IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS REMICK, et al., on behalf of themselves and all others similarly situated,	:	**No. 2:20-cv-01959-BMS**
Plaintiffs,	:	
v.	:	
CITY OF PHILADELPHIA; and BLANCHE CARNEY, in her official capacity as Commissioner of Prisons,	:	
Defendants.	:	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO VACATE ORDER OF SEPTEMBER 14, 2021

I. INTRODUCTION

On September 14, 2021, after consideration of proposed orders submitted by Plaintiffs and Defendants, this Court entered an Order addressing issues relating to out-of-cell time for all putative plaintiff class members, correctional officer staffing, visitation policies, and programming for incarcerated persons at the Philadelphia Department of Prisons ("PDP"). ECF No. 93. The Order: (1) gradually expanded the number of hours for out-of-cell time in stages over the period from September 14, 2021 to January 22, 2022; (2) required the hiring of new correctional officers to secure sufficient staff to safely operate the PDP with regular programming, visits, and internal movement of incarcerated persons and to match the staffing authorized by the City's FY 2022 budget; (3) required Defendants to provide the necessary overtime, hazard pay, adjustments in assignments, and discipline of officers who abused sick and family leave policies; and (4) provided for visits and on-unit programming for fully vaccinated

incarcerated persons. The Order also set forth procedures for adjustments to these requirements in the event of increased COVID-19 infection rates.

The Order incorporated some provisions that were proposed jointly by the parties, *see*, *e.g.*, Defendants' Proposed Order, Exhibit A, ¶¶ 2, 5 (hiring of new correctional officers, adjustments in scheduling, expanded use of overtime, and COVID hazard pay), ¶ 8 (providing for COVID-related reasons for adjusting the mandates of the Order), and ¶ 9 (providing that any contempt sanctions be guided by the terms of the Settlement Agreement of June 22, 2021 (incorporated into the Court Order of June 23, 2021, ECF No. 81)). Defendants did not move for modification or reconsideration of the Order or appeal to the Court of Appeals on any grounds, including those now made in the Motion to Vacate under the Prison Litigation Reform Act ("PLRA").

Defendants move to vacate the Order on the grounds that its terms and conditions violate the PLRA and that it cannot be applied to the putative class of plaintiffs in the absence of certification of a plaintiff class. Plaintiffs strongly disagree with the stated legal and factual grounds for vacating the Order, but in light of the fact that Plaintiffs are filing today a Motion for Preliminary Injunction that seeks relief similar to the provisions of the Order of September 14, 2021 (and additional relief from other unconstitutional conditions of confinement as alleged in the Second Amended Complaint), and 90 days have passed since the issuance of the Order of September 14, 2021, Plaintiffs do not oppose the vacating or termination of the Order prospectively. This Court's ruling on the

Motion for Preliminary Injunction, after an evidentiary hearing, would itself render the Order moot.[1]

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed this class action under 42 U.S.C. § 1983, 28 U.S.C. § 2241, and the Americans with Disabilities Act, on April 20, 2020, to ensure that Defendants City of Philadelphia ("City") and Commissioner Blanche Carney protected individuals incarcerated in the PDP from the risks of serious harm they face from the twin dangers of COVID-19 and prolonged isolation in their cells. At the same time, Plaintiffs filed a Motion for Class Certification. ECF No. 2. From that point forward, in discovery matters, consent orders, and addressing other remedial measures, the parties and the Court treated this case as a class action. Each litigation issue focused on practices and policies that could impact all incarcerated persons.

On April 23, 2020, Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction, seeking an order requiring Defendants to comply with the then-current health and safety standards necessary to protect the plaintiff class from the risks associated with COVID-19 and to provide humane conditions of confinement, including adequate out-of-cell time consistent with constitutional requirements. ECF No. 18. The parties reached a settlement agreement on the Motion, which was approved by the Court and entered as a Consent Order on Partial Settlement Agreement on June 3, 2020. ECF No. 35.

Along with various measures intended to mitigate the risks of harm from COVID-19 and ensure adequate access to counsel for members of the plaintiff class, the Consent Order, consistent with the class allegations and Motion for Class Certification, required Defendants to provide a minimum of 45 minutes of daily out-of-cell time for *all individuals* incarcerated in the

[1] Defendants' Response to the pending Motion for Contempt does not argue that the Order was invalid or is unenforceable by civil contempt for compensation to the putative plaintiff class.

PDP by June 10, 2020, and to make efforts to increase out-of-cell time thereafter, with Plaintiffs reserving the right to seek further relief from the Court regarding out-of-cell time, if necessary. *Id.* at ¶ 4(a).

Defendants failed to comply with various terms of the Consent Order, including the requirement of 45 minutes of daily out-of-cell time. *See* Joint Status Reports, ECF Nos. 44, 45, 46, 48. Further, there were numerous reports that the prolonged in-cell confinement of incarcerated people was leading to increased tension and adverse mental health consequences. *See* Joint Status Reports, ECF Nos. 44, 45, 46, 48, 49, 52, and accompanying exhibits. Plaintiffs filed multiple declarations with the Court documenting systemic lack of compliance with the Court's out-of-cell time Order. *See* Joint Status Report of December 24, 2020: Exhibit A, ECF No. 56-1; Joint Status Report of January 12, 2021: Exhibit B, ECF No. 61-2.

On January 13, 2021, the Court entered an Interim Order, finding that: (a) under the shelter-in-place protocol, incarcerated individuals were not receiving the 45 minutes of daily out-of-cell time required by the Consent Order; (b) it would be "feasible to permit persons from at least three cells out at a time, in 45-minute time frames, to separately shower, use phones, and engage in limited exercise, while still maintaining social distancing"; and (c) "[t]he current shelter-in-place policy . . . keeps incarcerated people in their cells for nearly 24 hours a day, and such prolonged confinement is harmful to the mental and physical health of incarcerated individuals." ECF No. 62. The Court again ordered Defendants to provide all individuals incarcerated in PDP facilities with a minimum of 45 minutes of daily out-of-cell time and stated that the Court would consider further orders on out-of-cell time after the then-pending universal

COVID-19 testing was completed. *Id.* Defendants did not seek reconsideration or modification of that Order and did not appeal the Order to the Court of Appeals.

On January 28, 2021, based on the results of universal COVID-19 testing, the Court ordered Defendants to increase out-of-cell time and provide all individuals incarcerated in PDP with a minimum of two hours of daily out-of-cell time by February 10, 2021, and a minimum of three hours of daily out-of-cell time by February 24, 2021, with exceptions made only for individuals on "a medically necessary quarantine" and "operational emergencies." Order of January 28, 2021, ECF No. 63. Once again, Defendants did not seek modification or reconsideration, and did not appeal that Order.

Defendants failed to comply with the Court's Order of January 28, 2021, following several Court conferences and submissions by the parties, the Court ruled:

> [T]here has been a pattern of noncompliance with the January 28, 2021 Order, particularly in the Curran-Fromhold Correctional Facility. Though concentrated at CFCF, reports from class members at each of the PDP facilities that they have regularly been denied the required amount of out-of-cell time have been filed with the Court on a regular basis…. The PDP Deputy Wardens (who have been designated as the City's monitors for compliance, as required by Order of the Court of December 18, 2020 (ECF No. 55)), and the City, have also reported that staffing shortages and other emergent events have impeded the ability of the facilities to meet or exceed the three hours of recreation time…. ***[B]ased on a full review of the record, particularly the Deputy Wardens' certifications, the Court finds that Defendants have not complied with the Order of January 28, 2021.***

Interim Order of May 4, 2021, ¶ 3, ECF No. 70 (emphasis added). Defendants did not move for reconsideration or appeal from this Order.

On May 14, 2021, Plaintiffs filed a Motion for Contempt and Sanctions for Defendants' failure to comply with the January 28, 2021, Court Order. ECF No. 71. Thereafter, this Court,

having found "grounds for holding the City in civil contempt of court," issued an Order on May 20, 2021, requiring the City to show by clear and convincing evidence it was in compliance with the Order of January 28, 2021, or pay a compensatory fine of $50,000 for past violations and daily fines of $10,000 (to be doubled every two weeks). ECF No. 74. Defendants did not appeal from this Order, and thereafter reached an agreement with Plaintiffs that settled the Contempt Motion. On June 23, 2021, this Court approved the Settlement Agreement that resolved the Motion for Contempt pursuant to which the Defendants paid $125,000 to two Philadelphia-based bail funds. ECF No. 81.

On September 14, 2021, after considering proposed orders submitted by the parties, the Court entered an Order setting the date of January 22, 2022 for the PDP to "return to full pre-COVID-19 operations with normal out-of-cell times of approximately eight hours per day [and] full attorney, family, and friends' visitation; and full programming." ECF No. 93, ¶ 1. The Court ordered Defendants to take interim steps to increase out-of-cell time, visits, and programs, including "a minimum of 5 hours daily out-of-cell time for persons in vaccinated housing units, 4 hours for persons in other non-quarantine housing areas, 3 hours for persons in quarantined housing areas, and 1 hour for persons housed in segregation units" as of November 6, 2021, *id.* at ¶ 3, and an increase in out-of-cell time in each of those types of housing units to 6 hours, 5 hours, 4 hours, and 2 hours, respectively, by December 22, 2021. *Id.* at ¶ 4.

In court filings leading up to the Order of September 14, 2021, both sides proposed provisions and mandates that would impact all incarcerated persons, and Defendants made no proposal or request that would limit the class-wide scope and application of the Order and they made no objection to the terms of the Order based on

the PLRA. The Order expressly applies to all members of the putative class, and upon its entry, Defendants did not take an appeal to the Court of Appeals.

For the period from September 14, 2021 to the current date, as reflected in the weekly Deputy Warden Reports submitted to the Court and declarations filed by incarcerated persons, there have been pervasive patterns of substantial noncompliance with the Court-ordered out-of-cell time at each of the PDP facilities, due in large part to the failure of Defendants to ensure an adequate staffing of correctional officers. For some incarcerated people, there have been consecutive days without *any* out-of-cell time and for others there has been far less out-of-cell time than mandated by the Court. *See* Plaintiffs' Reply Memorandum of Law in Support of Motion for Contempt.

Defendants have also admitted that with the current staffing levels (that are lower than they were two months ago, and well over 500 below the current City budget authorized levels), the PDP cannot comply with the Court's Orders. As alleged in the First and Second Amended Complaints, the lack of adequate staffing has caused degraded and dire conditions of confinement, denial of necessary medical and mental health care, increased violence and deaths in the incarcerated population, and related violations of the Eighth and Fourteenth Amendments. *See* Plaintiffs' Motion for Preliminary Injunction, filed January 7, 2022.

III. ARGUMENT

Defendants seek an order vacating the Order of September 14, 2021 on two grounds. First, they argue *for the first time* that the Order was entered in violation of the PLRA on the grounds that the relief was granted "in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of a Federal right, and is the least intrusive means necessary to correct the violation of a Federal right." 18 U.S.C. § 3626(b)(2). Defendants further assert that Plaintiffs cannot prove that any current conditions of

confinement are in violation of Federal law, including the U.S. Constitution. Second, Defendants contend that any relief under the Order must be limited to the named plaintiffs in the absence of an order certifying class status under Fed. R. Civ. P. 23.

Defendants' arguments are without merit, and in any event have been waived by their failure to object to, seek modification or reconsideration of, or appeal the Order on the grounds now asserted. We address these issues below but, given the filing of a Motion for Preliminary Injunction that presents the same issues as those covered by the Order and further seeks broad class-wide relief from other unconstitutional conditions of confinement, the Order of September 14, 2022 will soon be moot and, therefore, we do not oppose the vacating of the Order.[2] However, we submit the following arguments on the merits of the Motion to Vacate.

A. The Order of September 14, 2021 Properly Ordered Relief for the Putative Class of Incarcerated Persons

Defendants' argument that without a certified class, only two named plaintiffs could be entitled to any relief is wrong on the merits and is also waived. As set forth, *supra*, 3-7, from the very beginning of this litigation, with Plaintiffs' Motion for Class Certification pending, the parties and the Court have *treated every issue in the case, contested or not, as one that impacted every incarcerated person.* The parties entered into consent orders of the court that directly impacted and benefited all such persons at PDP, *see* ECF Nos. 35, 58, 59, 62, 63, 81, regularly filed Reports and Declarations that

[2] It may also be that the Order of September 14, 2021 has by operation of law expired after 90 days under the terms of the PLRA. *See* 18 U.S.C. § 3626(a)(2). Defendants do not make this argument, perhaps because the Order of September 14, 2021 is not designated as a preliminary injunction. For this reason, Plaintiffs do not oppose the Court vacating the Order of September 14, 2021 prospectively. As noted, with the filing of the Motion for Preliminary Injunction, the current conditions at PDP facilities can be examined with a factual record that can inform the decision on remedial measures under the PLRA.

addressed system-wide and class-based issues, and expressly recognized that all COVID-19 and related issues would be addressed and remedied in each facility for all incarcerated persons.

The Order of September 14, 2021 is explicit in its reach to all incarcerated persons and the Court's intent of ensuring that all persons benefit from its provisions. Yet, at the time of the submissions of proposed orders that led to the Order of September 14, 2021, Defendants made no argument or proposal that would have limited the scope and application of the Order to only the named plaintiffs. To the contrary, Defendants' proposal, attached hereto as Exhibit A, anticipated application of all mandates to all incarcerated persons.

Further, as Defendants did not take an appeal from the Order of September 14, 2021, they have waived any legal objections. It is a fundamental tenet that a party may not defend a contempt action on grounds that it did not assert and appeal at the time of the entry of the order. *See Marshak v. Treadwell*, 595 F.3d 478, 486 (3d Cir. 2009) ("[T]he validity of the order may not be collaterally challenged in a contempt proceeding for violating the order."); *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 628, 637 (3d Cir. 1982) (allowing a civil contemnor to raise any "substantive defense to the underlying order by disobeying it, [would mean that] the time limits [of] Fed. R. App. P 4(a) would easily be set to naught").

Moreover, the necessity of class certification as a predicate to court ordered class relief (enforceable by contempt) is not absolute. By their very nature, preliminary injunctions and temporary restraining orders are entered well before a hearing could be held on a class certification motion. *See, e.g., Hummel v. Brennan*, 83 F.R.D. 141 (E.D. Pa. 1979) (court granted preliminary injunctive relief affecting entire class prior to granting class certification).

Further, a filing of a motion for class certification, as was done here at the start of this litigation, ECF No. 2, preserves the class status of all claims in the Class Complaint, even if

named plaintiffs lose their personal standing due to release from custody, because of the transitory nature of these types of claims. *See Cy. of Riverside v. McLaughlin,* 500 U.S. 44, 52 (1991); *Gayle v. Monmouth Cy. Corr. Inst.*, 838 F.3d 297 (3d Cir. 2016); *Richardson v. Dir. Fed. Bureau of Prisons*, 829 F.3d 273 (3d Cir. 2016); *Sourovelis v. City of Philadelphia*, 10 F. Supp. 3d (E.D. Pa. 2015). And, where the parties intend that court orders or other relief be applied on a class basis and where relief for the named plaintiffs will also benefit putative class members, the injunctive relief is not limited to named plaintiffs. *See Easyriders Freedom F.I.G.H.T. v. Hannigan¸* 92 F.3d 1486, 1500–02 (9th Cir. 1996) (upholding injunction under Fourth Amendment that limits the powers of police to enforce traffic laws to *all* motorcyclists, even without class certification, as such an order is necessary to give the prevailing parties the full relief to which they are entitled on claims of official policy and practice).

For the same reasons, the argument that the Order of September 14, 2021 is invalid on its face based on the lack of findings and certification by the Court of the PLRA requirements that any order be "narrowly drawn," extend "no further than necessary to protect the violation of a Federal right," and be the "least intrusive means necessary to correct the violation" is waived and without merit. Defendants made none of these objections in its proposed order, on a motion for reconsideration, or an appeal of the Order of September 14, 2021, and thus waived a challenge to the Order. *See Marshak*, 595 F.3d at 486 ("[T]he validity of the order may not be collaterally challenged in a contempt proceeding for violating the order."); *Halderman*, 673 F.2d at 637 (allowing a civil contemnor to raise any "substantive defense to the underlying order by

disobeying it, [would mean that] the time limits [of] Fed. R. App. P 4(a) would easily be set to naught").

B. The Order of September 14, 2021 Complied with the PLRA

The PLRA requires a showing that the relief be narrowly drawn and not broader than necessary to protect against the violations of federal rights and be the least intrusive relief available. The Order of September 14, 2021 complies with this mandate as it precisely targets the unconstitutional conditions caused by the conceded lack of an adequate correctional staff to permit out-of-cell time necessary to secure services, programs, and treatment mandated by the Constitution for pre-trial detainees under the Fourteenth Amendment. As the U.S. Supreme Court has made clear, the Constitution does not permit punishing someone not convicted of a crime, including all pretrial incarcerated persons. *See, e.g., Kingsley v. Hendrickson*, 576 U.S. 389 (2015).[3]

The Order was based on data and reports from the parties, including admissions in Deputy Warden Reports, sworn declarations of incarcerated persons, and prior court orders. And, on the critical issue of correctional officer staffing, the Order incorporates sections of a Proposed Order submitted by Defendants that sets forth "facts" necessary for the issuance of a valid Order, Exhibit A, at 1, proposes terms and conditions to provide for "graduated increases in out-of-cell time" by "the hiring of new and recently retired correctional officers, and adjustments in scheduling . . . and expanded use of overtime and/or COVID hazard pay." *Id. at* ¶ 5.

[3] Defendants' arguments regarding the lack of a constitutional basis for orders on a vaccine ambassador program, commissary incentives for vaccinated incarcerated persons, and medical policies based on CDC guidelines are both beside the point, as these provisions were included in the Order of September 14, 2021 with the ***agreement of Defendants*** as a means of supporting programs and policies already in effect. *See* Exhibit A, ¶¶ 6-8. Having affirmatively agreed to these provisions, Defendants cannot now use them as a basis to support a collateral attack of the Order.

Moreover, having proposed some of the same elements of the Order it now attacks as "facially invalid" and having failed to appeal from the Order in a timely manner, Defendants are now barred from a collateral attack on the Order under the guise of a never-before asserted defense under the PLRA.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs do not oppose the vacating of the Order of September 14, 2021 and request that the Court conduct an evidentiary hearing on the Motion for Preliminary Injunction and issue appropriate relief.

Respectfully submitted,

/s/ Su Ming Yeh
Su Ming Yeh (PA 95111)
/s/ Matthew A. Feldman
Matthew A. Feldman (PA 326273)
/s/ Grace Harris
Grace Harris (PA 328968)
/s/ Sarah Bleiberg
Sarah Bleiberg (PA 327951)
PENNSYLVANIA INSTITUTIONAL LAW PROJECT
718 Arch St., Suite 304S
Philadelphia, PA 19106
(215)-925-2966
smyeh@pailp.org
mfeldman@pailp.org
gharris@pailp.org
sbleiberg@pailp.org

/s/ David Rudovsky
David Rudovsky (PA 15168)
/s/ Jonathan H. Feinberg
Jonathan H. Feinberg (PA 88227)
/s/ Susan M. Lin
Susan Lin (PA 94184)
KAIRYS, RUDOVSKY, MESSING, FEINBERG, & LIN, LLP
718 Arch Street, Suite 501S
Philadelphia, PA 19106
(215) 925-4400
drudovsky@krlawphila.com
jfeinberg@krlawphila.com
slin@krlawphila.com

/s Bret Grote
Bret Grote (PA 317273)
/s Nia Holston
Nia Holston (PA 327384)
/s Rupalee Rashatwar
Rupalee Rashatwar (FL 1011088)*
ABOLITIONIST LAW CENTER
PO Box 31857
Philadelphia, PA 19104
(412) 654-9070
bretgrote@abolitionistlawcenter.org
nia@alcenter.org
rupalee@alcenter.org

/s/ Will W. Sachse
Will W. Sachse (PA 84097)
/s/ Benjamin R. Barnett
Benjamin R. Barnett (PA 90752)
/s/ Mary H. Kim
Mary H. Kim*
/s/ Nicolas A. Novy
Nicolas A. Novy (PA 319499)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-2496
Will.Sachse@dechert.com
Ben.Barnett@dechert.com
Mary.Kim@dechert.com
Nicolas.Novy@dechert.com

* indicates counsel who will seek admission or *pro hac vice* admission

Attorneys for Petitioners/Plaintiffs

DATE: January 7, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS REMICK, et al., *on behalf of themselves and all others similarly situated*,	:	**No. 2:20-cv-01959-BMS**
Plaintiffs,	:	**Judge Berle M. Schiller**
v.	:	
CITY OF PHILADELPHIA; and BLANCHE CARNEY, in her official capacity as Commissioner of Prisons,	:	
Defendants.	:	

CERTIFICATE OF SERVICE

I, Sarah Bleiberg, hereby certify that a true and correct copy of Plaintiffs' Response to Defendants' Motion to Vacate Order of September 14, 2021 was served upon the following via ECF on January 7, 2022:

Craig M. Straw
Anne B. Taylor
Danielle B. Rosenthal
City of Philadelphia Department of Law
1515 Arch Street, 14th Floor
Philadelphia, PA 19102-1595

Respectfully submitted,

/s/ Sarah Bleiberg
Sarah Bleiberg
PA I.D. No. 327951
Pennsylvania Institutional Law Project
718 Arch Street, Suite 304S
Philadelphia, PA 19106
(215) 925-2966
sbleiberg@pailp.org

DATE: January 7, 2022