker at California
2 Correctional Institution in Tehachapi. These witnesses testified to vacancy rates at their
3 respective institutions, delays in hiring, working conditions at their respective institutions, and the
4 impact of staffing shortages on patient care at their respective institutions. Their testimony is
5 required reading for every named defendant. Regarding working conditions in particular, some of
6 the accounts are very concerning: multiple clinicians sharing office space in small windowless
7 closets, and a lack of basic supplies professional staff is entitled to, among other untenable
8 conditions.

9 There is no reason the dedication of these employees and their colleagues cannot be
10 matched – now -- by a commitment on behalf of the administration to effect the policy and
11 operational changes needed to achieve full compliance. This is court-ordered work. It is
12 important, hard work that California’s top public servants can no longer afford to put off or
13 ignore.

14 I have said this is a tentative order, to be made final only after the defendants have one
15 more chance to demonstrate the will and determination to comply with the court’s prior orders.
16 While the court intends to impose fines as described above, it is first referring the question of
17 staffing to a Ninth Circuit Mediator who is available to the court. The referral is for 60 days
18 initially, until May 8th. The same people here today are ordered to appear in this courtroom on
19 the dates I’ve already instructed you to calendar. I will take your appearances and then remain
20 available to the mediator as needed. At the end of each session, the Mediator will let me know if
21 the parties and he agree to continue meeting. I am asking the Mediator to report to me on or
22 before May 8th regarding any agreements the parties may have reached, or not.

23 In the meantime, I am adding compliance with the court-ordered suicide prevention
24 measures to the agenda for the April 26, 2024 status conference, and the parties should be
25 prepared for that matter to be set for enforcement hearing in June of this year. The same people
26 here today are ordered to attend that hearing.

27