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CALIFORNIA CORRECTIONAL PEACE

OFFICERS' ASSOCIATION

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

MARCIANO PLATA, *et al.*,

Plaintiffs,

v.

GAVIN NEWSOM, *et al.*,

Defendants,

CALIFORNIA CORRECTIONAL PEACE  
OFFICERS' ASSOCIATION,

Amicus Curiae and/or  
[Proposed] Intervenor.

Case No. 4:01-cv-01351-JST

**RESPONSE OF PROPOSED  
INTERVENOR CALIFORNIA  
CORRECTIONAL PEACE OFFICERS'  
ASSOCIATION TO ORDER TO SHOW  
CAUSE RE: RECEIVER'S  
RECOMMENDATION ON MANDATORY  
VACCINATION**

Date: September 24, 2021

Time: 9:30 a.m.

Crtrm.: 6 – 2nd Floor

The Hon. Jon S. Tigar

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## I.

## INTRODUCTION

The Court's efforts to address the effects of the COVID-19 pandemic in state prisons have been laudable. The California Correctional Peace Officers' Association ("CCPOA" or "the Union") has welcomed the opportunity to work collaboratively with the Court, the parties, Receiver J. Clark Kelso (the "Receiver"), and numerous experts, to protect residents and staff alike through an unprecedented public health emergency. This has been work of the highest importance. Nevertheless, even in an unprecedented emergency, we remain a nation of laws. As the Supreme Court recently reiterated in *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021):

It has never been enough for the State to insist on deference or demand that individual rights give way to collective interests. Of course we are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty. ... Even in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution.”

(Emphasis in original.)

Since the onset of the pandemic, the State has worked diligently to stop the spread of the pandemic in the correctional system, and to protect the health and well-being of its residents. Among other measures, it has offered, even prioritized, the provision of world class vaccinations to nearly all residents. On its face, therefore, the residents' federal rights as addressed by this lawsuit have already been secured by that vaccination provision. To date, however, while a majority of residents have been vaccinated, a significant number of residents have refused to be vaccinated despite ongoing months-long education efforts. Despite these avowedly reasonable actions taken by the State, the Receiver recommends going even further, now at the expense of correctional staff. The order recommended by the Receiver would require that staff be vaccinated, on threat of termination, in order to protect the health of residents who have refused to be vaccinated. This is a bridge too far. The Union submits that the law does not allow nor require the rights of correctional staff to be set beneath of the minority of residents who themselves refuse the ultimate protection of vaccinations. This case neither anticipates nor allows for such a trip through

1 the looking-glass.

2 To act, one must have the authority to act. Under the standards of the Prison Litigation  
3 Reform Act (“PRLA”), this Court lacks the authority to order mandatory vaccination of  
4 correctional staff under the particular circumstances of this case. As described in more detail  
5 below, and as this Court itself has recognized, the State has been proactive in combatting the  
6 spread of COVID-19 in the correctional system. This fact alone refutes any claim that the State  
7 has been “deliberately indifferent” as required under the PLRA for prospective relief to be  
8 warranted. In addition, intermediate efforts, short of a mandate, for increasing vaccination among  
9 correctional staff are recently underway and deserve time to take effect before implementing the  
10 ultimate option of requiring vaccination for continued employment.

11 Moreover, since issuing his recommendation for a blanket vaccination mandate, even the  
12 Receiver appears to have reconsidered the extreme nature of his original proposal. By the August  
13 23, 2021 directive issued by the California Department of Corrections and Rehabilitation  
14 (“CDCR”) and the California Correctional Health Care Services (“CCHCS”) for implementing the  
15 August 19 Order (“August 23 CDCR/CCHCS Order”), the Receiver signed a less intrusive  
16 interpretation that limits the reach of that Order. Rather than requiring that *all* correctional staff be  
17 vaccinated by October 4, 2021, the CDCR/CCHCS directive tailors the mandate to those  
18 employees regularly assigned to healthcare posts and areas. This most recent statement by the  
19 Receiver implicitly narrows the scope of his August 4 recommendations so that even if this Court  
20 concludes that it does have authority to order the State to take action, it should only do so  
21 commensurate with this most recent directive. Having said that, the State is willingly following  
22 this course, obviating the need for any other judiciary intervention.

23 The August 23 CDCR/CCHCS Order also highlights a less intrusive means of addressing  
24 the problem than the Receiver’s original recommendation.

## 25 II.

### 26 INSTANT PROCEDURAL BACKGROUND

27 On August 4, 2021, the Receiver filed recommendations (“Receiver’s Recommendations”)  
28 advocating that the Court issue a sweeping mandatory vaccination order for all (1) CDCR staff

1 who work in or enter its institutions, (2) incarcerated persons who desire to work outside of the  
 2 institution (e.g., fire camps), and (3) incarcerated persons receiving in-person visitation. ECF No.  
 3 3638.

4 On August 9, 2021, this Court issued an order to show cause (“August 9 OSC”) directing  
 5 the parties to file written responses to show cause why the Court “should not order that the  
 6 Receiver’s recommendations be implemented.” ECF No. 3647 at 3:6-7. The August 9 OSC  
 7 permitted CCPOA, which has been participating in these proceedings as a friend of the court since  
 8 the onset of the pandemic, to “file a response by the same date, with or without seeking  
 9 intervention.” *Id.* at 3:11-12.<sup>1</sup> The Court further ordered the parties and CCPOA to “state their  
 10 opinion on whether they agree or disagree with the public health conclusions described in the  
 11 Receiver’s report ... [and] ... their position on whether the rationale behind the State Public  
 12 Health Officer Order of August 5, 2021, applies to some or all of CDCR’s employees.” *Id.* at 3:23-  
 13 4:2.

14 Much has occurred since the Court issued the August 9 OSC.

15 On August 19, 2021, the State Public Health Officer for the California Department of  
 16 Public Health (“CDPH”) issued a follow-up order (the “August 19 CDPH Order”), directly  
 17 addressing staff in correctional institutions, which provides, *inter alia*:

18 2. The following workers are subject to the requirements of this  
 19 Order:

20 a. All paid and unpaid individuals who are regularly assigned to  
 21 provide health care or health care services to inmates, prisoners, or  
 22 detainees. This may include nurses, nursing assistants, nurse  
 23 practitioners, physicians, physician assistants, technicians,  
 24 therapists, phlebotomists, pharmacists, mental health providers,  
 25 students and trainees, dietary, and contractual staff not employed by  
 26 the correctional facility or detention center.

27 b. All paid and unpaid individuals who are regularly assigned to  
 28 work within hospitals, skilled nursing facilities, intermediate care  
 facilities, or the equivalent that are integrated into the correctional  
 facility or detention center in areas where health care is provided.  
 This includes workers providing health care to inmates, prisoners,  
 and detainees, as well as persons not directly involved in delivering

<sup>1</sup> Concurrently with this response, CCPOA is filing a Motion to Intervene pursuant to Federal Rule of Civil Procedure (“FRCP”) 24.

health care, but who could be exposed to infectious agents that can be transmitted in the health care setting (e.g., clerical, dietary, janitorial services, laundry, correctional officers, facilities maintenance staff, administrative, inmate workers, and volunteer personnel).

<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Correctional-Facilities-and-Detention-Centers-Health-Care-Worker-Vaccination-Order.aspx> (last visited on August 30, 2021).

On August 20, 2021, the Court issued another order, modifying the August 9 OSC (the “Modified OSC”), and, in pertinent part, directing “the parties, as well as proposed intervenors and CCPOA ... to state their position ... on whether there is any public health basis for limiting mandatory vaccines to the areas” identified in paragraphs 2 (a) and (b) of the August 19 Order. ECF No. 3653 at 2:21-3:4. The Modified OSC also directed that, by August 25, 2021,

Defendants:

shall file a statement that describes how they will implement the August 19 CDPH order. In particular, they shall identify (a) any institutions at which they will require all staff to be vaccinated and (b) for any remaining institutions, the areas in each institution for which they will require all staff to be vaccinated and the areas in which vaccination for all staff will not be required.

*Id.* at 2:14-18.

The August 23 CDCR/CCHCS Order provides directions to CDCR and CCHCS staff for implementing the August 19 CDPH Order. Declaration of Gregg M. Adam filed in support of this response (“Adam Dec.”), ¶ 2, Ex. A. It states that the August 19 CDPH Order applies to all staff at three institutions – California Health Care Facility (“CHCF”), California Medical Facility (“CMF”), and the skilled nursing facility at Central California Women’s Facility (“CCWF”). *Id.* In addition, mandatory vaccinations apply:

to those workers regularly assigned to work in the following health care areas or posts within institutions system-wide.

1. All Correctional Treatment Centers (CTC) and similar locations, including:

a. Medical CTC beds

b. Licensed and Unlicensed Psychiatric In-Patient

1 Program housing

2 c. Licensed and Unlicensed Mental Health Crisis  
3 housing

4 2. All Out-Patient Housing Units (OHUs)

5 3. Medical, Specialty, Mental Health, and Dental clinic  
6 treatment areas

7 4. Hospice beds

8 5. Dialysis units

9 6. Triage and Treatment Areas (TTAs)

10 7. Staff identified on the Master Assignment Roster as assigned  
11 to transportation or medical guarding in the community

12 8. All DJJ staff assigned to the Mental Health Residential  
13 Units, Intensive Behavioral Treatment Program Units, and Sexual  
14 Behavior Treatment Program Units

9. All staff assigned to the Medical Wings within DJJ facilities

10. All staff assigned to the Program Center at N.A. Chaderjian  
Youth Correctional Facility.

15 *Id.* The directive further provides that the mandatory vaccination order does “not apply to non-  
16 regularly assigned staff, such as relief staff, voluntary overtime, mandatory overtime, swaps, or  
17 those who do not work in the area regularly, such as staff making pick-ups or deliveries,  
18 conducting maintenance repairs, conducting tours, etc. Additionally, this will not apply to any  
19 staff responding to emergencies.” *Id.*

### 20 III.

### 21 ARGUMENT

#### 22 A. Under the PLRA Absent a Finding That the State is Acting With Deliberate 23 Indifference, This Court May Not Issue an Order Mandating Vaccinations for 24 Correctional Staff

25 The Court proposes to adopt and implement the Receiver’s Recommendations and to order  
26 mandatory vaccination of correctional staff. As discussed in more detail below, however, neither  
27 the Court nor Plaintiffs – who have been requesting this mandate over the past several months –  
28 can establish the threshold showing necessary to issue such an order: namely, that the State has  
acted with deliberate indifference towards the residents in its response to the pandemic,



specifically by failing itself to order the mandatory vaccination of all correctional staff. Absent such a finding, the Court has no authority to issue the proposed order.

Under the PRLA, prospective relief:

with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The 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 USC 3626(a). Here, the critical question is whether mandating vaccination of all staff, with the accompanying threat of termination, “extends no further than necessary to correct the violation of the federal right.” To establish a violation of federal right – here, the residents’ right to adequate medical care – Plaintiffs must establish that prison administrators and state actors are acting with deliberate indifference to the federal right. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

As has been shown repeatedly in filings before this Court, there is no evidence that in dealing with the ravages of this pandemic, the State has acted with deliberate indifference. Rather, as described in more detail below, over these many months, the State has taken consistent measures to ensure the safety of the resident population.

### **1. The State has not acted with deliberate indifference**

This Court acknowledges that it:

can only order relief if it first finds the violation of a federal right. That, in turn, requires the Court to find that Defendants have been deliberately indifferent to a substantial risk of serious harm to resident health or safety. The COVID-19 pandemic is ‘unprecedented,’ ...and no one questions that it poses a substantial risk of serious harm to Plaintiffs.

ECF No. 3291 [April 17, 2020 Order Denying Plaintiffs’ Emergency Motion Regarding Prevention and Management of COVID-19] at 1:24-2:2 (citation omitted). The Court did so, most recently, soon after the onset of the pandemic, in its Order denying Plaintiffs’ request for a mass release of residents due to the health risks associated with the pandemic.

Like the State, the Union does not dispute that COVID-19 remains a serious threat to the residents. *See* ECF No. 3235 at 12:6-11 (State concedes that COVID-19 presents a substantial

1 risk of harm). What is missing, and as the Court found missing when Plaintiffs sought the  
 2 extraordinary relief of mass release, is any evidence that the State has been deliberately  
 3 indifferent to resident rights in its actions combating the spread of COVID-19. Absent this  
 4 critical factor, no federal right has been violated, depriving this Court of any basis under the  
 5 PLRA for ordering mandatory vaccination of CDCR staff.

6 **(a) The State has taken reasonable measures to date to combat the spread**  
 7 **of COVID-19**

8 As discussed at length in multiple filings before the Court since the onset of the pandemic,  
 9 the State has undertaken an array of aggressive measures to contain and prevent the spread of  
 10 COVID-19 within the prison system. *See, e.g.*, ECF No. 3235 [Defendant's Opposition to  
 11 Plaintiffs' Emergency Motion to Modify Population Reduction Order filed on March 31, 2020] at  
 12 12:25-19:16, (e.g., screening entry, visit suspension, physical distancing, sanitation, masking,  
 13 quarantine procedures, improved housing ventilation, and, until recently, de-population through  
 14 the 180-day early-release program). These efforts have been positively received by the Court and  
 15 generally well-executed, especially bearing in mind how this pandemic has confounded  
 16 governments worldwide. To date, the Court has deemed those efforts reasonable as against  
 17 Plaintiffs' repeated arguments that the State has been deliberately indifferent. *See* ECF No. 3291 at  
 18 14:3-4 ("In this case, ... the Court concludes without difficulty that Defendants' response has been  
 19 reasonable"). *See Farmer*, 511 U.S. at 845 (where prison officials act reasonably, they do not  
 20 violate the Eighth Amendment's Cruel and Unusual Punishment Clause).

21 **(b) The State's vaccination efforts are demonstrably reasonable**

22 The State's above-described efforts continue unabated. Nothing has changed except the  
 23 ready availability of a vaccine as a tool in the arsenal against the virus. Since the Court has  
 24 previously recognized that the State has acted reasonably in its efforts to combat COVID-19  
 25 outside of vaccinations, the question becomes whether the State's actions *since* the vaccine  
 26 became available rise to the level of deliberate indifference.

27 In the Union's view they do not, nor can they be legitimately considered so. Since  
 28 vaccination became a viable option, the State has made every effort to promote vaccination as a

critical tool in fighting COVID-19, including by prioritizing the provision and distribution of the vaccine to residents and staff alike. The State's most recent, targeted vaccine mandate, as set forth in the August 23 CDCR/CCHCS Order issued jointly by Secretary Allison and Receiver Kelso, only underscores that the State continues to focus on combatting the virus and protecting staff and residents.

**(i) Resident vaccination efforts**

The State's efforts to vaccinate residents are ongoing and have proven successful. For example, as recounted in the parties' June 25, 2021 Joint CMC Statement (ECF No. 3605): "As of June 25, 2021, approximately 98% of the California Department of Corrections and Rehabilitation's (CDCR) incarcerated population has been offered at least one dose of the vaccine, and approximately 73% of those offered have accepted it," resulting in "71% of the population being fully vaccinated." *Id.* at 2:4 – 10.<sup>2</sup> Plaintiffs noted then: "We continue to be pleased with CCHCS's efforts to vaccinate incarcerated people against COVID-19." *Id.* 3:3 – 4. Since vaccines became publicly available, CCPOA has fully supported the State's decision to prioritize the vaccinations of residents. *See* ECF No. 3529 [December 23, 2020 letter from CCPOA to Governor Newsom stating: "I respectfully write on behalf of the over 30,000 Correctional Officers to offer our support for Correctional Officers' voluntary vaccination and request that all Corrections Staff and incarcerated persons be given the highest priority in receiving vaccinations"].

Resident vaccination rates are even higher now. Per CDCR's COVID-19 Tracker, as of August 25, 2021, approximately 3% of the resident population (or 3,087 residents) are partially vaccinated and approximately 74% of the population (or 73,749 residents) are fully vaccinated.

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<sup>2</sup> Vaccination rates of medically high-risk incarcerated people are even higher: "over 99% of all COVID-19-naïve patients aged 65 or older have been offered the vaccine, 90% of patients in this category are fully vaccinated, and another 1% await the second dose of the vaccine; over 99% of all COVID-19-naïve patients with a COVID-19 weighted risk score of 6 or higher have been offered the vaccine, 91% of patients in this category are fully vaccinated, and another 1% await the second dose of the vaccine; and 99% of COVID-19-naïve patients with a COVID-19 weighted risk score of 3 or higher have been offered the vaccine, 84% of patients in this category are fully vaccinated, and another 2% await the second dose of the vaccine." ECF No. 3605 at 2:11-19.

1 Population COVID-19 Tracking, CDCR Patients: CDCR Vaccination Tracker,  
 2 <https://www.cdcr.ca.gov/covid19/population-status-tracking> (lasted viewed August 25, 2021).

3 This Court has recognized the State's contribution to achieving this high rate of resident  
 4 vaccination:

5 The vaccination of the incarcerated population has been one of the  
 6 success stories of this case. ... For the most part, our uptake rates  
 7 have been pretty good in our incarcerated patient population. I think  
 the Receiver's office and CCHCS also deserves some credit for that  
 and CDCR, for that matter."

8 See Adam Dec., ¶ 3, Ex. B [Transcript of Proceedings Case Management Conference Held Via  
 9 Zoom on April 29, 2021 ("April 2021 CMC Transcript")] at 6:8 – 9, 19 – 22. Having recognized  
 10 this success then, the Court can hardly find deliberate indifference for those same efforts now.

11 **(ii) Staff vaccination efforts**

12 Without a doubt, the best evidence that the State has taken a proactive approach with  
 13 respect to deploying the vaccine is the recent August 19 CDPH Order and the August 23  
 14 CDCR/CCHCS Order it spawned. While the Union awaits a full interpretation of the reach of  
 15 those orders, presumably through the meet and confer process required by state law and the  
 16 collective bargaining agreement between CCPOA and the State,<sup>3</sup> at a minimum it plainly reaches  
 17 correctional staff working in assignments where residents are most exposed, *i.e.*, when submitting  
 18 to healthcare. Particularly in light of these two orders, no conclusion of deliberate indifference  
 19 may rightly be drawn.

20 But even before this latest step, the State has taken significant steps to increase vaccination  
 21 rates amongst staff through incentives and outreach, including a supplemental paid sick leave

22 \_\_\_\_\_  
 23 <sup>3</sup> CCPOA and other state unions are entitled to negotiate over the impacts of the CDCR's decision  
 24 to implement mandatory vaccinations pursuant to the Ralph C. Dills Act, Cal. Gov't Code §§3512,  
 25 et seq. See *Service Employees International Union v. Los Robles Regional Medical Center*, 2009  
 26 WL 3872138, \*3 (N.D. Cal., November 17, 2009) (ordering hospital to resolve dispute with union  
 27 regarding implementation of new vaccination policy pursuant to the collective bargaining  
 28 agreement); *Virginia Mason Hospital v. Washington State Nurses Association*, 2006 WL 27203  
 (W.D. Wash., Jan. 5, 2006) (hospital may not unilaterally require unionized nurses to accept  
 mandatory flu vaccine as condition of employment); Daria Koscielniak, "Broadening Healthcare  
 Personnel's Exemptions to Vaccination: Will Patients Pay the Ultimate Price?," *Temple Political  
 & Civil Rights Law Review*, 25 Temp. Pol. & Civ. Rts. L. Rev. 171, 188 (2016) ("Under the  
 National Labor Relations Act, a flu vaccination policy is a mandatory subject of bargaining").

1 program, a moratorium on routine COVID-19 testing for those who vaccinate, vaccination clinics,  
 2 and education and advertising regarding the benefits of being immunized. *See* ECF No. 3579  
 3 [April 29, 2021 Joint Case Management Conference Statement] at 7:20-8:10, 8:26-28; ECF No.  
 4 3592 [May 27, 2021 Joint Case Management Conference Statement] at 8:3-7. These steps have  
 5 helped to increase staff vaccination rates, which as of August 25, 2021, include 34,927 staff  
 6 members who are fully vaccinated and 1,691 staff members who are partially vaccinated. *See*  
 7 CDCR Population COVID-19 Tracking, CDCR Vaccination Tracker,  
 8 <https://www.cdcr.ca.gov/covid19/population-status-tracking> (last viewed on August 25, 2021).  
 9 This number constitutes approximately 56% of the entire staff, *see id.*, and was reached for the  
 10 most part before full U.S. Food and Drug Administration (“FDA”) approval of any of the  
 11 vaccines. CCPOA has been a strong advocate of voluntary staff vaccination since vaccines became  
 12 available. *See* ECF No. 3540 [January 27, 2021 CCPOA Update Regarding Mask Wearing and  
 13 Custody Staff] at 1:26 – 2:16; ECF No. 3556 [March 2, 2021 Update from CCPOA on COVID-19  
 14 Mitigation Efforts] at 2:6 – 19; ECF No. 3567 [March 25, 2021 Update from CCPOA on COVID-  
 15 19 Mitigation Efforts] at 1:24 – 2:15; ECF No. 3580 [April 27, 2021 Update from CCPOA on  
 16 COVID-19 Mitigation Efforts] at 2:7-15.)

17 In addition, in cooperation with the Receiver, the State has recently undertaken additional  
 18 efforts, still in their initial stages. As discussed in the Joint CMC Statement filed on June 25, 2021,  
 19 mandatory one-on-one meetings between healthcare professionals and unvaccinated staff is just  
 20 one example of the State’s proactive endeavors to increase voluntary vaccination by staff. Noting  
 21 that “[t]he Receiver’s office and CDCR believe it is important to do everything reasonably  
 22 possible to educate and encourage voluntary vaccine acceptance before mandating a vaccine as a  
 23 condition of employment,” the parties explained:

24 The Receiver’s office ... is moving forward with its plan for medical  
 25 professionals to have one-to-one, face-to-face consultations with  
 26 unvaccinated CDCR staff in an effort to address their specific  
 27 concerns about the vaccine. Going forward, those who continue to  
 28 decline to vaccinate will be required to participate in training and  
 document their declination. Defendants and the Receiver’s office  
 continue to consider additional incentives to encourage staff—  
 particularly those who work in the prisons—to voluntarily accept the  
 vaccine.

1 ECF No. 3605 at 6:5-11. The Union first raised the idea, after consulting with behavioral health  
 2 specialists, several months ago. *See* ECF No. 3591 [May 24, 2021 CCPOA Preliminary  
 3 Submission Regarding Mandatory Vaccinations] at 9:5-21.

4 Furthermore, CDCR and CCHCS are working with CCPOA and other unions and  
 5 stakeholders to implement a COVID-19 Mitigation Advocate Program to encourage voluntary  
 6 vaccinations among staff through peer-to-peer counseling. *See* ECF No. 3579 at 8:11-16 (creation  
 7 of program requiring each institution to “provide ongoing education to staff, at the peer level, on  
 8 the importance of COVID-19 compliance, the latest CDCR and CCHCS COVID-19 policies, the  
 9 importance of mask-wearing and physical distancing, precautions that should be taken outside of  
 10 work, testing, and the vaccination program.”) *See also* April 2021 CMC Transcript at 9:4-8 (Court  
 11 recognizing that “these COVID-19 mitigation teams could potentially be a very important step”).  
 12 The program has been long in the creation but only recently was put into effect. *See* ECF No. 3620  
 13 [CCPOA’s Submission for July 29, 2021 Case Management Conference] at 2:21 – 28.

14 CDCR has also used educational videos to incentivize staff to get vaccinated. *See* Adam  
 15 Dec., ¶ 3, Ex. B [April 2021 CMC Transcript] at 9:22 – 10:3 (noting Court’s approval of these  
 16 videos and stating that “the videos demonstrate CDCR’s commitment to addressing this issue in as  
 17 many different ways as they can”). Other successful measures also continue, including but not  
 18 limited to vaccine clinics, suspension of intake, and early release to keep prison populations down  
 19 and promote distancing in congregate settings.

20 (c) **The Receiver’s Recommendations are premature and, in any event, are**  
 21 **countered by his most recent statement in the August 23**  
**CDPH/CCHCS directive**

22 As of August 4, the Receiver recommended mandatory vaccination for all correctional  
 23 staff. As a threshold matter, this recommendation, in and of itself, does not and should not signal  
 24 that the State’s efforts up to now have been unreasonable or inadequate, let alone rising to the  
 25 level of deliberate indifference. The August 19 CDPH Order only underscores this fact. By the  
 26 August 23 CDCR/CCHCS Directive, the State – signed by the Receiver – has again taken action, a  
 27 step below blanket mandatory vaccination. This latest targeted response must be recognized for  
 28 what it is – a tailored measure by the State to fight the pandemic. As this Court has pointed out:



1 “[T]he question before the Court is not what it thinks is the best possible solution. Rather, the  
 2 question is whether Defendants' actions to date are reasonable.” ECF No. 3291 at 13:23-14:1. *See*  
 3 *also id.* at 5, citing *Farmer*, 511 U.S. at 844 (“Likewise, ‘prison officials who actually knew of a  
 4 substantial risk to resident health or safety may be found free from liability if they responded  
 5 reasonably to the risk, even if the harm ultimately was not averted”).

6 Coupled with the fact that implementation of multiple programs, including those under  
 7 CCHCS supervision, have only recently begun, it cannot be credibly asserted that the State has  
 8 acted with the requisite deliberate indifference such that prospective relief under the PLRA is  
 9 warranted here. *See* ECF No. 3566 [March 24, 2021 Joint Case Management Conference  
 10 Statement] at 3:10-12. (“CCHCS recently noted that CDCR has been one of the most proactive  
 11 correctional organizations in the world in recognizing the public health imperative to vaccinate  
 12 those who live and work in correctional facilities”). Indeed, this Court’s statements support the  
 13 opposite conclusion. For example, the Court noted as follows:

14 I think, as my earlier remarks were intended to signal – I think,  
 15 frankly, everyone is doing everything they can, that they can think  
 16 of on [the issue of staff vaccinations]. CCPOA is doing what it  
 17 thinks will be effective with its members. CDCR is doing what it  
 18 thinks will be effective with staff in terms of encouragement and  
 education. Plaintiffs are making every suggestion that they can that  
 they think will get uptake rates up. So this is -- this is an area where  
 I feel like, for the most part, everybody is pulling on the same oar.

19 Adam Dec., ¶ 3, Ex. B [April 2021 CMC Transcript] at 17:17 – 25. The Court also recognized that  
 20 the State has purposefully avoided a vaccination mandate due to thoughtful consideration of  
 21 advice from “institutional leaders and public health experts,” a point that negates any argument  
 22 that the State has been indifferent. *Id.* at 12:3 – 16.

23 In denying Plaintiffs’ April 2020 request for a prison population reduction through release,  
 24 this Court cited *Money v. Pritzker*, 453 F. Supp. 3d 1103 (N.D. Ill. 2020) in holding that  
 25 “Plaintiffs have not demonstrated that Defendants’ actions have been so deficient as to constitute a  
 26 violation of the Eighth Amendment.” ECF No. 3291 at 14:7-18. *Money* fits squarely here, for the  
 27 words used by that court to describe the State defendants there could be applied to CDCR with  
 28 little trouble:

Clearly Defendants are trying, very hard, to protect inmates against the virus and to treat those who have contracted it. The record simply does not support any suggestion that Defendants have turned the kind of blind eye and deaf ear to a known problem that would indicate "total unconcern" for the inmates' welfare....[Defendants' plan] may not be the plan that Plaintiffs think best; it may not even be the plan that the Court would choose, if it were sufficiently informed to offer an opinion on the subject. But the Eighth Amendment does not afford litigants and courts an avenue for de novo review of the decisions of prison officials, and the actions of Defendants here in the face of the COVID-19 outbreak easily pass constitutional muster.

*Money*, 453 F. Supp. 3d at 1132 (citation omitted). *See also id.* at 1131 (“[G]iven the constantly shifting parameters and guidance regarding how to combat a previously little-known virus, it is worth pointing out that ‘the mere failure \* \* \* to choose the best course of action does not amount to a constitutional violation’”) (citation omitted).

The PLRA cautions that: “The 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 evidence plainly does not support the requisite finding that Defendants’ actions have been so deficient as to constitute a violation of the Eighth Amendment. As this Court noted once before in response to a request for prospective relief under the PLRA: “Because Plaintiffs have failed to establish the violation of a federal right, *the Court cannot issue any orders* that are narrowly drawn to correct such a violation.” ECF No. 3291 at 14:18-20 (emphasis added).

## **2. A Vaccine Mandate Also Fails the Least Intrusive Means Test**

Even if the Court determines that the State has violated residents’ federal rights by a legally deficient response to COVID-19, it must also establish that mandating a vaccine as originally recommended by the Receiver, *i.e.*, for all staff, incarcerated persons off-site and individuals visiting in-person, is “the least intrusive means necessary to correct the violation of the Federal right.” 18 U.S.C. §3626(a)(1)(A). Particularly in light of the Receiver’s apparent endorsement of a lesser step in the August 23 CDCR/CCHCS Directive, this cannot be done.

*First*, the August 19 CDPH Order – at least as interpreted by CDCR and CCHCS in the



1 August 23 CDCR/CCHCS Directive – demonstrates that there are more tailored approaches for  
 2 enforcing a vaccine mandate than the blanket pronouncement originally prescribed by the  
 3 Receiver. *Second*, as this Court is aware, multiple efforts are currently underway for increasing  
 4 vaccination election. These efforts, begun within the last several months, must be given time to  
 5 bear fruit. Past experience has shown that these grass-roots efforts have resulted in vaccine up-take  
 6 by residents. There is no reason to assume that will not happen with correctional staff, given time.  
 7 There is also reason to believe that the FDA’s approval of the Pfizer vaccine this week will spur an  
 8 increase in vaccinations for those who were hesitant to do so before formal approval. These efforts  
 9 are clearly less intrusive than mandating vaccination on threat of job loss and, as a matter of law,  
 10 must certainly be allowed sufficient time before this more extreme option is imposed.

11 For these reasons, this Court should defer to the State’s decision to refrain from imposing  
 12 mandatory vaccination policies on all correctional staff. *See County of Los Angeles Department of*  
 13 *Public Health v. Superior Court of Los Angeles County*, 61 Cal.App.5th 478, 483 (2021) (“We  
 14 now hold that courts should be extremely deferential to public health authorities, particularly  
 15 during a pandemic, and particularly where, as here, the public health authorities have  
 16 demonstrated a rational basis for their actions. Wisdom and precedent dictate that elected officials  
 17 and their expert public health officers, rather than the judiciary, generally should decide how best  
 18 to respond to health emergencies in cases not involving core constitutional freedoms. Courts  
 19 should intervene only when the health officials’ actions are arbitrary, capricious, or otherwise lack  
 20 a rational basis, or violate core constitutional rights, which demonstrably is not the case here.”).

21 **B. The August 5, 2021 CDPH Order Does Not Apply to CDCR Employees in State and**  
 22 **Local Correctional Institutions**

23 The Court’s initial OSC directed the parties, and CCPOA, to state “their position on  
 24 whether the rationale behind the State Public Health Officer Order of August 5, 2021, applies to  
 25 some or all of CDCR’s employees.” ECF No. 3647 at 3:23-4:2. As the Court observed in the  
 26 Modified OSC, to that point CDPH intended to issue future guidance specifically as to staff in  
 27 health care integrated into a congregate setting (ECF No. 3653 at 1:18-21); CDPH itself  
 28 specifically stated that high risk congregate settings, including state and local correctional

1 facilities, were expressly *not* covered. *See* California Department of Public Health, Public Health  
 2 Order Questions & Answers: Health Care Worker Vaccine Requirement, August 7, 2021,  
 3 [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/FAQ-Health-Care-Worker-](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/FAQ-Health-Care-Worker-Vaccine-Requirement.aspx)  
 4 [Vaccine-Requirement.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/FAQ-Health-Care-Worker-Vaccine-Requirement.aspx). (Emphasis added.)

5 The August 19 CDPH Order mandated vaccination for a subset of staff in correctional  
 6 settings. [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Correctional-Facilities-and-Detention-Centers-Health-Care-Worker-Vaccination-Order.aspx#)  
 7 [Public-Health-Officer-Correctional-Facilities-and-Detention-Centers-Health-Care-Worker-](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Correctional-Facilities-and-Detention-Centers-Health-Care-Worker-Vaccination-Order.aspx#)  
 8 [Vaccination-Order.aspx#](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Correctional-Facilities-and-Detention-Centers-Health-Care-Worker-Vaccination-Order.aspx#). As of August 23, CDCR and CCHCS have interpreted the scope of that  
 9 Order. Adam Dec., ¶ 2, Ex. A. Whether that directive is the last word or whether the Order applies  
 10 to *all* correctional officers in *all* institutions, remains to be seen. CCPOA has no insight into how  
 11 the State intends to implement or apply this latest order and cannot substantively address that  
 12 question.

13 On its face, the August 23 CDCR/CCHCS Directive shows that the State has stopped short  
 14 of ordering a blanket vaccination mandate in favor of pursuing a less intrusive route, i.e., targeted  
 15 required vaccinations, and permitting the current multiple ongoing efforts for increasing voluntary  
 16 staff vaccinations to work. *See* ECF No. 3592 at 10:11 – 11:1 (“Defendants prefer to focus efforts  
 17 on implementing measures designed to increase voluntary vaccine acceptance...” and noting  
 18 “Defendants’ efforts to date to encourage staff acceptance of the vaccine, Defendants’ future plans  
 19 and ongoing efforts to increase acceptance, the recent successes of these new incentive programs,  
 20 and in light of the current low number of positive cases of COVID-19 among the incarcerated  
 21 population...”).

22 **C. CCPOA Cannot Opine as to the Medical Bases of the Receiver’s Recommendations**  
 23 **or as to the Public Health Basis for Limiting Mandatory Vaccines as Provided in the**  
 24 **August 19 CDPH Order**

25 The Court’s initial OSC directs the parties, and CCPOA, to “state their opinion on whether  
 26 they agree or disagree with the public health conclusions described in the Receiver’s report....”  
 27 ECF No. 3647 at 3:23-25. The Court’s Modified OSC expands that directive and asks for  
 28 CCPOA’s position “on whether there is any public health basis for limiting mandatory vaccines”  
 as provided in that Order. ECF No. 3653 at 3:2-4. Union respectfully submits, however, that the

1 issue at hand is not the soundness of the medical bases underlying the Receiver's  
2 Recommendations for mandatory vaccination of all correctional staff but whether the Court or the  
3 Receiver has the legal authority to order such a broad mandate. Here, where the State's active,  
4 ongoing and vigorous efforts to manage the effects of COVID-19 in the correctional setting cannot  
5 be denied and by their very fact negate any implication of deliberate indifference, there is no legal  
6 basis for any such action by this Court.

7 Dated: August 30, 2021

MESSING ADAM & JASMINE LLP

8  
9 By



10 Gregg McLean Adam

11 Matthew Taylor

12 Attorneys for [Proposed] Intervenor

13 CALIFORNIA CORRECTIONAL PEACE  
14 OFFICERS' ASSOCIATION  
15  
16  
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20  
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26  
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28

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**CALIFORNIA CORRECTIONAL PEACE  
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Attorneys for [Proposed] Intervenor  
CALIFORNIA CORRECTIONAL PEACE  
OFFICERS' ASSOCIATION

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

MARCIANO PLATA, *et al.*,

Plaintiffs,

v.

GAVIN NEWSOM, *et al.*,

Defendants,

CALIFORNIA CORRECTIONAL PEACE  
OFFICERS' ASSOCIATION,

[Proposed] Intervenor.

Case No. 01-cv-01351-JST

**DECLARATION OF GREGG McLEAN  
ADAM IN SUPPORT OF RESPONSE OF  
CALIFORNIA CORRECTIONAL PEACE  
OFFICERS' ASSOCIATION TO ORDER  
TO SHOW CAUSE RE: RECEIVER'S  
RECOMMENDATION ON MANDATORY  
VACCINATION**

Date: September 24, 2021

Time: 9:30 a.m.

Ctrm.: 6 – 2nd Floor

The Honorable Jon S. Tigar

1 I, Gregg McLean Adam, declare as follows:


2 1. I am an attorney duly admitted to practice before this Court. I am a partner with  
3 Messing Adam & Jasmine LLP, attorneys of record for the California Correctional Peace Officers'  
4 Association ("CCPOA"). I have personal knowledge of the facts set forth herein, and if called as a  
5 witness, could and would competently testify thereto. I make this declaration in support of  
6 CCPOA's Response to Order to Show Case regarding Receiver J. Clark Kelso's Recommendation  
7 on Mandatory Vaccination in the above referenced case.

8 2. Attached hereto as Exhibit A is a true and correct copy of a memorandum dated  
9 August 23, 2021 entitled "Mandatory COVID-19 Vaccines and Testing for Institution Staff,"  
10 jointly issued by the California Department of Corrections and Rehabilitation and California  
11 Correctional Health Care Services.

12 3. Attached hereto as Exhibit B are true and correct copies of relevant excerpts from  
13 the Transcript of Proceedings of the Case Management Conference Held Via Zoom on April 29,  
14 2021 in the above referenced case.

15 I declare under penalty of perjury under the laws of the United States of America that the  
16 foregoing is true and correct.

17 Executed on this 30th day of August, 2021, at Mill Valley, California.

18  
19  
20   
Gregg McLean Adam

# **Exhibit A**



# MEMORANDUM

**Date** : August 23, 2021

**To** : Wardens  
Chief Executive Officers  
Superintendents

**From** :

DocuSigned by:  
*Diana Toche*  
D7A487A8AEC64C4...  
KATHLEEN ALLISON  
Secretary, CDCR

DocuSigned by:  
*Clark Kelso*  
2E3708FD02AF4DC...  
CLARK KELSO  
Receiver

**Subject** : MANDATORY COVID-19 VACCINES AND TESTING FOR INSTITUTION STAFF

The purpose of this memorandum is to address two Public Health Orders issued by the California Department of Public Health (CDPH):

- [State and Local Correctional Facilities and Detention Centers Health Care Worker Vaccination Order](#), issued August 19, 2021, and
- [Health Care Worker Protections in High-Risk Settings](#), issued July 26, 2021.

In this memorandum, direction will be provided to all California Department of Corrections and Rehabilitation (CDCR), California Correctional Health Care Services (CCHCS), and Division of Juvenile Justice (DJJ) staff statewide regarding the requirements and expectations pursuant to these Orders.

## AUGUST 19, 2021, PUBLIC HEALTH ORDER: FULL VACCINATION REQUIREMENT FOR STAFF

The August 19, 2021, CDPH Public Health Order requires workers in specified correctional health care facilities to show evidence of full vaccination for COVID-19 by October 14, 2021, or to obtain approval for a reasonable medical or religious accommodation precluding them from the mandatory full vaccination. Staff for whom this requirement applies cannot opt out of vaccination or routinely test in lieu of vaccination.

The Order's requirement for full vaccination applies to all staff at California Health Care Facility (CHCF), California Medical Facility (CMF), and the Skilled Nursing Facility at Central California Women's Facility (CCWF). In addition, it applies to those workers regularly assigned to work in the following health care areas or posts within institutions system-wide.

1. All Correctional Treatment Centers (CTC) and similar locations, including:
  - a. Medical CTC beds
  - b. Licensed and Unlicensed Psychiatric In-Patient Program housing
  - c. Licensed and Unlicensed Mental Health Crisis housing
2. All Out-Patient Housing Units (OHUs)
3. Medical, Specialty, Mental Health, and Dental clinic treatment areas
4. Hospice beds
5. Dialysis units

6. Triage and Treatment Areas (TTAs)
7. Staff identified on the Master Assignment Roster as assigned to transportation or medical guarding in the community
8. All DJJ staff assigned to the Mental Health Residential Units, Intensive Behavioral Treatment Program Units, and Sexual Behavior Treatment Program Units
9. All staff assigned to the Medical Wings within DJJ facilities
10. All staff assigned to the Program Center at N.A. Chaderjian Youth Correctional Facility

All paid and unpaid regularly assigned workers/volunteers subject to the Order's vaccination requirement include but are not limited to the following: clinicians, nurses/nursing assistants, technicians, therapists, phlebotomists, pharmacists, dietary staff, janitorial and laundry staff, administrative staff, registry staff, contract staff, volunteers, custody staff, health facility maintenance workers, and inmate workers. The Order's vaccination requirement shall apply to all five-day-a-week posts and regular-day-off posts. Currently, this requirement will not apply to non-regularly assigned staff, such as relief staff, voluntary overtime, mandatory overtime, swaps, or those who do not work in the area regularly, such as staff making pick-ups or deliveries, conducting maintenance repairs, conducting tours, etc. Additionally, this will not apply to any staff responding to emergencies.

*Local Hiring Authority Responsibilities:* Each local hiring authority shall be responsible for identifying staff who are regularly assigned to the listed areas and notifying the employees that they are covered by and must comply with the August 19, 2021, order. The [Staff Vaccine Registry](#) shall be utilized to determine staff who are vaccinated, partially vaccinated, and unvaccinated. Staff who have not already done so may submit vaccination records. For complete instructions, refer to the May 19, 2021 memorandum, "[Submission of COVID-19 Vaccination Record Cards](#)."

#### **Qualifying Accommodations to Vaccination Requirement**

1. *Medical Reasonable Accommodation*

Staff unable to be fully vaccinated due to a qualifying medical reason shall notify their supervisor and Return-to-Work Coordinator of their request for a reasonable accommodation. Reasonable accommodation requests shall be submitted on the CDCR Form 855, Request for Reasonable Accommodation, and require a written statement signed by a physician, nurse practitioner, or other licensed medical professional practicing under the license of a physician stating that the individual qualifies for the accommodation (but the statement should not describe the underlying medical condition or disability) and the probable duration of an individual's inability to receive the vaccine (or if the duration is unknown or permanent, so indicate).

2. *Religious Accommodation*

Staff unable to be fully vaccinated due to a sincerely held religious belief shall notify their supervisor and local Equal Employment Opportunity Coordinator of their request for religious accommodation. Religious accommodation requests shall require a statement indicating that the individual has a sincerely held religious belief that precludes them from obtaining any COVID-19 vaccine.

3. Requests for medical/religious reasonable accommodation shall be submitted by September 14, 2021. The Department shall engage in the interactive process with staff to ensure that the appropriate determination is made. Staff who have submitted a request for reasonable medical or religious accommodation may request permission to remain off work, using leave credits or an unpaid leave of absence pending a determination on the request. Staff who are approved for a reasonable medical or religious accommodation shall be subjected to mandatory twice-weekly testing as required by the [August 5, 2021 California Department of Public Health Public Health](#)



[Order](#) and the [All Facilities Letter \(AFL\) 21-28](#) until such Order and AFL are rescinded or otherwise no longer in effect.

Further direction will be forthcoming regarding staff regularly assigned to the identified institutions or health care areas who are not vaccinated or do not have an approved reasonable medical or religious reasonable accommodation secured by October 14, 2021.

CDCR and CCHCS Labor Relations will be working with labor organizations to inform them of this Order.

**JULY 26, 2021, PUBLIC HEALTH ORDER: HEALTH CARE WORKER PROTECTIONS IN HIGH-RISK SETTINGS**

The August 19, 2021 order **supplements and does not supplant** the CDPH's Public Health Order issued on July 26, 2021. The CDPH's July 26, 2021, Public Health Order requires all unvaccinated and partially vaccinated workers in High-Risk Congregate Settings, including state and local correctional facilities, to undergo screening and testing for COVID-19. In other words, staff to whom the August 19, 2021, requirement does not apply remain subject to the requirements of the July 26, 2021, Order.

Therefore, pursuant to this Order and effective August 23, 2021, all staff who work in correctional settings who are unvaccinated, partially vaccinated, or have not provided a record of full vaccination shall undergo **twice-weekly COVID testing** with at least 72 hours between each test.

If you are testing outside of the CDCR testing program, you will need to submit proof of testing. See attachment for instructions on how to submit this information.

Refusal to get tested on a twice-weekly basis may result in corrective or disciplinary action in accordance with Department Operations Manual, Article 22, Employee Discipline, Section 33030.8, Causes for Corrective Action, and 33030.9, Causes for Adverse Action.

**QUESTIONS/CONCERNS**

If you have any questions or concerns about the directives contained in this memorandum, inquiries should be directed as follows:

- For Wardens: Contact your mission's Associate Director, Division of Adult Institutions (DAI)
- For Chief Executive Officers: Contact your respective Regional Health Care Executive
- For DJJ: Contact either Deputy Director
- For staff with reasonable accommodation-related questions: Contact the local Return-to-Work Coordinator for medical accommodations and their local EEO Coordinator for religious accommodations.

CDCR/CCHCS is committed to providing additional information as soon as available.

Attachment

cc: CDCR\_CCHCS Extended Executive Staff  
Regional Health Care Executives  
Associate Directors, DAI

## ATTACHMENT

The Environmental Health and Safety module within the Business Information Systems (BIS) platform is used to capture testing data for all California Department of Corrections and Rehabilitation (CDCR) and California Correction Health Care Services (CCHCS) staff. Using the [DocuSign PowerForm](#) will securely submit staff's documentation of **Non-CDCR/CCHCS COVID-19 Test Result** directly to the Employee Health Program team. The [PowerForm](#) can be used only if staff has an email account where they can verify their submittal. For the best user experience, staff shall use their @CDCR.CA.GOV email account.

Staff shall submit documentation of COVID-19 test result only if they have tested outside of CDCR/CCHCS (e.g. Kaiser, Sutter, CVS, Walgreens, etc.). Tests completed within CDCR/CCHCS will automatically be recorded in BIS. Documentation of test results must include the following:

1. Name of the company that conducted the test
2. Name and date-of-birth of the employee
3. The test result

### DIRECTIONS FOR USING THE POWERFORM

1. A confirmation code will be sent to the email address provided while initiating the [PowerForm](#).
2. Once confirmed via the email account provided, the **Non-CDCR/CCHCS COVID-19 Test Result** [PowerForm](#) will launch for staff to fill out.
3. Enter all required information into the form.
4. Attach the documentation of **Non-CDCR/CCHCS COVID-19 Test Result**.
5. Click Finish once all required information are entered and the documentation of **Non-CDCR/CCHCS COVID-19 Test Result** is attached.

Name:

Date:

PERNR:

Date of Birth:

Attach documentation of **Non-CDCR/CCHCS COVID-19 Test Result** (as shown in Example).

### Example:

**LabCorp Patient Report**

Specimen ID: [REDACTED] Control ID: [REDACTED] Act #: [REDACTED] Phone: [REDACTED] Rte: 00  
 Xpress Urgent Care Medical Center  
 131 E 17th St  
 COSTA MESA CA 92627  
 [Barcode]

**Your Name**

**Patient Details**  
 DOB: [REDACTED]  
 Age/gender: [REDACTED]  
 Gender: M  
 Patient ID: [REDACTED]

**Specimen Details**  
 Date collected: 01/02/2021 1100 Local  
 Date received: 01/03/2021  
 Date entered: 01/03/2021  
 Date reported: 01/04/2021 0906 ET

**Physician Details**  
 Ordering: B LINTON  
 Referring: [REDACTED]  
 NPI: [REDACTED]

**General Comments & Additional Information**  
 Alternate Control Number: [REDACTED] Alternate Patient ID: [REDACTED]

**Ordered Items**  
 SARS-CoV-2, NAA; SARS-CoV-2, NAA 2 DAY TAT

TESTS	RESULT	FLAG	UNITS	REFERENCE	INTERVAL	LAB
SARS-CoV-2, NAA	Not Detected			Not Detected		01

This nucleic acid amplification test was developed and its performance characteristics determined by LabCorp Laboratories. Nucleic acid amplification tests include PCR and TMA. This test has not been FDA cleared or approved. This test has been authorized by FDA under an Emergency Use Authorization (EUA). This test is only authorized for the duration of time the declaration that circumstances exist justifying the authorization of the emergency use of in vitro diagnostic tests for detection of SARS-CoV-2 virus and/or diagnosis of COVID-19 infection under section 564(b)(1) of the Act, 21 U.S.C. 360bbb-3(b)(1), unless the authorization is terminated or revoked sooner.

When diagnostic testing is negative, the possibility of a false negative result should be considered in the context of a patient's recent exposures and the presence of clinical signs and symptoms consistent with COVID-19. An individual without symptoms of COVID-19 and who is not shedding SARS-CoV-2 virus would expect to have a negative (not detected) result in this assay.

Although DocuSign is the preferred method, staff may also mail-in their documentation of test results to the following address:

California Correctional Health Care Services  
 Attn: Employee Health Program, E-1  
 PO Box 588500  
 Elk Grove, CA 95758

# **Exhibit B**

Pages 1 - 31

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jon S. Tigar, Judge

MARCIANO PLATA, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	NO. CV 01-01351-JST
	)	
GAVIN NEWSOM, ET AL.,	)	
	)	
Defendants.	)	
_____	)	

Oakland, California  
Thursday, April 29, 2021

**TRANSCRIPT OF PROCEEDINGS**  
**CASE MANAGEMENT CONFERENCE HELD VIA ZOOM**

**APPEARANCES:**

For Plaintiffs:

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**BY: DONALD H. SPECTER, ESQUIRE**  
**ALISON HARDY, ESQUIRE**  
**STEVEN FAMA, ESQUIRE**

For Defendants:

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**SAMANTHA D. WOLFF, ESQUIRE**

OFFICE OF THE ATTORNEY GENERAL  
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**BY: DAMON MCCLAIN**  
**IRAM HASAN**  
**RYAN GILLE**  
**DEPUTY ATTORNEYS GENERAL**

Reported By: Pamela Batalo-Hebel, CSR No. 3593, RMR, FCRR  
Official Reporter

APPEARANCES CONTINUED:

For the Receiver J. Clark Kelso:

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San Francisco, CA 94111

**BY: JAMIE DUPREE, ESQUIRE**

For California Correctional Peace Officers Association:

MESSING ADAM & JASMINE  
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Sacramento, CA 95814

**BY: GREGG ADAM, ESQUIRE**

CCPOA  
755 Riverpoint Drive - No. 200  
West Sacramento, CA 95605

**BY: DAVID A. SANDERS, ESQUIRE**

Also Present:

**J. CLARK KELSO, RECEIVER**

1           The parties' first topic in their Case Management  
2 Statement is "Vaccines." This is probably the only topic I  
3 want to address at any length.

4           The parties have not indicated that they have any disputes  
5 there, so in that sense, the Case Management Statement was  
6 informational. And I think there really are two separate  
7 stories going on right now in our institutions.

8           The vaccination of the incarcerated population has been  
9 one of the success stories of this case. It was a success  
10 story in the sense that we had the support of the Governor's  
11 office, which I continue to appreciate. We had some  
12 outstanding logistical planning by the Receiver's team to make  
13 sure that we could push out these vaccines to our population.  
14 I think a lot of people don't realize how hard it is to get  
15 that many doses into that many arms across 35 separate  
16 institutions up and down the State with a population that  
17 fluctuates between 90 and a hundred thousand people. That's  
18 just a significant effort.

19           For the most part, our uptake rates have been pretty good  
20 in our incarcerated patient population. I think the Receiver's  
21 office and CCHCS also deserves some credit for that and CDCR,  
22 for that matter.

23           It's unfortunate that not every patient has been willing  
24 to take the vaccine. Unfortunately that's true all over the  
25 country. And there are isolated pockets where incarcerated

1 these COVID mitigation teams will have a positive effect on  
2 staff vaccination rates and also on mask wearing, which we will  
3 address a little later in the conference.

4 I fully understand that for CDCR to move the needle on  
5 staff vaccination, that process will just go a lot better if we  
6 have buy-in from staff, from within the staff itself, and not  
7 just pressure and education from above, so I think these COVID  
8 mitigation teams could potentially be a very important step.

9 I really like the emails that CCPOA has sent its  
10 membership with the help of the Goldman School of Public  
11 Policy. They look official. They are official. And I think  
12 that kind of messaging could potentially be very important and  
13 helpful. I hope those efforts are successful.

14 I also hope that we go down just one level from CCPOA  
15 headquarters and that leadership within each institution are  
16 also demonstrating the same commitment to fighting COVID and  
17 that the captains and lieutenants that people look up to are  
18 also getting the vaccine and wearing their masks.

19 I also appreciate the State's efforts to increase staff  
20 participation in the COVID-19 vaccine program. I'm glad CCHCS  
21 is conducting open vaccine clinics. I think that's a great  
22 step. I've seen some of the videos that CDCR is showing its  
23 staff. I think those are a step in the right direction.  
24 They're really catchy, they're really smart, they make the  
25 point real effectively. One of them does makes the point with

1 humor and one of them makes it with sadness, frankly. And I  
2 think the videos demonstrate CDCR's commitment to addressing  
3 this issue in as many different ways as they can.

4 So nothing that I've said to this point actually is very  
5 controversial. It's just a summary of where we are in terms of  
6 staff vaccine uptake rates.

7 Plaintiffs say in their portion of the Case Management  
8 Statement that they believe the time has come for the Receiver  
9 and CDCR to require that all staff be vaccinated. There might  
10 be some additional comment about that today. I don't think  
11 that we're going to resolve that issue today, but the  
12 Plaintiffs point to a recent announcement by the University of  
13 California and the California State University System that all  
14 staff and students will need to be vaccinated before they are  
15 allowed on campus, and what I want to say is I think that a  
16 mandatory staff vaccination policy deserves a hard look. And  
17 that's where we are today.

18 I think we should note for the record that there are a  
19 couple of caveats to the universities' announcement. A kind of  
20 top line press that these announcements are getting is that  
21 these university systems have completely committed to requiring  
22 all staff and students must be vaccinated before they can  
23 return to campus this fall, and my understanding, having looked  
24 at the announcements, is that that is a little bit of an  
25 oversimplification.



1 And with respect to other incentives that may have been  
2 asked for here or spoken to by either Mr. Fama or Mr. Specter,  
3 I think it requires additional discussion, and I cannot yet  
4 confirm my client on those issues, but we know it is very  
5 important.

6 May will be a big month where they are going out to each  
7 institution for five days and having open clinics. We hope the  
8 uptake increases. It is absolutely unfortunate that our  
9 prisons and our staff mirror what is happening around the  
10 country and in the State where some counties and some states  
11 have better uptake versus others, but we will continue to work  
12 on it, and it is terribly important to our clients and we  
13 understand that.

14 And with that, I have nothing more, Your Honor. Thank  
15 you.

16 **THE COURT:** Thank you, Mr. Mello.

17 I think, as my earlier remarks were intended to signal --  
18 I think, frankly, everyone is doing everything they can, that  
19 they can think of on this issue. CCPOA is doing what it thinks  
20 will be effective with its members. CDCR is doing what it  
21 thinks will be effective with staff in terms of encouragement  
22 and education. Plaintiffs are making every suggestion that  
23 they can that they think will get uptake rates up. So this  
24 is -- this is an area where I feel like, for the most part,  
25 everybody is pulling on the same oar.

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Thursday, April 29, 2021

*Pamela Batalo Hebel*

---

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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

MARCIANO PLATA, *et al.*,

Plaintiffs,

v.

GAVIN NEWSOM, *et al.*,

Defendants,

CALIFORNIA CORRECTIONAL PEACE  
OFFICERS' ASSOCIATION,

[Proposed] Intervenor.

Case No. 01-cv-01351-JST

**NOTICE OF MOTION AND MOTION TO  
INTERVENE BY CALIFORNIA  
CORRECTIONAL PEACE OFFICERS'  
ASSOCIATION; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Judge: The Honorable Jon S. Tigar

Date: October 14, 2021

Time: 2:00 p.m.

Ctrm: 6 – 2nd Floor

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**NOTICE OF MOTION TO INTERVENE**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on Thursday, October 14, 2021, at 2:00 p.m., or as soon thereafter as counsel may be heard, before the Honorable Jon S. Tigar, located in Courtroom 6 – 2nd Floor, United States Courthouse, 1301 Clay Street, Oakland, CA 94612, the California Correctional Peace Officers’ Association (“CCPOA” or the “Union”) will move this Court to intervene as defendants as of right pursuant to Federal Rule of Civil Procedure (“FRCP”) 24(a), or in the alternative, respectfully request leave for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b).

CCPOA is entitled to intervention of right under FRCP 24(a) because (1) this Motion is timely and without delay or prejudice to any parties; (2) CCPOA on behalf of its members has a legally protectable interest in its members’ economic interests and legal rights, as reflected in the Memorandum of Understanding (“MOU”) between the State and CCPOA, which may be directly impacted by issuance of a vaccination mandate; (3) issuance of a vaccination mandate may harm CCPOA’s members directly by infringing on and/or violating their rights under the MOU; and (4) the interests of CCPOA and its members are not adequately represented by either the State or Plaintiffs because Plaintiffs favor imposition of the mandate and the State has already adopted vaccine mandates for other state employees and may do so here. As a non-party, CCPOA cannot adequately protect these interests, and cannot rely on any existing party to the litigation to adequately represent or protect them.

In the alternative, CCPOA requests permissive intervention pursuant to FRCP 24(b) in whole or in part for the reasons noted above and because CCPOA will raise common legal issues and defenses with respect to the main action.

The Motion to Intervene is based on the Notice of Motion and Motion, the accompanying Points and Authorities in support thereof, the concurrently filed declarations of Suzanne L. Jimenez and Gregg McLean Adam in support thereof, CCPOA’s Complaint in Intervention filed concurrently herewith, and such arguments and evidence that may be presented at the hearing of this matter.

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1 CCPOA provided prior notice of its intent to file this Motion and has attempted to obtain  
2 the stipulation and consent of the parties to CCPOA's intervention. While Plaintiffs have declined  
3 to so stipulate, Defendants have given their consent to CCPOA's intervention. Declaration of  
4 Gregg McLean Adam in support of the Motion to Intervene ("Adam Dec."), ¶ 2, Ex. A.



1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 Throughout the course of the pandemic, CCPOA has observed and occasionally acted as  
 5 amicus in this case while the parties have litigated measures to address the spread of COVID-19  
 6 among prison staff and inmates. In light of the Receiver's August 4, 2021 Report (the "Report"),  
 7 however, CCPOA's obligation to its membership now requires it to assume a more active role by  
 8 intervening as a party.

9 As the Court is aware, the Report recommends mandatory vaccination for all (1) California  
 10 Department of Corrections and Rehabilitation ("CDCR") staff who work in or enter its  
 11 institutions, (2) incarcerated persons who desire to work outside of the institution (e.g., fire  
 12 camps), and (3) incarcerated persons who desire to have in-person visitation. Based on these  
 13 recommendations and on the Court's commentary in previous case management conferences,  
 14 CCPOA anticipates that the Court intends to adopt some form of mandatory vaccination order. If  
 15 so, it is certain that such an order will directly and significantly impact CCPOA's membership.  
 16 Members who refuse vaccination and have no recognizable need for accommodation may face  
 17 employment termination. The working conditions of other CCPOA members will also be  
 18 significantly affected, including coping with staff shortages resulting from the resignation and/or  
 19 termination of non-compliant staff members or changes in staff assignments, contrary to  
 20 contractual seniority rights, to facilitate reasonable accommodation to officers exempt from the  
 21 mandate due to medical or religious reasons. As such, the Receiver's recommended measures  
 22 directly jeopardize CCPOA's interests—and those of the nearly 28,000 employees it represents—  
 23 under the MOU. Despite this direct threat, CCPOA's members are not adequately represented or  
 24 protected by the existing parties, both of whom either currently favor a vaccine mandate  
 25 (Plaintiffs) or, as to Defendants, have demonstrated that it is open to mandating vaccination for  
 26 state employees having done so recently in other contexts. Furthermore, neither party—even  
 27 Defendants, which include CDCR's management—has as extensive experience or expertise  
 28 regarding how the MOU protects the rights of CCPOA's members and how its provisions affect

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1 these members' working conditions on a daily basis.

2 The law provides intervention as a vehicle whereby a party missing from a lawsuit and  
3 who will be directly affected by the actions taken in that matter may have their voice heard. As  
4 discussed in detail below, given the direct interest of CCPOA's membership in the Receiver's  
5 recommended measures as well as in the substance of any order issued by this Court in reliance on  
6 the Report, CCPOA respectfully requests intervention as of right under FRCP 24(a), or, in the  
7 alternative, requests that the Court permit CCPOA to intervene under FRCP 24(b).

## 8 II.

### 9 STATEMENT OF FACTS AND PROCEDURAL HISTORY

10 These proceedings began in 2001 when Plaintiffs alleged that Defendants were failing to  
11 provide constitutionally adequate medical care for prison inmates. Since that time, the Court has  
12 entered into numerous remedial orders, including instituting a receivership to take control of the  
13 CDCR's health care system. Recently, the case has focused on stemming the spread of COVID-19  
14 infections within the prison system.

#### 15 A. The Parties' Position Regarding Mandatory Vaccination of CDCR Prison Staff

16 Plaintiffs have advocated for a mandatory vaccination order for prison staff only since  
17 April of this year. *See* ECF No. 3579 at 6 [Joint Case Management Statement filed on April 27,  
18 2021]. Plaintiffs' legal counsel has rejected the notion that CCPOA members will be negatively  
19 impacted by such an order, and urged the Receiver to "direct that all staff who work in the prisons  
20 be vaccinated immediately." ECF No. 3605-1 at 1 [Prison Law Office Letter to Receiver regarding  
21 COVID-19 Staff Vaccination Mandate dated June 14, 2021].

22 To date, Defendants have consistently resisted Plaintiffs' calls for mandatory vaccinations  
23 for employees, preferring use of incentives to increase staff vaccination rates. *See* ECF No. 3620  
24 at 6 [Joint Case Management Statement filed on July 27, 2021]. Despite its position in this action,  
25 however, the State now appears to be embracing mandatory vaccinations for its employees. Within  
26 the past several weeks, Governor Newsom enacted a policy where all State employees must show  
27 either proof of vaccination or become subject to a strict testing policy where tests are conducted *at*  
28 *least* once a week ("State Mandatory Testing Policy"). *See* Office of Governor Newsom,

1 “California Implements First-in-the-Nation Measures to Encourage State Employees and Health  
 2 Care Workers to Get Vaccinated,” 1 (July 26, 2021), [https://www.gov.ca.gov/  
 3 2021/07/26/california-implements-first-in-the-nation-measures-to-encourage-state-employees-and-  
 4 health-care-workers-to-get-vaccinated/](https://www.gov.ca.gov/2021/07/26/california-implements-first-in-the-nation-measures-to-encourage-state-employees-and-health-care-workers-to-get-vaccinated/). On August 5, 2021, the California Department of Public  
 5 Health (“CDPH”) ordered that all employees working in certain health care facilities, excluding  
 6 those working in CDCR’s health care facilities, must be vaccinated by September 30, 2021  
 7 (“CDPH Vaccination Order”). *See* CDPH Memorandum to All Californians entitled, “Health Care  
 8 Workers Vaccine Requirement,” 2 (August 5, 2021), [https://www.cdph.ca.gov/Programs/CID/  
 9 DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Health-Care-Worker-Vaccine-  
 10 Requirement.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Health-Care-Worker-Vaccine-Requirement.aspx). CDPH issued a subsequent order on August 19, 2021 implementing a similar  
 11 vaccine mandate with respect to health care workers in correctional facilities which must be  
 12 complied with by October 14, 2021. *See* CDPH Memorandum to All Californians entitled, “State  
 13 and Local Correctional Facilities and Detention Centers Health Care Worker Vaccination  
 14 Requirement,” Section 1 (August 19, 2021), [https://www.cdph.ca.gov/Programs/CID/DCDC/  
 15 Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Correctional-Facilities-and-Detention-  
 16 Centers-Health-Care-Worker-Vaccination-Order.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Correctional-Facilities-and-Detention-Centers-Health-Care-Worker-Vaccination-Order.aspx). It applies to “individuals who are regularly  
 17 assigned to provide health care services to inmates, prisoners or detainees” and those “who are  
 18 regularly assigned to work within hospitals, skilled nursing facilities, intermediate care facilities,  
 19 or the equivalent that are integrated into the correctional facility of detention center in areas where  
 20 health care is provided.” *Id.* at Section 2.

21 **B. CCPOA Has Strongly Supported Voluntary Vaccination Efforts and Has Warned**  
 22 **That a Mandatory Policy Will Significantly Affect the State and Its Employees**

23 CCPOA has strongly supported voluntary vaccination efforts to prevent the spread of  
 24 COVID-19. Throughout the pandemic, it has provided regular updates to the Court, as amicus,  
 25 regarding its aggressive efforts to encourage its members to get vaccinated and its cooperation  
 26 with both parties to realize this goal. *See* ECF Nos. 3529 [December 23, 2020 letter from CCPOA  
 27 to Governor Newsom], 3540 [], 3556 [March 2, 2021 Update from CCPOA on COVID-19  
 28 Mitigation Efforts], ECF No. 3567 [March 25, 2021 Update from CCPOA on COVID-19

Mitigation Efforts], ECF No. 3580 [April 27, 2021 Update from CCPOA on COVID-19 Mitigation Efforts]. More recently, it filed a brief informing the Court that various mitigation efforts by Defendants to curb COVID-19 were still only in a preparatory phase and needed more time to work, and that additional measures to increase voluntary vaccination should be considered. *See* ECF No. 3591 at pp. 5:6 – 9:21 [CCPOA’s Preliminary Submission Regarding Mandatory Vaccinations filed on May 24, 2021]. CCPOA also emphasized that significant resources will be required to address the fall-out of imposing mandatory vaccinations. *Id.* at pp. 11:7 – 14:10.

**C. The Court Has Stated That It Will Consider Ordering Mandatory Vaccination of CDCR Employees**

During the past several case management conferences, the Court has indicated its intention to consider issuing a mandatory vaccination order once the Receiver issued his recommendations and the parties were given the opportunity to brief the matter. Adam Dec., ¶ 3. Now the Receiver has spoken, recommending mandatory vaccination of CDCR employees, including those represented by CCPOA. During those same conferences, the Court recognized that efforts to intervene by CCPOA was likely, either by stipulation of the parties or a motion to intervene. *Id.*

**III.**

**ARGUMENT**

**A. CCPOA’s Is Entitled to Intervention as of Right**

FRCP 24(a) provides for intervention of right when the movant “claims an interest relating to the property or transaction that is the subject of the action” and “is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” FRCP 24(a)(2). There is “[a] liberal policy in favor of intervention [which] serves both efficient resolution of issues and broadened access to the courts.” *United States v. City of Los Angeles* (“*City of Los Angeles*”), 288 F.3d 391, 397-98 (9th Cir. 2002) (citations omitted). The purpose of this liberal interpretation is to involve “as many apparently concerned persons as is compatible with efficiency and due process.” *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1496 (9th Cir. 1995); *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (“[W]e are guided primarily by practical and

1 equitable considerations. We generally interpret the requirements broadly in favor of  
2 intervention”).

3 In the Ninth Circuit, intervention is appropriate on satisfaction of a four-factor test: the  
4 motion must be timely; the applicant must claim a “‘significantly protectable’ interest” relating to  
5 the transaction pending in the lawsuit; its interests will be adversely affected by disposition of the  
6 lawsuit unless intervention is allowed; and its interests are not adequately represented by the  
7 existing parties. *See, e.g., Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1061 (9th  
8 Cir. 1997). Each of these factors are readily met here.

9 **1. CCPOA’s motion is timely**

10 In the context of COVID-19’s impact on this long-standing matter in receivership, the  
11 instant motion is timely. CCPOA has been involved in efforts to contain the spread of COVID-19  
12 at CDCR institutions from the beginning of the pandemic, but its members’ interests under the  
13 MOU have only now been brought into play by the prospect of a vaccine mandate. The Court has  
14 implicitly recognized this fact by inviting CCPOA to move for intervention at this time. *See* ECF  
15 No. 3647 at 3:19 – 20 [August 9, 2021 Order to Show Cause Re: Receiver’s Recommendation on  
16 Mandatory Vaccination].

17 Aside from this indication that the Court will view this motion as timely, under the test  
18 applicable in this Circuit, timeliness is evaluated based on (i) the stage of the proceedings, (ii) the  
19 prejudice to the other parties, and (iii) the reasons for and length of delay, if any. *See, e.g., State of*  
20 *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1319 (9th Cir. 1997); *United States v.*  
21 *Oregon*, 913 F.2d 576, 588-589 (9th Cir. 1990), *cert denied*, 501 U.S. 1250 (1991). “Timeliness is  
22 a flexible concept,” *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1156 (9th Cir. 1981), and a motion to  
23 intervene may be timely even where “the litigation has entered a new stage, where the would-be  
24 intervenor’s rights would be jeopardized.” *Natural Resources Defense Council, Inc. v. Gutierrez*,  
25 2007 WL 1518359 at \*14 (N. D. Cal. May 22, 2007) (citing *United States v. Oregon*, 745 F.2d  
26 550, 552 (9th Cir. 1984)). Timeliness is to be construed leniently, in favor of the would-be  
27 intervenor—especially where, as here, intervention is sought as “of right.” *See United States v.*  
28 *Oregon, supra*, 745 F.2d at 552.

Here, CCPOA has determined that it must intervene because recent developments arising from the availability of a vaccine, low vaccination rates and the surge of COVID-19 due to the Delta variant have motivated the Court to seek the Receiver's recommendations on how to best address these threats to inmate health and welfare in the prison system. While CCPOA's amicus status has been sufficient until now, the direct impact on its members' interests as a result of a probable mandatory vaccination directive requires that CCPOA assume a more central and vocal role in the litigation. There can be no legitimate claim of prejudice by the other parties who have acquiesced in CCPOA's role thus far, nor can they credibly deny that any vaccine mandate for CDCR prison staff directly impacts those employees' contractual rights. Absent CCPOA's involvement in these proceedings, those employees' contractual interests will be unrepresented in the evaluation of whether and such an order should issue.

**2. CCPOA has a significant interest in this lawsuit that would be adversely affected unless intervention is allowed**

"An applicant for intervention has a significantly protectable interest if the interest is protected by law and there is a relationship between the legally protected interest and the plaintiff's claims." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). Because the interest requirement is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process[.]" *City of Los Angeles, supra*, 288 F. 3d at 398, "[i]t is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993). That relationship requirement is met where "'resolution of plaintiffs' claims actually will affect the applicant.'" *City of Los Angeles*, 288 F.3d at 398 (quotation omitted).

To show impairment of interests for the purposes of FRCP 24(a)(2), a proposed intervenor need show only that the disposition of an action "may as a practical matter," impede the intervenor's ability to protect its interests in the subject of the action. Fed. R. Civ. P. 24(a)(2) (emphasis added). *See California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) ("[A] party has a sufficient interest for intervention purposes if it will suffer a practical



1 impairment of its interests as a result of the pending litigation”). In evaluating this question, “the  
 2 court is not limited to consequences of a strictly legal nature.” *Forest Conservation Council*,  
 3 *supra*, 66 F.3d at 1498. Where the relief sought by the Plaintiffs would have direct, immediate and  
 4 harmful impact on a third party’s interests, that adverse impact is sufficient to satisfy FRCP  
 5 24(a)(2). *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D. C. Cir. 2003).

6 Case authority applying FRCP 24 to labor unions strongly supports CCPOA’s right to  
 7 intervene on the instant facts. The Ninth Circuit’s decision in *City of Los Angeles, supra*, is  
 8 instructive. In that case the Court allowed the Los Angeles Police Protective League (“LAPPL”) to  
 9 intervene in a civil rights action involving a consent decree between the United States and various  
 10 entities associated with the City of Los Angeles and its Police Department (“LAPD”). In that  
 11 action, the United States alleged that LAPD had engaged in a pattern or practice of depriving  
 12 individuals of their civil rights through the use of excessive force, false arrests, and improper  
 13 seizures. *See id.* at 396. The parties negotiated a consent decree to resolve the suit, and lodged the  
 14 proposed decree with the district court. *Id.* As the designated bargaining unit for rank and file  
 15 LAPD officers, LAPPL sought leave to intervene, claiming that the proposed consent decree was  
 16 incompatible with LAPPL’s collective bargaining agreement with the City. *Id.* The district court  
 17 denied the motion. *Id.* at 397. On appeal, the Ninth Circuit outlined the conditions for intervention  
 18 (as set forth above), and concluded that LAPPL had a protectable interest in the litigation and  
 19 proposed remedy, holding that: “The Police League has state-law rights to negotiate about the  
 20 terms and conditions of its members’ employment as LAPD officers and to rely on the collective  
 21 bargaining agreement that is the result of those negotiations. These rights give it an interest in the  
 22 consent decree at issue.” *Id.* at 399 – 400. The Court further stated:

23 To the extent that [the consent decree] contains or might contain  
 24 provisions that contradict terms of the officers’ MOU, the Police  
 25 League has an interest. Further, to the extent that it is disputed  
 26 whether or not the consent decree conflicts with the MOU, the  
 Police League has the right to present its views on the subject to the  
 district court and have them fully considered in conjunction with the  
 district court’s decision to approve the consent decree.

27 *Id.* at 400.

28 *City of Los Angeles* is directly on point. Just as the Ninth Circuit permitted LAPPL to

1 intervene to challenge a consent decree potentially contradicting terms of the police officers’  
 2 collective bargaining agreement, so too should the Court permit CCPOA to intervene here on  
 3 similar grounds, where a projected vaccine mandate order will conflict with critical terms of its  
 4 collective bargaining agreement with the State. As in *City of Los Angeles*, the State and CCPOA  
 5 memorialized their collective bargaining agreement regarding a variety of labor concerns after  
 6 extensive negotiations. “To the extent that [anticipated order] contains or might contain provisions  
 7 that contradict terms of the officers’ MOU, [CCPOA] has an interest.” *Id.* at 400. Here the  
 8 Receiver’s recommendation for mandatory vaccinations of employees will, if adopted by the  
 9 Court, infringe and in some instances violate CCPOA members’ negotiated contractual rights  
 10 under the MOU. CCPOA therefore has a clear and established interest in ensuring that this Court  
 11 does not take actions that violate or impinge on these procedural rights under the MOU. *Id.* See  
 12 also *CBS, Inc. v. Snyder*, 798 F. Supp. 1019, 1023 (S.D.N.Y.1992) (union entitled to intervene  
 13 where its “interest in administering and enforcing the collective bargaining agreements that it  
 14 negotiated with the networks may be impaired by an unfavorable disposition”).

15 A recent case decided by California Public Employment Relations Board (“PERB”), the  
 16 State agency responsible for administering public sector employees’ collective bargaining  
 17 agreements, including CCPOA’s MOU, is instructive. In *Regents of the University of California*  
 18 (2021) PERB Decision No. 2783H, pp. 9, the University of California implemented a mandatory  
 19 vaccination policy in July 2020 with the primary purpose of mitigating the effects of a potential  
 20 “winter surge of COVID-19.” PERB held that though the decision to implement the policy was non-  
 21 negotiable, the State employer violated collective bargaining principles enshrined in California  
 22 labor laws, including the Ralph C. Dills Act, Cal. Gov’t Code §§3512, et seq. that applies to  
 23 CCPOA and its members, when it implemented the new policy prior to negotiating with  
 24 employees’ representatives over the impacts that the new policy will have on working conditions.  
 25 *Id.* at 31. In its analysis, PERB noted, “A change in policy has, by definition, a generalized effect  
 26 or continuing impact upon the terms and conditions of employment of bargaining unit members.”  
 27 *Id.* at 21 quoting *Grant Joint Union High School District* (1982) PERB Decision No. 196, 9. It  
 28 also stated that when an employer’s decision has foreseeable effects on discipline, in particular,



1 “those effects are negotiable.” *Id.* at 30.

2 As described in the accompanying declaration of CCPOA’s Managing Counsel, Suzanne  
 3 L. Jimenez (“Jimenez Dec.”), multiple critical provisions of the current MOU are implicated by  
 4 any such order and many hard-won contractual rights thereunder are threatened. As a member of  
 5 the Union’s MOU negotiation team for approximately 15 years, including as its chief negotiator  
 6 for five of those years, Ms. Jimenez has in-depth knowledge of the MOU’s terms and conditions  
 7 and how they are practically applied. Jimenez Dec. at ¶¶ 3 – 5. Based on her considerable  
 8 experience, Ms. Jimenez attests to the widespread impact of a mandatory vaccination order,  
 9 directly affecting members’ rights under numerous key MOU provisions. *Id.* at ¶¶ 5, 9 – 20.  
 10 These provisions include vitally important employee rights, gained over the course of long careers,  
 11 such as seniority in selecting preferred assignments and voluntary overtime shifts, and avoiding  
 12 disfavored assignments including involuntary overtime shifts and transfers. *Id.*

13 As a threshold matter, it is self-evident given current vaccination rates at CDCR  
 14 institutions that compulsory vaccinations will lead to a decrease in the experienced employee  
 15 ranks, with some number of staff members either resigning in protest, or being terminated due to  
 16 non-compliance. For those employees who seek and obtain an exemption from the mandate based  
 17 on religious and medical grounds, by law CDCR must generally provide reasonable  
 18 accommodation,<sup>1</sup> which likely means transferring them to positions either outside of CDCR  
 19 institutions or to those with no inmate interaction. *Id.* at ¶¶ 11, 12, 14, 16. Due to resignations,  
 20 terminations, and staff movement related to accommodations, there will inevitably be staff  
 21 shortages requiring management to cover unfilled positions, possibly with less qualified personnel.  
 22 *Id.* at ¶¶ 10, 11, 12, 13, 14, 16. These shortages, in turn, will force CDCR to order involuntary  
 23 transfers or mandatory overtime, all governed under the MOU, in order to provide sufficient  
 24 coverage for the safe operation of the affected institutions. This likely chain of events threatens to  
 25 frustrate at best and upend at worse the negotiated-for seniority-based rights of employees both to  
 26

27 <sup>1</sup> See Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) and California Fair Employment  
 28 and Housing Act (California Gov. Code § 12900 et seq.) (medical condition exemption); Title  
 VII, Civil Rights Act of 1964 (42 U.S.C. § 2000e) (“Title VII”) (religious objections).

1 choose their preferred assignments or avoid undesirable ones as provided in MOU sections 12.05  
 2 (Voluntary Overtime by Seniority), 12.06 (Involuntary Overtime), 12.07 (Personnel Preferred  
 3 Post-Assignment (PPA) for Correctional Officers and MTAs), 20.03 (Post and Bid By Seniority  
 4 for Correctional Counselor), 22.04 (Post and Bid By Seniority for Institutional Parole Agents IS),  
 5 24.05 (YCC Voluntary Demotion), and 24.07 (Post-Assignment (PPPA) For YCOS ). *Id.* at ¶¶ 9 –  
 6 16.

7 Section 9.09 (Personnel Investigations) is another critical MOU provision implicated by a  
 8 mandatory vaccine order. *Id.* at ¶ 17. Section 9.09 establishes the parameters for the conduct of  
 9 personnel investigations, and contains hard-fought protections for personnel who are subject to  
 10 discipline, including potential termination. *Id.* This section will be directly at issue if, as a result of  
 11 a mandatory vaccine order by this Court, CDCR management orders an individual employee to be  
 12 vaccinated on threat of discipline. *Id.* To ensure that discipline is imposed fairly and not as a result  
 13 of mistake or bad faith, and so that employees do not improperly lose their jobs and that CDCR  
 14 does not become subject to unnecessary litigation, it is vital to employees and management alike  
 15 that the protections afforded by section 9.09 be applicable to a mandatory vaccination policy. *Id.*

16 Staffing changes that are likely to result from a new vaccination policy will also impact  
 17 CCPOA members' entitlement to scheduled time-off, including vacation, holidays and other  
 18 leaves. *Id.* at ¶ 18. Resignations, terminations, and transfers due to accommodations would result  
 19 in the cancellation of pre-planned and approved vacations under these provisions. *Id.* Prison staff  
 20 are already facing high levels of stress due to understaffing, excessive workloads, and the dangers  
 21 inherent in guarding residents; thus, their time off is an important time to rest and recuperate from  
 22 a challenging and often dangerous job. *Id.* The cancellation of vacations and other leaves due to  
 23 transfers to cover essential positions will certainly exacerbate existing morale issues. *Id.*

24 CCPOA employees are also guaranteed certain protections under the MOU addressing  
 25 equitable division of workload. *Id.* at ¶ 19. Unfilled positions caused by employee separations or  
 26 accommodations will force management to increase certain employees' workload in violation of  
 27 these provisions, resulting in even greater levels of job stress, and further affecting morale.

1           **3. The existing parties cannot adequately represent CCPOA's interests**

2           Plaintiffs are not parties to the MOU, and therefore have little to no knowledge of its terms  
 3 or practical effects on working conditions nor any interest in enforcing it or ensuring that  
 4 employees' rights thereunder are protected. FRCP 24(a)(2)'s requirement of showing inadequate  
 5 representation "is satisfied if the applicant shows that representation of his interest 'may be'  
 6 inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v.*  
 7 *United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (citation omitted). The Ninth  
 8 Circuit offers three factors to use in evaluating the adequacy of such a demonstration. A court  
 9 must assess whether "the interests of a present party to the suit are such that it will undoubtedly  
 10 make all of the intervenor's arguments[;]" whether "the present party is capable of and willing to  
 11 make such arguments[;]" and whether "the intervenor would not offer any necessary element to  
 12 the proceedings that the other parties would neglect." *County of Fresno v. Andrus*, 622 F.2d 436,  
 13 438-39 (9th Cir. 1980) (emphasis added).

14           Although defendant CDCR is bound by the terms of the MOU, there is a clear divergence  
 15 of interests between CDCR, as employer, and CCPOA, the exclusive collective bargaining  
 16 representative of the department's employees. Neither CDCR nor any other defendant is equipped  
 17 or motivated to assert CCPOA's interests in the MOU, and to ensure that its terms are correctly  
 18 and fairly implemented. *See CBS, supra*, 798 F. Supp. at 1023. Recent developments, such the  
 19 State Mandatory Testing Policy and CDPH Vaccination Order, also indicate that Defendants may  
 20 change their position in this matter and either strongly support the Receiver's recommendations or  
 21 implement a mandatory vaccination order on their own. As such, Defendants will more closely  
 22 align with Plaintiffs and be taking a position directly contrary to CCPOA's interest here. "The  
 23 most important factor in determining the adequacy of representation is how the interest compares  
 24 with the interests of existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).  
 25 A more stark need for CCPOA to intervene and provide representation for the membership's  
 26 indisputable interests could not be stated.

27           Given that a mandatory vaccination order stands to alter the contractual relationship  
 28 between CDCR and CCPOA in significant ways, CCPOA should be permitted full representation

1 as an affected party.

2 **B. Alternatively, CCPOA Seeks Leave for Permissive Intervention Under FRCP 24(b)**

3 Permissive intervention under FRCP 24(b) may be granted where: (1) the applicant's  
4 motion is timely; (2) the applicant's claim or defense, and the main action, have a question of law  
5 or a question of fact in common; and (3) the applicant has independent grounds for jurisdiction  
6 "Rule 24(b) plainly dispenses with any requirement that the intervenor shall have a direct personal  
7 or pecuniary interest in the subject of the litigation." *Kootenai Tribe of Idaho v. Veneman*, 313 F.  
8 3d 1094, 1108 (9th Cir. 2002) (quotation omitted); *see also N.W. Forest Res. Council v. Glickman*,  
9 82 F.3d 825, 839 (9th Cir. 1996).<sup>2</sup> A court has the discretion to grant permissive intervention to a  
10 movant meeting these factors. *See Kootenai Tribe*, 313 F.3d at 1108-10.

11 As demonstrated above, CCPOA's motion is timely, and it possesses legally protectable  
12 interests in its members' economic interests and legal rights in the MOU which is implicated by  
13 the Receiver's recommendations and any subsequent order by this Court. Plaintiffs claim that  
14 CDCR's current policies are failing to provide constitutionally adequate medical care for inmates  
15 that will protect them from COVID-19 and thus the Court should order mandatory vaccinations  
16 for prison staff. As intervenor, CCPOA intends to protect its members' interests by asserting that  
17 the Court does not have the authority to order such a mandate under federal law, including the  
18 Prison Litigation Reform Act, which provides the nexus between the federal issues in the main  
19 action and CCPOA's interests in seeking intervention.

20 The third prong regarding a jurisdictional requirement is not applicable in this matter  
21 because it is a federal question case and CCPOA brings no new state law claims. *See Freedom*  
22 *from Religion Foundation, Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) ("The jurisdictional  
23 requirement, therefore, prevents the enlargement of federal jurisdiction in such cases only where a  
24 proposed intervenor seeks to bring new state-law claims. ... We therefore clarify that the

25  
26  
27 <sup>2</sup> Under this standard, neither the inadequacy of representation, nor a direct interest in the subject  
28 matter of the action need be shown. *Kootenai Tribe*, *supra* 313 F.3d at 1108. In exercising its  
discretion, however, the court must also consider "whether the intervention will unduly delay or  
prejudice the adjudication of the original parties' rights." Fed. R. Civ. Pro. 24(b)(3).

1 independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-  
2 question cases when the proposed intervenor is not raising new claims.” (Citations omitted.))

3 **IV.**

4 **CONCLUSION**

5 Pursuant to FRCP 24(a)(2), CCPOA is entitled to intervene in this action and vigorously  
6 defend its interests and those of its members under the MOU which governs represented  
7 employees’ terms and conditions of employment. Alternatively, under FRCP 24(b) this Court may  
8 exercise its discretion to permit CCPOA’s intervention. Ample grounds exist for either avenue.  
9 For this reason and those discussed above, CCPOA respectfully requests that the Court permit it  
10 leave to intervene.

11  
12 Dated: August 30, 2021

MESSING ADAM & JASMINE LLP

13  
14 By

  
15 Gregg McLean Adam

16 Attorneys for [Proposed] Intervenor  
17 CALIFORNIA CORRECTIONAL PEACE  
18 OFFICERS’ ASSOCIATION  
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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

MARCIANO PLATA, *et al.*,

Plaintiffs,

v.

GAVIN NEWSOM, *et al.*,

Defendants,

CALIFORNIA CORRECTIONAL PEACE  
OFFICERS' ASSOCIATION,

[Proposed] Intervenor.

Case No. 4:01-cv-01351-JST

**DECLARATION OF GREGG McLEAN  
ADAM IN SUPPORT OF MOTION TO  
INTERVENE BY CALIFORNIA  
CORRECTIONAL PEACE OFFICERS'  
ASSOCIATION**

Date: October 14, 2021

Time: 2:00 p.m.

Crtrm.: 6 – 2nd Floor

The Honorable Jon S. Tigar

I, Gregg McLean Adam, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am a partner with  
Messing Adam & Jasmine LLP, attorneys of record for [Proposed] Intervenor California  
Correctional Peace Officers' Association ("CCPOA"). I have personal knowledge of the facts set


1 forth herein, and if called as a witness, I could and would testify competently thereto. I make this  
2 declaration in support of CCPOA's Motion to Intervene in the above referenced matter.

3 2. Attached hereto as Exhibit A is a true and correct copy of an email dated August 9,  
4 2021 from Paul B. Mello, counsel for defendants herein.

5 3. As legal counsel for CCPOA, I have attended the past several case management  
6 conferences in this matter. During those conferences the Court indicated its intention to consider  
7 issuing a mandatory vaccination order for employees of California Department of Corrections and  
8 Rehabilitation and California Correctional Health Care Services once Receiver J. Clark Kelso  
9 made his recommendations with respect to this issue and the parties to this matter were given the  
10 opportunity to brief their positions on this issue. During those same conferences, the Court  
11 recognized that efforts to intervene by CCPOA to address a potential mandatory vaccination order  
12 and related issues was likely, either by stipulation of the parties or a motion to intervene.

13 I declare under penalty of perjury under the laws of the United States of America that the  
14 foregoing is true and correct.

15 Executed on this 30th day of August, 2021, at Mill Valley, California.

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26  
27  
28  
Gregg McLean Adam

# **Exhibit A**



---

**From:** Paul B. Mello <Pmello@hansonbridgett.com>  
**Sent:** Monday, August 9, 2021 5:02 PM  
**To:** Matthew B. Taylor; Donald Specter; Steve Fama; Alison Hardy (ahardy@prisonlaw.com); Sophie Hart  
**Cc:** Samantha Wolff; Gregg Adam; Wendi J. Berkowitz; v\_Damon.McClain@doj.ca.gov; 'Iram Hasan'; 'Ryan Gille'; Ambra S. Jackson  
**Subject:** RE: [EXTERNAL] RE: Plata v. Newsom: CCPOA's Proposed Complaint In Intervention

**[EXTERNAL]**

Matt,

Defendants will stipulate that CCPOA meets the requirements for limited intervention in this matter. Defendants are not stipulating to or taking a position regarding any arguments CCPOA may take regarding the issues before the court.

I am copying Don so he sees our position.

Thanks.

Paul

---

**From:** Matthew B. Taylor <[Matthew@majlabor.com](mailto:Matthew@majlabor.com)>  
**Date:** Monday, Aug 09, 2021, 1:27 PM  
**To:** Paul B. Mello <[Pmello@hansonbridgett.com](mailto:Pmello@hansonbridgett.com)>  
**Cc:** Samantha Wolff <[SWolff@hansonbridgett.com](mailto:SWolff@hansonbridgett.com)>, Gregg Adam <[Gregg@majlabor.com](mailto:Gregg@majlabor.com)>, Wendi J. Berkowitz <[Wendi@majlabor.com](mailto:Wendi@majlabor.com)>  
**Subject:** [EXTERNAL] RE: Plata v. Newsom: CCPOA's Proposed Complaint In Intervention

Paul,  
Here is our proposed stipulation. A copy of this draft has also been forwarded to Plaintiffs' counsel. Please let us know if Defendants agree to so stipulate.

Thanks,  
Matthew

---

**From:** Matthew B. Taylor  
**Sent:** Friday, August 6, 2021 4:57 PM  
**To:** Paul B. Mello  
**Cc:** Samantha Wolff ; Gregg Adam ; Wendi J. Berkowitz  
**Subject:** Plata v. Newsom: CCPOA's Proposed Complaint In Intervention

Paul,  
As my colleague, Gregg Adam, discussed with you, attached is CCPOA's draft Complaint In Intervention in the above-referenced case. We remain hopeful that the parties will ultimately stipulate to CCPOA intervening in the case. However, in the event that the parties decline to so stipulate, by this email we request that you stipulate to an order shortening

time for a hearing on CCPOA's motion to intervene. If a motion to intervene is necessary, we propose filing our opening brief on Tuesday, August 10 (by 5 pm), any party opposing intervention file their opposition on Thursday, August 12 (by noon), and no reply, with a hearing before Judge Tigar on Friday, August 13.

Please advise by Monday whether you will agree to shorten time for hearing on a motion to intervene in the event you do not stipulate to intervention by CCPOA (we understand that you may not decide whether to stipulate to intervention until Monday). In the event you decline to stipulate to shorten time, please consider this email notice that pursuant to Northern District Local Rules 6-3 and 7-1, CCPOA will appear ex parte on Tuesday to request an order shortening time for hearing on motion to intervene. We will let you know on Monday the exact date and time for such appearance.

Thanks,

Matthew

**Matthew Taylor**

**MESSING ADAM & JASMINE LLP**



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OFFICERS' ASSOCIATION  
13

14 **UNITED STATES DISTRICT COURT**  
15 **NORTHERN DISTRICT OF CALIFORNIA**  
16

17 MARCIANO PLATA, *et al.*,

18 Plaintiffs,

19 v.

20 GAVIN NEWSOM, *et al.*,

21 Defendants,

22 CALIFORNIA CORRECTIONAL PEACE  
OFFICERS' ASSOCIATION,

23 [Proposed] Intervenor.  
24  
25  
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27  
28

Case No. 01-cv-01351-JST

**DECLARATION OF SUZANNE L.**  
**JIMENEZ IN SUPPORT OF MOTION TO**  
**INTERVENE BY CALIFORNIA**  
**CORRECTIONAL PEACE OFFICERS'**  
**ASSOCIATION**

Judge: The Honorable Jon S. Tigar

1 I, Suzanne L. Jimenez, declare as follows:

2 1. I am an attorney duly admitted to practice in all courts of the State of California. I  
3 have personal knowledge of the facts set forth herein, and if called as a witness, could and would  
4 competently testify thereto. I make this declaration in support of the Motion to Intervene filed by  
5 the California Correctional Peace Officers' Association ("CCPOA") in the above referenced case.

6 2. I have been employed with CCPOA since 1991. My current job classification at  
7 CCPOA is Managing Counsel.

8 3. From May 2015 until April 2020, I served as CCPOA's Chief of Labor. In that  
9 role, one of my duties was to act as the chief negotiator for the negotiation of the various  
10 Memoranda of Understanding entered into between the State of California and CCPOA ("MOU").  
11 I acted as chief negotiator for the 2015 – 2018 MOU, the 2019 – 2019 MOU and the 2019 – 2020  
12 MOU.

13 4. Prior to serving as chief negotiator, I participated as either a negotiations team  
14 member or negotiations team advisor during negotiations for the 1992 – 1995 MOU, the 1998  
15 MOU and the 1999 – 2001 MOU.

16 5. Based on my experience in negotiating on behalf of CCPOA, I have personal  
17 knowledge of the history, language and interpretation of the majority of all sections of the current  
18 MOU between the State of California and CCPOA.

19 6. I have reviewed Receiver J. Clark Kelso's Recommendation to the Court, dated  
20 August 6, 2021, regarding mandatory vaccines for all CDCR staff who enter CDCR institutions.

21 7. Based on my familiarity with the current MOU, if the Receiver's Recommendation  
22 is implemented as the order of the Court, I believe the following consequences are likely to result.  
23 The list below is by no means exhaustive but does represent likely consequences that may arise  
24 under several frequently-invoked MOU sections.

25 8. In evaluating the possible ramifications of the Receiver's Recommendation, I will  
26 state below where I make factual assumptions if I do not have relevant facts which may alter my  
27 conclusions.

28 //

**MOU Section 12.05, Voluntary Overtime by Seniority**

9. Section 12.05 sets up a voluntary bid process by seniority for overtime positions at each CDCR institution and governs the assignment of voluntary overtime. The Receiver's Recommendation does not directly state what will happen to custody employees who refuse to be vaccinated. For purposes of this analysis, I assume that these employees will be separated from state service in some manner, whether by termination, resignation or otherwise.<sup>1</sup>

10. Employees who voluntarily request overtime pursuant to section 12.05 perform a vital function at each CDCR institution because they reduce the amount of involuntary or forced overtime required of officers. Dozens of essential positions must be filled each day by overtime at each CDCR institution. If a significant number of employees separate from employment at a given CDCR institution for refusal of a vaccine mandate, the number of employees who "sign up" for voluntary overtime will necessarily decrease. This will cause an increase in management's use of forced overtime to fill essential positions, which is disfavored by employees who prefer to choose when and how (including, the choice of which assignment) they will spend extra time at their job working overtime.

11. Section 12.05 and the procedures for assigning voluntary overtime may also be impacted by the need for religious or medical accommodations for those employees who, under the Receiver's Recommendation, are exempt from vaccination. CCPOA is unaware of what form actual accommodations may take at the institutional level for employees receiving religious or medical accommodations; however, if these employees are limited in the number and/or types of posts they may work, accommodation could also effectively reduce the number of employees who are eligible to "sign up" for voluntary overtime each day.

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<sup>1</sup> CCPOA is unaware of whether CDCR or the other parties to this action have taken a position on how employees who refuse a vaccine mandate will be separated, i.e., whether separation will occur by termination from state employment through a Notice of Adverse Action pursuant to Government Code §19572, et seq., or whether non-compliant employees will be terminated for failure to meet a requirement for continued employment pursuant to Government Code §19585.

1 **MOU Section 12.06, Involuntary Overtime by Inverse Seniority**

2 12. If accommodated employees are limited to working only certain positions or in  
3 certain areas (i.e., not inside the prison population), the strict terms of MOU section 12.06 may be  
4 violated. With narrow exceptions, assigning involuntary overtime occurs by seniority.<sup>2</sup> As a  
5 general matter, under section 12.06, involuntary overtime is assigned by inverse seniority so that  
6 those staff with lower seniority work more involuntary overtime each month than those staff with  
7 higher seniority. As stated above, the more voluntary overtime worked, the less involuntarily  
8 overtime must be assigned.

9 13. As with voluntary overtime, each institution uses lists to make involuntary  
10 overtime assignments. Each month, as overtime shifts become open, if no employee volunteers to  
11 work the shift, then normally the least senior employee on the involuntary overtime list is ordered  
12 to work the open shift. The employees who are responsible for selecting other employees for  
13 involuntary overtime assignments then go to the next employee on the list in inverse seniority  
14 order and the process continues throughout the month. The primary impact of the Receiver's  
15 Recommendation on involuntary overtime assignments arises if many employees are separated.  
16 As with voluntary overtime, the list gets shorter if there are fewer employees to share the burden  
17 of involuntary overtime shifts, so each remaining employee is faced with the potential to work  
18 more involuntary overtime shifts as a result of the vaccine mandate.

19 14. As with section 12.05, if accommodated employees are precluded from working in  
20 certain posts or areas of institutions due to the terms of their accommodations, fewer employees  
21 will be eligible to work in each post that may need to be filled on an involuntary overtime basis,  
22 and as with the scenario above involving separated employees, fewer employees will be forced to  
23 work more involuntary overtime. Additionally, precluding accommodated employees from  
24

25 \_\_\_\_\_  
26 <sup>2</sup> MOU section 12.05A states in relevant part: "Each of the available overtime assignments that the  
27 employee *is qualified for* shall be offered to the most senior employee whose name appears on the  
28 voluntary overtime list, working through the voluntary overtime list until all overtime slots have  
been filled or the list is exhausted." (Emphasis added.) The history of the italicized language  
reveals that the parties intended to include any special required training for particular posts such as  
firearms qualification or specific drivers' licenses.

1 staffing particular involuntary posts will violate the express language of section 12.06, which  
 2 requires involuntary assignments be made strictly by seniority.

3 **MOU Section 12.07, Personnel Preferred Post-Assignment (PPA) for Correctional Officers**  
 4 **and MTAs**

5 15. MOU section 12.07 provides a complex system under which officers are permitted  
 6 to bid by seniority for seventy percent of most posts at CDCR institutions. This section is vitally  
 7 important to many employees in Bargaining Unit 6 insofar as it provides them with an opportunity  
 8 to pick, by seniority, preferred posts. Similar post and bid procedures are also found in MOU  
 9 sections 20.03 (Post and Bid by Seniority for Correctional Counselor), 22.04 (Post and Bid by  
 10 Seniority for Institutional Parole Agent IS (IPA)), 24.05 (YCC Voluntary Demotion), and 24.07  
 11 (Post-assignment (PPPA) for YCOS), and the information below is applicable to each of these  
 12 sections as well.

13 16. As discussed above, should many employees be granted medical and/or religious  
 14 accommodations limiting the posts and/or areas where they may work, to the extent these  
 15 employees have already successfully bid to a post under section 12.07, they may lose any bid  
 16 posts that are prohibited due to the mandate. Each circumstance in which an accommodated  
 17 employee is removed from a bid post would violate section 12.07.<sup>3</sup>

18 **MOU Section 9.09, Personnel Investigations**

19 17. MOU section 9.09 provides the procedural rights to be afforded to Unit 6 members  
 20 in scenarios where there is potential for employee discipline. Although CCPOA has not been  
 21 informed if CDCR will separate employees who refuse to take a vaccine through the disciplinary  
 22

23  
 24 <sup>3</sup> MOU section 12.07A.3.c.2 discusses Limited Term Light Duty Assignments ("LTLDA's"). The  
 25 intent of the parties in creating these posts as exemptions to the bid posts covered in MOU section  
 26 12.07 was to provide short term accommodations for employees needing reasonable  
 27 accommodation for limited time periods. CCPOA has not been informed and is not aware of  
 28 whether CDCR would intend to place persons accommodated under the Receiver's  
 Recommendation into these LTLDA's, as these posts were meant to be of very short duration. It is  
 unclear at this point how long employees with accommodations under the Receiver's  
 Recommendation would need to be accommodated. CCPOA assumes these accommodations  
 would have to last, at a minimum, for the duration of the declared COVID-19 emergency.



1 process, if it elects to follow that process, section 9.09 will be implicated. It is imperative that any  
 2 employee who is to be terminated for cause (i.e., refusal to take a vaccine) be given all of their  
 3 section 9.09 rights. The protections in section 9.09 have been hard-fought for CCPOA and are  
 4 consistent with the Public Safety Officers Procedural Bill of Rights Act (Gov't Code § 3300, et  
 5 seq.), and the Ralph C. Dills Act (Gov't Code § 3512, et seq.). If supervisors are empowered to  
 6 order individual employees to take the vaccine, and if those who refuse are to be subsequently  
 7 terminated for insubordination, it is vital that all protections in section 9.09 be followed so that  
 8 situations involving mistake or bad faith are avoided. Specifically, an employee should be  
 9 allowed during an interview, as provided for in section 9.09A, B and H to explain the  
 10 circumstances under which the order was given, whether an order was clear and actually given at  
 11 all, and whether the employee may have requested a medical or religious accommodation at the  
 12 time the order was given.

### 13 **MOU Sections Governing Leave Scheduling**

14 18. MOU sections addressing vacation scheduling will be impacted if any court order  
 15 results in staff separations as described above due to non-compliance with the mandate. *See, e.g.*  
 16 MOU section 10.01 (Vacation Leave), subsections G and I, 10.16 (Annual Leave – Enhanced  
 17 NDI), subsections A.7 and 8, 17.06 (Fire Captain Scheduling), subsection D, 17.11 (Fire Captain  
 18 Annual Leave Accrual Rate), 19.12 (Parole Agent Vacation Scheduling), 19.16 (PSA Vacation  
 19 Scheduling), 20.05 (Correctional Counselor Vacation Leave), and 24.08 (Youth Correctional  
 20 Counselor/Youth Correctional Officer Use of Leave Credits). Staff shortages created by large-  
 21 scale separations and/ accommodations as a result of a vaccine mandate such as that recommended  
 22 by the Receiver will inevitably result in the cancellation of pre-planned and approved vacations  
 23 under these MOU sections. Current CDCR institutional staff are already working under elevated  
 24 levels of job stress primarily due to problems that started before the pandemic and have  
 25 continued, including understaffing, excessive workloads, and the dangers inherent in guarding  
 26 residents. The cancellation of needed vacations due to staff shortages will only exacerbate this  
 27 existing job stress. CCPOA's primary focus is ensuring that the working conditions of its members  
 28 are legal, appropriate and satisfactory and the MOU is the vehicle for ensuring that goal. The



1 MOU provides for necessary breaks and interference with that process compromises the safety and  
 2 security of any given institution as well as the rights of Bargaining Unit 6 members.

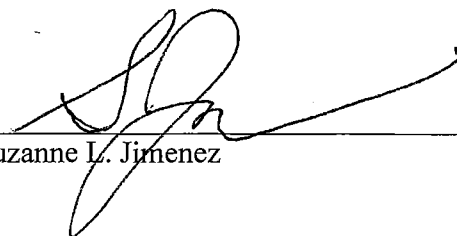
3 **MOU Sections Governing Equitable Division of Workload**

4 19. The current MOU contains multiple provisions which address the equitable  
 5 division of workload to Unit 6 staff, including sections 19.08 (Parole Agent workload), 20.02  
 6 (Correctional Counselor I workload), 22.03 (DJJ IPA and Caseload Specialist Workload, and  
 7 24.03 (Youth Correctional Counselor Workload). During a staff shortage created by large-scale  
 8 separations and/or accommodations limiting where staff may work, these provisions will be  
 9 challenging and, more likely, impossible to comply with, as CDCR management, when faced with  
 10 staff shortages, will be unable to keep workload manageable or fairly distributed among  
 11 employees. Increased stress on Unit 6 employees will be the result.

12 20. It is a certainty that there are still more MOU sections will be implicated and  
 13 infringed on if the Receiver's Recommendations becomes the order of the court. Although the full  
 14 impact cannot be ascertained at this time, it is reasonably foreseeable that the above-referenced  
 15 MOU sections and many others will be affected. In turn, MOU violations will require CCPOA to  
 16 file grievances that then may result in arbitrations. Hundreds of CCPOA staff hours and  
 17 thousands of dollars will be expended defending the properly negotiated MOU if the impacts that  
 18 are likely to result from the Receiver's Recommendation become a reality.

19 I declare under penalty of perjury under the laws of the State of California that the  
 20 foregoing is true and correct.

21 Executed on this 30th day of August, 2021, at Sacramento, California.

22  
 23  
 24   
 25 Suzanne L. Jimenez  
 26  
 27  
 28

