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10 **UNITED STATES DISTRICT COURT**
 11 **NORTHERN DISTRICT OF CALIFORNIA**
 12 **OAKLAND DIVISION**

14 MARCIANO PLATA, et al.,
 15 Plaintiffs,
 16 v.
 17 GAVIN NEWSOM, et al.,
 18 Defendants.

CASE NO. 01-1351 JST

**DEFENDANTS’ RESPONSE TO
 RECEIVER’S REPORT OF MEET AND
 CONFER ON IMPLEMENTATION PLAN**

20 On October 15, 2021, this Court ordered Defendants and the Receiver to meet and confer
 21 over the timeframe for implementing the Court’s September 27, 2021 order, and gave them 13
 22 days to do so. The Court requested an update on those efforts at the next case management
 23 conference on October 28, 2021.

24 But after just two business days of meeting and conferring (consisting of only two
 25 videoconference meetings on October 18 and 19), the Receiver’s counsel unilaterally terminated
 26 those efforts when Defendants raised the issue of their collective bargaining obligations under
 27 state law. (Declaration of Samantha Wolff In Support Of Defendants’ Response to Receiver’s
 28 Report of Meet and Confer on Implementation Plan (“Decl. Wolff”), ¶¶ 3, 7, 9.) Disregarding the

1 Court’s request to provide an update at the next case management conference, the Receiver’s
2 counsel presented a one-sided and incomplete filing and proposed order that fails to take into
3 account Defendants’ concerns. Counsel did this without sharing their implementation proposal to
4 defense counsel and without suggesting that they believed the parties were at impasse or that they
5 would be reporting to the Court and seeking court intervention – though counsel had spoken less
6 than 24 hours prior to the Receiver’s filing. (*Id.* at ¶ 9.) In fact, Defendants first learned that the
7 Receiver was ending the meet and confer process when they received notice of the Receiver’s
8 electronic filing with this Court. (*Id.*)

9 As a threshold matter, the Receiver’s unilateral “lodging” of its own proposed order is not
10 required under any court order and fails to comply with this Court’s rules for requesting relief via
11 a properly noticed motion. On the basis of these procedural defects alone, the Court should reject
12 the proposed order.¹

13 Additionally, the Receiver’s unilateral termination of the meet-and-confer process has
14 unnecessarily put implementation efforts at a standstill. (Declaration of Diana Toche Supp. Defs.’
15 Response to Receiver’s Report of Meet and Confer on Implementation Plan (“Decl. Toche”), ¶ 2.)
16 Defendants are prepared to proceed with implementation while complying with their bargaining
17 obligations under state law prior to implementation. (*Id.* at ¶ 3.) Indeed, although Defendants will
18 be imminently asking this Court to stay implementation of its September 27 order pending appeal,
19 Defendants are prepared to issue the required notice with implementation details and commence
20 bargaining, consistent with the September 27 order and their bargaining obligations, pending

21
22 _____
23 ¹ It is also unclear whether this Court has jurisdiction to adopt the Receiver’s proposed order in
24 light of Defendants’ pending appeal of the Court’s September 27 order, which removes the court’s
25 jurisdiction to modify that order. The September 27 order expressly left all details related to
26 implementing the Court’s September 27 order to Defendants and the Receiver, including a
27 compliance deadline. (*See* ECF 3684 at 20 (“[T]he manner in which a vaccine mandate might be
28 implemented has not yet been determined – and is something that the Court leaves to the
discretion of the Receiver and Defendants in the first instance”); *id.* at 21 (“Again, the Court
leaves the details of implementation to the Receiver and Defendants in the first instance.”).)

1 resolution of their forthcoming stay motion.² (*Id.*)

2 Accordingly, Defendants request that the Court reject the Receiver's procedurally
3 defective motion. To the extent that disputes regarding bargaining or other issues are not resolved
4 through renewed meet and confer efforts, the parties can raise the issues directly with the Court at
5 the status conference scheduled for October 28. As noted, Defendants are prepared to commence
6 with implementation now, consistent with the September 27 order and their bargaining
7 obligations, and pending resolution of their forthcoming stay motion.

8 Separate from the proposed order, the Receiver's October 20, 2021 Report of Meet and
9 Confer on Implementation Plan ("Receiver's Report") also contains several inaccuracies and
10 omissions that warrant correction:

11 First, the Receiver's Report states, "Defendants also asserted, for the first time, that they
12 were unwilling to implement this Court's order prior to meeting and conferring with bargaining
13 units under the Dills Act." (Receiver's Request, ECF No. 3707, at 2:27-3:2.) When counsel
14 spoke on October 18, 2021, Defense counsel explained that it was their understanding that CDCR
15 would be required to meet and confer with the affected bargaining units in light of the Court's
16 October 15, 2021 order, which seemed to indicate that no further order would issue requiring the
17 State to implement the October 12, 2021 vaccination plan. (*See* ECF No. 37 at 1:25-27; Decl.
18 Wolff, ¶ 3.) As defense counsel explained to counsel for the Receiver on October 18, 2021, a
19 court order requiring the State to take action by a date certain would normally exempt the State
20 from their contractual bargaining requirements. (*Id.*) Given that no such order was forthcoming,
21 and thus no bargaining exception would apply, defense counsel explained that CDCR would be
22 required to meet and confer with the unions per the terms of their contracts. (*Id.*) At no point did
23 Defendants indicate that they were unwilling to comply with the Court's order, as the Receiver's
24 counsel suggests. (*Id.* at ¶ 4.)

25

26

27 ² Compliance with any aspect of the Court's orders is not in any way intended to act as or to
28 indicate voluntary relinquishment by Defendants of any and all issues cognizable in Defendants'
appeal of the September 27, 2021 Order. Defendants do not waive any issues on appeal by taking
steps to implement a COVID-19 vaccination policy pursuant to the order.

1 Second, and related, the Receiver’s Report states that Defendants indicated they “would
2 proceed with the implementation plan of the Court’s September 27, 2021 order immediately if this
3 Court ordered implementation on a particular timeline, but that they will not cooperate on
4 implementation prior to bargaining absent this Court ordering a specific timeline.” (Receiver’s
5 Request, ECF No. 3707 at 4:5-7.) This omits defense counsel’s full position on this subject.
6 Defense counsel stated that the State *could* proceed with implementation without having to
7 bargain *only if* the Court ordered implementation by a date certain, which the Court has not.
8 (Decl. Wolff, ¶¶ 3, 7.) Defense counsel also stated that they could not implement the mandate
9 prior to bargaining absent a court order because doing so could violate the terms of the State’s
10 contracts with a number of unions. (*Id.*) And indeed, as defense counsel advised the Receiver’s
11 counsel, as of October 18th, the State had received at least one cease-and-desist letter, an unfair
12 practice complaint, and a lawsuit seeking to permanently restrain CDCR’s implementation of a
13 vaccine mandate for failure to properly notice and bargain. (*Id.* at ¶ 4.)

14 Third, the Receiver’s Report states that “Defendants suggested that COVID-19 may not
15 currently constitute an emergency permitting implementation prior to bargaining.” (Receiver’s
16 Request, ECF No. 3707 at 3:9-10.) This misstates Defendants’ position for the same reasons the
17 other characterizations of Defendants’ position is inaccurate. The issue isn’t that COVID-19
18 doesn’t constitute an emergency; it’s that foregoing the normal notice period and meet and confer
19 to immediately implement the specific vaccine mandate here is not justified by an emergency.

20 Additionally, and by way of update to this Court, the Kern County Superior Court in the
21 matter of *Davis v. California Department of Public Health*, Case No. BCV-21-102318, issued an
22 order on October 22, 2021 denying CCPOA’s request for a preliminary injunction that would have
23 prevented CDCR from implementing the California Department of Public Health’s August 19,
24 2021 order requiring vaccination of certain Bargaining Unit 6 staff by October 14, 2021. (Decl.
25 Wolff, ¶ 10.)

26 For these reasons, the Court should reject the Receiver’s proposed order (ECF No. 3708)
27 and instruct the Receiver to continue to meet and confer in good faith to work out an
28 implementation timeline, consistent with the Court’s September 27 and October 15 orders, and

1 that takes into account the reality of Defendants' obligations to its employees.

2 DATED: October 25, 2021

HANSON BRIDGETT LLP

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4

By: /s/ Samantha Wolff

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PAUL B. MELLO

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SAMANTHA D. WOLFF

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Attorneys for Defendants

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Dated: October 25, 2021

ROB BONTA

Attorney General of California

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By: /s/ Damon McClain

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DAMON MCCLAIN

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Supervising Deputy Attorney General

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CASE NO. 01-1351 JST

**DECLARATION OF DIANA TOCHE,
 DDS, IN SUPPORT OF DEFENDANTS'
 RESPONSE TO RECEIVER'S REPORT
 OF MEET AND CONFER ON
 IMPLEMENTATION PLAN**

20 I, Diana Toche, DDS, declare as follows:

21 1. I am the Undersecretary of Health Care Services for the California Department of
 22 Corrections and Rehabilitation (CDCR). I have served in this role since 2014. I advise the
 23 Secretary of CDCR on major policy, program, and organizational issues related to the
 24 administration and delivery of health care to CDCR's incarcerated population. I determine and
 25 execute health care priorities, plans, policies, and programs consistent with the direction of CDCR,
 26 and develop and direct the implementation of initiatives that will be sustainable and improve the
 27 efficacy of CDCR's health care system. I formulate and oversee the implementation of priority
 28 initiatives that cut across division and program areas including health care, rehabilitative

1 programs, and re-entry. In my current role, I work closely with the court-appointed Receiver who
2 oversees the delivery of medical care to CDCR's incarcerated population. By way of distinction,
3 my role includes oversight of other forms of health care, including mental and dental health care.
4 I have been employed by CDCR since 2009, and previously served as Acting Undersecretary of
5 Administration and Offender Services, Acting Director of the Division of Health Care Services,
6 and Statewide Dental Director. I worked in private practice from 1989 to 2008 before joining
7 CDCR. I have personal knowledge regarding the matters stated in this declaration, except for
8 those statements made on information and belief. I am competent to testify to the matters set forth
9 in this declaration and would do so if called upon to testify.

10 2. In my role as the Undersecretary of Health Care Services, I have been working
11 closely with CDCR's partners at the California Correctional Health Care Services (CCHCS) since
12 the beginning of the pandemic to implement mitigation measures, including the vaccine program
13 for staff and incarcerated persons, among many other measures. Following the Court's September
14 27, 2021 order mandating vaccines for CDCR and CCHCS staff, I have been working with
15 CCHCS to create an implementation plan, though those efforts are currently at a standstill
16 following the Receiver's submission of a proposed order last week establishing unilateral
17 deadlines that do not take into account CDCR's obligations to its employees' labor unions.

18 3. CDCR is prepared to proceed with implementation of the court-ordered vaccine
19 mandate while complying with its bargaining obligations under state law prior to implementation.
20 Although CDCR will be imminently asking the Court to stay implementation of the September 27,
21 2021 order pending appeal, CDCR is nonetheless prepared to issue the required notice with
22 implementation details and commence bargaining, consistent with the September 27 order and
23 CDCR's bargaining obligations, pending resolution of CDCR's forthcoming stay motion.

24
25 I declare under penalty of perjury that I have read this document, and its contents are true
26 and correct to the best of my knowledge. Executed on October 25, 2021, in Sacramento,
27 California.

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CASE NO. 01-1351 JST

**DECLARATION OF SAMANTHA
 WOLFF IN SUPPORT OF DEFENDANTS'
 RESPONSE TO RECEIVER'S REPORT
 OF MEET AND CONFER ON
 IMPLEMENTATION PLAN**

20 I, Samantha Wolff, declare as follows:

21 1. I am a partner with the law firm Hanson Bridgett LLP, counsel of record in this
 22 matter for Defendants Governor Newsom, et al. (Defendants). I have personal knowledge of the
 23 matters set forth in this declaration and could and would competently testify to them. All of the
 24 matters stated here are known to me personally, unless stated on information and belief; and with
 25 regard to those statements, I am informed and reasonably believe them to be true.

26 2. On Monday, October 18 at 8:45am, counsel for the Receiver, Katherine Forster,
 27 emailed defense counsel and requested a call "as soon as possible" to discuss the implementation
 28 plan and associated deadline. Damon McClain, counsel for Defendants, responded less than three-

1 and-one-half hours later, at 12:13pm, stating that Defendants would be available at 3:00pm.

2 3. Counsel for the Receiver and defendants spoke at 3pm on October 18 via
3 videoconference. I was a participant in this discussion. During that call, Mr. McClain explained
4 to Ms. Forster that, typically when the State receives a court order with specified deadlines, it is
5 able to implement first and satisfy their notice and bargaining requirements later. Mr. McClain
6 further stated that because that has not happened, and instead the Receiver and Defendants have
7 discretion to work out a timeline, the State is concerned that CDCR would be required to meet and
8 confer with the affected bargaining units. I also explained that the current status of COVID-19
9 within the institutions likely does not constitute an emergency. Mr. McClain proposed that the
10 next step should be that CDCR's labor team consult with CCHCS and figure out what is the most
11 feasible way forward for implementation and the timing.

12 4. During the October 18 videoconference, Mr. McClain also advised Ms. Forster that
13 CDCR had received a cease and desist letter from one affected union, an unfair labor practice
14 charge from SEIU, and CCPOA's lawsuit seeking to restrain and enjoin the State from
15 implementing the August 19, 2021 California Department of Public Health order that is applicable
16 to Bargaining Unit 6. Ms. Forster agreed that we needed the labor people to be part of this
17 process. But at no point during this discussion, or any subsequent discussion, did any defense
18 counsel suggest that CDCR was unwilling to comply with the Court's September 27, 2021 order.

19 5. Immediately following that videoconference, counsel for Defendants reached out to
20 their clients and requested a call with Robert Ramirez, Chief of CDCR's Labor Relations Office in
21 advance of a call with Counsel for the Receiver and, presumably, persons from CCHCS's Labor
22 Relations Office.

23 6. Ms. Forster emailed defense counsel at 5:22pm on October 18 and asked when
24 CDCR's labor relations personnel could be available for further discussion. Mr. McClain
25 responded less than an hour later that CDCR's labor relations personnel could be available at 3pm
26 on October 19.

27 7. Counsel for the Receiver and Defendants, as well as CCHCS's and CDCR's
28 respective labor experts, spoke on October 19, 2021 at 3pm. During that call, in which I was a

1 participant, Mr. Ramirez explained CDCR's labor concerns, principally that four of CDCR's
2 union contracts have provisions regarding obtaining a waiver for the bargaining requirement due
3 to court order, but those provisions are inapplicable here without a court order. He further
4 explained that since there is no court order here requiring implementation on specific timeframe,
5 the concern is that CDCR must now comply with a 60-day notice requirement. Mr. Ramirez also
6 advised that the unions were willing to waive their rights to implement COVID-19-related
7 protocols in the past, but were unwilling to do so now. He further stated that CDCR received
8 cease and desist letters from two unions for failing to meet and confer before implementing the
9 August CDPH orders.

10 8. During the October 19 videoconference, Ms. Forster asked what CDCR's position
11 was as to whether it could proceed with implementation prior to bargaining by invoking the
12 emergency exception under the Dills Act. Mr. McClain responded that Defendants had not yet
13 decided if there was some way around the bargaining requirement, including by emergency or
14 court order, but defense counsel would provide Ms. Forster with a response after conferring
15 further with their clients. Ms. Forster then responded that it appeared there was nothing further to
16 discuss during the call.

17 9. It was my impression following the October 19 discussion, and that of my co-
18 counsel as well, that defense counsel would provide the Receiver's counsel with the State's
19 position on the applicability of the emergency exception to the Dill's Act, and that further meet
20 and confer discussions would occur with respect to the implementation plan, including discussion
21 of mutually agreeable deadlines for implementation. However, before defense counsel could even
22 provide a response to Ms. Forster's question (which they were working to do the morning of
23 October 20th), we received the electronic case filing (ECF) notification that the Receiver had filed
24 a report on his meet and confer efforts regarding the implementation plan. Defense counsel had
25 no prior knowledge that such a statement would be filed, that the Receiver would submit a
26 unilateral proposed order with implementation deadlines that had not previously been the subject
27 of discussions during the meet and confer sessions with his counsel, or that the Receiver's counsel
28 believed that the Receiver and the State were at impasse over the implementation plan. Indeed,

1 discussions between the Receiver’s counsel and defense counsel had been ongoing until less than
2 24 hours prior to the Receiver’s filing.

3 10. Additionally, and unrelated to defense counsel’s discussions with the Receiver’s
4 counsel, I am informed that the Kern County Superior Court in the matter of *Davis v. California*
5 *Department of Public Health*, Case No. BCV-21-102318, issued an order on October 22, 2021
6 denying CCPOA’s request for a preliminary injunction that would have prevented CDCR from
7 implementing the California Department of Public Health’s August 19, 2021 order requiring
8 vaccination of certain Bargaining Unit 6 staff by October 14, 2021.

9
10 I declare under penalty of perjury under the laws of the United States that the foregoing is
11 true and correct. Executed on October 25, 2021 at Lafayette, California.



Samantha D. Wolff