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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 OAKLAND DIVISION
12

13 **JOHN ARMSTRONG, et al.,**

14 Plaintiffs,

15 **v.**

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

17 Defendants.
18
19

C 94-2307 CW

**DEFENDANTS' REPLY TO
PLAINTIFFS' RESPONSE TO ORDER
DIRECTING PARTIES TO FILE BRIEFS
ADDRESSING MONITORING BY THE
OFFICE OF THE INSPECTOR
GENERAL**

Dept: 2, Fourth Floor
Judge: The Honorable Claudia Wilken

INTRODUCTION

In their response to the Court's order, Plaintiffs' counsel fail to respond to the Court's request for information on how an Office of the Inspector General (OIG) monitoring tool might be developed and structured. Nor have they explained why comprehensive and consistent third-party monitoring, using specific monitoring tools and goals, could not better inform the Court and the parties of instances in which Defendants' Americans with Disabilities Act (ADA) compliance might be improved and how that might be achieved. Instead, Plaintiffs' counsel launched unfounded attacks on the integrity of Inspector General Robert Barton and his staff.

Plaintiffs' counsel fail to address why their subjective in-prison touring, which was criticized by the *Valdivia* special master, should not be replaced by a neutral third-party. Instead, Plaintiffs' counsel emphasize that their in-prison monitoring "tours" are "essential" and that only their touring, rather than monitoring by anyone else, can measure Defendants' ADA compliance. (ECF No. 2290 at 5.) But they offer no evidence to support this assertion. Nor do they acknowledge that, under Defendants' proposal, Plaintiffs will continue to receive the numerous documents that Defendants now produce, and can continue to interview their clients and CDCR staff to verify or contest OIG's findings.

After over a decade of Plaintiffs' unfocused monitoring efforts, at a cost to taxpayers of \$18 million in just the last four years, this Court asked whether there is another way to monitor Defendants' ADA compliance and protect inmates' disability rights. Defendants have suggested such a course: replace Plaintiffs' subjective touring with comprehensive and consistent OIG monitoring structured in the manner proposed by Defendants.

ARGUMENT

A. Plaintiffs Inappropriate Attack OIG Personnel In Lieu of Answering the Court's Questions.

This Court ordered the parties to file briefs on whether OIG should have a monitoring role in this case, and to describe how an OIG "monitoring role and tool might be developed and structured and how it might be used to evaluate the need for ongoing Court supervision of individual institutions in the future." (ECF 2231 at 2.) Defendants responded by stating that

1 “OIG monitoring would prove useful in resolving this case, but only if structured in the right
2 way.” (ECF No. 2252 at 11.) And Defendants provided this Court with a detailed response to its
3 questions that emphasized a plan for comprehensive and consistent OIG monitoring using a tool
4 developed to define and measure “substantial compliance” for each Court ordered requirement in
5 this matter. (ECF No. 2252.) Defendants’ plan also requires that, if substantial compliance is not
6 found, OIG must prescribe specific measures that, if taken by Defendants, would ensure that the
7 rights of disabled inmates are met and substantial compliance is achieved. (*Id.*)

8 By contrast, Plaintiffs have not complied with the Court’s order to brief it on how an OIG
9 monitoring tool might be developed and structured, and how it could be used to evaluate the need
10 for ongoing Court supervision in the future. Instead, Plaintiffs’ counsel attacked the character
11 and reputation of OIG, and specifically Inspector General Robert Barton. Plaintiffs support this
12 attack by asserting that, in another class action in which they represent the plaintiff-class,
13 Inspector Barton concluded that the defendants had substantially complied with constitutional
14 requirements. Because they disagree with Inspector Barton and his staff, Plaintiffs assert that
15 Inspector Barton and OIG are “highly politicized,” “allied” against Plaintiffs, are “partisan
16 advocate[s],” and “lack neutrality.” (ECF No. 2290 at 4-5, 8-9.)

17 The Court should not contenance this personal attack. By law, the OIG is a neutral and
18 independent office, and not a subdivision of any other governmental entity. Cal. Penal Code §
19 6125. The Governor appoints the Inspector General, whose appointment is then approved by the
20 State Senate. *Id.* The Inspector General serves a six-year term and may not be removed from
21 office during that term, except for good cause. *Id.*

22 When requested by the Governor or Legislature, the Inspector General must review the
23 policies, practices and procedures of CDCR. Cal. Penal Code § 6126(b). In completing a
24 requested review, the Inspector General must identify areas of full and partial compliance, or
25 noncompliance, with departmental policies and procedures, specify deficiencies in the completion
26 and documentation of processes, and recommend corrective actions such as additional training,
27 policy changes or additional policies, and make other findings or recommendations that the
28 Inspector General finds appropriate. *Id.* § 6126(d). Indeed, Defendants’ suggestions for how

OIG monitoring should be structured comport with the requirements of Penal Code section 6126. OIG monitoring, if structured to monitor in a clear and structured manner what is necessary to achieve substantial compliance, will aid the Court and prove useful in resolving this case.

B. Plaintiffs' Counsel Are Unable to Define Their Own Monitoring Efforts.

Plaintiffs offer no evidence to show they have any standards or structure that guide or inform their very expensive monitoring efforts, for which they have billed taxpayers \$11.6 million over the last four years for prison monitoring, and \$6.4 million for monitoring related to parole. (Defs.' RJN Exs. A-D, Reply RJN Exs. A-EE.) Instead, Plaintiffs rebrand their monitoring as "qualitative monitoring" in which they look for "trends." And they attempt to explain away their inconsistent monitoring by asserting that, in some undefined way, they have determined that the disability rights of inmates at each prison are "divergent."

Previously, Plaintiffs asserted a different story. For years Defendants, trying to make sense of Plaintiffs' inconsistent reports, asked Plaintiffs whether they used a comprehensive monitoring tool for their in-prison "tours," and—if any such tool existed—to provide Defendants a copy. Plaintiffs' counsel insisted that if any such tool existed, it was "privileged." (Defs.' RJN Exs. E-F.) Plaintiffs' counsel eventually confessed that there is no monitoring tool. (*Id.* Ex. G.)

Plaintiffs now admit that they have no objective means to measure Defendants' ADA compliance. Replacing Plaintiffs' subjective touring letters with the OIG's objective, fact-based monitoring reports will allow this Court to protect inmates' disability rights while offering a methodology to bring this multi-decade litigation to a close.

C. The Parties Spent Nearly Two Years Jointly Developing A Comprehensive Monitoring Tool; Plaintiffs Now Suggest The Parties Repeat This Process Instead of Replacing Their In-Prison Tours With Neutral OIG Monitoring.

Plaintiffs allege their monitoring "compliments" the work performed by CDCR's Office of Audits and Court Compliance (OACC). Plaintiffs have newly labeled their monitoring as undefined "qualitative" monitoring, while dubbing OACC's work as "quantitative" monitoring.

1 And they suggest that, rather than end their multi-million dollar tours, the parties should meet to
 2 discuss ways to “improve” monitoring that, according to Plaintiffs, is just fine as is.

3 Plaintiffs fail to explain that OACC’s monitoring tool was jointly developed with Plaintiffs’
 4 counsel over a nearly two-year period, and was intended by both parties to serve as a
 5 comprehensive monitoring tool. (Wells Decl., ¶¶ 2-8 and Exs. A-B.) The process included
 6 repeated meetings with Plaintiffs’ counsel, and various draft monitoring tools upon which
 7 Plaintiffs’ counsel offered numerous comments and suggestions, nearly all of which were
 8 incorporated into the final monitoring tool. (*Id.* ¶¶ 4-7 and Exs. A-B.) In September 2008, once
 9 Plaintiffs were satisfied, OACC began using the jointly-developed monitoring tool in ADA and
 10 remedial plan compliance audits. (*Id.* ¶¶ 8-9.)

11 Now Plaintiffs disparage this comprehensive monitoring by OACC. (ECF No. 2290 at 8-
 12 9.) But this should not deflect the Court from considering comprehensive OIG monitoring in lieu
 13 of Plaintiffs’ undefined and inconsistent “tours” and letters. If Plaintiffs’ counsel truly want to
 14 improve monitoring in this case, they could work with OIG to develop a monitoring tool that, as
 15 proposed by Defendants, will define the requirements of the Court’s remedial orders, establish
 16 consistent means to measure Defendants’ overall rate of compliance at each prison for each
 17 requirement, and set a specific and measureable definition for substantial compliance at each
 18 prison for each requirement, while also documenting any individual instances of noncompliance.
 19 (ECF No. 2252 at 2, 5-6.) As discussed above, this was done years ago with OACC. It could be
 20 done with OIG if Plaintiffs truly wished to assist in developing a means to objectively measure
 21 Defendants’ ADA compliance and protect disabled inmates’ rights.

22 **D. Plaintiffs Will Retain Ample Means to Verify OIG’s Findings.**

23 Plaintiffs contend that under Defendants’ proposal for the replacement of Plaintiffs’
 24 counsel’s in-prison “tours” and reports with structured OIG monitoring, Plaintiffs will not have
 25 copies of the documents OIG reviews, and thus will be unable to comment on OIG’s reports.
 26 (ECF No. 2290 at 20.) This is false. Defendants proposed that the OIG “shall have access to the
 27 same documents that are currently produced to Plaintiffs’ counsel.” (ECF No. 2252 at 8.) If the
 28 Court agrees with Defendants’ suggestions, Plaintiffs will still be able to interview Defendants’

1 staff, meet with inmates, and continue to receive a vast variety and quantity of periodic document
 2 production on every facet of this case. Although Plaintiffs' counsel now assert they primarily
 3 review only responses to Form 1824 grievances (ECF No. 2290 at 15), they demand, and
 4 Defendants regularly produce, a wide variety of documents. (Knowles Decl., ¶ 3.) That will
 5 continue under Defendants' proposal.

6 CONCLUSION

7 OIG monitoring in lieu of Plaintiffs' in-prison "tours," if structured correctly, will help
 8 resolve this case and is the most effective means of enforcing inmates' disability rights.

9 Dated: May 6, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Case Name: **Armstrong v. Edmund G.
Brown, Jr., et al.**

No. **C 94-2307 CW**

I hereby certify that on **May 6, 2013**, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- 1. DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO ORDER DIRECTING PARTIES TO FILE BRIEFS ADDRESSING MONITORING BY THE OFFICE OF THE INSPECTOR GENERAL**
- 2. DECLARATION OF M. KNOWLES IN SUPPORT OF DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO ORDER DIRECTING PARTIES TO FILE BRIEFS ADDRESSING MONITORING BY THE OFFICE OF THE INSPECTOR GENERAL**
- 3. DECLARATION OF RICHARD WELLS IN SUPPORT OF DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO ORDER DIRECTING PARTIES TO FILE BRIEFS ADDRESSING MONITORING BY THE OFFICE OF THE INSPECTOR GENERAL; EXHIBIT A-B**
- 4. DEFENDANTS' REQUEST FOR JUDICIAL IN SUPPORT OF DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO ORDER DIRECTING PARTIES TO FILE BRIEFS ADDRESSING MONITORING BY THE OFFICE OF THE INSPECTOR GENERAL; EXHIBIT A TO EE**
- 5. DEFENDANTS' ADMINISTRATIVE MOTION TO STRIKE PLAINTIFFS' RESPONSE TO FEBRUARY 4, 2013, ORDER REGARDING MONITORING BY THE OFFICE OF THE INSPECTOR GENERAL**
- 6. PROPOSED ORDER GRANTING DEFENDANTS' ADMINISTRATIVE MOTION TO STRIKE PLAINTIFFS' RESPONSE TO FEBRUARY 4, 2013, ORDER REGARDING MONITORING BY THE OFFICE OF THE INSPECTOR GENERAL**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 6, 2013**, at San Francisco, California.

D. Criswell
Declarant

s/ D. Criswell
Signature