

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

CODY BARNETT, et al.,

Plaintiffs/Petitioners,

Case No. 0:20-cv-61113-WPD

v.

GREGORY TONY,

Defendant/Respondent.

/

**PLAINTIFFS' MOTION FOR ENFORCEMENT AND
MODIFICATION AND INCORPORATED MEMORANDUM OF LAW**

TABLE OF CONTENTS

PRELIMINARY STATEMENT 8

BACKGROUND 11

 A. Procedural History 11

 B. The Evolving COVID-19 Pandemic Places Detainees in Grave Danger 12

 C. COVID-19 in the Broward County Jail 13

 D. Evolving Knowledge of COVID-19 17

LEGAL STANDARDS 20

 A. Enforcement Power 20

 B. Modification Power 22

ARGUMENT 23

I. DEFENDANT SHOULD BE ORDERED TO COMPLY WITH HIS OBLIGATIONS UNDER THE SETTLEMENT AGREEMENT 23

 A. Evidence from Plaintiffs’ Expert and Detainees Shows Violations of Several Provisions of the Settlement Agreement 23

 B. The Court Should Find Defendant Has Failed to Comply with the Plain Terms of the Court-Ordered Consent Decree, And Order Corrective Measures to Ensure Compliance 34

II. TO EFFECTUATE THE PURPOSE OF THE SETTLEMENT AGREEMENT, THE COURT SHOULD MODIFY THE AGREEMENT BY ORDERING DEFENDANT TO STRENGTHEN VACCINATION EFFORTS 37

 A. The Court Has the Authority—And the Responsibility—to Modify the Consent Decree to Effectuate Its Purpose 38

 B. In Light of New Circumstances Since the Settlement Agreement Was Originally Ordered by the Court, the Settlement Agreement’s Purpose Would Be Frustrated Without Modification To Address COVID-19 Vaccination 39

III. THE COURT SHOULD ORDER AN EXPEDITED BRIEFING SCHEDULE TO PROTECT CLASS MEMBERS FROM THE CURRENT COVID-19 OUTBREAK AT THE JAIL 42

CONCLUSION 43

TABLE OF AUTHORITIES

CASES	Page(s)
<i>ACLU of Tennessee, Inc. v. City of Memphis, Tennessee</i> , No. 17:cv-02120 (W.D. Tenn.).....	36
<i>Alvarwz v. LaRose</i> , 2020 WL 5594908 (S.D. Cal. Sept. 18, 2020).....	43
<i>Am. Disability Ass’n, Inc. v. Chmielarz</i> , 289 F.3d 1315 (11th Cir. 2002)	21
<i>Benjamin v. Fraser</i> , 343 F.3d 35 (2d Cir. 2003).....	36
<i>Blanco GMBH+Co Kg v. VLANCO Industries, LLC</i> , 2014 WL 11531359 (S.D. Fla. Dec. 14, 2014).....	20, 21, 35, 36
<i>Brown v. Plata</i> , 563 U.S. 493 (2011).....	22, 38
<i>Busby v. Bonner</i> , No. 2:20-cv-02359 (E.D. Tenn. Aug. 30, 2021).....	19
<i>In re Consol. Non-Filing Ins. Fee Litig.</i> , 431 F. App’x 835 (11th Cir. 2011).....	23, 38
<i>F.T.C. v. Garden of Life, Inc.</i> , 2012 WL 1898607 (S.D. Fla. May 25, 2012).....	23, 38
<i>Frew v. Hawkins</i> , 540 U.S. 431 (2004).....	21, 22
<i>Gayle v. Meade</i> , No. 20-21553 (S.D. Fla. May 21, 2020), ECF No. 107.....	43
<i>Griffin v. Secretary, Florida Dep’t of Corrections</i> , 787 F.3d 1086 (11th Cir. 2015)	22
<i>Holmes v. Godinez</i> , 991 F.3d 775 (7th Cir. 2021)	25
<i>Horne v. Flores</i> , 557 U.S. 433 (2009).....	38

Howard Johnson Co. v. Khimani,
892 F.2d 1512 (11th Cir. 1990)21

Loyd v. Ala. Dep’t of Corrections,
176 F.3d 1336 (11th Cir. 1999)36

McCray v. Dawson,
953 F. Supp. 1476 (M.D. Ala. 1996)35

Miller v. Carson,
550 F. Supp. 543 (M.D. Fla. 1982).....35

Mobile Cty. Jail Inmates v. Purvis,
581 F. Supp. 222 (S.D. Ala. 1984).....35

Palmigiano v. DiPrete,
710 F. Supp. 875 (D.R.I. 1989))35

Pottinger v. City of Miami,
805 F.3d 1293 (11th Cir. 2015)21

R.J. v. Mueller,
2020 WL 4934989 (N.D. Ill. Aug. 24, 2020)25

Reynolds v. McInnes,
338 F.3d 1221 (11th Cir. 2003)23

Reynolds v. Roberts,
207 F.3d 1288 (11th Cir. 2000)21

Riccard v. Prudential Ins. Co.,
307 F.3d 1277 (11th Cir. 2002)23, 39

Rufo v. Inmates of Suffolk Cnty. Jail,
502 U.S. 367 (1992).....22, 23, 38

Sec. & Exch. Comm’n v. Monterosso,
2015 WL 13239830 (S.D. Fla. July 29, 2015).....35

Stone v. City and Cnty. of San Francisco,
968 F.2d 850 (9th Cir. 1992)35

U.S. Commodity Futures Trading Comm’n v. Southern Trust Metals, Inc.,
2017 WL 2875427 (S.D. Fla. May 15, 2017)21

United States v. Cotton,
2021 WL 776050 (S.D. Fla. Jan. 27, 2021)22

United States v. Jefferson Cty., Ala.,
2013 WL 4482970 (N.D. Ala. Aug. 20, 2013)36

STATUTES AND RULES

Federal Rule of Civil Procedure 608, 22, 38
Local Rule 7.142, 44

OTHER AUTHORITIES

Amanda Klonsky & Erika Tyagi, *As COVID Rates Rise, Mandate Vaccine for Prison Staff*, USA TODAY (Aug. 18, 2021).....20

Andrew Perez & Andrea Torres, *Vaccine Hesitancy in Broward County Contributes to COVID Surge, Officials Say*, LOCAL 10 (Aug. 10, 2021), <https://www.local10.com/news/politics/2021/08/09/vaccine-hesitancy-in-broward-county-contributes-to-covid-surge-officials-say/>12

Arielle Mitropoulos & Sony Salzman, *COVID-19 Vaccine Still Months Away for Most Americans*, ABC NEWS (Nov. 20, 2020), [https://abcnews.go.com/Health/covid-19-vaccine-months-americans/story?id=74324596./](https://abcnews.go.com/Health/covid-19-vaccine-months-americans/story?id=74324596/)17

Becky Sullivan, *All Federal Inmates to be Offered Vaccine By Mid-May, BOP Says*, NPR (April 16, 2021), <https://www.npr.org/2021/04/16/988237102/all-federal-inmates-to-be-offered-vaccine-by-midmay-bop-director-says>.....14, 19, 41

Braeden Waddell, *The Delta Variant Is Hammering the Southeastern U.S.*, U.S. NEWS (Sept. 2, 2021), <https://www.usnews.com/news/best-states/articles/2021-09-02/delta-surge-hits-southern-states-the-hardest>.....12

Benjamin A. Barsky et al., *Perspective: Vaccination Plus Decarceration — Stopping Covid-19 in Jails and Prisons*, 384 NEW ENG. J. MED. 1583, 1584 (2021).....13, 19

Broward County COVID-19 Hospital Report – as of 11:00AM: 9/17/2021, BROWARD.ORG, <https://www.broward.org/CoronaVirus/Documents/hospital-report--latest.pdf>.....12

COVID-19 Tracker: Known Florida Coronavirus Cases and Deaths by Day and County, MIAMI HERALD (updated Sept. 16, 2021), <https://www.miamiherald.com/news/coronavirus/article242270081.html>12

COVID-19 Vaccines Work, CTRS FOR DISEASE CONTROL & PREVENTION (updated Aug. 16, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html>17, 39

Delta Variant: What We Know About the Science, CTRS. FOR DISEASE CONTROL & PREVENTION (updated Aug. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>.....12, 14

Elizabeth T. Chin, et al., *NEW ENG. J. MED.*, *Correspondence* (May 12, 2021).14, 19, 41

Experts Agree All Available COVID-19 Vaccines Are Effective, KAISER PERMANENTE (May 6, 2021), <https://about.kaiserpermanente.org/total-health/health-topics/experts-agree-all-available-covid-19-vaccines-are-effective>.....18, 37

Hannah Critchfield, *As New COVID Cases Hit Florida Prisons, Staff Vaccination Rates Are Unknown*, TAMPA BAY TIMES (Aug. 9, 2021), <https://www.tampabay.com/life-culture/2021/08/09/as-new-covid-cases-hit-florida-prisons-staff-vaccination-rates-are-unknown>.20

Homer Venters, *Four Steps to Increase COVID-19 Vaccinations Among Correctional Officers*, THE HILL (July 22, 2021), <https://thehill.com/opinion/criminal-justice/564155-four-steps-to-increase-covid-19-vaccinations-among-correctional>.41

Interim Guidance for SARS-CoV-2 Testing in Correctional and Detention Facilities, CTRS. FOR DISEASE CONTROL & PREVENTION, (updated June 7, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html>.....24

Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, CTRS. FOR DISEASE CONTROL & PREVENTION (updated June 9, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>18, 20, 24, 29, 30, 32, 39, 41

Javonte Anderson, *America Has a History of Medically Abusing Black People. No Wonder Many Are Wary of COVID-19 Vaccines*, USA TODAY (Feb. 16, 2021), <https://www.usatoday.com/story/news/2021/02/16/black-history-covid-vaccine-fears-medical-experiments/4358844001/>.18

Marc Stern, et al., *Willingness to Receive a COVID-19 Vaccination Among Incarcerated or Detained Persons in Correctional and Detention Facilities—Four States, September-December 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 2, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7013a3.htm>18, 19

Nicole Lewis & Michael Sisak, *“Hell No”; Correctional Officers Are Declining The Coronavirus Vaccine En Masse*, MARSHALL PROJECT (Mar. 15, 2021), <https://www.themarshallproject.org/2021/03/15/hell-no-correctional-officers-are-declining-the-coronavirus-vaccine-en-masse>20

People with Certain Medical Conditions, CENTERS FOR DISEASE CONTROL & PREVENTION (updated Aug. 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>11

Press Release, U.S. Food & Drug Admin., FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>.....18

U.S. COVID-19 Vaccine Tracker: See Your State’s Progress, MAYO CLINIC (updated Sept. 17, 2021), <https://www.mayoclinic.org/coronavirus-covid-19/vaccine-tracker>.....13, 14

Variant Proportions, CENTERS FOR DISEASE CONTROL & PREVENTION (updated Sept. 11, 2021), <https://covid.cdc.gov/covid-data-tracker/#variant-proportions>13

Pursuant to Rule 60 of the Federal Rules of Civil Procedure, Paragraph 24 of the settlement agreement (ECF No. 103-1) (the “Agreement,” “Settlement Agreement” or “Settlement Order”) between Plaintiffs¹ and Defendant Gregory Tony, Sheriff of Broward County (“BSO”), and the Court’s inherent powers of equity, Plaintiffs, by and through their undersigned counsel (“Class Counsel”), respectfully move this Court to enter an order granting the relief requested herein and in the proposed order (“Proposed Order”), filed concurrently herein, to enforce and/or modify the Settlement Agreement, which was incorporated into and approved by this Court’s Order Certifying Settlement Class and Approving Class Settlement (ECF No. 112) (“Approval Order” or “Consent Decree”). In addition, given the grave urgency of enforcing the Settlement Order and protecting Class Members from rising numbers of COVID-19 infections, Plaintiffs respectfully request that the Court expedite the briefing schedule so that this dispute can be resolved as soon as practicable.

PRELIMINARY STATEMENT

In May 2021, this Court entered the Consent Decree and mandated that BSO undertake a series of measures to prevent a COVID-19 outbreak at the Broward County Jail (the “Jail”) to protect persons detained there. (ECF Nos. 112, 103-1.) In the four months since the Court’s order, BSO has plainly failed to comply with key terms of the Consent Decree. The result is as predictable as it is tragic. On July 18, 2021, BSO reported only one positive case of COVID-19 in the Jail.² Yet, as the highly infectious “Delta” variant of COVID-19 has swept across the country, Florida, and Broward County, that number has grown dramatically. A month later, on August 18, 2021, BSO reported 36 positive cases, and by September 20, 2021, the number has

¹ Plaintiffs are the individually named persons, the Settlement Class for whom they serve as representatives, as well as organizational plaintiff Disability Rights Florida.

² Ex. 11 (7.18.2021 Email from M. Piper to N. Rosenbloom).

climbed to 129.³ According to BSO's own data collection and reporting, some of those infections occurred prior to detained people being booked into the Jail, but most did not; because of BSO's inadequate screening procedures, in violation of clear terms in the Settlement Agreement, people with COVID-19 infections have been allowed to enter the Jail without proper medical precautions and spread the infection to scores of persons under BSO's care and custody. Similarly, BSO staff, who enter and leave the Jail daily, are not adequately protected because of BSO's failure to comply with other provisions of the Settlement Agreement; staff who have the COVID-19 virus may also spread the infection to Class Members.

The current COVID-19 outbreak at the Jail was not inevitable. As explained below, based on sworn affidavits from Class Members and the expert report of Dr. Homer Venters, a preeminent authority in correctional facility healthcare, BSO has failed to comply with the terms of the Consent Decree. Only this Court's prompt intervention can stem the tide. While there are a number of deficiencies in BSO's COVID-19 response (as detailed below), two aspects warrant the Court's closest attention.

First, BSO has disregarded its obligation to conduct COVID-19 testing in accordance with its obligations under the Consent Order. Most troublingly, BSO was obligated to test each detainee at admission to ensure that positive cases do not unknowingly enter the Jail, but *admittedly* flouted that obligation for months, allowing countless COVID-19 cases to enter the jail undetected. Only in recent weeks has the BSO started to test newly admitted detainees, which is far too late for the scores of detainees who have been infected. Similarly, BSO is still not testing newly admitted detainees during the 14-day cohorting period, nor is it instituting regular testing of staff. There is no excuse for BSO's failure to follow these measures, which are required by the Consent Decree,

³ Exs. 12, 17 (8.18.2021 and 9.20.2021 Emails from M. Piper to N. Rosenbloom).

called for by public health guidance, and are routine in detention and correctional facilities across the country.

Second, BSO must improve the abysmally low 28.2% COVID-19 vaccination rate among people detained in the Jail, which is substantially lower than the average rate both in the Broward community and among correctional facilities nationwide. *See infra* at 39-43. To do so, BSO must make every effort to provide appropriate education to both detainees and staff about the safety and efficacy of the vaccines. Yet, BSO provides inadequate education, relying on passive measures and rote announcements, instead of active education measures by trusted intermediaries and one-to-one interactions with medical professionals. Even worse, some detainees report Jail staff actively discouraging vaccines. (Ex. 4 (Knight Decl.) ¶¶ 20-21.) The Jail must also take further affirmative measures to encourage vaccinations for both detainees and staff, including prompt access to vaccination, frequent vaccination drives, and non-punitive incentives for people incarcerated at the Jail.

Most deficiencies with the Jail's COVID-19 response could be cured by an enforcement order directing Defendant to comply with his obligations under the Consent Decree within specific time frames and oversight of that process, and the Court should use its enforcement power to ensure that compliance. However, the Consent Decree's purpose—to protect detainees in the Jail—cannot be effectuated without BSO undertaking certain additional, vaccination measures. These measures were not contemplated at the time the Agreement was originally negotiated and executed in November 2020 because vaccines were not yet publicly available. Accordingly, the Court should discharge its equitable power and power under the Federal Rules to modify the explicit terms of the Agreement in line with the Consent Decree's purpose.

Given the alarming pace of infections in the Jail and in Broward County, time is of the essence. Accordingly, Plaintiffs respectfully request that the Court order an expedited briefing schedule and schedule this motion for hearing at the first available opportunity.

BACKGROUND

A. Procedural History

Plaintiffs filed this case on June 5, 2020, alleging that detainees at the Broward County Jail were being exposed to an unreasonable and unconstitutional risk of COVID-19 infection. Plaintiffs and Defendant subsequently negotiated a Settlement Agreement that included certification of a Settlement Class (ECF No. 103-1), which was executed on November 30, 2020, and finally approved by the Court on May 13, 2021 (ECF No. 112). As part of the Agreement, Defendants committed to undertaking a series of measures to protect Class Members⁴ from COVID-19 infection. The terms of the Agreement reflected the best information available about COVID-19 at the time it was executed, but also contemplated compliance with evolving guidance from the Centers for Disease Control & Prevention (“CDC Guidance” or “Guidance”). (*E.g.*, Settlement ¶¶ 31, 41, 43, 44, 48, 51, 53, 54, 56, 58, 59, 61.) The Court “retain[ed] jurisdiction over this action for the purpose of enforcing the Settlement Agreement and all other Orders in this action.” (ECF No. 112 ¶ 5.)

⁴ The Settlement Class is defined as “persons who are being, or will be, confined in the Broward County Jail at any time while the Agreement remains in effect, including any facilities where the Defendant may in the future confine persons.” The Settlement Class includes persons who are “Medically Vulnerable,” defined as “persons 65 years of age and over, persons who are both age 50 and over and who are hypertensive, and persons of any age who suffer from certain underlying medical conditions which the CDC has determined are at an increased risk of severe illness from COVID-19.” *See People with Certain Medical Conditions*, CENTERS FOR DISEASE CONTROL & PREVENTION (updated Aug. 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

B. The Evolving COVID-19 Pandemic Places Detainees in Grave Danger

The COVID-19 pandemic has had a dramatic impact on the lives of Americans, acting as a persistent threat to public health and safety. As of September 17, 2021, in the state of Florida alone, over 3.49 million people have been infected with COVID-19 and over 50,000 people have died.⁵ In Broward County alone, at least 3,079 people have died from COVID-19.⁶

COVID-19 cases have skyrocketed recently due especially to a highly contagious COVID-19 variant, known as the “Delta.” Medical and public health experts warn that Delta is more than twice as transmissible as previous COVID-19 strains, and appears to cause more severe infections.⁷ Florida is considered the epicenter of the Delta surge in the United States, and Broward County has recently experienced a significant rise in infections because of Delta.⁸ Broward County officials reported on September 17, 2021, that hospital capacity for adult ICU patients was at 91% while their pediatric ICU beds were at 79% capacity.⁹ As of September 11, 2021, experts estimated

⁵ *COVID-19 Tracker: Known Florida Coronavirus Cases and Deaths by Day and County*, MIAMI HERALD (updated Sept. 17, 2021), <https://www.miamiherald.com/news/coronavirus/article242270081.html>. As of the date of filing, there were 50,825 COVID-19 deaths in Florida. Broward County accounts for the second most deaths of any County in Florida, at a total of 3,079 or 161.3 per 100K. *Id.*

⁶ *See supra* note 5; Andrew Perez & Andrea Torres, *Vaccine Hesitancy in Broward County Contributes to COVID Surge, Officials Say*, LOCAL 10 (Aug. 10, 2021), <https://www.local10.com/news/politics/2021/08/09/vaccine-hesitancy-in-broward-county-contributes-to-covid-surge-officials-say/>.

⁷ *Delta Variant: What We Know About the Science*, CTRS. FOR DISEASE CONTROL & PREVENTION (updated Aug. 26, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>

⁸ Braeden Waddell, *The Delta Variant Is Hammering the Southeastern U.S.*, U.S. NEWS (Sept. 2, 2021), <https://www.usnews.com/news/best-states/articles/2021-09-02/delta-surge-hits-southern-states-the-hardest> (“Florida currently has over 18% of all new COVID-19 cases in the country, though it makes up just 7% of the U.S. population. The state's seven-day average number of cases as of Aug. 31 was the highest in the country, at more than 17,000 new cases.”).

⁹ *Broward County COVID-19 Hospital Report – as of 11:00AM: 9/17/2021*, BROWARD.ORG, <https://www.broward.org/CoronaVirus/Documents/hospital-report--latest.pdf>.

that Delta is responsible for over 99.5% of all COVID-19 cases in the United States.¹⁰ Additionally, although roughly 55.7% of Floridians have been fully vaccinated,¹¹ a significant population in the state remains unvaccinated. And largely because of the Delta variant, there are now cases of so-called “breakthrough” infections among some vaccinated individuals.

C. COVID-19 in the Broward County Jail

Like the rest of the state and county, the Broward County Jail has experienced a surge of cases in recent weeks, and incarcerated people experience a higher risk of contracting COVID-19 than the general population because of “overcrowding, inadequate testing and health care, high-volume daily inflow and outflow of staff and detainees, lack of personal protective equipment, and normalized systematic neglect of the welfare of incarcerated people.”¹² By Defendant’s own reporting, on July 17, 2021, there was one detainee in the Jail with COVID-19.¹³ The reported number climbed to 36 in the following month,¹⁴ and then by September 20, 2021, there were 129 detainees with COVID-19.¹⁵ This alarming infection rate has been accompanied by inadequate

¹⁰ *Variant Proportions*, CTRS FOR DISEASE CONTROL & PREVENTION (updated Sept. 11, 2021), <https://covid.cdc.gov/covid-data-tracker/#variant-proportions>.

¹¹ *U.S. COVID-19 Vaccine Tracker: See Your State’s Progress*, MAYO CLINIC (updated Sept. 17, 2021) [hereinafter *COVID-19 Vaccine Tracker*], <https://www.mayoclinic.org/coronavirus-covid-19/vaccine-tracker>.

¹² Benjamin A. Barsky et al., *Perspective: Vaccination Plus Decarceration — Stopping Covid-19 in Jails and Prisons*, 384 NEW ENG. J. MED. 1583, 1584 (2021), <https://www.nejm.org/doi/full/10.1056/NEJMp2100609>.

¹³ Ex. 11 (7.18.2021 Email from M. Piper to N. Rosenbloom). Because the Jail does not conduct adequate testing pursuant to the Settlement Agreement, this number may well be an undercount.

¹⁴ Ex. 12 (8.18.2021 Email from M. Piper to N. Rosenbloom).

¹⁵ Ex. 17 (9.20.2021 Email from M. Piper to N. Rosenbloom). As Plaintiffs and Dr. Venters explain, because of inadequate testing measures these numbers are likely a significant undercount. (Ex. 9 (Venters Report) ¶ 10.)

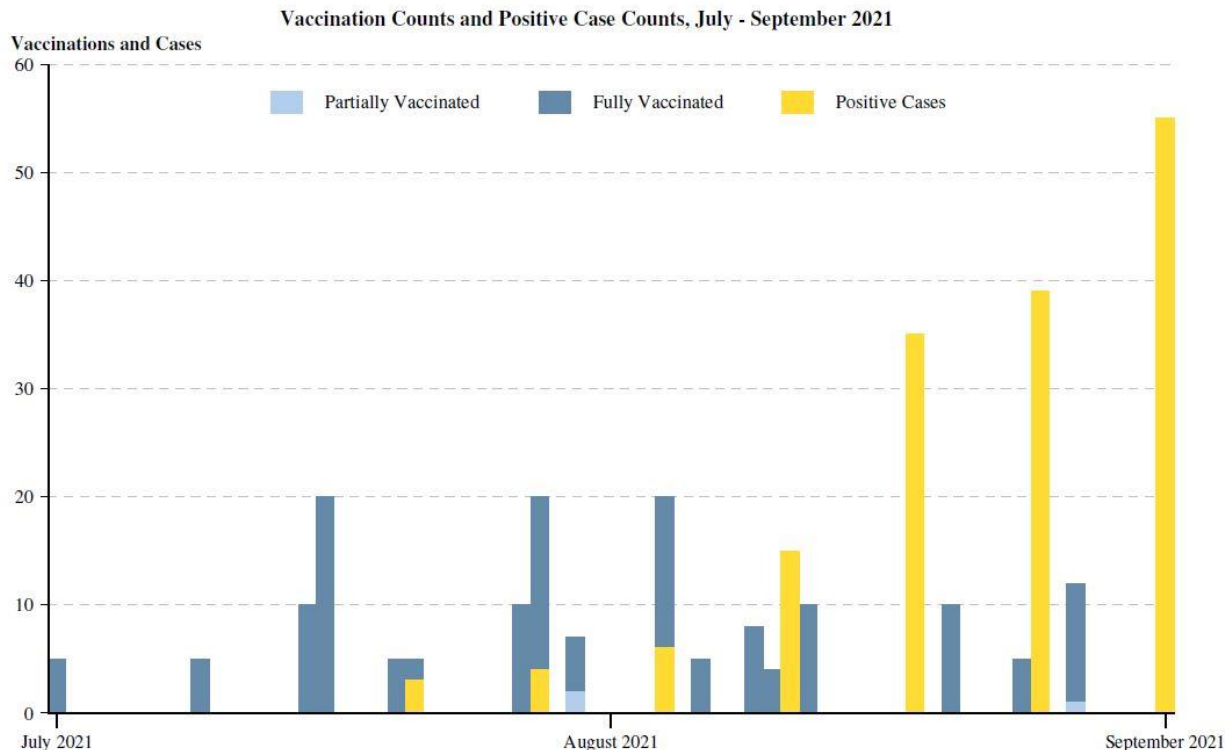
and disappointing preventative measures. The Jail is large and crowded; as of September 20, 2021, 3,527 men and women were incarcerated there, many housed in close quarters in crowded “tanks,” and even made to sleep on the floors of common areas.¹⁶ The Jail’s prevention efforts have fallen short of what the Consent Decree and public health guidance prescribe. For example, Defendant has failed to comply with the Consent Decree’s obligation and CDC Guidance to test newly admitted detainees. (Settlement ¶ 44; Ex. 8 (Venters Report) ¶¶ 39(b), 34.) As an additional example, even though all three COVID-19 vaccines available in the United States have proven effective at preventing serious illness or death in inoculated persons, even against Delta,¹⁷ the Jail has achieved a vaccination rate of at most only 28.2%,¹⁸ putting it well below the vaccination rate for Florida and correctional facilities around the country.¹⁹ The following chart, compiled using data provided by Defendant, shows the explosion of COVID-19 cases at the Jail in recent weeks, along with the anemic vaccination rate:

¹⁶ *Id.*

¹⁷ *Delta Variant: What We Know About the Science*, *supra* note 7 (“The COVID-19 vaccines approved or authorized in the United States are highly effective at preventing severe disease and death, including against the Delta variant.”).

¹⁸ This percentage was calculated based on BSO’s data reporting, required under Paragraph 62 of the Settlement Agreement. The full set of daily and weekly reporting can be compiled and filed in full with the Court if requested.

¹⁹ *COVID-19 Vaccine Tracker*, *supra* note 11 (noting roughly 55.7% of Florida’s population is fully vaccinated); Elizabeth T. Chin, et al., *Covid-19 Vaccine Acceptance in California State Prisons*, NEW ENG. J. MED., *Correspondence* (July 22, 2021) (noting a 66.5% acceptance rate in California prisons); Becky Sullivan, *All Federal Inmates to be Offered Vaccine By Mid-May*, *BOP Says*, NPR (April 16, 2021), <https://www.npr.org/2021/04/16/988237102/all-federal-inmates-to-be-offered-vaccine-by-midmay-bop-director-says> (66% of federal prisoners offered vaccines accepted at least one dose).

**Notes:**

[1] Partially Vaccinated is the number of individuals listed as receiving their first dose of a vaccine that is not J&J on that date. Fully Vaccinated is the number of individuals listed as receiving their second dose of a vaccine that is not J&J on that date or their first dose of the J&J vaccine on that date.

[2] Positive cases source includes note that numbers may not reconcile as positives may have tested the week prior and other results may not have been received as of yesterday.

[3] Date from infections data is week-end date.

Sources: Inmate Vaccine_Master List ACLU files; WeeklyCOVIDStatsData files.

The cause of the Jail's current COVID-19 outbreak has become apparent: Class Counsel has learned through ongoing interviews with Class Members, and a two-day inspection of the Jail conducted by Plaintiffs' expert Dr. Venters, that Defendant is failing to adhere to several provisions of the Consent Decree, thus putting Class Members at grave risk of serious illness or even death from COVID-19 infections. To highlight several findings, Class Members and/or Dr. Venters have reported that:

- a. Defendant has failed to comply with CDC Guidance to test newly admitted detainees and to test staff routinely (Settlement ¶ 44; Ex. 8 (Venters Report) ¶¶ 39(b));
- b. Defendant's practice of locking down entire units instead of conducting individualized cohorting and quarantine based on a detainee's exposure to COVID-19 is not in compliance with CDC Guidance (Settlement ¶ 48; Ex. 4 (Knight Decl.) ¶¶ 3-8, 15; Ex. 6 (Pink Decl.) ¶¶ 5, 9; Ex. 7 (Simpson Decl.) ¶ 7);

- c. Defendant has failed to comply with CDC Guidance on cohorting and quarantining which directs physical separation between quarantine and cohort groups (Settlement ¶ 48; Ex. 8 (Venters Report) ¶ 40(b));
- d. Defendant has failed to facilitate widespread social distancing in the Jail, as evidenced by an increase in the number of detainees sleeping in “boats” in common areas, and a lack of social distancing markers in certain housing units (Settlement ¶¶ 36-37; Ex. 4 (Knight Decl.) ¶¶ 16-17; Ex. 7 (Simpson Decl.) ¶ 5; Ex. 5 (Mesadieu Decl.) ¶ 10; Ex. 1 (Green Decl.) ¶ 4; Ex. 9 (Vickers Decl.) ¶ 6);
- e. Defendant has failed to identify all Medically Vulnerable detainees and house them such that they can maintain social distancing, and only partially complied with his obligation to identify *all* symptomatic persons and medically isolate all such individuals in separate housing units (Settlement ¶¶ 35-36; Ex. 8 (Venters Report) ¶¶ 17, 38(b); Ex. 9 (Vickers Decl.) ¶ 5; Ex. 7 (Simpson Decl.) ¶ 4; Ex. 6 (Pink Decl.) ¶ 23; Ex. 5 (Mesadieu Decl.) ¶ 12; Ex. 9 (Vickers Decl.) ¶ 10);
- f. Defendant has failed to test some detainees who are symptomatic or have been exposed to a person who has tested positive for COVID-19 (Settlement ¶ 43; Ex. 6 (Pink Decl.) ¶¶ 12-16, 23; Ex. 2 (Jefferson Decl.) ¶ 7; Ex. 9 (Vickers Decl.) ¶ 10; Ex. 5 (Mesadieu Decl.) ¶ 12);
- g. Defendant has failed to monitor all newly admitted detainees to the jail for COVID-19 symptoms during the cohorting period (Settlement ¶ 49; Ex. 8 (Venters Report) ¶ 40(b); Ex. 1 (Green Decl.) ¶ 13; Ex. 5 (Mesadieu Decl.) ¶ 5);
- h. Defendant has failed to provide or require use of adequate personal protective equipment (“PPE”) for staff by overlooking the need for higher risk PPE in cohort units and allowing staff to utilize neck gaiters instead of cloth or surgical masks, and for detainees by failing to replace disposable masks when necessary (Settlement ¶¶ 52, 54; Ex. 8 (Venters Report) ¶ 41(b); Ex. 4 (Knight Decl.) ¶ 18; Ex. 6 (Pink Decl.) ¶¶ 10, 25, 33; Ex. 9 (Vickers Decl.) ¶¶ 9, 11; Ex. 7 (Simpson Decl.) ¶¶ 3, 16; Ex. 1 (Green Decl.) ¶ 7; Ex. 2 (Jefferson Decl.) ¶ 13);
- i. Defendant has failed to provide adequate education to detainees on the latest public health guidance on COVID-19 vaccinations (Settlement ¶ 61; Ex. 8 (Venters Report) ¶ 42(b); Ex. 4 (Knight Decl.) ¶ 22-23; Ex. 2 (Jefferson Decl.) ¶ 9; Ex. 6 (Pink Decl.) ¶¶ 41-44; Ex. 9 (Vickers Decl.) ¶¶ 14-15; Ex. 7 (Simpson Decl.) ¶¶ 20-23; Ex. 5 (Mesadieu Decl.) ¶¶ 13-14); Ex. 1 (Green Decl.) ¶¶ 16-18); and
- j. Defendant has failed to monitor Medically Vulnerable detainees for COVID-19 through temperature and symptoms screening (Settlement Agreement ¶ 43; Ex. 8 (Venters Report) ¶¶ 17, 43(b); Ex. 2 (Jefferson Decl.) ¶¶ 3, 7-8; Ex. 9 (Vickers Decl.) ¶¶ 2-3; Ex. 7 (Simpson Decl.) ¶¶ 1, 9; Ex. 6 (Pink Decl.) ¶ 38; Ex. 1 (Green Decl.) ¶ 15).

In Accordance with Paragraph 24 of the Agreement, Plaintiffs notified Defendant in writing of the noncompliance issues summarized above on September 3, 2021. The parties conferred over telephone on September 10, 2021, and made some progress over email during the following week, but were unable to resolve their disputes within seven days of Plaintiffs' written notice. Accordingly, Plaintiffs filed this motion.

D. Evolving Knowledge of COVID-19

During negotiations about the Settlement Agreement, the parties anticipated that circumstances would evolve after the Agreement was executed in November 2020, and thus, the Agreement contains several provisions that require compliance with evolving CDC Guidance for correctional facilities. (Settlement ¶¶ 31, 41, 43, 44, 48, 51, 53, 54, 56, 58, 59, 61.) But there are several recent developments in the fight against COVID-19 that the parties did not anticipate when they negotiated the terms of the Agreement, including the wide-spread availability of highly-effective vaccines. When the parties negotiated the Agreement, scientists expected that any mass distribution to the public of a vaccine was many months away.²⁰ Even then, the safety and efficacy of the vaccines were unknown. Now, it is widely accepted and proven that vaccines are the best way to prevent serious illness and death from COVID-19 infections.²¹

²⁰ ECF No. 49, at 2 (citing Arielle Mitropoulos & Sony Salzman, *COVID-19 Vaccine Still Months Away for Most Americans*, ABC NEWS (Nov. 20, 2020), <https://abcnews.go.com/Health/covid-19-vaccine-months-americans/story?id=74324596> (“The regular Joe is probably not going to receive a vaccine until July or August.”)).

²¹ *COVID-19 Vaccines Work*, CTRS FOR DISEASE CONTROL & PREVENTION (updated Aug. 16, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html> (“All COVID-19 vaccines currently authorized for use in the United States helped protect people against COVID-19, including severe illness, in clinical trial settings. So far, studies that have looked at how COVID-19 vaccines work in real-world conditions (vaccine effectiveness studies) have shown that these vaccines are working well.”); *Experts Agree All Available COVID-19 Vaccines Are Effective*, KAISER PERMANENTE (May 6, 2021), <https://about.kaiserpermanente.org/total->

Despite the proven safety and efficacy of the available vaccines,²² many populations of people have been hesitant to receive a vaccine. Nationwide, people detained in jails and prisons, like Class Members, have exhibited vaccine hesitancy, including some Class Members.²³ (Ex. 6 (Pink Decl.) ¶¶ 42-44; Ex. 7 (Simpson Decl.) ¶ 20; Ex. 3 (Kersey Decl.) ¶ 8.) Vaccination is especially important for Class Members, who are subjected to a heightened risk of infection while incarcerated because of the congregate setting in the Jail which they are not permitted to leave, which forces Class Members into constant close contact with each other and Jail staff who come and go from the facility to the community every day. The CDC has recognized that high vaccination rates of both incarcerated people and staff in correctional facilities are the most effective way to combat infections and prevent serious illness and death.²⁴

health/health-topics/experts-agree-all-available-covid-19-vaccines-are-effective (“Receiving the vaccine is the best way to protect your friends, family, and yourself from the COVID-19 virus.”).

²² The Food and Drug Administration recently approved the Pfizer-BioNTech COVID-19 Vaccine. Press Release, U.S. Food & Drug Admin., FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>.

²³ See Marc Stern, et al., *Willingness to Receive a COVID-19 Vaccination Among Incarcerated or Detained Persons in Correctional and Detention Facilities—Four States, September-December 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 2, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7013a3.htm> (finding vaccine refusal rate was 45% among correctional facility detainees). Many Class Members may also be vaccine hesitant because of a long history of medical abuses of Black Americans. Javonte Anderson, *America Has a History of Medically Abusing Black People. No Wonder Many Are Wary of COVID-19 Vaccines*, USA TODAY (Feb. 16, 2021), <https://www.usatoday.com/story/news/2021/02/16/black-history-covid-vaccine-fears-medical-experiments/4358844001/>.

²⁴ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION (updated June 9, 2021) [hereinafter *CDC Correctional Facility Management Guidance*], <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (“[H]igh COVID-19 vaccination coverage is critical to protect staff and people who are incarcerated/detained[.]”) However, vaccination is not a panacea, and other preventive measures remain critical. In congregate settings like the Jail, “even a vaccine with 90% efficacy will leave many people at ongoing risk for Covid-19, given the extraordinarily high rate

By Defendant’s own reporting, only 28.2% of detained Class Members have been vaccinated as of September 15, 2021—a much lower vaccination rate than the general public and even other correctional facilities.²⁵ Class Counsel has spoken with Class Members who voiced that the vaccine hesitancy among Class Members stems from one of three reasons: (1) lack of educational information about the vaccines, (2) lack of regular, repeated availability of vaccines, and (3) the absence of non-punitive incentives. (Ex. 6 (Pink Decl.) ¶¶ 42-44; Ex. 7 (Simpson Decl.) ¶ 20; Ex. 3 (Kersey Decl.) ¶ 8.) These reasons are consistent with hesitancy observed and documented by experts. On April 2, 2021, the CDC issued a report on a study of the willingness of incarcerated and detained persons to accept a COVID-19 vaccination.²⁶ That study showed that the vaccine refusal rate was 45% and the vaccine acceptance rate in the study was also 45%, with an additional 10% willing to consider using the vaccine.²⁷ The most common reason for vaccine hesitation among incarcerated people was wanting to hear more information about the vaccines.²⁸

Across the country, correctional facility staff have also exhibited an alarming degree of vaccine hesitancy.²⁹ Vaccine hesitancy among correctional facility staff makes it harder to prevent

of transmission in jails and prisons attributable to rampant overcrowding, inadequate testing and health care, high-volume daily inflow and outflow of staff and detainees, lack of personal protective equipment, and normalized systematic neglect of the welfare of incarcerated people.” Barsky et al., *supra* note 12, at 1584.

²⁵ See Chin, et al., *supra* note 19, (noting a 66.5% acceptance rate in California prisons); Sullivan, *supra* note 19 (66% of federal prisoners offered vaccines accepted at least one dose). *But see* Order Denying Defendants’ Motion To Terminate the Consent Decree at 13-14, *Busby v. Bonner*, No. 2:20-cv-02359 (W.D. Tenn. Aug. 30, 2021) (noting 25% vaccination rate in Tennessee Jail was “shockingly low”).

²⁶ Marc Stern, et al., *supra* note 23.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Nicole Lewis & Michael Sisak, “Hell No”: *Correctional Officers Are Declining the Coronavirus Vaccine En Masse*, MARSHALL PROJECT (Mar. 15, 2021),

transmission from community spread and to protect detainees from infection.³⁰ Some states, having recognized the benefits of the vaccines and the risk that unvaccinated staff pose, have mandated vaccines, or weekly testing, for persons who work directly with vulnerable populations, including correctional facility staff.³¹

LEGAL STANDARDS

A. Enforcement Power

A settlement order is an order of the Court, which the Court may enforce. “A consent judgment has the same effect as any other judgment rendered by a court, and the prevailing party may request the court to enforce it.” *Blanco GMBH+Co. Kg v. VLANCO Indus., LLC*, 2014 WL 11531359, at *7 (S.D. Fla. Dec. 19, 2014), *report and recommendation adopted by* 2015 WL 11142884 (S.D. Fla. Jan. 22, 2015) (citing *Smalbein v. City of Daytona Beach*, 353 F.3d 901, 907 (11th Cir. 2003)).³² Federal district courts retain the power to enforce consent decrees entered and

<https://www.themarshallproject.org/2021/03/15/hell-no-correctional-officers-are-declining-the-coronavirus-vaccine-en-masse>. *But see* Hannah Critchfield, *As New COVID Cases Hit Florida Prisons, Staff Vaccination Rates Are Unknown*, TAMPA BAY TIMES (Aug. 9, 2021), <https://www.tampabay.com/life-culture/2021/08/09/as-new-covid-cases-hit-florida-prisons-staff-vaccination-rates-are-unknown/> (“[T]he Florida Department of Corrections is not releasing vaccination rates among detention staff, data that a little over half of other states in the nation have opted to disclose.”).

³⁰ *CDC Correctional Facility Management Guidance*, *supra* note 24 (“Staff vaccination coverage is particularly important given their frequent contact with the outside community, which creates the opportunity for potential introduction of SARS-CoV-2 to the facility.”).

³¹ *See* Amanda Klonsky & Erika Tyagi, *As COVID Rates Rise, Mandate Vaccine for Prison Staff*, USA TODAY (Aug. 18, 2021), <https://www.usatoday.com/story/opinion/policing/2021/08/18/prisons-were-covid-hot-spot-rates-rise-mandate-vaccine-staff/8124028002/> (noting California, Illinois, New Jersey, New York, and Pennsylvania all require state prison workers to be vaccinated or face weekly testing).

³² A district court’s approval of a settlement agreement functions “as the equivalent of the entry of a consent decree.” *Pottinger v. City of Miami*, 805 F.3d 1293, 1296 (11th Cir. 2015) (citing *Smalbein*, 353 F.3d at 905 (“A formal consent decree is unnecessary because the . . . explicit retention of jurisdiction over the terms of the settlement [is] the ‘functional equivalent of an entry of a consent decree.’” (citation omitted))).

approved in their cases. *See, e.g., Frew v. Hawkins*, 540 U.S. 431, 440 (2004) (“Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced.”).

Consent decrees are enforced through compliance orders and, if needed, the district court’s civil contempt power. *Reynolds v. Roberts*, 207 F.3d 1288, 1298 (11th Cir. 2000); *Am. Disability Ass’n, v. Chmielarz*, 289 F.3d 1315, 1321 (11th Cir. 2002) (noting that where a district court incorporates a settlement into its order, the court “having expressly retained jurisdiction, c[an] enforce the terms, even by use of its contempt power”).

The district court may find a party in contempt of a consent decree if the party seeking the order of contempt demonstrates by clear and convincing evidence that the alleged contemnor has violated a valid court order. *Howard Johnson Co. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990). “The focus of a court’s inquiry in civil contempt proceedings is not the subjective intent of the alleged contemnors; rather, it is whether their conduct objectively complied with the terms of the order.” *Blanco GMBH+Co. Kg*, 2014 WL 11531359, at *7 (citing *Khimani*, 892 F.2d at 1516). “Thus, alleged contemnors must do more than merely assert they did not violate the order; they must introduce evidence to support their claim.” *Id.* (citing *Chanel, Inc. v. Krispin*, 2010 WL 4822737, at *3 (S.D. Fla. 2010)). The court’s contempt power is “purposefully broad to cover a full range of litigation abuses.” *U.S. Commodity Futures Trading Comm’n v. S. Tr. Metals, Inc.*, 2017 WL 2875427, at *4-5 (S.D. Fla. May 15, 2017 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-50 (1991))). District courts have “‘wide discretion’ to craft a remedy for contempt. ‘[A] court’s civil contempt power is measured solely by the ‘requirements of full remedial relief.’”” *United States v. Cotton*, 2021 WL 776050, at *7 (S.D. Fla. Jan. 27, 2021) (quoting *United States v. City of Miami*, 195 F.3d 1292, 1298 (11th Cir. 1999) (further citation omitted)

B. Modification Power

Pursuant to their equitable powers, courts have a “continuing duty and responsibility to assess the efficacy and consequences of its order[s].” *Brown v. Plata*, 563 U.S. 493, 542 (2011). “Once invoked, ‘the scope of a district court’s equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies.’” *Id.* at 538 (internal quotation marks omitted) (quoting *Hutto*, 437 U.S. at 687, n.9). A court’s equitable powers gives it the authority to modify a consent decree if the decree is not meeting its intended purpose. *See, e.g., Plata*, 563 U.S. at 542 (“Experience may teach the necessity for modification or amendment of an earlier decree.”). One exercise of this equitable power is encompassed by Federal Rule of Civil Procedure 60(b)(5), which allows a party to move for modification of the consent decree when “applying it prospectively is no longer equitable.” “Rule 60(b)(5) ‘encompasses the traditional power of a court of equity to modify its decree in light of changed circumstances.’” *Griffin v. Sec’y, Fla. Dep’t of Corr.*, 787 F.3d 1086, 1090 (11th Cir. 2015) (quoting *Frew*, 540 U.S. at 906). The United States Supreme Court noted that district courts should apply a “flexible standard” when applying Rule 60(b)(5) to consent decrees involving institutional reform. *Rufo v. Inmates of Suffolk Cnty Jail*, 502 U.S. 367, 393 (1992).

Modification under Rule 60(b)(5) is appropriate where (i) the “party seeking modification of a consent decree [carries] the burden of establishing that a significant change in circumstances warrants revision of the decree,” and (ii) “the proposed modification is suitably tailored to the changed circumstance.” *Rufo*, 502 U.S. at 383. The moving party can establish a significant change in circumstances in several ways, including where the “consent decree has failed to achieve its purpose,” *F.T.C. v. Garden of Life, Inc.*, 2012 WL 1898607, at *3 (S.D. Fla. May 25, 2012), and where “enforcement of the decree without modification would be detrimental to the public interest.” *E.g., In re Consol. Non-Filing Ins. Fee Litig.*, 431 F. App’x 835, 840-41 (11th Cir. 2011)

(quoting *Rufo*, 502 U.S. at 384, 388, 390); *Reynolds v. McInnes*, 338 F.3d 1221, 1226-27 (11th Cir. 2003). Courts in the Eleventh Circuit have “broad discretion to modify an existing injunctive order when factual circumstances have changed or new ones have arisen since the order was issued, as long as notice and an opportunity to be heard are provided before the modification is made.” *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1298 (11th Cir. 2002).

ARGUMENT

I. DEFENDANT SHOULD BE ORDERED TO COMPLY WITH HIS OBLIGATIONS UNDER THE SETTLEMENT AGREEMENT

Under the provisions of the Settlement Agreement ordered by the Court, BSO must comply with very clear directives to protect the detainees in its care from COVID-19 infection. While the Jail has honored its obligations in certain respects, it has fallen woefully short in critical ways, exposing detainees to a serious and unacceptable risk of COVID-19 infection. Given the imminent risk of continuing harm to Class Members—as can already be seen through the alarming pace of infections over the past nine weeks—swift action from the Court is required to put the Jail back on track. Thus, Plaintiffs respectfully request an enforcement order finding Defendant has failed to comply with specific obligations required by the Consent Decree, directing Defendant to submit monthly detailed compliance reports to the Court and Plaintiffs’ counsel, and appointing an independent monitor to facilitate enforcement and ongoing compliance.

A. Evidence from Plaintiffs’ Expert and Detainees Shows Violations of Several Provisions of the Settlement Agreement

The evidence Class Counsel has collected shows Defendant’s failure to comply with several substantive provisions of the Settlement Agreement, presenting a serious and immediate risk to Class Members.

Testing at Admission and During Intake Cohorting. The Settlement Agreement provides that “Defendant . . . shall comply with CDC Guidance for correctional and detention

facilities that expand testing beyond that provided in this Agreement.” (Settlement ¶ 44.) Since February 2021, CDC Guidance has provided that that correctional facilities should “[t]est incoming incarcerated/detained persons, including those returning after more than 24 hours away from the facility.”³³ The Guidance further recommends that during the cohorting period following admission, detainees undergo “re-testing every 3-7 days.”³⁴ CDC Guidance also provides that “[c]orrectional facility administrators should establish daily symptom and temperature screening to identify staff with signs or symptoms consistent with COVID-19[.]”³⁵

BSO, by their own admission, has failed to comply with these terms. (Ex. 8 (Venters Report) ¶ 17.) Plaintiffs’ expert, Dr. Venters, explains that the Jail’s refusal to conduct testing at intake—a “completely essential practice”—is “shocking.” (Ex. 8 (Venters Report) ¶ 39(b).) Indeed, of the almost 30 COVID-19 inspections of jails, prisons and immigration detention facilities Dr. Venters has conducted around the country during the pandemic, the Broward County Jail is the *only* facility where intake testing was not done. (*Id.*) As a result, the Jail is “ill-prepared to detect new cases of COVID-19 . . . virtually ensur[ing] that new cases of COVID-19 go undetected for far longer than should occur based on . . . current CDC guidelines.” (Ex. 8 (Venters Report) ¶ 34.) The recent proliferation of infections at the Jail can almost certainly be connected with BSO’s failure to conduct adequate testing at intake.

³³ *CDC Correctional Facility Management Guidance, supra* note 24; *Interim Guidance for SARS-CoV-2 Testing in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, (updated June 7, 2021) [hereinafter *CDC Correctional Facility Testing Guidance*], <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html>.

³⁴ *CDC Correctional Facility Testing Guidance, supra* note 33.

³⁵ *Id.*

During the meet-and-confer process, BSO represented that it only began testing detainees at intake on August 9, 2021.³⁶ To begin, this is a clear admission that the Jail was in violation of its responsibilities under the Consent Decree for six months, between February and August 2021. And perhaps more troubling, BSO's representation is patently false, according to their own data. For example, BSO reported that for the week ending August 25, 2021, it had tested 173 detainees, but had admitted 499 new people to the Jail during that same period, making it impossible that every newly admitted person was tested.³⁷

Plaintiffs recognize that BSO has recently, within the past three weeks or so, begun testing certain detainees at admission, after months of failing to do so. Even if BSO is now in compliance with this provision of the Settlement Agreement—which has yet to be established—an order from this Court enforcing the terms of the Settlement Agreement is still necessary so that BSO understands compliance should have been immediate and must be ongoing. *See R.J. v. Mueller*, 2020 WL 4934989, at *5 (N.D. Ill. Aug. 24, 2020) (finding defendant in contempt of consent decree for partial compliance and noting “[t]he Court is unwilling to set aside the plan’s and the consent decree’s requirements and conclude, in effect, that coming close to compliance at least some of the time is good enough.”); *Holmes v. Godinez*, 991 F.3d 775, 781-82 (7th Cir. 2021) (noting that the district court could find defendant in contempt in part because of past violations and that “it makes sense for the court to be able to enter orders that help ensure both that past violations don’t repeat and that ongoing violations cease.”).

³⁶ Ex. 15, at 3 (9.17.2021 Email from M. Piper to N. Rosenbloom (BSO Memo)) (“Testing in pre-booking during the expanded COVID Screening Process began on August 9, 2021.”).

³⁷ Ex. 13 (8.26.2021 Email from R. Oduola to B. Stevenson, et al. (Weekly Tracking and Report of COVID-19 Statistics/Data Broward County Jail: Week Ending August 25, 2021)).

Similar to the deficiencies during the booking process, Dr. Venters reports that the Jail's failure to monitor and test detainees during the initial cohort period is out of step with both the Agreement and best practices:

Like intake testing, [monitoring during the cohorting period] is a routine practice in other correctional settings I have inspected and I am shocked that neither intake testing nor daily COVID-19 screening occurred in Broward County Jail for newly detained people. This lack of active systems leaves the facilities blind to new cases until they become clinically apparent to patients themselves and/or visible to staff. Given the extremely transmissible nature of the Delta variant, and the emergence of cases and even transmission among vaccinated people, these deficiencies are alarming.

(Ex. 8 (Venters Report) ¶ 40(b) (emphasis added).)

Testing at Release or for Court Visits. Dr. Venters explains that detainees “awaiting transfer to another facility or release home” are kept in an area known as the “bus-stop,” but Jail staff reported there was “no repeat of COVID-19 screening during this time in these housing units and that there was no testing in this area unless people exhibited symptoms of COVID-19.” (Ex. 8 (Venters Report) ¶ 19.) During the meet-and-confer process, BSO represented that “[d]etainees who are court ordered to programs and transfers to Florida DOC are tested at release.”³⁸ Even if that is what BSO is actually doing—contrary to Jail staff’s representations to Dr. Venters—that leaves out people who are released home or elsewhere, and is still in violation of the Consent Decree. The Consent Decree requires compliance with CDC Guidance for correctional facilities, (Settlement Agreement ¶ 44), which in turn provides for “test[ing of] incarcerated/detained persons leaving the facility as close to the day of . . . release (whether into the community or to a halfway house or other transitional location) as possible (no more than 3 days prior).”³⁹ Thus, even if BSO

³⁸ Ex. 15, at 1 (9.17.2021 Email from M. Piper to N. Rosenbloom (BSO Memo)).

³⁹ *CDC Correctional Facility Testing Guidance*, *supra* note 33.

is testing detainees upon release in *some* situations, that falls short of their agreement and obligation to test upon release in *all* situations.

Dr. Venters further observed that the Jail has no “screening process . . . for people . . . who go to/return from court.” (Ex. 8 (Venters Report) ¶ 37(b).) Dr. Venters noted that CDC guidance recommends “verbal screening and temperature checks for incarcerated/detained persons . . . who enter correctional and detention facilities[.]” (*Id.*) Dr. Venters’s observation is consistent with the experiences of Class Members who have reported that the Jail conducts no screening or testing before or after court visits. (Ex. 9 (Vickers Decl.) ¶¶ 7-8; Ex. 7 (Simpson Decl.) ¶¶ 11-12; Ex. 3 (Kersey Decl.) ¶¶ 4, 6.) This is particularly concerning because Class Members further report that they are kept in small holding areas at court visits with many other detained persons. (Ex. 9 (Vickers Decl.) ¶ 7; Ex. 7 (Simpson Decl.) ¶ 11; Ex. 3 (Kersey Decl.) ¶ 4.)

Testing of Jail Staff. Dr. Venters also noted that “regular testing of all staff,” who enter and exit the Jail buildings daily, is a “completely essential practice,” occurring at other jails and prisons he has inspected related to COVID-19 issues and “is clearly recommended by the CDC.” (Ex. 8 (Venters Report) ¶ 39(b).) Given the importance of testing staff routinely, as recommended by CDC Guidance, Dr. Venters recommended that Defendant “[c]reate a testing program for staff that include twice-weekly testing for unvaccinated staff and allow for reduced testing among vaccinated staff.” (Ex. 8 (Venters Report) ¶ 39(c)(ii).)

Cohorting Upon Admission. With limited exceptions, the Agreement requires Defendant to “[c]ohort newly-admitted persons for 14 days in separate housing units, and monitor them on a daily basis for COVID-19 infection before they are transferred to units in other Jail facilities[.]” (Settlement ¶ 49.) Class Members have reported that some newly admitted detainees have been

brought directly from intake into the general population without cohorting or daily symptom checks. (Ex. 1 (Green Decl.) ¶ 13; Ex. 5 (Mesadieu Decl.) ¶ 5.)

Similarly, Jail “staff reported [to Dr. Venters] that [a newly admitted person] going to the medical infirmary or to a mental health unit would lead to a patient going into a non-cohort setting” (Ex. 8 (Venters Report) ¶ 19), and there is also no COVID-19 screening of people admitted into the infirmary or mental health units (*id.* ¶ 40(b)). This is in direct violation of the Jail’s obligation under the Settlement Agreement to cohort upon admission detainees who require mental health or medical services within the infirmary. (Settlement ¶ 49.)

Failure to Test Symptomatic Detainees or Those Exposed to Symptomatic Detainees.

The Agreement requires Defendant to test all detainees and staff who display symptoms and all detainees who are exposed to a person who has tested positive for COVID-19. (Settlement ¶ 43.) The Agreement also requires Defendant to “[i]dentify persons who came into contact with others . . . who test positive or are symptomatic” (contact tracing) and implement “appropriate cohorting, quarantining, and medical isolation procedures” for such persons. (Settlement ¶ 45.) Class members report instances where Defendant has failed to test individuals who display COVID-19 symptoms, including when such individuals communicate to Jail staff that they are experiencing COVID-19 symptoms, some of whom are very ill. (Ex. 6 (Pink Decl.) ¶¶ 16, 23; Ex. 9 (Vickers Decl.) ¶ 10; Ex. 5 (Mesadieu Decl.) ¶ 12.) Class members further report that detainees who are exposed to someone who tested positive for COVID-19 are not subsequently tested, or they are tested many days after exposure thereby enabling the spread of COVID-19 in the interim period. (Ex. 6 (Pink Decl.) ¶ 14; Ex. 2 (Jefferson Decl.) ¶¶ 5, 7.)

Cohorting and Quarantining. The Agreement requires Defendant to “[i]mplement CDC-compliant cohorting, quarantining, and medical isolation procedures for those who test positive,

who are symptomatic, or those who have come into close contact with such persons[.]” (Settlement ¶ 48.) As a general matter, CDC Guidance directs that those who test positive, who are symptomatic, or have come in close contact with such persons should be identified and housed separately from other detainees.⁴⁰ The Guidance recommends restriction of movement of only these individuals outside of their isolation or quarantine space.⁴¹ Importantly, the Guidance stresses that any isolation should be non-punitive and the Guidance does not direct blanket lockdowns of entire units or widespread restrictions on movement of detainees.⁴²

Class Members have reported that the Jail’s response to identification of a COVID-19 positive detainee is to move that detainee to medical isolation, and then lock down their entire unit, restricting the movement of all detainees irrespective of their degree of exposure to the detainee who tested positive. (Ex. 4 (Knight Decl.) ¶¶ 3-8, 15; Ex. 6 (Pink Decl.) ¶¶ 5, 9; Ex. 7 (Simpson Decl.) ¶ 7.) While quarantining an entire unit can be appropriate in circumstances where all detainees in a unit have come in close contact and may have been exposed to the individual who tested positive, the Jail has reported no mechanism for contact tracing, such that it would be able to follow CDC Guidance and determine who may have actually been exposed (and therefore subject to quarantine). Further, Class Members have reported that even when units are not technically in “quarantine”—*i.e.*, when there has not been a positive case in a unit—they are still being locked down in their cells for 21 hours a day (Ex. 6 (Pink Decl.) ¶ 5), which is unduly restrictive and out of step with CDC Guidance.

⁴⁰ *CDC Correctional Facility Management Guidance*, *supra* note 24.

⁴¹ *Id.*

⁴² *Id.* While BSO may not refer to its practice of restricting the movement of detained persons in such a manner as “lockdowns,” this is the language used by Class Members to describe the practice.

In addition, Dr. Venters reported observing “quarantine and cohort groups sharing the same physical space.” (Ex. 8 (Venters Report) ¶ 40(b).) Specifically, Dr. Venters observed one large housing area that included both cohort and quarantine groups, separated by “a stack of chairs and tables” only. (Ex. 8 (Venters Report) ¶ 24.) Dr. Venters noted, “[w]ere a person to develop COVID-19 in either group, it would not be reliably known whether it resulted from their own group’s risk or those of the adjacent group.” (Ex. 8 (Venters Report) ¶ 40(b).) This practice is contrary to CDC Guidance which requires “**separate** physical locations (dedicated housing areas and bathrooms)” for detainees in medical isolation, cohorts, or quarantine.⁴³ In response, BSO admits that, within the Conte facility, distinct quarantine/cohort units are separated with “no physical wall between them,” but justifies this on the basis there is “15 to 30 feet” between the two units.⁴⁴ This justification is inadequate. CDC Guidance is clear that quarantine/cohort units should be “separate” from one another, meaning an area with “solid walls” and “a solid door that closes fully.”⁴⁵

Social Distancing. The Agreement requires Defendant to develop a housing plan that would allow, where possible, detainees “to maintain six-feet of social distance from others while in their cells . . . and common areas, including dayrooms, dining areas, recreation-areas, and bath and shower rooms.” (Settlement ¶ 36.) In recent weeks, there has been an increase in the number of detainees sleeping in “boats” in common areas which makes social distancing near impossible. (Ex. 4 (Knight Decl.) ¶ 16; Ex. 7 (Simpson Decl.) ¶ 5; Ex. 5 (Mesadieu Decl.) ¶ 10; Ex. 1 (Green Decl.) ¶ 4.)

⁴³ *Id.*

⁴⁴ Ex. 15, at 2 (9.17.2021 Email from M. Piper to N. Rosenbloom (BSO Memo)).

⁴⁵ *CDC Correctional Facility Management Guidance*, *supra* note 24.

The Agreement further requires Defendant to “lay out tape markers at six-foot increments in areas where persons are required to line up or congregate for medications, security searches of cells and housing units, recreation, and food service.” (Settlement ¶ 37.) Some Class Members have reported that Defendant has failed to implement such tape markers in certain locations. (Ex. 4 (Knight Decl.) ¶ 17 (Main Jain); Ex. 9 (Vickers Decl.) ¶ 6 (North Broward, Unit 5C).)

Housing Arrangements for Medically Vulnerable and Symptomatic Detainees. The Agreement requires Defendant to identify all Medically Vulnerable detainees and house them such that they can maintain social distancing. (Settlement ¶ 35.) However, Defendant does not maintain any reporting to identify or track all Medically Vulnerable detainees incarcerated in the Jail, and thus does not appear to take *any* special precautions for this at-risk population, much less house them in accordance with this provision of the Agreement. (Ex. 8 (Venters Report) ¶¶ 17, 38(b).)

The Agreement further requires Defendant to medically isolate symptomatic persons in individual cells in separate housing units, instead of in cells or on tiers with other symptomatic persons. (Settlement ¶ 39.) Class Members have reported instances when a symptomatic individual was not tested or isolated in a separate unit. Rather, they remain housed with other detainees, some of whom may also have been symptomatic. (Ex. 6 (Pink Decl.) ¶¶ 16, 23; Ex. 5 (Mesadieu Decl.) ¶ 12; Ex. 9 (Vickers Decl.) ¶ 10.)⁴⁶ As outlined above, the severity of this violation is compounded by the fact that Defendant has failed to test all symptomatic detainees, thereby exposing detainees and staff alike to possible COVID-19 exposure and frustrating the

⁴⁶ During his inspection, Dr. Venters observed that “patients with known and suspected COVID-19 whom Jail staff had selected for testing had all been tested and were being housed in separate and isolated settings.” (Ex. 8 (Venters Report) ¶ 39(a) (emphasis added).) This suggests that Defendant may be in partial compliance with this obligation under the Agreement, but reports from detainees to Class Counsel disclose several examples of apparent violations of this provision which is critical to addressing the spread of COVID-19 in the Jail.

additional protective force of Paragraph 38 which requires medical isolation of persons who test positive for COVID-19. *See supra* at 28.

Inadequate PPE. The Agreement requires Defendant to provide detainees with two face coverings that are replaced per manufacturer's instructions, and his Settlement Agreement response Defendant states that face coverings are replaced "weekly or as needed." (Settlement ¶ 52.) Class Members report that Defendant has failed to replace disposable masks within an appropriate time frame, and has refused to provide timely replacements for damaged or soiled masks. (Ex. 6 (Pink Decl.) ¶ 33; Ex. 9 (Vickers Decl.) ¶ 11; Ex. 2 (Jefferson Decl.) ¶ 13.)

The Agreement further requires Defendant to provide Jail staff with face coverings and PPE that is appropriate to their duties in the Jail as recommended by CDC Guidance. (Settlement ¶ 54.) Defendant has failed in this respect by (i) overlooking the need for higher risk PPE in cohort units; and (ii) allowing staff to utilize neck gaiters as face coverings instead of cloth or surgical masks. (Ex. 8 (Venters Report) ¶ 41(b); Ex. 4 (Knight Decl.) ¶ 18; Ex. 6 (Pink Decl.) ¶¶ 25-26; Ex. 9 (Vickers Decl.) ¶ 9; Ex. 7 (Simpson Decl.) ¶ 16; Ex. 1 (Green Decl.) ¶ 7.) BSO has attempted to justify the use of gaiters by pointing to generalized CDC Guidance on face coverings.⁴⁷ However, the CDC Guidance for *correctional facilities* recommends various types of PPE, and does not contemplate the user of gaiters.⁴⁸

Education on COVID-19 Prevention. The Agreement requires Defendant to provide detainees with educational information on the latest CDC and other public health guidance on COVID-19, including best practices to prevent infection and transmission of COVID-19. (Settlement ¶ 61.) Defendant has failed to provide adequate educational information on the most

⁴⁷ Ex. 15, at 5 (9.17.2021 Email from M. Piper to N. Rosenbloom (BSO Memo)).

⁴⁸ *CDC Correctional Facility Management Guidance*, *supra* note 24.

vital development in the fight against COVID-19 infection and transmission: vaccinations. CDC Guidance explains that “[i]ncreasing COVID-19 vaccination rates among facility employees and incarcerated/detained persons is an important step to prevent incarcerated and detained persons and correctional staff from getting sick with COVID-19 disease. COVID-19 vaccines protect more than just an individual’s health, they also help minimize the spread of SARS-CoV-2.”⁴⁹

Defendant has failed to provide detainees with adequate education about the COVID-19 vaccine, which has “contribut[ed] to the low vaccination rate in the Jail” and is “critical to address[ing] the apparent vaccine hesitancy among certain detainees.” (Ex. 8 (Venters Report) ¶ 42(b).) Many Class Members understandably have questions about vaccination given widespread misinformation. (Ex. 6 (Pink Decl.) ¶ 42; Ex. 7 (Simpson Decl.) ¶ 20.) To assist Defendant in providing educational information to Class Members, Class Counsel gathered and delivered informational packets to Defendant for distribution to Class Members.⁵⁰ Despite Defendant’s assurance that the materials would be distributed individually, numerous Class Members have reported to Class Counsel that they never received the educational packets. (*E.g.*, Ex. 7 (Simpson Decl.) ¶ 22; Ex. 5 (Mesadieu Decl.) ¶ 16.) When Class Counsel inquired about this issue, counsel for Defendant explained on a meet-and-confer call that copies of the educational materials were left on tables without any individual distribution to detainees, or even an explanation of what materials were being provided. There is also no indication that BSO is providing active one-to-one outreach by medical professionals to detainees who have declined the vaccine, which Dr. Venters explains is an important facet of vaccine education. (Ex. 8 (Venters

⁴⁹ *CDC Correctional Facility Testing Guidance*, *supra* note 33.

⁵⁰ Ex. 18 (Vaccine Education Packet).

Report) ¶ 42(c)(ix); Ex. 9 (Vickers Decl. ¶ 13-15; Ex 3 (Kersey Decl. ¶ 8; Ex 5 (Mesadieu Decl.) ¶¶ 15-16; .)

Monitoring for Medically-Vulnerable Detainees. The Agreement requires Defendant to monitor Medically Vulnerable detainees for COVID-19, including twice-daily temperature checks. (Settlement ¶ 64.) As noted above, Defendant has failed to take the critical threshold step of tracking all Medically Vulnerable detainees housed in the Jail who should be subject to such monitoring, and thus it is unsurprising that Defendant is failing to undertake the required twice-daily temperature and COVID-19 symptom checks of such detainees. (Ex. 8 (Venters Report) ¶¶ 17, 43(b); Ex. 2 (Jefferson Decl.) ¶¶ 3, 7-8; Ex. 9 (Vickers Decl.) ¶¶ 2-3; Ex. 7 (Simpson Decl.) ¶¶ 1, 9; Ex. 6 (Pink Decl.) ¶ 38; Ex. 1 (Green Decl.) ¶ 15.) Indeed, BSO has admitted it was not in compliance with this provision, and is only starting now, about ten months after committing to do so.⁵¹

B. The Court Should Find Defendant Has Failed to Comply with the Plain Terms of the Court-Ordered Consent Decree, And Order Corrective Measures to Ensure Compliance

To ensure timely compliance with the Court-ordered Consent Decree, Defendant should be subjected to findings of noncompliance and an order imposing strict measures to ensure compliance, including monthly compliance reporting to the Court and all counsel, the appointment of an independent monitor to oversee compliance, and the specter of contempt findings and sanctions if noncompliance continues. It is well-established that “[a] party may be held in contempt if he violates a definite and specific court order requiring him to perform or refrain from performing a particular act or acts with knowledge of that order.” *Sec. & Exch. Comm’n v. Monterosso*, 2015 WL 13239830, at *5 (S.D. Fla. July 29, 2015) (quoting *Whitfield v. Pennington*,

⁵¹ Ex. 15, at 2 (9.17.2021 Email from M. Piper to N. Rosenbloom (BSO Memo)).

832 F.2d 909, 913 (5th Cir. 1987)). That is exactly what occurred here. The Settlement Agreement is explicitly incorporated into the Court’s Approval Order, and requires Defendant to perform certain actions. (ECF Nos. 103-1, 112.) As just one example of a provision under the Agreement, Defendant is required to comply with CDC Guidance on testing, which provides that correctional facilities should “[t]est incoming incarcerated/detained persons.”⁵² Defendant is of course aware of the Agreement and the Approval Order, and also of the CDC Guidance on testing. (*See* Ex. 8 (Venters Report) ¶ 11 (“During the inspection, facility security and health leadership stated that they are in full compliance with CDC recommendations for COVID-19 response in correctional settings and that their approach is to follow those recommendations.”).) On these facts, there is no available inference other than that Defendant knowingly violated the Court’s Approval Order, which would merit a contempt finding and remedy.⁵³ Because compliance is the urgent goal, Plaintiffs at this time ask only for a detailed enforcement order.

As the sanction for civil contempt, the Court would have “numerous options, among them: a coercive daily fine, a compensatory fine, attorneys’ fees and expenses . . . and *coercive incarceration*.” *Blanco GMBH+Co. Kg v. VLANCO Indus., LLC*, 2014 WL 11531359, at *9 (S.D. Fla. Dec. 19, 2014), *report and recommendation adopted sub nom. Blanco GmbH + Co. KG v. Vlanco Indus., LLC*, 2015 WL 11142884 (S.D. Fla. Jan. 22, 2015) (internal quotation marks omitted; emphasis in original).

⁵² *CDC Correctional Facility Testing Guidance*, *supra* note 33.

⁵³ As to future remedies, if needed, *see, e.g., Mobile Cty. Jail Inmates v. Purvis*, 581 F. Supp. 222, 228 (S.D. Ala. 1984) (in jail conditions case, ordering a contempt fine of \$5,000 a day for failure to comply with court order); *Miller v. Carson*, 550 F. Supp. 543, 549 (M.D. Fla. 1982) (same); *McCray v. Dawson*, 953 F. Supp. 1476, 1485 (M.D. Ala. 1996) (\$100 per day per inmate); *Palmigiano v. DiPrete*, 710 F. Supp. 875, 889 (D.R.I.), *aff’d*, 887 F.2d 258 (1st Cir. 1989) (\$50 per day per inmate); *Stone v. Cty. and Cnty. of S.F.*, 968 F.2d 850, 853, 856 (9th Cir. 1992) (\$300 per day per inmate).

Plaintiffs submit that Court findings of noncompliance, coupled with an enforcement order imposing regular and frequent reporting requirements and the appointment of an independent monitor to oversee compliance are reasonable, limited measures that should ensure Defendant's attention and compliance with the Consent Decree.⁵⁴ While Class Counsel have been diligent in their attempts to monitor Defendant's compliance, those efforts are limited to the means provided for in the Agreement, which have proved insufficient. Class Members previously reported to the Court that Defendant was in violation of numerous provisions of the Agreement in the time period before this Court's Approval Order was entered, and many of those violations have continued.⁵⁵ This suggests that a more robust form of reporting compliance back to the Court may be needed. Further, Class Counsel is limited in its ability to directly monitor compliance given both the correctional and pandemic context which significantly limit access to Class Members and Jail facilities. It was only through the sharp increase in positive cases, phone conversations with some detainees, and the results of Dr. Venters's inspection that Class Counsel was able to gather sufficient information concerning the severity and extent of Defendant's noncompliance, none of which have turned out to be adequate for compliance monitoring of an Agreement aimed at proactive, preventative measures to address a deadly virus. As to the mechanism for selecting a

⁵⁴ Courts often appoint a monitor to report directly to the court on compliance with a court-approved settlement agreement or consent decree, including in the context of prison litigation. *See, e.g., Loyd v. Ala. Dep't of Corr.*, 176 F.3d 1336 (11th Cir. 1999); *United States v. Jefferson Cty., Ala.*, 2013 WL 4482970 (N.D. Ala. Aug. 20, 2013); *ACLU of Tenn., Inc. v. Cty. of Memphis, Tenn.*, No. 17:cv-02120, ECF Nos. 151, 152 (W.D. Tenn.). Courts have explained that the Prison Litigation Reform Act ("PLRA") provisions governing the appointment of a special master do not restrict the power of a district court to appoint a monitor. *See, e.g., Benjamin v. Fraser*, 343 F.3d 35, 44-47 (2d Cir. 2003), *overruled on other grounds by Caiozzo v. Koreman*, 581 F.3d 63 (2d Cir. 2009) (holding that an entity appointed to monitor compliance with consent decrees settling seven class actions brought by pretrial detainees in New York City jails was not subject to the PLRA's provisions governing special masters).

⁵⁵ Plaintiffs' Motion for Approval of the Class Settlement and Certification of Settlement Class at 13, 15-17 (ECF No. 103).

monitor, Plaintiffs propose that each party submit to the Court three names for consideration, from which the Court would select the monitor in its discretion.

II. TO EFFECTUATE THE PURPOSE OF THE SETTLEMENT AGREEMENT, THE COURT SHOULD MODIFY THE AGREEMENT BY ORDERING DEFENDANT TO STRENGTHEN VACCINATION EFFORTS

Section I above addresses BSO's failure to comply with the explicit terms of the Consent Decree and thus the need for the Court to enforce its order. Section II addresses BSO's failure to comply with the purpose of the Consent Decree—to protect incarcerated persons. In light of significant changed circumstances, including the advent of effective vaccinations after the Agreement was signed, and the extraordinary rate of COVID-19 infection in the Jail, more is needed to effectuate the purpose of the Court-approved Settlement Agreement—*i.e.*, “to address the risk from COVID-19 infection at the Broward County Jail consistent with public health principles.” (Settlement ¶ 3.) Thus, the Court should use its equitable power—and responsibility—to modify the Settlement Agreement, requiring BSO to undertake certain additional affirmative measures to increase the abysmal 28.2% vaccination rate in the Jail. It is widely accepted by public health officials that Defendant cannot address the risks from COVID-19 infection without widespread vaccination.⁵⁶ To that end, Plaintiffs respectfully request that the Court modify the Settlement Agreement, requiring BSO to take certain affirmative measures to improve the vaccination rate among detainees and staff, as specified below.⁵⁷

⁵⁶ *Experts Agree All Available COVID-19 Vaccines Are Effective*, *supra* note 21 (“Receiving the vaccine is the best way to protect your friends, family, and yourself from the COVID-19 virus.”).

⁵⁷ To the extent the Court finds that any other requests made in Plaintiffs' Proposed Order do not fall within the scope of the current Settlement Agreement, Plaintiffs respectfully request that the Court modify the Settlement Agreement as appropriate to cover all relief requested in the Proposed Order.

A. The Court Has the Authority—And the Responsibility—to Modify the Consent Decree to Effectuate Its Purpose

When a consent decree is failing to meet its intended purpose, courts have not just the authority, but the “duty and responsibility” pursuant to their equitable powers, to modify the consent decree and effectuate its purpose. *Brown v. Plata*, 563 U.S. 493, 542 (2011). Federal Rule of Civil Procedure 60(b) codifies the courts’ inherent authority to modify or vacate the prospective effect of their decrees, when “applying it prospectively is no longer equitable; or [for] any other reason that justifies relief.” As the Supreme Court explained in *Rufo*, 502 U.S. at 383, a modification to the consent decree is warranted if the “party seeking the modification of [the] consent decree . . . establish[es] that a significant change in circumstances warrants revision of the decree[,]” and “the proposed modification is suitably tailored to the changed circumstance.” Indeed, if a significant change in circumstances is shown, “a court abuses its discretion ‘when it refuses to modify an injunction or consent decree in light of such changes.’” *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Agostini v. Felton*, 521 U.S. 203, 215 (1997)).

Courts in the Eleventh Circuit have recognized that modification is appropriate where “the consent decree has failed to achieve its purpose,” *F.T.C. v. Garden of Life, Inc.*, 2012 WL 1898607, at *3 (S.D. Fla. May 25, 2012), or where “enforcement of the decree without modification would be detrimental to the public interest,” *In re Consol. Non-Filing Ins. Fee Litig.*, 431 F. App’x 835, 840-41 (11th Cir. 2011) (quoting *Rufo*, 502 U.S. at 384, 388, 390). Once the Court finds that modification is appropriate, it has “broad discretion to modify an existing injunctive order.” *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1298 (11th Cir. 2002).

B. In Light of New Circumstances Since the Settlement Agreement Was Originally Ordered by the Court, the Settlement Agreement’s Purpose Would Be Frustrated Without Modification To Address COVID-19 Vaccination

Plaintiffs agree with this Court’s observations at the May 10, 2021, Fairness Hearing that vaccination is a critical issue deserving of this Court’s oversight attention. (ECF No. 126 at 9:7-9 (“If you guys come back to me, the first thing I’m going to be asking you is, what’s going on with the vaccines.”).⁵⁸ As Plaintiffs’ counsel noted to the Court at that hearing—with no objection from Defendant’s counsel—vaccines were not “contemplated . . . at the time” of the Settlement (*Id.* at 7:6-13). But it is now widely accepted and proven that vaccines are the best way to prevent serious illness and death caused by COVID-19 infections.⁵⁹ The CDC recognizes that “high COVID-19 vaccination coverage is critical to protect staff and people who are incarcerated/detained” who are subjected to a heightened risk of infection while due to the congregate setting leading to close contact.⁶⁰ The CDC recommends that correctional facilities “ensure vaccination is available for staff and people who are incarcerated/detained and encourage them to be vaccinated.”⁶¹ Thus, there can be no dispute that the entire purpose of the Settlement Agreement—to “address the risk from COVID-19 infection at the Broward County Jail consistent

⁵⁸ Defendant seems to agree that vaccines are important and should be addressed in this action. In response the Court’s concerns about vaccinations, Defendant submitted a “Voluntary Report of Information/Update Addressing Vaccination of Inmates” that summarized Defendant’s efforts to vaccinate Class Members. (ECF No. 109.)

⁵⁹ *COVID-19 Vaccines Work*, *supra* note 21 (“All COVID-19 vaccines currently authorized for use in the United States helped protect people against COVID-19, including severe illness, in clinical trial settings. So far, studies that have looked at how COVID-19 vaccines work in real-world conditions (vaccine effectiveness studies) have shown that these vaccines are working well.”).

⁶⁰ *CDC Correctional Facility Management Guidance*, *supra* note 24.

⁶¹ *Id.*

with public health principles” (Settlement ¶ 3)—would be undermined without incorporating provisions on vaccinations in the absence of a sufficiently robust vaccination effort by BSO.

Despite the proven safety and efficacy of the available vaccines, some correctional facility detainees, like the Class Members, have been hesitant to receive a vaccine.⁶² Class Counsel has spoken with Class Members who voiced that the vaccine hesitancy among Class Members stems primarily from: (1) lack of educational information about the vaccines,⁶³ (2) lack of regular, repeated availability of vaccines, and (3) lack of ongoing non-punitive incentives. (*See, e.g.*, Ex. 6 (Pink Decl.) ¶¶ 42-44; Ex. 7 (Simpson Decl.) ¶ 20; Ex. 3 (Kersey Decl.) ¶ 8.)⁶⁴ These reasons are consistent with hesitancy observed and documented by experts.⁶⁵

Defendant has taken some steps to encourage vaccination in the Jail, including a one-time vaccination drive in May 2021, which included a non-punitive incentive, posting educational materials, such as informational posters on the bulletin boards, and periodic overhead announcements. These measures are largely passive, and do little to address the issues leading to vaccine hesitancy. Further, Class Members have reported that Defendant does not provide repeated or prompt access to vaccines. (Ex. 7 (Simpson Decl.) ¶¶ 18-19.) Thus, unsurprisingly, but dishearteningly, by Defendant’s reporting, only 28.2% of detained Class Members have been

⁶² *See supra* notes 23, 26-28.

⁶³ Issues concerning vaccine education are encompassed within Paragraph 61 of the Agreement. Defendant’s failure with respect to education about vaccines may be remedied through enforcement of the Agreement as summarized above. *See infra* 33-34.

⁶⁴ BSO claims that it has been providing non-punitive incentives in the form of \$25 commissary kits. (Ex. 15, at 6 (9.17.2021 Email from M. Piper to N. Rosenbloom (BSO Memo)).) That assertion is belied by its own data. According to BSO’s data, it has distributed 169 commissary kits, (Ex. 16 (9.17.2021 Email from M. Piper to N. Rosenbloom (BSO Incentive Pack Records))), whereas 1,721 detainees have received vaccinations while in custody (Ex. 17 (9.20.2021 Email from M. Piper to N. Rosenbloom)).

⁶⁵ *See supra* notes 23, 26-28.

vaccinated as of September 15, 2021—a much lower vaccination rate than other correctional facilities.⁶⁶ And more, this percentage has remained relatively unchanged since Defendant first reported it had implemented a vaccination incentive program.⁶⁷ By Defendant’s own reporting required by the Consent Decree, the Jail has vaccinated only 276 detainees in the last three and a half months⁶⁸ in a churning population of more than 3,400 and at least 1,412 new detainees were admitted over the last three months.⁶⁹

Further, the CDC recognizes that “[s]taff vaccination coverage is particularly important given their frequent contact with the outside community, which creates the opportunity for potential introduction of SARS-CoV-2 to the facility.”⁷⁰ There has been reported vaccine hesitancy among correctional facility staff generally in the United States, and there is no reason to believe BSO staff are different.⁷¹ Defendant has not provided any information or statistics as to

⁶⁶ See Chin, et al., *supra* note 19 (noting a 66.5% vaccine acceptance rate in California prisons); Sullivan, *supra* note 19 (66% of federal prisoners offered vaccines accepted at least one dose).

⁶⁷ Defendant’s Counsel reported to the Court in “Defendant’s Voluntary Report of Information/Update Addressing Vaccination of Inmates” that as of the week of May 3, approximately 450 detainees were vaccinated. (ECF No. 109 at 3) By May 30, 2021, Defendant reported that 1,445 detainees had been vaccinated while in custody. (Ex. 10 (05.30.2021 Email from M. Piper to N. Rosenbloom).)

⁶⁸ Compare Ex. 17 (9.20.2021 Email from M. Piper to N. Rosenbloom) (noting 1,721 detainees vaccinated while in custody as of September 20, 2021), with Ex. 10 (05.30.2021 Email from M. Piper to N. Rosenbloom) (noting 1,445 detainees vaccinated while in custody as of May 30, 2021).

⁶⁹ This number was calculated based on BSO’s data reporting, required under Paragraph 62 of the Settlement Agreement. The full set of daily and weekly reporting can be compiled and filed in full with the Court if requested.

⁷⁰ CDC *Correctional Facility Management Guidance*, *supra* note 24.

⁷¹ Homer Venters, *Four Steps to Increase COVID-19 Vaccinations Among Correctional Officers*, HILL (July 22, 2021), <https://thehill.com/opinion/criminal-justice/564155-four-steps-to-increase-covid-19-vaccinations-among-correctional>.

the vaccination rates of Jail staff. Nor has Defendant provided any information on vaccination programs for Jail staff. (*See* Ex. 8 (Venters Report) ¶¶ 17, 42.)

In order to address the alarmingly low vaccination rate in the Jail and in light of changed circumstances, Plaintiffs request that the Court employ its equitable powers to give effect to the purpose of the Agreement and modify the Consent Decree to require Defendant: (1) to provide detainees with adequate, repeated and prompt (within 72 hours of request) access to COVID-19 vaccines; (2) to make available knowledgeable medical or other trusted messengers to answer individuals' questions about the vaccine in a private setting without a sick call or other fee; (3) to provide detainees and staff with repeated opportunities to obtain COVID-19 vaccines through at least monthly vaccination drives and additional non-punitive incentives to encourage vaccination; (4) to implement one-on-one conversations between detainees who decline a vaccine and a mid-level health professional, on a regular basis; (5) to take necessary steps to arrange for screening and providing detainees with any booster COVID-19 vaccines in accordance with CDC Guidance as they become approved for use, with an emphasis on providing such vaccines to medically vulnerable Class Members (Ex. 8 (Venters Report) ¶ 38(c)(ii)); and (6) survey staff regarding vaccination status and institute a program to reach full vaccination among staff, with regular and mandatory education as recommended by the CDC.

III. THE COURT SHOULD ORDER AN EXPEDITED BRIEFING SCHEDULE TO PROTECT CLASS MEMBERS FROM THE CURRENT COVID-19 OUTBREAK AT THE JAIL

Under the default briefing schedule set by Local Rule 7.1(c), this motion would not be fully briefed until October 12, 2021—three weeks from now. In the last three weeks, COVID-19

infections at the Broward County Jail have grown from 73 positive detained persons to 129,⁷² and especially because of the high risk of severe illness from COVID-19 for Medically Vulnerable people, the Class Members would be prejudiced by a lengthy schedule for the motion. Courts addressing the exigencies of the pandemic in a carceral setting have routinely ordered expedited briefing. *E.g.*, *Alvarez v. LaRose*, 2020 WL 5594908, at *1 (S.D. Cal. Sept. 18, 2020) (noting court-ordered expedited briefing schedule for dispute over inspection of detention center to ensure compliance with CDC guidelines during COVID-19 pandemic); *Gayle v. Meade*, No. 20-21553 (S.D. Fla. May 21, 2020), ECF No. 107 (ordering expedited briefing schedule on petitioners' motion to compel compliance with a Court order). Defendant would not be prejudiced by an expedited briefing schedule—during the meet-and-confer process, Plaintiffs already previewed the substance of their motion, and in fact, on September 15, 2021, Plaintiffs shared with Defendant the draft expert report of Dr. Venters. Accordingly, Plaintiffs respectfully request that this Court set an expedited briefing schedule.⁷³ Plaintiffs further request that if the Court sets this motion for an evidentiary hearing, that hearing be scheduled at the first available date convenient for the Court.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully move this Court to issue an order granting Plaintiffs' requested relief, as discussed above and outlined in the Proposed Order, filed concurrently herein. In addition, given the grave urgency in enforcing the Settlement Order to protect Class Members from serious illness or death during the current COVID-19 outbreak at the

⁷² Compare Ex. 14 (08.29.2021 Email from M. Piper to N. Rosenbloom, with Ex. 17 (09.20.2021 Email from M. Piper to N. Rosenbloom).

⁷³ Plaintiffs proposed to Defendant that Defendant respond to Plaintiffs' motion within seven days, and Plaintiffs be permitted to reply within three days thereafter. Defendant rejected that proposed, and opposes expedited briefing.

Jail, Plaintiffs respectfully request that the Court expedite the briefing schedule so that this dispute can be resolved as soon as practicable.

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to the Southern District of Florida Local Rule 7.1(a)(3)(A) and Section 24 of the Settlement Agreement, undersigned counsel has conferred with counsel for Defendant in a good faith effort to resolve the issues raised in this motion, but the parties have been unable to do so.

Dated: September 21, 2021

Respectfully submitted,

Anjana Samant (*pro hac vice*)
Nancy Rosenbloom (*pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad St., 18th Fl.
New York, NY 10004
Telephone: (212) 549-2500
asamant@aclu.org
nrosenbloom@aclu.org

Eric Balaban (*pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION
NATIONAL PRISON PROJECT
915 15th St., N.W.
Washington, D.C. 20005
Telephone: (202) 393-4930
ebalaban@aclu.org

Suhana S. Han (*pro hac vice*)
Akash M. Toprani (*pro hac vice*)
Elizabeth N. Olsen (*pro hac vice*)
SULLIVAN & CROMWELL LLP
125 Broad St.
New York, NY 10004
Telephone: (212) 558-4000
hans@sullcrom.com
toprania@sullcrom.com
olsene@sullcrom.com

/s/ Benjamin James Stevenson
Benjamin James Stevenson
Florida Bar. No. 598909
ACLU FOUNDATION OF FLORIDA
3 W. Garden St., Suite 712
Pensacola, FL 32502-5636
Telephone: (786) 363-2738
bstevenson@aclufl.org

Jacqueline Nicole Azis
Florida Bar No.101057
ACLU FOUNDATION OF FLORIDA
4023 N. Armenia Ave., Suite 450
Tampa, FL 33607
Telephone: (786) 363-2708
jazis@aclufl.org

Daniel Tilley
Florida Bar No. 102882
ACLU FOUNDATION OF FLORIDA
4343 W. Flagler St., Suite 400
Miami, FL 33134
Telephone: (786) 363-2714
dtalley@aclufl.org

Curtis Filaroski

Florida Bar. No. 111972

Kathryn Strobach

Florida Bar No. 670121

DISABILITY RIGHTS FLORIDA, INC.

1000 N. Ashley Drive, Suite 640

Tampa, FL 32308

Telephone: (850) 488-9071

curtisf@disabilityrightsflorida.org

kathryns@disabilityrightsflorida.org

Attorneys for Plaintiffs/Petitioners