

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

LAWRENCE CARTY, et al.,

Plaintiffs,

v.

KENNETH MAPP, et al.,

Defendants.

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Civil No. 94-78

**PLAINTIFFS' MOTION TO ENFORCE THE SETTLEMENT AGREEMENT AND
COMPEL DEFENDANTS TO ALLOW PLAINTIFFS' SCHEDULED SITE VISIT AND
FOR EXPEDITED CONSIDERATION**

Plaintiffs respectfully move the Court to enforce the 2013 Settlement Agreement and compel Defendants to allow Plaintiffs' scheduled site visit from October 12-16, 2015. The grounds for this Motion are set forth below.

Background

On October 1, 2015, Plaintiffs' counsel notified Defendants of their upcoming site visit to the CJC and CJC Annex from October 12-16, 2015. *See* E. Balaban Oct. 1, 2015 Letter to S. D'Andrade (Ex. A).

Seven days later, on October 7, 2015, Defendants' counsel replied and stated that "counsel for Defendants are unavailable and Defendants cannot accommodate your site visit." *See* S. D'Andrade Oct. 7, 2015 Letter to E. Balaban (Ex. B) (asserting that because (1) Defendants' counsel is unavailable, (2) October 12 is a federal holiday and therefore civilian staff are unavailable, (2) security staff will be in a training during the week of October 12, (3)

Defendants have a fire evacuation drill planned for October 14, and (5) Plaintiffs' counsel has already visited the facilities four times this year, Plaintiffs should "forgo this visit").

Plaintiffs promptly responded and informed Defendants counsel were willing to modify their schedule in light of some of the scheduling constraints at the facility. *See* E. Balaban Oct. 7, 2015 Letter to S. D'Andrade (Ex. C). Defendants did not accept these changes.

I. PLAINTIFFS ARE ENTITLED TO CONDUCT THEIR TOUR UNDER THE PLAIN TERMS OF THE AGREEMENT.

It is established that district court judges retain the power to enforce consent decrees entered into their cases. *See, e.g., Frew v. Hawkins*, 540 U.S. 431, 432 (2004) ("Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced."). Thus, "[u]ntil parties to such an instrument have fulfilled their express obligations, the court has continuing authority and discretion—pursuant to its independent juridical interests—to ensure compliance." *Holland v. New Jersey Dep't of Corrections*, 246 F.3d 267, 283 (3d Cir. 2001). Consent decrees are enforced on their plain terms. *See Harris v. City of Philadelphia*, 137 F.3d 209, 212 (3d Cir.1998)("A court should not later modify the decree by imposing terms not agreed to by the parties or not included in the language of the decree.").

Under the 2013 Settlement Agreement, Defendants are required to provide Plaintiffs' counsel with access to the Jail "including onsite tours." 2013 Settlement Agreement (D.E. 765-1) ¶VII. The 2013 Settlement Agreement also retains and incorporates all of the parties' monitoring and enforcement rights and duties from the 1994 Settlement Agreement and subsequent orders. *Id.* at 21. Pursuant to the 1994 Agreement, Plaintiffs are entitled to conduct on-site tours provided they give Defendants ten days' notice. *See* 1994 Settlement Agreement (DE 805-2) at 44, ¶C ("Defendants shall grant plaintiffs' counsel access to tour CJC to evaluate

defendants' compliance with this Agreement. Plaintiffs' counsel shall provide ten (10) days' notice to defendants in advance of these tours."'). Plaintiffs provided Defendants with eleven (11) days' notice of their tour. Under the plain terms of the Agreement, counsel is therefore entitled to conduct a site visit beginning next Monday.

Defendants raised several objections of the tour, none of which excuses their non-compliance with the Agreement:

First, Defendants state that Plaintiffs' counsel can neither review documents, nor tour the facility, since Defendants' counsel Ms. D'Andrade is not available next week. There is nothing in the Agreement that prohibits class counsel from touring when Defendants' counsel is unavailable. Had Defendants wanted this exclusion, they should have insisted on it being in the Agreement. Having given proper notice, Plaintiffs' counsel are entitled to tour on the Agreement's plain terms. Second, Ms. D'Andrade is not the only attorney in this case for Defendants, or the Government's only attorney. If Defendants insist on counsel being present, then they should enlist another Government attorney. Third, class counsel has regularly toured without counsel being present. For the most part, counsel will be reviewing documents, and there is no apparent need for Defendants to have counsel present during this review. Fourth, Plaintiffs are willing to accommodate Defendants if they want counsel present while class counsel asks questions about compliance of Jail staff. Plaintiffs can agree to ask questions on designated days next week when counsel is available, though the Agreement again does not require this accommodation.

Second, Defendants assert that Plaintiffs cannot review records or tour the facility on October 12, 2015 because this is a federal holiday. Putting aside the fact that Jails do not close on federal holidays, Plaintiffs' counsel offered to limit their tour that day to reviewing Jail log

books and health care records (since nursing staff will be on-site). The Jail, of course will be staffed, and staff can pull the requested logs now (and have been aware that class counsel wants to review these logs for over a week).

Third, Defendants state class counsel cannot visit the facility at all on October 14 because there is a planned evacuation drill that day. Plaintiffs' counsel agreed to exit the facility during the fire drill and re-enter the facility once the drill is completed. There is no just reason why class counsel should be denied access for an entire day because a drill is planned.

Fourth, Defendants object because there is planned officer training next week. Again, the Jail will not be closed next week, it will be staffed by officers and civilian personnel, and the fact that some staff may be in training does not warrant denial of class counsel's clear right to tour on adequate notice.

Fifth, Defendants assert that Plaintiffs' counsel does not need to tour the facility next week because counsel already conducted visits in February, April and August. First, the Agreement does not place a numerical limit on the number of tours class counsel takes. Second, in February and April class counsel was preparing for and then attending site visits by the parties' joint experts. The experts completed those visits and issued their reports. *See* Doc. 823-1 (Bogard's Second Report), 832-1 (Burns' Second Report). The experts are now poised to conduct more site visits, and conduct another round of assessments of Defendants' compliance with the Agreement. Also, the Court on August 21, 2015 set this matter for an evidentiary hearing, now scheduled for Nov. 27, 2015. *See* Doc. 833. The Court's order requires the experts to assess Defendants' compliance with quarterly goals for reaching compliance, and requires the parties to also submit reports on Defendants' progress towards the goals. *See id.* at 4 Plaintiffs' October visit is to prepare for the experts' reviews and for the hearing. The two August site

visits were extremely short, amounting to a total of three days. The first August site visit focused specifically on the status of the Jail's ventilation and cooling system (HVAC), which was inoperative and malfunctioning for two months, resulting in potentially dangerous living conditions at the jail. And, the second August site visit lasted for a total of two days, as it was cut short due to the approaching Tropical Storm Erika.¹ Accordingly, the requested visit is necessary in order for Plaintiffs' counsel to have sufficient access to CJC and the Annex, and allow Plaintiffs to adequately assess Defendants compliance with the terms of the Agreement.

II. PLAINTIFFS ASK THE COURT TO EXPEDITE A RULING ON THIS MOTION.

Plaintiffs respectfully request the Court to expedite its ruling on this Motion. Class counsel is travelling to the Virgin Islands on Sunday, and the planned site visit begins next week. Defendants' refusal to accommodate Plaintiffs throws into doubt the scope and extent of that tour. So that this dispute can be resolved before the visit begins next Monday, Plaintiffs ask that the Court expedite its ruling on this Motion.

CONCLUSION

For the forgoing reasons, Plaintiffs respectfully ask that the Court to enforce the Agreement and compel Defendants to permit Plaintiffs' counsel to conduct a site visit next week.

¹ Plaintiffs' counsel was told on August 28, 2015 that the Government was closed, and therefore counsel would not be permitted access to the Jail. Ex. D Counsel later learned that the Governor lifted the curfew and ordered all government employees to work as of 11 am that day. *See* Ex. E. Defendants did not notify Plaintiffs that the curfew had been lifted and that government staff was required to report to work. Counsel also was not informed that they could resume their visit that day.

Respectfully submitted,

/s/ ERIC BALABAN

Eric Balaban
National Prison Project of the ACLU Foundation
915 15th Street
Seventh Floor
Washington, D.C. 20005
(202) 393-4930

/s/ BENJAMIN CURRENCE

Benjamin Currence
11A Norre Gade, Suite 4
P.O. Box 6143
St. Thomas, U.S.V.I. 00804-6143
(340) 775-3434

Attorneys for Plaintiffs

Dated: October 8, 2015

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading, exhibits, and proposed Order were served by the Notice of Electronic Filing administered by this Court to the following counsel for Defendants at the following address:

Carol Thomas-Jacobs
Asst. Attorney General
V.I. Department of Justice
Office of the Attorney General
GERS Bldg., 2nd Floor
34-38 Kronprindsens Gade
St. Thomas, USVI 00801
cjacobs@doj.vi.gov

Shari D'Andrade
Assistant Attorney General
Virgin Island Department of Justice
GERS Building, 2nd Floor
34-38 Kronprindsens Gade
St. Thomas, VI 00802
sdandrade@doj.vi.gov

/s/ **ERIC BALABAN**
Eric Balaban

LEGAL DEPARTMENT
NATIONAL PRISON
PROJECT



BY ELECTRONIC AND FIRST CLASS MAIL

October 1, 2015

Shari D'Andrade
Assistant Attorney General
Virgin Island Department of Justice
GERS Building, 2nd Floor
34-38 Kronprindsens Gade
St. Thomas, VI 00802
sdandrade@doj.vi.gov

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DAVID C. FATH
DIRECTOR
ATTORNEY AT LAW*

*NOT ADMITTED IN DC,
PRACTICE LIMITED TO
FEDERAL COURTS

Re: *Carty v. Mapp*, Civil Action No. 94-78

Dear Shari:

This is to notify you that I plan to make a site visit to the CJC and CJC Annex from October 12-16, 2015. Ben Currence may join me for all or part of this site visit. As with previous site visits, I ask that you make arrangements so that I can bring my laptop computer with me to use at the jail.

I have listed our itinerary below. As part of our visit, we would like to review all CJC and CJC Annex log books (including unit logs, Main Control logs, disciplinary logs, contraband logs, and any other log (including recreation logs) maintained at the Jail, from March 1, 2015-present.

Monday, October 12, 2015: Inspection, document reviews, log book reviews, and prisoner interviews at the CJC, beginning at 9:00 a.m. We also may want to review health care records and classification records (including computerized classification records), to be designated while on site. For our prisoner interviews, we would like to meet individually with some prisoners, and talk with some in groups.

Tuesday, October 13, 2015: Inspection, document reviews, log book reviews, and prisoner interviews at the CJC, beginning at 9:00 a.m. Should we complete our work at the CJC, we also want to conduct an inspection, document reviews, and prisoner interviews at the CJC Annex, beginning in the afternoon. We also may want to review health care records and classification records (including computerized classification records), to be designated on-site. For our prisoner interviews at both facilities, we would like to meet individually with some prisoners, and talk with some in groups.



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Wednesday, October 14, 2015: Inspection, document reviews, log book reviews, and prisoner interviews at the CJC, beginning at 9:00 a.m. Should we complete our work at the CJC, we also want to conduct an inspection, document reviews, and prisoner interviews at the CJC Annex, beginning in the afternoon. We also may want to review health care records and classification records (including computerized classification records), to be designated on-site. For our prisoner interviews, we would like to meet individually with some prisoners, and talk with some in groups.

Thursday, October 15, 2015: Inspection, document reviews, log book reviews, and prisoner interviews at the CJC, beginning at 9:00 a.m. Should we complete our work at the CJC, we also want to conduct an inspection, document reviews, and prisoner interviews at the CJC Annex, beginning in the afternoon. We also may want to review health care records and classification records (including computerized classification records), to be designated on-site. For our prisoner interviews, we would like to meet individually with some prisoners, and talk with some in groups.

Friday, October 16, 2015: Inspection, document reviews, log book reviews, and prisoner interviews at the CJC, beginning at 9:00 a.m. Should we complete our work at the CJC, we also want to conduct an inspection, document reviews, and prisoner interviews at the CJC Annex, beginning in the afternoon. We also may want to review health care records and classification records (including computerized classification records), to be designated on-site. For our prisoner interviews, we would like to meet individually with some prisoners, and talk with some in groups.

Thank you for notifying the Warden and staff about our visit, and your help in setting up our visit.

Sincerely,

A handwritten signature in black ink, appearing to read 'Eric Balaban', with a long horizontal flourish extending to the right.

Eric Balaban

cc: B. Currence



GOVERNMENT OF
THE VIRGIN ISLANDS OF THE UNITED STATES
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
6040 Castle Coakley
Christiansted, St. Croix, U.S. Virgin Islands 00820

Tel: (340) 773-0295
Fax: (340) 773-1425

October 7, 2015

Via Electronic Mail: ebalaban@aclu.org

Eric Balaban
ACLU
National Prison Project
915 15th Street, NW, 7th Floor
Washington, DC 20005

RE: *Carty v. Mapp*, Civil No. 3:94-cv-78
Response to ACLU's October 1, 2015 Correspondence Regarding Site Visit

Dear Attorney Balaban:

We are in receipt of your October 1, 2015 correspondence notifying us of your intended site visit on October 12 – 15, 2015. Unfortunately, counsel for Defendants are unavailable and Defendants cannot accommodate your site visit.

In August, during your co-counsel's site visit to the St. Thomas jails, we indicated that because site visits generally last up to five days, we requested advance notice of proposed dates for such visits so that the parties can confer and select mutually agreeable dates. Despite this standing request, on August 13, 2015, you unilaterally scheduled a site visit for the week of August 24, 2015. In response, we re-asserted our request of advance notice, indicated counsel's unavailability because of other matters, and requested that you reschedule the visit for any date in September, October 5-15, 2015 or November 2-6, 2015, the same dates of the security expert's site visit. You, however, were unwilling to reschedule. We reluctantly accommodated and you visited the jails during the week of August 24, 2015.

Again, without conferring with us to select mutually agreeable dates, on October 1, 2015, you independently scheduled a site visit for October 12 – 15, 2015. We are surprised that the dates of the visit are the exact dates that we proposed back in August, to which you failed to respond and left the impression that the dates were inconvenient.

During the week of October 12th, counsel is unavailable and Defendants cannot accommodate this visit. Specifically, October 12th is a federal holiday and therefore, counsel and civilian staff at the St. Thomas jails (with the exception of nursing staff) are unavailable. Furthermore, security staff will be in training the week of the October 12th and Defendants will conduct a facility-wide, full-scale fire evacuation drill, tentatively set for October 14, 2015, that requires participation of all staff and prisoners.

In light of this, the fact that Plaintiffs' counsel has visited the facilities in February, April, and on two separate occasions in August of this year, and that you are expected on site on



Defendants' response to ACLU's October 1, 2015 Letter

Page 2

November 2-6, 2015 (during the security expert's site visit), we ask that you forgo this visit. If you do not, Defendants can only make the prisoners available to you in the attorney-client room on October 12, 13, and 15. Finally, we avail ourselves to the exchange of proposed dates for future site visits.

Sincerely,

A handwritten signature in blue ink, appearing to read "Shari N. D'Andrade".

Shari N. D'Andrade
Assistant Attorney General

cc: Benjamin Currence, Esq. (via email)

LEGAL DEPARTMENT
NATIONAL PRISON
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BY ELECTRONIC MAIL

October 7, 2015

Shari D'Andrade
Assistant Attorney General
Virgin Island Department of Justice
GERS Building, 2nd Floor
34-38 Kronprindsens Gade
St. Thomas, VI 00802
sdandrade@doj.vi.gov

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DAVID D. RATH
DIRECTOR
ATTORNEY AT LAW

*NOT ADMITTED IN DC.
PRACTICE LIMITED TO
FEDERAL COURTS

Re: *Carty v. Mapp*, Civil Action No. 94-78

Dear Shari:

This is in response to your October 7, 2015 letter. In light of the issues you raise, Plaintiffs are willing to modify their schedule for next week's visit as follows:

Monday, October 12, 2015: Site visit shall be limited to a review of (1) CJC log books (including unit logs, Main Control logs, disciplinary logs, contraband logs, and any other log (including recreation logs) maintained at the Jail, from March 1, 2015-present and (2) health care records.

Tuesday, October 13, 2015: No change from itinerary in October 1, 2015 letter.

Wednesday, October 14, 2015: No change from itinerary in October 1, 2015 letter, other than Plaintiffs' counsel agree to exit the facility during the planned fire drill, should one occur, and then re-enter the facility once the drill is completed, and the prisoners are back in the Jail. Counsel asks that they be told October 13 whether the drill is going forward as planned on Oct. 14, 2015.

Thursday, October 15, 2015: No change in itinerary.

Friday, October 16, 2015: No change in itinerary.

Plaintiffs ask that Defendants notify them by 9:30 am tomorrow whether this schedule is acceptable. If Plaintiffs do not receive a response from Defendants by then, they will proceed as if Defendants have rejected this



proposal.

I hope we can resolve this matter. If this plan is acceptable, please do notify the Warden and staff about our visit, and thank them on our behalf for their help in setting up this visit.

Sincerely,

A handwritten signature in black ink, appearing to read 'Eric Balaban', with a long horizontal flourish extending to the right.

Eric Balaban

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UNION FOUNDATION

cc: B. Currence

Eric Balaban

From: Shari D'Andrade <Shari.D'Andrade@doj.vi.gov>
Sent: Friday, August 28, 2015 6:50 AM
To: Eric Balaban
Cc: Alicia Gathers; Benjamin A. Currence; Carol Jacobs
Subject: Re: Site visit on August 27, 2015

Good morning Eric:

The Governor has declared a state of emergency, imposed a curfew and the government remains closed. Therefore, you will not have access to the facilities today.

Shari

Sent from my iPhone

On Aug 26, 2015, at 8:07 PM, Eric Balaban <ebalaban@aclu.org> wrote:

Shari:

I understand. Thank you for letting me know. Kim Lyons and I had made plans. I have copied her here. I will plan on returning to the Jail Friday.

Eric Balaban
ACLU National Prison Project
915 15th St NW
Washington, D.C. 20005

On Aug 26, 2015, at 7:19 PM, "Shari D'Andrade" <Shari.D'Andrade@doj.vi.gov> wrote:

Good evening Eric:

As you are aware, Tropical Storm Erika is projected to affect the Virgin Islands tomorrow. The center of the storm is expected to be within ten miles of St. Thomas with top winds of 50 miles per hour and expected to produce rainfall amounts of 2 to 4 inches with maximum amounts up to 8 inches. In addition, St. Thomas may experience flash floods in the low lying areas. Accordingly, the Government of the Virgin Islands, its instrumentalities and agencies, is closed on Thursday. In addition, the Bureau of Corrections has implemented its emergency preparations in anticipation of the storm and thus, the facilities are on lock-down and will not be accessible to civilians. You will therefore not have access to the facilities on August 27, 2015. Weather permitting, you may resume your on-site visit on August 28, 2015.

Shari



Shari N. D'Andrade
Assistant Attorney General
Department of Justice
Office of the Attorney General
6040 Estate Castle Coakley
Christiansted, St. Croix, USVI 00820
Telephone: [\(340\) 773-0295](tel:(340)773-0295)
Facsimile: [\(340\) 773-1425](tel:(340)773-1425)



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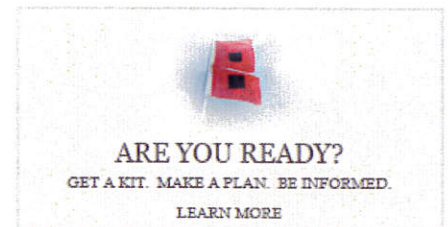


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Governor Mapp Lifts Curfew in the St. Thomas-St. John District Only

As of 8 a.m. today, Governor Kenneth E. Mapp has lifted the curfew for the St. Thomas-St. John district only. An assessment of the Tropical Storm Erika's impact is the St. Thomas-St. John has been completed. All roads have been cleared for vehicular traffic and power has been fully restored with the exception of a few isolated areas that are currently being addressed. Governor Mapp is also directing all government employees in the St. Thomas-St. John district only to report in to work at 11 a.m. today.

###



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**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

LAWRENCE CARTY, et al.,

Plaintiffs,

v.

KENNETH MAPP, et al.,

Defendants.

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Civil No. 94-78

ORDER

Having considered Plaintiffs' Motion to Enforce the Settlement Agreement and for Expedited Consideration, and for good cause appearing,

IT IS ORDERED that Plaintiffs' Motion is **GRANTED**. Defendants shall provide access to Plaintiffs' counsel for a site visit on the terms set forth in Plaintiffs' counsel's October 1 and 7, 2015 letters, which are incorporated by reference herein.

SO ORDERED this _____ day of _____, 2015,

Hon. Judge Curtis V. Gomez