UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
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RALPH COLEMAN, ET AL., Plaintiff, v. GAVIN NEWSOM, ET AL., Defendants.	) Docket No. 90-CV-520) Sacramento, California) October 23, 2019) 2:00 p.m.))) Re: Evidentiary Hearing) Day 4)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE KIMBERLY J. MUELLER
UNITED STATES DISTRICT JUDGE

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(Appearances cont'd next page.)

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SACRAMENTO, CALIFORNIA, WEDNESDAY, OCTOBER 23, 2019

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(In open court.)

THE CLERK: Calling civil case 90-520, Coleman, et al. v. Newsom, et al. This is on for an evidentiary hearing, and today is day four.

THE COURT: All right. Good afternoon. Appearances just for the record for the plaintiffs.

MS. ELLS: Good afternoon, Your Honor; Lisa Ells, Michael Bien, Cara Trapani, Jessica Winter for the plaintiff class.

THE COURT: Good afternoon to you.

MR. LEWIS: Good afternoon, Your Honor, Kyle Lewis, Roman Silberfeld, Glenn Danas, Adriano Hrvatin and Elise Thorn.

THE COURT: Good afternoon to all of you. And in the audience, we have?

MS. MUSELL: Good morning, Your Honor; Wendy Musell on behalf of Drs. Golding and Gonzalez.

THE COURT: And Dr. Golding is not present. Is Dr. Gonzalez present, just so it's clear?

MS. MUSELL: Yes. She's present in the courtroom, Your Honor.

THE COURT: All right. All right. In the courtroom, Mr. Walsh is representing the Special Master, Mr. Kerry Walsh.

And the Special Master, Mr. Lopes, are you on the

telephone?

MR. LOPES: I am, Your Honor.

THE COURT: All right. I am prepared to provide my summary of how I size up the conclusions that are appropriate based on the Golding proceedings, and it will take me some time to do that, so I'm going to primarily read, explain as I go along. I've obviously done this on a pretty short time frame, but I'm confident that this represents my core conclusions based on what I've seen, heard, read, and considered. And then I will memorialize, as soon as I can, in a written order with full record support.

I feel the need, given what has happened here, to step way back and invoke the overarching reason that we are here in this case. And so I am going to just remind folks of what judges before me have said.

"Whatever rights one may lose at the prison gates, Eighth Amendment protections are not forfeited by one's prior acts. Mechanical deference to the findings of state prison officials in the context of the Eighth Amendment would reduce that provision to a nullity in precisely the context where it is most necessary. The ultimate duty of the federal court to order that conditions of state confinement be altered where necessary to eliminate cruel and unusual punishment is well established." The district judge who preceded me in one of his remedial orders.

At this critical juncture, it bears repeating as that same judge said in 2013, not so very long ago, that "The Eighth Amendment violation in this action is defendant's severe and unlawful mistreatment of prisoners with serious mental disorders through grossly inadequate supervision of mental healthcare."

Before that, in 2011, the Supreme Court had observed "For years the mental healthcare provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well-documented result."

Once an Eighth Amendment violation is found and injunctive relief ordered, the focus shifts to remediation of the serious deprivations that form the objective component of the identified Eighth Amendment violation. Remediation can be accomplished by compliance with targeted orders for relief, as the Court has issued here, or by establishing that the violation has been remedied in another way. The Court is aware of that alternative, but here the Court is called on, this Court, is called upon to make clear what should be patently obvious, and that is that remediation may not be accomplished by end runs and hiding the ball to create a false picture to the Court.

This Court is so called because Dr. Golding, followed by Dr. Gonzalez, just before defendants planned to submit a

staffing proposal seeking permission to very significantly reduce the number of psychiatrists serving the mental health population, a proposal plaintiffs indicate they were poised to accept, Dr. Golding came forward. Needless to say, the plaintiffs' acceptance was withdrawn, and plaintiffs to this day have made clear their trust has not been restored.

Once Dr. Golding issued his report -- I've looked back at the history of what's happened in this case. The defendants rushed in with a defense telling this Court that no investigation was needed. The Court, however, determined that the seriousness of the allegations required a process to ensure full, fair and transparent consideration of the allegations and at that point just that, allegations.

The Court, again, through a deliberative process, ultimately identified a neutral expert with unassailable credentials to investigate and report without delegating to that expert any of the Court's authority or responsibility to ultimately resolve the questions Dr. Golding raised.

Based on the neutral's report and Dr. Golding's report, the Court has now conducted its own further development and evaluation of the record, including in the last week. And I have to say the proceedings, particularly the most recent proceedings, have borne out in the Court's mind the necessity of the approach it's taken, even though it has taken some time.

Since the neutral expert provided his report, which

helped focus the Court's exercise of its authority, the Court has signaled more than once that defendants have had the opportunity to come forward and come clean and not just by acknowledging that problems have occurred. And I do want to acknowledge the steps that defendants have taken.

In fact, as of July 22nd, as the Court has memorialized in an August 2019 order, the defendants have admitted that misleading information was provided to the Court. There are at least two court filings on the docket that embody the acknowledgment that the redefinition of monthly in the business rules resulted in the reporting of misleading data and data reported in two separate filings. The defendants acknowledge the hub certification letters were based on data generated with erroneous business rules. Misleading information was provided to the Court, make no mistake.

The defendants have had the opportunity to fully cleanse and purge the record of misleading information. They have filed errata, some only as recently as the last week or two. There are objections pending I will resolve. I'm not going to resolve those from the bench today. But I note that at least some errata have been filed, some only very recently. Most importantly, though, nothing has prevented defendants from coming forward to provide a cogent, believable, supported, full-blown explanation as to why misleading information was provided. And without an understanding of the why, a proper

solution simply cannot be identified.

At best, defendants have offered various explanations, including in closing yesterday, of inadvertent errors, program guide vagueness, innocent absences of system course correctors, but it's because the defendants have not answered the fundamental question of why, the Court has gone in search of it herself. I have reached the core conclusions I'm sharing with the parties today and, again, my order in full will issue. But just to review the framing of the most recent proceedings, and to review the neutral expert's conclusions, which, as I signaled in a passing comment to Mr. Silberfeld yesterday were essentially conclusions helped to focus the Court's own work, it is ultimately for this Court to make the decisions called for by Dr. Golding's report. And while it is possible to find some parts of the neutral expert's report that could be read as exonerating defendants, I think it has to be said the neutral expert himself did not let defendants off the hook. Rather, he pointed to serious examples of misleading information being presented or apparently presented.

Wherever the neutral expert pointed to or suggested that presentation of misleading data, the record now before the Court bears out his observations and then some. Just a few examples: The business rule change redefining monthly to lengthen intervals between EOP appointments from 30 to 45 days. That rule, while in effect, generated misleading data about

CDCR compliance with routine EOP evaluations. That's the neutral expert's report.

CDCR's reporting of timely psychiatry contacts overstated CDCR's compliance with program guide timeline requirements. The data presented to the Court and the Special Master was inconsistent with those requirements and made CDCR reports appear more compliant with the program guide than it actually was.

And thirdly, just among examples, CDCR should have been aware many psychiatrists were not reporting whether visits were nonconfidential. Therefore, reports to the Special Master and the Court were misleading because erroneously skewed towards confidential evaluations.

To quote the neutral, "EHRS data on compliance with program guide timelines for compliance with psychiatric evaluations is potentially misleading because it includes nonconfidential encounters."

So after review of that report, the Court narrowed the focus for development of evidence to three areas to facilitate reaching its own conclusions. Everyone here knows those three areas, the 30 to 45-day change, the monthly definition being exploited, "appointments seen as scheduled" indicator and the supervising psychiatrists acting as line staff.

I want to address my preparations for the hearings we had last week. Before hearing, as the parties know, the Court

did review quite a few documents, essentially a banker's box full of documents claimed as confidential by defendants and not provided to the neutral. I had several in camera discussions with defendants in assessing claims of confidentiality. A record has been created. It will be sealed, but it's created.

Regarding the confidential documents, the defendants have resisted at every turn any reliance by the Court on any portion of any document covered by a claim of privilege. As I've said before in this courtroom, if the Court were to have relied on any such document, I would have disclosed the document to the plaintiffs for full and transparent proceedings.

Having reflected on defendant's position, which has been consistent, if hard fought, the Court declines to engage the questions raised by the privilege claims more fully.

My general impression is that defendants have overreached in a number of instances, while certain of their claims might be sustained if not waived by the positions defendants have taken during the Golding proceedings.

But to venture into that thicket would lead the Court and all of us astray and be a litigation adventure of the kind that I have been trying to discourage in this case while recognizing the parties' rights to go there.

I am today making a record of my general conclusions based on the review of those documents, and I'm doing so now in

summary form. Nothing in the documents provided the Court is the proverbial "smoking gun." Nothing in the documents supports a conclusion, including by inference, that anyone involved in presenting misleading information to the Court committed intentional fraud. And I'm talking now about the confidential documents specifically. I'll come back to a more general conclusion towards the end of my observations.

If there were unwritten directions to engage in intentional fraud or the equivalent, the author left no trail. Rather, the picture that emerges from the documents is consistent with the picture emerging from the public record completed here in open court. It is the public record on which the Court relies in making its findings and drawing its conclusions here.

One minor note, I did have in camera discussions with the defendants about one document in particular. A portion of that document the defendants agree is not subject to a claim of privilege. And that's a document that is currently identified as CDCR crib 409 to 412. And Ms. Thorn will know certainly what I'm talking about. I'm directing the defendants to file the nonprivileged portion of that document with the plan that it references because it may be relevant to what happens following these proceedings. And the plan it references is the Healthcare Services Performance Improvement Plan, 2016 to 2018. The Court may not be looking in the right places, but it hasn't

been able to find that plan on its own.

Relatedly, with respect to the record, I'm confirming that I'm accepting the declarations of Mr. Onishi, Mr. Weber and Ms. Bentz, in lieu of their live testimony. That probably is implicit from the way the proceedings wrapped up, but I'm accepting the parties' stipulations and their declarations the Court considers to be part of the record.

So I have findings and I first want to -- I felt it necessary to consider the testimony of certain witnesses, and so I'm going to provide summary assessments of witnesses before I lead into conclusions based on the subject areas that the hearing covered. And I think it's part of the clarifying, cleansing and purging that's required at this stage.

So first, Dr. Golding. Based on Dr. Golding's testimony, observing him, listening to him on the stand, I find him credible. I find his observations and conclusions overall are well-founded. He acknowledges there can be margins of error. He says he's not a stickler, but here there were boundaries crossed that he could not countenance. He's not a data guy, and I don't think he held himself out to be a data guy, but he did, looking at the totality of the record, call in a team of people who do understand the data, and those persons' analyses, and that includes Dr. Gonzalez's analysis of some of what was going on informed Dr. Golding's conclusions.

The defendants suggest that Dr. Golding disagrees with

everyone. Now, I don't know Dr. Golding apart from what I've seen here in the courtroom and in his written report, so he may well have a disagreeable streak. I'm not here to make that judgment. But even if he does, I would just observe that ofttimes it takes a difficult person to see a problem and to right a wrong.

Dr. Golding may have a pro psychiatry bias. That would be understandable. He is the defendant's own chief of psychiatry. That bias does not mean his report and his testimony is stripped of value. I have considered the question because the defendants have argued that that bias is critical in assessing his credibility, but I find still his testimony is sound, his report is fundamentally sound. There are a few exceptions I'm going to get to and note for now.

Moreover, Dr. Golding is not alone in his assessment of what's happened here, and I think the defendants' characterization of his views does not fail to account for the views of Dr. Gonzalez and Dr. Kuich. Dr. Gonzalez's report and Dr. Kuich's deposition, both in the record, are required reading to understand the totality of the record before the Court. And I would say that Dr. Kuich's deposition is like reading a good book, regardless of whose side you're on. He provides a very helpful narrative, explaining context in a way that fits with the rest of the essential pieces of the evidence here. And he manages to interject colorful language that keeps

the reader's attention, such as being "gobsmacked" when he sees, you know, dashboards turn from red to green or understanding the reasons for that. He talks about the reptilian brain. Required reading, I think, for everyone here.

So in terms of Dr. Golding's ultimate position when it comes to the three areas that the Court probed through the hearing on the 30 to 45 days, the key takeaways are psychiatry was not consulted in advance, certainly not the second time around. Psychiatry learned only after investigating with Drs. Gonzalez and Kuich doing much of the legwork trying to figure out why those dashboards turned from red to green dramatically overnight.

The Court notes that Dr. Golding continues to have concerns about what he calls "disambiguation," precluding proper analysis resulting from the merging of data from both CCCMS and the EOP. He may be right, but that's beyond the Court's purview at this point. At most, I would refer that issue to the Special Master.

On the "appointments seen as scheduled" indicator, while the defendants argue that indicator is not tied to the Coleman program guide, Dr. Golding is correct that the Special Master relies on information generated using that indicator in conducting his monitoring.

While the indicator has revised, here as well Dr. Golding believes it still does not allow reporting of

appointments that are missed.

I listened carefully, have thought about what Dr. Ceballos has said, including her view that Dr. Golding doesn't understand the data. That may be, but given that the processes have not been in place to make data methodology fully transparent and understandable, including to the chief psychiatrist, who is a key stakeholder, I'm not reaching ultimate conclusions on that point. Again, perhaps something for the Special Master to get to the bottom of.

In terms of supervisors acting as line staff, Dr. Golding's observations are well-founded. Here, again, they're bolstered by Dr. Kuich's very clear explanations for the reasons that clear data matter.

It did matter to me to understand why Dr. Golding felt unable to surface his concerns internally. Courts generally like exhaustion. The Court wants to know that there's an internal process for someone who has concerns to work through those, and that would be the sign of a healthy organization. But here, again, Dr. Golding's narrative is supported by Dr. Gonzalez and Dr. Kuich. And I'll get into that in a bit. His explanation for providing the report to the receiver instead of the Special Master, despite its implications for the Coleman case, also make sense in context.

Where I'm not accepting Dr. Golding's conclusions, just so it's clear, they're fairly minor, but they don't

materially -- and they don't materially affect my conclusions here, I don't find support in the record for his strong belief that the Governor's Office -- essentially his strong belief that the Governor's Office directed the provision of misleading data. I have an observation about that, but I'm not accepting his strong conclusion.

I also can't get to the bottom of Dr. Golding's belief that Ms. Tebrock told him that his telling her of fraud was sufficient to quote/unquote unburden himself because she's an officer of the court, based on the current record. Ms. Tebrock denies saying that. It may be that attorneys use language in a certain way that means something else to others not in the attorney's discipline. Apart from that cautionary observation, I'm not feeling the need to resolve that question.

In terms of other key witnesses, I'm not going to cover every witness here today, but I do want to give a sense of how I size up testimony. And I can't say that I take great pleasure in doing this, but I think it's a part of my job at this stage, given what the Court has heard and seen.

So first, Ms. Tebrock. On the one hand, I don't find Ms. Tebrock not credible, but I found her testimony ultimately disappointing for the lack of full acceptance and the absence of leadership that it displayed, given her obvious intelligence and her significant abilities. And the Court has no reason to disbelieve that she loved and cared about her job.

Perhaps she, as others, I believe, perhaps she is/was a victim of bureaucratic dysfunction and not given adequate training and support to manage in a very complex environment, but Ms. Tebrock signed key declarations in this case in the relevant time period, and she did not ask anyone to correct any reports or filings she made to this Court after becoming aware of Dr. Golding's report. She did testify last week in this Court that if given the chance, she would correct, but that comes across as more than a day late and many, many dollars short.

The Court, as it has noted, has provided the defendants the chance many months now to correct the record, and so the chance has been provided.

I also find Ms. Tebrock's handling of the staffing proposal inexplicably constrained, as if designed to preclude meaningful input from psychiatry, and it informs the Court's disappointment.

The defense argues that Ms. Tebrock was, at all times, available to Dr. Golding; but as I've signaled, I find her carefully curing interactions with him lacking. I'm not saying that was the sum total of her interactions, but she was a leader in that department. In particular, her explanation of the need to keep the precise wording of court documents close to the vest and controlled by lawyers alone is completely unsatisfactory to this Court, and that verges on a part of the

foundation of how misleading information got to the Court.

Dr. Ceballos. As the plaintiffs point out, Dr. Ceballos, the psychologist, designed CQIT, the tool central to defendants demonstrating they are in compliance with Coleman court orders; and, yet, her testimony betrayed little to no appreciation for the letter or the spirit of those orders.

She maintained, for the bulk of her testimony, a false distinction between internal and external data and seemed to think of her role as a limited role of just being a clinician.

The Special Master has considered her in the past a key contact. I raised that with her, a person they assumed would report changes affecting the substance of Coleman to them. But as the record documents, when Dr. Golding asked her initially, Dr. Ceballos said the Court had not been notified of the 30 to 45-day change and said, "Well, we don't inform the Court about every change, only major changes that have significant impact." And Dr. Ceballos has been consistent in her testimony that she thought the change fell within the program guide's requirement of monthly and that this was purely a decision to help the field improve patient continuity of care and quote/unquote "very clearly within the policy requirements," but her clarity on that point is -- goes too far. And given her significant role and her significant contact position with the Special Master's Office, it is -- it's fair for the Special Master, if he so decides. It's for

him ultimately to decide. But if the trust previously placed on Dr. Ceballos is out the window, it would be believable and hard to imagine that it could be restored.

The Court believes the change from 30 to 45 days is a material change because it affected reporting to the Special Master and, therefore, the Court.

Dr. Leidner, plaintiffs argue that Dr. Leidner cannot claim ignorance of the context in which he works or worked. Having testified in the 2013 termination proceedings before the Court, they also point to his belated discovery of an error or not even his own discovery of an error with respect to the PIP indicator. While both are true, in this respect I -- I do not accept the plaintiff's assessment of Dr. Leidner. I see him, although a psychologist, in a more positive light.

Given that the record suggests he was working at the direction of others, working diligently in a dysfunctional system, he should have been more aware. He was working diligently while making human errors, but he was not the key decision-maker, as the Court sees it, with respect to the matters that the Court has probed here.

In a properly designed structure with proper supervision, it appears to this Court that Dr. Leidner could, even today, continue to play an important role, given his significant skills.

And as importantly, as someone who assesses

credibility, the Court believes Dr. Leidner distinguished himself here by exhibiting a conscience on the stand. He understands he made mistakes, and he didn't seem to shrink from accepting that and explaining that, in fact, he had.

So make no mistake here, Dr. Leidner did not depart his position in CDCR Mental Health based on anything the Court has observed about his role as related to the Golding proceedings.

Those are the witnesses whose testimony I'm sharing my assessment of at this point in time. And therefore, I'm going to move on to my conclusions regarding the substantive areas covered by the proceedings.

So the 30 to 45 days, you've already heard me say this, but that change was a material change inconsistent with the program guide as implemented through a long period of practice. It should have been thoroughly vetted before any implementation.

While the defendants argue the change was prompted by a request from the field to improve continuity of care, that does not go far enough to explain the change, I believe. The requests did come from the field, a medication admin at CHCF, and there was apparently some relief provided to psychiatrists seeing patients. They could go on vacation and still see the same patient in a reasonable time frame, as the folks who made the change saw it at the time. But the request went nowhere

the first time because Dr. Golding did not approve it.

The second time, at a critical time with respect to one of the Special Master's monitoring rounds, the request sailed through without any checking with psychiatry. And, again, it did materially affect reporting to the Special Master.

Specifically the rule change affected a period where the Special Master had been tasked with receiving monthly updates on the status of defendant's implementation of their staffing plan and filing a stand-alone report on the status of mental health staffing and, again, implementation of that plan.

So here I find plaintiff's suggestion the Court draw an inference of willfulness is quite persuasive. At a minimum, it's a matter of willful blindness or reckless indifference, given the context in which the decision was made.

In terms of appointments seen as scheduled, here there was a descriptor. The Court got clarity on this issue during the hearings. The descriptor was not changed to track changes to code, and Dr. Leidner fixed it once the error was identified. It appears to the Court the error in not updating was unintentional, but plaintiffs are correct that the descriptor is what's public facing, and so critical to transparency. This kind of error needs a system to catch it promptly, if it happens at all. I question the correction that was made in October of 2018, but it was made through the wrong

kind of identification of the error in the first place.

The Court has the very strong impression at this point in time that the real problem is that the failure to modify coding or the EHR system more broadly to capture data relevant to treatment, that is the real problem that must be fixed.

And the defendants simply are not correct in believing that missed appointments are not relevant to patient care. And here, again, Dr. Kuich's deposition includes a good explanation of why properly tracking missed appointments is relevant. Such tracking contributes to qualitative analysis, which could include identification of a number of trends and patterns at a local institution that currently simply are not available without a very detailed manual tracking, if that occurs. Here as well, I'm going to refer that issue to the Special Master for some more work along the lines that has already begun.

With respect to the appointments seen as scheduled, I do want to credit Dr. Toche's testimony concerning remedial measures to be explored and taken, assuming transparency and full communication with the Special Master and the Court going forward. And there's much more to be done to assure that. I'll talk about that in just a moment.

The third area, supervising psychiatrists acting as line staff. Here defendants contend that Ms. Ponciano's analysis was not intended to show how much supervisor time was required but, instead, to ascertain how much clinical time, how

many line staff going forward was required in the field. But here as well, I conclude defendant's argument misses the point or at least the full point.

Ms. Ponciano's analysis masked the time that supervisors spent providing line care and yielded a number that was significantly understated. And here it appears Golding did attempt to surface the issue -- Dr. Golding attempted to surface the issue at meetings where he was representing psychiatry. Here Dr. Golding and Dr. Kuich disagree on the percentage of time that supervisors spend providing line care. I don't think anyone disagrees that some provision of line care is appropriate and not out of line, but Dr. Golding estimates it's 50 percent. Dr. Kuich estimates a third to a half of their time. But regardless of what range the Court credits, supervisors have clinical responsibilities far in excess of those contemplated by the 2009 staffing plan.

I would note that Ms. Ponciano testified that the results of her analysis showed that if supervisor contacts were removed from timely CCCMS contacts, it would have shown that those patients were being seen on average .98 times every 90 days rather than 1.07 times every 90 days. That analysis was not shared with the Court or the Special Master prior to these proceedings.

Ultimately, with respect to this indicator, here again, I think Dr. Kuich provides a narrative that rings true.

"Psychiatrists were practicing in an environment that, among other things, causes data to have to be massaged in certain ways to allow information to be more presentable to say we don't need psychiatrists so we can get out of the lawsuit."

He testified, "The more you automate this process to make sure that compliance happens, the more you take control out of the clinician to be able to determine what's clinically relevant for that patient." And that approach runs counter to a key principle articulated in this case since the very beginning, since 1995 at least, and that is, "In order to provide inmates with access to constitutionally adequate mental healthcare, defendants must employ mental health staff in sufficient numbers to identify and treat, in an individualized manner, those treatable inmates suffering from serious mental disorders." That's this case, 1995.

There's some backdrop concerns that emerged for the Court, and I'll just touch on those because they inform the Court's answer to the "why" question. I do think -- I know there's this: Well, it's psychologist versus psychiatrists, and I'm trying to rise above that, as I think everyone here must. But I think the record as a whole does support the conclusion that psychiatrists were marginalized to the point where their input carried insufficient weight in the decision-making process. It doesn't mean they had to win, but they had to be meaning fully consulted. They are the ones who

take the hippocratic oath.

And so Ms. Tebrock's, with Ms. Brizendine's reading bullet points to Dr. Golding, never showing him the staffing report before it's finalized, asking him to sign something that he could not, it just doesn't cut it.

Ms. Ponciano pulling Dr. Kuich out of another meeting for, as he estimates, about five minutes to run some numbers by him without giving him context, full information or time to evaluate numbers she was putting together to support the staffing proposal. He expressed general concerns. That was it. Ms. Ponciano could say honestly she talked with him. That's not a meaningful discussion of the sort that should be occurring.

Ms. Tebrock and Ms. Brizendine, if not Ms. Ponciano as well, asked Dr. Golding and his team to stop with their own monthly staffing tracking. They were tracking information that CDCR has said could not be tracked. They were asked to stop doing that. So marginalization of psychiatry is a backdrop. I heard Dr. Toche say she's aware of an issue there. I don't know how she defines it, but she's aware of an issue and she's working on it, and I credit her with that.

A second backdrop is what can only be described as significant bureaucratic dysfunction and negative messaging preventing internal reporting or hearing internal reports when key persons attempt to make them.

So while Dr. Golding may have put a target on Ms. Tebrock's back, the context that he describes and for which she had responsibility as a leader is concerning. He had the impression, credibly, that he was not able to speak to the Special Master. That was the impression that was corrected after his report was filed.

He credibly said he was told to wait to talk about his staffing concerns until some date after the staffing report was planned for filing with the Court.

He provided -- he went as far as to provide his report to the receiver for clearly articulated reasons that signaled his concern about reporting it up through the Coleman chain of command.

Dr. Kuich here as well describes multiple instances where he says he just gave up on trying to report, on trying to make changes that he saw as necessary because they were never heard.

Dr. Ponciano, she may be a very diligent public servant, and she's credible in her testimony as far as it goes, but she is in administration. She oversees operations and labor negotiations, and that's the person who was tasked with coming up with the numbers of psychiatrists to hire and to cut and did not have the full knowledge base to reach a meaningful conclusion that satisfies the Coleman Court requirements.

A third backdrop, the boundaries that should be in

place between PLATA and Coleman, despite their overlaps, were not being policed. And I'm just talking about the Coleman side of the house. So the "appointments seen as scheduled" indicator was adopted, an indicator developed by the receiver's team without any tailoring. The receiver's team makes changes to healthcare business rules that affect mental healthcare indicators, and it's the receiver's team running validation on code.

I'm not pointing at the receiver as the source of a problem here. It's for mental health. It's for the Coleman side of the house to push back and maintain the line. And in many instances, it appears that has not happened.

Mental health QM was heavily involved in development of the EHRS, and many of psychiatry's requests for a solution to critical scheduling problems linked to diagnosis and prescriptions have not been incorporated into EHRS. EHRS is not tailored, as far as the Court can tell, to the mental health concerns in the Coleman case; examples being that a person who enters data can self-select their own title, doesn't allow tracking of key treatment data. And it's not clear to this Court that psychiatrists, who are relied upon to enter data, were ever fully properly trained. I've heard the defense say they acknowledge a need for more training. I think it might need to be a more robust process than sending memos to the field.

Another backdrop I would just observe, it appears to the Court there's a proliferation of committees and subcommittees. I realize some of them are on hold, but there are committees, there are subcommittees, there are mental health subcommittees, receiver committees, the webinars. Dr. Toche at least has acknowledged the limitations of the webinars that were being held.

And there's a clear system in place for improving transparency with respect to coding changes, but I am asking for a list, just so you know, from the Special Master and the receiver, so I can see what all the committees are, even if they've been put on hold, to try to understand the structure. I think the structure does not support the goals of the Coleman case currently. So the fundamental question of why, which informs what the solutions here must be.

I think there was a laser focus. The defendants adopted a laser focus on an effort to obtain termination of Court supervision, which led to a stark "ends justifying the means" scenario, and it appears that they lost complete sight of the reasons that remediation has been required in this case for some time.

Mr. Bien asked the one question going to the heart of that, that issue of Dr. Toche. She was not prepared for it, to her credit. She said she needed to think about it, and I do believe her that she will think about it and be thoughtful in

solutions that she may propose going forward. But it should be clear to everyone here -- and this Court has not felt the need to say it, but legal cases are not just words on a piece of paper, and I think it needs to be said at this point in time legal cases have hearts and souls. And there was never a question in this Court's mind but that the predecessor judge, Judge Karlton, put his heart and his soul into this case, as reflected in his orders, which stand today. And this case cries out for every single player to consult their hearts daily and keep their eyes daily on those souls who are the mentally ill housed behind bars in this state who have the absolute, undeniable right to adequate treatment and care, constitutionally adequate care.

So how did the defendants lose sight? I do think timing played a role, awareness of Special Masters' rounds, I think the end of a prior governor's term. There's no evidence, I repeat, that anyone in the Governor's Office ever instructed any player to mislead, but the neutral expert's report does capture an interaction that I think provides some insight.

In March of 2017, Ms. Tebrock sent an email noting that the Governor's Office had asked to explain in more detail what metrics can be used to show that the care by psychiatry is adequate. What metrics can be used to show that the care by psychiatry is adequate. I think when a Governor's Office asks those who work for it in the agencies to jump, it is natural

that those in the agencies may say "How high?" On the one hand, I believe there was attention to data and an effort to review the data and to make certain it was data generated from the data warehouse ultimately through the Coleman indicators, but with the direction that the job was to show that care was adequate. So the chosen method to lay groundwork for litigation.

Ms. Tebrock's explanation of the need for lawyers to wordsmith the court documents as a reason for not showing the staffing report to Dr. Golding exposes that "ends justifying the means" approach, as opposed to engaging in responsible problem solving. I think it's fair to say that litigation trumped substantive compliance. And so far, at least, that road has not worked for the defendants.

It's not for this Court to tell either party how to litigate its case, if it chooses litigation, and if it believes it has that right, but I would just make an observation that given the litigation results to date, following that road has exacted a steep, steep price. And that price is at the cost of the plaintiff class.

Other examples? Getting the dashboards from red to green. And here, again, Dr. Kuich provides a narrative explanation that pulls it together, having heard the other testimony in the case. His observation, someone who's left the department: "Mental health felt that they were performing very

well in many areas, that they could police themselves with data" -- that echos Dr. Ceballos's testimony -- "that they were a structure. That they were sustainable. And the only piece that was the problem was that there weren't enough psychiatrists. And so if there was some way to show that with fewer psychiatrists we were meeting the metrics, that final block would tumble, and there would be no basis for the lawsuit." If dashboards turn from red to green, it helps demonstrate there's no need for the lawsuit.

Before turning to some overarching conclusions, I just want to note, the Court has often thought that there's some irony, given the structure of this case, that defendants have so often resorted to litigation. The Special Master approach, carefully constructed by my predecessor actually moderates court intervention into defendant's own efforts to remediate, in contrast to a receivership.

And so, arguably, it's more respectful and more hopeful that defendants can figure this out on themselves -- by themselves. It does mean that the Court relies on defendants' representations to the Court. And so if the approach of using a Special Master has, in some way, contributed to the problems here, there is at least irony, if not a need to revisit the structure because at this point, as the parties now know, the Court cannot help but conclude that the status of defendant's representations is in doubt.

So the overarching conclusions. In determining whether there has been fraud on the Court, the relevant inquiry is whether the conduct at issue harmed the integrity of the judicial process. Most fraud on the Court cases involve a scheme by one party to hide a key fact from the Court and the opposing party. It's a high standard. The Court does not find the kind of scheme necessary for fraud satisfied here.

Plaintiffs, I listened carefully yesterday -- plaintiffs urged instead that the Court find that defendants acted knowingly in presenting misleading information.

The defendants argue that the Court took no action, based on incorrect data. The Court did not approve the staffing plan, they say, but that is because it blew up in the face of Dr. Golding's report followed by Dr. Gonzalez's report. And that is thanks to Dr. Golding.

It is the case that the Special Master, an arm of the Court, has received data and relied on it in monitoring rounds.

It is the case that documents, including hub certification letters, have been filed with the Court. And that means -- again, it should not need repeating, but any document filed with the Court is covered by Federal Rule of Civil Procedure 11, 11(b), which provides that the attorney or other person presenting certifies that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, it is not being

presented for any improper purpose, including needlessly increasing the cost of litigation.

And, as relevant here, the factual contentions have evidentiary support. And documents residing on the Court's docket, there are thousands of such documents in this case, as the parties know.

Even if the Court has not expressly acknowledged it, a document residing on the Court's docket is a tangible thing. It is not merely bits of Os and 1s. It is not a digital remnant. And Rule 11 violations are sanctionable. I'm not going there at this point in time, as you'll hear, but plaintiffs' characterization is well taken, piecing together the evidence and drawing reasonable inferences from the totality of the record before the Court. And so at this point in time, I am prepared to adopt their naming of the defendant's collective provision of misleading information to the Court. They have engaged in knowing presentation of misleading information.

That said, there are hopeful signs. And before turning to remedies, I want to acknowledge those. Dr. Toche presents as a hopeful sign for the future. She has not just arrived on the scene, but she has concrete plans. Her presence here in this courtroom demonstrated her ability to listen, to hear what others are saying. As I said, I have no doubt that she is thinking about how to respond to Mr. Bien's question.

She is looking at structural issues. And so I look forward to hearing what her input may be on any proposal to revive the change committee, the monthly prioritization committee and how that dovetails with CLAC and mental health QM and receiver QM and whatever else is out there; her description of the release note process, formalizing what was going on through very informal webinars; perhaps well-meaning webinars, but not documented in any way that was transparent. It sounds to me as if there's a hopeful process there.

There is a new administration, and with any new administration comes the chance to turn over a new leaf. I have acknowledged Ms. Evans' presence in the courtroom in the past. She is not a witness. There was no need to have her as a witness.

But Ms. Evans and her boss have an opportunity here, I believe, to step into the breach and to take the lessons from what has occurred and move forward in a way that really can bring this case to a conclusion.

When I first inherited this case, I naively said I thought we were on a glide path. We have not been on a glide path, and I'm not going to repeat that image, but I do hope that in the lifetime of this judge as an active judge that this case might come to conclusion. And I don't rule that possibility out, but it has to be because people have learned the lessons from the mistakes and understand the reasons.

Another hopeful sign, that there is a renewed effort to coordinate between the Special Master in Coleman and the Receiver in PLATA with the judges at the table. There has been one meeting with some positive signs, and there will be more such meetings and the Court will be thinking very deliberately about how to structure coordination going forward.

I would caution that no one should rush into the breach before this Court approves any new plan for improved data collection analysis and reporting. I've asked the Special Master to work on that issue. I'm going to ask him to speed up his report back to me. I had given him initially six months. I believe our December status will occur before the six-month period runs. I want this issue on the agenda for our December status.

If the PLATA receiver is the service provider, given the past coordination and the creation of the data warehouse, if that receiver is the service provider for data, it has to be understood this Court and its Special Master are the client, and the client is going to negotiate and make certain that the Coleman class and its interests are served. I, of course, will look to the parties to weigh in on that.

Hopeful signs don't preclude the need for remedies. The plaintiffs have identified a series of remedies. It appears to the Court that the parties agree on certification. The Court has previously required certification. I believe I

heard Mr. Silberfeld say the defendants are willing to certify.

I direct the parties to meet and confer on this question and to present to the Court within 7 days a proposal or their competing proposals for certification.

And I would ask -- in the past I've asked that the defendant certify that they've read past orders. I still believe that's important because there's turnover. It's a long docket. There should be a bible at this point of court orders that are the law of the case that every person working on this case should read. And that's separate from the program guide, which is the bible for remediation. But to understand remediation, as I signaled at the beginning, persons need to understand the history of this case.

The parties can let me know what kind of certification, if any, apart from what is expected of officers of the court and public servants can convey to this Court that the players appreciate the big picture and are not losing sight of the real people behind this case and the reason for the ordered injunctive relief and the reason remediation is being required.

In terms of plaintiff's other proposed remedies, I'm directing that they memorialize those in a brief. It can be a summary brief to be filed within 7 days. Defendants shall respond within 14 days with any opposition. The parties are free to meet and confer. I am prepared to order remedies. And

I'm willing to very seriously consider plaintiff's proposed remedies because, fundamentally, plaintiffs are correct that this is the time to effect a sea change, to make certain that no court is back here again at any time in the future.

I will plan to issue a remedial order before December. If I need to hear from the parties before I do that, I'll set a special hearing.

The targeted remediation called for by these proceedings will allow a long, delayed return to the big picture and the proper focus, a laser focus on quality of care for the patient population. Nothing has prevented working on that while these Golding proceedings have proceeded on a parallel track. It is the case that a focus on the quality of care for the patient population is what will guide defendant's true relief from court oversight.

And once again, in closing, I just want to put in perspective how important it is to maintain the proper focus, however it may be maintained. This is the second time in less than 10 years that defendants have embarked on a litigation strategy that delayed and frustrated compliance with staffing requirements. It was 10 years ago that defendants themselves submitted their 2009 staffing plan to this Court followed by a budget change proposal to the California Legislature to quote/unquote fully implement the staffing model described in that plan.

The budget change proposal described the critical flaws in defendant's prior staffing model and represented that the 2009 staffing plan identifies appropriate staffing levels to meet constitutional standards.

Still today, psychiatrist staffing vacancies hover at the 30 percent mark. The Court has heard many times the explanation of supply and demand. There's insufficient supply, particularly given the location where psychiatrists must serve, to meet the needs of the plaintiff class. But these hearings have provided additional explanations and contributors to the challenge in identifying psychiatrists, I believe, including an uninviting dysfunctional workplace that does not value the essential treatment perspectives that psychiatrists have to offer and creates an atmosphere where morale is low. And so where a change from 30 to 45 days might provide a modicum of relief against that backdrop to solve that problem, here it was misguided and a symptom of an approach marked by a quick, really unthinking fix and applying a very tiny bandage to a festering wound while the infection spreads throughout the body.

So, for now, defendants must come to term with the substance of the staffing plan, involve all key stakeholders in working with the proper focus to satisfy it. The Court believes that is not a litigation focus.

And to continue to relitigate or to turn to data in an

effort to create reports, to provide metrics that make it look as if the goal is being met, is, itself, a form of insanity.

If, after addressing the problems these hearings have exposed, it really is the case the defendants honestly believe that the staffing plan needs to be monitored, their staffing plan, which the Court has adopted, the defendants have the option, as they always have had, of approaching the Court, seeking a modification, explaining in full what the problems are. Any such request would need to be properly justified, honestly supported. It could be, once again, supported by the plaintiffs if they are able to regain their trust with proper remedies following these proceedings. Nothing would prevent the defendants coming forward with a more transformational option. I realize it can be hard to think that way, but one hint of a transformational option was put forth by Judge Karlton in 2014, and the Court wants to read that into the record once again. "California is not alone in criminalizing mental illness," he observed. He was quoting a published article, actually, from a newspaper, but he adopted the perspective. "We've systematically shut down all of the mental health facilities, so the mentally ill have nowhere else to go. The prison system has become the de~facto mental health hospital."

The mental health population numbers have risen since the time the Court has assumed responsibility for this case.

It is this Court's view, as Judge Karlton observed, that many of the problems giving rise to this suit and the ongoing efforts at remediation arise from the inevitable tensions created by the distinct needs of custody supervision and the distinct need for mental healthcare.

If there is a transformational and realistic alternative to the prison as de~facto mental health hospital, this Court is all ears. At the same time, I'm not a dreamer. And so in the meantime, it is the staffing plan in the context of the program guide that charts the way forward and must be put front and center. Data must be fixed, and it must be fixed so that it serves the policies set by this case, not the other way around. The policies must not be drained of meaning to fit a square peg in a round hole. And the data must be fixed with the key stakeholders at the table. It must be, as Dr. Toche recognizes, checked and double checked. The data must be pulled together, gathered and collected in a form that allows the defendants ultimately, when they truly can, accurately to demonstrate to the Court that the Constitution is finally satisfied.

Those are my observations today. I will issue an order memorializing them with greater explanation and record support. I will look for your filings as directed, and I will see you in December, if not before. Thank you very much.

THE CLERK: Court is adjourned.

(Concluded at 3:12 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled matter.

/s/ JENNIFER L. COULTHARD October 30, 2019

DATE

JENNIFER L. COULTHARD, RMR, CRR
Official Court Reporter