

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
WESTERN DIVISION

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ANTONIO LEATHERWOOD, ERIC	)	
HOWARD, JERRY SANFORD, JOHN	)	
LEVINS, MICHAEL PATRICK, and,	)	
individually and on behalf of all present and	)	
future HIV-positive inmates in the Limestone	)	
Correctional Facility in Capshaw, Alabama,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	No. CV-02-BE-2812-W
	)	
DONAL CAMPBELL, Commissioner of the	)	CLASS ACTION
Alabama Department of Corrections, RONALD	)	
CAVANAUGH, Director of Treatment Alabama	)	
Department of Corrections, BILLY MITCHEM,	)	
Warden of Limestone Correctional Facility,	)	
DAVID WISE, Deputy Warden,	)	
	)	
Defendants.	)	

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**MOTION FOR AN ORDER TO SHOW CAUSE**  
**WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT**

Plaintiffs, the present and future HIV infected prisoners at the Limestone Correctional Facility ("Limestone") in Harvest, Alabama, move this Court to enter an *Order to Show Cause* why defendants should not be held in civil contempt for their failure to comply with numerous provisions of the *Settlement Agreement* (DOC #159) in this case. Ten months since the parties signed the *Settlement Agreement* on April 29, 2004, and eight months since the *Order* adopting the *Settlement Agreement* on June 26, 2004 (DOC #165), and the defendants' innumerable assurances to this Court that during the course of this litigation the "DOC was making

improvements” in the medical care and housing provided to HIV prisoners, compliance with the provisions of the *Agreement* is no more closer than the day the document was signed.<sup>1</sup>

Defendants’ inactions not only threaten the health and endangers the lives of the

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<sup>1</sup> In their *Brief in Opposition to Fees/Expenses*, defendants assured this Court that the Alabama Department of Corrections was enacting needed changes in the medical care for HIV prisoners at Limestone, or had implemented changes in the contract with the newly contracted medical provider. In their *Brief in Opposition to Fees/Expenses*, the defendants asserted:

However, as pointed out by the court in *Reedy*, the desirable settlement was the result, just as importantly, of the circumstances of the case: namely, light opposition from the Commissioner of Corrections, who voluntarily stepped in and drastically changed the housing arrangements, terminated an inadequate health care contractor and hired a competent one, and then agreed to a set of standards, many of which were already included in the new provider’s contract, and were in process of implementation, and others which the DOC simply felt ought to be adopted and were perfectly willing to agree to.

See DOC #173, Alabama Department of Corrections’ Brief in Opposition to Fees/Expenses of \$866,00, at 4. In their *Opposition Brief*, defendants’ continued to assure this Court that they had hired a new, “competent” medical provider to provide adequate medical care to HIV prisoners:

These defendants do not deny that there were constitutional inadequacies, but, as hereafter related in more detail, the defendants themselves began a self study which became an important basis for the plaintiffs’ lawsuit, the defendants themselves drastically changed the housing arrangements, fired the inadequate health care provider and replaced it with a competent one, and voluntarily entered into a satisfactory settlement of this case.

Id. at 5 (emphasis in original).

Yet, these assurances of change in the medical care for HIV prisoners did not cease there. In fact, the defendants indicated to this Court that most of the provisions in the *Settlement Agreement* were going to be “voluntarily followed even without litigation.” Id. at 7-8 (“There was simply no reason to subject the taxpayers to the fees and costs of litigating over a set of standards, most of which would be voluntarily followed even without litigation.”). Nevertheless, since the inception of the *Settlement Agreement*, the defendants have woefully failed to comply with the terms of the *Settlement Agreement*. Defendants have **mised** this Court and they have misled us.

plaintiffs, but breaches their commitment to this Court who has expended considerable time, attention, and effort to attempt to ensure that HIV infected prisoners are provided minimal medical care and housing guaranteed by the Eighth Amendment of the United States Constitution.

In support of this Motion, plaintiffs submit the *Quarterly Reports* from the neutral medical consultant -- Dr. Joseph Bick<sup>2</sup>, the letters of Dr. Valda M. Chijide, M.D., the former HIV Specialist at Limestone<sup>3</sup>, and declarations from individual HIV prisoners at Limestone<sup>4</sup>. In addition, plaintiffs state the following:

1. This civil rights case addresses the medical treatment and living conditions provided to the HIV prisoners confined at Limestone. On April 29, 2004, both parties in this case signed a comprehensive *Settlement Agreement*. On June 24, 2004, this Court approved and entered an *Order* adopting the *Settlement Agreement* (DOC #165).

2. The *Settlement Agreement* provides a comprehensive process to informally resolve acts of noncompliance. The steps include:

(1) first, upon any report or observation of noncompliance, the plaintiffs will submit a written description to the defendants addressing the noncompliant act;

(2) second, upon receiving the written complaint from the plaintiffs, the defendants will

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<sup>2</sup>Dr. Joseph Bick's, the neutral medical consultant, *Quarterly Reports* are contained in Exhibits 5 and 6 to this Motion. Dr. Bick's appointment as the neutral medical consultant stems from section 26.1, page 15 of the *Settlement Agreement* and was endorsed and approved by this Court in an Order on June 24, 2004 (DOC #165). Among his court approved duties, Dr. Bick authors a written quarterly report following a one week on-site inspection and examination of all facets of the delivery of medical care to HIV and AIDS prisoners -- Plaintiffs -- at Limestone.

<sup>3</sup>Dr. Valda Chijide's letters are contained in Exhibits 8, 9, 10, and 11 to this Motion.

<sup>4</sup>HIV prisoner declarations are all contained in Exhibit 12 to this Motion.

have fifteen days to resolve the dispute;

(3) third, if after fifteen days, the dispute has not been adequately resolved, the plaintiffs may petition the Special Master for a finding of fact addressing noncompliance.<sup>5</sup>

See §§ 28.1, 28.3, and 28.5 of *Settlement Agreement*, at 18 (DOC #159). Plaintiffs have pursued the informal resolution process described in the *Agreement*. Nevertheless, defendants have chosen not to participate in the process.

3. On December 20, 2004, plaintiffs notified defendants that they were in violation of numerous provisions of the *Settlement Agreement* including: gaps and delays in medication distribution (*Id.*, § 7.1, at 6); waiting several months for routine checkups with the HIV Specialist (*Id.*, § 5.1, at 5); not able to see the doctor for urgent medical needs (*Id.*, § 3.4, at 3); newly arrived HIV prisoners are not being seen by the HIV Specialist when urgent medical needs are identified at intake (*Id.*, § 11.2, at 8); broken windows in the HIV dorms (*Id.*, § 19.1, at 12); inadequate responses to medical emergencies arising in the Health Care Unit (*Id.*, § 3.4, at 3); and no treatment for HIV prisoners co-infected with Hepatitis C (*Id.*, § 8.3, at 7).<sup>6</sup> Defendants have never responded to these noncompliance issues.

4. On January 12, 2005, plaintiffs again notified defendants that they were in violation of the *Settlement Agreement*.<sup>7</sup> In the beginning of January 2005, Dr. Wyndol Hamer, the primary physician at Limestone, left the facility. Plaintiffs notified defendants that Dr. Hamer's absence violated section 3.1 of the *Settlement Agreement*. See § 3.1 of *Settlement Agreement* (DOC

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<sup>5</sup>See §§ 28.1-28.5 of *Settlement Agreement*.

<sup>6</sup>See Exhibit 1, letter from plaintiffs to defendants, dated December 20, 2004.

<sup>7</sup>See Exhibit 2, letter from plaintiffs to defendants, dated January 12, 2005.

#159) (“An HIV Specialist **and** a medical doctor shall provide medical treatment at Limestone Correctional Facility.”) (emphasis added). Defendants have never responded to these noncompliance issues.

5. On January 27, 2005, plaintiffs again notified defendants that they were violating numerous provision of the *Settlement Agreement*. Plaintiffs’ notification was attached to a letter written by Dr. Valda Chijide, M.D., the HIV Specialist at Limestone.<sup>8</sup> Dr. Chijide’s letter provided a detailed description of numerous acts of noncompliance by the defendants. Defendants have never responded to these noncompliance issues.

6. On February 1, 2005, plaintiffs yet again notified defendants that they were violating the provisions of the *Settlement Agreement*.<sup>9</sup> Plaintiffs notified defendants that Dr. Chijide’s placement on administrative leave without an adequately trained replacement, violated section 3.1 of the *Agreement*. See § 3.1 of *Settlement Agreement*, at 2-3 (“An HIV Specialist and a medical doctor shall provide medical treatment at Limestone Correctional Facility.”). Defendants did not respond to this letter. In fact, defendants have **never** responded to any of the plaintiffs’ noncompliant written complaints:

- (1) letter of December 20, 2004. See Exhibit 1;
- (2) letter of January 12, 2005. See Exhibit 2;
- (3) letter of January 27, 2005. See Exhibit 3;
- (4) letter of February 1, 2005. See Exhibit 4.

7. Some limited progress has been made at Limestone. Nevertheless, substantial and very

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<sup>8</sup>See Exhibit 3, letter from plaintiffs to defendants, dated January 27, 2005.

<sup>9</sup>See Exhibit 4, letter from plaintiffs to defendants, dated February 1, 2005.

serious medical care and housing problems exist which endanger the health, safety and lives of the HIV prisoners at Limestone. These problems include: (1) the absence of an HIV Specialist (§ 3.1 of *Settlement Agreement*, at 2-3); the absence of a full time physician (§§ 3.1 and 3.7 of *Settlement Agreement*, at 3); the failure to treat HIV prisoners co-infected with Hepatitis C (§ 8.3 of *Settlement Agreement*, at 7); gaps in the provision of medication (§ 7.1 of *Settlement Agreement*, at 6); inadequate HIV prisoner access to outside specialist medical care (§ 4.4 of *Settlement Agreement*, at 4); and a shortage of nursing staff (§ 3.7 of *Settlement Agreement*, at 4). In each of these areas, defendants are violating the provisions of the *Settlement Agreement*.

## I. AREAS OF NONCOMPLIANCE

### A. Healthcare Staff.

8. Section 3.1 of the *Settlement Agreement* states that “[A]n HIV Specialist **and** a medical doctor shall provide treatment at Limestone Correctional Facility (‘Limestone’).” The Defendants are in violation of section 3.1, one of the core provisions of the *Agreement*. Dr. Valda Chijide, the HIV Specialist at Limestone, was placed on administrative leave and subsequently resigned on February 8, 2005 as the HIV Specialist at Limestone stating:

Pursuant to previous memos you have received and due to lack of organizational and administrative support from Prison Health Services as well as personal abuses I have received, I resign effectively immediately.<sup>10</sup>

Her position has not been replaced. Because Dr. Chijide was placed on administrative leave and then resigned, most HIV prisoners have not seen the HIV Specialist for two weeks or longer. In fact, the lengthy delays in not being examined by the HIV Specialist have caused many HIV

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<sup>10</sup>See Exhibit 11, letter from Dr. Chijide dated January 31, 2005.

prisoners to not be seen in conformance with section 5.1 of the *Settlement Agreement*.<sup>11</sup> The physician positions at Limestone are understaffed which violates numerous provisions of the *Agreement*: section 3.1, pp. 2-3; section 3.7, p. 4.

9. Section 3.4 states that “[P]risoners shall not provide emergency medical treatment to other prisoners.” Medical emergencies that arise in the Limestone Health Care Unit (“HCU”), are often first responded too by prisoner runners. The prisoner runners ask the HIV prisoner in need of medical treatment for a description of their symptoms. The prisoner runner then decides if the HIV prisoner needs to see a nurse. Prisoner runners do not have the necessary training to make these medical decisions. In his November 2004 report, Dr. Bick describes the system:

To call a nurse, the patients use the call system. Because the nurse is not actually in the infirmary, an officer or inmate must be relied upon to go get the nurse. In effect, inmates and correctional staff control access to nurses in the infirmary.

See Exhibit 6, Dr. Joseph Bick November Report 2004, at the *Information Concerning the Infirmary* section. Such actions jeopardize the health, safety, and lives of HIV prisoners and violates the *Settlement Agreement*.

10. Section 4.2 states that all registered nurses and licensed practical nurses shall not make medical decisions outside the scope of their license. Decisions made outside the scope of a person’s medical license threatens the health and lives of HIV prisoners at Limestone.

11. Section 3.7 requires that all staffing levels conform to NCCHC P-C-07 (2003).

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<sup>11</sup> Section 5.1 states:

The HIV Specialist shall see all HIV infected prisoner at least quarterly, or more frequently as medically necessary, which will include: a history, physical examination, and evaluation of current CD4+ levels and viral load. All prisoners with AIDS shall be seen every sixty (60) days.

According to Dr. Bick's November report, medical staff at Limestone is understaffed and fails to comply with the provisions of the *Settlement Agreement*. See Exhibit 6, Dr. Joseph Bick November Report 2004, at section 3.7. ("Because of the intensity of the medical mission at Limestone, I do not believe that the existing physician and RNP staffing conforms to NCCHC P-C-07.").

12. Section 4.4 of the *Settlement Agreement* states that "[I]f Limestone lacks adequate resources for the medical treatment of an HIV infected prisoner, then the prisoner shall be sent to an outside specialist in a timely manner." Defendants are in violation of section 4.4. For example, HIV prisoners have not received physician ordered eye exams and EKG's.<sup>12</sup> Such inadequate access to outside medical specialists and emergency medical care jeopardizes the lives of the HIV prisoners at Limestone.

**B. HIV Medical Treatment at Limestone.**

13. Section 5.1 of the *Settlement Agreement* requires the HIV Specialist to see all HIV prisoners at least quarterly, and sometimes more often if needed, and all AIDS prisoners every sixty days. Defendants continue to violate this provision of the *Settlement Agreement*. Dr. Bick's November 2004 report indicates that HIV and AIDS prisoners are not seen by the HIV Specialist within these time frames. See Exhibit 6, Dr. Bick's November 2004 report, at section 5.1.

14. Section 6.2 of the *Settlement Agreement* provides that: "All prisoners who have, or are suspected to have, contagious tuberculosis, shall be placed in respiratory isolation until they

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<sup>12</sup>See Exhibit 12, Declaration of Paul Edwards, at 2 (received an order for an eye exam and EKG on December 5, 2004 and has not received either an eye exam or EKG as of February 10, 2005)



[have] sic no longer pose a risk to the public health, especially to other HIV infected prisoners.” Since this *Settlement Agreement* has gone into effect, defendants have never been in compliance with this provision. Not only does this violate the provisions of the *Settlement Agreement*, but it also threatens the health, safety, and lives of all of the HIV prisoners at Limestone, the medical staff, and correctional staff.

15. Section 6.3 of the *Settlement Agreement* requires defendants to implement treatment guidelines and minimize the spread of Methicillin Resistant Staphylococcus Aureus (“MRSA”) among HIV prisoners at Limestone.<sup>13</sup> HIV prisoners continue to receive inadequate treatment for MRSA infections. Moreover, HIV prisoners with MRSA have not been adequately isolated from the rest of the HIV population to prevent or minimize a MRSA outbreak among the HIV prison population at Limestone.<sup>14</sup>

### **C. Medication Administration.**

16. Defendants continue to violate section 7.1 of the *Settlement Agreement*. HIV prisoners are not provided their medication at the proper times or in the proper dosages as prescribed by the Food and Drug Administration (“FDA”). Many HIV prisoners have

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<sup>13</sup> Section 6.3 states:

Protocols shall be adopted to minimize the spread of Methicillin Resistant Staphylococcus Aureus (‘MRSA’) among the HIV infected prisoner population at Limestone. The MRSA guidelines will address: (1) prevention, (2) examining and interviewing prisoners at intake and listing MRSA on a prisoner’s “problem list” in their medical chart, (3) diagnosis and treatment, and (4) MRSA outbreak and control protocols.

<sup>14</sup>See Exhibit 12, Declaration of Terry Shelby (he has not received medical treatment for boils on his body), at 1-2; Declaration of Ronald Evans, at 1-3 (he experienced a delay in receiving medication to treat his infection and was taken off medical wash).

experienced dangerous gaps in receiving their antiretroviral medication and other life saving medication.<sup>15</sup> In his February 2005 report, Dr. Bick provides an exhaustive list demonstrating dangerous gaps in the provision of life saving medication for 192 HIV patients at Limestone.<sup>16</sup> Inadequate staffing to appropriately dispense medication is not an adequate explanation and violates section 3.7 of the *Agreement*.

17. Section 7.5 of the *Settlement Agreement* requires defendants to administer medication “to HIV prisoners in strict accordance with the prescriptions -- including directions relating to the timing of HIV medication administration in relation to food and water intake.” As stated previously, defendants continue to violate this provision and fail to ensure that medication is properly dispensed to HIV prisoners.<sup>17</sup>

18. Section 7.3 of the *Settlement Agreement* states that defendants shall provide HIV prisoners with “clear written instructions for medication administration.” Additionally, “[A]ll HIV medications shall be administered, and dispensing documented, consistent with FDA regulations.” Several HIV prisoners have not been provided clear, written instructions addressing their medication administration.

19. Section 7.8 of the *Settlement Agreement* requires defendants to keep medications on their medication formulary that are typically used to treat HIV infection, co-occurring illnesses,

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<sup>15</sup>See Exhibit 12, Declaration of Terry Shelby, at 2 (every month, he has to wait one to two weeks to receive his medication); Declaration of David Keith, at 1-4 (has received his HIV medication, anti-seizure medication, or diarrhea medication inconsistently); Declaration of Richard Berry, at 1 (upon arriving at Limestone, he did not receive his HIV medication for three days) .

<sup>16</sup>See Exhibit 7, Dr. Joseph Bick February 2005 report, at Attachment C.

<sup>17</sup>Id.

and opportunistic infections. Defendants have violated this provision. An inability to timely receive essential HIV and other life saving medications threatens the health and lives of the HIV prisoners.

**D. Hepatitis C Treatment.**

20. Since the adoption of this *Settlement Agreement*, defendants have never been in compliance with section 8.3.<sup>18</sup> In his November 2004 report, Dr. Bick identified several HIV prisoners who may qualify for Hepatitis C treatment. In his February 2005 report, Dr. Bick identified thirty-four additional HIV prisoners who would qualify for Hepatitis C treatment.<sup>19</sup> Several HIV prisoners have been informed that there is no medical treatment being provided to prisoners co-infected with HIV and Hepatitis C.<sup>20</sup> Since the adoption of the *Settlement Agreement*, no HIV patients at Limestone have received Hepatitis C treatment.

**E. Food.**

21. Section 9.5 of the *Settlement Agreement* requires defendants to provide dietary supplementation and medications for HIV prisoners experiencing wasting. Defendants have failed to comply with this provision. Numerous HIV prisoners experience difficulties receiving

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<sup>18</sup> Section 8.3 states:

Treatment of HIV infected prisoners with Hepatitis C shall conform to Baker, et. al. v. Campbell, et. al., settlement agreement dated \_\_, 2004. HIV infected prisoners with symptoms of liver dysfunction and who have a negative HCV antibody test, shall be administered an HCV PCR test, as medically indicated.

<sup>19</sup>See Exhibit 7, Dr. Joseph Bick February 2005 report, at Attachment A.

<sup>20</sup>See Exhibit 12, Declaration of Paul Edwards, at 1-2 (has been informed that no one is receiving Hepatitis C treatment).

Resource and other dietary supplementation needed to prevent wasting.<sup>21</sup>

**F. Medical Emergencies.**

22. Section 10.4 of the *Settlement Agreement* states that during medical emergencies, all medical decisions will be made by an on-site, on-duty medical person. Recently, medical emergency decisions have been made by an off-site physician, Dr. Willard Mosier, located in Montgomery, Alabama. While in Montgomery, Dr. Mosier has overruled emergent medical care ordered by the on-site HIV Specialist at Limestone. Such actions by an off-site physician violate section 10.4 of the *Settlement Agreement* and threaten the lives of HIV prisoners at Limestone.

**G. Intake at Limestone.**

23. Section 11.2 of the *Settlement Agreement* states: "Within two weeks of arriving at Limestone, the HIV infected prisoners shall be seen by the HIV Specialist or mid-level provider." Newly arriving HIV prisoners have not been seen by the HIV Specialist or mid-level provider within two weeks, several weeks, or even several months.<sup>22</sup>

24. Section 11.3 states that if a newly arriving HIV prisoner can identify their medication upon entering Limestone, that patient will be provided their medication and there shall not be any unnecessary interruptions in the continuity of their medication. As indicated in Dr. Bick's November 2004 report, numerous, newly arriving HIV prisoners have experienced lengthy gaps

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<sup>21</sup>See Exhibit 12, Declaration of Carl Smith, at 1-2 (has inconsistent access to Resource and has lost a lot of weight).

<sup>22</sup>See Exhibit 6, Dr. Joseph Bick November 2004 report, at section 11.2 ("Of ten HIV infected arrivals in September, 4/10 were not seen by an MD as of 11/16/04. An additional 1/10 September arrival was not seen until 10/20/04. In total 50% were not seen within two weeks of arrival."); see also Declaration of Richard Berry, at 2 (after entering Limestone, he did not see a physician for approximately three months.)

in their medication.<sup>23</sup>

#### **H. Dental Services.**

25. Section 14.2 of the *Settlement Agreement* states: "All HIV infected patients shall have access to prophylactic dental hygiene, which include dental cleanings, at least annually." HIV prisoners in need of outside dental specialist care, not available at Limestone, have been unable to access the necessary care.<sup>24</sup> The inability to access necessary outside specialist dental care causes unnecessary pain and suffering.

#### **I. Complaint and Grievance Process.**

26. Section 17.3 of the *Settlement Agreement* requires that defendants shall respond to informal grievances within seventy-two (72) hours, and formal grievances within five (5) days. Defendants fail to respond to complaint and grievance forms in accordance with the *Agreement*.

#### **J. Housing.**

27. Section 19.1 of the *Settlement Agreement* provides in part that the physical condition of the buildings used to house HIV prisoners shall be maintained in good working order. The housing used to confine HIV prisoners is not maintained in good working order. Windows remain broken and are not replaced. Instead, staff covers the windows with tape and plastic. Though a temporary solution, the tape and the plastic fall off. Such temporary measures to cover broken windows does not comply with the "good working order" provisions of section 19.1.

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<sup>23</sup>See Exhibit 6, Dr. Joseph Bick November 2004 report, at section 11.3 ("Of 5 new arrivals on 11/16/04, four were on medications at the time of transfer. These inmates all arrived from Kilby at ~ 10:30 am. 4/5 missed at least one dose of meds upon arrival at Limestone."); see also Declaration of Richard Berry, at 1 (upon arriving at Limestone, he did not receive his HIV medication for three days.)

<sup>24</sup>See Exhibit 12, Declaration of Jonathan Sexton, at 1-3.

28. Section 19.3 of the *Settlement Agreement* requires defendants to conduct rodent and pest control on a monthly basis, or as needed. Rats in examination rooms and housing units unnecessarily expose HIV prisoners to potentially dangerous diseases and infections. See Exhibit 8, letter from Dr. Valda Chijide dated January 26, 2005, page 10 (“One day while evaluating an inmate in dorm 7, a rat ran across the exam room floor. . .[R]ats can carry diseases which can sometimes spread to humans.”).

**K. Release From the Department of Corrections.**

29. Section 22.3 of the *Settlement Agreement* states that prior to being released into the community, HIV prisoners will be provided appropriate discharge planning. Defendants have failed to provide appropriate discharge planning for HIV prisoners being released from Limestone.

**L. Dr. Bick’s February 2005 Quarterly Report.**

30. In his February 2005 audit, Dr. Bick found continued noncompliance with core provisions of the *Settlement Agreement*. Indeed, the defendants remain in violation of the core provisions of the *Agreement* including: sections 2.1. and 2.2 (the standard of care shall be consistent with National Commission on Correctional Healthcare and Centers for Disease Control guidelines); section 2.3 (the provision of treatment that is “medically necessary”); and section 3.4 (an HIV Specialist).

**II. RELIEF REQUESTED**

For all of the reasons stated above, plaintiffs request that this Court issue an *Order to Show Cause Why Defendants Should Not Be Held in Contempt*. A proposed Order is attached to this Motion. If defendants dispute any factual matters set forth in this Motion, plaintiffs request

that the Court order defendants to identify such disputed items and set an evidentiary hearing for their resolution.

Upon a finding that defendants are in contempt for their violations of the *Settlement Agreement*, plaintiffs will seek the following relief:

(1) an *Order* by this Court requiring defendants to comply immediately with all terms of the *Settlement Agreement*;

(2) a schedule of per diem monetary sanctions for future violations of the *Settlement Agreement*;

(3) toll the two (2) year statute of limitations until defendants are in substantial compliance with the *Settlement Agreement* while Dr. Joseph Bick's quarterly visits continue, or in the alternative, issue an *Order nunc pro tunc* tolling the two year statute of limitations from the date of the *Order* adopting the *Settlement Agreement* since the defendants have never complied with the *Agreement*;

(4) an award of reasonable attorney's fees and costs to plaintiffs; and

(5) such additional relief as the Court may deem just and necessary.

Respectfully submitted this 17<sup>th</sup> day February, 2005.

BY: 

JOSHUA R. LIPMAN

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Warden of Limestone Correctional Facility, )  
DAVID WISE, Deputy Warden, )

Defendants. )

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CIVIL ACTION

No. CV-02-BE-2812-W

CLASS ACTION

**CERTIFICATE OF SERVICE**

I hereby certif that on February 17, 2005, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following: Albert Butler, Esq., Attorney for the Defendants Donal Campbell, Ronald Cavanaugh, Billy Mitchem, 101 South Union Street, P.O. Box 301501, Montgomery, Alabama 36130-1501.

Respectfully submitted,

**s/Joshua R. Lipman**  
Joshua R. Lipman

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CIVIL ACTION

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CLASS ACTION

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'  
MOTION FOR AN ORDER TO SHOW CAUSE WHY  
DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT**

Plaintiffs, by counsel, submit this Memorandum of Law in support of their *Motion for an Order to Show Cause Why Defendants Should Not Be Held in Contempt*. Plaintiffs request that this Court order Defendants to show cause why they should not be held in civil contempt for their failure to comply with numerous provisions of the *Settlement Agreement*.

**I. PURPOSE**

Federal courts have the inherent power to enforce their lawful orders through civil

contempt proceedings. Spallone v. United States, 493 U.S. 265, 276 (1990); Young v. United States, 481 U.S. 787, 793 (1987); Michaelson v. United States, 266 U.S. 42, 65-66 (1924); see also Reynolds v. McInnes, 338 F.3d 1201, 1208 (11<sup>th</sup> Cir. 2003) (“In *Reynolds II*, we emphasized that consent decrees, like all injunctions, are to be enforced through the trial court’s civil contempt power.”). This Court retains jurisdiction to impose contempt sanctions against defendants because defendants are parties of record to the *Settlement Agreement*, and because contempt proceedings are a continuation of the original proceedings. Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 452 (1932).

Contempt proceedings are convened to determine whether obligations established by a court order are being discharged by those responsible for doing so. Newman v. Graddick, 740 F.2d 1513, 1524 (11<sup>th</sup> Cir. 1984). The question presented therefore is not whether the present conditions arise to a constitutional violation -- indeed plaintiffs submit that they do -- but rather, this Court need only determine whether Defendants are complying with the specific terms of the *Settlement Agreement*.<sup>1</sup> “Whatever may have been the understanding for proving a constitutional violation at the time of the decree, they all agreed on a course of conduct. . .” Sarabia v. Toledo Police Patrolman’s Ass’n, 601 F.2d 914, 919 (6<sup>th</sup> Cir. 1979).

By filing a *Motion for an Order to Show Cause*, Plaintiffs seek civil contempt sanctions with the goal of coercing Defendants into full compliance with the *Settlement Agreement*, or else

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<sup>1</sup>“A consent decree or order is to be construed for enforcement purposes basically as a contract. . .” United States v. ITT Continental Baking Co. 420 U.S. 223, 238 (1975); see also Reynolds v. McInnes, *supra*, at 1211 (“We apply the same rules that govern contract interpretation when we interpret a consent decree, because a consent decree is essentially a form of contract.”). Therefore, this Court should address defendants’ compliance within the four corners of the *Settlement Agreement*. *Id.*

remedying Plaintiffs' injuries caused by their noncompliance. See Blalock v. United States, 844 F.2d 1546, 1550 (11<sup>th</sup> Cir. 1988). "It is well-settled that sanctions in civil contempt proceedings may be employed to coerce a contemnor into compliance with the court's order, and/or to compensate a complainant for losses sustained." Martin v. Guillot, 875 F.2d 839, 845 (11<sup>th</sup> Cir. 1986); see also Bush Ranch v. E.I. DuPont de Nemours R. Co., 99 F.3d 363, 368 (11<sup>th</sup> Cir. 1996)(same). As the Supreme Court recognized, civil contempt sanctions are "designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard." International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 827 (1994).

## II. PROCESS

In Mercer v. Mitchell, 908 F.2d 763 (11<sup>th</sup> Cir. 1990), the Eleventh Circuit outlined a model proceeding to be followed in civil contempt actions:

Every civil contempt proceeding is brought to enforce a court order that requires the defendant to act in some defined manner. The defendant then allegedly acts, or refuses to act, in violation of the order. The plaintiff would like the defendant to obey the court order and requests the court to order the defendant to show cause why he should not be held in contempt and sanctioned until he complies. If the court finds that the conduct as alleged would violate the prior order, it enters an order requiring the defendant to show cause why he should not be held in contempt and conducts a hearing on the matter.

At the hearing, the defendant is allowed to show either that he did not violate the court order or that he was excused from complying. Typically, a defendant will argue that he should not be held in contempt because changed circumstances would make strict enforcement of the order unjust. In such a case, the defendant should move the court to modify the order, and the hearing on the show-cause order would take on the appearance of a hearing on a motion to modify the injunction. If the court determines that the order should be modified and that the defendant's conduct did not violate the order as modified, then ordinarily it would be unjust to hold the defendant in contempt. If, however, the court concludes that the order should not be modified and that the defendant did not

comply with the order, then the court may hold him in contempt and impose sanctions designed to ensure compliance. Thus, the typical proceeding satisfies the two essential requirements of due process: notice and hearing.

Id. at 768 (citations omitted); *see also* Chairs v. Burgess, 143 F.3d 1432, 1436 (11<sup>th</sup> Cir. 1998).

In their *Motion to Show Cause*, Plaintiffs have provided Defendants with ample notice of their alleged non-compliance with the *Settlement Agreement*. Plaintiffs allege that Defendants have violated section 3.1 (HIV Specialist and general physician staffing), section 3.4 (prisoners providing emergency medical treatment), section 4.2 (nurses making medical decisions outside the scope of their license), section 3.7 (medical staffing), section 4.4 (referral to outside medical specialists), section 5.1 (periodic evaluations of HIV and AIDS prisoners by the HIV Specialist), section 6.2 (treatment of HIV prisoners with tuberculosis), section 6.3 (protocols for treatment of Methicillin Resistant Staphylococcus Aureus ("MRSA")), section 7.1 (proper provision of medication), section 7.5 (administer medication with food and water as prescribed), section 7.3 (clear instructions provided to HIV prisoners addressing medication provision), section 7.8 (medication formulary), section 8.3 (hepatitis C treatment), section 9.5 (dietary supplementation), section 10.4 (medical emergencies), section 11.2 (newly arrived HIV prisoners seeing the HIV Specialist), section 11.3 (medication provision to newly arrived HIV prisoners), section 14.2 (prophylactic dental hygiene), section 17.1 (complaint and grievance process), section 19.1 (physical condition of housing for HIV prisoners), section 19.2 (rodent and pest control), and section 22.3 (discharge planning).

Following the Eleventh Circuit's analysis in Mercer, *supra*, defendants are entitled to an opportunity to show why they are not in violation of the *Consent Order*. *See* Chairs v. Burgess, 143 F.3d 1432, 1436 (11<sup>th</sup> Cir. 1998) (Once the prima facie showing of a violation is made, the

burden then shifts to the alleged contemnor 'to produce evidence explaining noncompliance' at a 'show cause' hearing.") (quoting Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1301 (11<sup>th</sup> Cir. 1991). If the defendants dispute any of the factual allegations made in plaintiffs' *Motion for an Order to Show Cause*, the Court may order an evidentiary hearing on those factual matters. Plaintiffs are prepared to prove the above-listed violations of the *Consent Order* by clear and convincing evidence at a show cause hearing. See United States v. Hayes, 722 F.2d 723, 725 (11<sup>th</sup> Cir. 1984). If the defendants do not dispute plaintiffs' factual allegations, the Court may properly dispense with a hearing prior to finding defendants in contempt. Mercer, 908 F.2d at 769 n. 11.

At a show cause hearing, defendants will not be able to rely on their subjective beliefs or intent as defenses to noncompliance. See Howard Johnson Co. v. Khimani, 892 F.2d 1512, 1516 (11<sup>th</sup> Cir. 1990); Doe v. Bush, 261 F.3d 1037, 1047 (11<sup>th</sup> Cir. 2001); Newman v. Graddick, 740 F.2d 1513, 1524 (11<sup>th</sup> Cir. 1984). As the Supreme Court has explained:

The absence of willfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of non-compliance. . . . Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act.

McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949) (citations omitted); see also Wright & Miller, Federal Practice and Procedure Criminal 3rd., § 705 ("Willfulness is not a necessary element of civil contempt.").

### **III. RELIEF**

Upon a finding that defendants are in contempt, plaintiffs will seek injunctive relief and monetary sanctions that are narrowly tailored to each violation of the *Settlement Agreement* but

nevertheless sufficient to coerce defendants into full compliance. This Court has substantial equitable power to address and remedy defendants' present non-compliance.

When considering the type of injunctive relief to coerce the defendants into full compliance, this Court "must consider the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." United States v. United Mine Workers of America, 330 U.S. 358, 304 (1947); *see also* Reynolds v. Alabama Department of Transportation, 10 F.Supp. 2d 1263, 1278 (M.D. Ala. 1998) (same). In this case, the "magnitude of the harm" caused by continued noncompliance by the defendants with this Court's *Order*, is the persistent, unabated violation of the plaintiffs' Constitutional rights and the continued threatening of the health and lives of the plaintiffs. Plaintiffs therefore request that this Court suspend the two year time period of the *Settlement Agreement* pending substantial compliance by the defendants, or in the alternative, *Order* nunc pro tunc the tolling of the two year time period to the date of the *Order* adopting the *Settlement Agreement*. Since the signing of the *Agreement*, nine months ago, defendants have not been in compliance with the terms of the *Agreement*. The injunctive relief requested is warranted to prevent the defendants from remaining noncompliant throughout the two year term of the *Agreement* without ever complying with the *Agreement's* terms. Indeed, plaintiffs have yet to **realize** the provisions of the *Agreement* or their Constitutional rights.

Finally, upon a finding that defendants are in civil contempt of the *Settlement Agreement*, plaintiffs will seek reasonable attorney's fees and costs. Federal courts have discretion to award such fees and costs in contempt proceedings, even where the contemptuous conduct was not willful. Sizzler Family Steak House v. Western Sizzlin Steak, Inc., 793 F.2d 1529, 1535-36 (11<sup>th</sup>



Cir. 1986).

#### IV. CONCLUSION

In conclusion, defendants continue to violate some of the most important and fundamental aspects of the *Settlement Agreement* in this case. Defendants have been put on notice of their non-compliance by plaintiffs' counsel. Their defiance of this Court's *Settlement Agreement* is endangering the health and lives of the HIV prisoners at Limestone. Plaintiffs therefore respectfully request that the Court order defendants to show cause why they should not be held in civil contempt.

Respectfully submitted this 17<sup>th</sup> day February, 2005.

BY: 

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
WESTERN DIVISION

ANTONIO LEATHERWOOD, ERIC  
HOWARD, JERRY SANFORD, JOHN  
LEVINS, MICHAEL PATRICK, and,  
individually and on behalf of all present and  
future HIV-positive inmates in the Limestone  
Correctional Facility in Capshaw, Alabama,

Plaintiffs,

v.

DONAL CAMPBELL, Commissioner of the  
Alabama Department of Corrections, RONALD  
CAVANAUGH, Director of Treatment Alabama  
Department of Corrections, BILLY MITCHEM,  
Warden of Limestone Correctional Facility,  
DAVID WISE, Deputy Warden,

Defendants.

CIVIL ACTION

No. CV-02-BE-2812-W

CLASS ACTION

**CERTIFICATE OF SERVICE**

I hereby certf that on February 17, 2005, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following: Albert Butler, Esq., Attorney for the Defendants Donal Campbell, Ronald Cavanaugh, Billy Mitchem, 101 South Union Street, P.O. Box 301501, Montgomery, Alabama 36130-1501.

Respectfully submitted,

**s/Joshua R. Lipman**  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
WESTERN DIVISION

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ANTONIO LEATHERWOOD, ERIC )  
HOWARD, JERRY SANFORD, JOHN )  
LEVINS, MICHAEL PATRICK, and, )  
individually and on behalf of all present and )  
future HIV-positive inmates in the Limestone )  
Correctional Facility in Capshaw, Alabama, )

Plaintiffs, )

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DONAL CAMPBELL, Commissioner of the )  
Alabama Department of Corrections, RONALD )  
CAVANAUGH, Director of Treatment Alabama )  
Department of Corrections, BILLY MITCHEM, )  
Warden of Limestone Correctional Facility, )  
DAVID WISE, Deputy Warden, )

Defendants. )

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CIVIL ACTION

No. CV-02-BE-2812-W

CLASS ACTION

**ORDER TO SHOW CAUSE WHY DEFENDANTS  
SHOULD NOT BE HELD IN CONTEMPT**

THIS CAUSE has come before the Court on Plaintiffs' *Motion for an Order to Show Cause Why Defendants Should Not Be Held in Contempt*. The Court having reviewed and considered Plaintiffs' motion, it is hereby GRANTED.

ORDERED AND ADJUDGED

(1) The Defendants in this case will SHOW CAUSE, if there be any, WHY THEY SHOULD NOT BE HELD IN CONTEMPT OF COURT for their failure to comply with the

*Settlement Agreement* approved and entered by this Court. If defendants dispute plaintiffs' factual assertions, they are ORDERED to appear in person at a hearing in front of the Special Master, Magistrate Judge John Ott, to be set by separate order. This process is contemplated by the *Settlement Agreement* (DOC#159), section 28.5, page 16 ("If after 15 days, the dispute has not been adequately resolved, then the Plaintiffs may petition the Special Master to make findings of fact addressing noncompliance, in accordance with 18 U.S.C. § 3626(f)(1)(A).")

DONE AND ORDERED in Birmingham, Alabama this \_\_ day of \_\_\_\_\_,  
2005.

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JOHN E. OTT  
UNITED STATES MAGISTRATE JUDGE

cc: counsel of record