No. 10-2746
In the United States Court of Appeals
For the Seventh Circuit

JIMMY DOE, et al., Plaintiffs – Appellees	)	
and	)	
EARL DUNLAP Petitioner – Appellee	)	On Appeal from the United States Court for the Northern District of Illinois, Eastern Division.
v.	)	
	)	No. 99 C 3945
COOK COUNTY, CLARA COLLINS, Defendants – Appellees	)	The Honorable James F. Holderman, Presiding Judge
APPEAL OF: TEAMSTERS LOCAL UNION 700, Intervenor	)	

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES

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INTRODUCTION

This brief responds to the six questions posed by the Court at the conclusion of the oral argument in this case. The first three questions involve overlapping concerns regarding the form and validity of the relief ordered by the district court. The last three questions are somewhat narrower, focusing on who should participate as a party or in some other capacity in the proceedings.

Plaintiffs focus primarily on the first three questions, which concern the legal and practical effect of two orders entered by the district court: (1) The court's 2002 order approving and reserving jurisdiction to enforce the parties' proposed Memorandum of Agreement (MOA or Agreement); and (2) The court's approval and entry in 2007 of the Agreed Order Appointing a Transitional Administrator (Appointment Order), essentially selecting a receiver to assume administration of the facility.

Before approving the 2002 Agreement, the district court certified a plaintiff class, ruled on a motion to dismiss, oversaw discovery for years, supervised settlement negotiations through a Magistrate Judge, provided notice of and held a public hearing, and reviewed the substantial evidence the parties jointly submitted in support of the settlement terms. Thereafter, the court approved the settlement as fair, adequate and reasonable and made the ultimate finding required by the Prison Litigation Reform Act (PLRA) – that the terms of the MOA complied, without qualification, with the provisions of 18 U.S.C. § 3626(a) concerning prospective relief. (Doc. No. 71 at 2.) Finally, in compliance with this

Court's jurisprudence following the Supreme Court's decision in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), the district court dismissed the case without prejudice and expressly retained jurisdiction to "enforce, modify or take any other appropriate action with regard to the terms of the Agreement." (Doc. 71 at 2.)

Similarly, the district court approved the 2007 Appointment Order after months of negotiations supervised at the district court's direction by court-appointed monitors who were intimately familiar with the longstanding problems at the Cook County Juvenile Temporary Detention Center (JTDC). The court reviewed volumes of uncontested reports from court-appointed monitors and experts documenting the dangerous conditions and inadequate services at the facility before it entered the Appointment Order and also found it in compliance with the PLRA. (Doc. 330.)

The form of the district court's orders reflected a careful and appropriate balance of legal requirements and practical concerns. The court properly retained subject matter jurisdiction of remedial matters through its 2002 Order and succinctly stated, without elaboration, that both orders complied with the PLRA's requirements. (Doc. 71 at 2; Doc. 330 ¶ 3.) Plaintiffs believe that the retention of subject matter jurisdiction was legally effective and that the PLRA findings were sufficient. Plaintiffs are aware of no decision requiring more detailed findings when the parties are in agreement and the factual record is clear and uncontested, as it is here. As a legal matter, even if this Court found

the PLRA findings inadequate that would not defeat the subject matter jurisdiction of the district court over the remedial process. Instead, the appropriate remedy would be a remand for an appropriate hearing to evaluate the propriety of terminating or modifying relief pursuant to the PLRA. *See* Section II, *infra.*

As a practical matter, requiring district courts to describe in detail why the relief they ordered complies with the PLRA would make settlements of cases like this one extremely difficult if not impossible. Parties settle prison cases in part to avoid the time and expense of a trial.[1] Governmental defendants in injunctive cases also want to avoid factual findings detailing every aspect of their violations of law. Indeed, such findings may have preclusive effect in future damages actions. If district courts were required to make detailed findings about the defendants' violations of law and the harm they caused, and to hold the lengthy evidentiary hearings that almost certainly would be necessary to make those findings, there would be little reason for defendants to agree to a settlement.

The PLRA does not obstruct proper settlements. Instead, reasonably applied, it requires that courts insure in a manner appropriate to the circumstances of the case that there is a violation of federal law and that the remedy is

[1] The court also has a strong interest in avoiding the unnecessary consumption of judicial time. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) (noting that federal courts "favor the settlement of class action litigation").

appropriately circumscribed. *See* 18 U.S.C. § 3626(a). While these findings may require some supporting detail in a contested matter, they should not in a case resolved by an agreement in which the parties stipulate to the findings, the court relies on an uncontested factual record, and there is a public hearing where interested parties can contest the findings.

Moreover, the statute provides prompt relief for public officials who want to terminate prospective relief whenever it is no longer necessary to address ongoing constitutional violations. *See* 18 U.S.C. § 3626(b). The termination provisions of the PLRA frequently are employed by successors to public officials who agreed to prospective relief. *See Frew v. Hawkins*, 540 U.S. 431, 441 (2004) (cautioning lower courts about relief that may "improperly deprive future officials of their designated legislative and executive powers . . . . even absent an ongoing violation of federal law").

The record in this case has, unfortunately, always clearly demonstrated continuing violations of the Constitution. The consistent evidence of these violations includes reports prepared by retained experts and jointly submitted by the parties as well as reports from court-appointed monitors and experts, such as the Compliance Administrator and the Transitional Administrator (TA or Administrator). No one has ever submitted any evidence to contradict those reports, extending over more than a decade. Nor have the remedies ordered in 2002 or 2007 ever been challenged on a factual basis as extending beyond what was necessary to address these profound deficiencies.

In fact, a long line of officials who succeeded the original defendants consistently have declined to seek termination or modification of the court's remedial orders under the PLRA after they took office and became informed about the problems at the JTDC. The Chief Judge of the Circuit Court of Cook County recently reiterated to this Court his decision not to appoint a Superintendent of the facility until the Administrator has completed the job of bringing the facility into compliance with constitutional standards. (*See* Appellate Doc. 68, Ex. A ¶ 7.) In addition, the Union – although it raises a variety of hypertechnical arguments against the district court's decisions – vehemently opposed an evidentiary hearing in the district court and repeatedly has declined to submit any evidence that would support termination of relief. (*See, e.g.*, Doc. 544 at 8; Doc. 573 at 4 n.2; *see also* Doc. 589 at 17.)

In short, as recognized by the two experienced district court judges who have supervised this litigation, this is an appropriate case for the engagement of the federal courts. A series of public officials repeatedly have recognized they are unable to bring the JTDC into compliance with the Constitution without the services of a court-appointed receiver. For the reasons stated in this brief and in their opening brief, plaintiffs respectfully urge this Court to affirm the district court's decisions so that the district court can insure that the Administrator is able to complete the task he is well on his way to completing: providing constitutionally adequate care and services to the plaintiff children.

ARGUMENT

I. The 2002 Memorandum of Agreement is the functional equivalent of a consent decree because it is enforceable in the district court.

The term "consent decree" is ambiguous, and settlement agreements that are not labeled consent decrees nevertheless are enforceable where the district court has approved them and properly retained jurisdiction to enforce their terms. *See Am. Disabilty Ass'n., Inc. v. Chmielarz*, 289 F.3d 1315, 1321 (11th Cir. 2002) (district court "effected precisely the same result" as would have been achieved with a consent decree by approving settlement agreement and retaining jurisdiction to enforce its terms). Here, where the court both approved the 2002 Agreement and effectively retained jurisdiction to enforce it, *see* Section III, *infra*, the Agreement is the functional equivalent of a consent decree. Furthermore, because the Agreement is not purely a private agreement between the parties but is enforceable in the district court, it satisfies the definition of a consent decree under the PLRA. *See* 18 U.S.C. § 3626(c)(1)-(2) & (g)(1);(6).

A. Factual background.

The district court has supervised this litigation for more than a decade. In 2002, after extensive discovery and settlement negotiations supervised by a Magistrate Judge, the parties submitted a joint motion to approve a proposed settlement of this class action. (Doc. 67.) The evidentiary record submitted in support of the joint motion included substantial expert reports describing

substandard services and conditions at the JTDC.[2] No evidence contradicting any of these reports was presented by any party, intervenor, JTDC employee or other entity at the settlement hearing.

After notice to a wide range of class members and their families, as well as advocacy groups and public officials (*see* Docs. 67-68), the court received no objections to the proposed settlement. Accordingly, the court reviewed the parties' submissions, held a hearing pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, advised the parties that they should modify a provision of the Agreement, and thereafter approved the modified settlement as fair, reasonable and adequate. The court also made the finding that the Agreement was in full compliance with the requirements for settlement of a class action under the PLRA, including the statute's "specific requirements concerning prospective injunctive relief." (Doc. 71 at 2.) The court dismissed the case without prejudice and expressly retained jurisdiction "to enter any orders necessary or appropriate to enforce, modify or take any other appropriate action with regard to the terms of the Agreement." (*Id.*)

For more than four years after the district court approved the settlement, the constitutional violations existing in 2002 continued unabated, and the defendants continued to house the JTDC residents in unconstitutional conditions that endangered their health and safety. (*See* Pls.' Merits Br. at 6-9.) The court

[2] The John Howard Association, commissioned by the County, had long before publicly reported that conditions at the JTDC were grossly inadequate. (*See* Docs. 273 – 35-38 (John Howard Association Report May 1998).) The John Howard Association's 1998 report was cited in the Second Amended Complaint. (Doc. 38 ¶¶ 16-17, 20, 24, 28-29.)

was well aware of this situation, because it received regular reports from court-appointed experts and monitors describing the JTDC's grossly inadequate services and conditions and the defendants' unwillingness to select administrators able to address the profound problems at the facility. (*Id.* at 10-11); *see Berwanger v. Cottey*, 178 F.3d 834, 840 (7th Cir. 1999) (noting importance of information supplied by court-appointed monitor to determine whether the statutory criteria are satisfied under the PLRA); *Inmates of Suffolk Cnty. Jail v. Rouse*, 129 F.3d 649, 661-62 (1st Cir. 1997) (noting district court's "intimate familiarity" with the case based on receiving and evaluating periodic reports). The court on several occasions discussed with the parties the facility's mounting problems. (*See, e.g.*, Tr. June 21, 2007 at 8-9 (Supplemental App. at 8-9).)

After several less intrusive measures failed and conditions and services continued to deteriorate, plaintiffs moved for the appointment of a receiver. In support of their motion, plaintiffs submitted several volumes of evidence including reports by court-appointed monitors and court-appointed experts documenting the abuse and neglect of the JTDC's young residents. (Docs. 271-73.) Shortly thereafter a court-appointed monitor filed a lengthy report with the district court judge detailing defendants' complete disregard for the court's orders. He advised the court that, in his view, the only effective remedy was to remove day-to-day operation of the JTDC from the County and for the court to appoint someone to manage the JTDC. (Doc. 559-2 at 33.)

On August 14, 2007, the court entered the Appointment Order, the terms of which were agreed to by the parties. (Doc. 330.) The court reviewed the mountain of uncontroverted reports indicating that the defendants were simply unable or unwilling to eradicate the unconstitutional infirmities at the JTDC and specifically found, and the parties agreed, that the Order complied with the PLRA's requirements for prospective relief. (*Id.* ¶ 3.)

Effective January 1, 2008, a few months after the Appointment Order, changes to the County Shelter Care and Detention Home Act transferred the authority to appoint a Superintendent of the JTDC from the Cook County Board to the Chief Judge of the Circuit Court of Cook County. 55 ILCS 75/1. The Chief Judge, aware of the longstanding problems at the JTDC, publicly announced that he had decided not to appoint a Superintendent and that instead he would support the Administrator's efforts to bring the facility into compliance with constitutional standards. (*See* Press Release, Office of Chief Judge Timothy C. Evans, "Chief Judge Evans announces decision on detention center administrator" (July 1, 2008), *http://www.cookcountycourt.org/pressreleases/arch_view.aspx?id=448*) (hereinafter "Chief Judge's Press Release") (Supplemental App. at 48); *see also* Appellate Doc. 68, Ex. A ¶ 7.)

Importantly, neither the defendants, the Union, nor anyone else has ever moved pursuant to Federal Rule of Civil Procedure 60(b) or the PLRA provision for termination (18 U.S.C. § 3626(b)) to rescind or modify the 2002 and 2007

Orders in this case. *See Jones-El v. Berge*, 374 F.3d 541, 545 (7th Cir. 2004) (a "consent decree remains valid" until the court grants an appropriate motion to terminate or modify). As discussed in Sections III and IV *infra*, the district court expressly retained jurisdiction to enforce the 2002 Agreement, and the Union has not been granted the authority to intervene to challenge the court orders approving the Agreement or appointing the Administrator.

On October 9, 2009, the Administrator sought district court approval for a staffing plan because in his expert opinion the living units staffed by incumbent employees would remain chaotic, dangerous and below constitutional standards until unqualified employees are replaced. (*See* Doc. 557 at 4, 12-13.) On June 23, 2010, the district court found that the Administrator's plan was consistent with state labor law and that the underlying court orders of 2002 and 2007 remained valid, noting that the Union did not introduce any evidence challenging the Administrator's expert opinions regarding the constitutionality of conditions at the JTDC or ask the court to terminate the orders pursuant to 18 U.S.C. § 3626(b). (*See* Doc. 589 at 17.) The court made clear in its order denying the Union's Motion for a Stay that while there had not been any formal hearings to determine whether there are ongoing violations at the JTDC since May of 2008, "the court finds it unduly risky to conclude from this lack of evidence that there are no ongoing constitutional violations at the JTDC. Indeed, in light of the fact that no party to this litigation has yet sought the termination of these post-

judgment proceedings, the court finds it likely that this is not the situation." (Doc. 625 at 3.)

B. The Memorandum of Agreement is the "functional equivalent" of a consent decree.

The district court effectively reserved jurisdiction to enforce, modify, and take any other appropriate action regarding the 2002 Agreement. *See* Section III, *infra*. This reservation of jurisdiction indicated the prospect of further judicial action, making the Agreement "functionally a consent decree" in the related context of fee-shifting statutes. *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir. 2003) (relying on *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002)); *see Am. Disability Ass'n., Inc.*, 289 F.3d at 1319 n.2 (the district court's approval of a settlement and express retention of jurisdiction to enforce its terms are "the functional equivalent of a consent decree and, therefore, plainly separate [the] case from those in which a private settlement is unaccompanied by any further judicial action").

These cases discussing the propriety of fee awards examine settlement agreements to determine if they include the "judicial approval and oversight" sufficient for the plaintiffs to be eligible for attorneys' fees in statutes that award fees to a prevailing party. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 n.7 (2001). In *Buckhannon*, the Supreme Court discussed the parameters of claims for attorneys' fees under such statutes. The Court held that the plaintiffs can be considered prevailing parties when they "create the 'material alteration of the legal relationship of the parties'

necessary to permit an award of attorney's fees." *Id.* (quoting *Texas State Teachers Ass'n. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)). The Court recognized that, "in addition to judgments on the merits . . . settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees." *Id.* The Court noted that purely private settlements "do not entail the judicial approval and oversight involved in consent decrees." *Id.* n.7. As a result, "federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal." *Id.* (citing *Kokkonen*, 511 U.S. 375).

This Court, along with a long line of other federal appellate courts, has acknowledged that a settlement agreement that the district court approves and effectively reserves jurisdiction to enforce is the functional equivalent of a consent decree for purposes of fee awards under *Buckhannon. See T.D.*, 349 F.3d at 478 (relying on *Smyth*, 282 F.3d at 281); *Aronov v. Napolitano*, 562 F.3d 84, 90 (1st Cir. 2009); *Am. Disability Ass'n., Inc.*, 289 F.3d at 1320. As discussed in Section III, *infra*, the district court approved the terms of the settlement and properly reserved jurisdiction to enforce the MOA, making it the functional equivalent of a consent decree.

C. The term "consent decree" is ambiguous.

The caption of the 2002 Agreement does not describe it as a consent decree, and it was not entered as a formal judgment when the district court approved it in 2002. As a result, it does not meet some traditional definitions of the term.

See Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 378 (1992). Because the district court effectively retained jurisdiction to enforce the Agreement, however, *see* Section III *infra*, it clearly meets the definition of a consent decree under the PLRA. *See* 18 U.S.C. § 3626(g)(1) ("'consent decree' means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties" except for "private settlements"); *see also* 18 U.S.C. § 3626(c)(2) (stating that purely private settlement agreements enforceable only in state court are exempt from the requirements for prospective relief).[3]

Here, after holding a fairness hearing pursuant to Rule 23(e), the court found the Agreement was fair, reasonable and adequate. (Doc. 71 at 2.) "A court's responsibility to ensure that its orders are fair and lawful stamps an agreement that is made part of an order with judicial imprimatur . . . ." *Smyth*, 282 F.3d at 282. Whatever its formal label, neither the district court nor any party has questioned the fact that the 2002 Agreement and 2007 Appointment Order are enforceable.

II. The district court complied with the PLRA in 2002 and 2007.

A. Challenges to the 2002 and 2007 Orders are not before this Court.

This Court should not decide whether the findings in the district court's 2002 and 2007 Orders complied with the PLRA. No party has moved to terminate the

[3] A private settlement, although it may resolve a dispute before the court, ordinarily does not receive the approval of the court. *See, e.g.*, *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 835 (3d Cir. 1995).

2002 Agreement under the PLRA in the more than eight years that the district court properly has enforced the agreement. *See* Section III, *infra*. The PLRA allows "any party or intervener" to bring a motion to terminate prospective relief. 18 U.S.C. § 3626(b)(1).[4] No such motion has ever been filed, and there is no reason that the district court should not continue to enforce the MOA. *See Jones-El*, 374 F.3d at 545 ("consent decree remains valid" until an appropriate motion to terminate or modify is made); *see also Morales Feliciano*, 378 F.3d at 52 (under PLRA, order entered even without adequate findings is not void *ab initio* and hearing is required prior to termination).

The 2007 Order is not properly before this Court for the same reasons. No party has challenged that order or moved to terminate it pursuant to the PLRA. The Union was granted only a limited right of intervention in 2008 and has no authority to raise issues pertaining to the validity of the 2007 Order (*see* Section IV *infra*). The district court's June 23, 2010 Order – not the 2002 and 2007 Orders – is the subject of the appeal.[5]

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[4] The PLRA does not change the rules about who can intervene pursuant to Federal Rule of Civil Procedure 24 to challenge a decision to order prospective relief. *See* Section IV *infra*.

[5] Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the district court certified its June 23, 2010 Order as a final judgment "that the Transitional Administrator's proposed staffing plan does not (1) exceed the scope of the TA's mandate; (2) impermissibly interfere with the state law bargaining rights of affected employees; (3) violate the affected employees' due process rights; or (4) violate the Prison Litigation Reform Act." (Doc. 611 at 3.) These issues are the subject of the appeal.

B. The PLRA findings made by the court in the 2002 and 2007 Orders were adequate.

The PLRA provides that "[t]he court shall not grant or approve any prospective relief unless the court finds that such 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(a)(1)(A). The statute does not instruct the district courts in the degree of specificity the court must use in making these findings, and the Supreme Court has made clear that courts should not impose additional procedural requirements that are not specified in the statute. *See Jones v. Bock*, 549 U.S. 199, 212 (2007).[6]

Following a common and reasonable procedure when the record is adequate, the parties are in agreement, and the elements of the PLRA finding are not contested at the settlement hearing, the district court's 2002 Order Approving Agreement expressed compliance with the PLRA as an ultimate finding: "The Agreement is in full compliance with the requirements for settlement of a class action pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626, including the specific requirements of 18 U.S.C. §3626(a)(1) concerning prospective injunctive relief." (Doc. 71 at 3.) Again, in 2007, when the court entered the Agreed Order Appointing a Transitional Administrator, the court simply stated

[6] Rule 52 of the Federal Rules of Civil Procedure contemplates findings in disputed cases. Where the facts are undisputed or stipulated, detailed findings are unnecessary. *See, e.g.*, *Jones v. New York Cent. R. Co.*, 182 F.2d 326, 327 (6th Cir. 1950).

its ultimate finding that the Order was in full compliance with the requirements for settlement of class actions and prospective injunctive relief pursuant to the PLRA. (Doc. 330 ¶ 3.) The court's findings in these circumstances were adequate under the PLRA.

There is a split among the federal courts of appeals about whether the district courts need to provide detailed findings when they decide disputes between the parties regarding compliance with this provision of the PLRA.[7] There is no difference of opinion, however, that where the parties agree and the record is clear the PLRA does not require detailed findings. *See, e.g.*, *Cason v. Seckinger*, 231 F.3d 777, 785 n.8 (11th Cir. 2000) (noting particularized findings are not necessary concerning undisputed facts and the parties may make concessions or stipulations as "they deem appropriate"); *Parrish v. Ala. Dep't of Corr.*, 156 F.3d 1128, 1129 n.1 (11th Cir. 1998) ("Alabama does not contest these findings; so we accept them."); *Benjamin v. Fraser*, 156 F. Supp. 2d 333, 344 (S.D.N.Y. 2001), *aff'd in part, vacated and remanded in part on other grounds*, 343 F.3d 35 (2d Cir. 2003) ("Agreements between the parties . . . are evidence that those provisions . . . comply with the needs-narrowness-intrusiveness analysis, and constitute the kind of findings arguably required by the PLRA."); *accord Clark v. California*, 739 F. Supp. 2d 1168, 1228-29 (N.D. Cal. 2010) (court's failure to make specific PLRA findings when it entered settlement order did not necessitate termination because relief met the PLRA standard (relying

[7] *Compare Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1070-71 (9th Cir. 2010) *with Cason v. Seckinger*, 231 F.3d 777, 785 (11th Cir. 2000).

on *Gilmore v. California*, 220 F.3d 987, 1007 n.25 (9th Cir. 2000) ("If existing relief was so crafted according to the record and relevant caselaw, the findings required by the statute are implicit in the court's judgment.")); *McBean v. City of New York*, 2007 WL 2947448, at *3 (S.D.N.Y. Oct. 5, 2007) ("While it is not the province of the Court to make detailed findings on matters not contested by the parties, the Court has concluded that the evidence in the extensive discovery record and in the pre-trial submissions presented to the Court . . . fully supports the parties' stipulation . . . ."); *Morales Feliciano v. Calderon Serra*, 300 F. Supp. 2d 321, 334 (D.P.R. 2004) ("The very fact that the defendants chose to join the plaintiffs in selecting this remedy would seem to mean–and must be taken to mean–that they understood it to be precisely tailored to the needs of the occasion, that it is narrowly drawn and least intrusive–in fact not intrusive at all."), *aff'd sub nom Morales Feliciano v. Rullan*, 378 F.3d at 54-56, *cert. denied sub nom Rullan v. Feliciano*, 543 U.S. 1054 (2005).

The fact that particularized findings are unnecessary is particularly apparent "[w]here the parties in jail reform litigation agree on a proposed remedy, or modification of a proposed remedy" because the remedy negotiated by the parties "usually also constitutes the least intrusive means necessary to correct the violation of federal rights." *Little v. Shelby County, Tenn.*, 2003 WL 23849734, at *2 (W.D. Tenn. Mar. 25, 2003); *see also United States v. Puerto Rico*, 2007 WL 1119336, at *3 (D.P.R. Apr. 10, 2007) ("the acknowledgment by the parties of compliance with the relevant provisions of the PLRA and the factual data

regarding deficiencies and constitutional violations and corresponding remedies provided the Court with a sufficient basis to enter its findings [in an agreed proposed order] on PLRA standards compliance"); *Laube v. Campbell*, 333 F. Supp. 2d 1234, 1239 (M.D. Ala. 2004) ("the remedial provisions to which the parties have agreed . . . represent the parties' considered judgment as to what is necessary, narrow, and least intrusive with respect to the specific problems presented in this case, with which the parties are intimately familiar") (internal quotation omitted).[8]

The parties jointly presented ample evidence supporting the PLRA findings in 2002, including lengthy reports from experts detailing serious deficiencies in the care and services provided to the JTDC residents. (*See* Doc. 67, Exs. 5-6.) For several years prior to its 2007 Appointment Order, the court had received regular reports from court-appointed monitors and experts detailing defendants' noncompliance, and the court repeatedly had discussed the deteriorating situation with the parties. (*See* Pls.' Merits Br. at 6-11; Tr. June 21, 2007 at 8-9 (Supplemental App. at 8-9); *see also Berwanger*, 178 F.3d at 839 (noting importance of information supplied by court-appointed monitor overseeing compliance with decree).) The record contained overwhelming and uncontroverted evidence supporting the court's finding that the Appointment Order complied with the PLRA. (*See, e.g.*, Report of Court Monitor Charles Fasano, Doc. 559-2 at 33 ("I am convinced that the only possible means of

[8] Many of the cases discussing this issue are from district courts. Plaintiffs assume that the relative paucity of appellate case law is because parties rarely appeal the adequacy of findings to which they agreed.

beginning a good-faith effort toward compliance . . . is appointment of a receiver or special master under the auspices of the Court . . . . Only extraordinary measures to undo years of neglect and the recent and unconscionable decimation of the administrative and management structure of [the JTDC] have any hope of success.").)

The procedure followed by the district court in this case is consistent with the common practice of the United States Department of Justice (DOJ) and of other courts approving settlement agreements governed by the PLRA. The DOJ, for example, has entered into a number of consent decrees with state and local governments following investigations of prison conditions pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997. These negotiated agreements, containing findings very similar to those in this case, have been approved by numerous federal courts, which have upheld the parties' stipulations that their agreements satisfy the PLRA's requirements.

In the Northern District of Illinois, for example, the DOJ recently entered into an agreement with Cook County officials designed to remedy constitutional violations at the Cook County Jail. *United States v. Cook County*, No. 10-cv-02946, Doc. 13 (N.D. Ill. May 26, 2010) (Supplemental App. at 50). In their proposed settlement, entered as an Agreed Order by the Honorable Virginia M. Kendall of the Northern District of Illinois, the parties consented to a finding that the provisions of the order comply "in all respects with the" PLRA. *Id.* at 2 ¶ 7, Supplemental App. at 51 ¶ 7; *see also id.* at 55 ¶ H ("Nothing herein shall be

deemed, construed, or interpreted as an admission of liability by Defendants"),[9] Supplemental App. at 103 ¶ H, 56 ¶ A (parties' additional stipulation that Agreed Order complies with prospective relief provisions of the PLRA), Supplemental App. at 104 ¶ A, 56 ¶ B (stipulation that liability has not been litigated), Supplemental App. at 104 ¶ B. The district court entered the order without making any other findings of PLRA compliance.

The *Cook County* order represents a common practice of the DOJ. *See* United States Dep't of Justice, Special Litigation Section Cases and Matters: Civil Rights of Institutionalized Persons Act Settlements and Court Decisions, *http://www.justice.gov/crt/about/spl/findsettle.php#Settlements* (last visited Mar. 9, 2011) (collecting PLRA settlement agreements and consent decrees into which the DOJ has entered). These decrees, which contain ultimate findings similar to those in this case, have been approved and enforced by numerous United States District Courts. These consent decrees have been entered for many years during the terms of several different Attorneys General.

The common practice of expressing the court's PLRA findings in ultimate terms when the parties are in agreement mirrors the practice of district courts in many other types of cases. As long as the agreed findings are adequately supported by the record, as was the case here, the courts of appeals appropriately have been reluctant to disturb those findings on appeal. *See, e.g.*,

[9] Similarly, in this case, as Judge Tinder pointed out in the oral argument, defendants deny liability in the MOA. (Doc. 273-3 at 3.) This self-serving disclaimer was not included in the district court's finding that the MOA complied with the PLRA, and plaintiffs believe it should have no effect on the validity of that finding. The defendants did not even attempt such a disclaimer in 2007.

United States v. Comunidades Unidas Contra La Contaminacion, 204 F.3d 275, 280 (1st Cir. 2000) ("[T]he question is whether the record contains adequate facts to support the decision of the district court to approve the proposed compromise . . . . [A]s the Supreme Court has observed, 'a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based.'" (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 437 (1968)).

This Court must assume that the district court independently reviewed the evidence before finding the MOA and the Appointment Order in compliance with the PLRA. *See, e.g.*, *Miller v. United States*, 78 U.S. 268, 299-300 (1870) ("The general rule, however, is, that in courts of record all things are presumed to have been rightly done . . . . Those presumptions are that the court . . . having entered a judgment, did everything that was necessary to warrant its entry of the judgment."); *Trawczynski v. United States*, 89 F.2d 922, 924 (7th Cir. 1937) (appellate court has a duty to assume district court considered all the evidence presented).

This Court should not diverge from the usual deference accorded to district courts' findings in a case under the PLRA. In *Jones v. Bock*, the Supreme Court held that the PLRA's exhaustion provisions did not alter the ordinary pleading rule that exhaustion is an affirmative defense. 549 U.S. at 214. The Court explained that where the PLRA (or any statute) is silent on a particular

procedure, "the usual practice should be followed," and "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Id.* at 212. The Court concluded that the PLRA did not "justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself." *Id.* at 214. There is similarly no reason to fault the district court in this case for following accepted practice by making a simple and straightforward ultimate finding about matters that were agreed upon by the parties, amply supported in the record and unchallenged by third parties.

As the Supreme Court noted even before the enactment of the PLRA, "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandlin v. Conner*, 515 U.S. 472, 482 (1995). Where, as here, county officials consented to a remedy that represents, in their considered and negotiated judgment, a necessary, narrowly drawn and least intrusive means of addressing alleged constitutional violations, there is no reason to require district courts to provide detailed findings of the reasons they agreed with those conclusions. *See, e.g.*, *Benjamin*, 156 F. Supp. 2d at 344 (when defendants agree, the remedy is presumed to be the least intrusive).

Even if this Court concludes that the district court's PLRA findings were insufficient, the fact that the parties agreed and the uncontroverted record supported those findings indicates that whatever error the district court made was harmless. *See, e.g.*, *In re Legel, Braswell Gov't Secs. Corp.*, 648 F.2d 321, 326 n.8 (5th Cir. 1981) ("Where a district court fails to make necessary findings

[under Rule 52], a remand for entry of such findings is the usual recourse for an appellate court; however, where all of the issues on appeal may be fairly resolved from the record presented, a remand may not be required.").

C. Should this Court find the district court's PLRA findings deficient and that the error is not harmless, this Court should remand for an appropriate termination hearing under 18 U.S.C. Section 3626(b)(3).

Should this Court find that it has the authority to reach the adequacy of the PLRA findings in the district court's Orders, and concludes that those findings were inadequate and prejudicial, the proper remedy is to remand this matter to the district court to allow plaintiffs to demonstrate that the "relief continues to be appropriate under the criteria of subsection (b)(3)."[10] *Berwanger*, 178 F.3d at 839; *see also Hadix v. Johnson*, 228 F.3d 662, 671 (6th Cir. 2000) ("[T]he party opposing termination must be given the opportunity to submit additional evidence in an effort to show current and ongoing constitutional violations."); *Gilmore*, 220 F.3d at 1010 (district court was "obliged to take evidence on the current circumstances at the prison as plaintiffs requested, at least with respect to those remedies as to which plaintiffs did not concede that defendants were in

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[10] 18 U.S.C. § 3626(b)(3) provides that:

> Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

This provision serves as a limitation on subsection (b)(2) that entitles a defendant or appropriate intervener to immediate termination of prospective relief "if the relief was approved or granted in the absence of a finding by the court" that the relief meets the need-narrowness-instrusiveness requirements of the PLRA. *Id.* at § 3626(b)(2).

compliance"); *Loyd v. Ala. Dep't of Corr.*, 176 F.3d 1336, 1342 (11th Cir. 1999) (abuse of discretion to deny evidentiary hearing prior to termination); *Benjamin v. Jacobson*, 172 F.3d 144, 166 (2d Cir. 1999) (plaintiffs must be afforded "an opportunity to show current and ongoing violations of their federal rights" prior to termination); *Cagle v. Hutto*, 177 F.3d 253, 258 (4th Cir. 1999) (pre-termination evidentiary hearing required where "the party opposing termination alleges specific facts which, if true, would amount to a current and ongoing constitutional violation").

Even a consent decree entered with no PLRA findings whatsoever is not void *ab initio*. Rather, the court's order can be terminated only pursuant to the process described in the PLRA. *See Morales Feliciano*, 378 F.3d at 52 (even when court fails altogether to make PLRA findings, remand for a termination hearing is appropriate remedy). Even if this Court were to find that termination of the 2002 or 2007 Orders would be appropriate on the existing record, plaintiffs must first be afforded an opportunity to demonstrate that "prospective relief remains necessary to correct a current and ongoing violation of" plaintiffs' federally protected rights. *See* 18 U.S.C. § 3626(b)(3); *Berwanger*, 178 F.3d at 838 (remanding for a hearing, because relief is not terminated if "the judge makes the termination-avoiding findings specified in subsection b(3)").

III. The district court properly asserted jurisdiction under *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994).

The district court has complied with the law regarding maintaining subject matter jurisdiction in this case since it approved the settlement agreement in

2002. In the Order Approving Agreement (Doc. 71), the district court dismissed the action without prejudice, found that the parties' Agreement was fair, reasonable and adequate pursuant to Federal Rule of Civil Procedure 23(e)[11] and explicitly retained jurisdiction "over the parties and this action to enter any orders necessary or appropriate to enforce, modify or take any other appropriate action with regard to terms of the Agreement." (Doc. 71 at 2.) In accordance with the Supreme Court's decision in *Kokkonen*, 511 U.S. 375, the court made clear its intention to make itself available if necessary to enforce the terms of the settlement for the long-term. *See Blue Cross & Blue Shield Ass'n. v. Am. Express Co.*, 467 F.3d 634, 636 (7th Cir. 2006) (recognizing that a provision retaining jurisdiction "contemplates long-term undertakings").

The district court carefully adhered to the requirements of *Kokkonen* to insure that it had retained jurisdiction to enforce the 2002 Agreement. In *Kokkonen*, the parties agreed to a settlement and a voluntary dismissal with prejudice. 511 U.S. at 376. The district court signed the dismissal, but did not retain jurisdiction to enforce its terms or "so much as refer to the settlement agreement" in its order. *Id.* at 377. Shortly thereafter, the parties disagreed about their obligations under the agreement, and one party moved to have the district court enforce the settlement. The district court entered an "enforcement order" on the basis of its "inherent power." *Id.* The Supreme Court reversed, holding that there was no basis for the district court to assert jurisdiction over

[11] Given the severity of the conditions at the JTDC, it is unlikely that the court would have approved the settlement without retaining the authority to enforce it.

an alleged "breach of an agreement that produced the dismissal of an earlier federal suit." *Id.* at 379.

The Court observed that the outcome would be different "if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal-either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." *Id.* at 381. The Court recognized the authority of the district court "to embody the settlement contract in its dismissal order or, what has the same effect, retain jurisdiction over the settlement contract[] if the parties agree." *Id.* at 381-82; *see also Am. Disability Ass'n., Inc.*, 289 F.3d at 1320 ("even absent the entry of a formal consent decree, if the district court either incorporates the terms of a settlement agreement into its final order of dismissal *or* expressly retains jurisdiction to enforce a settlement, it may thereafter enforce the terms of the parties' agreement").

The federal courts of appeals consistently have held that when a district court dismisses a case without prejudice and expressly retains jurisdiction to enforce a settlement agreement the court has reviewed and approved, the court maintains subject matter jurisdiction over the case and the authority to enforce the agreement. In *DuPuy v. McEwen*, 495 F.3d 807 (7th Cir. 2007), for example, this Court ruled that "when a suit is dismissed *with* prejudice, it is gone, and the district court cannot adjudicate disputes arising out of the settlement that led to the dismissal merely by stating that it is retaining jurisdiction." *Id.* at 809

(emphasis added). The Court commented that an "obvious alternative," permitting the court to retain jurisdiction to enforce the settlement, "is for the court to dismiss with*out* prejudice" and, if the defendant wishes to insure against the filing of another case raising the same issues, "to include in the settlement a release of the defendant." *Id.* at 810 (emphasis added).

That is precisely what the district court did in this case.[12] (Doc. 71 at 2); *see Shapo v. Engle*, 463 F.3d 641, 643-46 (7th Cir. 2006) (holding that dismissal with prejudice, even where there is an express reservation of jurisdiction, ends the case, but acknowledging a different result if the case is dismissed without prejudice); *Hill v. Baxter Healthcare Corp.*, 405 F.3d 572, 576-77 (7th Cir. 2005) (courts "may retain power to protect and enforce their judgments" by expressly retaining jurisdiction or by making the terms of the settlement agreement part of the judgment); *Ford v. Neese*, 119 F.3d 560, 562 (7th Cir. 1997) (court found dismissal without prejudice together with retention of jurisdiction sufficient to confer continued jurisdiction on the district court to enforce the settlement agreement); *see also Am. Disability Ass'n., Inc.*, 289 F.3d at 1320 ("it is clear that, even absent the entry of a formal consent decree, if the district court . . . expressly retains jurisdiction to enforce a settlement, it may thereafter enforce the terms of the parties' agreement").

The DOJ frequently employs this approach, asking the court to dismiss a suit without prejudice while explicitly retaining jurisdiction to enforce the terms of

[12] Paragraph 69 of the 2002 Memorandum of Agreement, "Resolution of claims", states that the Agreement constitutes a final resolution of all claims set forth in the Second Amended Complaint. (Doc. No. 273-4 at 28 ¶ 69.)

the agreement. *See, e.g.*, *United States v. Georgia*, No. 10-cv-249-CAP, Doc. 112 (Joint Mot. to Enter Parties' Settlement Agreement) at 1 (N.D. Ga. Oct. 19, 2010) (Supplemental App. at 109); Doc. 115 (order approving agreement) (N.D. Ga. Oct. 29, 2010) (Supplemental App. at 162).

In its order requesting supplemental briefing, this Court linked the question of whether adequate findings have been made under the PLRA to the issue of subject matter jurisdiction in *Kokkonen*. As discussed above, the district court properly has asserted jurisdiction in this case under *Kokkonen* and, as discussed at length in Section II, made the necessary findings under the PLRA when it entered its orders for prospective relief in this case in 2002 and 2007. Even if this Court finds that the PLRA findings were inadequate at time of entry of 2002 Agreement or the 2007 Appointment Order, however, that determination would not affect the district court's jurisdiction. The proper course of action would be a remand for the district court to determine if prospective relief should continue under the PLRA. *See Morales Feliciano*, 378 F.3d at 52 (even when court fails altogether to make PLRA findings, remand for a termination hearing is appropriate remedy).

IV. The union has representational standing but its limited authority to intervene does not permit it to challenge the court's 2002 and 2007 Orders.

Plaintiffs acknowledge the Union's standing to challenge the district court's June 23 Order approving the Administrator's staffing plan on behalf of its members. The district court granted the Union only a limited right to intervene,

however, and the Union should not be permitted now to attack the court's 2002 and 2007 Orders that neither the Union nor any party challenged below.

A. The Union has standing to assert the rights of its members pursuant to state labor law.

The Supreme Court has recognized that a union in appropriate circumstances may pursue litigation on behalf of its members under principles of representational or organizational standing. *See Int'l Union, UAW v. Brock*, 477 U.S. 274, 291 (1986) (upholding union's standing to challenge law affecting employee members' benefits). Plaintiffs do not question the Union's right to challenge the district court's decision approving the Administrator's staffing plan and rejecting the Union's arguments that the plan violated its members' state labor law rights.[13] Those were the only issues certified as appealable in the district court's Order pursuant to Rule 54(b), Doc. 611, and they are the only issues the Union has standing to raise on appeal.

B. The Union has no standing to challenge the district court's 2002 and 2007 Orders.

The district court granted the Union only a limited right to intervene to oppose the Administrator's 2008 Emergency Motion seeking the court's permission to override certain provisions of the collective bargaining agreement in order to respond to a staffing crisis that endangered the health and safety of

[13] On appeal, the Union argued that little deference should be accorded the current district judge, because he was not the one who approved the MOA or the Appointment Order. (Union Merits Br. at 23.) But Judge Holderman has supervised this case for well over two years and, in any event, "it is the district court as an institution that merits deference," not any particular district judge. *Pearson v. Fair,* 935 F. 2d 401, 409 (1st Cir. 1991).

staff and residents. (*See* Docs. 389 (Administrator's Emergency Motion) & 405 (granting Union limited right of intervention "for the limited purpose of contesting the emergency motion); *see also* Pls.' Merits Br. at 11-13.) Plaintiffs did not object to the Union participating in the subsequent proceedings regarding the Administrator's staffing plan because that controversy arose in the context of the Administrator's reports pursuant to the court's decision granting his Emergency Motion. (*See* Doc. 405 (Order granting Administrator's Emergency Motion and ordering Administrator to file report); Doc. 458 (Administrator's First Report); Doc. 530 (Administrator's Second Report).)

The Union has no standing, however, to challenge the district court's 2002 and 2007 Orders. The Union never sought to intervene in this litigation until many years after the court's 2002 decision to approve and retain jurisdiction to enforce the Agreement. The Union initially filed a Motion to Intervene shortly before the court entered the Appointment Order in 2007, but the Union abandoned briefing of that Motion.[14] When the Union renewed its effort to intervene in order to oppose the Administrator's Emergency Motion in 2008, the district court granted only limited intervention. (*See* Doc. 413 (Tr. Apr. 23, 2008)

[14] The Union first moved to intervene in this case on July 6, 2007 after plaintiffs moved for a receivership. (Doc. 294.) The intervention motion was entered and continued generally. (Doc. 300.) The Union filed a notice that it would renew its motion to intervene at the evidentiary hearing on the receivership motion scheduled for August 14, 2007 (Doc. 328), which never took place as the matter was resolved by the Agreed Order appointing the Administrator. On August 14, 2007, the Union requested briefing on its motion to intervene and the court gave the Union 28 days to file a brief. The Union later moved for an extension of time (Doc. 345) and shortly thereafter filed a motion to stay the briefing on intervention. (Doc. 352.) In a minute order dated September 26, 2007, the court stayed indefinitely the motion to intervene. (Doc. 356.) The motion was not renewed until April 15, 2008. (Doc. 392.)

at 5-6 (discussing limited scope of intervention); Doc. 405 (granting limited right of intervention).)

This Court should not hear the Union's belated objections to the 2002 and 2007 Orders. A party granted limited intervention has no standing to raise other issues on appeal. *Gatreaux v. Pierce*, 743 F.2d 526, 529-33 (7th Cir. 1984); *see Devlin v. Scardelletti*, 536 U.S. 1, 6 (2002) ("only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment") (internal quotation omitted). An effort by the Union to expand the scope of its intervention below would have failed to meet the requirements of Federal Rule of Civil Procedure 24. With respect to the 2007 Order, for example, although the Union may prefer one administrator over another, it cannot claim a "direct, substantial and legally protectable interest" in who manages the JTDC any more than it had the right before the 2007 Order to challenge defendant's choice of Superintendent. *See Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F. 3d 1377, 1380 (7th Cir. 1995); *see also Sokaogon Chippewa Comm'y v. Babbitt*, 214 F. 3d 941, 947 (7th Cir. 2000) (general economic interest is insufficient for intervention). In addition, an effort by the Union now to challenge the district court's 2002 and 2007 Orders clearly would be rejected as untimely. *See* Fed. R. Civ. P. 24(a) & (b) (motions for intervention of right and permissive intervention both must be timely).

This Court has an obligation to decide issues regarding subject matter jurisdiction whether or not they are raised by the parties. As discussed in

Section III, *supra*, the district court continues to have subject matter jurisdiction over this lawsuit and has properly retained the authority to enforce the 2002 Agreement. Because the Union does not have standing to challenge the district court's 2002 and 2007 Orders, issues regarding any other alleged deficiencies in those Orders are not before this Court. *See Solid Waste Agency v. U.S. Army Corp. of Eng'rs*, 101 F. 3d 503, 507 (7th Cir. 1996) ("a case must be dismissed if the only party on one side of the suit is an intervenor who lacks standing").

V. The Transitional Administrator should be entitled to appear in the court of appeals.

Plaintiffs defer to the submission of the Administrator regarding this issue.

VI. Cook County and the Superintendent of the JTDC are the correct defendants in the case.

The Second Amended Complaint named as defendants Cook County and the Superintendent of the JTDC in his or her official capacity. (Doc. 38 ¶¶ 9-10.) They remain the appropriate defendants.

Cook County owns and funds the JTDC. Plaintiffs consistently have alleged, and court-appointed monitors and experts have confirmed, that many of the unconstitutional conditions and services plaintiffs have endured were the result of Cook County's control of the facility's budget, including its equipment, maintenance and personnel. (*See, e.g.*, Doc. 38 ¶ 30; Doc. 559-2 at 5-10, 32.) Throughout this case Cook County has remained responsible, and is responsible today, for the budget, support and maintenance of the JTDC, including all

purchases and repairs at the facility. *See* 55 ILCS 74/1(a), 55 ILCS 75/3(a), (c) & (d). Cook County, through its subdivision Cermak Health Services, also remains responsible for all medical services at the JTDC. (Doc. 136 ¶ 11; Doc. 530 at 13-15.)

The Second Amended Complaint also named as a defendant the Superintendent of the JTDC, the "chief executive officer" of the facility, responsible for administrative control and staff supervision. (Doc. 38, ¶ 9.) The Superintendent's duties have not changed, but the position now is vacant. At the time this case was filed, and for several years thereafter, the President of the Cook County Board selected the Superintendent of the JTDC. On January 1, 2008, several months after the district court signed the Appointment Order, the Chief Judge of the Circuit Court of Cook County assumed responsibility for appointing the Superintendent and other JTDC personnel. 55 ILCS 75/3(b). The Chief Judge has publicly stated that he will not appoint a Superintendent until the TA brings the facility up to constitutional standards. *See* Chief Judge's Press Release (Supplemental App. at 48); Appellate Doc. 68, Ex. A ¶ 7. The Chief Judge has collaborated with the TA and endorsed many of the TA's ongoing remedial efforts at the JTDC. (*See*, *e.g.*, Doc. 458 at 4-6, Doc. 530 at 17 (describing cooperative relationship between the TA and the Office of Chief Judge).)

When the Chief Judge appoints a new Superintendent, that individual automatically will become a defendant pursuant to Fed. R. Civ. P. 25(d)[15] and will have the authority (as does Cook County) to move for modification or termination of the 2002 Agreement and the 2007 Order pursuant to Federal Rule of Civil Procedure 60(b)(5) and the PLRA. *See Rufo*, 502 U.S. at 383-91; *see generally Benjamin v. Fraser*, 264 F.3d 175 (2d Cir. 2001). The current defendants in this case – Cook County and the Superintendent of the JTDC in his or her official capacity – remain the appropriate defendants.

CONCLUSION

Plaintiffs respectfully ask this Court to affirm the district court's June 23, 2010 order. In the alternative, if the Court finds that the 2002 and 2007 orders are properly before the Court and that the district court's findings that its 2002 or 2007 orders complied with the PLRA were materially deficient, plaintiffs request that this case be remanded to the district court for a determination of whether its remedial orders should be modified or terminated pursuant to the PLRA's provision regarding termination of prospective relief. 18 U.S.C. § 3626(b).

[15] Federal Rule of Civil Procedure 25(d) and Federal Rule of Appellate Procedure 43 make clear that this case does not "abate" while the superintendent position is vacant. *See United States v. Raines*, 189 F. Supp. 121, 136 (M.D. Ga. 1960).

Respectfully submitted,

March 10, 2011

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CIRCUIT RULE 31(e) CERTIFICATION

The undersigned certifies that the digital version of the foregoing SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES was generated by printing to PDF format from the original word processing file and not by scanning paper documents, pursuant to Circuit Rule 31(e).

Dated this 10th day of March, 2011.

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CERTIFICATE OF SERVICE

I,Benjamin S. Wolf , hereby certify that on March 10, 2011, I caused two copies of the foregoing PLAINTIFFS-APPELLEES' SUPPLEMENTAL BRIEF to be served via hand delivery upon the following:

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