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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.
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Case No. 01-cv-01351-JST

[PROPOSED] INTERVENOR
CALIFORNIA CORRECTIONAL PEACE
OFFICERS' ASSOCIATION'S REPLY TO
RESPONSES 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

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2
3 Like the Receiver’s Recommendation, the Plaintiffs’ Response to Order to Show Cause
4 Re: Receiver’s Recommendation on Mandatory Vaccination (“Plaintiffs’ Response to OSC”)
5 argues extensively that the Court should issue an order mandating the vaccination against COVID-
6 19 of all California Department of Corrections and Rehabilitation (“CDCR”) employees.
7 Although it goes unstated in both the Receiver’s Recommendation and the Plaintiffs’ Response to
8 OSC, refusal to comply with such an order would be on pain of termination.

9 Such an order would be unprecedented. The Receiver and Plaintiffs offer no precedent to
10 support the Court’s authority to issue the order they propose. And CCPOA finds no record of any
11 court ordering any employee to be vaccinated or be terminated—let alone a court subjecting tens
12 of thousands of state civil servants to this kind of compulsion.

13 Not only do the Receiver and the Plaintiffs ask the Court to make new law, but each also
14 ignores the plainest, most common sense solution for the Court, if the goal here is to protect the
15 health of the resident population: issuance of an order to vaccinate the remaining population of as-
16 yet unvaccinated residents.

17 The Union doubts neither the Receiver’s nor the Plaintiffs’ motives, only their proposed
18 means and rationale. COVID-19 has been a scourge not only in California’s prisons but
19 worldwide. However, the Plaintiffs’ arguments are heavy on facts, images, and emotions, and
20 light on law. It speaks volumes that of their 25-page brief, Plaintiffs devote only 15 lines to the
21 key question before the Court: even if it wanted to impose a vaccine mandate on CDCR
22 employees (which the Court’s comments over these past several months suggest it does) does the
23 Prison Litigation Reform Act (“PLRA”) allow it to?

24 As the Union noted in its Response to Order to Show Cause Re: Receiver’s
25 Recommendation on Mandatory Vaccination (“Union’s Response to OSC”), even in this case,
26 notwithstanding its exigencies, and perhaps more so because of them, the Court is still bound to
27 follow the law. Thus, while the procedural posture of this case, the PLRA, and the cases
28 interpreting it and the Eighth Amendment give the Court significant authority, the Court does not

1 sit in the role of a sovereign. It cannot legislate from the bench in the public interest. The Court
 2 may only act if it meets all of the requirements of the PLRA. First and foremost amongst these,
 3 the Court must establish conclusively that CDCR has acted with deliberate indifference. On this
 4 question, based on the State’s extensive efforts in response to COVID-19, both currently and
 5 throughout the course of the pandemic, the Union agrees with the State that the requisite showing
 6 of deliberate indifference simply cannot be shown.¹

7 Perhaps recognizing this, Plaintiffs present the novel argument—again asking this Court to
 8 paint beyond the lines and make new law—that deliberate indifference may be found by
 9 disregarding the State’s laudable efforts over the past 18 months and focusing on the sole issue of
 10 vaccination of staff, in a vacuum. Yet the law does not support Plaintiffs’ myopic focus—as even
 11 the cases they themselves rely on establish. Deliberate indifference is reviewed based on the
 12 totality of the circumstances, through all of the Defendants’ relevant actions.

13 Even if the indifference questions could be analyzed only through the vaccination issue
 14 (which it cannot), as Defendants ably demonstrate in their Response to Order to Show Cause
 15 Regarding Receiver’s Mandatory COVID-19 Vaccine Policy (“Defendants’ Response to OSC”),
 16 the State’s efforts have been commendable, not indifferent. Nearly every resident has been
 17 offered vaccination. That so many inmates have refused to be vaccinated does not create
 18 deliberate indifference on the part of Defendants. Nor does it justify forcing staff who have thus
 19 far declined to be vaccinated, to be forcibly vaccinated upon pain of being fired.

20 II.

21 ARGUMENT

22 A. The State Cannot Be Found Deliberately Indifferent Where Residents Themselves 23 Choose to Refuse Effective Medical Treatment That Would Protect Them From COVID-19

24 The glaring omission in Plaintiffs’ Response to OSC is the fact that approximately 22
 25 percent of residents have declined to receive the vaccine. *See* Population COVID-19 Tracking,
 26 CDCR Patients: CDCR Vaccination Tracker, <https://www.cdcr.ca.gov/covid19/population-status->
 27 _____

28 ¹ CCPOA is still reviewing the new federal regulations that were issued on September 9, 2021 for
 their potential application to Defendants.

1 [tracking](#) (lasted viewed September 8, 2021) (showing that approximately 78% of inmates have
2 received at least one dose of the vaccine). Plaintiffs gloss over this fact; Defendants rightly do
3 not. *See* Defendants’ Response to OSC at 5:1 – 7:10. A serious analysis of whether Defendants’
4 actions amount to deliberate indifference has to consider the fact that Defendants have offered
5 residents vaccines that are not yet available in many parts of the world, yet a large number of
6 residents have declined to take advantage of it. *See id.* at 5:16-27.

7 The Court’s charge here is to ensure that the State provides a constitutionally adequate
8 level of healthcare to residents. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) (“If government
9 fails to fulfill [its obligation to provide adequate medical care], the courts have a responsibility to
10 remedy the resulting Eighth Amendment violation.”). Defendants’ Response to OSC explains at
11 length the praiseworthy efforts CDCR has made during the past 18 months to tackle a pandemic
12 that is unprecedented in its scale and evolving nature and has challenged national, let alone state,
13 governments worldwide. (Defendants’ Response to OSC at 7:11 – 12:18.) The Union cited many
14 of those same efforts in its own response. (CCPOA Response to OSC at 7:6 – 11:19.)

15 Plaintiffs, understandably, want to focus the analysis exclusively on staff vaccination.
16 However, as one of Defendants’ declarants, James Watt, MD, MPH, the Chief of the Division of
17 Communicable Disease Control of the Center for Infectious Diseases at the California Department
18 of Public Health (and presumably, based on his position, one of the highest ranking infectious
19 disease doctors in the State), attests, “[t]he best way for patients in correctional settings to reduce
20 their risk of severe illness—regardless of location—would be to get vaccinated.” Watt Decl. at
21 para. 18; see also *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613, 1614, (2020)
22 [“federal courts owe significant deference to politically accountable officials with the
23 ‘background, competence, and expertise to assess public health’”]. Moreover, it is undisputed that
24 “nearly 99 percent of CDCR’s incarcerated population has been offered a COVID-19 vaccine at
25 least once.” (Decl. of Diana Toche, DDS filed in support of Defendants’ Response to OSC at 5:6-
26 11.)

27 If vaccination is the best way to fend off COVID-19, as the Receiver and Plaintiffs argue at
28 length, Defendants have offered nearly every resident the optimum in medical care. That

1 approximately 22 percent of residents have declined to get vaccinated does not make Defendants
 2 deliberately indifferent to residents' medical condition. There are plenty of cases where penal
 3 authorities have been found to have acted with deliberate indifference. However, in not one of
 4 them has the state (as here) offered the residents the best means to protect themselves, but the
 5 residents have declined.

6 **B. Plaintiffs Arguments About Which Defendants' COVID-19-Fighting Actions Are**
 7 **Relevant is Too Narrow**

8 Perhaps understanding their uphill task, on this record, to try to establish deliberate
 9 indifference by the State, Plaintiffs advance a novel theory. They argue that while Defendants
 10 may have acted reasonably in the extensive array of measures they have deployed to date to
 11 protect residents from COVID-19, all of that should be ignored, and the Court should singularly
 12 focus on whether the State's failure to force its entire prison workforce to get vaccinated shows
 13 deliberate indifference towards the health of the resident population. *See* Plaintiffs' Response to
 14 OSC at 14:11 – 15:18. However, the cases Plaintiffs cite do not support reviewing the vaccine
 15 issue in a vacuum; rather the cases support the view that deliberate indifference is assessed based
 16 on the totality of the circumstances.

17 **1. It is not just Defendants' actions concerning vaccines that are relevant**

18 Plaintiffs cite several cases to support their argument that only Defendants' "current
 19 attitudes and conduct" are relevant to the Court's analysis. These cases, claim Plaintiffs, support
 20 the view that Defendants' other, myriad and wide-ranging ongoing efforts to fight COVID-19 can
 21 be ignored, and the Court can analyze in isolation whether Defendants' failure to mandate
 22 vaccination of all CDCR employees in and of itself establishes deliberate indifference to residents'
 23 rights. Plaintiffs' Response to OSC at 14:18-22 citing *Plata v. Brown*, 427 F.Supp.3d 1211, 1225,
 24 n. 13 (N.D. Cal. 2013).

25 Unsurprisingly, the cases cited do not support the radical conclusion Plaintiffs advance:
 26 that is, because a new tool to combat COVID-19 (i.e., vaccines) exists, Defendants' extensive
 27 COVID-19 fighting efforts to date may be disregarded. Nor has the Union found any.

28 First, Plaintiffs inaccurately describe the Court's analysis in *Jones v. City & County of San*

1 *Francisco*, 976 F. Supp. 896, 908 (N.D. Cal. 1997), and thereby minimize the extent to which the
 2 defendants’ *cumulative* actions in that case contributed to their failure to protect inmates from an
 3 “unreasonable threat of injury or death by fire.” In a parenthetical describing *Jones, supra*,
 4 Plaintiffs state that “although [the *Jones*] defendants had undertaken measures to improve fire
 5 safety, they ‘continued to abdicate their constitutional responsibility’ by failing to implement **two**
 6 **other measures.**” (Emphasis added.) (Plaintiffs’ Response to OSC at 14:25-28.) This suggests
 7 that the “two other measures” that were not implemented were themselves the basis for the finding
 8 of a constitutional violation in *Jones*. Not so. In *Jones*, the fire hazards in the jail were rampant.
 9 Not only had defendants failed to address approximately 20 different unsafe fire hazards, but also
 10 they had failed to do so over a long period of time. *See Jones, supra*, 976 F. Supp. at 908. Hence,
 11 the constitutional violation was premised on the totality of the circumstances, not a single issue.

12 Next, Plaintiffs try to obfuscate with time, suggesting that it was as long as “sixteen
 13 months ago” since this Court found Defendants’ efforts to tackle COVID-19 reasonable.
 14 Plaintiffs’ Response to OSC at 14:15. Plaintiffs are at least a year off; for example, as recently as
 15 the April CMC, the Court lauded everyone’s efforts:

16 I think, frankly, everyone is doing everything they can, that they can
 17 think of on this issue. CCPOA is doing what it thinks will be
 18 effective with its members. CDCR is doing what it thinks will be
 19 effective with staff in terms of encouragement and education.
 20 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.

21 Transcript of 4/29/2021 CMC at 17:16-25.

22 Third, Plaintiffs fail to take into account a glaring difference between the facts here and
 23 those that transpired earlier in the case and led to the decision in *Plata v. Brown, supra*. In that
 24 situation, the State insisted on spending more time to “study” the problem before implementing
 25 additional measures to prevent the spread of *coccidioidomycosis*, commonly referred to as Valley
 26 Fever. However, as the Court noted, many years had already passed since the problem—and its
 27 solution—were first identified, and in the Court’s view, Defendants took too long to implement
 28 necessary measures. (*Id.* at 1227.) The situation with cocci is worlds apart from Defendants’

1 expeditious efforts in addressing COVID-19.

2 Finally, *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995), Plaintiffs' Response to
3 OSC at 15:3, is distinguishable. In finding deliberate indifference, that court found that
4 defendants "repeatedly and consistently" over a period of ten years rejected experts' findings
5 regarding the inadequacies of the prison's mental health care system. (*Id.* at 1319.) In *Coleman*,
6 as with Plaintiffs' other examples, a court found deliberate indifference based on the totality of
7 circumstances over a long period of time.

8 None of these cases supports the view that Defendants' prior reasonable actions can be
9 ignored solely because vaccination is now another potential tool in the fight against COVID-19.
10 And absent a carve-out from the analysis of the State's lengthy list of actions to resist spread in the
11 prisons of COVID-19 over the past 18 months, a finding of deliberate indifference is completely
12 unsupported and unwarranted.

13
14 **2. Were Defendants NOT providing residents with access to vaccines, Plaintiffs' claims would have more merit**

15 Were it true that Defendants were refusing to offer and provide vaccinations to residents,
16 or were unduly cumbersome in vaccine administration, Plaintiffs would have a far better argument
17 of deliberate indifference. But, of course, that is not the case. As Defendants have established,
18 they have offered 99% of residents the vaccine but approximately 22% have declined to avail
19 themselves of it. *See* Defendants' Response to OSC at 5:16-27.

20 Plaintiffs' case citations on deliberate indifference and/or Eighth Amendment violations
21 exclusively concern the State's obligation to provide a certain level of care for inmates and the
22 circumstances surrounding its failure to meet these obligations (i.e., inadequate provision of
23 services, products, or equipment). Common violations include insufficient levels of staffing, poor
24 screening of health problems, failure to provide medication, and delays in providing care.

25 In none of these cases, though, did the court analyze or rule upon steps State employees
26 were *personally* obligated to take to safeguard the health of inmates. In *Jones, supra*, for instance,
27 the defendants' deliberate indifference as to fire safety involved primarily failures to fix or update
28 equipment or construction.

1 **C. Plaintiffs Have Failed to Consider that a Vaccination Mandate Will Likely Have**
 2 **Significant Negative Impacts on the Safe, Effective Operation of the Prison System**
 3 **and On Residents**

4 Beyond the legal infirmities of their arguments, Plaintiffs completely ignore the practical
 5 implications of how a vaccination mandate would or could be implemented. Since at least May,
 6 the Union has urged the parties and the Receiver to engage in detailed planning on how, if a
 7 vaccination mandate became necessary (which CCPOA does not believe has occurred), and if one
 8 is legal (as described above, it is not), such a mandate would be implemented. (*See* ECF No. 3591
 9 [CCPOA’s Preliminary Submission Regarding Mandatory Vaccinations] at 11:7 – 14:10.)

10 In all of the briefing that accompanies and is filed in response to the Receiver’s
 11 Recommendation, it appears that no thought has been given to how a vaccination mandate will be
 12 implemented. Introducing a vaccination mandate on the scale contemplated by the Receiver’s
 13 Recommendation is an enormous task. Even the narrower vaccination mandate required under the
 14 CDPH Order is a massive undertaking.

15 In the Union’s view, at least the following four issues must be addressed as part of the
 16 deliberations over whether to implement a vaccine mandate:

17 • **Meet and Confer Obligations**

18 CCPOA previously raised the State’s obligation to meet and confer over the impacts of any
 19 vaccination mandate for staff. (*See* ECF No. 3591 at 11:11 – 12:6.) The Service Employees’
 20 International Union, Local 1000 raises the same issue in its amicus filing. (*See* ECF No. 3656
 21 [SEIU, Local 1000’s Motion for Leave to File Amicus Curiae Brief and Brief In Response to
 22 Order to Show Cause Re: Receiver’s Recommendation on Mandatory Vaccination Dated August
 23 9, 2021], at 3:24 – 6:16.) CCPOA is due to begin, on September 9 and 10, 2021, to meet and
 24 confer with CDCR regarding the CDPH Order. If the Court does, despite the arguments raised by
 25 the Union and Defendants, order any form of mandatory vaccination for staff, it should allow
 26 sufficient time for State employees’ collective bargaining rights to be exercised by their exclusive
 27 bargaining representatives.

28 • **Timelines**

Any deadline for vaccination should be driven by the ability of staff to obtain vaccinations,

1 to take the appropriate time between first and second shots, and to take sufficient time to recover
2 from any side effects—all without detriment to work and their wages. Currently, the
3 recommended time between first and second doses is two weeks for the Pfizer vaccine and four
4 weeks for the Moderna vaccine. Given that the vaccines are not fully effective until at least two
5 weeks after the second shot, a minimum period of six weeks should be contemplated before any
6 mandate takes effect—though the timing of events is certainly a subject appropriate for
7 bargaining.

8 • **Accommodation Requests**

9 Defendants are obligated by the Americans with Disabilities Act (*see* 42 U.S.C.
10 § 12112(b)(5)(A)), Title VII of the Civil Rights Act of 1964. (42 U.S.C. § 2000e), and the
11 California Fair Employment and Housing Act (Cal. Gov’t Code section 12900 *et seq.*) to consider
12 requests for medical and religious accommodations, respectively. Based on experiences in other
13 jurisdictions where mandatory vaccination orders are being implemented by local governments,
14 the State can expect a significant number of requests for accommodation. Employees should not
15 be displaced from their work assignments until accommodation requests have been determined,
16 including any appeals.

17 • **Consequences of employees declining to be vaccinated**

18 If lessons from other jurisdictions are replicated in CDCR, it is likely that a significant
19 number of employees will, at least initially, decline to be vaccinated. If that happens, the State
20 will have to decide how it will try to persuade said employees to comply with its directive or how
21 it will attempt to discipline those not in compliance.

22 If CDCR decides to remove those not in compliance once any deadline takes effect, it may
23 be required to remove a significant number of employees from the shifts. This will put
24 extraordinary pressures on staffing, where some prisons are already significantly understaffed.
25 *See* ECF No. 3658 [Proposed Brief of Amici Curiae Mental Health Professionals In Support of
26 Receiver’s Report Recommending Mandatory COVID-19 Vaccination Policy for the California
27 Department of Corrections and Rehabilitation] at 9:1-4 (explaining that “reductions in overall
28 staffing levels” “creates higher levels of stress among remaining staff, and can lead to more

1 tension inside of the institutions and an increase in dysfunctional behavior by mentally ill
2 incarcerated people.”). It will also cause extensive restrictions on residents, including those that
3 cause negative impacts on residents. The Union is aware of no staffing plan by CDCR that
4 contemplates significant numbers of staff on enforced leave.

5 As the Union previously noted, some employees will refuse to be vaccinated. Others will
6 wait until the last possible moment to be vaccinated. All of which begs the question of how the
7 prisons will be adequately staffed while this plays out. These are real practical consequences of a
8 mandate order that no one appears to have given any thought.

9
10 **D. Plaintiffs’ Argument That No Employee Exercising Their Right to a Religious
Exemption Should Be Permitted Inside Prisons May Be Constitutionally Suspect**

11 Plaintiffs’ argument that “workers who are unvaccinated due to religious beliefs should not
12 be allowed into the prisons” may be constitutionally suspect. Plaintiffs appear to be taking the
13 position that unvaccinated residents may remain in the prisons, but staff who seek to be
14 accommodated without being vaccinated due to their religious beliefs should not be permitted
15 inside the prisons. As such, it gives preferential treatment to unvaccinated residents over staff
16 exercising religious rights. In *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. at
17 1614, at least three justices questioned a state’s ability to apply more stringent COVID-19
18 restrictions to religious institutions than to other, non-religious entities. The same rationale may
19 well apply here.

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III.
CONCLUSION

For the reasons set forth above and in the Union’s Response to the Receiver’s Recommendation, the Court should not order mandatory vaccination of CDCR employees.

Dated: September 10, 2021

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