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11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE EASTERN DISTRICT OF CALIFORNIA
 13 SACRAMENTO DIVISION

15 **RALPH COLEMAN, et al.,**

16 Plaintiffs,

17 v.

19 **GAVIN NEWSOM, et al.,**

20 Defendants.

2:90-cv-00520 KJM-DB (PC)

**REPLY TO PLAINTIFFS' RESPONSE
 TO DEFENDANTS' STRATEGIC
 COVID-19 MANAGEMENT PLAN**

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15
16
17
18
19
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21
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23
24
25
26
27
28

TABLE OF CONTENTS

	Page
Introduction	1
Discussion	2
I. Plaintiffs’ Objections to Defendants’ COVID-19 Plan Are Squarely in the Province of the Plata Court.	2
A. Plaintiffs Cannot Forum-Shop and Re-Litigate Issues They Raised and Lost in Plata.	2
B. Plaintiffs’ Objections Tread on the Plata Court’s Order and Violate Judicial Comity.	4
C. The Secretary of CDCR Does Not Have Unilateral Authority to Transfer Inmates, Specifically in Connection with CDCR’s COVID-19 Response.	5
II. Plaintiffs’ Objections to Defendants’ COVID-19 Plan Are Unfounded.	6
A. As Guidance, Public Health Guidance Does Not Create a Static List of Requirements Defendants Must Meet to Comply with the Constitution.	6
B. CDCR’s Plan Aligns with the Vast Majority of the CDC’s General Guidance.	8
C. Defendants Did Not Fail to Foresee and Plan for the Global Pandemic.	10
D. The Strategic Plan Targets All Inmates in All Housing Units, Including the Medically Vulnerable and Patients Housed in Dormitories.	12
E. CDCR’s COVID-19 Strategy Plan Is Comprehensive, as the Plata Court Found, and Is Consistent with or Exceeds Actions Taken by Other Correctional Systems Across the Country.	13
III. Plaintiffs’ Objections to COVID-19 Plan Are Procedurally Improper Because They Request Additional Relief Rather than Addressing the Court’s Order.	16
IV. CDCR’s COVID-19 Plan is Dynamic, As Demonstrated By Recent Actions Approved by the Plata Receiver to Achieve Greater Physical Distancing Among Small Groups of Inmates Through Transfers.	16
Conclusion	18

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation
402 U.S. 313 (1971).....3

Church of Scientology of Cal. v. U.S. Dep’t of Army
611 F.2d 738 (9th Cir. 1979).....4

Coleman v. Wilson
912 F.Supp. 1282 (1995)..... *passim*

Farmer v. Brennan
511 U.S. 825 (1994).....7

Feller v. Brock
802 F.2d 722 (4th Cir. 1986).....4

Hoptowit v. Ray
682 F.2d 1237 (9th Cir. 1982).....7

In re Palmer
207 F.3d 566 (9th Cir. 2000).....3

Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.
342 U.S. 180 (1952).....4

Mays v. Dart
No. 20 C 2134, 2020 WL 1812381 (N.D. Ill. Apr. 9, 2020).....8

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No. 20-cv-00756, 2020 WL 1890670 (D. Colo. Apr. 16, 2020).....8, 15

Ord v. United States
8 Fed. Appx. 852 (9th Cir. 2001).....4

Plata v. Newsom
N.D. Cal. No. 4:01-cv-01351-JST (April 17, 2020) *passim*

Rhodes v. Chapman
452 U.S. 337 (1981).....7

United States v. Weems
49 F.3d 528 (9th Cir. 1995).....3

TABLE OF AUTHORITIES

(continued)

	<u>Page</u>
<i>West Gulf Mar. Ass’n v. ILA Deep Sea Local 24</i> 751 F.2d 721 (5th Cir. 1985).....	4
CONSTITUTIONAL PROVISIONS	
United States Constitution Eighth Amendment	2, 7
COURT RULES	
Federal Rules of Civil Procedure Rule 7	16
OTHER AUTHORITIES	
<i>CDC’s Interim Guidance on Management of COVID-19 in Correctional and Detention Facilities</i> , available at https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf (last accessed Apr. 21, 2020)	7
Corrections, <i>FDC COVID-19 Action Items</i> , available at http://www.dc.state.fl.us/comm/covid-19.html#action (last visited Apr. 21, 2020)	15
<i>DOCCS COVID-19 Report, Preparedness and What DOCCS is Doing</i> , available at https://doccs.ny.gov/doccs-covid-19-report	15
ECF No. 3266 with <i>Coleman</i>	2
Federal Bureau of Prisons, <i>Bureau of Prisons COVID-19 Action Plan: Phase Six</i> , available at https://www.bop.gov/resources/news/pdfs/20200414_press_release_action_pla_n_6.pdf (last accessed Apr. 21, 2020)	13
Federal Bureau of Prisons, <i>COVID-19 Action Plan: Phase Five</i> , available at https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp (last accessed Apr. 21, 2020)	14
Guidance for Correctional & Detention Facilities, available at https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last accessed Apr. 22, 2020).....	11
<i>People Who Are at Higher Risk for Severe Illness</i> , available at: https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last accessed Apr. 22, 2020.)	12

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2
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4
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10
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12
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14
15
16
17
18
19
20
21
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23
24
25
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27
28

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
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Prisons, <i>About Our Facilities, By the Numbers</i> , available at https://www.bop.gov/about/facilities/ (last visited Apr. 21, 2020).....	13
Prisons, <i>BOP Implementing Modified Operations</i> , available at https://www.bop.gov/coronavirus/covid19_status.jsp (last accessed Apr. 21, 2020)	14

INTRODUCTION

1
2 Defendants, like the rest of the world’s leaders and public officials, are working around the
3 clock to keep people safe from an unprecedented and unpredictable pandemic that has no horizon.
4 Defendants have worked closely with the federal Receiver appointed under the *Plata* Court —
5 who oversees healthcare in the California Department of Corrections and Rehabilitation’s
6 (CDCR) 35 institutions—to prevent and slow the spread of COVID-19. CDCR has quickly
7 implemented extensive, thoughtful, and unprecedented measures in response to a rapidly-
8 fluctuating and novel pandemic, including nearly all of the Centers for Disease Control and
9 Prevention’s (CDC) recommended measures for correctional facilities, many of which were
10 implemented before the CDC’s recommendations were even released. On April 10, 2020, the
11 Court ordered Defendants to submit their COVID-19 strategic plan. (ECF No. 6600.)
12 Defendants met that mandate, filing a plan with nearly three hundred pages of supporting
13 materials demonstrating Defendants’ comprehensive, proactive, and ongoing efforts addressing
14 the emergency crisis.

15 After repeatedly attempting to impede and micromanage Defendants’ crisis response in
16 three separate federal courts, Plaintiffs now object to Defendants’ efforts. Plaintiffs devote
17 significant attention to the concept of social distancing guidance, allege that Defendants were not
18 diligent enough in preparing for COVID-19 within institutions, and take issue with a perceived
19 shortage of personal protective equipment, largely based on unsourced “anecdotal reports.” (ECF
20 No. 6626.) What Plaintiffs’ objections do *not* focus on, however, is telling—Plaintiffs make no
21 allegation that Defendants’ COVID-19 plan fails to address *Coleman* class members’ members’
22 interests or the provision of mental health care. Instead, Plaintiffs’ objections read more like a
23 motion for reconsideration of the recent order in *Plata v. Newsom*, N.D. Cal. No. 4:01-cv-01351-
24 JST (April 17, 2020), denying their emergency motion. But this is not the *Plata* court, and
25 Plaintiffs’ criticisms of CDCR’s strategic plan focus on broader health concerns impacting all
26 CDCR inmates with no focus on issues with specific relevance to the *Coleman* class or the
27 provision of mental health care. Plaintiffs failed to obtain a prison release order before the Three-
28 Judge Panel (ECF No. 6574) and failed to obtain an order requiring Defendants to develop a plan

1 to manage and prevent the further spread of COVID-19 in *Plata* (*Plata*, ECF No. 3291).
2 Plaintiffs are thus precluded from seeking the same relief in this forum to obtain a different and
3 conflicting result.

4 Plaintiffs' objections lack merit and the Court should reject them so that Defendants can
5 continue to act responsibly in real time to address the pandemic. First, contrary to Plaintiffs'
6 objections, Defendants' plan has a clear objective—the preservation of health and safety—and,
7 with the newly added dormitory transfer plan set forth in *Plata* on Monday, has a timeline for
8 effecting greater physical distancing. CDCR's response to the global pandemic has been thus far
9 reasonable and certainly does not violate the Eighth Amendment.

10 Second, while Plaintiffs appear to be laying the groundwork for yet another meritless
11 population reduction motion, Defendants have been diligently working with the federal Receiver
12 to ensure the safety of all inmates under their care, including *Coleman* class members, during this
13 unprecedented pandemic. As Defendants have noted on several occasions, the plans provided to
14 this Court are subject to review and amendment based on daily changing circumstances and new
15 information. Indeed, the plan submitted on Thursday has already been changed in several
16 important ways, as set forth below. Finally, as the *Plata* court found last week, Defendants have
17 not been deliberately indifferent to the emergent health crisis they now face. Plaintiffs cannot re-
18 litigate that claim here.

19 DISCUSSION

20 I. PLAINTIFFS' OBJECTIONS TO DEFENDANTS' COVID-19 PLAN ARE SQUARELY IN 21 THE PROVINCE OF THE *PLATA* COURT.

22 A. Plaintiffs Cannot Forum-Shop and Re-Litigate Issues They Raised and 23 Lost in *Plata*.

24 Plaintiffs' objections to Defendants' COVID-19 Strategic Plan amount to a rehashing of
25 their emergency motion in *Plata*, rather than relating to any issue specific to the *Coleman* class.
26 (*See Plata*, ECF No. 3266.) For example, Plaintiffs focus on the perceived inadequacy of
27 Defendants' social distancing measures, predict dire consequences for Defendants' plan of action,
28 and ask this Court to impose population reduction measures as the only "real" way to remedy the
alleged deficiencies with Defendants' plan. (*Compare Plata*, ECF No. 3266 with *Coleman* ECF

1 No. 6626.) But the *Plata* court denied Plaintiffs’ motion, describing in detail Defendants’
2 response to the COVID-19 crisis and finding specifically that the response was not
3 constitutionally deficient. (*See Plata* order, ECF No. 3291 at 14.) Because Plaintiffs have
4 already had a “full and fair opportunity” to litigate their claims regarding Defendants’ response to
5 COVID-19, the doctrine of issue preclusion bars them from re-litigating those claims before this
6 Court. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313,
7 329 (1971).

8 Issue preclusion requires that: “(1) the issue sought to be litigated is sufficiently similar to
9 the issue present in an earlier proceeding and sufficiently material in both actions to justify
10 invoking the doctrine; (2) the issue was actually litigated in the first case; and (3) the issue was
11 necessarily decided in the first case.” *United States v. Weems*, 49 F.3d 528, 532 (9th Cir.
12 1995). Moreover, the person against whom issue preclusion is being asserted must have been “a
13 party or in privity with a party in the previous action.” *In re Palmer*, 207 F.3d 566, 568 (9th Cir.
14 2000). Each of these elements is certainly present here; in *Plata* and before this Court, Plaintiffs
15 objected to Defendants’ plan to manage COVID-19 within CDCR institutions, and the *Plata* court
16 rejected those objections, stating explicitly that Defendants’ response to the crisis has been
17 reasonable. (*Plata*, ECF No. 3291.)

18 From a more pragmatic standpoint, Plaintiffs’ objections to the plan do not highlight any
19 perceived danger specific to the *Coleman* class or any concerns regarding the provision of mental
20 health care. In fact, the phrase “mental health” only appears four times in the Plaintiffs’ 16-page
21 brief, and three of those instances are quotes from the Court’s order or Defendants’ plan itself.
22 (ECF No. 6626 at 4, 8, 9.) Plaintiffs bring no new issue before this Court, nor could they—as
23 Defendants’ COVID-19 plan, which applies statewide to protect all inmates and staff, is already
24 being addressed in *Plata*. Plaintiffs have failed to identify any unique or specific relief
25 permissible in this case.
26
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1 **B. Plaintiffs’ Objections Tread on the *Plata* Court’s Order and Violate**
2 **Judicial Comity.**

3 The well-established doctrine of judicial comity permits one district to decline judgment on
4 an issue that is properly before another district. *See Kerotest Mfg. Co. v. C-O-Two Fire Equip.*
5 *Co.*, 342 U.S. 180, 184–86 (1952). The purpose of the doctrine is to avoid rulings that may
6 “trench upon the authority of sister courts.” *West Gulf Mar. Ass’n v. ILA Deep Sea Local 24*, 751
7 F.2d 721, 728 (5th Cir. 1985). The doctrine is also designed to avoid placing unnecessary burden
8 on the federal judiciary, and to avoid the confusion and embarrassment of conflicting judgments.
9 *Church of Scientology of Cal. v. U.S. Dep’t of Army*, 611 F.2d 738, 750 (9th Cir. 1979)
10 (*overruled on other grounds by Animal Legal Defense Fund v. U.S. Food & Drug Administration*,
11 836 F.3d 987 (9th Cir. 2016); *see Feller v. Brock*, 802 F.2d 722, 727 (4th Cir. 1986) (holding that
12 whenever possible, coordinator courts should avoid duplicating litigation or issuing conflicting
13 orders).

14 In *Ord v. United States*, the plaintiff asked the district court to declare another court’s order
15 void and to enjoin the Securities and Exchange Commission from enforcing it. The Ninth Circuit
16 found that the district court properly dismissed the plaintiff’s action based on “considerations of
17 comity and orderly administration of justice.” *Ord*, 8 Fed. Appx. 852, 854 (9th Cir. 2001) (citing
18 *Lapin v. Shulton, Inc.*, 333 F.2d 169, 172 (9th Cir. 1964)). The court found that “[w]hen a court
19 entertains an independent action for relief from the final order of another court, it interferes with
20 and usurps the power of the rendering court.” *Id.* (citing *Treadaway v. Acad. of Motion Picture*
21 *Arts & Sci.*, 783 F.2d 1418, 1422 (9th Cir. 1986)). Attempts to overturn another court’s order
22 should, in all but rare instances, yield to principles of judicial comity, fairness, and efficiency. *Id.*

23 Here, Judge Tigar has already ruled on Defendants’ actions to manage COVID-19 within
24 CDCR’s institutions, finding “without difficulty that Defendants’ response has been reasonable.”
25 (*Plata*, ECF No. 3291 at 14.) Plaintiffs all but invite this Court to overturn Judge Tigar’s order
26 finding Defendants’ COVID-19 plan reasonable and constitutional. Because this issue has
27 already been addressed in *Plata*, it would be more appropriate and efficient to continue any
28

1 further discussions of the general COVID-19 plan in the *Plata* court while addressing issues
2 specific to the provision of mental health in this case.

3 **C. The Secretary of CDCR Does Not Have Unilateral Authority to Transfer**
4 **Inmates, Specifically in Connection with CDCR’s COVID-19 Response.**

5 Plaintiffs request that “Coleman class members or high risk inmates” be “target[ed] . . . for
6 special movement or housing.” (ECF No. 6626 at 8.) This request is problematic for at least two
7 reasons. First, CDCR may only order general transfers of inmates in response to the COVID-19
8 pandemic in coordination with, and with the approval of, the Plata Receiver. (*Plata*, ECF No. 473
9 at 4.) Under the Plata order, the Receiver shall “exercise all powers vested by law in the
10 Secretary of CDCR as they relate to the administration, control, management, operation, and
11 financing of the California prison medical health care system.” (*Id.*) And although some
12 institutions’ medical delivery has been delegated back to CDCR, the Receiver retains control of
13 the administrative functions of CDCR’s medical services and sets statewide medical policy. All
14 matters concerning COVID-19-related inmate transfers and health care decisions fall under the
15 full purview and authority of the Receiver in the Plata action. Defendants are collaborating with
16 the Plata Receiver, Plaintiffs, and the Special Master to address issues related to all class
17 members, of which Coleman class members are a subset being addressed through Plata. Any
18 request made by this Court with respect to inmate movement or care requires approval by the
19 Plata Receiver. The jurisdiction lies in the Plata court addressing this global pandemic. Thus,
20 CDCR cannot enter into agreements regarding the provision of medical care to “high risk”
21 patients or regarding physical-distancing measures for medical purposes without the approval of
22 the Receiver. (Gipson Decl., ¶ 6.)

23 Plaintiffs request that “*Coleman* class members or high risk inmates” be “target[ed] . . . for
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1 financing of the California prison medical health care system.” (*Id.*) And although some
2 institutions’ medical delivery has been delegated back to CDCR, the Receiver retains control of
3 the administrative functions of CDCR’s medical services and sets statewide medical policy.
4 Thus, CDCR cannot enter into agreements regarding the provision of medical care to “high risk”
5 patients or regarding physical-distancing measures for medical purposes without the approval of
6 the Receiver. (Gipson Decl., ¶ 6.)

7 Second, the Receiver has explicitly stated that inmates with higher risk factors for COVID-
8 19 should *not* be housed together, as a single point of entry for the virus could result in an
9 outbreak among all of them, with dire consequences. (Gipson Decl., Ex. A at 2.) Transferring
10 elderly patients or those with medical risk factors to be housed together would essentially create a
11 series of nursing home-like facilities within CDCR—the very scenario that Plaintiffs claim to be
12 concerned about in their objections. Defendants acknowledge the greater risk of mortality and
13 morbidity from inmates with additional risk factors, but the best way to protect them from
14 COVID-19 is to adopt strategies that protect *all* inmates within CDCR, not to group them
15 together in such a manner that a single infection could spread to all of them. The Court should
16 reject Plaintiffs’ efforts to usurp the *Plata* Receiver’s well-established authority, particularly in
17 this time of crisis.

18 **II. PLAINTIFFS’ OBJECTIONS TO DEFENDANTS’ COVID-19 PLAN ARE UNFOUNDED.**

19 **A. As Guidance, Public Health Guidance Does Not Create a Static List of** 20 **Requirements Defendants Must Meet to Comply with the Constitution.**

21 Plaintiffs’ objections to CDCR’s comprehensive plan for responding to COVID-19 rely
22 heavily on a few cherry-picked citations to Centers for Disease Control and Prevention (CDC)
23 and California Department of Public Health’s (CDPH) guidance. But broad generic guidelines
24 from public agencies meant to set best practices for a wide range of other organizations with
25 varying characteristics are not the criteria that establish whether a plan is constitutionally
26 adequate.

27 As Defendants previously pointed out in their prior response to the Court’s April 6, 2020
28 order, there is “no one-approach-fits-all answer” in determining the constitutional minima in

1 responding to an emergency – let alone a global pandemic. The Eighth Amendment requires
2 Defendants take reasonable steps under the circumstances in responding to a serious risk of harm.
3 *Farmer v. Brennan*, 511 U.S. 825, 844 (1994). In this case, the Court has recognized that
4 Defendants’ actions must be considered in context in determining whether they meet the
5 constitutional minima, and requires balancing “common sense, and the clinical nature of the
6 problem,” with deference to prison administrators. *See Coleman v. Wilson*, 912 F.Supp. 1282,
7 1301 (1995). Expert-based standards are “helpful and relevant” to the Eighth Amendment
8 analysis, but they do not set fixed constitutional benchmarks. *See Rhodes v. Chapman*, 452 U.S.
9 337, 348 n.13 (1981); *see also Hoptowit v. Ray*, 682 F.2d 1237, 1253-54 (9th Cir. 1982)
10 (reversing injunction adopting American Medical Association standard because the district judge
11 “failed to take into account the approach taken by the State”).

12 The CDC itself recognizes that not all parts of its guidance will be possible or applicable to
13 all prisons across the country and are to be considered “guiding principles.” (*See, e.g., CDC’s*
14 *Interim Guidance on Management of COVID-19 in Correctional and Detention Facilities*,
15 available at [https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-](https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf)
16 [detention.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf) (last accessed Apr. 21, 2020).) Moreover, “[t]he guidance will not necessarily
17 address every possible custodial setting” and recommendations are not differentiated based on
18 “different facility types [] and sizes.” *Id.* Accordingly, prison officials are encouraged to tailor
19 their response based on “facilities’ physical space, staffing, population, operations, and other
20 resources and conditions.” *Id.* And, the CDC envisions its guidance will change and be updated
21 over time “as additional information becomes available.” *Id.*

22 Similarly, the courts have followed the CDC’s guidance and recognized that complete
23 compliance may not be possible, and deviations from certain parts of CDC’s guidance does not
24 render a prison’s response to the pandemic constitutionally deficient. As pointed out, the court in
25 *Plata* considered the constitutionality of Defendants actions under the same plan now before this
26 Court. There, plaintiffs acknowledged that Defendants’ plan was largely consistent with the CDC
27 and CDPH’s guidance, but, similar to here, claimed Defendants lacked a plan to facilitate
28 physical distancing. (*Plata*, ECF No. 3291 at 8.) The court disagreed, finding Defendants

1 implemented “several measures to promote increased physical distancing,” and while “the Court
2 might adopt additional distancing measures if it were solely responsible for prison health care,” it
3 could not “conclude Defendants’ actions are constitutionally deficient.” (*Id.*) In reaching its
4 conclusion, the court recognized that CDC’s guidance acknowledge that social distancing may
5 not be possible in all situations. (*Id.* at 9.) And other courts have also been hesitant to find prison
6 responses inadequate because they failed to meet the letter of CDC’s requirements in one way or
7 another. *See Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381, at *10 (N.D. Ill. Apr. 9, 2020)
8 (Sheriff’s ongoing efforts to modify arrangement to create greater separation between inmates
9 was not unreasonable even though it did not strictly adhere to CDCR guidance that recognized
10 social distancing may not be possible); *Nellson v. Barnhart*, No. 20-cv-00756, 2020 WL
11 1890670, at *6 (D. Colo. Apr. 16, 2020) (lack of social distancing in the law library and
12 communal restrooms did not establish deliberate indifference).

13 By focusing on whether CDCR’s plan aligns perfectly with every part of the CDC’s
14 guidance, the Plaintiffs risk losing the forest through the trees. The inquiry is whether CDCR’s
15 comprehensive plan is a reasonable response to COVID-19, not whether it perfectly aligns with a
16 few select generic guidelines.

17 **B. CDCR’s Plan Aligns with the Vast Majority of the CDC’s General**
18 **Guidance.**

19 Plaintiffs argue that the Strategic Plan fails to “identify: (1) their objectives for housing
20 *Coleman* class members who are not being granted early release from CDCR; (2) timelines for
21 those objectives; and (3) a specific plan for housing medically vulnerable members of the
22 *Coleman* class.” (ECF No. 6626 at 4.) But Plaintiffs mischaracterize the contents of the Strategic
23 Plan and the CDC Guidelines. CDCR’s plan, nearly 300 pages in length, provides both the
24 concrete steps and the dates those steps began, including the steps required to provide a safe
25 living environment (housing) for all inmates, including *Coleman* class members. (ECF No. 6616,
26 and 6616-1.) Specifically, the plan outlines a myriad of preventative measures to ensure safe
27 housing for all inmates including “population management measures, mandatory modified
28 programming, eliminating non-essential transfers, ... transferring inmates out of dormitory

1 settings...and taking steps to enhance social distancing in communal areas.” (ECF Nos. 6616 at
2 pp. 9-12.) Additionally, the plan addresses steps to ensure staff do not bring COVID-19 into the
3 institutions (ECF No. 6616 at 12), testing protocols to ensure prompt identification and quarantine
4 of sick or exposed inmates (ECF No. 6616 at 13-14), and the use of proper protective equipment
5 and hygiene protocols to prevent the spread of COVID-19 through inmate housing. (ECF No.
6 6616 at 14-15.) The plan also references the release of thousands of inmates, the suspension to
7 intake of another several thousand inmates, and the steps taken to manage yard and groups to
8 reduce the spread of COVID-19. (ECF No. 6616-1 at 9-10.)

9 CDCR’s plan is not equivocal. Prior to the submission of the plan, CDCR had initiated
10 transfers from dorms to increase physical distancing and reducing the population by releasing
11 inmates under the accelerated release plan. (*Id.* at 6, 9.) As a result of these efforts, the vast
12 majority of dorms in CDCR were able to accomplish appropriate physical distancing as
13 recommended by the Receiver as of April 19, 2020. (*Plata*, ECF No. 3294 at 10-12.)
14 Completion of these tasks were necessary to allow CDCR to assess what additional population
15 moves were needed to comply with the Receiver’s April 10, 2020 memorandum. Development
16 of CDCR’s April 20, 2020 dorm movement out of dorms began immediately following the
17 completion of the initial dorm movements discussed in Defendants’ plan (ECF No. 6616 at 11)
18 and following the completion of the early releases. (ECF No. 6616 at 9.) As a result of the
19 implementation of that plan, CDCR anticipates that all transfers necessary to accommodate
20 physical distancing as recommended by the federal Receiver will be complete by April 29, 2020.
21 (*See* COVID Compliance Transfer Schedule filed under seal at ECF No. 6631.)

22 Contrary to Plaintiffs’ argument, CDCR’s comprehensive plan contains policies,
23 procedures, and guidelines that are responsive to most of the CDC’s guidance. As CDCR’s plan
24 notes, “CDCR and CCHCS’s plans and policies have been made with guidance from public
25 health experts and with reference to the guidelines on the prevention of COVID-19 in correctional
26 settings issued by the CDC.” (ECF No. 6616 at 6.) And, it implemented plans that accounted for
27 what ultimately became CDC’s guidance before it issued the guidance on March 23, 2020. (*Id.*)
28

1 A fair reading of CDCR's plan and 28 attachments, including its table comparing its plan to
2 the general principles in the CDC's guidance, shows that its plan is responsive to almost all of
3 CDC's guidance. Plaintiffs' critiques are primarily aimed at two parts of the guidance: social
4 distancing and the provision of PPE supplies. Those critiques miss the point. They ignore the
5 overwhelming number of efforts CDCR undertakes in its plan to combat the spread of COVID-
6 19, including the ongoing measures taken to provide sufficient PPE and social distancing. CDCR
7 instituted additional cleaning procedures, made soap and hand sanitizer available, providing PPE
8 for those who require it, provided education on the use of PPE, and is providing cloth masks to all
9 inmates and staff. (ECF No. 6616 at 6,14-15; ECF No. 6616-1 at 43-44.) And, the *Plata* court
10 already determined that the steps CDCR has taken and will take to provide for social distancing
11 are constitutionally sufficient. (*Plata*, ECF No. 3291 at 8, 12)

12 It is important to note that, similar to CDCR's plan to protect all medically vulnerable
13 inmates, including those who have a mental illness, the CDC's guidance does not single out
14 inmates with mental illness as requiring special protection. The CDCR's guidance does not
15 include mental illness as one of the medically vulnerable categories. And its guidance does not
16 include specific recommendations on how mental health care should be provided to patients in
17 prison during the COVID-19 outbreak beyond stating that it should continue to the extent
18 possible. CDCR's comprehensive plan contains policies and strategies that are targeted to
19 treating mental illness in the inmate population throughout the COVID-19 pandemic, including
20 plans for providing care based on available resources, plans for providing care for different levels
21 of acuity, and plans for how and when inmates are transferred. Plaintiffs raised no objections
22 with those temporary policies.

23 **C. Defendants Did Not Fail to Foresee and Plan for the Global Pandemic.**

24 Plaintiffs claim that Defendants should have been aware of the risks posed by COVID-19
25 and started planning for its possible effects in CDCR's prisons in January 2020. The contention
26 fails. They seek to impute a duty on Defendants to foresee and respond to a global pandemic
27 before most other people in the United States did, including Plaintiffs' counsel. Indeed, the CDC,
28 which the Court and Plaintiffs have relied on to great extent did not issue its guidance until March

1 23, 2020. (United States Centers for Disease Control and Prevention, Coronavirus Disease 2019
2 (COVID-19), Guidance for Correctional & Detention Facilities, available at
3 [14 Plaintiffs' argument is a distraction from the purpose of the Court's order. Defendants'
15 filed their comprehensive plan on April 16, 2020. At a status conference the following day, the
16 Court granted Plaintiffs' request to file a response to the plan. \(ECF No. 6622 at 2.\)
17 Accordingly, the focus should be on the sufficiency of Defendants' fifteen-page long
18 comprehensive plan and twenty-eight attachments. \(*See generally*, ECF No. 6616.\) The Court
19 should not be distracted by Plaintiffs' attempt to litigate when Defendants might have guessed an
20 infected person might reach our shores and pose a threat to incarcerated people in California.](https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-
4 <u>correctional-detention.html</u> (last accessed Apr. 22, 2020).) Defendants were in constant contact
5 with Plaintiffs and the Special Master throughout January and February, and Defendants are not
6 aware of an attempt by either to find out whether CDCR was beginning to plan for the possibility
7 that COVID-19 might reach California and spread. Plaintiffs certainly do not point to any such
8 attempt. And Plaintiffs' counsel, who are counsel in Plata, Clark, and Armstrong, continued to
9 tour CDCR institutions in January, February and through much of March 2020, evidencing a lack
10 of concern over the potential spread of COVID-19. Nonetheless, despite the relatively unknown
11 nature of COVID-19's threat to CDCR in January 2020, CDCR did begin early assessments of the
12 potential impact of the virus and soon started discussions with healthcare officials about it.
13 (Gipson Decl. at ¶ 3.)</p></div><div data-bbox=)

21 In addition, Plaintiffs' argument that Defendants' did not file a comprehensive plan until a
22 month after CDPH issued guidance for health systems is disingenuous. Plaintiffs are fully aware
23 that Defendants were actively and aggressively implementing plans to respond to the COVID-19
24 pandemic during this time period. They were involved in numerous task force meetings with
25 Defendants and the Special Master and negotiated the minute details of Defendants' policies. (*See*
26 ECF No. 6616 at 7.) As Defendants have consistently represented to the Court, the fact that their
27 COVID-19 plans were not in one specific document does not mean that CDCR was not taking a
28 comprehensive approach in responding to COVID-19. Defendants were addressing each part of

1 this crisis long before they filed their comprehensive plan and anticipate that, much like the rest
2 of the world, their “plans to mitigate the spread of COVID-19 [will] continue to evolve as
3 additional scientific and medical information becomes available.” (*Id.*)¹

4 **D. The Strategic Plan Targets All Inmates in All Housing Units, Including the**
5 **Medically Vulnerable and Patients Housed in Dormitories.**

6 Plaintiffs’ conclusion that the outbreaks of COVID-19 at the California Institution for Men
7 (CIM) and CSP-Los Angeles County (LAC) are the result of poor planning is not based in reality
8 and not supported by the statistics cited. First, there is no evidence of a causal connection
9 between mental illness and COVID-19. Mental illness is not one of the risk factors identified by
10 the CDC. (United States Centers For Disease Control and Prevention, Coronavirus Disease 2019
11 (COVID-19), *People Who Are at Higher Risk for Severe Illness*, available at:

12 <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>

13 (last accessed Apr. 22, 2020.) Second, the statistics show that there were outbreaks limited to
14 discreet housing units that just happened to be limited, under mental health policies, to *Coleman*
15 class members. This is not indicative that CDCR did not have a plan to address social distancing
16 in those housing units. The COVID-19 outbreak at LAC is in an Enhanced Outpatient Program
17 (EOP) celled-housing unit housing *Coleman* class members.² (Facility D is a Level IV EOP
18 program, ECF No. 5779 at 31.) Over half of the *Coleman* class members who have tested
19 positive for COVID-19 are housed in EOP housing units at LAC. This is not an indication of an
20 overcrowded dorm or that CDCR has not done enough for *Coleman* class members. And, as the
21 *Plata* court noted, “that a large percentage of confirmed cases are in a single housing unit is

22 ¹ Plaintiffs attempt to analogize the entirety of CDCR to an acute care hospital in order to
23 argue that CDCR should have acted on guidance provided for hospitals. It is accurate that CDCR
24 does provide medical care at some of its facilities, but to claim that CDCR is tantamount to a
25 hospital is not credible. Indeed, the CDC clearly saw the need to issue distinct guidance to for
26 prisons and detention facilities rather than instructing them to follow existing guidance for health
27 care facilities. Moreover, contrary to Plaintiffs’ analogy, acute community hospitals could expect
28 to see a surge in patients coming from all over the surrounding communities, including potentially
from jails and prisons if the patients were too ill to be isolated and treated in-house. Prisons and
jails would not be expected to become general care facilities for a surge of disease in the
community.

² Enhanced Outpatient Programs are “characterized by a separate housing unit,” meaning
that EOP patients may only be housed with other EOP patients. (MHSDS Program Guide at 12-
4-1.)

1 actually some evidence that Defendants’ containment policies are having their intended effect.”
2 (*Plata* Order, ECF No. 3291 at 7-8.)

3 **E. CDCR’s COVID-19 Strategy Plan Is Comprehensive, as the Plata Court**
4 **Found, and Is Consistent with or Exceeds Actions Taken by Other**
5 **Correctional Systems Across the Country.**

6 As the Court requested, CDCR showed how its strategic plan comports with the CDC’s
7 guidance, noting the instances in which CDCR’s plan may deviate from that guidance. (Cite.)
8 CDCR and California have been leaders in their response to COVID-19, and Defendants’
9 comprehensive plan – provided to this Court and found to be constitutionally sufficient by the
10 *Plata* court – reflects that leadership in this ongoing time of crisis. No one currently sees a
11 “horizon” to this pandemic. Yet, this Court can credit the State’s leadership as it manages the
12 pandemic in real time consistent with or in ways that exceed steps taken by other correctional
13 departments, in addition to steps not taken elsewhere.

14 Notwithstanding Plaintiffs’ repeated attacks, CDCR is not on an island in its management
15 of this unexpected, unprecedented, and unpredictable disease. For example, the Federal Bureau
16 of Prison (BOP) – which has approximately 122 prisons and 143,803 inmates in the facilities it
17 operates – issued a plan to combat coronavirus. (United States Federal Bureau of Prisons, *About*
18 *Our Facilities*, available at https://www.bop.gov/about/facilities/federal_prisons.jsp (last visited
19 Apr. 21, 2020); United States Federal Bureau of Prisons, *About Our Facilities, By the Numbers*,
20 available at <https://www.bop.gov/about/facilities/> (last visited Apr. 21, 2020).) Like CDCR’s
21 plan, the BOP has taken a phased approach, initiating and adjusting the particular pieces of its
22 plans as needed. Presently, the BOP’s plan is in phase six. (U.S. Dept. of Justice, Federal Bureau
23 of Prisons, *Bureau of Prisons COVID-19 Action Plan: Phase Six*, available at
24 https://www.bop.gov/resources/news/pdfs/20200414_press_release_action_plan_6.pdf (last
25 accessed Apr. 21, 2020) (hereinafter Phase Six).) BOP’s modified operations and protective
26 measures include:

- 27 • suspended social visits, with a corresponding increase in inmate telephone system
28 minutes;

- 1 • a general suspension on inmate movement except in certain limited circumstance
- 2 subject to COVID-19 screening criteria, including, but not limited to medical or
- 3 mental health transfers, and, if necessary, to manage bedspace;
- 4 • suspension of legal visitation, with possible case-by-case exceptions;
- 5 • suspension of official staff travel except for relocation;
- 6 • suspension of staff training;
- 7 • mandatory health screening for all contractors performing essential maintenance on
- 8 essential systems, with all other contractor work suspended;
- 9 • suspension of volunteer visits, with some exceptions;
- 10 • enhanced health screening for staff;
- 11 • enhanced health screening and quarantine protocols for new inmates;
- 12 • tour suspensions, with limited exceptions; and
- 13 • modified operations to maximize social distancing “as much as practicable,”
- 14 including “consideration of staggered meal times and staggered recreation times.”

15 (U.S. Dept. of Justice, Federal Bureau of Prisons, *BOP Implementing Modified Operations*,

16 available at https://www.bop.gov/coronavirus/covid19_status.jsp (last accessed Apr. 21, 2020).)

17 In addition, BOP also implemented a plan to coordinate with the United States Marshals

18 Service to decrease incoming movement, and significantly decrease internal inmate movement

19 starting April 1, 2020. Specifically, BOP ordered inmates secured in their assigned cells or

20 quarters for fourteen days, during which time the inmates would be provided access to programs

21 and services such as mental health and education “to the extent practicable.” (U.S. Dept. of

22 Justice, Federal Bureau of Prisons, *COVID-19 Action Plan: Phase Five*, available at

23 https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp (last accessed

24 Apr. 21, 2020) (hereinafter Phase Five).) Phase Six extended all existing protective measures to

25 May 18, 2020. (*See* Phase Six.)

26 The plan CDCR has been developing and implementing for months with Plaintiffs, the

27 Special Master, and the *Plata* Receiver contains a version of all these actions, including specific

28 policies, procedures, and plans to address the mental health needs of class members.

1 Significantly, the BOP recognizes, as does CDCR, that it must “revise and update its action plan
2 in response to the fluid nature of the COVID-19 pandemic, and in response to the latest guidance
3 from experts” including the World Health Organization and CDC. (*See* Phase Five.) And, just as
4 the *Plata* court determined CDCR’s response was constitutional, the district court in *Nellson v.*
5 *Barnhart* determined it would not alter BOP’s plan as it was implemented at one of its prisons.
6 *See Nellson v. Barnhart et. al.*, No. 20-CV-00756, 2020 WL 1890670, at *6 (D. Colo. Apr. 16,
7 2020) (denying motion for preliminary injunction because Plaintiff failed to exhaust, defendants
8 provided the relief requested, and BOP and United States Prison Florence were not deliberately
9 indifferent because they took numerous steps to reduce the risk of transmission).

10 Correctional departments around the country are taking approaches that are similar to
11 Defendants – if not always identical or as comprehensive as Defendants. (*See* Florida
12 Department of Corrections, *FDC COVID-19 Action Items*, available at
13 <http://www.dc.state.fl.us/comm/covid-19.html#action> (last visited Apr. 21, 2020) (Florida
14 suspended visitation, implemented screening for all entrants, adjusted programming to comply
15 with social distancing, staggered meals, and suspended non-critical transfers, but unlike
16 California is still accepting new commitments); *see also* New York Department of Corrections
17 and Community Supervision, *DOCCS COVID-19 Report, Preparedness and What DOCCS is*
18 *Doing*, available at <https://doccs.ny.gov/doccs-covid-19-report> (last visited Apr. 21, 2020) (New
19 York created a COVID-19 task force, mandated staff masking, allowed inmates to use
20 handkerchiefs and masking isolated inmates, suspended intake from the counties, suspended
21 external transfers unless exigent, suspended visitation, displayed COVID-19 information on
22 posters, issued enhanced cleaning and disinfecting procedures, among other steps.) CDCR has
23 demonstrated its leadership in attacking the deadly COVID-19 virus, and it will continue to do so.
24 CDCR’s plan mirrors or exceeds actions taken by other correctional systems, which shows the
25 constitutional adequacy of the plan.

1 **III. PLAINTIFFS’ OBJECTIONS TO COVID-19 PLAN ARE PROCEDURALLY IMPROPER**
2 **BECAUSE THEY REQUEST ADDITIONAL RELIEF RATHER THAN ADDRESSING THE**
3 **COURT’S ORDER.**

4 Plaintiffs criticize CDCR’s COVID-19 Plan and request an order requiring “Defendants to
5 identify concrete, measurable benchmarks, with dates certain for completion, to ensure they are
6 prepared to address adequately the next institution-level and system-wide COVID-19 outbreaks
7 that will occur in their system.” (ECF No. 6626 at 15.) In addition to denying Plaintiffs’ request
8 on the merits, this Court should disregard Plaintiffs’ request because it is an improperly noticed
9 motion. Rule 7 of the Federal Rules of Civil Procedure provides that a request for a court order
10 must be made by written motion unless made during a hearing or a trial. Rule 7 also requires that
11 the motion state with particularity the grounds for seeking the order. Plaintiffs’ objections do not
12 meet the notice or substantive requirements of the Federal Rules of Civil Procedure and their
13 requested relief should be denied.

13 **IV. CDCR’S COVID-19 PLAN IS DYNAMIC, AS DEMONSTRATED BY RECENT ACTIONS**
14 **APPROVED BY THE PLATA RECEIVER TO ACHIEVE GREATER PHYSICAL**
15 **DISTANCING AMONG SMALL GROUPS OF INMATES THROUGH TRANSFERS.**

16 Defendants have repeatedly stated that CDCR’s COVID-19 strategic plan is not static and
17 will evolve in response to the global pandemic. CDCR’s position is consistent with the daily (if
18 not hourly) decisions government officials are making worldwide in response to the pandemic.
19 During an April 20 status conference in *Plata*, the State informed that court that the Receiver had
20 approved CDCR’s plan to transfer various groups of inmates out of dormitory settings into other
21 prison facilities’ spaces to achieve physical distancing among 8-person groups of inmates. The
22 plan creating physically separate groups of inmates comports with CDC guidance concerning
23 physical distancing among persons in analogous congregate group settings, and demonstrates the
24 rapid responsive actions that Defendants are taking to prevent the spread of COVID-19
25 throughout its facilities.

26 Working under the guidance of the Receiver and CCHCS, CDCR has consistently
27 promoted physical distancing among the inmate population. On March 20, 2020, CCHCS’s
28 Director of Health Care Operations, Dr. Steven Tharratt, and CDCR’s Director of the Division of
Adult Institutions, Connie Gipson, issued joint guidance to institutions among, other things,

1 directed implementation of social distancing as much as possible for all inmates and staff, with
2 particular emphasis for the most vulnerable patients, including those most at risk per clinical
3 judgment. (Gipson Decl. Supp. Defs.’ Reply, ¶ 5.) The guidance also recommended against
4 cohorting or housing vulnerable patients together because they are more susceptible to
5 contracting and rapidly spreading the disease to other high-risk patients and are at high risk for
6 developing serious complications or death related to the disease. (*Id.*) Indeed, any suggestion
7 that medically high-risk *Coleman* inmates should be housed together to protect them from
8 COVID-19 is incorrect and medically dangerous.

9 Furthermore, on April 10, 2020, the Receiver wrote a memorandum to CDCR Secretary
10 Ralph Diaz recommending the creation of 8-person pods within CDCR’s dormitory housing to
11 promote physical distancing among inmates. (Gipson Decl. ¶ 6.) The memorandum reiterated
12 that CDCR was not able to initiate any inmate movements between institutions to achieve
13 necessary social distancing without the approval of CCHCS officials. (*Id.*) This memorandum
14 and its supplement coincided with efforts by CDCR staff to assess efforts to achieve greater
15 inmate distancing with healthcare staff. (*Id.*) As CDCR staff gathered further information and
16 prepared plans consistent with the Receiver’s instruction, prisons were directed to begin
17 establishing 8-person pods or implement measures to promote six feet of distance between
18 inmates. (*Id.*)

19 Based on the need to move inmates in order to facilitate this process, CDCR staff also
20 developed an inmate transfer schedule. (Gipson Decl. ¶ 7.) Director Gipson submitted a transfer
21 plan, including identification of numbers of inmates to be moved from certain institutions and a
22 proposed movement schedule, to the Receiver and the Secretary on April 17. (*Id.*) This plan is
23 intended to create distancing for all inmates in the identified institutions, and does not
24 differentiate based on inmate medical or mental health factors. (*Id.*) The Receiver requested
25 additional information concerning the plan, and on April 20, Director Gipson submitted a revised
26 transfer plan to the Receiver and Secretary for approval, which was approved on the same day.
27 (*Id.*)
28

1 Defendants informed the *Plata* Court and *Plata* Plaintiffs of the plan in conjunction with
2 the status conference that day. Defendants' counsel in *Coleman* electronically delivered an
3 unredacted version the plan to *Coleman* Plaintiffs' counsel later on April 20.³ (See Decl. J. Yellin
4 Supp. Pls. Request to File Under Seal, ECF No. 6631-1 at 2, 5.) Given the sensitive information
5 in plan, Defendants' counsel provided it under the case's protective orders. (*Id.*) Under the
6 approved plan, inmates will begin moving to facilitate physical distancing of 8-person pods on
7 April 22, and will be completed by April 29. (Gipson Decl. ¶ 7.) As a result, approximately
8 1,300 inmates will be moved into 8-person pods to promote physical distancing. (*Id.*) This quick
9 action by CDCR, working in conjunction with the Receiver and CCHCS to protect the health and
10 safety of inmates from COVID-19, demonstrates that Defendants' multi-faceted plan is and
11 continues to be a reasoned and active response to the global pandemic. As Judge Tigar held,
12 CDCR's plan to prevent and manage the spread of COVID-19 in its institutions statewide, cannot
13 violation the constitution. (*Plata* ECF No. 3291 at 13-14.)

14 CONCLUSION

15 As determined by the *Plata* court, CDCR's response to COVID-19 has already been found
16 constitutionally adequate. Plaintiffs' objections raise no new issues or concerns related to this
17 case which justify disturbing any prior ruling regarding CDCR's plan. CDCR's plan reflects a
18 thoughtful, informed, response—in real time—to a rapidly evolving worldwide pandemic.
19 Defendants will continue to make any appropriate changes as circumstances change while
20 working towards their ultimate goal: to keep all inmates and staff safe throughout this pandemic.
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27 ³ This is contrary to Plaintiffs' assertions in their response to CDCR's COVID-19 plan
28 that Defendants had not provided them with the plan before the response was filed. (ECF No.
6626 at 8; ECF No. 6627 at 6-7.)

1 Dated: April 22, 2020

Respectfully Submitted,

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