IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JIMMY (BILLY) MCCLENDON, et al.,

Plaintiffs,

vs. No. CV 95-24 JAP/KBM

CITY OF ALBUQUERQUE, et al.,

Defendants.

vs.

E.M., R.L., W.A., D.J., P.S., and N.W., on behalf of themselves and all others similarly situated,

PLAINTIFFS' AND PLAINTIFF-INTERVENERS' JOINT MOTION FOR ORDER TO SHOW CAUSE AND FOR FURTHER REMEDIAL RELIEF PURSUANT TO COURT ORDER, Doc. Nos. 256 and 1222-3, AND MEMORANDUM IN SUPPORT

Come now the Plaintiff class and the Plaintiff-Intervener subclass ("Plaintiffs"), through undersigned counsel and, pursuant to this Court's Order Doc. Nos. 256 and 1222-3, move for further remedial relief as follows. County Defendants do not consent to this motion.

I. Introduction

This Court's prior orders, as well as the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*., require that Metropolitan Detention Center corrections officers who are assigned to posts in psychiatric services units possess a minimum level of specialized skills and training essential to accommodate the needs of inmates residing in those units. *See* Doc. No. 256, page 12 and Doc. No. 1222-3, page 16. Bernalillo County ("County") is currently violating this Court's orders, by allowing senior corrections officers to choose for themselves that they wish to be posted in psychiatric services units at the Metropolitan Detention Center ("MDC"), despite

their lack of necessary skills and training for these posts. The County does so pursuant to a Collective Bargaining Agreement (CBA) that was adopted in 2015 after an arbitration with the union representing corrections officers. Even after corrections officers have proven themselves incapable of accommodating the needs of inmates incarcerated in the jail's psychiatric services units, MDC administrators have declined to remove these officers from their posts, choosing their contract with the union over this Court's orders.

Notably, as counsel for Plaintiff-Interveners will describe in detail, *infra*, Dr. Jeffrey Metzner, this Court's appointed expert, expressed concern in his February 1, 2016 report at the deterioration in the working relationship between corrections officers and mental health personnel in MDC's psychiatric services units. As counsel will also describe in detail, since Dr. Metzner's report, counsel have received several complaints regarding excessive and arbitrary lock down of inmates in their cells, undue restraint, and constant verbal abuse by corrections officers assigned to psychiatric services units. And most notably, in his most recent July 19, 2016 report, Dr. Metzner has roundly condemned the actions of some of the corrections officers currently assigned to the psychiatric units, stating that "the conduct of some of the MDC correctional staff has effectively denied a significant number of inmates access to adequate mental health care and has caused harm to inmates with a serious mental illness." The harm highlighted by Dr. Metzner includes unnecessary and excessive use of force, abusive verbal interactions, and excessive and unnecessary lockdowns. As Plaintiff-Interveners will detail, *infra*, Dr. Metzner has singled out the collective bargaining agreement as blocking Defendants from remedying this serious non-compliance. "As a result, problematic correctional officers/supervisors working within the HSUs have been allowed to continue to work within those units despite their very problematic interactions with inmates with a serious mental

illness." This motion seeks a court order remedying the problems identified by Dr. Metzner.

The County has not taken action to remedy the problems identified by Dr. Metzner. In response to complaints by counsel regarding failures by corrections staff to transfer to other posts corrections officers who are not reasonably accommodating the disabilities of inmates housed in specialized mental health and medical units, MDC administrators have asserted that, pursuant to the CBA adopted in 2015, MDC administrators are powerless to remove corrections officers who are lacking the requisite skills to supervise inmates in the psychiatric services units. This is due to a new "bid process" established in 2015 that allows corrections officers with seniority as MDC employees to choose where they are posted. This change in MDC policy has resulted in a dangerous imbalance of power between corrections officers whose actions endanger the health of inmates and the administrators who are unable to effectively supervise them.

In choosing compliance with the 2015 collective bargaining agreement over this Court's prior orders, the County is in violation of clear federal and New Mexico precedent, which plainly holds that a contract that violates a federal court order or federal law is void *ab initio*, and therefore cannot be enforced. *See* Section IV, *infra*. Plaintiff-Interveners therefore respectfully request that this Court enter an order to show cause why County Defendants should not be subject to sanction for failure to comply with this Court's Orders, Document Nos. 256 and 1222-3, and for all such further remedial relief as this Court finds just and proper.

II. Statement of Facts

1. This Court's prior order, entered November 5, 1996, states that:

> security staff shall receive adequate training regarding the identification of symptoms of mental or developmental disabilities and regarding appropriate methods for dealing with residents with mental or developmental disabilities. Correctional officers who work in detention

> levels 5 East and 6 East[1] and any other units in which people with mental or developmental disabilities are congregated shall receive specialized training to adequately prepare them for working with people with mental or developmental disabilities. The specialized training shall be no less than 40 hours.

Doc. No. 256, page 12.

2. In 2015, Defendants adopted the practice of allowing any correctional officer with seniority to "bid into" a post in a mental health unit at the Metropolitan Detention Center ("MDC"). Defendants did so pursuant to a newly negotiated collective bargaining agreement between Bernalillo County ("County") and the American Federation of State, County, and Municipal Employees ("AFSCME"), Local 2499 ("Union"), the union representative for MDC employees, including corrections officers.

3. Specifically, Provision 10.2 of the Collective Bargaining Agreement ("CBA") allows corrections officers to bid for specific posts: "Employees will be allowed to bid semi-annually for shift, days off and Unit (post) assignments in seniority order." Collective Bargaining Agreement, Provision 10.2, attached hereto as Plaintiffs' Exhibit 1. Once a corrections officer successfully bids for a post on the basis of seniority, "[a]n employee may not be moved from their bid position without 'just cause.'" Collective Bargaining Agreement, Provision 10.5.

4. The current CBA *per se* allows corrections officers, as agents of the County, to circumvent this Court's order by permitting their assignment to a specialty post at MDC on the basis of seniority status, without complying with the mandate of Document No. 256 regarding corrections officers working in psychiatric services units.

5. The new practice adopted by the County of allowing senior MDC corrections officers, to "bid into" a post in the MDC housing unit of their personal choice also interferes in practice with MDC's implementation of this Court's orders. The County is allowing unqualified

[1] 5 East and 6 East were the names of the psychiatric services units in 1996.

staff to continue to work in specialized medical and mental health units even after the medical and mental health professionals running those specialized units have determined that the officer lacks the necessary skills to work in the units.

6. Specifically, pursuant to the current CBA, the County is allowing corrections officers to work in specialized housing units where people with disabilities are congregated even though they do not demonstrate the skills essential to working in those posts. Through the current "bid process" by which MDC staff choose their own posts, certain unqualified correctional officers are working in posts where people with disabilities are congregated, even though they are harming sub class members due to those officers' failure to demonstrate the specialized skills that are essential for working that post.

7. Importantly, on October 7, 2015 the Court instructed its operations expert, Manuel Romero to evaluate the impact of the CBA. Mr. Romero's Fifth Report, dated December 23, 2015 stated:

> At the October 7, 2015 hearing the Court instructed me to provide the Court and parties with my analysis of the Collective Bargaining Agreement (CBA) that is in effect between AFSCME Local 2499 (MDC Custody Employees) and Bernalillo County. My analysis was conducted with respect as to what impact it may have on extant McClendon Orders as it pertains to my areas of expertise. The following is my analysis on this topic.
>
> 1. The most problematic provision in the new CBA is that the bidding process for custody staff has expanded from shift and days off to include unit post assignments. The bidding process includes all security posts within the MDC, the Community Custody Program and Transportation of Inmates. Furthermore, once an employee is occupying a "bid position", the employee may not be moved from their bid position without "just cause." Managements' prerogative to assign custody staff to a unit (post) is taken away which is very problematic for inmate and custody staff safety and for security reasons. For example, there are custody staff that may not be suitable to work with special management inmates, mentally ill inmates or special inmate populations, but under the current CBA any officer can bid for any post by seniority order. It is also risky and potentially harmful to both inmates and staff to solely supervise cross gender inmates or to assign an officer who may not have the necessary experience to work a particular security post, such as booking or master control. Moreover, if a particular officer has or has had a conflict with a particular inmate; he or she cannot be removed from that

> security post without meeting the standard of "just cause" which is operationally problematic.

December 23, 2015 Report, page 9

8. Just over a month later, Dr. Jeffrey Metzner, the court-appointed expert in this case for mental health services at MDC, expressed his own concerns regarding the potential for serious deterioration of mental health services at MDC, due to the serious breakdown in the working relationships between and among the MDC mental health staff and corrections officers. Notably, the breakdown in communication between MDC mental health staff and corrections officers apparently began after Dr. Metzner submitted his report in July 2015, shortly after the CBA was negotiated in June 2015. *See* February 1, 2016 Report of Dr. Jeffrey L. Metzner at pages 16-17, 24-25, attached hereto as Plaintiffs' Exhibit 2.

The February 2016 report identified an "area of practice that was very good but is now very problematic…[t]he working relationships between mental healthcare and correctional staffs." February 1, 2016 Report, Plaintiffs' Exhibit 2, at p. 34.

9. The February 2016 report also identified areas that had fallen out of compliance or were in jeopardy of falling out of compliance due to this deterioration in communication between mental health and security staffs.

10. For example, regarding "[w]hether mental health care and security staff communicate sufficiently about inmates with special needs conditions" the July 2015 report found this to be in compliance, but the February 2016 report found partial compliance, noting that "the working relationship between security staff and mental health staff has been strained since the latest bid process." February 1, 2016 Report, Plaintiffs' Exhibit 2, at p. 16. Another example is regarding "[w]hether MDC follows a proactive program which provides care for special needs patients who require close mental health supervision or multidisciplinary care." The February 2016 report found continued compliance, but noted that "continued compliance is in jeopardy related to the previously referenced working relationship issues between mental health and custody staffs." February 1, 2016 Report, Plaintiffs' Exhibit 2, at p. 17. Regarding

therapeutic services and overall HSU assessment, Dr. Metzner's February 2016 report noted significant issues regarding the working relationship between mental health and correctional staffs. February 1, 2016 Report, Plaintiffs' Exhibit 2, at p. 24. Finally, as to chronic mental health follow up care for residents in segregation, the February 2016 report stated "Significant issues previously referenced in the context of mental health staff-correctional staff working relationships exist which have negatively impacted the treatment program within Seg 6.[2]" February 1, 2016 Report, Plaintiffs' Exhibit 2, at p. 25.

11. Since Dr. Metzner's February 2016 visit, counsel for Plaintiff-Interveners have made numerous reports regarding reported mistreatment by HSU-6 staff, which Defendants have largely declined to investigate.

12. For example, in a February 12, 2016 email to Defendants by Peter Cubra, Mr. Cubra made the following report and request regarding HSU-6 and CO Sisneros: "I am writing to initiate a formal complaint against an MDC staff member pursuant to MDC Policy 3.35. I am alleging a violation of Policy 3.35 B.4.I, which prohibits 'Abusive language or behavior directed at an inmate,' by Correctional Officer Sisneros who is working in HSU 6, a unit designated as a mental health treatment program. I have received phone calls from inmates housed in HSU 6 who are fearful of retaliation for initiating a complaint and I am, therefore, not disclosing their names in this email."

13. Mr. Cubra quoted the inmates as alleging that "corrections officers in Seg. 6, including CO Sisneros, 'are treating us abusively;' The residents complained that Mr. Sisneros commonly 'intimidates us,' 'threatens us,' and 'curses us.' For example: Mr. Sisneros allegedly announced at a command call that if anyone talks at command call, then everyone will get locked down. When someone responded and said 'that's not fair,' Mr. Sisneros allegedly stated that he

[2] Note that the same pod is referred to as both "Seg 6" and "HSU 6" throughout this motion. The pod in question is physically located with the segregation unit, but was designated as a treatment pod. Therefore it may be referred to as either Seg 6 or HSU (Health Services Unit) 6.

didn't ‘give a f***.’ He allegedly stated that he has ‘run STG units and no one disrespected me’ and ‘you're not going to disrespect me.’ "

14. One inmate alleged that on one occasion, everyone in HSU 6 was locked down. Officers Largo and Ortiz reportedly left the unit and Officer Sisneros was the only one present. CO Sisneros spoke abusively to residents who complained about being locked down. When an inmate called out and banged on his cell door while locked down, Mr. Sisneros allegedly went to his cell and yelled, “Who the f*** do you think you are?” When the resident complained about “discrimination” against inmates because of their mental disabilities, Mr. Sisneros allegedly said ‘I don't give a f***.’

15. On a different occasion, an inmate reportedly arrived in HSU 6 when CO Ortiz and CO Sisneros “had everyone on lockdown.” When he asked CO Sisneros why everyone was on lock down, CO Sisneros reportedly said, ‘because you're ignorant f***s.’ One resident who has been in HSU 6 for a short time stated that, “On most all of the shifts,” the CO's in HSU 6 talk rudely and unprofessionally to the residents. He said that CO's who work in PAC 1 are more professional.

16. During February of 2016, inmates in HSU 6 reported that corrections officers were “locking us down whenever they feel like it.” For example: Inmates were allegedly locked down routinely from 1:30 p.m. to 6:00 p.m. and no one was getting outdoor recreation after 5:00. Corrections officers locked inmates down on an arbitrary and random basis. On one occasion, an inmate asked CO Sisneros if he could get out of lock down and CO Sisneros said “no,” because there was work to do. But no work occurred. The inmate told counsel that, “[t]he officers here have kept us on lock down for two days,” and that staff told some inmates that the lock down was because the cage near the bathroom needed work. But the inmate observed that no work was done on the cage, and the inmates were let out of their cells after two days of lock down. Inmates also asked why they haven't been getting any outdoor recreation for some time and were told that inmates were not allowed to go outside because of a fight some time back.

17. Defendants subsequently informed counsel that they had declined to investigate this report of mistreatment by staff on HSU-6.

18. In a March 22, 2016 memo counsel for Plaintiff-Interveners reported, "Counsel again received complaints regarding CO Sisneros. For example, [D.B.], reported that CO Sisneros is verbally abusive to residents and that he does not seem to understand that the residents on that pod have significant mental health needs. He also said that CO Sisneros routinely threatens to lock residents down for minor things. [D.B] reported that CO Sisneros threatened to lock him down for 23-hours because his shirt was not properly tucked in. He said he had not filed a grievance for fear of retaliation."

19. In the same March 22, 2016 memo counsel also reported: "[J.B.], reported that he had filed a grievance regarding mistreatment by COs Romm and Michelback on HSU-6, during a previous stay at MDC, which ended February 22, 2016. He said that the grievance involved mistreatment such as verbal abuse and shackling him to his bunk while in four-point restraints. [J.B.] said that he was interviewed by Doug Shawn, from Universal Investigation Services, but had received no further follow up regarding his grievance or the investigation. He said that when he came back to MDC on March 8 he was returned to HSU-6, where COs Romm and Michelback were still working the swing shift. The outside investigation found conflicting evidence regarding shackling [J.B.] to his bunk. Verbal mistreatment of [J.B.] by CO Michelback was found, though there is no indication in the documents counsel received that CO Michelback was ever assigned to a different, non-HSU pod as a result of this finding.

20. Next, in an April 18, 2016 memo counsel reported: "On April 14 counsel received a call from HSU-6 resident [C.R.], who reported that the excessive lock downs continue. He said they are typically locked down throughout the afternoon. He said that staff, especially CO Sisneros, continue to be disrespectful and verbally abusive. [C.R.] reported that a couple days prior to his call to counsel he heard CO Sisneros shout at another HSU-6 resident, [T.S.], 'Are you retarded?! Don't you know how to make a bed?!' [C.R.] said he didn't know if [T.S.] filed a grievance, but that observing the incident was upsetting to him. He said this incident is

illustrative of CO Sisneros behavior towards the HSU-6 residents." The response from defendants indicated that because [T.S.] had not filed a grievance they were not investigating the report.

21. Finally, in a May 23, 2016 memo counsel reported: "[M.T.], reported that CO Sisneros was verbally abusive to him throughout his time on HSU-6. [M.T.] reported that CO Sisneros made degrading personal comments to him nearly daily. For instance, [M.T.] said that one day he was smiling when CO Sisneros came to give him his food. He said that CO Sisneros asked 'Is that how you smiled when your wife was fu**ing your friends?' He reported that CO Sisneros also told him 'You'll never get out, you are going to be locked down forever,' and on another occasion called [M.T.] a 'loser' saying 'you lost your wife, your kids, you're just a piece of sh**.' [M.T.] said that CO Sisneros told him if he ever talked back he would lock him down. [M.T.] said that on at least one occasion he was locked down for 23 hours as a result of saying something to CO Sisneros in response to CO Sisneros' verbal abuse. [M.T.] reported that CO Sisneros' conduct continued consistently until the day HSU-6 residents were moved to PAC-2." The response from defendants indicated that there was no record of an incident report or of any grievances filed by M.T. regarding CO Sisneros. The response gave no indication that the allegations would be investigated.

22. When Dr. Jeffrey Metzner, the court-appointed expert in this case for mental health services at MDC, returned to MDC in late June 2016 he found that the concerns raised in his February 2016 report, *supra* at paragraphs 7-10, had not been corrected. July 19, 2016 Report, Plaintiffs' Exhibit 3, at p. 17.

23. Dr. Metzner's report stated:

> It is my opinion that the conduct of some of the MDC correctional staff has effectively denied a significant number of inmates access to adequate mental health care and has caused harm to inmates with a serious mental illness. This harm has been both physical, due to unnecessary and/or excessive use of force, and mental related to abusive and/or inappropriate verbal interactions and excessive and unnecessary lockdowns.

> Although it is clear that the vast majority of correctional officers at MDC are working well with mental health staff and inmates, it is equally clear that a small number of correctional officers during the past seven months created a toxic environment for many inmates with a serious mental illness. The responses by correctional management staff, in my opinion, has been problematic and ineffective, which appears to be related, in part, to union contract issues and permanent administrative leadership positions being vacant or changed. As a result, problematic correctional officers/supervisors working within the HSUs have been allowed to continue to work within those units despite their very problematic interactions with inmates with a serious mental illness.

July 19, 2016 Report, Plaintiffs' Exhibit 3, at p. 17.

24. As with his February 2016 Report, *supra*, at paragraphs 7-10, Dr. Metzner again identified areas of partial compliance related to staffing on the HSU unit. For example, as to "[w]hether mental health care and security staff communicate sufficiently about inmates with special needs conditions", partial compliance was again found. July 19, 2016 Report, Plaintiffs' Exhibit 3, at p. 19. And, as to [w]hether MDC follows a proactive program which provides care for special needs patients who require close mental health supervision or multidisciplinary care", for which compliance was previously found, Dr. Metzner found this to now be in partial compliance. *Id.*

25. One of the incidents reviewed by Dr. Metzner during his June 2016 visit involved subclass member L.S. In an August 23, 2016 memo, after receiving additional information regarding this incident, counsel reported the following: "Counsel received a report regarding an excessive use of force against [L.S.] by Sgt. Charles Griego on PAC-1 on November 5, 2015. The report indicated that [L.S.], who is identified as having a serious mental illness, was taken to the ground, sprayed with OC twice and subjected to three or four applications of a Conducted Electricity Weapon 'CEW'/Taser, while already restrained, for reportedly failing to follow directives to not turn around and to stop talking. Please provide the incident report, all supporting documents and all documentation of any investigation into this incident. Please provide all video

of the incident. Please provide all documentation of any corrective action taken in connection with this incident, including any disciplinary action."

26. On October 21, 2016 counsel received some documents responsive to the above request for information regarding L.S., but as of the drafting of this motion have not received the requested received video, investigation or documentation of any corrective action. Defendants' October 21, 2016 response indicated that the incident had been referred for review in November 2015, but that the investigation had not yet been completed. Upon information and belief, Sgt. Griego is working in the HSU/PAC unit.

III. The County Has Violated this Court's Orders

The County's violations of this Court's orders, in terms of improper assignments of incompetent corrections officers in the psychiatric services units, began shortly after the County and the Union signed the 2015 collective bargaining agreement allowing senior corrections officers to pick and choose where they worked. Depending on the amount of time that passes between an act and a result, temporal proximity may be sufficient to establish causation. *Cf. Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir.1999)(in retaliation in employment case, passage of seven weeks between protected activity and retaliation may establish causation). Moreover, the County has itself admitted that the County's agreement with the Union interferes with the County's ability to comply with this Court's orders. When forced to choose between compliance with a federal court order and compliance with a collective bargaining agreement, the law is clear that a court order must supersede the contract, an issue to which Plaintiffs will now turn.

IV. This Court's Orders Supersede the Collective Bargaining Agreement and therefore the Collective Bargaining Agreement Cannot Be Asserted by the County as a Defense

It is beyond cavil that a contract to perform an illegal act is void *ab initio* and is therefore unenforceable, regardless of the will or wishes of the contracting parties. *See, e.g., Kaiser Steel*

Corp. v. Mullins, 455 U.S. 72 102 S.Ct. 851 80-1345 (1982)(party cannot be required to comply with a contract requiring an illegal act); *Coppell v. Hall*, 1868 74 U.S. 542, 1868 WL 11170 (1868)(contract stipulating performance of illegal act is void, regardless of will or wish of parties); *see also Padilla v. State Farm Mutual Automobile Insurance Company,* 133 N.M. 661, 68 P.3d 901 (2003)(New Mexico courts "will not enforce a contractual provision that violates public policy" or state statutes); *Capo v. Century Life Ins. Co.*, 94 N.M. 373, 610 P.2d 1202 (1980)(illegal contract is not enforceable); *Maynerich v. Little Bear Enterprises, Inc*., 82 N.M. 650, 485 P.2d 984 578 (Ct.App. 1971)(contract in violation of penal statute was unenforceable and therefore could not be pled as defense); *Schnoor v. Griffin*, 79 N.M. 86, 439 P.2d 922 (1968)(contract requirring illegal act cannot be enforced by either party, where both parties are culpable); *Bartholemew v. Village of Endicott*, 59 N.Y.S.2d 84 (S.Ct. 1945)(where statute authorized city to operate public utility services, contract could not limit the exercise of municipality's right to act for public benefit). While the County may be liable in damages – a point Plaintiff-Interveners have no standing to and do not address[3] – a court may not order specific performance of an illegal contract.

One corollary to the long established principle that parties cannot contract to perform an illegal act is that an employer cannot require an employee to perform an illegal act or one that violates public policy. *See, e.g., Shackelford v. Courtesy Ford, Inc*., 96 F.Supp.2d 1140 (D.Colo. 2000)(employer who directs employee to perform illegal act as part of employee's work related

[3]The remedy for a non-culpable party who enters into an agreement in good faith, that later proves impossible to perform due to a pre-existing court order or law, is an action for damages, *not* an action for specific performance. *See* Restatement (Second) of Contracts § 264 ("If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made."); *id*., § 264 cmt. a ("If the prohibition or prevention already exists at the time of the making of the contract, the rule stated in § 266(1) rather than that stated in § 261 controls, and this Section applies for the purpose of that rule as well."); *id*.. § 266(1)(excusing performance "[w]here, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary."). Where, for example, statutory law prohibits specific performance but one party was aware of the prohibition in advance of the contract, the non-culpable party can recover damages for breach. *See Twombly v. Ass'n of Farmworker Opportunity Programs*, 212 F.3d 80 (1st Cir. 2000).

duties or prohibits employee from performing public duty or exercising important job-related right or privilege, or directs employee to perform an act that would undermine clearly expressed public policy relating to employee's basic responsibility as citizen could be held liable for wrongful discharge).

Similarly, while the issue does not arise as often in national precedent, an employee cannot require an employer to violate statutory law, judicial order, or public policy. *See, e.g., WR Grace and Company v. Local Union 759, International Union of the United Rubbert, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757 (1983). In *WR Grace*, the United States Supreme Court was asked to determine whether an arbitrator's award of damages to union members, in the form of back pay, should be set aside by the United States District Court, where the employer had laid off union members in order to comply with a federal court order that had later been reversed on appeal. While the Supreme Court ultimately held that in the particular circumstances of the case, the union members were entitled to damages in the amount of back pay,[4] the Court made clear that where there was a direct conflict, an employer could not violate a judicial order simply to comply with a collective bargaining agreement.

> As with any contract, however, *a court may not enforce a collective bargaining agreement that is contrary to public policy*. *See Hurd v. Hodge*, 334 U.S. 24, 34–35, 68 S.Ct. 847, 852–53, 92 L.Ed. 1187 (1948). . . . If the contract as interpreted

[4] In *WR Grace*, the employer entered into a conciliation agreement with the Equal Employment Opportunity Commission ("EEOC"), in order to settle a discrimination allegation that the employer had discriminated against women and African Americans. The agreement required the employer to take affirmative steps to hire employees from both groups, to remedy the effects of past discrimination. The employer's seniority system, pursuant to a collective bargaining agreement with the employee union, perpetuated past discrimination. The employer's subsequent conciliation agreement with the EEOC in effect modified the collective bargaining agreement, to permit the employer to prevent male union members from exercising the shift preference seniority to which they were entitled under the collective bargain agreement, to obtain positions held by female employees with less seniority.

The District Court enjoined enforcement of the seniority clause of the collective bargaining agreement. While the United States Court of Appeals for the Fifth Circuit ultimately held that the seniority clause was not animated by a discriminatory purpose and was therefore lawful, the question presented to the United States Supreme Court was more nuanced: whether the employer could set aside the arbitrator's award on the basis that it had laid off male union members solely in order to comply with the federal court order. The Supreme Court held that the union members were entitled to the back pay they lost as a result of the employer's compliance with the federal court order pending appeal, because the ultimate "fault" in the entire debacle belonged to the employer, who had started the discriminatory practices that in turn caused the male union members to lose back pay.

> by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. *Hurd v. Hodge*, 334 U.S. at 35, 68 S.Ct. at 853. Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Muschany v. United States*, 324 U.S. 49, 66, 65 S.Ct. 442, 451, 89 L.Ed. 744 (1945).
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> *It is beyond question that obedience to judicial orders is an important public policy. An injunction issued by a court acting within its jurisdiction must be obeyed until the injunction is vacated or withdrawn. Walker v. City of Birmingham*, 388 U.S. 307, 313–314, 87 S.Ct. 1824, 1828, 18 L.Ed.2d 1210 (1967); *United States v. United Mine Workers*, 330 U.S. 258, 293–294, 67 S.Ct. 677, 695–96, 91 L.Ed. 884 (1947); *Howat v. Kansas*, 258 U.S. 181, 189–190, 42 S.Ct. 277, 280–81, 66 L.Ed. 550 (1922). A contract provision the performance of which has been enjoined is unenforceable. *See* Restatement (Second) of Contracts §§ 261, 264 (1981).

WR Grace and Company, 461 U.S. at 766-67 (emphasis added).

The County was not authorized to "bargain away" the rights of the class and sub-class in a collective bargaining agreement, any more than the County could unilaterally set aside the rights of the plaintiff sub-class. Indeed, parties to a collective bargaining agreement cannot even bargain away the substantive state law rights of their own employees and/or union members, much less the rights of non-parties. *See Self v. United Parcel Service*, 126 N.M. 396, 401, 970 P.2d 582, 587 (1998).

> The Company claims that employees forego state-law labor rights by virtue of their participation in a collective-bargaining agreement. The United States Supreme Court has rejected this position as "irreconcilable" with the purposes of federal labor law. *Livadas v. Bradshaw*, 512 U.S. 107, 130-32 (1994). Congress never intended Section 301 to displace state wage and hour laws. Allis-Chalmers *v. Lueck*, 471 U.S. 202, 211-12 (1985)(Section 301 was never intended to allow collective bargaining parties to agree to what is illegal under state substantive law). If the Company's claim were accepted: "Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." *Lueck*, 471 U.S. at 212. This is not what Congress intended. *Livadas*, 512 U.S. at 130 ("[W]e have never suggested that labor law's bias toward bargaining is to be served by forcing employees or employers to bargain for what they would otherwise be entitled to as a matter of course" under state law.). More importantly, such a rule would *penalize* unionized workers by depriving them of protection of minimum

> standards other workers in the state enjoy, thereby thwarting Congress' intended purpose. For these reasons, the United States Supreme Court has said that Section 301 "cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." *Livadas,* 512 U.S. at 123.

Self v. United Parcel Service, 126 N.M. at 401, 970 P.2d at 587 (some citations omitted).

Similarly, in *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645, 646 (1988), the Kansas Supreme Court considered whether an employer could immunize itself from common law tort liability by having employees bargain away such rights pursuant to a collective bargaining agreement. Setting aside a long line of Kansas precedent to the contrary, the court in *Coleman* held that substantive state law rights could not be set aside, in part because, if employers are allowed to set aside other responsibilities by "bargaining them away" in a collective bargaining agreement, this in effect immunizes employers with such contracts from "accountability for violations of state public policy." *Coleman,* 752 P.2d at 651.

The United States Supreme Court has made equally clear that an employer and a union cannot bargain away the federal statutory or constitutional rights of employees. *See, e.g., Lehnert v. Ferris Faculty Association,* 500 U.S. 507, 520 (1991)(public-sector union could not require objecting employees to pay for lobbying efforts to which employees objected)); *Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d (1977); (collective bargaining agreement that silences conflicting views may deny First Amendment rights of dissenting employees); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981)(collective bargaining agreement may not waive minimum wage rights of employees); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). (collective bargaining agreement may not waive minimum wage rights of employees).

The issue of "bargaining away" substantive rights becomes exponentially more problematic where an employer and a union seek in effect to bargain away the substantive rights of third parties. Thus, for example, in *Steele v. Louisville & N.R. Co.,* 323 U.S. 192, 203-204 (1944), the United States Supreme Court addressed whether an employer and a union could

bargain away the anti-discrimination rights of African Americans, by the device of limiting membership in the union.

> The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making. In both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. "The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted." *Deitrick v. Greaney*, 309 U.S. 190, 200, 201, 60 S.Ct. 480, 485, 84 L.Ed. 694; *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313; *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176, 177, 63 S.Ct. 172, 173, 174, 87 L.Ed. 165; *cf. Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838.

Steele , 323 U.S. at 204.

The cases cited above make clear that the Court's orders requiring that only specially trained and appropriately skilled correctional staff may work in medical and mental health units where people with disabilities are congregated supersede any contradictory provisions of a contract between the County and a union.

V. Request for Relief

Plaintiff-Interveners respectfully request that this Court:

1. Enter an order to show cause requiring the County to appear before the Court to answer the allegations set forth herein;
2. Enter orders mandating that:

   a. In order to work in a Unit where inmates with medical conditions or mental disabilities are congregated, an employee must successfully complete specialized competency-based training designed to prepare an employee for working in the post, and must also demonstrate the essential specialized skills needed to work in such a unit. The process for

determining whether an employee demonstrates the specialized skills that are essential for working in a unit where people with medical conditions and/or mental disabilities are congregated must be an interdisciplinary process in which security personnel and medical and/or mental health professionals jointly determine whether an employee demonstrates the specialized skills that are required for working in such a unit; and

b. If the mental health professionals running the unit determine that an employee working in such a post is not demonstrating the specialized skills necessary to work in such a unit, the employee will be transferred out of the post by the jail administration and replaced by a qualified employee; and

3. For such other relief the Court determines to be just and proper, including, if necessary, awarding attorneys' fees, expenses and costs incurred in bringing this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2016 I filed the foregoing document electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.
/s/ Peter Cubra
Peter Cubra