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15 Attorneys for Receiver
16 J. Clark Kelso

17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION
19

20 MARCIANO PLATA, et al.,

21 Plaintiffs,

22 vs.

23 GAVIN NEWSOM, et al.,

24 Defendants.
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27
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Case No. 4:01-cv-01351-JST

**UNOPPOSED ADMINISTRATIVE
MOTION FOR LEAVE TO FILE
SURREPLY TO DEFENDANTS' MOTION
TO STAY SEPTEMBER 27, 2021 ORDER
RE; MANDATORY VACCINATIONS
PENDING APPEAL (ECF NO. 3719).**

1 Defendants filed their Reply in support of their Motion to Stay on November 11, 2021.
2 ECF No. 3741. In support of their Reply, defendants introduced new factual evidence—a study
3 published in the periodical *Lancet* on October 28, 2021—and contended that this new evidence
4 undermined the Receiver’s Recommendation and the Court’s order. See ECF No. 3742-2; 3741 at
5 7. Relying on this evidence, Defendants for the first time dispute the efficacy of vaccination in
6 preventing transmission of COVID-19. The Receiver respectfully requests that, pursuant to Local
7 Rule 7-11, the Court grant the Receiver leave to file the attached Surreply, which is limited to
8 discussion of the *Lancet* study introduced for the first time in Defendants’ Reply Brief, as well as
9 the attached supporting Declaration of Dr. Joseph Bick. See, e.g., *Shenzhenshi Haitiecheng Sci. &*
10 *Tech. Co. v. Rearden LLC*, No. 15-CV-00797-JST, 2019 WL 1560449, at *2 (N.D. Cal. Apr. 10,
11 2019) (Tigar, J.) (granting motion to file sur-reply that responded to evidence introduced on
12 reply); *Spillard v. Lien*, No. 19-CV-01407-JST, 2020 WL 7696079, at *6 (N.D. Cal. Dec. 28,
13 2020) (Tigar, J.) (denying leave to file a surreply because “[t]here are no grounds for such leave,
14 i.e., the reply brief did not contain new evidence or argument”).

15 Counsel for Defendants, Plaintiffs, and Intervenor California Correctional Peace Officers
16 Association have all represented that they do not oppose this motion.

17
18 DATED: November 16, 2021

MUNGER, TOLLES & OLSON LLP

19
20 By: 

21 Brad D. Brian

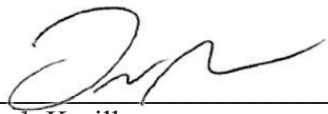
22 Attorneys for Receiver J. Clark Kelso
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Declaration of Jacob Kreilkamp

I declare, under penalty of perjury and pursuant to 28 U.S.C. § 1746, as follows:

1. I am an attorney admitted to practice in the State of California and before this Court. I am an attorney at the law firm of Munger, Tolles & Olson LLP and counsel of record for the Receiver, J. Clark Kelso, in the above-captioned matter. I have personal knowledge of the facts set forth in this declaration, and, if called as a witness, I could and would testify competently to the matters set forth herein.
2. Attached hereto as Exhibit A and Exhibit B is correspondence, split in two threads, between counsel for the parties in response to the Receiver's request for a stipulation to the filing of a surreply to address newly introduced evidence, the Lancet study. Defendants indicated that they did not believe a stipulation to additional briefing was procedurally proper but that they did would not object to the Receiver's motion to file a surreply limited to discussion of the Lancet study. The California Correctional Peace Officers Association and Plaintiffs similarly indicated they would not object to a request to file such a surreply.

Executed on this 16th day of November, 2021, at Los Angeles, California.



Jacob Kreilkamp

EXHIBIT A

Bowen, Robert

From: Meltzer, Jonathan
Sent: Monday, November 15, 2021 10:42 AM
To: Steven Fama; Gregg Adam; Samantha Wolff; Paul B. Mello; Iram Hasan; Alison Hardy; Rita Lomio; Sara Norman; Laura Bixby; Damon.McClain@doj.ca.gov; David C. Casarrubias; Don Specter
Cc: Forster, Katherine; Bowen, Robert; Kreilkamp, Jacob; Doyen, Michael; Brian, Brad; Jamie Dupree; Barrow, Roscoe@CDCR; Werner, Alex
Subject: RE: Limited sur-reply to stay motion in Plata

Thank you counsel, for your prompt replies.

Best,

Jonathan

From: Steven Fama <sfama@prisonlaw.com>
Sent: Monday, November 15, 2021 1:34 PM
To: Gregg Adam <Gregg@majlabor.com>; Samantha Wolff <SWolff@hansonbridgett.com>; Meltzer, Jonathan <Jonathan.Meltzer@mto.com>; Paul B. Mello <Pmello@hansonbridgett.com>; Iram Hasan <Iram.Hasan@doj.ca.gov>; Alison Hardy <ahardy@prisonlaw.com>; Rita Lomio <rlomio@prisonlaw.com>; Sara Norman <snorman@prisonlaw.com>; Laura Bixby <lbixby@prisonlaw.com>; Damon.McClain@doj.ca.gov; David C. Casarrubias <DCasarrubias@hansonbridgett.com>; Don Specter <dspecter@prisonlaw.com>
Cc: Forster, Katherine <Katherine.Forster@mto.com>; Bowen, Robert <Robert.Bowen@mto.com>; Kreilkamp, Jacob <Jacob.Kreilkamp@mto.com>; Doyen, Michael <Michael.Doyen@mto.com>; Brian, Brad <Brad.Brian@mto.com>; Jamie Dupree <JDupree@fddcm.com>; Barrow, Roscoe@CDCR <Roscoe.Barrow@cdcr.ca.gov>; Werner, Alex <Alex.Werner@mto.com>
Subject: RE: Limited sur-reply to stay motion in Plata

Plaintiffs, consistent with our earlier email, also do / will not object, if a Stipulation is not possible.

From: Gregg Adam <Gregg@majlabor.com>
Sent: Monday, November 15, 2021 10:31 AM
To: 'Samantha Wolff' <SWolff@hansonbridgett.com>; Meltzer, Jonathan <Jonathan.Meltzer@mto.com>; Paul B. Mello <Pmello@hansonbridgett.com>; Iram Hasan <Iram.Hasan@doj.ca.gov>; Alison Hardy <ahardy@prisonlaw.com>; Rita Lomio <rlomio@prisonlaw.com>; Sara Norman <snorman@prisonlaw.com>; Laura Bixby <lbixby@prisonlaw.com>; Steven Fama <sfama@prisonlaw.com>; v Damon.McClain@doj.ca.gov <Damon.McClain@doj.ca.gov>; David C. Casarrubias <DCasarrubias@hansonbridgett.com>; Don Specter <dspecter@prisonlaw.com>
Cc: Forster, Katherine <Katherine.Forster@mto.com>; Bowen, Robert <Robert.Bowen@mto.com>; Kreilkamp, Jacob <Jacob.Kreilkamp@mto.com>; Doyen, Michael <Michael.Doyen@mto.com>; Brian, Brad <Brad.Brian@mto.com>; Jamie Dupree <JDupree@FDDCM.com>; Barrow, Roscoe@CDCR <Roscoe.Barrow@cdcr.ca.gov>; Werner, Alex <Alex.Werner@mto.com>
Subject: RE: Limited sur-reply to stay motion in Plata

Nor will the Union.

From: Samantha Wolff <SWolff@hansonbridgett.com>
Sent: Monday, November 15, 2021 10:30 AM

To: Meltzer, Jonathan <Jonathan.Meltzer@mto.com>; Paul B. Mello <Pmello@hansonbridgett.com>; Iram Hasan <Iram.Hasan@doj.ca.gov>; Gregg Adam <Gregg@majlabor.com>; Alison Hardy <ahardy@prisonlaw.com>; Rita Lomio <rlomio@prisonlaw.com>; Sara Norman <snorman@prisonlaw.com>; Laura Bixby <lbixby@prisonlaw.com>; Steven Fama <sfama@prisonlaw.com>; v_Damon.McClain@doj.ca.gov <Damon.McClain@doj.ca.gov>; David C. Casarrubias <DCasarrubias@hansonbridgett.com>; Don Specter <dspecter@prisonlaw.com>

Cc: Forster, Katherine <Katherine.Forster@mto.com>; Bowen, Robert <Robert.Bowen@mto.com>; Kreilkamp, Jacob <Jacob.Kreilkamp@mto.com>; Doyen, Michael <Michael.Doyen@mto.com>; Brian, Brad <Brad.Brian@mto.com>; Jamie Dupree <JDupree@FDDCM.com>; Barrow, Roscoe@CDCR <Roscoe.Barrow@cdcr.ca.gov>; Werner, Alex <Alex.Werner@mto.com>

Subject: RE: Limited sur-reply to stay motion in Plata

[EXTERNAL]

Jonathan,

I do not believe that counsel are permitted to stipulate to additional briefing, however, Defendants will not object to the Receiver's request to file a short sur-reply limited solely to discussion of the Lancet study.

Sincerely,
Samantha

Samantha Wolff

Partner

Hanson Bridgett LLP
(415) 995-5020 Direct
(415) 995-3547 Fax
swolff@hansonbridgett.com



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The foregoing applies even if this notice is embedded in a message that is forwarded or attached.

From: Meltzer, Jonathan <Jonathan.Meltzer@mto.com>

Sent: Saturday, November 13, 2021 5:55 AM

To: Paul B. Mello <Pmello@hansonbridgett.com>; Iram Hasan <Iram.Hasan@doj.ca.gov>; Gregg Adam <Gregg@majlabor.com>; Alison Hardy <ahardy@prisonlaw.com>; Rita Lomio <rlomio@prisonlaw.com>; Sara Norman <snorman@prisonlaw.com>; Laura Bixby <lbixby@prisonlaw.com>; Steven Fama <sfama@prisonlaw.com>; v_Damon.McClain@doj.ca.gov <Damon.McClain@doj.ca.gov>; Samantha Wolff <SWolff@hansonbridgett.com>; David C. Casarrubias <DCasarrubias@hansonbridgett.com>; Don Specter <dspecter@prisonlaw.com>

Cc: Forster, Katherine <Katherine.Forster@mto.com>; Bowen, Robert <Robert.Bowen@mto.com>; Kreilkamp, Jacob <Jacob.Kreilkamp@mto.com>; Doyen, Michael <Michael.Doyen@mto.com>; Brian, Brad <Brad.Brian@mto.com>; Jamie Dupree <JDupree@FDDCM.com>; Barrow, Roscoe@CDCR <Roscoe.Barrow@cdcr.ca.gov>; Werner, Alex <Alex.Werner@mto.com>

Subject: [EXTERNAL] Limited sur-reply to stay motion in Plata

Caution: This email originated from outside of Hanson Bridgett. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Counsel,

In their reply brief, Defendants introduce new evidence for the first time in the form of a Lancet study. The Receiver understands that that study was not yet published at the time Defendants filed their motion for a stay, and does not dispute the propriety of introducing this new evidence in the reply brief. The Receiver intends to file an administrative motion for leave to file a short sur-reply to Defendants' motion limited to discussion of the Lancet study, comprising the sur-reply and any documents supporting the sur-reply. Please let us know by 12 pm on Monday whether you will stipulate to the filing of the sur-reply pursuant to Local Rule 7-11 and 7-12. If all parties stipulate to the filing of the sur-reply, we will circulate a proposed stipulation for your review and signature on Monday.

Best,

Jonathan

Jonathan S. Meltzer ([he/him/his](#)) | Munger, Tolles & Olson LLP
601 Massachusetts Ave., NW, Suite 500E | Washington, DC 20001
Tel: 202.220.1105 | Jonathan.Meltzer@mto.com | www.mto.com

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EXHIBIT B

Bowen, Robert

From: Steven Fama <sfama@prisonlaw.com>
Sent: Monday, November 15, 2021 9:40 AM
To: Meltzer, Jonathan; Paul B. Mello; Iram Hasan; Gregg Adam; Alison Hardy; Rita Lomio; Sara Norman; Laura Bixby; Damon McClain; Samantha Wolff; David C. Casarrubias; Don Specter
Cc: Forster, Katherine; Bowen, Robert; Kreilkamp, Jacob; Doyen, Michael; Brian, Brad; Jamie Dupree; Barrow, Roscoe@CDCR; Werner, Alex
Subject: RE: Limited sur-reply to stay motion in Plata

Good morning, Jonathan. Plaintiffs stipulate to the filing of a sur-reply by the Receiver.

Thanks,

Steve

From: Meltzer, Jonathan <Jonathan.Meltzer@mto.com>
Sent: Saturday, November 13, 2021 5:55 AM
To: Paul B. Mello <Pmello@hansonbridgett.com>; Iram Hasan <Iram.Hasan@doj.ca.gov>; Gregg Adam <Gregg@majlabor.com>; Alison Hardy <ahardy@prisonlaw.com>; Rita Lomio <rlomio@prisonlaw.com>; Sara Norman <snorman@prisonlaw.com>; Laura Bixby <lbixby@prisonlaw.com>; Steven Fama <sfama@prisonlaw.com>; Damon McClain <Damon.McClain@doj.ca.gov>; Samantha Wolff <SWolff@hansonbridgett.com>; David C. Casarrubias <DCasarrubias@hansonbridgett.com>; Don Specter <dspecter@prisonlaw.com>
Cc: Forster, Katherine <Katherine.Forster@mto.com>; Bowen, Robert <Robert.Bowen@mto.com>; Kreilkamp, Jacob <Jacob.Kreilkamp@mto.com>; Doyen, Michael <Michael.Doyen@mto.com>; Brian, Brad <Brad.Brian@mto.com>; Jamie Dupree <JDupree@FDDCM.com>; Barrow, Roscoe@CDCR <Roscoe.Barrow@cdcr.ca.gov>; Werner, Alex <Alex.Werner@mto.com>
Subject: Limited sur-reply to stay motion in Plata

Counsel,

In their reply brief, Defendants introduce new evidence for the first time in the form of a Lancet study. The Receiver understands that that study was not yet published at the time Defendants filed their motion for a stay, and does not dispute the propriety of introducing this new evidence in the reply brief. The Receiver intends to file an administrative motion for leave to file a short sur-reply to Defendants' motion limited to discussion of the Lancet study, comprising the sur-reply and any documents supporting the sur-reply. Please let us know by 12 pm on Monday whether you will stipulate to the filing of the sur-reply pursuant to Local Rule 7-11 and 7-12. If all parties stipulate to the filing of the sur-reply, we will circulate a proposed stipulation for your review and signature on Monday.

Best,

Jonathan

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

MARCIANO PLATA, et al.,

Plaintiffs,

vs.

GAVIN NEWSOM, et al.,

Defendants.

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

**[PROPOSED] ORDER GRANTING
ADMINISTRATIVE MOTION FOR
LEAVE TO FILE SURREPLY TO
DEFENDANTS' MOTION TO STAY
SEPTEMBER 27, 2021 ORDER RE;
MANDATORY VACCINATIONS
PENDING APPEAL**

The Receiver has filed an Administrative Motion seeking leave to file a surreply. The Court having reviewed the Motion and good cause appearing therefore, the Administrative Motion for Leave to File Surreply is GRANTED.

IT IS SO ORDERED.

DATED: _____

JON S. TIGAR
United States District Judge

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13 Los Angeles, California 90071-3426
14 Telephone: (213) 683-9100
Facsimile: (213) 687-3702

15 Attorneys for Receiver
16 J. Clark Kelso

17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION
19

20 MARCIANO PLATA, et al.,

21 Plaintiffs,

22 vs.

23 GAVIN NEWSOM, et al.,

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

**SURREPLY TO DEFENDANTS' MOTION
TO STAY SEPTEMBER 27, 2021 ORDER
RE; MANDATORY VACCINATIONS
PENDING APPEAL (ECF NO. 3719).**

1 The Receiver will address at oral argument the arguments set forth in defendants' Reply in
 2 Support of their Motion to Stay. But the Receiver feels compelled to respond in advance of the
 3 hearing to an argument raised by Defendants for the first time in their Reply Brief.

4 Defendants, for the first time, dispute the efficacy of vaccination in preventing
 5 transmission of COVID-19. In making this new argument, they rely on a single study. Strikingly,
 6 however, they ignore that study's *principal* conclusion. The Lancet study concludes in the first
 7 sentence of the "Interpretation" of its findings that "Vaccination reduces the risk of delta variant
 8 infection and accelerates viral clearance." ECF No. 3742-2 at 1. *See also* ECF No. 3742-2 at 11.
 9 This conclusion strongly supports the Receiver's recommendation because it indicates that if all or
 10 nearly all CDCR institutional staff were vaccinated against COVID-19, many fewer would
 11 become infected with, and potentially introduce, COVID-19 into CDCR institutions. *See* Bick
 12 Surreply Declaration ¶ 2.

13 Defendants nevertheless assert that the study refutes "the Receiver's theory that
 14 vaccinating all staff will prevent COVID-19 from entering CDCR's prisons" because it concludes
 15 that vaccinated individuals *who contract COVID-19* are just as likely to spread COVID-19 to
 16 household members as unvaccinated people who are COVID-positive. ECF No. 3741 at 7. This
 17 ignores that the study also concluded that vaccinated individuals are far less likely to contract
 18 COVID-19 in the first place, and therefore are far less likely to transmit it. The study actually
 19 demonstrates the importance of *all* persons in CDCR institutions being vaccinated against
 20 COVID-19: staff are less likely to introduce COVID-19 to institutions if they are vaccinated and,
 21 when there are breakthrough infections, incarcerated persons and staff in CDCR institutions are
 22 less likely to contract COVID-19 from those with breakthrough infections if they are also
 23 vaccinated.¹ Bick Surreply Declaration ¶ 2. And because staff remain the primary vectors into
 24

25 _____
 26 ¹ Incarcerated persons are already vaccinated at a high rate. 78% of incarcerated persons in CDCR
 27 custody are fully vaccinated and 80% of incarcerated persons have received one dose of a two-
 28 dose regimen. California Department of Corrections and Rehabilitation, Population COVID-19
 Tracking (last accessed 11/15/2021), <https://www.cdcr.ca.gov/covid19/population-status-tracking/>.
 And consistent with this Court's order, the Receiver has been reviewing ways to increase the
 vaccination rate of incarcerated persons.

1 CDCR institutions, so long as large numbers remain unvaccinated, it will greatly inhibit CDCR
2 and CCHCS’s ability to limit the introduction of COVID-19 into institutions, where it becomes
3 exceptionally difficult to contain.

4 Based on Defendants’ selective reading of the Lancet study, they argue that COVID-19
5 “will become endemic,” declare it “inevitabl[e]” that class members will be exposed to COVID-
6 19, and argue that the best response is vaccination of incarcerated persons to reduce disease
7 severity. ECF No. 3741 at 7. Defendants appear to present an argument against all efforts to
8 prevent the introduction and spread of COVID-19 in CDCR institutions, an argument that
9 Defendants evidently do not themselves believe, given that they continue to tout their efforts to
10 prevent the introduction and spread of COVID-19. *See* ECF No. 3715-1 at 10-12.

11 And with good reason. Defendants do not dispute that if COVID-19 became endemic and
12 all class members were inevitably exposed to COVID-19, even fully vaccinated Defendants would
13 be at substantial risk of serious harm. *See* ECF No. 3684 at 9, 11. Accordingly, they have not
14 explained why it is reasonable for them to fail to take a step that the Lancet study, like the medical
15 literature cited in the Receiver’s Report, undeniably supports: vaccinating staff, the primary vector
16 of COVID-19 into CDCR institutions, to limit the introduction and spread of the disease into those
17 institutions. *See* ECF No. 3684 at 12, 18.

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DATED: November 16, 2021

MUNGER, TOLLES & OLSON LLP

By: 

Brad D. Brian
Attorneys for Receiver J. Clark Kelso

Surreply Declaration of Dr. Joseph Bick

I declare, under penalty of perjury and pursuant to 28 U.S.C. § 1746, as follows:

1. I am Dr. Joseph Bick, Director, Healthcare Services at California Correctional Health Care Services (CCHCS). I oversee all healthcare services, including medical, nursing, quality management, mental health, and dental. In that capacity, I have also led healthcare’s response to COVID-19 since I assumed this role in July 2020.
2. Since my declaration of September 10, 2021, a study of the household transmission of the delta variant of COVID-19 in households has been published in Lancet. The study found that vaccination significantly reduces the likelihood of becoming infected with COVID-19. Because a person must be infected with COVID-19 in order to transmit it, the study provides further support for the conclusion that vaccination of all those who enter CDCR institutions without quarantining would significantly reduce the introduction of COVID-19 to institutions.

Executed on this 16th day of November, 2021, at Sacramento, California.

DocuSigned by:
Joseph Bick
347167202A8A404...

Joseph Bick, M.D.