IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO:
	)	3:12cv59-JAG
v.	)	
	)	
COMMONWEALTH OF VIRGINIA,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
PEGGY WOOD, et al.,	)	
	)	
Intervenor-Defendants.	)	
	)	

UNITED STATES' SUBMISSION PURSUANT TO MARCH 11, 2021 ORDER REGARDING COURT'S AUTHORITY TO ADDRESS THE COMMONWEALTH'S NONCOMPLIANCE WITH CONSENT DECREE

I. INTRODUCTION

The United States submits this response to the Court's March 11, 2021 Order, ECF 390. In that order, the Court noted the parties' agreement that "the Commonwealth would not be able to achieve full compliance by July 1, 2021 – the date the Consent Decree identifies as when '[t]he Parties anticipate that the Commonwealth will have achieved full compliance,'" and directed the United States to "file a brief addressing the following issues:"

> (1) What authority does the Court have to extend the timeline for the Commonwealth to comply with the consent decree and to retain jurisdiction over the action?

(2) What procedural steps must be taken, when, and by whom when the Commonwealth has failed to fulfill its obligation under the consent decree?

(3) What remedies or sanctions may the Court impose when the Commonwealth has failed to fulfill its obligations under the consent decree?

(4) Does the Court have the authority to hold the Commonwealth in contempt for failure to fulfill its obligations under the consent decree and, if so, what individuals or entities may it hold in contempt and what contempt sanctions may it impose?

Id.

In summary, the Court has the authority to extend the timeline for the Commonwealth to comply with the consent decree as a remedy for the Commonwealth's noncompliance, and it retains continuing jurisdiction over the consent decree. The consent decree sets out the procedural steps for the United States to follow when seeking judicial relief to remedy the Commonwealth's noncompliance with the decree. The Court may impose a broad range of equitable remedies for noncompliance, including: ordering specific performance; instituting plans or timelines for compliance; addressing barriers to creating community placements; issuing fines or penalties; and appointing technical experts, monitors, special masters, or a receiver. The Court may also hold the Commonwealth, its agencies, and its officials in contempt and may impose sanctions.

II. DISCUSSION

1. What authority does the Court have to extend the timeline for the Commonwealth to comply with the consent decree and to retain jurisdiction over the action?

a. The Court has the authority to extend the timeline for the Commonwealth to comply with the consent decree as a remedy for the Commonwealth's noncompliance.

The Court has the authority to extend the timeline for the Commonwealth to comply with the consent decree as a remedy for the Commonwealth's noncompliance. Courts have inherent authority to enforce their orders. *See Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, 404 F.3d

821, 833 (4th Cir. 2005) ("Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced.") (quoting *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004)); *see also Williams v. Pro. Transp., Inc.*, 388 F.3d 127, 131 (4th Cir. 2004) ("[C]ourts have inherent authority, derived from their equity power, to enforce settlement agreements."). Moreover, courts are empowered to ensure compliance with an order absent a finding of contempt. *See Alexander v. Hill*, 707 F.2d 780, 783 (4th Cir. 1983) ("[T]he lack of a finding of contempt or of bad faith should not preclude exercise of inherent equitable powers to achieve fair remedial results."); *see also Smith v. Bounds*, 813 F.2d 1299, 1302-03 (4th Cir. 1987) (upholding the district court's order of "relief in the form of legal assistance when it could have sought contempt orders against the defendants" because "[t]he contempt power of a court does not limit its discretion to fashion equitable remedies."), *aff'd on reh'g*, 841 F.2d 77 (4th Cir. 1988); *but see Wyatt v. Rogers*, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996) (discussing Eleventh Circuit precedent requiring a party seeking compliance with an injunctive order to move for contempt). Courts also have a broad range of equitable remedies for noncompliance, including imposing timelines for specific performance. *See infra* § II.3.

Here, the Commonwealth has admitted it will not fulfill its obligations under the consent decree by the required date. ECF 390 at 1 (noting that the Commonwealth agreed at the March 10, 2021 status conference that it "would not be able to achieve full compliance" by the anticipated due date); Commonwealth's Resp. to Extension of Settlement Agreement to July 1, 2022, ECF 392 at 10-11 (projecting full compliance with the decree will not occur until December 31, 2023). In order to remedy the Commonwealth's admitted noncompliance, the

Court has the authority to impose a new timeline for compliance, and the Court appropriately exercised that authority in its order, ECF 390.

b. The Court retains jurisdiction over the consent decree until full compliance is reached.

As stated in the United States' Notice Objecting to March 11, 2021 Court Order, ECF 391, the Court retains jurisdiction over the consent decree until full compliance is reached, and that jurisdiction does not depend upon a particular date. The consent decree specifically provides for the possibility that the Commonwealth would not achieve compliance by June 30, 2021, and that the Court's jurisdiction would extend: "The Court shall retain jurisdiction of this action for all purposes until the end of State Fiscal Year 2021 unless: . . . (2) The United States disputes that the Commonwealth is in compliance with the Agreement at the end of State Fiscal Year 2021." § VII.B.2. The United States timely disputed compliance pursuant to § VII.B.2, ECF 385, and the Commonwealth has not challenged this noncompliance determination. In fact, at the March 10, 2021 status conference, the Commonwealth agreed that it "would not be able to achieve full compliance by July 1, 2021." ECF 390 at 1; *see also* Commonwealth's Resp. to Extension of Settlement Agreement to July 1, 2022, ECF 392 at 10-11 (projecting full compliance with the decree would not occur until December 31, 2023). Under the terms of the consent decree, the Court retains jurisdiction until compliance is reached.

Further, even if the consent decree had not preserved the Court's continued jurisdiction, the Court retains inherent jurisdiction until compliance is reached. *See Thompson*, 404 F.3d at 833 (noting that "even if the district court had declined to modify the retention-of-jurisdiction clause, the court's inherent authority over its own judgment would have provided it with the continuing authority to enforce the Consent Decree against HUD"); *see also Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 280 (4th Cir. 2002) ("The parties to a consent decree expect and achieve

a continuing basis of jurisdiction to enforce the terms of the resolution of their case in the court entering the order.").

2. What procedural steps must be taken, when, and by whom when the Commonwealth has failed to fulfill its obligation under the consent decree?

The consent decree sets out the procedural steps for the United States to follow before seeking judicial remedies for the Commonwealth's noncompliance with the consent decree.[1] Before initiating any court proceeding to remedy such noncompliance, the United States must "give written notice to the Commonwealth which, with specificity, sets forth the details of the alleged noncompliance."[2] § VII.D. The Commonwealth then has "forty-five (45) days from the date of such written notice to respond to the United States in writing by denying that noncompliance has occurred, or by accepting (without necessarily admitting) the allegation of noncompliance." § VII.D.1.

If the Commonwealth accepts the allegation of noncompliance, it must then propose "steps that the Commonwealth will take, and by when, to cure the alleged noncompliance." *Id*. If the Commonwealth "fails to respond within 45 days or denies that noncompliance has occurred, the United States may seek an appropriate judicial remedy." § VII.D.2. However, if the Commonwealth "timely responds [within 45 days] by proposing curative action by a specified deadline, the United States may accept the Commonwealth's proposal or offer a counterproposal for a different curative action or deadline." § VII.D.3. After this meet and

[1] These steps do not limit the Court's inherent power to act on its own initiative to remedy the Commonwealth's noncompliance. *See supra* § II.1.a.

[2] However, the United States may initiate a court proceeding without notice to the Commonwealth to remedy "conditions or practices within the control of the Commonwealth [that] pose an immediate and serious threat to the life, health, or safety of individuals in the Training Centers or individuals receiving services pursuant to [the consent decree]." § VII.E.

confer, "[i]f the Parties fail to reach agreement on a plan for curative action, the United States may seek an appropriate judicial remedy." *Id*.

While the United States has not yet provided the Commonwealth with written notice per § VII.D, it has begun discussions with the Commonwealth to address its noncompliance.

3. What remedies or sanctions may the Court impose when the Commonwealth has failed to fulfill its obligations under the consent decree?

Courts may impose a broad range of equitable remedies for noncompliance without holding the noncompliant party in contempt. As the Supreme Court has stated: "A court that maintains continuing jurisdiction over a consent decree will have a more flexible repertoire of enforcement measures." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 523 n.13 (1986). Courts have significant discretion to impose remedies in order to induce compliance. *See South Carolina v. United States*, 907 F.3d 742, 765 (4th Cir. 2018) ("[A] district court retains discretion to order agency compliance, including by fixing firm deadlines if appropriate, and even when full compliance may be unlikely. Such an injunction will serve, in part, to ensure that the delinquent agency makes serious, vigorous attempts to fulfill its statutory responsibilities.") (internal quotation marks omitted) (affirming an injunction absent contempt proceedings).

For example, a court may order specific performance of provisions in a consent decree without finding contempt. *See Scott v. Clarke*, 3:12-CV-00036, 2020 WL 2263535, at *1, *4 (W.D. Va. May 7, 2020) (ordering specific performance of settlement provision in a large-scale prison reform case where court retained jurisdiction over the settlement agreement); *Ohio Valley Env't Coal., Inc. v. ERP Env't Fund, Inc.*, No. 3:11-CV-0115, 2019 WL 2607000, at *1 (S.D. W.Va. June 24, 2019) (granting motion to enforce a consent decree in a large-scale environmental clean-up case); *see also LaShawn A. v. Kelly*, 887 F. Supp. 297, 300 (D.D.C.

1995) (discussing "a series of piecemeal orders directing compliance with extant orders" including "requiring defendants to formally adopt policies and procedures" and issuing a deadline for defendants to issue a request for proposals), *aff'd sub nom. LaShawn A. v. Barry*, 107 F.3d 923 (D.C. Cir. 1996).

A court may also impose plans and timelines by which jurisdictions must meet compliance without finding contempt. *See South Carolina*, 907 F.3d at 765-66 (affirming imposition of injunction with two-year timeframe to meet compliance); *see also David C. v. Leavitt*, 242 F.3d 1206, 1208 (10th Cir. 2001) (noting prior order mandating that a monitoring team prepare a "new plan for correcting any non-compliance" that the State would be required to implement); *Gary W. v. Louisiana*, No. 74-cv-02412, 1990 WL 17537, at *7 (E.D. La. Feb. 26, 1990) (discussing prior order imposing compliance timeline).

Additionally, courts have approved *sui generis* remedies that extend beyond orders for specific performance in order to achieve the decree's objectives, without making contempt findings. *See Smith*, 813 F.2d at 1301 (4th Cir. 1987) (affirming order requiring the provision of attorney assistance as a remedy for noncompliance with a court order regarding state prison's failure to meet prisoners' constitutional right to meaningful access to the courts through its law library program); *Vaughn G. v. Mayor of Baltimore*, No. MJG-84-1911, 2005 WL 1949688, at *1, *7 (D. Md. Aug. 12, 2005) (in case with longstanding consent decree about the provision of special education services, requiring briefing and proposals from all parties about how to address lack of compliance, and ordering implementation of proposal submitted by one of the parties); *LaShawn A.*, 887 F. Supp. at 316 (discussing order that required the District of Columbia to maintain funding levels in order to prevent pay cuts and furloughs); *Gary W.*, 1990 WL 17537, at

*9 (discussing order requiring the State to address barriers to placement and to ensure adequacy of services and specialized training).

Courts may also impose remedial fines as a sanction for noncompliance without finding contempt. *See Alexander*, 707 F.2d at 782-83 (affirming imposition of "remedial fines and penalties" even though the district court had not made a finding of contempt, in class action involving widespread noncompliance with court's prior orders, and noting that "the lack of a finding of contempt or of bad faith should not preclude exercise of inherent equitable powers to achieve fair remedial results").

Courts may also order the appointment of an expert, monitor, or special master without a contempt finding. *See Plata v. Schwarzenegger*, No. 3:01-cv-01351-TEH, 2005 WL 2932253, at *35 (N.D. Cal. Oct. 3, 2005) (appointing a subject-matter expert to recommend remedial orders to the court); *Gary W.*, 1990 WL 17537, at *3, *14, *29 (noting prior orders issued without contempt finding, including appointing a special master and requiring the creation of an independent monitor unit); *Dixon v. Barry*, 967 F. Supp. 535, 539, 540, 554 (D.D.C. 1997) (discussing earlier appointments of a "technical expert" to oversee the implementation of a compliance plan and then a special master to oversee the consent decree, compliance plan, and prior court orders); *Shaw v. Allen*, 771 F. Supp 760, 761 (S.D. W. Va. 1990) (discussing orders requiring expert inspections of the facility without finding contempt); *see also* Fed. R. Civ. P. 53 (rule governing special masters).

In addition, courts have imposed receivership without finding contempt in institutional reform cases. *See e.g.*, *Morgan v. McDonough*, 540 F.2d 527, 533 (1st Cir. 1976) (school desegregation); *Plata*, 2005 WL 2932253 *33 (prison) ("A contempt finding is not a prerequisite to the appointment of a receiver."); *LaShawn A.*, 887 F. Supp. at 300 (imposing limited

receivership in child welfare litigation); *Gary W.*, 1990 WL 17537, at *29-30, *32-33 (institutionalized children with disabilities); *Newman v. Alabama*, 466 F. Supp. 628, 635 (M.D. Ala. 1979) (prison).

4. Does the Court have the authority to hold the Commonwealth in contempt for failure to fulfill its obligations under the consent decree and, if so, what individuals or entities may it hold in contempt and what contempt sanctions may it impose?

a. The Court has the authority to hold the Commonwealth in contempt for failure to fulfill its obligations under the consent decree.

There is "no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). "[T]he essence of civil contempt is to coerce future behavior." *Rainbow Sch., Inc. v. Rainbow Early Educ. Holding LLC*, 887 F.3d 610, 617 (4th Cir. 2018) (quoting *Consolidation Coal Co. v. Local 1702, United Mineworkers of Am.*, 683 F.2d 827, 830 (4th Cir. 1982)). Civil contempt is "wholly remedial . . . and is intended to coerce compliance with an order of the court or to compensate for losses or damages caused by noncompliance." *Carbon Fuel Co. v. United Mine Workers of Am.*, 517 F.2d 1348, 1349 (4th Cir. 1975) (quoting *S. Ry. v. Lanham,* 403 F.2d 119, 124 (5th Cir. 1969)) (internal quotation marks omitted). "Civil contempt is conditional or contingent in nature, terminable if the contemnor purges himself of the contempt." *Id.*[3]

[3] Criminal contempt is also available as a sanction for noncompliance. Unlike civil contempt, which is "intended to coerce the contemnor into compliance with court orders or to compensate the complainant for losses sustained, [] criminal contempt sanctions are intended to vindicate the authority of the court by punishing the contemnor and deterring future litigants' misconduct." *Bradley v. Am. Household Inc.*, 378 F.3d 373, 378 (4th Cir. 2004) (internal quotation marks omitted) (citing *Buffington v. Baltimore Cnty*, 913 F.2d 113, 133 (4th Cir. 1990)). Criminal contempt defendants must be afforded procedural safeguards, including notice of the charges, and prosecution by an independent prosecutor. *Id.* at 379. They also must have their guilt determined "beyond a reasonable doubt." *Id.* (citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444 (1911)). *See also United States v. Neal*, 101 F.3d 993, 997 (4th Cir. 1996) (discussing indirect criminal contempt).

In the Fourth Circuit, to establish civil contempt, the moving party must show "by clear and convincing evidence: (1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) that the decree was in the movant's favor; (3) that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and (4) that the movant suffered harm as a result." *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000) (internal quotation marks omitted).

After the movant establishes a *prima facie* showing of contempt, the alleged contemnor can attempt to establish a defense. In the Fourth Circuit, one consideration is whether the alleged contemnor has a "good faith" defense in failing to comply with the decree. *See Consumer Fin. Prot. Bureau v. Klopp*, 957 F.3d 454, 461–62 (4th Cir. 2020) ("Once the movant establishes these elements, the burden shifts to the defendant to show 'good faith [in making] all reasonable efforts to comply with the enforcement order.'") (quoting *United v. Ali*, 874 F.3d 825, 831 (4th Cir. 2017)). Substantial compliance and inability to comply also can be defenses to civil contempt. *Consolidation Coal*, 683 F.2d at 832 (stating that a good faith attempt to comply, substantial compliance, or the inability to comply can be defenses to civil contempt); *Lambert v. Gift Dev. Grp., LLC*, No. 1:18-CV-00215, 2019 WL 177078, at *2 (M.D.N.C. Jan. 11, 2019) (same). However, because the purpose of civil contempt is remedial, the United States is not required to prove that the Commonwealth intended to violate the order. Even the Commonwealth's unintentional failure to comply could constitute civil contempt. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) ("The absence of willfulness does not relieve from civil contempt. . . . Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act.").

b. The Court may hold the Commonwealth's agencies, its officials, and the Commonwealth itself in contempt.

The Court may hold the state agencies responsible for implementing the decree in contempt, including the Department of Behavioral Health and Developmental Services and the Department of Medical Assistance Services. *See Hutto v. Finney*, 437 U.S. 678, 691 (1978) (affirming that a state agency could be held in contempt for refusing to adhere to a district court's order); *cf. South Carolina*, 907 F.3d at 765 (finding that contempt was not ripe, but noting the availability of holding the defendants – the United States, the Department of Energy, the National Nuclear Security Administration, and two federal officials – in contempt). The Court may also find the Commonwealth itself in contempt. *See also United States. v. Tennessee*, 925 F. Supp. 1292, 1300 (W.D. Tenn. 1995) (discussing the court's determination that the State of Tennessee was in contempt of court for failing to comply with a consent decree); *Spallone v. United States*, 493 U.S. 265, 276 (1990) (upholding imposition of contempt sanctions against the City of Yonkers for failing to comply with a consent decree).

The Court may also hold state officials in contempt. *See Robertson v. Jackson*, 972 F.2d 529, 533, 535 (4th Cir. 1992) (affirming district court's finding that Commissioner of the Virginia Department of Social Services was "fully responsible for ensuring compliance with federal laws and regulations" and discussing possibility of holding Commissioner in contempt in the future); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 6365522, at *1 (W.D. Va. Oct. 9, 2020) (analyzing whether the Virginia State Board of Elections and its Commissioner were in contempt); *Shaw*, 771 F. Supp at 760-61 (discussing prior finding of contempt against the defendants: the sheriff, jail administration, and county commissioners, among others); *see also Cobell v. Norton,* 226 F. Supp. 2d 1, 132 (D.D.C. 2002) ("As an initial matter, the Court finds that federal courts have the power to hold executive branch

officials, even Cabinet officers, in civil contempt of court."), *vacated on other grounds*, 334 F.3d 1128 (D.C. Cir. 2003); *Palmigiano v. Garrahy,* 448 F. Supp. 659, 673 (D.R.I. 1978) ("This is hardly the first time that state officials have been found in contempt of a federal court.") (listing cases).

c. The Court may impose a variety of contempt sanctions.

Courts have the authority to impose sanctions for contempt in order to compel compliance with an existing court order. *See Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632 (1988); *Shillitani* 384 U.S. at 370 (1966); *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 442 (1911). Courts are guided by two requirements for civil contempt: (1) the sanction must be coercive or remedial rather than punitive, *Carbon Fuel*, 517 F.2d at 1349, and (2) when "selecting contempt sanctions, a court is obliged to use the least possible power adequate to the end proposed," *Spallone* 493 U.S. at 276 (quoting *United States v. City of Yonkers,* 856 F.2d 444, 454 (2nd Cir. 1988)).

First, "civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience." *Intl. Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994). "Civil contempt sanctions are designed to force compliance with court orders or to remedy past noncompliance, rather than to punish noncompliance. When it becomes obvious that sanctions are not going to compel compliance, they lose their remedial characteristics and take on more of the nature of punishment." *Sivley v. A.H. Robins Co.*, 887 F.2d 1081, at *1 (4th Cir. 1989) (unpublished table decision) (internal citation omitted). Thus, whatever sanction the Court decides, in the context of civil contempt, it must have the aim of compelling compliance.

Further, as noted, the Court must select contempt remedies with "the least possible power adequate to the end proposed." *Spallone*, 493 U.S. at 276. As the court in *United States v.*

Tennessee explained, "there may be many sanctions that will coerce compliance and further the remedial purpose of the order, but a court does not automatically impose the most severe and intrusive." 925 F. Supp. at 1303. Rather, the court must balance intrusiveness and effectiveness. "Determining the relative intrusiveness of different possible sanctions . . . is a common sense inquiry. . . . Determining what sanctions will be effective to coerce compliance involves a court's discretion and judgment based on an understanding of the case and the contemnor, particularly with respect to the nature of prior noncompliance." *Id.*

"[A] court has broad discretion to fashion a remedy [to contempt] based on the nature of the harm and the probable effect of alternative sanctions." *Colonial Williamsburg Found. v. Kittinger Co.*, 792 F. Supp. 1397, 1407 (E.D. Va. 1992) (internal quotation and quotation marks omitted), *aff'd*, 38 F.3d 133 (4th Cir. 1994). *See also Redner's Markets, Inc. v. Joppatowne G.P. Ltd. P'ship*, 608 F. App'x 130, 131 (4th Cir. 2015) ("The appropriate remedy for civil contempt is within the court's broad discretion."); *Ohio Valley Env't Coal., Inc. v. Apogee Coal Co., LLC*, 744 F. Supp. 2d 561, 568 (S.D. W.Va. 2010) ("Moreover, the remedy for civil contempt is within a court's broad discretion."); *Wright & Miller,* Enforcement of and Collateral Attack on Injunctions, 11A Fed. Prac. & Proc. Civ. § 2960 (3d ed.) ("A federal court's discretion includes the power to frame a sanction to fit the violation.").

Fines are a traditional sanction for civil contempt and may be imposed – so long as they are coercive or conditional on the contemnor's continuing noncompliance. *See, e.g., Hicks*, 485 U.S. at 632; *Gompers*, 221 U.S. at 441-42; *United States v. Darwin Const. Co., Inc.*, 873 F.2d 750, 754 (4th Cir. 1989) (noting that a fine is an appropriate sanction for civil, rather than criminal, contempt when the defendant "can avoid paying the fine simply by performing the affirmative act required by the court's order" (quoting *Hicks*, 485 U.S. at 625)). *See also United*

States v. Tennessee, No. 92-2062-D/A, 2006 WL 8437339, at *1–2 (W.D. Tenn. Mar. 27, 2006). In *United States v. Tennessee*, the court fined the State $1,000 per day to coerce compliance with a consent decree that required the State to serve individuals with developmental disabilities in the community instead of institutional settings. *Id.* at *1; *see also Tennessee*, 925 F. Supp. at 1296 (noting that the individuals in the institution were "developmentally disabled persons"). The Court noted: "the $1000.00 per-day provision is a civil remedy designed to compel the State's compliance with the Court's longstanding orders forbidding placement of class members in nursing homes." *Tennessee*, 2006 WL 8437339, at *1–2.

In addition to fines, courts have a broad range of sanctions available to remedy contempt, including, *inter alia*, developing *sui generis* sanctions particular to the facts of the case, appointing monitors or judicial administrators, and even, in certain cases, receivership. As an example of *sui generis* sanctions, in *United States v. Tennessee*, the court required Tennessee's Commissioner of Mental Health and Mental Retardation "to spend every fourth weekend at [a specific institutional setting] until the State was in full compliance" with an order's emergency remedial provisions, and found that "initially [it] was a very effective remedial sanction." 925 F. Supp. at 1300, 1315. Later, the court replaced that sanction with another: requiring four key administrators to be available one day a month at that same institution "for transcribed group and/or individual question and answer sessions." *Id.* at 1315.

Courts also have the discretion to impose more severe sanctions in response to a contempt finding. In *Shaw*, where the defendants failed to comply with an order to remedy unconstitutional conditions at the McDowell County Jail, the court ordered that the jail population be reduced as a sanction for contempt. 771 F. Supp at 761 (discussing order reducing

jail population to achieve full compliance and maintaining compliance after the population cap was lifted, in response to contempt finding).

Further, courts may appoint monitors or administrators as a sanction for contempt. *See e.g.*, *Glover v. Johnson,* 934 F.2d 703, 715 (6th Cir. 1991) (affirming the appointment of a "special administrator" to develop a remedial plan); *Reed v. Rhodes*, 642 F.2d 186, 187 (6th Cir. 1981) (affirming appointment of judicial "Administrator of Desegregation" with authority to implement specified remedial orders in coordination with the Cleveland Board of Education; *Shaw*, 771 F. Supp at 763-64 (discussing a prior order appointing a monitor in response to contempt finding).

In addition, courts may appoint a receiver after a finding of contempt. *See e.g.*, *Dixon*, 967 F. Supp. at 555 (D.D.C. 1997) (mental health); *LaShawn A.*, 887 F. Supp. at 316 (D.D.C. 1995) (child welfare); *Shaw*, 771 F. Supp. at 764 (jail).

III. CONCLUSION

For the foregoing reasons, the United States submits that the Court has the authority to extend the timeline for the Commonwealth to comply with the consent decree as a remedy for the Commonwealth's noncompliance and that the Court maintains continuing jurisdiction over this matter until the Commonwealth is in sustained compliance. In addition, the United States submits that the Court has broad discretion to remedy the Commonwealth's failure to fulfill its obligations. Finally, the United States notes that it has begun discussions with the Commonwealth to address the Commonwealth's noncompliance.

Respectfully submitted,

Dated: May 10, 2021

FOR THE UNITED STATES:

RAJ PAREKH
Acting United States Attorney
Eastern District of Virginia

By: /s/
ROBERT McINTOSH
Virginia Bar Number 66113
Attorney for the United States of America
United States Attorney's Office
919 East Main Street, Suite 1900
Richmond, Virginia 23219
Telephone: (804) 819-7404
Facsimile: (804) 819-7417
Robert.McIntosh@usdoj.gov

PAMELA S. KARLAN
Principal Deputy Assistant Attorney General
Civil Rights Division

STEVEN H. ROSENBAUM
Chief
Special Litigation Section

BENJAMIN O. TAYLOE, JR.
Deputy Chief
Special Litigation Section

By: /s/
KYLE SMIDDIE
JESSICA POLANSKY
Trial Attorneys
U.S. Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Ave, NW
Washington, D.C. 20530
Phone: (202) 532-3249
Fax: (202) 514-4883
kyle.smiddie@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2021, I will electronically file the foregoing UNITED STATES' SUBMISSION PURSUANT TO MARCH 11, 2021 ORDER REGARDING COURT'S AUTHORITY TO ADDRESS THE COMMONWEALTH'S NONCOMPLIANCE WITH CONSENT DECREE with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Allyson Kurzmann Tysinger
Office of the Attorney General
202 North 9th Street
Richmond, VA 23219
(804) 786-2071
ATysinger@oag.state.va.us

Gerard Thomas Schafer
Schafer Law Group
5265 Providence Rd
Suite 303
Virginia Beach, VA 23464
rschafer@schaferlawgroup.com

Thomas York
The York Legal Group LLC
3511 North Front Street
Harrisburg, PA 17110
tyork@yorklegalgroup.com

/s/
Robert P. McIntosh
Virginia Bar Number 66113
Attorney for the United States of America
United States Attorney's Office
919 East Main Street, Suite 1900
Richmond, Virginia 23219
Telephone: (804) 819-5400
Facsimile: (804) 819-7417
Email: Robert.McIntosh@usdoj.gov