IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAN DURAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 74 C 2949
	)	
THOMAS J. DART, Sheriff of Cook County, et al.,	)	The Hon. Virginia M. Kendall
	)	
	)	
Defendants.	)	

PLAINTIFFS' RENEWED MOTION FOR AN EVIDENTIARY HEARING AND FOR OTHER RELIEF CALLED FOR AS A RESULT OF THE MONITOR'S REPORT

Plaintiff Dan Duran, individually and as the representative of a certified class, respectfully renews his motion for entry of an order granting certain relief that is called for as a result of the John Howard Association's April 9, 2007 Court Monitoring Report, including an evidentiary hearing with respect to the defendants' failure to comply with the population limitations at the Cook County Jail ("Jail") that this Court's April 1982 Consent Decree directs. In support of this motion, the Plaintiff class states as follows.

1. The Plaintiff class is renewing the motion it made at the August 24 status hearing for certain relief that is necessitated as a result of the John Howard Association's April 9, 2007 Court Monitoring Report (the "Plaintiff Class August 2007 Motion" or the "Motion," a copy of which is attached as Ex. A). The Motion raised, *inter alia*, the defendants' brazen violation of § 2 of this Court's April 1982 Consent Decree (the "Decree" or "Consent Decree"), which provides that "[e]ach pre-trial detainee shall have one permanent bed in a cell," and that "no pre-trial detainee shall be housed where inmates are required to sleep on the floor, or on a mattress on the floor, or in any area not designed as sleeping quarters." The Motion explained (at ¶¶5-6)

that defendants' violation of this provision of the Decree (resulting in an average daily overflow population of 411.7 class members for the period January through May 2007) was the product of defendants having drastically cut back on the Electronic Monitoring Program ("EMP"). The Motion cited (at ¶¶4-6) John Howard Association data establishing that if defendants had fully utilized the EMP – or, indeed, simply not cut it back – that would have swiftly and fully eliminated the Decree violation.

2. At the conclusion of the August 24 status hearing, this Court denied the Plaintiff Class August 2007 Motion – but did so without prejudice and with the understanding that the Motion could be renewed if the Jail's overcrowding problems had not been meaningfully addressed as part of a collaborative project involving the Cook County judiciary, *see* ¶ 7 below, or by other means. *See* 8/24/07 Transcript of Proceedings ("8/24/07 Tr.") at __, copy attached as Ex. B.[1]

3. In the more than three months since the August 24 hearing, defendants have not only failed to cure or even ameliorate their violation of §2 of the Decree, but, remarkably, they have accelerated their cut back in their utilization of the EMP, with the predictable result that

[1] Plaintiffs had ordered the August 24 transcript for delivery by November 27, 2007, intending to file their motion on that day, three days prior to the intended presentment date (November 30, the date of the Court's previously scheduled status hearing), in accordance with this court's general directive. Unfortunately, however, the court's official court reporter (Ms. Metzler) fell ill, and was unable to effect delivery of the transcript by that date; this made it impossible for plaintiffs to file their motion by November 27, with the transcript and corresponding transcript citations. Ms. Metzler, who showed every courtesy to plaintiffs' counsel under the difficult circumstances, initially said that she expected to be able to transmit the completed transcript to plaintiffs' counsel by 3 p.m. on November 28 (today). At approximately 3: 45 p.m. this afternoon, however, Ms. Metzler advised plaintiffs' counsel that she would not be able to transmit the completed transcript until sometime early in the evening. Given this notification, plaintiffs' counsel were of the view that the most appropriate course for them was to file their motion promptly, without the completed transcript or the corresponding citations; and they did so. As soon as practicable after the completed transcript is transmitted to plaintiffs' counsel, however, they will ensure that it is filed with the Court.

overcrowding at the Jail has *increased.* It is now apparent that this Court's active intervention is necessary. This Court should schedule a prompt evidentiary hearing regarding the defendants' failure to comply with the population provisions in § 2 of the Decree and should direct the defendants to present a plan prior to that hearing for eliminating within 90 days the Jail's illegal population overflow.

Jail Overcrowding is Up
EMP Participation is Down

4. At the time of the Plaintiff Class August 2007 Motion, the latest data available (for July 2007) showed an average daily overflow population of 441.6 – *i.e.*, on average, during the month of July 2007, more than 441 members of the Plaintiff class were relegated to sleeping on the floor of the Jail, in direct contravention of § 2 of the Decree. As of July 2007, the average daily EMP caseload stood at 649. The Plaintiff Class August 2007 Motion pointed out (at ¶5) that this average represented a sharp and precipitous decline in the usage of the EMP. In April 2006, when the defendants were in near-compliance with the Decree (only 3.4 members of the Plaintiff class slept on the floor, on average, during that month), the average EMP caseload stood at 1365 class member participants. Thus, the usage of EMP had declined by more than 700 participants in a little over a year.

5. The Plaintiff class counsel have recently been furnished with updated data from the John Howard Association. A copy of the John Howard Association's November 15, 2007 Population and Capacity Summary is attached as Ex. C. The data demonstrate the defendants' abject failure to take any meaningful steps to address the ongoing Decree violation. The average daily population overflow for October 2007 stands at 586.3 class members – 144.7 *additional* class members on average are sleeping on the Jail's floor now than was the case last July. At the

same time, EMP participation continues to dwindle. As of October, the average daily EMP caseload stood at 487 – down by 162 from the July average of 649.

6. Since April 2006, there has been a steady and precipitous decline in the defendants' usage of EMP – from an average daily caseload of 1365 in that month to the October 2007 average of 487. It is clear that, if the defendants were to make the same use of the EMP today that they made of it in April 2006, there would be no class members sleeping on the floor and no violation of the Decree. Indeed, if defendants were to increase the EMP caseload by only 586 participants (the October 2007 average daily population overflow), the total EMP caseload would be 1073 – well below the average daily EMP caseload of 1365 in April 2006. In other words, there is no question that the defendants have it within their power to eliminate the violation of § 2 of the Decree. They only need to act.

There Is Little, if Any, Hope of Voluntary Cooperation Between the Sheriff and the Cook County Judiciary

7. At the August 2007 status hearing, counsel for the Sheriff represented to the Court that the Decree violation was likely to be remedied by cooperation between the Sheriff and the Cook County judiciary. *See* 8/24/07 Tr. at __. The Sheriff staked out the position that assignments to EMP should be made based on input provided by the judiciary. *Id.* at __. His counsel expressed confidence that a meeting among counsel for the parties and the Chief Judge of the Circuit Court of Cook County could produce a plan for increasing EMP usage with the direct involvement of the judges assigned to Central Bond Court. *Id.* at __.

8. The meeting has never happened. Prospects for convening a meeting on this issue between the Chief Judge and the Sheriff appear bleak. At a County Board hearing on November 8, 2007, the Chief Judge and the Sheriff reportedly "traded barbs" over who has the

responsibility for deciding eligibility for EMP. *See* M. Higgins, "Sheriff, judge spar over jail population," *Chicago Tribune* (November 8, 2007) (attached as Ex. D). At the hearing, the Sheriff reiterated his belief that judges should make the call as to whether a class member qualifies for EMP. Far from acceding to that proposition, the Chief Judge maintained that, under the Decree, that responsibility is the Sheriff's. *Id.*

9. It appears that neither the Sheriff nor the County judiciary *want* the responsibility for determining eligibility for EMP. Yet it is the Sheriff, who is a party to this case and to the Consent Decree, who *has* the responsibility for eliminating population overflow and achieving compliance with § 2 of the Decree. The indisputable and drastic decline in EMP participation since April 2006, giving rise to the equally indisputable and drastic increase in Jail overcrowding during the same period, however, establishes that: (a) the Sheriff will not discharge his responsibilities under the Decree; and (b) the Cook County judiciary will not bail the Sheriff out.

It is Imperative that this Court Conduct an Evidentiary Hearing And that the Defendants Propose a Realistic Plan for Eliminating Jail Overcrowding

10. In the Plaintiff Class August 2007 Motion, plaintiffs pointed out (at ¶¶ 9-10) that it is fully within the defendants' power to eliminate the perennial violation of § 2 of the Decree, either by fully utilizing the EMP or by some other approach that the defendants might develop. *See Duran v. Elrod,* 713 F.2d 292, 297-98 (7th Cir. 1983). That remains the case.

11. Instead of addressing the problem, however, the defendants have been content to allow the Jail's overpopulation to continue trending upward while they simultaneously cut back on the EMP program. The defendants are violating the Decree with impunity. In addition, their inaction threatens the health and safety of every member of the Plaintiff class. A *Chicago Reader* article, published on October 11, 2007, reports on the spread of methicillin-resistant

staphy lococcus aureus (CA-MRSA) within the Jail – and from the Jail into the Cook County population at large. *See* K. Virella, "Releasing the Disease," *Chicago Reader* (October 11, 2007) (Ex. E hereto). CA-MRSA is potentially deadly, and the article reports that there are five to ten new cases of CA-MRSA within the Jail *each day*. *Id.* According to the *Reader* article, "CA-MRSA has been spreading like wildfire in the jail *in part because of overcrowding* and unsanitary living conditions." *Id.* (emphasis added).

12. At the August 2007 status hearing, this Court expressed grave concern about the crisis of health care delivery at the Jail. 8/24/07 Tr. at __. That crisis, to be sure, is beyond the purview of the Consent Decree in this case. The problem of overcrowding is within this Court's jurisdiction, however. To the extent the spread of a deadly infectious disease in the Jail – and in the County – is caused in part by Jail overcrowding, this Court is in a position to take remedial action. It is imperative at this time for this Court to insist that the defendants take immediate, concrete measures to eliminate the violation of § 2 of the Decree.

13. To that end, there should be an evidentiary hearing to examine the reasons for the current overcrowding problem[2] before which hearing the defendants should be required to present a concrete plan for eliminating overcrowding at the Jail within the next 90 days. This Court should consider extending an invitation to the Chief Judge of the Circuit Court of Cook

[2] [2] At the August 2007 status hearing, the Plaintiff class was given permission to serve written discovery to the Sheriff concerning the reduction in EMP usage. 8/24/07 Tr. at __. The Sheriff's answers were, however, non-responsive in critical respects. For example, Interrogatory No. 2 asked the Sheriff to explain the relationship between the EMP selection criteria in effect from January 1, 2006 through the present and the decline in EMP participation during the same period. The Sheriff's non-answer was "the pool of eligible candidates has declined based on the selection criteria," and that "therefore the number of pretrial detainees on Electronic Monitoring has declined." *See* Defendant Thomas Dart, Sheriff of Cook County's Answers to Plaintiff's Interrogatories and Responses to Production Request (attached as Ex. F), Answer to Interrogatory No. 2. At an evidentiary hearing (or in a pre-hearing deposition), the Sheriff and his staff would be obliged to provide a meaningful answer to this basic question.

County to attend the hearing. And, following the hearing, based on input from the parties, the Court should enter an order imposing a plan to achieve prompt compliance with § 2 of the Decree.

WHEREFORE, the Plaintiff class respectfully requests that this Court schedule an evidentiary hearing regarding the reasons for the defendants' current failure to comply with § 2 of the Decree and directing the defendants, in advance of the hearing, to present a concrete plan for eliminating overcrowding at the Jail within the next 90 days.

Respectfully submitted,

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By: /s/ Locke E. Bowman
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