No. 10-1758

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

COMMONWEALTH OF PUERTO RICO, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BRIEF FOR THE UNITED STATES AS APPELLANT

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TABLE OF CONTENTS

PAGE

STATEMENT OF JURISDICTION.....1

ISSUE PRESENTED.....2

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS 4

1. The United States' CRIPA Action 4

2. The 1997 Consent Decree And Continued Staffing Problems.....5

3. The 2007 Modifications To The Consent Decree.....7

4. Continued Staffing Problems 9

5. The United States' Motion For Specific Performance.....11

6. The Stipulated Order On Staff Hiring.....15

7. The United States' Contempt Motion And Continued Staffing Problems.....18

8. The Court's Order.....25

9. Continued Violence And Injury In The First Quarter Of 2010.....25

SUMMARY OF ARGUMENT 27

TABLE OF CONTENTS (continued): **PAGE**

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE UNITED STATES' MOTION FOR CONTEMPT, WHERE IT RELIED ON CLEARLY ERRONEOUS FINDINGS, ERRED IN FAILING TO CONSIDER DEFENDANTS' ABILITY TO COMPLY AND DEGREE OF COMPLIANCE, AND INAPPROPRIATELY RELIED ON DEFENDANTS' INTENTIONS TO EXCUSE NONCOMPLIANCE 28

A. Standard Of Review And Standards For Showing Civil Contempt 28

B. The Court Clearly Erred In Finding Defendants Were "Reasonably Diligent" In Attempting To Comply With The Stipulated Order 31

C. The Court Erred In Failing To Consider Defendants' Degree Of Compliance Or Ability To Comply 35

1. The Commonwealth's Degree Of Compliance Was An Essential Element In Adjudicating A Contempt Motion 36

2. The Commonwealth's Ability To Comply Was Also An Important Part Of The Consideration Of Contempt In This Case 38

3. The Court Made No Findings About the Commonwealth's Degree Of Compliance Or Ability To Comply 42

D. The District Court Erred In Basing Its Decision On Defendants' Intentions 43

E. This Court Should Order The Defendants To Be Held In Contempt Or, At The Very Least, Remand For Consideration Under The Proper Legal Standards 46

CONCLUSION 47

TABLE OF CONTENTS (continued): **PAGE**

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES: **PAGE**

Accusoft Corp. v. *Palo*, 237 F.3d 31 (1st Cir. 2001) .....*passim*

AMF Inc. v. *Jewett*, 711 F.2d 1096 (lst Cir. 1983) .....*passim*

Anderson v. *Bessemer City*, 470 U.S. 564 (1985) 28

Berger v. *Heckler*, 771 F.2d 1556 (2d Cir. 1985).....30

Burke v. *Guiney*, 700 F.2d 767 (1st Cir. 1983).....42

Chicago Truck Drivers Union Pension Fund v. *Brotherhood Labor Leasing*, 207 F.3d 500 (8th Cir. 2000).....31, 35, 42, 46

Commodity Futures Trading Comm'n v. *Premex, Inc.*, 655 F.2d 779 (7th Cir. 1981) 45

Donovan v. *Enterprise Foundry, Inc.*, 751 F.2d 30 (1st Cir. 1984) 46

Eck v. *Dodge Chemical Co.*, 950 F.2d 798 (1st Cir. 1991).....39

EEOC v. *Local 638*, 81 F.3d 1162 (2d Cir.), cert. denied, 519 U.S. 945 (1996).....33

Fortin v. *Commissioner of Mass. Dep't of Pub. Welfare*, 692 F.2d 790 (1st Cir. 1982).....*passim*

Frew v. *Hawkins*, 540 U.S. 431 (2004) 30

Harley-Davidson, Inc. v. *Morris*, 19 F.3d 142 (1994) 45

Howard Johnson Co. v. *Khimani*, 892 F.2d 1512 (11th Cir. 1990) 36, 38

Hutto v. *Finney*, 437 U.S. 678 (1978) 30

CASES (continued): **PAGE**

In re Grand Jury Investigation, 545 F.3d 21 (1st Cir. 2008).....*passim*

Jove Eng'g, Inc. v. *IRS*, 92 F.3d 1539 (11th Cir. 1996) 36

Langton v. *Johnston*, 928 F.2d 1206 (1st Cir. 1991)..... 33, 36-37, 43

Massachusetts Ass'n of Older Americans v.
Commissioner of Public Welfare,
803 F.2d 35 (1st Cir. 1986).....29, 34, 40

McComb v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949).....44

Morales-Feliciano v. *Parole Bd. of Puerto Rico*,
887 F.2d 1 (1st Cir. 1989),
cert. denied, 494 U.S. 1046 (1990).....*passim*

New York State Ass'n for Retarded Children, Inc. v. *Carey*,
631 F.2d 162 (2d Cir. 1980) 40

NLRB v. *Maine Caterers, Inc.*, 732 F.2d 689 (1st Cir. 1984) 45

Project B.A.S.I.C. v. *Kemp*, 947 F.2d 11 (1st Cir. 1991).....29

Puerto Rico Hosp. Supply, Inc. v. *Boston Sci. Corp.*,
426 F.3d 503 (1st Cir. 2005).....28

Rockwell Graphic Sys. v. *DEV Indus., Inc.*,
91 F.3d 914 (7th Cir. 1996) 43

Roe v. *Operation Rescue*, 54 F.3d 133 (1995) 35

Rufo v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).....40

Sanders v. *Monsanto Co.*, 574 F.2d 198 (5th Cir. 1978).....2

Star Fin. Servs., Inc. v. *AASTAR Mortg. Corp.*,
89 F.3d 5 (1st Cir. 1996).....44

CASES (continued): **PAGE**

Tranzact Techs., Inc. v. *1Source Worldsite*,
406 F.3d 851 (7th Cir. 2005) 33, 42, 46

United States v. *Rylander*, 460 U.S. 752 (1983).....38

United States v. *United Mine Workers*, 330 U.S. 258 (1947) 31

Whitfield v. *Pennington*, 832 F.2d 909 (5th Cir. 1987),
cert. denied, 487 U.S. 1205 (1987)..... 30, 34-35, 45

STATUTES:

Civil Rights of Institutionalized Persons Act (CRIPA),
42 U.S.C. 1997 *et seq* 2

18 U.S.C. 3626(b)(1).....7

18 U.S.C. 3626(b)(2).....7

28 U.S.C. 1291 2

28 U.S.C. 1331 1

28 U.S.C. 1391 1

42 U.S.C. 1997b(a) 4

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLANT

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 and 1345. Venue was proper pursuant to 28 U.S.C. 1391. The court entered judgment on the United States' Motion for Contempt on March 25, 2010. Doc. 895, Add. 1-3.[1] The United States filed a notice of appeal on May 21, 2010. Doc. 905, J.A. 269-

[1] "Doc. _" refers to documents filed in the district court, by docket number. Page numbers used are those assigned in the header added during electronic processing. "J.A. _" refers to pages in the Joint Appendix. "Add. _" refers to pages in the Addendum to this brief.

270. This Court has jurisdiction under 28 U.S.C. 1291. *Morales-Feliciano* v. *Parole Bd. of Puerto Rico*, 887 F.2d 1, 3-4 (1st Cir. 1989), cert. denied, 494 U.S. 1046 (1990); *Sanders* v. *Monsanto Co.*, 574 F.2d 198, 199 (5th Cir. 1978).

ISSUE PRESENTED

Whether the district court abused its discretion in denying the United States' motion for contempt, where it relied on clearly erroneous findings that defendants were "reasonably diligent," erred in failing to consider defendants' ability to comply and degree of compliance, and inappropriately relied on defendants' intentions to excuse noncompliance.

STATEMENT OF THE CASE

For nearly 20 years, the United States has investigated and pursued an action pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq.*, to remedy dangerous and unconstitutional conditions of confinement in Puerto Rico's juvenile correctional facilities, including chronic understaffing. Doc. 554-2 at 2. Under a 1997 settlement agreement, defendants agreed to make several changes, including maintaining minimum staffing ratios. Doc. 25 at 8, J.A. 79. Although conditions improved, the Commonwealth did not comply with staffing ratios, and the lack of supervision contributed to hundreds of incidents of sexual assault, suicide attempts, self-inflicted wounds, attacks among residents, and abuse by staff members.

In 2007, the parties eliminated parts of the settlement agreement, but retained the staffing ratio provisions in recognition of the chronic understaffing and its impact on youth safety. Doc. 719 at 3, J.A. 91. After the agreement, defendants continued to disregard the required staffing ratios. In January 2008, defendants requested a modification of the settlement to change the ratios, eliminating any requirement for increased staff. Doc. 765-2 at 3-4. The United States moved to enforce the staffing provisions. Doc. 783.

The parties reached a compromise and entered a stipulated order in January 2009. The Commonwealth agreed to hire 50 staff members per month until it reached compliance with the staffing ratios. Doc. 813 at 2-3, J.A. 166-167. As the months passed, the Commonwealth hired no one. The United States filed a motion for contempt on July 2, 2009. Doc. 846, J.A. 194-198. In response, the Commonwealth claimed budget difficulties had hampered compliance. Doc. 850 at 1-2, J.A. 395-396. More than five months later, the United States filed an urgent motion requesting a ruling on its contempt motion. Doc. 874, J.A. 509-521. The Commonwealth notified the court on February 27, 2010, that it had hired 43 new youth services officers. Doc. 892 at 2; Doc. 896-2 at 1, J.A. 256. On March 25, the court issued a one-sentence order denying the United States' contempt motion. Doc. 895, Add. 1-3. The United States filed its notice of appeal on May 21, 2010. Doc. 905, J.A. 269-270.

STATEMENT OF THE FACTS

1. The United States' CRIPA Action

CRIPA allows the United States to sue local authorities, after giving them proper notice of alleged violations, for equitable relief from certain unconstitutionally harsh conditions of confinement. 42 U.S.C. 1997b(a).

In August 1994, the United States filed a complaint under CRIPA following a three-year investigation into severely dangerous and unconstitutional conditions in Puerto Rico's youth facilities. The parties entered into a consent order and, three years later, a settlement agreement. Doc. 25, J.A. 72-88.

In its 1997 Second Amended Complaint, the United States laid out several serious problems threatening juveniles' safety, and justifying court supervision. Doc. 23, J.A. 53-71. Facilities had severe vermin infestations, fire hazards, broken plumbing, standing water breeding mosquitoes, bare electrical wiring, and no lighting in some cells. Doc. 23 at 8, J.A. 67; Doc. 554-5 at 4-8. Supervision was inadequate to prevent extreme violence and to stop residents with known suicidal and self-mutilating behaviors from inflicting harm on themselves, including repeated lacerations, hanging attempts, ingesting broken glass, or eating toxic chemicals. Doc. 23 at 8, J.A. 67. Juveniles endured stabbings, assaults by guards, and sexual assaults. Doc. 554-5 at 4-5. Cell doors were sometimes chained and padlocked, and staff members did not have keys to intervene in the case of an

assault or other emergency. Doc. 554-5 at 8. Some living areas were unlit and therefore completely unsupervised at night. Doc. 554-5 at 6-7. Even when staff members could see their charges, guards were too few in number to provide adequate supervision.

2. The 1997 Consent Decree And Continued Staffing Problems

In the 1997 consent decree, the Commonwealth agreed to implement changes in physical facilities, safety, discipline, mental health care, education, and other areas. Doc. 25, J.A. 72-88. It agreed to maintain minimum ratios of direct care staff (typically youth services officers) based on resident populations. Doc. 25 at 8, J.A. 79. Paragraph 48 of the agreement provided in part:

> Defendants shall ensure that the facilities have a sufficient number of staff to implement all terms of this agreement. A sufficient number of direct care staff means not less than one (1) worker to eight (8) juveniles during day and evening shifts and not less than one (1) worker to sixteen (16) juveniles during normal sleeping hours.

Doc. 25 at 8, J.A. 79.

In the subsequent years, the Commonwealth achieved substantial improvements in many areas but did not comply with the staffing requirements they had negotiated. In some circumstances, defendants failed to give the court's monitor adequate information. Doc. 664-2 at 13. Where data were available, the monitor repeatedly found understaffing and other staffing problems. Doc. 444-2 at 5; Doc. 541-2 at 30; Doc. 662-2 at 8; Doc. 664-2 at 11, 13; Doc. 703-2 at 38; Doc.

735-2 at 7, 32; Doc. 770-2 at 4, 58. Between 2003 and the end of 2007, the Commonwealth did not hire *any* new youth services officers. Doc. 770-2 at 20. The only two facilities with consistent compliance were those run by a private contractor. Doc. 735 at 4.

Although safety and other conditions improved, incidents of violence and injury continued due to the lack of supervision. From early 2003 to February 2006, 3,000 allegations of abuse were reported, including allegations of extreme violence by residents and staff members. Doc. 554-2 at 2. Staff members pepper-sprayed youths and beat them with broomsticks for not cleaning their cells, beat one juvenile unconscious, punched a boy in the head, and pepper-sprayed another in his ear. Doc. 554-11 at 5; Doc. 554-2 at 6-7; Doc. 554-20 at 2. Suicidal behaviors and self-mutilations decreased by 2006, but the monitor reported continuing problems, including a youth who, while presumably on observation, cut himself 40 times, requiring 175 stitches. Doc. 703-2 at 69-72, 78. A resident on enhanced supervision tried to hang himself from a tree branch, falling and injuring himself when the branch broke. Doc. 588 at 8.

There was rampant violence among juveniles. One boy suffered several puncture wounds to his genitals and other injuries after being beaten by other juveniles, another youth was stabbed and beaten in an apparent attempted murder, and a third was sexually assaulted by youths who bit him. Doc. 554-2 at 6; Doc.

554-11 at 8; Doc. 554-20 at 2-3. Youths attacked others and shocked them with electrical cables. Doc. 554-2 at 6; Doc. 554-11 at 8. In September 2005, a youth alleged another beat him and shocked him with electrical cables applied to his tongue. Doc. 588 at 8.

In 2005, there were 530 youth-to-youth incidents involving injury and 188 staff-to-youth incidents involving injury. Doc. 577-2 at 4. In 2006, there were 543 youth-to-youth injuries, 39 youth-to-youth sexual incidents, and 146 staff-to-youth injuries. Doc. 664-2 at 26. The monitor concluded that "the sheer number of injuries – almost 700 injuries in a year in a system that houses fewer than 900 youths – establishes a * * * pervasive pattern of abuse and injury and risk of abuse and injury." Doc. 703-3 at 6 (internal quotation marks omitted).

3. The 2007 Modifications To The Consent Decree

In May 2007, the parties resolved the Commonwealth's termination motion under the Prison Litigation Reform Act (PLRA),[2] and modified the decree through

[2] The PLRA allows defendants in prison conditions litigation to seek termination of orders for prospective relief, including consent decrees, two years after entry of the decree. 18 U.S.C. 3626(b)(1). A defendant is entitled to immediate termination "in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. 3626(b)(2). Relief may not be terminated where the court finds it meets the above criteria and "remains necessary to correct a current and ongoing violation of the Federal right." 18 U.S.C. 3626(b)(2).

a stipulated order. Doc. 719 at 3, J.A. 91. In light of substantial improvements, the order ended the court's oversight of many aspects of the facilities' management, eliminating many requirements of the 1994 consent order. It retained the staffing stipulations of Paragraph 48, however, in recognition of the chronic understaffing at the facilities. Doc. 719 at 3, J.A. 91.[3] The parties recounted continuing staffing problems and stipulated that, as a result, "serious patterns of injury, risk of injury or abuse" persisted. Doc. 719 at 3, J.A. 91 at 3 (quoting Monitor's Experts' Reports for the PLRA Hearing, Doc. 703-2 at 43). In addition, the order recognized problems with the use of double shifts, which impaired staff members' effectiveness. Doc. 719 at 3, J.A. 91. In reviewing the stipulation, the court emphasized the monitor's "alarming observations" about staffing deficiencies, and stated it was time that the Commonwealth take immediate, "concrete steps" to rectify them. Doc. 726 at 24. The parties retained the staffing requirements despite a hiring freeze in the Commonwealth, implemented through an executive order in early 2006. Doc. 754-2 at 4; see also Doc. 786 at 2, J.A. 285.

[3] The parties also retained provisions regarding physical facilities, special education, discipline, mental health care, and the reporting of abuse and mistreatment. Doc. 719 at 4-7, J.A. 92-95.

The new agreement stipulated that defendants could comply with Paragraph 48 through an alternate staffing plan, provided there was adequate supervision. The agreement stated:

> Defendants may develop, and submit to the Court for approval, an alternate staffing roster for any facility in this case. The roster shall be based on a study that shall specify fixed posts and the assignments necessary to implement the terms of this agreement, taking into consideration the physical configuration and function of spaces, the classifications and risk profiles of youths involved, the incident patterns in the settings involved, the routine availability in the settings of other categories of staff, and the overall numbers of direct care positions necessary to consistently achieve the coverage proposed. Once a plan is approved for a facility, Defendants shall document the employment of the necessary overall numbers of direct care staff, and the ongoing deployment of such staff in accordance with the plan.

Doc. 719 at 4, J.A. at 92.

4. Continued Staffing Problems

During 2007, the monitor observed numerous vacancies and "extensive staffing deficiencies across the system," noting that staffing was "unacceptable" and "a critical problem" resulting in very serious risk to residents. Doc. 735-2 at 3-4, 7, 58. There were "insufficient workers to comply with the staffing requirements, and insufficient funding to hire more workers." Doc. 735-2 at 4. From May 1 through September 30, 2007, the monitor reported that defendants' median compliance with staffing ratios during the day and evening shifts was only 26% and 25%, respectively. Doc. 770-2 at 40. At defendants' maximum security

facility, Humacao, only 7% of day shifts and 6% of evening shifts met Paragraph 48's staffing requirements. Doc. 770-2 at 40. At one facility, Guaynabo, there was only 1% compliance in the day and evening shifts. Doc. 770-2 at 40. In November 2007, the monitor filed a study showing that the Commonwealth needed to hire an estimated 418 more staff members to implement a staffing program in compliance with Paragraph 48. Doc. 756-2 at 12. Staffing had worsened that year, falling from 934 youth services officers in 2006 to 719 such officers in November 2007. Doc. 754-2 at 3-4. During 2007, there were 703 incidents of youth-to-youth injuries, 23 youth-to-youth sexual incidents, and seven staff-to-youth sexual incidents. Doc. 770-2 at 26.

In January 2008, the defendants proposed an alternate staffing plan. Doc. 765 at 4. It called for eight youth services officers per resident at most of its 12 facilities, at least during the day, but allowed as many as 22 residents per officer. Doc. 765-2 at 3. Defendants aimed to meet the ratios with current staff by reducing days off, redefining which employees counted in the ratios, and abolishing off-site duties. Doc. 765-2 at 2-4.

The United States objected to the proposal because it called for no staff hiring and validated the Commonwealth's staff reductions in recent years. Doc. 767 at 1, 7. The monitor also stated that the plan would not bring the Commonwealth into compliance, and that "an immediate hiring program" was

needed. Doc. 775-2 at 3. The monitor estimated that the defendants would need to hire hundreds of additional staff members to achieve compliance, would need to hire staff members even if they did gain approval of an alternative staffing plan, and would only be able to avoid hiring if they closed some existing facilities and opened another run by private contractors. Doc. 770-2 at 3-4. "[I]f the Commonwealth does not take the decisive steps in the immediate future," the monitor stated, "there is a legal and factual basis for the Court to order steps necessary to achieve compliance." Doc. 770-2 at 4. The monitor recommended defendants hire 50 staff members per month for several months. Doc. 775-2 at 3.

5. The United States' Motion For Specific Performance

In February 2008, the monitor filed an emergency report notifying the court of "very serious compliance problems" at some facilities. Doc. 776-2 at 1. During the previous month, the monitor's staff observed 75 instances where a housing unit was left entirely unstaffed. Doc. 776-2 at 1. On April 28, 2008, the United States moved for specific performance and supplemental relief, and submitted an expert report showing inadequate supervision, violence, self-injury, suicide attempts, reliance on chemical agents to control residents, and sexual assaults. Doc. 783-6 at 5.

The monitor's report for the first quarter of 2008 highlighted 64 reported abuse allegations. Doc. 784-2 at 6-17, J.A. 120-131; see also Doc. 797-2 at 1-18.

In the months preceding the United States' motion, a youth attempted to hang himself from a sprinkler head, failing when the sprinkler head broke. Doc. 783-6 at 28, J.A. 114; Doc. 784-2 at 6, J.A. 120; Doc. 802-4, J.A. 133. Another, while under special watch, ingested detergent and was discovered and treated after he began vomiting. Doc. 783-6 at 25, J.A. 113; Doc. 784-2 at 15, J.A. 129. A third cut his wrist even though he was on enhanced watch. Doc. 783-6 at 24, J.A. 112. The supervising officer was in charge of 13 others at the time. Doc. 783-6 at 24, J.A. 112. Altogether, there were 193 incidents of self mutilation involving 168 youths, with 32 cases needing sutures. Doc. 784-2 at 6-17, 36, J.A. 120-131; see also Doc. 783-6 at 23-24, J.A. 111-112.

Many juveniles suffered assaults and injuries, including one boy assaulted by ten others while his unit was unattended. Doc. 783-6 at 11, 16, 19, 22, 25, 29, J.A. 99, 104, 107, 110, 113, 115; Doc. 784-2 at 6-8, J.A. 120-122. Three juveniles were beaten with a wooden board in a unit where one staff member supervised 15 youths. Doc. 783-6 at 22, J.A. 110. At a facility where some living units had no officers assigned, a juvenile alleged that others threatened to shock him with electrical cables. Doc. 784-2 at 6, J.A. 120; Doc. 802-4 at 1, J.A. 133. One boy said he temporarily lost his vision after being hit in the head, and another was taken to the hospital because assailants knocked out a tooth. Doc. 784-2 at 15-16, J.A. 129-130; Doc. 808-2 at 1-2, J.A. 155-156. Residents reported sexual assaults

and inappropriate touching. Doc. 784-2 at 11, 16, J.A. 125, 130. Some assaults went unobserved, coming to light only after the victim's injuries were discovered. Doc. 783-6 at 11-12, 16, J.A. 99-100, 104; Doc. 784-2 at 6, J.A. 120.

Supervision was inadequate to control contraband, the destruction of facilities, and the making of weapons. Doc. 783-6 at 28-30, J.A. 114-116. Several juveniles in one living area set fires. Doc. 783-6 at 23, J.A. 111. Over a six-month period in one facility, 153 shanks were recovered. Doc. 783-6 at 29, J.A. 115. Not all the institutions, apparently, even conducted searches for weapons. Doc. 783-6 at 30, J.A. 116. There were a number of stabbing incidents. Doc. 783-6 at 28-30, J.A. 114-116; Doc. 784-2 at 12, J.A. 126. In one facility where searches apparently failed to adequately control weapons, juveniles injured six boys in a recreation area containing 75 juveniles and two officers. Doc. 783-6 at 30-31, J.A. 116-117. One suffered 14 stab wounds. Doc. 783-6 at 31, J.A. 117. The United States' expert observed "an unacceptable level of violence by any reasonable measure." Doc. 783-6 at 12, J.A. 100.

The United States' expert reported officers working in places where they could not observe residents, watching television on duty, or supervising multiple housing units at the same time. Doc. 783-6 at 13-14, 27, J.A. 101-102. At one facility, officers typically supervised 22 juveniles. Doc. 783-6 at 12, J.A. 100.

Officers routinely used chemical irritants designed for larger scale crowd control, deployed them at very close range in violation of labeling, and sprayed bystanders as well as unruly youths. Doc. 783-6 at 19, J.A. 107. In one incident, an officer sprayed youths who were fighting in a classroom. Doc. 784-2 at 9, J.A. 123. Officers then told everyone in the room to sit down. Another officer reportedly entered and sprayed all the seated residents, kicking some and hitting one in the face. Doc. 784-2 at 9, J.A. 123.

On May 1, 2008, the monitor reported the facilities likely needed some 360 new youth services officers to comply with Paragraph 48. Doc. 784-2 at 4, J.A. 119. "Since the May 15, 2007 Order," the monitor stated, "the Commonwealth has not submitted any evidence documenting the consistent achievement of compliance with paragraph 48." Doc. 784-2 at 4, J.A. 119. As a result, there were "serious patterns of injury, risk of injury, or abuse." Doc. 784-2 at 17, J.A. 131. The court held a status conference on the matter on May 29, 2008, and ordered the Commonwealth to comply with the staffing ratios until an alternate plan was approved. Doc. 786 at 3, J.A. 286.

On August 15, 2008, the monitor reported a decline, by some measures, in staffing compliance. Doc. 802-2 at 8. He observed an "accelerating increase" in youth-to-youth injuries requiring off-site medical care, from two in each of the last quarters of 2007, to ten and 18 in the first and second quarters of 2008,

respectively. Doc. 802-2 at 8, 23, J.A. 132. On August 27, 2008, the United States filed an urgent motion requesting a status conference on staffing. Doc. 804.

The monitor submitted a staffing report on October 2, 2008, finding "pervasive deficiencies in staff coverage and in the documentation of staff coverage." Doc. 808 at 4. The Commonwealth had promised to hire 100 new youth services officers, the monitor noted, because it was taking over the administration of formerly private facilities. Doc. 808 at 7. Nevertheless, the monitor concluded this would not be enough to provide compliance. Doc. 808 at 4, 7. He again noted abuses and injuries associated with understaffing, and reiterated his request for a continuing hiring program. Doc. 808 at 4; Doc. 808-2 at 1-10, J.A. 155-164.

6. The Stipulated Order On Staff Hiring

The court did not rule on the United States' urgent motion or its motion for specific performance. Doc. 821, J.A. 357-358; Doc. 828. The parties reached a compromise in November 2008. Doc. 813 at 2, J.A. 166. Starting within 30 days, the Commonwealth agreed to hire 50 staff members per month until it "achieve[d] the goal to provide adequate supervision of youth in all facilities." Doc. 813 at 2-3, J.A. 166-167. Defendants were permitted to count additional employees, such as social workers, in its direct care staff ratios once they were properly trained. Doc. 813 at 2, J.A. 166. The parties stated that they sought "to ensure full

compliance with Paragraph 48" of the 2007 consent decree, which they stipulated was "the necessary and appropriate remedy to address the Defendants' staffing deficiencies." Doc. 813 at 1, J.A. 165.

In December 2008, the monitor reported a continued lack of staff, and recommended that the court approve the parties' stipulation as soon as possible. Doc. 819-2 at 2-5, 28, J.A. 170-172. Youth-to-youth injuries requiring external care had greatly declined from their very high levels during the first half of the year, but there were nevertheless 59 youth-to-youth injuries and 96 self-mutilation incidents. Doc. 819-2 at 12-13, J.A. 173-174; Doc. 843 at 40-48, J.A. 181-189. The monitor highlighted 68 serious incidents that quarter, including assaults where juveniles were punched, attacked with a chair, assaulted with shanks, hit with a broomstick, or beaten with socks containing soap and deodorant canisters. Doc. 843 at 40-48, J.A. 181-189. In the last quarter of 2008, the Commonwealth's facilities met staffing ratios, on average, only 52% of the time in the first shift, 53% of the time in the second shift, and 79% of the time for the night shift. Doc. 833-2 at 23, J.A. 177. There were 84 youth-to-youth injuries, 37 staff-to-youth injuries, and 110 self-mutilation incidents. Doc. 833-2 at 24-25, J.A. 178-179.

The court entered the agreement as a stipulated order on January 8, 2009. Doc. 821, J.A. 357-358. In the following months, the Commonwealth did not once meet the required hiring goals. It failed to hire *any* new direct care staff members.

Doc. 851-2 at 3. During February, May, and June of 2009, the Commonwealth did not file required staffing reports. Doc. 846 at 2, J.A. 195. It did file an "informative motion" in February 2009, stating that it was experiencing budget difficulties and would continue to seek funding for the new staff hiring. Doc. 830 at 5-8, J.A. 363-366.

During the first quarter of 2009, the monitor reported 30 incidents, including beatings, forced sex acts, and attacks with shanks. Doc. 851-2 at 35-38, J.A. 227-230. There were 51 reported cases of youth-to-youth injuries and 24 staff-to-youth injuries. Doc. 851-2 at 64, J.A. 232. There were 31 suicide incidents and 113 self-mutilation incidents (with ten requiring sutures). Doc. 851-2 at 63, J.A. 231.[4] Again, staffing was one of the "key problems in making progress toward compliance." Doc. 843 at 4. There still had been *no* hiring in the months since the stipulated order took effect, nor had the Commonwealth trained its social workers in order to qualify them as direct care staff members. Doc. 843 at 14-15. Only 41% of direct care staff members had completed annual training as required under the decree, and some facilities had not submitted required staffing reports. Doc. 843 at 15. Reporting facilities met staffing ratios less than half of the time during daytime hours. Doc. 843 at 29, J.A. 180.

[4] The monitor's reports for 2009 did not include complete statistics on self-mutilation or suicide incidents due to inadequate reporting. Doc. 851-2 at 4, J.A. 214; Doc. 885 at 33, J.A. 251.

7. The United States' Contempt Motion And Continued Staffing Problems

After nearly six months had passed with none of the required monthly hiring, the United States filed a motion for civil contempt on July 2, 2009. Doc. 846, J.A. 194-198. It requested immediate enforcement, noting the Commonwealth had "failed to hire any direct care staff – let alone fifty (50) per month – since the January 8 Stipulation was entered." Doc. 846 at 2, J.A. 195. The contempt motion noted that the monitor had observed continuing unsafe conditions due to lack of supervision. Doc. 846 at 2, J.A. 195.

The monitor's subsequent report, filed on August 3, 2009, showed a continued deficiency in staffing during the second quarter of 2009. Doc. 851-2 at 2. On average, the facilities met daytime staff ratios 40% of the time for the first shift and 42% for the second shift. Doc. 851-2 at 32, J.A. 226. Thus, compliance was worse in the second quarter of 2009 than at the end of 2008, when the parties agreed to the stipulated order. Doc. 833-2 at 23. The monitor estimated that the Commonwealth would need 1,031 officers to achieve compliance. Doc. 851-2 at 4, 20, J.A. 214, 225. At last count, it employed only 713. Doc. 851-2 at 4, J.A. 214. The monitor reported the Commonwealth intended to seek federal funding for 100 new officers, but pointed out this alone would not bring them into compliance. Doc. 851-2 at 6, J.A. 216.

The monitor highlighted 36 additional cases of injury, violence, or potential abuse in the second quarter of 2009. Doc. 869 at 24-27, J.A. 238-241. There were, in particular, several sexual incidents. There were two reported observations of juveniles engaging in voluntary sexual contact, three cases of forced sexual behavior, and one attack in which one youth cut another in his genital area. Doc. 869 at 24-26, J.A. 238-240. Altogether, there were eight youth-to-youth sexual incidents and one staff-to-youth sexual incident. Doc. 869 at 29, J.A. 243. There were 117 reported self-mutilation incidents (with 61 requiring sutures), and 18 youth-to-youth injuries. Doc. 869 at 28-29, J.A. 242-243.

In its response to the United States' motion, filed on August 4, 2009, the Commonwealth did not deny its failure to hire, but stated that the new territorial administration faced unexpected budget shortfalls it blamed on the prior administration and the global economic recession. Doc. 850 at 1-2, J.A. 395-396. The administration had implemented a hiring freeze on January 8, 2009. Doc. 850 at 2-3, J.A. 396-397.[5] "Regretfully," the Commonwealth claimed, "although

[5] As noted previously, p. 9, *supra*, hiring freezes were enacted in 2006. Doc. 754-2 at 3-4; see also Doc. 856 at 7, J.A. 427; Doc. 756-2 at 3; Doc. 770-2 at 20; Doc. 786 at 2, J.A. 285. The hiring freeze enacted in 2009 did not include positions "required by federal or state law order or by order of the court," "essential to protect the health, safety and well being of citizens," or "necessary to provide basic needs to residents of institutions or facilities of the State." Doc. 830-7 at 2; Doc. 836-6 at 2, J.A. 389.

certain commitments had been made by the prior administration, financial resources had not been earmarked contemporaneously in order to be able to pay for those commitments." Doc. 850 at 3, J.A. 397. The Commonwealth claimed it had attempted to improve supervision by better use of technology, putting some youths in a National Guard program that would allow earlier release,[6] reducing absenteeism, and shifting staff members from closed facilities. Doc. 850 at 5-8, J.A. 399-402. It stated it planned additional closures and was seeking funding, including federal funds, to hire 100 new officers. Doc. 850 at 7, J.A. 401; Doc. 863-9 at 2, J.A. 505. Accordingly, the Commonwealth asserted, it had "been acting in good faith seeking alternative methods of complying with ¶ 48" without hiring staff, and "could not have reasonably anticipated" its fiscal difficulties "without a functioning crystal ball." Doc. 850 at 8, 20, J.A. 402, 414.

In its response, the Commonwealth requested that the court terminate the Stipulated Order or modify it, "so that the defendants are no longer obligated by the provisions of such order to hire fifty new employees every month, but that the defendants instead be permitted to work to full compliance * * * through

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[6] Youths in the National Guard program are in the custody of the Commonwealth's juvenile corrections officials. Nevertheless, the Commonwealth maintains these youths are not subject to the consent decree, and does not provide staffing data for these facilities. The Commonwealth allocated $300,000 for facilities rental for the program's initial 22-week class of 27 youths. Doc. 903 at 8-10, J.A. 260.

alternative means." Doc. 850 at 25, J.A. 419. Defendants also suggested that any failure to comply with the Stipulated Order was not violation of a "judgment" for contempt purposes, Doc. 850 at 12, J.A. 406, and that the Stipulated Order was too vague to be enforced through contempt sanctions because it did not specify when the requirement to hire 50 new staff members per month would end. Doc. 883 at 12, J.A. 567.

On November 16, 2009, the monitor filed a third quarterly report for 2009, noting no hiring of youth services officers. Doc. 869 at 4-5, 11, J.A. 233-234. During the quarter, the facilities' 524 juveniles endured 35 youth-to-youth injuries, 16 staff-to-youth injuries, and 76 self-mutilation incidents involving 71 juveniles. Doc. 869 at 11, 28-29, J.A. 242-243. During the first, second, and third quarters of 2009, there were two suicide incidents requiring hospitalization, 20 youth-to-youth sexual incidents, 58 staff-to-youth injuries, five staff-to-youth sexual incidents, and more than 300 self-mutilation incidents – including 71 cases requiring sutures. Doc. 869 at 28-29, J.A. 242-243. In September, three staff members assaulted a youth and faced criminal charges. Doc. 885 at 10.

On October 2, 2009, the Commonwealth submitted additional documents in response to the United States' contempt motion, including a recruiting announcement for youth services officers. Doc. 863-5, J.A. 497; Doc. 896-12 at 1,

J.A. 257. The positions were offered as "transitory" appointments as youth services officers. Doc. 896-12 at 1, J.A. 257.

On December 23, 2009, the monitor filed an updated report on staffing. Since October 2009, the number of youth services officers in active service had declined from 720 to 653. Doc. 873 at 4. Some had resigned, and the Commonwealth had transferred some officers from closed institutions to Ponce Girls, a facility not covered by the Stipulated Order. Doc. 873 at 4. The facilities were short 202 positions. Doc. 873 at 4. Since April 2008, the monitor stated, he and his staff had documented "hundreds of incidents of assault, self-mutilation, and sexual molestation. In each instance, the incidents took place when the Paragraph 48 staffing requirements were not being met." Doc. 873 at 6.

In December 2009, the United States filed an urgent motion requesting a ruling on its contempt motion, which had been pending for nearly six months. Doc. 874, J.A. 509-521. The United States included additional reports from its inspection of the facilities in December. In recent months, a boy had cut himself severely with broken tile, requiring sutures; a youth had attacked another with a razor blade, cutting his face from his mouth to his ear; several juveniles assaulted another with homemade weapons, cutting his neck, face, and back, requiring hospitalization; and a boy was stabbed and beaten by another in the bathroom. Doc. 874 at 8, J.A. 516. Evidence suggested staff members were improperly

providing juveniles with razor blades. Doc. 879-2 at 3, J.A. 536. Residents reported that officers knowingly sprayed an asthmatic boy with chemical irritants, sprayed irritants on open wounds, struck youths with chemical canisters, and intentionally put a victimized youth in the same living area as his aggressor. Doc. 879-2 at 2-3, J.A. 535-536. Defendants responded that they had recently transferred staff members to problem facilities (although they were not able to close an additional facility and shift staff as planned), had recently received permission to hire more staff, and that there was "no evidence * * * staffing shortages have worsened." Doc. 883 at 5-8, J.A. 560-563. The court did not act on the urgent motion.

In February 2010, the monitor reported facilities were currently short 202 positions and the number of youth services officers had declined. Doc. 885 at 4, J.A. 244. No recently vacated positions had been filled. Doc. 885 at 4, J.A. 244. No new hiring or training of potential hires had been completed, but federal funds had become available to fill 100 "temporary" positions and hiring was underway for 45 positions. Doc. 885 at 4-5, J.A. 244-245. For the first time, all facilities submitted staffing compliance reports. Doc. 885-2 at 6. The monitor stated that "after more than two years of documentation of alarming non-compliance accompanied by expressions of urgent concern, compliance actions seem to emerge only in the context of a motion for contempt." Doc. 885 at 5, J.A. 245.

Defendants' compliance with the target staffing ratios during afternoon shifts ranged from a high of 29% to a low of 8% at the six facilities housing 97% of the male juvenile population. Doc. 885 at 27, J.A. 250.

Among the facilities' 535 residents in the fourth quarter of 2009, there were four suicide incidents requiring hospitalization, 74 youth-to-youth injuries, 15 staff-to-youth injuries, and 57 self-mutilation incidents – including six requiring sutures. Doc. 885 at 36-37, J.A. 254-255. One youth burned his mattress, allegedly after a custody officer gave him a lighter. Doc. 885 at 34, J.A. 252. Among several assaults, there were three stabbings; one youth was severely wounded on Christmas Day; and another was stabbed in the shower, requiring hospitalization. Doc. 885 at 34-35, J.A. 252-253.

The monitor pointed out that the number of reported incidents had declined in the past two years because the population of residents diminished,[7] and because the Commonwealth had changed its reporting practices and "diverted" many cases into a separate mental health screening program yet to be developed. Doc. 885 at 33, J.A. 251. There was, accordingly, "no conclusive evidence that the number of

[7] Population was not routinely included in the monitor's reports. Charts in the report for March 2006 show 716 residents in the system, excluding Ponce Girls. Doc. 577-2 at 5. In April 2007, the monitor remarked that the system housed "fewer than 900 youth." Doc. 703-3 at 6. The average daily male population for the fourth quarter of 2009 was 535. Doc. 885 at 17.

incidents accompanied by staffing non-compliance has declined." Doc. 885 at 33, J.A. 251.

On February 27, 2010, the Commonwealth notified the court it had completed some of its long-promised recruiting and had hired 43 new staff members. Doc. 892 at 2; Doc. 896-2 at 1, J.A. 256.

8. The Court's Order

On March 25, 2010, nearly nine months after the United States filed its civil contempt motion, the district court issued a one-sentence order denying the motion. Doc. 895, Add. 1-3. The order stated, in full:

> Having considered the United States' Motion for an Order Holding Defendants in Civil Contempt for Violation of the January 8 Stipulated Order on Staffing filed on July 2, 2009, the Commonwealth Defendants' Opposition filed on August 4, 2009, the United States' Memorandum in Reply filed on August 19, 2009 and the Commonwealth Defendants' Surreply filed on October 2, 2009, said motion for civil contempt is DENIED as the reasons adduced by the Commonwealth defendants show that they had been reasonably diligent in attempting to fulfill what was required in the Stipulated Order and their non-compliance with the terms of said Order was not the result of intentional actions and/or omissions.

Doc. 895 at 2-3, Add. 2-3 (citations omitted).

9. Continued Violence And Injury In The First Quarter Of 2010

The monitor's report for the first quarter of 2010, submitted on May 17, 2010, showed that the Commonwealth met target staffing ratios 19% of the time during the afternoon shift and 21% of the time in the morning shift, a slight drop from the fourth quarter of 2009 and much worse than the compliance in the fourth

quarter of 2008, when defendants agreed to additional hiring. Doc. 903 at 17, J.A. 261; Doc. 833-2 at 23, J.A. 177.

The monitor reported particular problems at the Humacao facility, housing around 100 residents. Doc. 903 at 18, 31-39. There were, on average, five youth-on-youth incidents per month, with an average of six juveniles involved. Doc. 903 at 31. There were problems with homemade weapons and razor blades provided by staff or visitors. Doc. 903 at 31. One juvenile at the facility assigned to "constant watch" cut himself several times, requiring 77 stitches. Doc. 903 at 40, J.A. 264. Another cutting incident required 36 stitches. Doc. 903 at 41, J.A. 265. A youth was found hanging by a blanket, but was not seriously injured. Doc. 903 at 41, J.A. 265. There was one stabbing at the facility and a reported case of sexual molestation. Doc. 903 at 41-42, J.A. 265-266. The monitor's report did note that conditions seemed to improve in March 2010 after the facility received 15 additional staff members. Doc. 903 at 32. Altogether, there were 113 self-mutilation incidents and 41 youth-to-youth injuries among the system's 519 male residents. Doc. 903 at 18, 43-44, J.A. 267-268.

The United States filed its notice of appeal on May 21, 2010. Doc. 905, J.A. 269-270.

SUMMARY OF ARGUMENT

The district court abused its discretion in refusing to hold defendants in contempt for longstanding violations of the stipulated order. The court clearly erred in holding defendants were "reasonably diligent" in meeting staffing requirements. After several years of inaction under mandated staffing ratios, defendants agreed to hire 50 new youth services officers per month. They hired no one for more than a year. When they did begin hiring, six months after the United States moved to hold them in contempt, defendants hired fewer than one month's allotment of officers.

Even if the defendants' efforts could be characterized as "reasonably diligent," the ruling cannot stand because the court failed to apply the proper legal standard for contempt. Diligent *efforts* excuse partial fulfillment of a court order where they yield substantial *progress* towards compliance. The court in this case abused its discretion in ignoring defendants' degree of compliance or ability to comply, grounding its decision in "diligen[ce]" alone. Indeed, it denied the contempt motion even though it found defendants "non-complian[t]," and made no findings on defendants' degree of compliance or ability to comply. Doc. 895 at 3, Add. 3.

The court further erred as a matter of law in giving defendants' *intentions* dispositive weight, finding that defendants' non-compliance "was not the result of

intentional actions and/or omissions." Doc. 895, Add. 1-3. A party's intentions do not shield contemptuous actions.

The overwhelming and virtually undisputed evidence of non-compliance in this case, in our view, is more than sufficient to warrant an order finding the defendants in civil contempt. At the very least, the United States is entitled to a remand for reconsideration under the appropriate legal standards.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE UNITED STATES' MOTION FOR CONTEMPT, WHERE IT RELIED ON CLEARLY ERRONEOUS FINDINGS, ERRED IN FAILING TO CONSIDER DEFENDANTS' ABILITY TO COMPLY AND DEGREE OF COMPLIANCE, AND INAPPROPRIATELY RELIED ON DEFENDANTS' INTENTIONS TO EXCUSE NONCOMPLIANCE

A. Standard Of Review And Standards For Showing Civil Contempt

The district court's ultimate finding of contempt is reviewed for abuse of discretion. *Accusoft Corp.* v. *Palo*, 237 F.3d 31, 46 (1st Cir. 2001). A district court abuses its discretion when it relies on clearly erroneous facts or makes an error of law. *Puerto Rico Hosp. Supply, Inc.* v. *Boston Sci. Corp.*, 426 F.3d 503, 505 (1st Cir. 2005). This Court reviews the district court's factual findings for clear error and will reverse where, "although there is evidence to support" the finding, "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985) (citations and quotation marks omitted).

To prove civil contempt, the movant must show by clear and convincing evidence that (1) there was a clear, outstanding order, (2) the potential contemnor knew of it, but (3) nevertheless violated the order. *In re Grand Jury Investigation*, 545 F.3d 21, 25 (1st Cir. 2008); *Project B.A.S.I.C.* v. *Kemp*, 947 F.2d 11, 17 (1st Cir. 1991).

A district court has substantial discretion in deciding a contempt motion, and has "a certain negative discretion * * * to eschew the imposition of a contempt sanction if it deems such eschewal to be in the interests of justice in the particular case." *In re Grand Jury Investigation*, 545 F.3d at 25; see also *AccuSoft*, 237 F.3d at 47 ("[A] court may decline to find a party in contempt despite the failure to achieve letter perfect compliance with the order at issue.") (internal quotation marks and citation omitted). Use of contempt employs "prudential principles," *In re Grand Jury Investigation*, 545 F.3d at 27, and "greater deference is owed to the trial court in public law litigation than in purely private litigation," *Project B.A.S.I.C.*, 947 F.2d at 16.

It is also true, however, that "the reviewing court's deference to the district court's manner of enforcing compliance with the decree must vary according to the substantive matter at issue." *Massachusetts Ass'n of Older Americans* v. *Commissioner of Pub. Welfare*, 803 F.2d 35, 38 (1st Cir. 1986). This Court is more likely to intervene where "the consequences of failure to comply [are] quite

serious" and involve an important "interest at stake." *Ibid*. (citation and internal quotation marks omitted) (noting financial assistance to the needy for medical services is an important interest); see also *Fortin* v. *Commissioner of Mass. Dep't of Pub. Welfare*, 692 F.2d 790, 795 (1st Cir. 1982) (finding entitlement to substance-level welfare benefits an important interest).

Furthermore, "a trial court can abuse its discretion by failing to exercise * * * discretion." *In re Grand Jury Investigation*, 545 F.3d at 25. It does so "when a relevant factor deserving of significant weight is overlooked, or when an improper factor is accorded significant weight, or when the court considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decisional scales." *Id*. at 24 (citation and internal quotation marks omitted).

A "court has an affirmative duty to protect the integrity of its [consent] decree," where, as in this case, "the performance of one party threatens to frustrate the purpose of the decree." *Berger* v. *Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985) (citation and internal quotation marks omitted). "Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced." *Frew* v. *Hawkins*, 540 U.S. 431, 440 (2004); see also *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978). A district court is "*bound* to ensure that [defendants] compl[y] with [a] consent order." *Whitfield* v. *Pennington*, 832 F.2d 909, 915 (5th Cir.) (emphasis added), cert. denied, 487 U.S. 1205 (1987).

Settling parties such as the United States in this case "give up the advantages of a lawsuit in return for obligations contained in a negotiated decree," and they "rely upon and have a right to expect a fairly literal interpretation of the bargain that was struck and approved by the court." *AMF Inc.* v. *Jewett*, 711 F.2d 1096, 1101 (lst Cir. 1983).

B. The Court Clearly Erred In Finding Defendants Were "Reasonably Diligent" In Attempting To Comply With The Stipulated Order

In this case, defendants' failure to comply with the Stipulated Order is not reasonably in dispute. The parties implemented the Stipulated Order to rectify years of absolute inaction in hiring. It explicitly required hiring at the rate of 50 staff members per month, and the Commonwealth hired no one for a year. [8] Indeed, the court itself referenced Puerto Rico's "non-compliance" in denying contempt. Doc. 895 at 3, Add. 3. Nevertheless, the district court inexplicably held

[8] Although the Commonwealth had the option of achieving compliance with Paragraph 48 through developing an alternative, court-approved plan, it has not done so. Any claims that hiring was not necessary for youth safety are not only devoid of factual support, but are irrelevant. "One of the overarching goals of a court's contempt power is to ensure that litigants do not anoint themselves with the power to adjudge the validity of orders to which they are subject." *Chicago Truck Drivers Union Pension Fund* v. *Brotherhood Labor Leasing*, 207 F.3d 500, 504 (8th Cir. 2000); see also *United States* v. *United Mine Workers*, 330 U.S. 258, 290 & n.56 (1947). This is especially appropriate in this case, where defendants negotiated the order, agreed to the hiring requirements, and stipulated that hiring was necessary to ensure safe supervision. Doc. 719 at 3, J.A. 91.

that Puerto Rico had been "reasonably diligent in attempting to fulfill what was required in the Stipulated Order." Doc. 895 at 2-3, Add. 2-3.

While the clear error standard is a demanding one, here it is easy to see that the Commonwealth's minimal, belated efforts were not "diligent." Doc. 895, Add. 1-3; see *Fortin*, 692 F.2d at 794. The Commonwealth was in abject noncompliance with the hiring goals when the United States filed its contempt motion. Indeed, the Commonwealth's failure to hire followed years of inaction under other decrees imposing specific staffing ratios. Despite numerous quarterly reports of suicide attempts, sexual assaults, electrocution, arson, rampant self-mutilation, and stabbings among undersupervised youths, the Commonwealth essentially ignored the staffing requirements of Paragraph 48.

In its response to the United States' contempt motion, defendants did not identify any diligent efforts to meet staffing requirements. They did little more than point to the requests of one codefendant, the Juvenile Institutions Administration, for funding authorization from codefendant Puerto Rico. The Commonwealth's self-erected, internal barriers to compliance hardly show "diligent" efforts to comply with the court's order.

Even after the United States' urgent motion for a ruling on contempt, the Commonwealth hired only 43 staff members, fewer than the number required *per month* under the Stipulated Order. Such belated, minimal efforts towards

compliance are not "diligent" and do not avert contempt, especially in light of the Commonwealth's long history of absolute failure. *Fortin*, 692 F.2d at 794 (holding the court was entitled to consider compliance beyond the six months preceding a contempt ruling). In *AMF Inc.*, 711 F.2d at 1103, this Court overturned a finding of no contempt, noting that defendant's best efforts to comply came after plaintiffs moved for contempt. Similarly, in *Tranzact Technologies, Inc*. v. *1Source Worldsite*, 406 F.3d 851, 855 (2005), the Seventh Circuit reversed a dismissal of a contempt motion, where defendant achieved partial compliance with a consent decree after the motion was filed. The court remanded for reconsideration, stating that "[b]ased on [the party's] plain failure to fulfill his court-ordered obligations – to which he had agreed rather than going to trial – it would have been proper to hold [the party] in contempt." *Ibid*.; see also *EEOC* v. *Local 638*, 81 F.3d 1162, 1176 (2d Cir.) (upholding contempt where party "complied reluctantly with orders to remedy its violations" and "had been willing to come into compliance" only "after a contempt motion had been filed"), cert. denied, 519 U.S. 945 (1996).

From "the whole of the record," an observer would "form a strong, unyielding belief that a mistake has been made." *Langton* v. *Johnston*, 928 F.2d 1206, 1219 (1st Cir. 1991) (internal quotation marks and citation omitted). Years of quarterly reports show defendants' unyielding resistance to meeting court-ordered staffing ratios, unmoved by serious and continuous violence, injury, and

abuse. "Confronted by clear and convincing evidence of noncompliance by [defendants], the district court nevertheless refused to exercise its contempt powers," and "clearly erred in failing to enforce the consent order through the imposition of the civil contempt sanction." *Pennington*, 832 F.2d at 915.

Indeed, this Court overturned a district court's denial of contempt in *AMF Inc.*, 711 F.2d at 1100, based on a similar clear error in assessing a potential contemnor's efforts. In that case, defendant entered a consent decree agreeing not to use plaintiff's name and trademarks. Plaintiff accused defendant of multiple violations, including use of its name in local phone listings over a period of years. *Id*. at 1103. The district court found defendant took "reasonably appropriate steps necessary for compliance" by calling the phone company's credit department to update its records. *Ibid*. This Court found these efforts "feeble," as the defendant did not request a change in the phone listings. It stated that plaintiff was "entitled to a greater level of responsibility on defendants' part." *Id*. at 1103 & n.1. Defendants "sat idly by for * * * two years" after the decree, knowing but seemingly unconcerned about their noncompliance. *Id*. at 1104. In this case, protection from abuse, injury, and violence represents a more important "interest at stake" than AMF's trademark protection. *Massachusetts Ass'n of Older Americans*, 803 F.2d at 39. The "consequences of failure to comply" have already been "quite serious." *Ibid*; see also *Fortin*, 692 F.2d at 795.

Other courts have similarly overturned no-contempt rulings grounded in erroneous factual findings. In *Roe* v. *Operation Rescue*, 54 F.3d 133, 137-138 (1995), the Third Circuit reversed the district court's ruling, in part because it "appear[ed] to have ignored the vast documentary evidence" and "undisputed testimony" demonstrating that the contemnors helped blockade clinics and were part of Operation Rescue, the enjoined organization. See also *Pennington*, 832 F.2d at 909 (reversing denial of motion for contempt where there was undisputed evidence of violation). Similarly, in this case, the court ignored undisputed evidence that the Commonwealth had hired no one before the contempt motion, and fewer than one month's requirement of staff members thereafter. Indeed, in an opinion virtually devoid of factual findings, the court acknowledged defendants' "non-compliance," Doc. 895 at 3, Add. 3, and did not point to any evidence of Puerto Rico's "diligen[ce]."

C. The Court Erred In Failing To Consider Defendants' Degree Of Compliance Or Ability To Comply

The district court's finding of "reasonabl[e] diligen[ce]" is all the more troubling because it is essentially the only factual finding supporting its ruling. Doc. 895, Add. 1-3. The terse order's failure to address the Commonwealth's ability to comply and degree of compliance strongly suggests that the court abused its discretion, overlooking "relevant factor[s] deserving of significant weight." *In re Grand Jury Investigation*, 545 F.3d at 24; see also *Chicago Truck Drivers Union*

Pension Fund v. *Brotherhood Labor Leasing*, 207 F.3d 500, 504-505 (8th Cir. 2000) (reversing a finding of no contempt, where the district court's "two-page order" was "unclear [as to] whether the district court properly considered" the parties' respective burdens of proof); *Jove Eng'g, Inc*. v. *IRS*, 92 F.3d 1539, 1546 (11th Cir. 1996) (noting a court abuses its discretion where it "ignores or misunderstands the relevant evidence") (citation and internal quotation marks omitted), superseded on other grounds.

1. The Commonwealth's Degree Of Compliance Was An Essential Element In Adjudicating A Contempt Motion

Under applicable law, the Commonwealth's degree of compliance was an important consideration which the district court's order completely ignored. Even if the Commonwealth was reasonably diligent in its efforts, defendants cannot, as a matter of law, escape a contempt finding without *substantial* compliance. *AccuSoft*, 237 F.3d at 47; *Langton*, 928 F.2d at 1220. Accordingly, this district court abused its discretion in denying contempt based solely on "diligence" or "attempt[s]" to comply, without considering whether there was any real progress towards that goal. Doc. 895 at 2, Add. 2. No precedent provides that diligence alone can excuse an absolute failure to comply. Indeed, this Court has stated that "good-faith efforts alone do not insulate a defendant in a contempt action." *AccuSoft*, 237 F.3d at 47; see also *Howard Johnson Co.* v. *Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990) ("Conduct that evinces substantial, but not complete,

compliance with the court order may be excused if it was made as part of a good faith effort at compliance.").

Evidence of a potential contemnor's efforts matters only where those efforts have brought about substantial compliance. This Court has explained that "diligent, good faith efforts, *culminating in substantial compliance*," will avert a finding of contempt. *Langton*, 928 F.2d at 1220 (emphasis added); see also *AccuSoft*, 237 F.3d at 47 ("[O]ur precedent permits a finding of contempt to be averted where diligent efforts result in substantial compliance with the underlying order."). The *Langton* Court approved a finding of no contempt based on "notable progress." 928 F.2d at 1222. Thus, "substantial compliance" may under certain conditions be a defense to contempt. *Fortin*, 692 F.2d at 795 & n.6. Such a finding is appropriate where there is "neither letter-perfect compliance with, nor palpable disregard for, the demands of the consent decrees." *Langton*, 928 F.2d at 1222.

Assessment of compliance is fact-intensive and case-specific, as "substantiality of compliance depends upon the nature of the interest at stake and the degree to which noncompliance affects that interest." *Morales-Feliciano* v. *Parole Bd. of Puerto Rico*, 887 F.2d 1, 4 (1st Cir. 1989), cert. denied, 494 U.S. 1046 (1990) (citation and internal quotation marks omitted). This Court has held that in prison cases, where constitutional rights are at issue, the "interest" at stake

"is fundamental." *Id*. at 4-5 (internal quotation marks omitted). Long-term inaction and "slow[], grudging[]" obedience in the face of a court order undermines a defendant's argument that partial compliance is substantial. *Howard Johnson Co.*, 892 F.2d at 1518; see also *Morales-Feliciano*, 887 F.2d at 5 (noting that "[t]he Commonwealth has had considerable time to meet its self-imposed deadline," and the long period of time since entry of the remedial decree undermined defendants' argument that partial compliance was substantial). Accordingly, the Commonwealth's lengthy period of inaction and belated, minimal efforts at compliance in this case would not support a finding of substantial compliance, especially where the understaffing seriously threatens the safety of juveniles in its facilities. And even if the district court could have acted within its discretion in finding partial compliance as a defense to contempt, it erred as a matter of law in finding that "diligen[ce]" alone sufficed. The court simply ignored defendants' degree of compliance, "a relevant factor deserving of significant weight" in the contempt calculus. *In re Grand Jury Investigation*, 545 F.3d at 24 (citation and internal quotation marks omitted).

2. The Commonwealth's Ability To Comply Was Also An Important Part Of The Consideration Of Contempt In This Case

Nor did the court conclude that Puerto Rico could not achieve substantial compliance. Where a defendant proves it cannot comply with the order, it will escape contempt. *United States* v. *Rylander*, 460 U.S. 752, 757 (1983); *Fortin*,

692 F.2d at 796-797. This Court in *Fortin*, however, pointed out that a potential contemnor carries a heavy burden, and "the test of impossibility may be particularly strict" in litigation regarding public welfare, where the needs of those seeking relief are "urgent." 692 F.2d at 797. In a similar prison reform case, this Court rejected Puerto Rico's arguments "that it has made good faith efforts to comply with the remedial order and the court cannot expect it to do better" in complying with an order to remedy conditions. *Morales-Feliciano*, 887 F.2d at 5. In that case, as here, "[t]he Commonwealth has explained why compliance became more difficult than it initially anticipated. But it has not shown that causes beyond its control have made it overwhelmingly difficult or anywhere near impossible" to comply. *Ibid.*

In this case, the Commonwealth cannot show inability to comply, where it has structured its budget leaving compliance unfunded. Self-induced inability to obey does not provide a defense to contempt. In *Eck* v. *Dodge Chemical Co*., 950 F.2d 798, 803 (1st Cir. 1991), this Court rejected defendant's argument that it could not comply with the court's order that it remove its equipment from plaintiff's premises after it had sold the equipment. Because the plaintiff had made the sale *after* the court issued its order, the inability did not excuse disobedience. Similarly, the Court should not excuse defendants' noncompliance here based on internal budgeting constraints.

Financial difficulties do not, standing alone, excuse compliance with a court order. *Morales-Feliciano*, 887 F.2d at 5. Although relevant in an institutional reform case, "[f]inancial constraints may not be used to justify the creation or perpetuation of constitutional violations," *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 392 (1992), and "budgetary constraints ordinarily do not, in and of themselves, provide a legal excuse for noncompliance" with a remedial order. *Morales-Feliciano*, 887 F.2d at 5; see also *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 631 F.2d 162, 165 (2d Cir. 1980) ("[A] state cannot avoid the obligation of correcting the constitutional violations of its institutions simply by pleading fiscal inability."). Indeed, this Court in *Morales-Feliciano* approved contempt sanctions for failure to carry out costly improvements even though the Commonwealth had "dramatically increased spending on prisons" in recent years. *Morales-Feliciano*, 887 F.2d at 5. If the defendants thought that the hiring requirements had become inappropriate because of changes in economic or other circumstances, they "should have sought relief in the form of a modification" before choosing to violate the order. *Massachusetts Ass'n of Older Americans*, 803 F.2d at 41.

Nor does the existence of hiring freezes relieve the defendants from their duty to comply. Hiring freezes were in effect before the Commonwealth agreed to monthly hiring. Doc. 856 at 7, J.A. 427; Doc. 754-2 at 3-4; Doc. 756-2 at 3; Doc.

770-2 at 20; Doc. 786 at 2, J.A. 285. Relevant exemptions existed. Doc. 830-7 at 2; Doc. 836-6 at 2, J.A. 389. Furthermore, the freezes were imposed by the governor of Puerto Rico, himself a party to this suit. The governor cannot, by his own executive order implementing a hiring freeze, relieve himself of his responsibility to obey a court order.

Indeed, the evidence in this case undermines defendants' claims that finances made compliance impossible. They failed to implement many low-cost changes the monitor recommended to improve staffing ratios, such as training social workers to qualify as direct-care staff members or transferring all available staff from closed institutions to those facilities required to meet staffing ratios. Doc. 873 at 5-6. Defendants transferred some officers from closed institutions to the Ponce Girls facility, which was not covered by the Stipulated Order, and increased assignments to administrative posts. Doc. 873 at 4. Furthermore, the Commonwealth managed to find $300,000 to pay the Puerto Rico National Guard in renting facilities for a 22-week class of 27 youths. Doc. 903 at 8-10, J.A. 260. The camp absorbed valuable resources but did not improve staffing ratios, as youth services officers had to be transferred to the camp along with the 27 juveniles. Doc. 903 at 8-10, J.A. 260-262.

3. The Court Made No Findings About the Commonwealth's Degree Of Compliance Or Ability To Comply

Despite the obvious importance of the Commonwealth's degree of compliance or ability to comply, the district court did not make any findings on these issues. In more than 100 pages of briefing and exhibits on the contempt motion, the parties presented extensive arguments and documentation on the Commonwealth's funding procedures and staffing. Nevertheless, the court included no corresponding findings in its one-sentence order. *Chicago Truck Drivers*, 207 F.3d at 506 (finding court's two-page order inadequate and remanding for "an express finding"). The court offered not even "[a] simple reference" to the matter. *In re Grand Jury Investigation*, 545 F.3d at 26.

Admittedly, a district court is not always required to make detailed findings of fact in denying contempt. See *Burke* v. *Guiney*, 700 F.2d 767, 770 (1st Cir. 1983). "[B]revity alone does not betoken an abuse of discretion." *In re Grand Jury Investigation*, 545 F.3d at 26. But appellate courts have remanded where they cannot adequately assess the court's reasoning. *AccuSoft*, 237 F.3d at 51 (remanding with instructions for court to "squarely confront[]" disputed issue of fact); *Tranzact Techs., Inc*., 406 F.3d at 856 (holding magistrate "abused his discretion in dismissing Tranzact's contempt motion without ruling on disputed issues of fact").

Indeed, the district court's dismissive treatment of the United States' arguments essentially affords this Court no adequate basis for review. "A party who seeks enforcement of an injunction through the medium of civil contempt is * * * entitled to the resolution of genuine issues of material fact that bear upon the allegations by which it seeks to support a finding of contempt." *Rockwell Graphic Sys.* v. *DEV Indus., Inc.*, 91 F.3d 914, 920 (7th Cir. 1996).

The one-sentence order stands in stark contrast to no-contempt findings this Court has affirmed in similarly complex cases. In *Langton*, for example, the district court denied a contempt motion, citing defendant's partial compliance with consent decrees setting staffing ratios in sex offender treatment facilities. This Court approved the court's "detailed review of compendious evidence," and evaluated four specific findings of fact underlying the order. *Langton*, 928 F.2d at 1222. Similarly, in *In re Grand Jury Investigation*, 545 F.3d at 24, 27, the Court upheld the lower court's "thoughtful memorandum opinion," which "thoroughly reviewed what had transpired" below.

D. The District Court Erred In Basing Its Decision On Defendants' Intentions

The district court not only erred in failing to consider relevant factors, it erroneously based its holding on an irrelevant factor, defendants' supposed good

intentions.[9] In the contempt context, the court abuses its discretion "when an improper factor is accorded significant weight." *In re Grand Jury Investigation*, 545 F.3d at 24 (citation and internal quotation marks omitted). Here, the court's one-sentence order includes the finding that defendants' "non-compliance with the terms of said Order was not the result of intentional actions and/or omissions." Doc. 895, Add. 1-3. Given the brevity of the order, one can only assume that this finding was essential.

The court's reliance was misplaced; even if the Commonwealth's failure to hire were unintentional, good intentions cannot avert a finding of civil contempt. The Supreme Court has stated that "[t]he absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance." *McComb* v. *Jacksonville Paper Co*., 336 U.S. 187, 191 (1949). "Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act," as "[a]n act does not cease to be a violation of law and of a decree merely because it may have been done innocently." *Id*. at 191. As this Court recognized, "good faith, or the absence of willfulness, does not relieve a party from civil contempt in the face of a clear order." *Star Fin. Servs., Inc.* v. *AASTAR Mortg. Corp*., 89 F.3d 5, 13 (1st Cir. 1996). There simply is "no

[9] Although the terms are similar, as used by the district court "dilligen[ce]" appears to refer to the defendants' *efforts*, see subpart B, *supra*, whereas "intention[s]" appears to refer to defendants' *state of mind*.

scienter requirement for a finding of civil contempt." *AMF Inc.*, 711 F.2d at 1104; see also *Commodity Futures Trading Comm'n* v. *Premex, Inc*., 655 F.2d 779, 784 (7th Cir. 1981) ("Good intentions cannot sterilize conduct otherwise contemptuous."). Accordingly, a "defense of good faith is beside the point in [a] civil contempt proceeding," and defendants' intentions should not have been part of the court's contempt calculus. *NLRB* v. *Maine Caterers, Inc*., 732 F.2d 689, 690 (1st Cir. 1984).

A court's improper consideration of a party's intent warrants reversal. The Third Circuit considered this issue in *Harley-Davidson, Inc.* v. *Morris*, 19 F.3d 142 (1994). There, defendant violated a consent order after he relied on plaintiffs' oral statements offering a temporary exception. In denying contempt, the district court based its decision in part on defendant's testimony regarding his conversations with plaintiffs as evidence of his intent. *Id*. at 148. The court of appeals reversed, and remanded for imposition of sanctions, noting that evidence "on intent and willfulness was relevant to the contempt proceeding only insofar as it pertained to the extent of the sanction to be imposed." *Id*. at 148-149; see also *Pennington*, 832 F.2d at 913 ("Intent is not an issue in civil contempt proceedings.").

E. This Court Should Order The Defendants To Be Held In Contempt Or, At The Very Least, Remand For Consideration Under The Proper Legal Standards

In our view, the overwhelming and virtually undisputed evidence of non-compliance in this case is more than sufficient to warrant an order holding the defendants in contempt. Where a district court abuses its discretion, the appeals court may order a party be held in contempt or remand for reconsideration. *Donovan* v. *Enterprise Foundry, Inc*., 751 F.2d 30, 31 (1st Cir. 1984) (ordering foundry be held in contempt for refusing inspection where the district court, in considering contempt, erroneously quashed the inspection warrant as invalid); *AMF Inc.*, 711 F.2d at 1114 (remanding with directions to enter findings of contempt and make an assessment of damages). At the very least, however, the United States is entitled to a remand in this case for consideration of its contempt motion under the proper legal standards. *Chicago Truck Drivers*, 207 F.3d 500 (remanding, holding the district court did not show how it allocated burdens of proof or make required factual findings); *Tranzact Techs., Inc*., 406 F.3d at 855 (reversing dismissal of contempt motion and remanding for factual findings). In the circumstances presented here, however, there is no question that the order refusing to grant the United States' motion to hold the defendants in civil contempt must be overturned.

CONCLUSION

This Court should reverse the district court's denial of contempt and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rules of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 11,000 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/April J. Anderson
APRIL J. ANDERSON
Attorney

Date: August 23, 2010

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2010, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLANT with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify that the following counsel of record will be served via the appellate CM/ECF system.

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ADDENDUM

TABLE OF CONTENTS

PAGE

Doc. 895: Order Denying United States' Motion for
an Order Holding Defendants in Civil Contempt 1-3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

THE UNITED STATES OF AMERICA	'	
Plaintiff	'	
vs.	'	
THE COMMONWEALTH OF PUERTO RICO;	'	
The Honorable PEDRO J. ROSSELLO, Governor of the Commonwealth of Puerto Rico, in his official capacity;	'	CIVIL 94-2080CCC
THE JUVENILE INSTITUTIONS ADMINISTRATION;	'	
ZORAIDA BUXO, Secretary of the Department of Corrections and Rehabilitation, in her official capacity;	'	
MIGUEL RIVERA, Director, Juvenile Institutions Administration, in his official capacity;	'	
DR. CARMEN FELICIANO VDA. DE MELECIO, Secretary of Health, Department of Health, in her official capacity;	'	
DR. NESTOR GALARZA, Director, Anti-Addiction Services Department, in his official capacity;	'	
VICTOR FAJARDO, Secretary, Department of Education, in his official capacity;	'	
PEDRO PIERLUISI, Secretary, Justice Department of the Commonwealth of Puerto Rico, in his official capacity;	'	
CARMEN RODRIGUEZ, Secretary, Department of Social Services, in her official capacity;	'	
DANIEL VAZQUEZ TORRES, Director Humacao Detention Center, in his official capacity;	'	

EDGARD ORTIZ ALBINO, Director, Mayaguez Industrial School, in his official capacity;

NORMA CRUZ, Director, Ponce Central Training School, in her official capacity

FRANCISCA APONTE, Director, Ponce Victoria Street Training Center, in her official capacity;

PAULITO DIAZ DE GARCIA, Director, Ponce Detention Center for Girls and Ponce Industrial School for Girls and Boys, in her official capacity;

JULIO CUALIO BONET, Director, Guaynabo Training School, in his official capacity; and

LYDIA LASALLE, Acting Director, Central Metropolitan Training School of Bayamon, in her official capacity;

Defendants

O R D E R

Having considered the United States' Motion for an Order Holding Defendants in Civil Contempt for Violation of the January 8 Stipulated Order on Staffing filed on July 2, 2009 (**docket entry 846**), the Commonwealth Defendants' Opposition filed on August 4, 2009 (docket entry 850), the United States' Memorandum in Reply filed on August 19, 2009 (docket entry 856) and the Commonwealth Defendants' Surreply filed on October 2, 2009 (docket entry 863), said motion for civil contempt is DENIED as the reasons adduced by the Commonwealth defendants show that they had been reasonably diligent in attempting to

fulfill what was required in the Stipulated Order and their non-compliance with the terms of said Order was not the result of intentional actions and/or omissions.

SO ORDERED.

At San Juan, Puerto Rico, on March 25, 2010.

S/CARMEN CONSUELO CEREZO
United States District Judge