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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.

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

**SUBMISSION OF AMICUS CURIAE
CALIFORNIA CORRECTIONAL PEACE
OFFICERS' ASSOCIATION
REGARDING STAFF TESTING**

The Hon. Jon. S. Tigar

Amicus Curiae, the California Correctional Peace Officers Association ("the Union"),
offers a short statement of relevant issues relating to the Court's June 28, 2020 ORDER TO
SHOW CAUSE RE: BASELINE STAFF TESTING FOR COVID-19 ("June 28th Order").

Subject to the Order to Show Cause, the June 28th Order directs Defendants to:

1. Test all staff at San Quentin by July 2, 2020;
2. Test all staff at CCC and CCI by July 3, 2020; and
3. Test all staff at all remaining CDCR institutions, including California City, by July 6, 2020.

1 Staff, as well as inmates, are at the forefront of the impacts of COVID-19 on the state
 2 prison system. (<https://eji.org/news/covid-19s-impact-on-people-in-prison/>.) They expose
 3 themselves and their families to danger every time they go to work. The Court has recognized
 4 this—repeatedly—which the Union appreciates.

5 Anticipating the increasing spread of COVID-19, and beginning in early June, following
 6 case management conferences in both *Plata* and in *Coleman v. Newsom*, in which both courts had
 7 spent considerable time discussing staff testing, David Sanders, the Union’s General Counsel, and
 8 the undersigned, spoke separately with counsel for Plaintiffs and Defendants about staff testing.
 9 The Union encouraged both sides to engage the Union on staff testing early. The Union’s
 10 perspective is that while the Union’s state law collective bargaining rights are somewhat
 11 marginalized by a federal court proceeding and a worldwide pandemic, it is nonetheless important
 12 for representatives of the employees who are to be tested to be involved in the process of setting
 13 up testing protocols. The Union has articulated similar views at a case management conference.

14 Thus far, the Union has had no involvement in discussing how staff testing will be
 15 conducted. Health screening of employees is a mandatory subject of bargaining. (*Virginia Mason*
 16 *Hospital* (2011) 357 NLRB 564 [employer’s unilateral implementation of flu-prevention policy
 17 unlawful]; *Salinas Valley Memorial Healthcare System* (2012) PERB Dec. No. 2298 [Hospital’s
 18 refusal to meet and confer on safety and workload issues unlawful].) The Union’s memorandum
 19 of understanding with the State has multiple provisions addressing safety equipment, substance
 20 abuse testing and random testing, and even an Infectious Disease Control Plan. (See
 21 <https://www.calhr.ca.gov/labor-relations/Documents/ta-20200703-20220702-bu06.pdf> and
 22 sections §§ 7.05 - 7.06, 7.07, 9.12 - 9.13.)

23 Normally, under the Ralph C. Dills Act, Government Code section 3512 *et seq.*, the
 24 collective bargaining law governing state employee relations, if a matter is within the scope of
 25 bargaining, an employer is required to complete the meet and confer process before implementing
 26 any change in working conditions. Emergency exceptions allow the State to “implement first and
 27 negotiate later.”

28 On June 9, 2020, in an effort to expedite the process, the Union wrote to CDCR seeking to

1 negotiate—urgently—about the “the issue of staff testing and to develop best practices to ensure
 2 the safety of custody staff in this COVID-19 era.” (A true and correct copy of the letter is attached
 3 hereto as Exhibit “A.”) Some informal acknowledgements from CDCR followed; however, as of
 4 the time of filing, no meetings have occurred and none are scheduled.

5 To the best of the undersigned’s knowledge, the first the Union knew about CDCR’s
 6 “COVID-19 Staff Testing Guidance” was when we received the parties’ Joint Case Management
 7 Conference in this case on the afternoon of June 18, 2020.

8 As a threshold issue, and on behalf of the almost 30,000 correctional peace officers it
 9 represents, the Union has identified five components that would increase the efficiency and
 10 success of COVID-19 testing and protect employees and the incarcerated:

- 11 i) Testing at the facility where employees are employed;
- 12 ii) on duty;
- 13 iii) at no cost to the employees;
- 14 iv) a policy whereby if an employee tests positive or otherwise exhibits symptoms of
 15 illness, and the employee is sent home, the employee will be placed on paid
 16 administrative leave; and
- 17 v) safeguard employees’ personal and medical information and prevent its use beyond
 18 what is necessary to effectuate the Court’s Order.

19
 20 Dated: June 30, 2020

MESSING ADAM & JASMINE LLP

21
 22 By


 23 Gregg McLean Adam
 24 Attorneys for Amicus Curiae California
 25 Correctional Peace Officers’ Association
 26
 27
 28

Exhibit A



SACRAMENTO
SAN FRANCISCO

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June 9, 2020

VIA E-MAIL

Candace Murch
Chief of Labor
California Department of Corrections and
Rehabilitation
1515 K Street
Sacramento, CA 95815

**Re: URGENT: COVID-19 Testing of Correctional Officers, Sergeants and
Lieutenants—Request to Meet and Confer**

Dear Murch:

The undersigned are the Chief of Labor of the California Correctional Peace Officers' Association ("the Union") and its outside legal counsel, who represents the Union in its capacity as a friend of the court and an intervener in *Coleman, et al. v. Newsom, et al.*, Eastern District, No. 2:90-cv-00520 and *Plata, et al. v. Newsom, et al.*, Northern District, No. 4:01-cv-01351 (collectively referred to as "the federal litigation"). As the judges in these cases grapple with the impacts of COVID-19 on their oversight of medical and mental health care in our State prisons, the issue of staff testing is moving to the fore.

This matter is urgent. Infection rates among inmates and employees continue to rise, as CDCR is tracking daily. It is likely that COVID-19 will be in our prisons for some time. We must tackle its challenges collaboratively.

To that end, the Union requests to meet and confer to address the issue of staff testing and to develop best practices to ensure the safety of custody staff in this COVID-19 era. The State Bargaining Unit 6 memorandum of understanding has numerous clauses addressing safety equipment (§§ 7.05-7.06), substance abuse testing and random testing (§§ 9.12-9.13), and even an Infectious Disease Control Plan (§7.07). And while the latter is a good starting off point, COVID-19 presents unique issues, especially how easily it spreads and how infected people can be asymptomatic.

CDCR and the Union have already successfully collaborated on testing at a local level at the California Institute for Men, Avenal State Prison, and the California Men's Colony. We should memorialize those successes and be prepared to apply them in other institutions as the need arises, as it undoubtedly will.

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Candace Murch

Re: URGENT: COVID-19 Testing of Correctional Officers, Sergeants and Lieutenants—
Request to Meet and Confer

June 9, 2020

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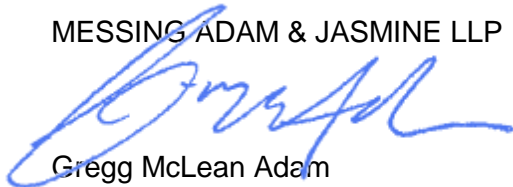
We understand that counsel for the plaintiffs (some of whom we have spoken with directly about this issue and who are copy recipients of this letter), counsel for the State (same), and the Receiver's Office (Martin Dodd, the Receiver's counsel is copied) have already begun discussions on staff testing. The Union is not seeking to interrupt that process; however, employee safety and testing are mandatory subjects of bargaining and efforts to create best practices will be aided, not hindered, by direct discussions with the representatives of the employees whose rights and bodies are at issue.

Whether the court and collective bargaining processes dovetail at some point or not, CDCR and its primary employee union should start addressing these crucial subjects as soon as possible.

Please contact the undersigned at your earliest opportunity to begin these discussions.

Very truly yours,

MESSING ADAM & JASMINE LLP



Gregg McLean Adam

CALIFORNIA CORRECTIONAL PEACE
OFFICERS' ASSOCIATION



Phillip Auzins
Chief Of Labor

GMA:jo

cc: Paul B. Mello, Esq., Hanson Bridgett LLP
Kyle A. Lewis, Office of the Attorney General
Donald Specter, Esq., Prison Law Office
Michael W. Bien Esq., Rosen Bien & Galvan LLP
Martin Dodd, Esq., Futterman Dupree Dodd Croley Maier LLP
David Sanders, General Counsel, CCPOA

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