STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 3

MILTON CHRISTENSEN, et al.,

Plaintiffs,

v.

Case No. 96CV1835
Hon. Clare L. Fiorenza

MICHAEL J. SULLIVAN, et al.,

Defendants.

NOTICE OF MOTION AND MOTION FOR ENFORCEMENT OF SETTLEMENT AGREEMENT AND CONSENT DECREE

TO: Mr. John Schapekahm
Milwaukee County Corporation Counsel
901 N. 9th Street, Room 303
Milwaukee, WI 53233

Attorney for Milwaukee County Defendants

PLEASE TAKE NOTICE:

Pursuant to Wis. Stat. § 802.01(2) and Part I, paragraphs II C, D and E and Part I paragraph III. A of the Consent Decree, and upon the attached affidavits and other papers and proceedings in this case, the Plaintiffs, by their attorneys, Legal Aid Society of Milwaukee, Inc., and ACLU of Wisconsin Foundation, Inc., will move this Court, Hon. Clare L. Fiorenza presiding, at the following place and time, or as soon thereafter as counsel may be heard:

Date: November 15, 2004
Time: 10:30 a.m.

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Location: Milwaukee County Courthouse, Room 402
901 N. 9th Street
Milwaukee, WI 53233

(A) for an order finding that the defendants have violated the settlement agreement and decree (1)through over 13,000 individual instances of holding detainees more than 30 hours without beds in booking (2) through failure to report that booking-status detainees were temporarily removed from booking before the midnight count and (3) through routinely operating the booking room above the agreed safe limit of 110 while reporting numbers falsely suggesting the booking room was being run in compliance with the decree;

(B) for an order requiring the defendants to submit to discovery and setting a date for an evidentiary hearing to determine compensation, if any, due to class members who were victims of the defendants' violations; and

(C) for any other appropriate remedy necessary to ensure defendants' future compliance with the decree.

Additional reasons and support for this motion are included in the accompanying memorandum of law and supporting material.

Dated this ___ day of September, 2004.

Respectully submitted,

____

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 3 | MILWAUKEE COUNTY

MILTON CHRISTENSEN, et al.,

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Case No. 96CV1835
Hon. Clare L. Fiorenza

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Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR ENFORCEMENT OF SETTLEMENT AGREEMENT AND CONSENT DECREE

Introduction

The defendants' own records document over 13,000 individual violations of the settlement agreement and consent decree's prohibition against holding anyone more than 30 hours in booking or without assigning them to a bed (the 30 hour rule). These violations occurred over *at least*[1] 19 months, from October 2002 through April 2004. The conditions under which the victims of these violations were held were cramped, stressful and degrading. Uncomfortable for a short duration,

[1] The plaintiffs have obtained reports of violations of the 30-hour booking length-of-stay provisions for the months October 2002 through April 2004. In October 2002 there were 789 individuals held in booking for over 30 hours, 293 for over 2 days and one individual held in booking for 157 hours. *See* Ex. 1 & 2 with Koneazny Affidavit. Presumably the violations did not begin full-blown in October 2002. The plaintiffs have requested information for violations for the months before October 2002, but the defendants have thus far refused to provide this information.

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these conditions became almost unbearable when imposed for successive days.

The defendants' documents also confirm that the defendants routinely ran the booking room at numbers well in excess of the 110 person booking room limit. The high numbers in booking and the long duration of detainees' stay in booking went undiscovered for months because the defendants failed to report these events. In effect, the defendants undermined the monitoring – and the safety – of the jail by moving detainees from booking shortly before the midnight count only to return them to booking a few hours later. Accordingly, the defendants consistently reported population numbers that falsely suggested that the population and lengths of stay were well under control.

The plaintiffs believe that there are no genuine issues of fact as to whether the defendants violated the settlement agreement and consent decree ("decree"). Therefore, the plaintiffs seek a determination that the defendants violated the decree (a) through 13,000 individual instances of holding detainees more than 30 hours without beds in booking (b) through failure to report that booking-status detainees were temporarily removed from booking before the midnight count and (c) for routinely operating the booking room above the agreed safe number of 110.

The plaintiffs further request that the Court order the defendants to submit to discovery as to the extent and reasons for the violations. The plaintiffs request that the Court schedule a remedies hearing to determine what compensation, sanctions, or other relief these violations require.

I. The Violations – The Defendants Have Committed Severe and Longstanding Violations of The Decree Provisions Which Absolutely Prohibit Detaining Class Members in Booking, or Without a Bed, In Excess of 30 Hours.

A. The decree provisions

The decree expressly prohibits holding detainees in booking for over 30 hours and also expressly prohibits the defendants' practice of requiring detainees to sleep on the floor or on concrete benches as these prolonged booking detentions necessarily entailed:

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> As of 3/21/01 and thereafter, no jail inmate shall be required to sleep on a mattress on the jail floor or on the jail floor. *There shall be no inmate in the jail for longer than 30 hours without being assigned to a bed* approved by regulations of the Wisconsin Department of Corrections for overnight housing (see par. D, next following).

(Decree - Part I, section II C) (emphasis added).

> The 1100 permanent capacity limit on the jail assumes that there will be a reasonable number of persons held on a *short-term basis* in the booking area. Since there are no beds in the booking room, a number of inmates may be placed there for *no more than 30 hours*. County defendants *will exercise best efforts to limit any inmate's stay in booking - open waiting to twenty four hours*.

(Decree - Part I, section II D) (emphasis added).

> Best efforts shall be made to assure that there will be no more than 110 inmates in booking at the midnight count. If the number exceeds 110 there shall be a plan for adequate emergency staffing in the booking room. The plan shall limit the number of inmates in the locked rooms surrounding the open waiting area in the booking room and shall specify how often those side rooms are checked.

(Decree - Part I, section II D).

B. The defendants confined more than 13,000 individuals in excess of 30 hours in booking without a bed or bedding for at least 19 months from October, 2002 through April, 2004.

The 30-hour rule violations could not be more clearly established. On April 6, 2004, after almost 11 months in which plaintiffs were requesting this very information, the defendants surrendered documentation of literally thousands of violations of the decree's prohibition against holding detainees in booking or without a bed for over 30 hours. Remarkably, in spite of plaintiffs' inquiries, these violations were at severe levels and went unreported for more than one and one half years. As previously reported to this Court on June 2, 2004, the defendants held more than 13,000 detainees in booking for over 30 hours between October 2002 and April 2004. During this period,

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4,156 detainees were held in booking for two full days or longer; 1,739 were held for 60 hours - twice the 30 hour limit; and 608 were held for three days or longer. There are numerous examples of individuals held in excess of 100 hours.

The full report of all the violations are single-spaced printouts comprising a two inch thick packet listing 48 and 49 individual victims per page. The full report is included with this motion. Exhibit 2 to Koneazny Affidavit. The month-by-month breakdown, showing that the violations have been consistently severe throughout the 19 month reported period, is also included. Exhibit 1 to Koneazny Affidavit. The existence of violations, and defendant knowledge thereof, are also evidenced by form lists, used in the jail since at least September of 2003 which contain detainee names under the caption "**THE FOLLOWING INMATES NEED TO BE SHOWERED AS THEY HAVE BEEN IN BKOW 72 HOURS"** (bold and capitol letters in original). *See* Exhibit 6 to Koneazny Affidavit.

These records are express admissions, and are sufficient to compel a finding that the defendants violated the decree as to all class members held in booking in excess of 30 hours.

C. The defendants undermined the safety of booking and prevented discovery of undue crowding and the 30-hour rule violations by temporarily moving detainees out of booking before the midnight count.

The defendants' documents also confirm that the defendants moved detainees from booking shortly before the midnight count. This previously undisclosed practice undermined the decree because it gave the false appearance that the booking room population was under control. In fact, it was often extremely crowded and contained many individuals who should not have been there. Booking room crowding of the magnitude admitted in the defendants' documents is a known danger. As described by defendants' former jail administrator crowding "increases the tension and hostility

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in what is already an anxious environment, which can lead to fights or assaults on deputies," it "threatens the ability to evacuate inmates to a safe area in the event of a fire or other emergency," it "increases the likelihood that a deputy might be attacked or overpowered," and "it increases the likelihood that an inmate might be injured in a fight or that stronger inmates may otherwise prey upon weaker inmates." Exhibit 10 to Koneazny Affidavit**.**

This administrator testified, in the litigation leading to this decree, that such dangerous conditions occurred when the booking room was crowded at the levels above 110 which the jail has apparently been run. According to the administrator, the Sheriff recommended that the booking room be run at the level of 75 detainees and that from his experience running the jail he was not comfortable with numbers over 75 in booking. Koneazny Affidavit, Ex. 9 pp. 76-78. When asked about possibly running the booking room at 125, he said that people become a "problem to you" if "they don't have anywhere to sit." He further testified that the problems would not be cured simply, but that "the more they are close together, okay, they become more aggressive." ***Id.***

The administrator further described the booking room as like a "bus station" and as problematic because it is "a less secure area of the jail." He stated that "the more people that you put in there there's the potential for harm to either the inmates or the staff because of the overcrowding in there, and I've been down there on numerous occasions where we've had in excess of 125 people in there, and it's hard to manage people in such a small space." *Id.* at pp. 104-106.

Booking room crowding exacerbated the suffering of detainees who were held for excessive time and exposed them to undue risks. And the defendants' failure to report that the booking room was routinely overcrowded prevented the plaintiffs and the court from learning about violations until

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a whistleblower informed plaintiffs of the defendants' long-standing practice. [2]

While the defendants may suggest that they were usually technically compliant with the 110 person booking limit – at the moment of the midnight count – such a practice is disingenuous if not reckless. And it clearly caused countless class members to endure the type of crowding the settlement agreement was designed to prevent.

The defendants have also implicitly acknowledged that the midnight count was not inherently or uniquely important and was not the only time of day crowding and safety were important. Rather, the settling parties assumed that relying on the midnight count was the practical way to measure booking population. Essentially the midnight count would serve as a barometer or proxy for the ongoing status of population flow and population control in booking. As the defendants have admitted, the parties assumed that during daytime hours the rapid turnover and the movement of detainees to court would produce "false positive" high numbers. Presumably during the day, detainees might be counted in booking when they were physically elsewhere. *See* Exhibit 12 to Koneazny Affidavit, p. 16.

[2] As previously reported to the Court, the plaintiffs' counsel received an anonymous phone call, on November 20, 2003, informing counsel that detainees were being routinely held for multiple days in booking, that detainees were moved shortly before midnight and returned after the midnight count, and that the jail utilized "shower lists" to allocate shower privileges to detainees who had already spent 3 days in booking in the same clothes without showers. Koneazny Affidavit par.4, 5.

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The defendants recently acknowledged that deputies in late 2002 had complained to the County Board of excessive booking room crowding. However, that issue was never disclosed to plaintiffs and was apparently discounted based on the defendants' "false positives" explanation[3]. In describing that episode and advancing the "false positives" explanation, the defendants' counsel all but acknowledged that *actual* booking room population numbers in the mid - 150s to 200 would be "huge":

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[3]The court accepted the defendants' explanation of the false positives as supporting the single reporting time to address the settlement goal of keeping the actual booking population at what was acknowledged to be the safe limits:

THE COURT:	Okay. And as I understand this whole settlement agreement, you came up to an agreed time.
MR. SCHAPEKAHM:	Correct.
THE COURT:	Because of the flux in and out of the jail...

Id. at 32.

The Court acknowledged that the actual number in booking was important even if the court and the parties had to cope with a practical unreliabilty of getting accurate numbers during the day. The in-court discussion turned to how plaintiffs could check on whether the booking room was actually being run at numbers beyond 110 if the "false positives" could be controlled for:

> I clearly understand at 10:00 o'clock in the morning you could get very false statements and you could get very false figures because people might be assigned to booking but [be] in court, and there's a lot of things that go on during the day, people getting transported. But 9:00 o'clock seems like a more reasonable time period where you're not going to have quite that concern.

Id. at p. 53.

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> What happened there was that deputies were taking spot-checks of populations in booking open waiting at maybe 10:00 or 11:00 o'clock in the morning or 2:00 o'clock, 3:00 o'clock in the afternoon and they were coming up with huge numbers, maybe 150, 200, 250. But the reason, quite frankly, for that was that all inmates are not – that all inmates that are in the custody of the sheriff have to be assigned somewhere. And inmates that are in court for their hearings are assigned to booking open waiting....
>
> The shots that were being taken during the day were providing false positives. So we worked our way through that with the committee. And our understanding of the issue, that that particular issue went away.

Id. (transcript pp. 14-16)**.**

"Huge" numbers, unfortunately were both real and frequent. The defendants' log books (from an October - November 2003 sample also first produced at the April 6th hearing) show that the "false positives" assumption is simply not true and actual booking population often exceeded the agreed safe limit. The booking logs are in fact a person-by-person running count of those actually in booking - the count goes down by one if a detainee leaves booking and it goes up if he is brought back. *See* Exhibit 7 to Koneazny Affidavit.

The logs also confirm the accuracy of insider reports that detainees were moved temporarily to another holding area as the midnight count time approached. *See* Koneazny Affidavit par. 4-6, 22-23.

According to an anonymous call in November 2003 that began plaintiffs' active questioning on booking issues and an anonymous April 6, 2004 letter to plainitiffs' counsel, the defendants were engaged in a "shell game" of moving inmates to court staging to lower the booking count and regularly violated the 110 cap. *Id.* and Exhibit 11 to Koneazny Affidavit.

For example, on October 15, the population was consistently in the 130s and hit 141 after 11 p.m. The booking count was well above 110 the entire day and was as high as 159 at points in the early evening. On October 19th the population was in the 130s, 140s and 150s much of the day. But the defendants reduced the population from the 150s to 103 by approximately 11:30 p.m. by

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transferring detainees to "court staging" (another bedless holding area). The population shot back up to 158 at approximately 4 a.m., when the same detainees were brought back to booking. The population hit 170 in the morning hours of October 20th. On October 25th the booking population was consistently above 150 and as high as 194. *See* Exhibit 7 to Koneazny affidavit.

Overcrowding the booking room, while also engaging in the practice of moving inmates late at night to briefly lower the BKOW count (but not the number of booking-status detainees), violates the manifest intent of the consent decree to keep the booking room population at safe and low-stress levels. Regardless of whether the defendants claim that detainee moves to court staging were for the detainees' own comfort, the failure to report late night moves and the resulting routine of running the booking room well above 110 except at midnight requires that the court order more detailed reporting[4] and an end to the practice under threat of sanctions.

2. Discovery **And An Evidentiary Hearing On Remedies Are Necessary Because, According to Plaintiffs' Investigation, The Defendants Violations Caused Numerous Class Members Undue Physical and Emotional Harm and Loss of Rights To Safety and Comfort Secured To Them Under the Decree**

The above-described violations require a declaration that the defendants violated the settlement agreement. Accordingly the Court should schedule a hearing to determine to what extent class members were harmed, what level of compensation if any is due these class members and whether other sanctions are needed to prevent future decree violations. The violations are not mere statistics. The plaintiffs' counsel in their monitoring role have contacted many individual victims of

[4]The parties had discussed the reporting issues with the defendants and had been assured that we would be provided with reports of actual numbers of 30 hour violations and reporting of peak daily booking counts. The 30 hour reports continued for several weeks after the court was made aware of the booking room violations but stopped after June. The defendants have provided no reports of peak population or of any other counts in addition to the 11:59 reports.

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the defendants' violations and have determined that these individuals suffered varying degrees of severe discomfort, psychological distress, humiliation and embarrassment – harms that entitle these class members to compensation for the loss of rights established by the consent decree.

1. At an evidentiary hearing class members can testify to the physical and emotional stress of enduring violations of the 30 hour rule.

For two to five days or more, detainees were forced to sit on hard wooden benches with little or no room to move. These individuals were not allowed to lie down on the benches, even if there had been room to do so, which usually there was not. Their only respite from the benches was when they were rotated, reportedly at 8 hour intervals, into one of the approximately 15 holding cells surrounding the booking room. There, they were confined to a small room with one or two concrete benches and as many as 10 to 15 detainees. Koneazny Affidavit par. 25 -31.

There was scarce room on the cement benches in these cells and most detainees had to curl up with others on the cement floor. One detainee reported having to stand because other detainees would not yield space on the bench or floor. Access to bench and floor space was determined on a first-come first-served basis or by physical intimidation. Some detainees were relegated to floor space next to the toilet. Tension and hostility were frequent for obvious reasons. *Id.*

Some detainees described the psychological stress of being confined in a locked, virtually windowless room that did not provide for ready access to jail staff for protection or for medical needs. One detainee reported being in a holding cell when another detainee had an apparent seizure. He and others were disturbed that it took a long time for the jail staff to respond to their pounding on the door to get the staffs' attention. Another detainee described getting no response for help when a woman in the holding cell with her became severely ill and vomited in the room. Yet another reported that one of his holding-cell-mates went through panic attacks in the holding cell and

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that this same person was apparently sick and was coughing phlegm around the cell and on the floor. One middle-aged African-American detainee feared for his safety when a very large white man was placed in his crowded holding cell and declared that he "hate[d] niggers," after bragging that he threw his wife or girlfriend through a window. *Id.*

Virtually all of the detainees complained about the body odors, toilet odors and unsanitary condition of their close confinement in the holding cells. They expressed embarrassment at using the toilet in a small room crowded with strangers. One detainee reported that he would not use the toilet the entire time he was in the holding cell. Other repeated complaints included the cold temperatures of the holding cells, particularly when trying to sleep on the concrete floors with no blankets or bedding of any kind. Several expressed their disgust at sleeping on a floor that was dirty and complained that some had to sleep next to the toilet. Some opted to remain on the benches for consecutive days rather than endure the cramped holding cells. Virtually every one of the detainees reported getting only a few hours sleep the entire time they were held in booking. *Id.*

One detainee and his wife told counsel of their frustration at the husband being confined in booking for days, with no ability to let his family know his whereabouts. The jail's phone system "blocked" his attempts to call home. This same detainee, who suffered from nerve-damaged legs (neuropathy), was extremely uncomfortable spending days with only the concrete floor for a bed. He slept only a few hours the entire time. In spite of having served in Vietnam, he described his days in the booking room as the worst experience of his life. *Id.* par. 30.

Women detainees described unique problems during long stays in booking. One woman reported that she was in a holding cell with an estimated 18 other women. She explained that, because there were so many men in the open waiting area, women could only be kept separate by being packed into the holding cells. This woman, who reported staying in booking for 4 days,

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described "being cold and tired and sleeping on the floor you'r (sic) barely able to sleep and then you have to worry about the silver fish crawling around." She described "being locked in the cell with these crazy females screaming and acting nuts." Finally she expressed another common complaint when she described the food in booking as "nasty" - bologna sandwiches only, for every meal – of which she "ate maybe 2 sandwiches the 4 days I sat in there." Another woman described the embarrassment of being denied privacy while also being deprived of access to feminine hygiene products. *Id.* par. 31.

B. The harm to which class member victims could testify are injuries that give rise to monetary relief.

The harm that class members suffered are clearly the kinds of emotional and loss-of- rights injuries that give rise to liability and damages even where not directly contrary to an existing court decree. For example in *Zolnowski v. County of Erie*, 944 F. Supp. 1096 (W.D.N.Y. 1996), the court found that the defendants' practice of holding pretrial detainees for 2-3 days in rooms with only benches and floor mats and having detainees sleep within a foot of the cell toilet violated detainees' due process rights. According to the court: "forcing pretrial detainees to sleep on the floor *on mattresses* in a jail cell violates the Due Process Clause without regard to the length of such a condition of confinement." (Emphasis added.)

Similarly, in *Lareau v. Manson*, 651 F.2d 96, 98 (2d Cir. 1981), the court found constitutional violations for maintaining holding areas similar to the crowded holding tanks to which our class members were confined. The *Lareau* court discussed a holding area referred to as the "fishtank": a glass-walled enclosure holding as many as 9 men who had to crawl over each other because of crowded sleeping arrangement to get to the one toilet in the room. Significantly, the court criticized the defendants' practice of forcing men to sleep on the floor *even with mattresses* .

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And finally it is well established that subjecting individuals to undue physical discomfort and embarrassing conditions against their rights entitles victims of those acts to compensation. For example in *Glaspy v. Malicoat*, 134 F. Supp. 2d 890, 897 (W.D. Mich. 2001), the court awarded $5000 compensatory and $5000 punitive damages for the temporary confinement of a prison visitor who was not allowed to use the bathroom during "count time" that coincided with a visit to his son. The man suffered the embarrassment and discomfort because he was denied his requests to use the bathroom and publicly urinated in his pants. The court recognized a right to urinate or defecate in reasonable privacy as part of the right against punishment without due process or as "part of the pretrial detainee's basic human needs the government is required to protect."

The mental harm incident to confinement was recognized as valuable also in *Rowell v. Holt,* 850 So. 2d 474,477 (Fla. 2003), where the court awarded $16,500 for the "loss of liberty, including mental anguish inconvenience and embarrassment" caused by detention that was initially lawful, but unnecessarily extended to a total of over 1 week. And in *Occhino v. United States*, 686 F. 2d 1302, 1306 (8th Cir. 1982), the undue emotional and physical distress of conditions of confinement that were unduly harsh was valued at $4000, a sum that might be considerably higher in 2004 dollars than when it was awarded in the early '80s.

Likewise, the court in *Hayes v. Faulkner County,* 285 F. Supp. 2d 1132, 1144-45 (E.D. Ark. 2003), recognized money damages as proper, for harm very similar to that suffered by our class member victims. In *Hayes,* the court remanded the plaintiff's case after it ruled that the plaintiff could recover damages for personal humiliation, embarrassment, mental anguish and emotional distress for undue time spent in confinement while waiting to be brought before a judge after arrest. The court also recognized that part of the harm was the man's pain from sleeping on "a thin mattress on the floor of his over-crowded cell".

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Finally, cases assessing damages for unlawful length of detention demonstrate that damages are properly awarded for emotional harm and loss of rights analogous to what our class members experienced by being held in deprivation of rights guaranteed by the consent agreement. In *Wright v. United States*, 1997 U.S. Dist. LEXIS 15009 (D.D.C. 1997), a wrongful detention case, the court award of $1000 day exemplifies the valuation of a night of enduring psychological discomfort in jail even without any unusual events. The court also canvassed other awards for brief losses of liberty, including $50,000 for 8 hours in one case; $10,000 for 2 hours; $16,000 for 5 hours; and $1,000 for an overnight detention.

Because the plaintiffs' investigation of the violations' impact indicates that many class members may have suffered compensable harm, it is essential for the court to schedule an evidentiary hearing to determine damages and other appropriate remedies.

III. The Defendants' Massive Violations of The Consent Decree Require The Court To Declare That The Defendants Are In Contempt of the Decree and In Breach of the Settlement.

The settlement decree is a court order and it is also a contractual obligation between the parties. *See Frew v. Hawkins*, ___ U.S. ___, 124 S.Ct. 899, 903, 157 L. Ed. 2d 855, 863 (2004). Consent decrees have elements of both contracts and judicial decrees. A consent decree "embodies an agreement of the parties" and is also "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgment and decrees." *Id.; see also Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). Consequential damages are appropriate under either theory for harm resulting from the defendants' breach. The decree decree, moreover, specifically recognizes the court's role in

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enforcing the decree and ruling on whether the defendants are in contempt:

> The Court shall retain jurisdiction for purposes of enforcing this consent decree until it determines that there is substantial compliance. Nothing stated herein shall prevent the plaintiffs from moving the Court for enforcement or contempt upon a claim of non compliance.

(Decree - Part I, section III A).

A. The Court should find the defendants in contempt of the decree.

Compensatory damages are among the sanctions incident to finding a party in contempt of a court order, such as the instant court-supervised settlement agreement. Wisconsin statutes Ch. 785 expressly notes that the court may order money damages to compensate for harm that results from a contempt of court. Notwithstanding the § 785.01 definition of remedial "sanctions" as being for "ongoing" violations, the legislature's reference to *compensation* clearly and logically anticipates such awards for past harms. The relevant sections of the contempt statute are as follows:

> **785.03 Procedure**. (1) Nonsummary procedure. (a) *Remedial sanction.* A person aggrieved by a contempt of court may seek imposition of a remedial sanction for the contempt by filing a motion for that purpose in the proceeding to which the contempt is related. The court, after notice and hearing, may impose a remedial sanction authorized by this chapter.
>
> ***
>
> **785.04 Sanctions authorized. (1)** Remedial sanction. A court may impose one or more of the following remedial sanctions:
>
> (a) Payment of a sum of money *sufficient to compensate a party for a loss or injury suffered by the party as a result of a contempt of court.*

Wis. Stats Chapter 785 (emphasis added).

If this Court finds that defendants violated the decree and that money is necessary to make a victim of the violation whole, compensation for such loss becomes the defendants' prospective obligation and payment is necessary to purge the contempt. *See e.g. Schroeder v. Schroeder,* 100 Wis. 2d 625, 302 N.W.2d 475 (1981) (husband in violation of support orders entitled to make

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payment on debt to purge contempt and avoid jail time). Chapter 785 should be read to include a contemnor's obligations to compensate victims of a violation because courts "have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States,* 384 U.S. 364, 370 (1966); *see also State v. King,* 82 Wis. 2d 124, 36, 262 N.W.2d 80 (1978) (the courts of this states and other jurisdictions have long held that courts possess an inherent contempt power to enforce their orders).

Sanctions for civil contempt are appropriate to coerce the contemnor into compliance, *or to compensate the complainant for losses sustained. United States v. United Mine Workers of America,* 330 U.S. 258, 303-04 (1947). It almost goes without saying that a consent decree, which causes harm to the victims of the violation, entitles the victims to compensation. *See e.g. Roe v. Operation Rescue*, 919 F.2d 857, 868 (3d Cir. 1990) (damages awarded to clinics, in addition to prospective "coercive" fines against contemnors, where clinics lost money in wasted payroll costs, after being able to treat only a small fraction of their scheduled patients, as a result of clinic protest blockades by abortion rights opponents, where protesters actions were in contempt of prior injunction); *see also Int'l Union United Mine Workers of America v. Bagwell,* 512 U.S. 821, 829 (1994) (Money damages are recognized as a permissible civil contempt remedy.)

Inmates are no exception and are entitled to compensatory damages if they suffer harm from government actors' violations of a conditions of confinement injunction. *See Carty v. Farrelly,* 957 F. Supp. 727, 747 (D. V. I. 1997) (in prison conditions case, contempt sanctions may include compensatory fines payable to prisoners); [5] *see also Hutto v. Finney,* 437 U.S. 678, 691 (1978) (civil

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[5] Interestingly, the court in *Carty* found the defendants in contempt for practices including making inmates sleep on the floor (albeit with mattresses). Similar to the conditions in the Milwaukee jail's booking room holding cells, the *Carty* defendants housed five or six inmates in a single cell, where housing more than two required others to sleep on the floor with their heads near the toilet, causing

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contempt may entail compensatory fines to "compensate [] a private party for the consequence of contemnor's disobedience"). "[C]ompensatory fines in civil contempt proceedings are analogous to a tort judgment for damages caused by wrongful conduct: they are 'employed not to vindicate that court's authority but to make reparation to the injured party and to restore the parties to the position they would have held had the injunction been obeyed." *Merriweather v. Sherwood,* 250 F. Supp.2d 391, 394-95 (S.D. N.Y. 2003) (citations omitted).

The defendants' unequivocal, blatant and longstanding violations of the unambiguous mandates of the decree satisfy the elements for finding the defendants in contempt. The defendants' acts were knowing and intentional, as was obvious from the fact that they actually maintained lists of detainees needing showers after three days in booking. *See* Exhibit 6. And as demonstrated by the defendants' being able to end the violations quickly after they were brought to the courts' attention, the violations were clearly within the defendants' control. *See Town of Seymour v. City of Eau Claire,* 112 Wis. 2d 33, 318, 332 N.W.2d 821 (Ct. App. 1983) (violation must be intentional and not beyond the party's control). And the decree mandates were clear and specific. *See Stotler & Co. v. Able,* 870 F. 2d 1158, 1163 (7th Cir. 1989) (court order or decree must clearly and specifically prohibit the challenged behavior). To preclude a finding of contempt, in turn, the defendants must demonstrate – not by mere assertions but by presenting evidence – that they have taken "all reasonable steps" toward compliance. Mere good faith efforts do not suffice. Indeed, evidence of good faith is relevant only to gauge the extent of contempt sanctions. *See Carty, supra,* at 743.

B. The Court should find that the defendants breached the settlement.

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unsanitary conditions, tension and violence. *Id.* at p. 735.

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This court also has the authority to award damages as a remedy for defendants' breach of the court approved settlement agreement. A written settlement agreement is an enforceable contract. *See, e.g., Kocinski v. Home Ins. Co.*, 154 Wis.2d 56, 6768, 452 N.W.2d 360, 365-66 (1990); *Klein v. Board of Regents*, 2003 WI App. 118, ¶ 14, 265 Wis.2d 543, 552 666 N.W.2d 67, 72. A settlement agreement embodied in a consent order is also enforceable as a contract. *See State v. Peppertree Resort Villas, Inc.*, 2002 WI App. 207, ¶ 13, 257 Wis.2d 421, 431-32, 651 N.W.2d 345, 350-51; *Klein*, 2003 WI App. 118 at ¶¶ 16-17. Indeed, courts should be particularly diligent in enforcing agreements resolving litigation. "The law strongly favors settlement of litigation, and there is a compelling public interest and policy in upholding and enforcing settlement agreements voluntarily entered into." *Hemstreet v. Spiegel, Inc.*, 851 F.2d 348, 350 (Fed. Cir. 1988). To permit the defendants in this case "to escape [their] obligation[s] under the settlement would seriously decrease the willingness of parties to settle litigation on mutually agreeable terms and thus weaken the efficacy of settlement generally." *Id.*

A plaintiff's choice of remedies for breach of a settlement agreement include: (1) rescinding the agreement; (2) awarding damages for breach; and (3) enforcing the agreement, through contempt or a similar mechanism. *See* 15A Am. Jur.2d, Compromise & Settlement §§ 49-51; Joel E. Smith, "Contempt for Violation of Compromise and Settlement the Terms of Which Were Approved by Court but Not Incorporated in Court Order, Decree or Judgment," 84 ALR3d 1047. If the action resolved by the settlement has not been dismissed, the aggrieved party may, by motion, seek enforcement in the original action rather than filing a new action. *See Hensley v. Alcon Laboratories, Inc.*, 277 F.3d 535, 540 (4th Cir. 2002); 15A Am. Jr.2d, Compromise & Settlement §§ 49.

There can be no dispute that the parties to this case have entered into a valid and enforceable settlement agreement, supported by the consideration of avoiding the cost, expense and uncertainty of

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continued litigation. The settlement agreement itself contemplates this Court's enforcement of the terms of the agreement. Part I, Sec. III. A. There can also be no dispute that the defendants breached the express terms of Part I, sections II.C. and II.D. of the settlement agreement by holding detainees in the booking room and/or without an approved bed in excess of 30 hours. Defendants also breached Part I, section II.D. of the agreement by failing to keep the number of people in the booking room below 110 and by concealing the number of people in booking by moving them out of the booking room shortly before the midnight count.

The defendants' violations caused undue suffering and loss of rights, harms that would be compensable if arising in a torts or civil rights context, that was the direct consequence of the defendants' breach of the settlement agreement. The plaintiffs are entitled, therefore, to a determination that the defendants breached the agreement. This finding in turn requires that the court schedule an evidentiary hearing to establish the appropriate compensation and other additional remedies necessary to prevent future breach.

Conclusion

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For the foregoing reasons, the plaintiffs request that this court enter an order finding that the defendants have: (a) violated the 30 hour length of stay in booking restrictions by holding more than 13,000 detainees in violation of the rule; (b) violated the population cap and reporting provisions of the settlement agreement and decree by failing to report detainees in booking status who were temporarily moved out of booking at the count time; and (c) violated the population cap and reporting provisions of the settlement agreement and decree by maintaining the booking room at populations in excess of 110, while concealing the extent of booking crowding. The plaintiffs also request that, upon a finding that the defendants violated the settlement agreement and decree, the court set a schedule for discovery and for a hearing as to appropriate remedies, including compensation, for those whose rights under the settlement agreement and decree were violated.

Respectfully submitted,

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