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14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

17 MARCIANO PLATA, *et al.*,

18 Plaintiffs,

19 v.

20 GAVIN NEWSOM, *et al.*,

21 Defendants.

22 CALIFORNIA CORRECTIONAL PEACE
OFFICERS' ASSOCIATION,

23 Intervenor.
24
25

Case No. 01-cv-01351-JST

**CALIFORNIA CORRECTIONAL PEACE
OFFICERS' ASSOCIATION'S
RESPONSE TO RECEIVER'S
PROPOSED ORDER REGARDING
MANDATORY VACCINATION**

The Hon. Jon S. Tigar

26 **I.**

27 **INTRODUCTION**

28 Intervenor the California Correctional Peace Officers' Association ("CCPOA" or "the

1 Union”) responds to the Receiver’s Proposed Order Regarding Mandatory Vaccinations as
 2 follows:

3 **1. The Receiver offers no explanation where the dates for implementation in his**
 4 **proposed Order come from.**

5 Based on other stated positions in his recommendation of a mandatory vaccination order,
 6 presumably the Receiver seeks to require vaccination of all staff as soon as possible. In CCPOA’s
 7 view, implementation, if this Court’s Order is permissible, should occur in as timely a manner as
 8 is practicable. Under this view, the State and the Union should be given opportunity to seek
 9 review of the Court’s mandatory vaccination order in the Ninth Circuit (particularly in light of that
 10 Court’s recent decision in *Fruihat v. U.S. Immigration and Customs Enforcement*, No. 20-55134
 11 (9th Cir. Oct. 20, 2021))—something the State has indicated it intends to do via seeking a stay of
 12 the Order in this Court, which the Union will likely join. Second, the parties should have a
 13 realistic practicable plan for implementing the Order. The October 12, 2021 plan lacks
 14 meaningful detail on how to force tens thousands of state employees to receive a one or two dose
 15 vaccine regimen within approximately five (5) weeks while maintaining safety and essential
 16 services in the prisons.

17 CCPOA has been warning of the challenges of practically implementing a statewide
 18 vaccination order since its May 24, 2021 Preliminary Submission Regarding Mandatory
 19 Vaccination—seemingly with little impact on the parties. The practicality of implementing such
 20 an Order is serious stuff; it is why numerous California cities have been forced to delay their own
 21 vaccine mandates to ensure that they are still able to continue to provide essential public services
 22 commensurate with implementing a vaccine mandate policy. (See, e.g.,
 23 <https://www.latimes.com/opinion/story/2021-10-21/la-vaccine-mandate>;
 24 [https://sanfrancisco.cbslocal.com/2021/10/01/san-jose-delays-disciplinary-action-for-city-
 25 employees-who-arent-vaccinated/](https://sanfrancisco.cbslocal.com/2021/10/01/san-jose-delays-disciplinary-action-for-city-employees-who-arent-vaccinated/).) As the first story notes, the City of Los Angeles recently
 26 delayed its deadline for staff to be vaccinated by two months due to implementation issues, and as
 27 large as Los Angeles’s employee numbers are, CDCR’s is on an entirely different level. This
 28 leads to the Union’s second point ...

1 **2. To ensure a workable implementation, the Court should allow meaningful time for**
 2 **collective bargaining over the impacts of the implementation order *before* it goes into**
 3 **effect.**

4 The Receiver appears to be advocating for the Court to override collective bargaining laws;
 5 however, collective bargaining will help, not hinder, creating a workable implementation plan.
 6 (See also Motion for Leave to File Amicus Curiae Brief and Brief in Response to Order to Show
 7 Cause Re: Receiver's Recommendation on Mandatory Vaccination Dated August 9, 2021, filed
 8 August 23, 2201 by Service Employees International Union, Local 1000 [ECF No. 3656],
 9 advocating for completion of impacts bargaining before any vaccine mandate is implemented.)

10 The Union and CDCR labor representatives have met six times over the State's proposed
 11 implementation of the California Department of Public Health's August 19, 2021 Order but only
 12 twice since the Court's September 27, 2021 Order. CCPOA has not yet received formal notice of
 13 the State's intent to implement the Court's September 27, 2021 Order, although the notice for the
 14 CDPH order also purported to provide notice of future "vaccination requirements." When
 15 negotiators met on September 29 and October 5, CDCR did not yet have implementation plans for
 16 the Court's Order.

17 Topics of discussion at the bargaining table have included: which posts will require
 18 vaccination at institutions (other than CMF and CHCF which require full vaccination);
 19 accommodation procedures, review, and appeal; non-compliance concerns, procedures;
 20 harmonization of disciplinary actions with procedures under the Public Safety Officers'
 21 Procedural Bills of Rights Act, California Government Code sections 3300 *et seq.*; vaccine injury,
 22 concerns about safety/efficacy, and long-term effects; and the availability of FDA approved
 23 vaccines at the vaccine clinics statewide. The next scheduled negotiation date is Friday, October
 24 29, 2021.


25 The default rule under the Ralph C. Dills Act, California Government Code sections 3512
 26 *et seq.* is that the State is obligated to negotiate over changes to wages, hours and other working
 27 conditions prior to implementation. (See Gov't Code § 3516.5.) According to the Receiver,
 28 "Defendants have the discretion to invoke an emergency exception obviating the need to provide
 notice and bargain prior to implementation." (Receiver's Request for Instructions Regarding

1 Implementation at p. 3, n. 1.) This needs to be clarified: Defendants cannot simply declare an
 2 emergency. Rather, an emergency must exist, and even if one does, and the State concludes it
 3 must act first and bargain later, it must still negotiate with its unions as soon as is practicable.
 4 (*Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989,
 5 1031-1033.) Moreover, while the Governor’s Proclamation of a State of Emergency remains in
 6 place after some 18 months, given the foreseeability for the past several months of the Court
 7 issuing a vaccination mandate it is not clear that the ongoing public health impacts of COVID-19
 8 constitute the type of emergency that justifies overriding collective bargaining obligations.
 9 (*Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267
 10 [For purposes of state public employment law, an “emergency” which exempts a public agency
 11 employer from “meet and confer” obligations is an unforeseen situation calling for immediate
 12 action; interpreting analogous emergency exception under the Meyers-Milias-Brown Act,
 13 California Government Code section 3504.5, which governs labor relations for city, county and
 14 other municipal employees.].)

15 The Court faces two options: either charge headlong into implementation as the Receiver’s
 16 Order proposes and run into the same implementation problems noted above that other California
 17 public agencies have discovered or allow a meaningful period of time for collective bargaining to
 18 occur to produce a more robust and workable implementation plan. CCPOA supports the latter
 19 and in that regard notes that the most recent COVID Data Summary for 10-22-21 (External
 20 Stakeholders) showed CDCR staff vaccination levels at 65%, with institutional staff vaccination
 21 levels at 63%.

22 Dated: October 25, 2021

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