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THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

A.B., by and through her next friend
Cassie Cordell Trueblood, *et al.*

Plaintiffs,

v.

Washington State Department of Social and
Health Services, *et al.*,

Defendants.

No. 14-cv-01178-MJP

**PLAINTIFFS’ MOTION FOR MATERIAL
BREACH OF CONTEMPT SETTLEMENT
AGREEMENT AND MOTION FOR CIVIL
CONTEMPT**

**NOTE ON MOTION CALENDAR:
JANUARY 13, 2023**

I. INTRODUCTION

Defendants’ noncompliance with this Court’s 2015 Order to provide timely competency restoration services has persisted for years and worsened significantly over this past year. Initial data for October 2022 indicates that class members are now waiting nearly 83 days on average for inpatient restoration services, up from 48 days in October of 2021 and 38 days in October of 2020. Mosolf Decl. Ex. D at 23. In May of 2016, shortly before this Court made its first finding of contempt against Defendants, the average wait time was 28 days. Dkt. No. 266 at 6. The number of “outlier cases” in which class members face excessively long waits for competency services has also increased drastically, from 15 in June of 2021 to 405 in August of 2022, with the longest wait for inpatient restoration hitting 681 days. Mosolf Decl. Ex. A at 12-13.

1 Defendants' own plans and actions have now created a growing crisis of civil conversion
2 patients held in state hospital forensic beds, greatly exacerbating wait times for class member
3 admission. This is a material breach of the Parties' 2018 Contempt Settlement Agreement
4 ("Agreement") and grounds for relief under this Court's contempt powers. Defendants have not
5 taken all reasonable steps to avoid this crisis and they do not have an adequate plan to address
6 the crisis now. Without significant intervention by this Court, Defendants' breach and
7 noncompliance will continue to worsen and class member wait times will continue to balloon.

8 Plaintiffs therefore seek relief from this Court in the form of contempt sanctions and
9 orders modifying both civil and forensic admissions to the state hospitals.

10 II. PROCEDURAL HISTORY

11 On April 2, 2015, this Court entered a permanent injunction requiring that Defendants
12 cease violating Plaintiffs' constitutional rights and provide competency services to Plaintiffs in a
13 timely manner. Dkt. No. 131. Nearly eight years later, Defendants have yet to reach substantial
14 compliance with this Order.

15 On July 7, 2016, Defendants were found in contempt due to their failure to comply with
16 the Court's Order regarding the timely provision of inpatient competency services. Dkt. No. 289.
17 Defendants were ordered to pay \$500 per day for class members who waited more than seven
18 days but fewer than fourteen days for in-hospital competency services, and \$1000 per day for
19 those who waited fourteen days or more for in-hospital services. *Id.* at 19.

20 On October 19, 2017, Defendants were again found in contempt, this time due to their
21 failure to comply with the Court's Order regarding timely provision of in-jail competency
22 evaluations. Dkt. No. 506. Defendants were ordered to pay \$750 per day for class members for
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1 each of the first six days of delay, and \$1500 starting on the seventh day and every day
2 thereafter. *Id.* at 13.

3 On February 1, 2018, Parties entered into an initial agreement to: 1) resolve pending
4 motions regarding the Yakima Competency Restoration Facility and a potential increase in
5 contempt fines; 2) facilitate the use of Building 27 at Western State Hospital (WSH) as a
6 restoration facility; and, 3) establish a process for broader settlement agreement negotiations to
7 “reform the current forensic mental health system.” Dkt. No. 534-1. After extensive
8 negotiations, Parties proposed a comprehensive Contempt Settlement Agreement on December
9 6, 2018 (Dkt. No. 599-1), approved by this Court’s Order on December 11, 2018. Dkt. No. 623.

10 The Agreement required Defendants to open additional forensic beds, hire more forensic
11 evaluators, attempt legislative changes, and seek funding for a variety of services for class
12 members, among other things (Dkt. No. 599-1). The underlying intention of the Agreement was
13 to bring Defendants into compliance with this Court’s orders. *Id.* at 2. Since January of 2019, the
14 Parties have worked collaboratively to implement the Agreement in several regions around the
15 state and have provided regular status update reports to this Court, most recently in September of
16 2022. Dkt. No. 924-1.

17 The Court has collected many millions of dollars in contempt fines from Defendants
18 since entering both contempt orders. Pursuant to the 2018 Agreement, fines resulting from the
19 July 2016 Contempt Order were suspended as of December 1, 2018. Dkt. No. 623. These fines
20 continue to accumulate, but Defendants may avoid paying them if the Court finds them in
21 substantial compliance with the Agreement. Dkt. No. 599-1 at 47. Defendants have continued to
22 pay fines pursuant to the October 2017 Contempt Order.

1 By Plaintiff's calculation, since December 1, 2018, there have been approximately \$200
2 million in fines for inpatient competency services delays that have accrued but not yet been
3 charged to Defendants, pending this Court's determination of substantial compliance.

4 III. FACTUAL BACKGROUND

5 Washington law provides a process for detaining criminal defendants for evaluation and
6 potential civil commitment treatment when the defendant is found not competent to stand trial
7 and not likely to be restored to competency. These defendants can be admitted to the state
8 hospitals after a criminal court determines that they are unlikely to regain competency to stand
9 trial, dismisses the criminal charges without prejudice, and orders them to be held "for evaluation
10 for the purpose of filing a civil commitment petition under chapter 71.05 RCW." Wash. Rev.
11 Code § 10.77.086(5); *see also* § 10.77.086(3). The former defendant and now civil patient is
12 then held at the state hospitals for their civil commitment evaluation, the duration of their civil
13 commitment hearing, and for any ordered involuntary inpatient treatment. These patients are
14 commonly referred to as "civil conversion" patients, reflecting the fact that they are "converted"
15 from competency restoration patients to civil patients. Dkt. No. 924-1 at 9. They usually start out
16 in a forensic bed at the state hospital and are eventually transferred into a civil bed as their civil
17 commitment proceeds. *Id.*

18 The number of civil conversion patients who remain in forensic beds at the state hospitals
19 for long periods of time has increased dramatically over the past year. This means many fewer
20 beds available to Plaintiff class members awaiting admission for competency restoration
21 services. In December of 2021, Defendants counted only 16 civil conversion patients in forensic
22 beds at WSH. Dkt. No. 924-1 at 9. Six months later in June of 2022, this number had climbed to
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1 85 civil conversion patients, or 39% of the competency restoration beds available at WSH.¹
 2 Mosolf Declaration (“Mosolf Decl.”) Ex. A at 18. Three months later in September, the number
 3 had grown to 121 civil conversion patients, or 54% of the available WSH competency restoration
 4 beds. *Id.* In November of 2022, WSH Administration advised Disability Rights Washington staff
 5 that the number had grown further to 154, or nearly 70% of WSH competency restoration beds.
 6 Mosolf Decl. ¶4.

7 The increase in civil conversion patients stuck in forensic beds corresponds to Defendants
 8 closing many civil beds at the state hospitals. In 2016, Governor Inslee publicly declared his
 9 administration’s intention to move civil commitment patients out of the state hospitals and into
 10 smaller facilities closer to their home communities.² The plan was outlined in more detail in the
 11 Governor’s December 2018 policy brief, *Transforming Washington’s Behavioral Health Care*
 12 *System*. Mosolf Decl. Ex B. Since then, under Defendants’ leadership, the state has actively
 13 worked to reduce civil bed capacity at the state hospitals while funding and opening long-term
 14 civil commitment beds in other facilities around the state. *See e.g.*, Wash. Rev. Code §
 15 71.24.700; Wash. Rev. Code § 71.24.648 Official Note “Findings—Intent-2019.”

16 As a result, the state’s Health Care Authority (HCA) now contracts with community
 17 hospitals and freestanding evaluation and treatment facilities for 90 and 180-day inpatient civil
 18 commitment beds.³ By January 2022, HCA had contracted 140 such beds, with an anticipated
 19

20 _____
 21 ¹ The number of civil conversion patients at Eastern State Hospital is also steadily growing, but at a much lower
 overall volume than at Western State Hospital. *See e.g.*, Mosolf Decl. Ex. A at 16.

22 ² Wash. Governor’s Office, *Inslee’s budget proposal fully funds K-12 education, launches overhaul of mental health*
system, Dec. 14, 2016, [https://medium.com/wagovernor/inslees-budget-proposal-fully-funds-k-12-education-](https://medium.com/wagovernor/inslees-budget-proposal-fully-funds-k-12-education-launches-overhaul-of-mental-health-system-feb698c75d34)
[launches-overhaul-of-mental-health-system-feb698c75d34](https://medium.com/wagovernor/inslees-budget-proposal-fully-funds-k-12-education-launches-overhaul-of-mental-health-system-feb698c75d34).

23 ³ Washington State Health Care Authority, *90- and 180-day civil commitment beds 2022*,
[https://www.hca.wa.gov/billers-providers-partners/program-information-providers/90-and-180-day-civil-](https://www.hca.wa.gov/billers-providers-partners/program-information-providers/90-and-180-day-civil-commitment-beds#hca-contracted-long-term-civil-commitment-bed-availability)
[commitment-beds#hca-contracted-long-term-civil-commitment-bed-availability](https://www.hca.wa.gov/billers-providers-partners/program-information-providers/90-and-180-day-civil-commitment-beds#hca-contracted-long-term-civil-commitment-bed-availability).

1 additional 75-plus beds coming within the next calendar year.⁴ Despite Defendants' reported
2 goal of moving state hospital civil patients into these HCA-contracted community beds,
3 Defendants are continuing to keep civil patients at WSH and Eastern State Hospital (ESH) and
4 dedicating forensic beds to their care.

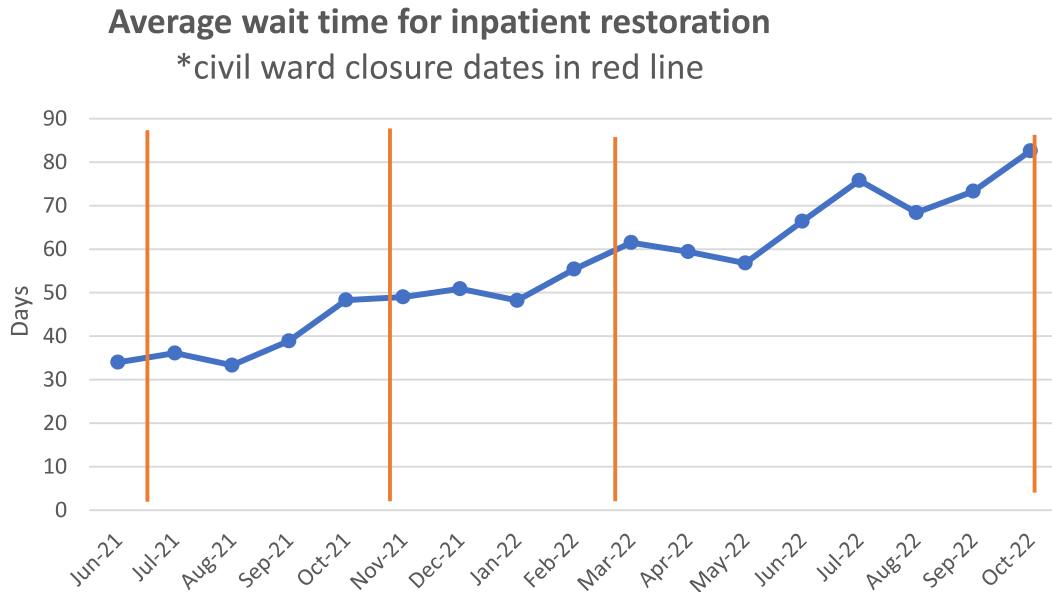
5 As part of the plan to move civil patients out of the state hospitals, Governor Inslee and
6 Defendants also called for building a brand new forensic hospital on the grounds of WSH.
7 Mosolf Decl. Ex. B. at 5. Their plan requires closure and demolition of many civil wards to make
8 way for the new hospital. Mosolf Decl. Ex. C at 6-8. Since July 1, 2021, Defendants have closed
9 four civil wards at WSH and plan to close two more by April 1, 2023, with even more slated to
10 close in 2023-2025. *See e.g.*, Dkt. No. 924-1 at 9; 2021 Wash. Sess. Laws (Operating Budget)
11 Ch.334, p.130, § 202(s)(ii-vi). The state appropriated \$52 million for design and pre-construction
12 work for the new forensic hospital in the 2021-2023 capital budget. Mosolf Decl. Ex. C at 7. In
13 the 2021-23 budget, Defendants estimated construction costs at \$612 million. *Id.* This has
14 increased significantly to a request for \$895 million in the 2023-2025 capital budget. *Id.*

15 The decrease in civil bed capacity at the state hospitals means that more and more civil
16 conversion patients are stuck in forensic beds, which in turn means that class members wait
17 longer in jail for a forensic bed to open up. From June to December of 2021, class members
18 waited on average 41.5 days to be transferred out of jail and into inpatient restoration at either
19 WSH or ESH. Mosolf Decl. Ex. A at 12.⁵ From January to July of 2022, as civil wards closed
20 and the number of civil conversion patients held in forensic beds grew significantly, class

21
22 ⁴ *Id.*

23 ⁵ Average calculated using data included in table: "Inpatient Competency Restoration Performance 24 Month Snapshot."

1 members’ average wait time increased to 60.8 days. *Id.* “First look” data for October 2022 shows
 2 an average wait time of 82.6 days. Mosolf Decl. at Ex. D. at 23.⁶



11
12 **IV. ARGUMENT**

13 **A. Defendants Are in Material Breach of the 2018 Contempt Settlement Agreement.**

14 On September 28, 2022, Plaintiffs notified Defendants that Plaintiffs believed them to be
 15 in material breach of their obligations under Section III(B)(4) of the Agreement, “Additional
 16 Forensic Bed Capacity,” as well as in general violation of the intent and goals of the Agreement.
 17 This material breach is the result of Defendants denying class members access to forensic beds at
 18 both state hospitals in favor of holding civil commitment patients in these beds. The number of
 19 civil commitment patients held in forensic beds at both state hospitals—but especially WSH—
 20 has grown at an alarming pace over the past year, resulting in increasingly and exceptionally
 21 long wait times for class members in jail. For example, in December 2021 when WSH had only
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23 ⁶ Average wait time data taken from Defendants’ Monthly Report to the Court Appointed Monitor dated November 29, 2022, Mosolf Decl. Ex. D. Civil ward closure dates from 2021-23 state operating budget, Wash. Sess. Laws Ch.334, p.130, § 202(s)(ii-vi).

1 16 civil conversion patients held in forensic beds (Dkt. No. 924-1 at 9), class members were
2 waiting an average of 50.8 days for restoration admission to WSH. Mosolf Decl. Ex D at 14. By
3 October of 2022, as the number of civil conversion patients in WSH forensic beds neared 150
4 (Mosolf Decl. ¶4), class members were waiting 76.3 days on average for restoration admission to
5 WSH. Mosolf Decl. Ex D at 14.

6 The Agreement defines “material breach” as:

7 ...a failure to be in "substantial compliance" with the Agreement,
8 and substantial compliance means something less than strict and
9 literal compliance with every provision of this Agreement. Rather,
10 deviations from the terms of the Agreement may occur, provided
any such deviations are unintentional and minor, so as not to
substantially defeat the object which the Parties intend to
accomplish, or to impair the structure of the Agreement as a whole.

11 Dkt. No. 599-1 at 48.

12 This language mirrors the standard outlined by the Ninth Circuit Court of Appeals in *Jeff*
13 *D. v. Otter*, in which the Court determined that consent decrees have many attributes of ordinary
14 contracts, and therefore the doctrine of substantial compliance, or substantial performance, may
15 be employed. 643 F.3d 278, 283-284 (9th Cir. 2011). Further, “The construction and enforcement
16 of settlement agreements are governed by principles of local law which apply to interpretation of
17 contracts generally.” *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989) (applying Idaho
18 contract law to a Settlement Agreement and Stipulation entered into in Idaho where the Parties
19 were all Idaho residents). In determining substantial compliance and material breach,
20 Washington courts look to the criteria identified in the Restatement (Second) of Contracts § 241
21 (*see DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 317 P.3d 543, 550–51 (Wash. Ct.
22 App. 2014)), which includes:

23 (a) the extent to which the injured party will be deprived of the
benefit which he reasonably expected;

- 1 (b) the extent to which the injured party can be adequately
2 compensated for the part of that benefit of which he will be
3 deprived;
4 (c) the extent to which the party failing to perform or to offer to
5 perform will suffer forfeiture;
6 (d) the likelihood that the party failing to perform or to offer to
7 perform will cure his failure, taking account of all the
8 circumstances including any reasonable assurances;
9 (e) the extent to which the behavior of the party failing to perform
10 or to offer to perform comports with standards of good faith and
11 fair dealing.

12 Restatement (Second) of Contracts § 241 (1981). Relying on both the analysis under *Jeff D.* and
13 the criteria laid out in the Restatement, Defendants are in material breach of the 2018 Contempt
14 Settlement Agreement.

15 **1. Defendants have failed to make available the additional forensic bed capacity**
16 **required by the Agreement.**

17 Defendants are in material breach of their obligation under Section III(B)(4) of the
18 Agreement, “Additional Forensic Bed Capacity,” causing class members to be deprived of a
19 benefit they reasonably expected under the Agreement. Under the Agreement, the State was
20 obligated to open 42 new forensic beds at WSH⁷ and 50 at ESH to improve class member access
21 to inpatient competency services. Dkt. No. 599-1 at 20. Despite significant delay at WSH, the
22 Defendants did eventually open the new forensic beds to class members at both state hospitals.
23 However, Defendants have since denied class members access to these beds. Instead, Defendants
are filling all of the allocated beds and many more with civil conversion patients.

Defendants reported to this Court that “it is normal to have some number of these patients
in forensic beds as they transition from forensic to civil legal authority,” but that more recently

⁷ Defendants reduced this by two beds after realizing a need for restraint and seclusion rooms in the new wards at WSH. See Dkt. No. 712-1 Ex. A at 4.

1 they have had trouble effectively meeting the demand and managing these civil conversion
2 patients. Dkt. No. 924-1 at 9. In 2022 Defendants have not effectively transferred these patients
3 into civil wards at the state hospital or HCA-contracted beds in the community, leading to a
4 backlog of civil patients held in forensic beds. *Id.* In addition to the growing backlog, civil
5 patients are also now waiting longer to be transferred out of forensic wards, some for many
6 months. *Id.*

7 The result is a material breach of the Agreement. By June of 2022, Defendants had filled
8 all of the 90 forensic beds required by the Agreement with civil conversion patients. Mosolf
9 Decl. Ex A. at 16, 18. The number of civil conversion patients held in forensic beds has
10 increased significantly since then. In November 2022, there were reportedly 154 civil conversion
11 patients using forensic beds at WSH, alone. Mosolf Decl. ¶4.

12 **2. Defendants’ breach of the Agreement is seriously harming class members**
13 **and they cannot be adequately compensated.**

14 This Court has recognized the serious harm that class members face waiting for
15 competency and restoration services in jail. Dkt. No. 131 at 9: “Section III: The Harms Caused
16 by Prolonged Incarceration.” Accordingly, this Court ordered Defendants to transfer class
17 members out of jail within seven days when they are ordered to inpatient competency services.
18 *Id.* at 22.

19 Defendants’ denial of the forensic beds promised under the Agreement has led to
20 increased wait times for class members in jail. Longer wait times in jail means more harm—
21 more time in solitary confinement, more time for illness to become “habitual and harder to treat
22 while they wait in isolation” (*Id.* at 9), and more time not receiving the health care they need.
23 These harms cannot be reversed once done, but instead must be prevented. Defendants must

1 make the inpatient forensic beds required under the Agreement available to class members
2 immediately. Nothing short of this is adequate compensation.

3 **3. Defendants’ actions are not minor deviations, but instead defeat the**
4 **Agreement’s intentions and goals.**

5 Deviations from the terms of the Agreement may occur, but those deviations must be
6 “unintentional and minor, so as not to substantially defeat the object which the Parties intend to
7 accomplish, or to impair the structure of the Agreement as a whole.” Dkt. No. 599-1 at 48. The
8 Agreement is intended by the Parties to “bring Defendants into substantial compliance with this
9 Court’s orders” with a goal “to timely serve those who become Class Members.” *Id.* at 3.
10 Defendants’ decisions and actions with regards to civil wards and patient placements defeat this
11 intention and goal.

12 As a result of Defendants’ failure to adequately plan for the civil conversion population at
13 the state hospitals, all of the 90 new forensic beds promised by the Agreement—and a growing
14 number of beds that were available to class members at the time of the Agreement—are currently
15 unavailable to class members and will remain unavailable for the foreseeable future. Moreover,
16 Defendants’ choices have moved them further from compliance, causing a significant and
17 growing increase in class member wait times. Defendants’ actions have effectively barred class
18 members from obtaining the relief intended by the Agreement and undermined efforts to bring
19 Defendants into substantial compliance with the orders of this Court.

20 **4. Defendants have not proposed a reasonable plan to timely address the**
21 **problem and are therefore unlikely to cure this breach without Court**
22 **intervention.**

1 In evaluating material breach, the Restatement (Second) of Contracts § 241 looks, among
2 other things, to the likelihood that Defendants may cure the material breach. Even taking account
3 of all the circumstances and assurances by Defendants, they are unlikely to cure their material
4 breach in the foreseeable future. The number of civil patients held for months at a time in
5 forensic beds at the state hospitals has grown astronomically in the past year and shows no sign
6 of slowing. Defendants have put forward no plans to this Court that will sufficiently slow or stop
7 this growth, or move existing civil conversion patients out of forensic beds in meaningful
8 numbers any time soon.

9 As described above, there has been a rapid increase in the number of civil conversion
10 patients held in forensic beds at the state hospitals. The increase at WSH over five months from
11 June to November represents an 81% growth rate in civil conversion patients using competency
12 restoration beds. At this rate and without significant, swift action by Defendants, Plaintiffs
13 estimate that WSH will be using all of its competency restoration beds to serve civil conversion
14 patients within 6 months. Despite this crisis, Defendants have not provided Plaintiffs or this
15 Court with an adequate plan to make forensic beds available to class members, as required by the
16 Agreement. As recently as September 2022, Defendants admitted to this Court that, despite the
17 growing wait times for class members, *they were choosing to prioritize admission of civil*
18 *conversion patients over class members at WSH.* Dkt. No. 924-1 at 23 (“...WSH should
19 prioritize Civil conversion cases ahead of Forensic cases, still admitting as many TB class
20 members as possible.”)

21 In September, Defendants advised this Court of their plan to address the increase in civil
22 conversion patients held in forensic beds. Dkt. No. 924-1 at 9 and 23-24. The plan is inadequate
23 and thus far is not having a meaningful impact. For example, Defendants report that they will be

1 transferring 25 civil patients from WSH to ESH. *Id.* However, at a meeting with WSH on
2 November 7, 2022, WSH officials reported to DRW that they had only transferred 10 patients
3 before ESH stated it was full and could not take any more. Mosolf Decl. ¶5. Defendants have
4 also indicated that they will delay the scheduled closure of some of the civil wards at WSH by
5 several months. Dkt. No. 924-1 at 10 and 23-24. However, Defendants still plan to close these
6 wards by the spring of 2023 to make way for demolition connected with the new forensic
7 hospital, so any mitigating effect will be brief. Mosolf Decl. Ex. C at 6. Even with some delay in
8 WSH civil ward closures, the number of civil conversion patients held in forensic wards at WSH
9 nearly doubled from June to November 2022.

10 Defendants also point to some WSH civil ward renovations and the opening of two new
11 forensic wards (F9 and F10) as possible avenues of relief. However, both new forensic wards
12 have been repeatedly delayed, with new patient admissions into F9 not expected until March.
13 Mosolf Decl. ¶6 and Ex C at 2. Ward F10 may not open at all unless WSH can secure sufficient
14 staff. Mosolf Decl. ¶6. WSH civil ward renovations may provide some additional beds, but it is
15 unclear how many will be available to civil conversion patients waiting on forensic wards, or if
16 the new beds will instead be needed to house current civil patients after their wards close. The
17 new DSHS-run civil commitment treatment facility at Maple Lane that may open to patients in
18 February 2023 is a positive development, but it is only 16 beds. Mosolf Decl. Ex. C at 3. All
19 other possible new beds that Defendants point to are too far in the future to address the current
20 crisis. *Id.* at 4-6.

21 On December 14, 2022, Defendants circulated a letter to state partners acknowledging the
22 civil conversion crisis and announcing that they would be adjusting civil admissions procedures
23 to admit patients who “present the highest levels of risk to the community and to themselves.”

1 Mosolf Decl. Ex. F at 2. Defendants have provided no clear criteria about which or how many
 2 patients this will affect, or to what extent this will impact the civil conversion crisis in the
 3 coming months. *Id.* The policy does not appear to affect the civil conversion patients already
 4 held in forensic beds. *Id.*

5 Finally, Defendants have put forward a plan to contract for jail beds at the South
 6 Correctional Entity (SCORE), a jail in south King County, in which they will ostensibly house
 7 class members.⁸ Governor Inslee’s *Proposed 2023-25 Budget and Policy Highlights* refers to this
 8 plan, but does not provide details around how these contracted jail beds will relieve class
 9 member wait times. Plaintiffs’ opposition to providing restoration services in jail is well
 10 established in this case. *See, e.g.*, Dkt. No 193.

11 While Plaintiffs appreciate Defendants’ efforts and plans, they are too little and too late
 12 and are having negligible impact on the existing and growing number of civil conversation
 13 patients taking up forensic beds. Plaintiffs are also concerned about the recently-announced plans
 14 to contract beds at the SCORE jail for class member use. No plan that Defendants have put
 15 forward will significantly slow or halt civil conversion admissions at the state hospitals, or
 16 adequately open up the forensic beds currently used by civil conversion patients. Defendants are
 17 therefore unlikely to cure their material breach and come into substantial compliance with the
 18 Agreement in the foreseeable future.

19 **5. Defendants’ own plans and actions led directly to this violation.**

20
 21 ⁸ Office of the Governor Jay Inslee, Proposed 2023-25 Budget and Policy Highlights, Dec. 2022, at 28. Available at
 22 [https://ofm.wa.gov/sites/default/files/public/budget/statebudget/highlights/budget23/202325PolicyBudgetHighlights.](https://ofm.wa.gov/sites/default/files/public/budget/statebudget/highlights/budget23/202325PolicyBudgetHighlights.pdf)
 23 pdf (“Finally, in response to increasing waitlists for forensic beds at Western State Hospital, the Department of
 Social and Health Services (DSHS) and Health Care Authority (HCA) will contract for additional capacity. This
 capacity will be in two behavioral health hospitals — an evaluation and treatment center, and in the South
 Correctional Entity (SCORE) in King County to increase community civil bed capacity — which will increase
 forensic bed capacity.”)

1 In evaluating material breach, the Restatement (Second) of Contracts § 241 also looks to
2 “(e) the extent to which the behavior of the party failing to perform or to offer to perform
3 comports with standards of good faith and fair dealing.” Here, Defendants knowingly undertook
4 plans over the past several years that led directly to the current material breach of the Agreement
5 and then made no effort to shift their plans in order to avoid the situation. Therefore, their
6 behavior in regards to this breach does not comport with standards of good faith and fair dealing.

7 Specifically, as described above, Defendants are in the process of significantly reducing
8 the state hospitals’ capacity to serve civil conversion patients without a reasonable plan to serve
9 these patients in other inpatient facilities or by less restrictive alternatives. In theory, the
10 Governor’s plan for a build-up of longer-term civil commitment beds in smaller community
11 facilities should have replaced the lost civil beds at the state hospitals and provided space for
12 civil conversion patients. However, Plaintiffs have seen no evidence that Defendants have
13 effectively diverted or transferred civil conversion patients into these new community beds.

14 For example, in the 2021-23 state operating budget, the Washington State Health Care
15 Authority (HCA) was instructed to work with Defendants and others to “identify gaps and
16 barriers in the current array of community long-term inpatient beds in serving higher need
17 individuals including those committed to a state hospital pursuant to the dismissal of criminal
18 charges and a civil evaluation ordered under RCW 10.77.086 or 10.77.088.” 2021 Wash. Sess.
19 Laws (Operating Budget) Ch. 334, p.224 § 215(66)(h). HCA was instructed to submit to the
20 legislature by December of 2021 an implementation plan to overcome these barriers. *Id.*

21 HCA’s resulting “Implementation plan to continue the expansion of civil long-term
22 inpatient capacity,” developed through a workgroup that included Defendants, identified four top
23 priorities to address the barriers to serving higher needs individuals (including civil conversion

1 patients) outside of state hospitals: 1) rate enhancement so that contracted providers were better
2 resourced and staffed to serve this population; 2) Advanced Crisis Intervention Training to staff;
3 3) the creation of specialized facilities to accommodate populations like the civil conversion
4 patients; and, 4) creation of “no refuse” facilities that would reliably admit and serve populations
5 like the civil conversion patients. Mosolf Decl. Ex. E at 4, 9-12. Unfortunately, HCA’s recently
6 submitted 2023-2025 Operating Budget Request does not appear to include funding in line with
7 these recommendations.⁹ Mosolf Decl. ¶8. The Governor’s 2023-25 Biennium Proposed
8 Operating Appropriations Bill does appear to request some funding so that HCA has “flexibility
9 to pilot...enhanced rates.” Bill Request z-0211.2/23 2nd draft (Wash. 2023) at 126.

10 Further, while Defendants were busy significantly reducing the civil bed capacity at the
11 state hospitals, they were also aware of an uptick in civil conversion cases. As Defendants
12 reported to this Court, the annual number of civil conversion cases increased from 186 in 2017 to
13 305 in 2019. Dkt. No. 924-1 at 9. However, after this jump in 2019, the number has remained
14 steadily around 300 per year: 305 in 2019, 286 in 2020, 265 in 2021, and 300 projected for 2022.
15 *Id.* We have not seen recent unprecedented growth in civil conversion cases. The difference in
16 2022 is that Defendants have significantly reduced the number of available civil beds at the state
17 hospitals into which they can transfer civil conversion patients.

18 Defendants should have revised their plans. They should have noted the roughly 300
19 yearly civil conversion cases they have dealt with since 2019 and recognized the decreasing
20 number of available civil beds at the state hospitals. Beginning in 2018, Defendants could have
21 better ensured that the long-term civil commitment bed capacity they were generating in the
22

23 ⁹ Full Agency Budget Requests are available for review through the Washington State Office of Financial
Management website at <https://abr.ofm.wa.gov/>.

1 community was adequately available to state hospital civil patients, including civil conversion
2 patients. They could have followed their own recommendations as laid out in HCA’s December
3 2021 implementation plan regarding community long-term civil beds. Mosolf Decl. Ex. E.
4 Defendants could have avoided the demolition of so many civil wards at WSH over such a short
5 period, opting instead to close wards only as civil patients were able to discharge or transfer out
6 of the state hospitals. Defendants also could have more fully invested in the community services
7 needed to better utilize Less Restrictive Alternative treatment orders in lieu of inpatient
8 treatment. *See e.g.*, Wash. Rev. Code §§ 71.05.020 (34) and 71.05.585. Finally, Defendants
9 could have better invested in the staff and community-based services necessary to achieve
10 discharge of the many civil patients at the state hospitals who are deemed ready for discharge but
11 currently sit—sometimes for months on end—waiting to actually leave the hospital. Mosolf
12 Decl. ¶10

13 Defendants did none of these things. Instead, they have pushed ahead with their civil bed
14 plans with a foreseeable and preventable outcome.

15 **B. This Court Has Broad Authority to Fashion a Remedy to Cure Defendants’**
16 **Material Breach of the Agreement.**

17 The 2018 Contempt Settlement Agreement allows the Party alleging material breach to
18 file a motion with the Court “to seek payment of suspended fines, restart contempt fines, increase
19 future contempt fines, or any other appropriate relief.” Dkt. No. 599-1 at 49. In the Agreement,
20 Parties contemplated an opportunity to cure any breach. *Id.* at 44. Washington courts have
21 construed a “cure” as designed to “place the nonbreaching party in the same position as he would
22 have occupied had no breach occurred.” *Moulden & Sons, Inc. v. Osaka Landscaping & Nursery,*

1 *Inc.*, 198, 584 P.2d 968, 970, (Wash. Ct. App. 1978), quoted in *DC Farms, LLC v. Conagra*
2 *Foods Lamb Weston, Inc.*, 317 P.3d 543, 551 (Wash. Ct. App. 2014).

3 Plaintiffs therefore seek Orders from this Court that will compel Defendants to make the
4 90 additional forensic beds required under the Agreement, and the base level of beds understood
5 to be available at the time of the agreement, available to class members in a timely fashion and
6 also ensure that Defendants avoid repeating this material breach in the future.

7 **C. Defendants' Failure to Comply with this Court's 2015 Order Has Worsened and**
8 **Contempt is an Appropriate Remedy.**

9 To establish civil contempt, the "moving party has the burden of showing by clear and
10 convincing evidence that the contemnors violated a specific and definite order of the court. The
11 burden then shifts to the contemnors to demonstrate why they were unable to comply." *F.T.C. v.*
12 *Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999) (quoting *Stone v. City and County of San*
13 *Francisco*, 968 F.2d 850, 856 n.9 (9th Cir.1992)). "The contempt 'need not be willful,' and there
14 is no good faith exception to the requirement of obedience to a court order." *In re Dual-Deck*
15 *Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993) (internal citations
16 omitted). Civil contempt is intended to "coerce the contemnor into future compliance with the
17 court's order." *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1352 (2d
18 Cir.1989).

19 This Court's July 2016 Contempt Order finding contempt of the seven-day inpatient
20 admission timeline by clear and convincing evidence still stands. Dkt. No. 289. The underlying
21 evidence supporting that order has only strengthened since 2016, as Defendants' noncompliance
22 with inpatient competency services timelines has significantly worsened. Over the past year, this
23 has been due in large part to the growing civil conversion patient crisis and Defendants' active

1 and consistent decisions to prioritize them over class members. Parties acknowledged in the 2018
2 Contempt Settlement Agreement that nothing in the Agreement regarding the determination of
3 substantial compliance or contempt mitigation “restricts the Court’s contempt powers or any
4 other powers possessed by the Court.” Dkt. 599-1 at 48. Therefore, contempt sanctions continue
5 to be an appropriate remedy to compel compliance.

6 **1. Defendants’ noncompliance with this Court’s 2015 Order has significantly**
7 **worsened.**

8 Since this Court first found Defendants in contempt in 2016 and 2017, they have never
9 come into substantial compliance with the Court’s 2015 Order requiring timely provision of
10 competency restoration services. Defendants’ compliance with the 14-day in-jail competency
11 evaluation timeline has improved over the past several years but never achieved a consistent rate
12 of substantial compliance. They reached a 92% compliance rate in August 2018, but have not
13 duplicated it since then. Mosolf Dec. Ex A at 8. More recently, the rate has ranged between 63%
14 (January 2022) and 73% (May 2022), dipping back down to the mid-60s over the past several
15 months. Mosolf Decl. Ex. D at 21.

16 Defendants’ compliance with the seven-day inpatient competency services timeline has
17 considerably worsened since 2015, especially over the recent year. Although Defendants’
18 compliance rates for inpatient competency evaluation often change greatly from month to month
19 given the relatively small number of these orders, they have recently fallen to 4% for September
20 2022 and 9% for October’s “first look” data. *Id.* at 22. Defendants’ compliance rates for inpatient
21 restoration have been alarmingly low for the past year. The September 2022 Court Monitor’s
22 Report to the Court notes that compliance rates: “...have been greater than 10% only once since
23 November 2021—12% in June 2022. Each month in the past 16 months was well below the still

1 low rates in 2019 (e.g., 28% in December 2019).” Mosolf Decl. Ex. A at 11. Compliance for the
 2 most recent months is as follows: 3% July 2022; 7% for August; 7% for September; and 3% for
 3 October’s “first look” data. Mosolf Decl. Ex. D at 23.

4 As compliance rates decrease, class member wait times for admission have increased.
 5 Defendants’ data indicates that the average inpatient restoration wait time was 75.8 days in July
 6 of 2022, 68.4 days in August, 73.3 days in September, and 82.6 days in October’s “first look”
 7 data.¹⁰ *Id.* A year earlier, the wait times for inpatient restoration admission were long, but much
 8 less than we currently face: 48.3 in October 2021, 49 in November, and 50 in December. *Id.*

9 The number of “outlier” cases—essentially those in which a class member has waited
 10 more than 20 days for evaluations and 40 days for restoration—have also hugely increased. The
 11 September 2022 Court Monitor report indicates that, while there were 15 outlier cases reported
 12 in June of 2021, in June of 2022 there were 405. Mosolf Decl. Ex. A at 12-13. Most of these
 13 outlier cases were long waits for inpatient restoration, ranging from 41 to 681 days. *Id.*

14 **2. Defendants have not taken all reasonable steps available to them to address**
 15 **worsening compliance.**

16 “If a violating party has taken ‘all reasonable steps’ to comply with the court order,
 17 technical or inadvertent violations of the order will not support a finding of civil contempt.” *Gen.*
 18 *Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986). Since this Court’s initial
 19 2016 Contempt Order, and especially over the past year as the civil conversion patient crisis has
 20 unfolded, Defendants have not taken all reasonable steps to comply with the 7-day timeline for
 21 inpatient competency services.

22
 23 ¹⁰ ESH restoration wait times have recently been particularly bad, with average 94.4 days in September and 129.8 in October.

1 **i. Defendants should have anticipated 2022’s increase in demand for**
2 **competency services and planned accordingly.**

3 Defendants indicate that there has been a 37% increase in demand for competency
4 services in State Fiscal Year (SFY) 2022. Dkt. No. 924-1 at 5. While this is substantial, it is not
5 unprecedented: in SFY 2016 there was a 26% increase in demand and in SFY 2017 it was 33%.

6 *Id.* Defendants also should have anticipated a significant increase in demand in SFY 2022 given
7 the drastic decrease during the pandemic—demand *decreased* by 15% in SFY 2020. *Id.* This
8 indicated a backlog of cases that would eventually be filed when pandemic restrictions eased.

9 Indeed, Defendants admit that “While COVID-19 cases continue to impact the Department, more
10 acute current impacts result from what appears to be a backlog of cases now being processed in
11 the criminal justice system.” *Id.* at 4.

12 **ii. Defendants knowingly failed to prevent the civil conversion patient**
13 **crisis and have not taken all reasonable steps to address it.**

14 Defendants have failed to take all reasonable steps to prevent and address the civil
15 conversion patient backlog in state hospital forensic wards, which has greatly exacerbated class
16 member wait times for inpatient admission. As discussed at length in Sections IV(A)(4) and
17 IV(A)(5) of this motion, Defendants essentially created this crisis by reducing available civil
18 beds at the state hospitals and not providing sufficient alternatives. Now they have failed to put
19 forward reasonable steps to fix this crisis of their own making. Nothing in the plans that
20 Defendants put forward will sufficiently slow or halt the civil conversion admissions at the state
21 hospitals. Nothing in their plans will timely or effectively move civil conversion patients who are
22 currently in class members beds out of those beds. These failures have led to worsening

1 noncompliance with this Court’s 2015 Order regarding inpatient competency restoration
2 services.

3 **D. Courts Have Broad Authority within Contempt Powers to Fashion a Remedy to**
4 **Compel Compliance.**

5 Once finding a party in contempt, federal courts have broad remedial powers to address
6 noncompliance. *Stone v. City and County of San Francisco*, 968 F.2d 850, 861-62 (9th Cir.1992)
7 (affirming court’s power to authorize sheriff to override state law). *See also, e.g., Brown v. Plata*,
8 563 U.S. 493 (2011) (imposing prison population limit); *Nat’l Org. for the Reform of Marijuana*
9 *Laws v. Mullen*, 828 F.2d 536 (9th Cir. 1987) (affirming appointment of a Special Master).

10 **1. This Court should impose increased contempt sanctions against Defendants.**

11 Civil contempt penalties can take the form of per diem fines imposed for each day a
12 contemnor fails to comply with an affirmative court order, or of fixed fines imposed and
13 suspended pending future compliance. *See Int’l Union, United Mine Workers of Am. v. Bagwell*,
14 512 U.S. 821, 829 (1994). Courts have imposed incremental and substantial daily contempt
15 sanctions when the harm to a party increases with time as does the contemnors’ tolerance for
16 financial penalty. *Telenor Mobile Communications AS v. Storm LLC*, 587 F. Supp.2d 594, 621
17 (S.D. New York 2008) (Court imposed “an initial contempt sanction of \$100,000 per day,
18 doubling to \$200,000 per day thirty days thereafter, and to \$400,000 per day thirty days after
19 that, and continuing to double every thirty days until compliance is achieved, is an appropriate
20 remedy to ensure probable compliance with this Court's orders.”). Increasing the initial amount
21 of contempt sanctions is appropriate to ensure swift compliance. *Shell Offshore Inc. v.*
22 *Greenpeace, Inc.* 815 F.3d 623, 627 (9th Cir. 2016) (Court structured sanctions as progressively
23 increasing to compel compliance with the court’s orders.).

1 Here, the Court has imposed contempt sanctions previously which did not bring
2 Defendants into compliance with its 2015 Order. The majority of those fines were suspended by
3 the 2018 Contempt Settlement Agreement unless and until this Court finds a material breach, but
4 the Court may now re-impose or impose new contempt sanctions against Defendants. Given that
5 previous sanctions did not compel compliance, not only should suspended fines be levied, but
6 contempt sanctions moving forward should increase to ensure swift compliance.

7 **2. This Court should use its contempt powers to order Defendants to modify**
8 **admissions to the state hospitals.**

9 Federal courts possess whatever powers are necessary to remedy constitutional violations
10 because they are charged with protecting these rights. *Stone*, 968 F.2d at 861, citing *Hutto v.*
11 *Finney*, 437 U.S. 678, 687 n. 9 (1978); *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 280–81
12 (1977). When the least intrusive measures fail to rectify the problems, more intrusive measures
13 are justifiable. *Stone*, 968 F.2d at 861 (citing *Hutto* 437 U.S. 678, 687 n.9). This Court’s orders
14 may infringe upon state laws because “otherwise valid state laws or court orders cannot stand in
15 the way of a federal court’s remedial scheme if the action is essential to enforce the scheme.”
16 *Stone*, 968 F.2d at 862.

17 In addition to contempt sanctions, this Court has employed other means to help
18 Defendants comply with its Order. For example, the Court has brought in the expertise of the
19 Court Monitor and her team to assist Defendants. The Court has ordered that millions in
20 contempt fines be used to fund diversion services around the state. The Court also approved the
21 2018 Contempt Settlement Agreement, under which the Parties have worked together to divert
22 people from the forensic mental health system and timely serve class members. Unfortunately,
23

1 these efforts have not been sufficient—especially as the civil conversion crisis has unfolded at
2 the state hospitals—and more intrusive measures are now required to compel compliance.

3 This Court should use its contempt powers to order the state to greatly limit civil
4 conversion patient admissions at the state hospitals. Only by significantly reducing civil
5 conversion patient admissions can Defendants stop the growing backlog and begin to get the
6 crisis under control. Such orders do not contravene state law, since Washington allows for civil
7 conversion patients to be admitted to other facilities licensed to provide long-term civil
8 commitment. Wash. Rev. Code § 71.05.320(1)(c).

9 This Court should also order Defendants to transfer or discharge appropriate civil patients
10 out of state hospitals. Only by doing so can Defendants actually start to open up meaningful
11 numbers of forensic beds to class members. Without such actions, the civil conversion patients
12 sitting in forensic beds will have nowhere to go and the backlog affecting class members will
13 remain largely static. Washington law allows for civil conversion patients to be transferred from
14 state hospitals into other licensed facilities. Wash. Rev. Code § 71.05.320(1)(c). Washington law
15 also requires the discharge of patients within 14 days when the hospital determines that person
16 no longer requires active psychiatric treatment at an inpatient level of care. Wash. Rev. Code §
17 71.05.365. There are civil patients at the state hospitals whom Defendants have determined no
18 longer need inpatient hospitalization, but who remain in the hospitals for months waiting to
19 actually be discharged. Mosolf Decl. ¶10. This Court may order Defendants to transfer or safely
20 discharge civil patients out of the state hospitals in order to make room for class members
21 suffering in jail.

22 Finally, this Court should limit the underlying criminal charges for which Defendants
23 may admit defendants for inpatient restoration services. Wait times for inpatient restoration

1 services are astounding and have been growing rapidly. Only by reducing, even temporarily, the
2 number of class members it must admit for competency restoration services can Defendants
3 tackle ballooning wait times in the foreseeable future.

4 Defendants' previous actions and current plans are not sufficient to reduce class member
5 wait times. Prior contempt sanctions have not achieved compliance. With the current crisis
6 worsening by the day, this Court cannot wait to see what can be achieved in another legislative
7 session. Previous legislative changes and funding obtained by Defendants have not sufficiently
8 reduced the class member population or lowered wait times. Defendants have also failed to take
9 necessary steps to avoid the civil conversion backlog as they closed civil beds at the state
10 hospitals and do not currently have an adequate plan to address this crisis. Any civil and forensic
11 beds scheduled to open in the foreseeable future will not significantly and timely decrease the
12 long wait times currently faced by class members. Defendants' late hour announcement that they
13 plan to limit some civil admissions is vague and too little, too late. This Court has no choice but
14 to take more intrusive measures.

15 **VII. RELIEF REQUESTED**

16 Plaintiffs seek relief from this Court pursuant to this Court's authority to order
17 Defendants to cure the material breach of the 2018 Contempt Settlement Agreement and the
18 Court's broad contempt powers to compel compliance with its 2015 Order. Plaintiffs respectfully
19 propose that this Court order the following, to be terminated upon Defendants' achievement of
20 substantial compliance with the seven-day standard for inpatient evaluations and restorations:

- 21 1) Defendants to immediately cease admitting civil conversion patients to the state
22 hospitals for ordered civil commitment treatment, except for patients for whom the
23

1 commitment court has made a special finding of violent felony pursuant to Wash.
2 Rev. Code § 71.05.280(3)(b);

- 3 2) Within 30 days, Defendants to identify 90 civil patients at the state hospitals whom,
4 in Defendants' clinical judgment, may be most safely discharged from the hospital or
5 transferred to a facility licensed for 180-day treatment. For those patients, Defendants
6 shall, within 45 days, provide to the Court Monitor and to Plaintiffs the patient name
7 and a description of the patient's discharge plan and anticipated living arrangement
8 upon discharge, or transfer plan to another treatment facility;
- 9 3) Within 60 days, Defendants to discharge or transfer the identified 90 civil patients out
10 of the state hospitals;
- 11 4) Defendants to use these 90 civil patient discharges and transfers to ensure that there
12 are 90 additional forensic beds at the state hospitals made available to and
13 immediately filled with class members;
- 14 5) Defendants to use the new forensic beds set to open at WSH in wards F9 and F10 to
15 hold class member competency restoration patients only;
- 16 6) Imposition of a fine per civil conversion patient held in a forensic ward bed at the
17 state hospitals on a per day basis. Defendants should pay a fine for each day spent in a
18 state hospital forensic ward beyond 21 days after dismissal of the patient's underlying
19 criminal case. For each civil conversion patient held in a forensic bed for more than
20 21 days after dismissal of the underlying criminal charge, but less than 28 days, the
21 daily fine shall be \$1,000 per day. For each civil conversion patient who is held in a
22 forensic bed 28 days or more, the daily fine shall be \$2,000 per day;
- 23

- 1 7) Imposition of a fine per class member on a per day basis. Defendants should pay a
2 fine for each day spent waiting in jail beyond seven days for in-hospital competency
3 evaluation or restoration services. For each class member who has waited more than
4 seven days but fewer than fourteen days for either of these services, the fine shall be
5 \$1,000 per day. For each class member who has waited fourteen days but fewer than
6 twenty-one days, the fine shall be \$2,000 per day. For each class member who has
7 waited twenty-one days or more, Defendants should be sanctioned \$3,000 per day;
- 8 8) Payment of the inpatient competency services fines suspended but accrued as of
9 December 1, 2018 pursuant to the 2018 Contempt Settlement Agreement;
- 10 9) Defendants to admit for inpatient competency restoration services to the state
11 hospitals or any DSHS-affiliated inpatient facilities providing competency services
12 only those class members who have an underlying criminal charge considered a
13 violent offense as defined under Wash. Rev. Code § 9.94A.030(58), or a felony with
14 a domestic violence classification as defined in Wash. Rev. Code § 9.94A.030(20)(a)
15 and (b).
- 16 10) Defendants and Plaintiffs to meet and confer within 14 days of this Court's Order and
17 to submit a written plan to implement this Court's Order which may include a joint
18 proposal to amend the Order upon Court approval, so long as the implementation plan
19 accomplishes substantial compliance with this Order.
- 20 11) Defendants to consult with the Court Monitor within 14 days of this Court's Order in
21 order to identify an expert to evaluate the State's current civil conversion practices
22 and identify improvements. After consultation with Defendants, the Court Monitor
23

1 shall select the evaluator and determine the scope and purpose of the evaluation.

2 Defendants are responsible for the costs of this evaluation.

3 **VIII. CONCLUSION**

4 For the foregoing reasons this Court should find Defendants in material breach and civil
5 contempt and make remedial orders accordingly.

6 Dated this 22nd day of December, 2022

7 Respectfully submitted,

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