

1 XAVIER BECERRA, State Bar No. 118517  
 Attorney General of California  
 2 MONICA N. ANDERSON, State Bar No. 182970  
 Senior Assistant Attorney General  
 3 ADRIANO HRVATIN, State Bar No. 220909  
 Supervising Deputy Attorney General  
 4 ELISE OWENS THORN, State Bar No. 145931  
 TYLER V. HEATH, State Bar No. 271478  
 5 KYLE A. LEWIS, State Bar No. 201041  
 LUCAS HENNES, State Bar No. 278361  
 6 Deputy Attorneys General  
 1300 I Street, Suite 125  
 7 P.O. Box 944255  
 Sacramento, CA 94244-2550  
 8 Telephone: (916) 210-7318  
 Fax: (916) 324-5205  
 9 E-mail: Elise.Thorn@doj.ca.gov  
*Attorneys for Defendants*

PAUL B. MELLO, State Bar No. 179755  
 LISA M. POOLEY, State Bar No. 168737  
 SAMANTHA D. WOLFF, State Bar No. 240280  
 LAUREL E. O'CONNOR, State Bar No. 305478  
 HANSON BRIDGETT LLP  
 1676 N. California Boulevard, Suite 620  
 Walnut Creek, CA 94596  
 Telephone: (925) 746-8460  
 Fax: (925) 746-8490  
 E-mail: PMello@hansonbridgett.com  
*Attorneys for Defendants*

ROMAN M. SILBERFELD, State Bar No. 62783  
 GLENN A. DANAS, State Bar No. 270317  
 ROBINS KAPLAN LLP  
 2049 Century Park East, Suite 3400  
 Los Angeles, CA 90067-3208  
 Telephone: (310) 552-0130  
 Fax: (310) 229-5800  
 E-mail: RSilberfeld@RobinsKaplan.com  
*Special Counsel for Defendants*

14 IN THE UNITED STATES DISTRICT COURT  
 15 FOR THE EASTERN DISTRICT OF CALIFORNIA  
 16 SACRAMENTO DIVISION

18 **RALPH COLEMAN, et al.,**

19 Plaintiffs,

20 v.

21 **GAVIN NEWSOM, et al.,**

22 Defendants.

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

**DEFENDANTS' REBUTTAL CLOSING  
 BRIEF FOLLOWING OCTOBER 23,  
 2020 EVIDENTIARY HEARING**

1 Plaintiffs' closing argument presents a scattershot approach to what the Court intended as a  
2 "focused" hearing regarding patient transfers from the California Department of Corrections and  
3 Rehabilitation (CDCR) to inpatient care at the Department of State Hospitals (DSH).  
4 Defendants' evidence shows that they took proactive and informed action to address the COVID-  
5 19 pandemic to protect the health and safety of mental health patients and staff at both agencies,  
6 in compliance with Program Guide requirements for transfers to DSH inpatient care. Any  
7 deviations from Program Guide timeframes resulted from screening and transfer guidelines  
8 developed through the Special Master's COVID-19 Task Force, are consistent with Program  
9 Guide exceptions and the Court's April 24, 2020 order, and are appropriate under Defendants'  
10 discretion to respond to a public health emergency. Plaintiffs' contention that Defendants'  
11 quarantine and testing protocols cause unnecessary delays in transfers to inpatient care is  
12 irresponsible and poses an unconscionable risk to patient safety. The Court should rule for  
13 Defendants.

## 14 ARGUMENT

### 15 I. DEFENDANTS ARE COMPLYING WITH THE PROGRAM GUIDE AS MODIFIED BY THE 16 COURT'S APRIL 24, 2020 ORDER.

17 Plaintiffs argue that "Defendants have imposed restrictions on patient transfers to DSH that  
18 contravene the Program Guide's requirements and extend far beyond the COVID-19 screening  
19 permitted by the April 24, 2020 order." (Pls.' Brief at 2.) The facts prove otherwise. The April  
20 24 order specifically allowed CDCR and DSH to screen patients referred to DSH for COVID-19  
21 to limit the virus's spread. Plaintiffs do not explain—and they cannot, given the record—how  
22 Defendants' screening process "extend[s] far beyond" the April 24 order, which simply specified  
23 that "no transfers to DSH inpatient mental health care are taking place without a COVID-19  
24 screening." (Order, ECF No. 6639 at 10.) With the Special Master and his experts' guidance and  
25 input and in Plaintiffs' clear view, Defendants created a system for screening patients for  
26 COVID-19 before transferring them to DSH. (10/23/20 Hrg. Tr. 98:1 – 99:4.) For months,  
27 Plaintiffs confirmed Defendants' compliance with the April 24 order. Plaintiffs now argue that  
28

1 the April 24 order only permitted Defendants to screen patients for COVID-19, but not to delay  
2 their transfer based on COVID-19 safety criteria that were long included in the screening system,  
3 including during times when Plaintiffs represented that Defendants were complying with the  
4 Court's April 24 order. (Pls.' Brief at 5.) Plaintiffs seek to rewrite this history, ignoring the  
5 undisputed danger presented by the coronavirus, and suggesting that Defendants were not able to  
6 take further actions that they deemed necessary to protect their patients. Plaintiffs' interpretation  
7 renders the Court's April 24 order incomprehensible and internally contradictory. According to  
8 Plaintiffs, the Court ordered a temporary exception to the Program Guide's transfer timelines to  
9 permit necessary COVID-19 screening, but did not permit screening necessary to identify and  
10 prevent transmission of COVID-19 if it results in deviations from the transfer timelines.<sup>1</sup>

11 Plaintiffs' argument that the COVID-19 pandemic does not fall within the unusual  
12 circumstances exception to transfer timelines is similarly specious. This pandemic was  
13 unforeseen, is stubborn in its persistence, and continues to impact the entire world in unusual and  
14 unpredictable ways (e.g., countries across the world are imposing new lockdown orders).  
15 Plaintiffs argue that, even though the pandemic has resulted in approximately hundreds of  
16 thousands of civilian deaths in this country and nearly one hundred inmate and staff deaths in  
17 CDCR, it is not an unusual occurrence because CDCR and DSH have been trying to manage the  
18 virus for seven months. But the Program Guide addendum setting forth applicable exceptions  
19 does not limit an unusual occurrence to events defined by their duration. Indeed, a worldwide  
20 pandemic, like earthquakes, flooding, and unusual occurrences that have widespread impacts on  
21 patient movement and programming, is precisely the type of event that was contemplated by the  
22 addendum. As Drs. Warburton, Mehta, and Bick all testified, the pandemic is constantly  
23 evolving, necessitating similar evolutions in policy to meet the unanticipated challenges posed by  
24 a disease that is still not fully understood (even after seven months). (10/23/20 Hrg. Tr. 44-46,  
25 117, and 162.) Indeed, at the time of this filing, there is not yet a proven vaccine.

26 <sup>1</sup> The COVID-19 screening and transfer guidelines are undeniably the product of the  
27 COVID-19 Task Force and its attendant small work groups. To the extent that any party is  
28 responsible for those supposed deviations—that are intended to foster patient safety, a primary  
concern among all—that responsibility must be shared among Defendants, Plaintiffs, the Special  
Master's team, and ultimately this Court.

1 **II. THERE IS NO EVIDENCE THAT ANY CLASS MEMBER WAS HARMED BECAUSE OF**  
 2 **DSH AND CDCR'S INPATIENT TRANSFER PROTOCOL, WHICH WAS DEVELOPED IN**  
 3 **CONSULTATION WITH THE SPECIAL MASTER AND HIS EXPERTS.**

4 Plaintiffs argue that Defendants' decisions to protect patients from COVID-19 harmed their  
 5 mental health, but failed to present supporting evidence at the October 23 trial. Rather, Plaintiffs'  
 6 mental health expert testified only in general terms regarding the alleged harms suffered by a  
 7 small subset of 55 patients while awaiting transfer. (*See, e.g.*, 10/23/20 Hrg. Tr. 258:5-19.) But  
 8 Plaintiffs do not refute that Defendants provided mental health care to inmates awaiting transfer,  
 9 or that 26 of the 55 inmates have since transferred to DSH. (*Id.* at 50:1-10.) Moreover, Plaintiffs  
 10 also cite to their infectious diseases expert's testimony regarding alleged harm suffered by  
 11 patients awaiting transfer. (ECF No. 6948 at 7.) But this expert is not a mental health expert or  
 12 knowledgeable about Program Guide requirements. (10/23/20 Hrg. Tr. at 214:16-17; 234:1-24.)  
 His testimony should carry no weight.

13 **III. DEFENDANTS OBJECT TO THE SUBMISSION OF DR. STEWART'S DECLARATION.**

14 To fix their failure to provide admissible evidence at trial, Plaintiffs submitted with their  
 15 closing argument a 32-page, 115-paragraph declaration from Dr. Pablo Stewart, purportedly  
 16 based on nearly 10,000 pages of medical records that had never been identified to Defendants.  
 17 (ECF No. 6948-1.) Before the trial, Defendants requested an offer of proof for Dr. Stewart's  
 18 opinions and copies of the medical records he reviewed to support his opinions. (ECF No. 6922-  
 19 1 at 5, 7.) Plaintiffs failed to identify and produce either Dr. Stewart's opinion or the patient  
 20 medical records that were provided to him to formulate that opinion and misrepresented that fact  
 21 to the Court at the hearing. (10/23/20 Hrg. Tr. at 13, 270:9 - 271:11; ECF No. 6922-1 at 5 and 7.)

22 Plaintiffs' after-the-fact proffer of substantial testimonial evidence fails to address  
 23 Defendants' objections—i.e., the right and opportunity to properly prepare for Dr. Stewart's  
 24 expert testimony and conduct a meaningful cross-examination of his opinions.<sup>2</sup> Plaintiffs'  
 25 strategy—simply entering the rejected expert testimony through a declaration during *closing*

26 <sup>2</sup> This Court acknowledged that right during the hearing by sustaining Defendants'  
 27 objections upon learning that Plaintiffs failed to provide the specific records underlying Dr.  
 28 Stewart's opinions. (10/23/20 Hrg. Tr. at 270:9 – 272:25.) Dr. Mehta's testimony that he  
 reviewed some of the 11 patients' records is not inconsistent with Plaintiffs' admission that they  
 failed to provide the specific patient records given to Dr. Stewart.

1 *briefing* three weeks after the hearing, without any request or authorization to do so—disregards  
2 the Court’s express ruling. The Court should reject Plaintiffs’ efforts to submit new evidence  
3 through an expert after this Court sustained objections to the expert’s testimony at trial.

4 **IV. PLAINTIFFS’ PROPOSED RELIEF EXPOSES THEIR CLIENTS TO A KNOWN BUT**  
5 **AVOIDABLE COVID-19 RISK.**

6 Plaintiffs want Defendants to revise their transfer policies with three additional  
7 requirements, which are outlined below. These proposed revisions risk the health and safety of  
8 not just *Coleman* class members, but also DSH’s entire staff and patient population. They also  
9 fail to satisfy the need-narrowness-intrusiveness requirements of the Prison Litigation Reform  
10 Act. This Court should reject them.

11 First, Plaintiffs propose that transfers of *Coleman* patients shall not be delayed or held  
12 based on screening for COVID-19. This proposal *directly* contradicts the Court’s April 24 order  
13 establishing an exception for such screening. (*See* ECF No. 6639 at 10.) Plaintiffs’ suggestion  
14 that testing occur within Program Guide timelines ignores the realities of COVID-19 testing;  
15 patients awaiting transfer can and have tested negative for the entire quarantine period of fourteen  
16 days before testing positive on the fourteenth day after exposure. (10/23/20 Hrg. Tr. at 62:10-17.)  
17 Requiring Defendants to transfer such patients despite inconclusive or incomplete testing greatly  
18 reduces the effectiveness of the entire screening process and exposes all DSH patients to  
19 heightened risk of infection. Plaintiffs appear willing to expose their clients to a known and  
20 preventable risk of COVID-19 transmission and harm, which is particularly egregious given the  
21 current spike in COVID-19 nationwide, including in California. Indeed, at the same time  
22 plaintiffs are asking DSH to lower its safety standards in order to admit *Coleman* patients more  
23 rapidly, it is being sued by other plaintiffs alleging that the pandemic makes DSH hospitals  
24 unsafe.<sup>3</sup> No intermediate-level mental health need outweighs the very real risk of death posed by  
25 COVID-19 infection, particularly when Defendants have established protocols to effectively and  
26 safely transfer *Coleman* patients.

27 \_\_\_\_\_  
28 <sup>3</sup> *See* <https://calmatters.org/health/coronavirus/2020/11/california-psych-hospitals-covid-inmates>, last retrieved Nov. 18, 2020.

1 Second, Plaintiffs propose that Defendants be precluded from taking a patients’ housing at a  
2 closed institution into account when attempting to safely transfer patients to DSH care. This  
3 proposal is dangerous and contradicts all public health guidance, including that of the federal  
4 Receiver in the *Plata* class action. Plaintiffs’ contention that “[t]he concept of a “closed”  
5 institution . . . is subject solely to Defendants’ discretion” is off base—an institution is closed to  
6 non-essential movement when doing so is necessary to contain the spread of COVID-19. The  
7 criteria for closing institutions is based on science and public health guidance (10/23/20 Hrg. Tr.  
8 115:5-18), and Defendants are working to refine this process to close only parts of institutions  
9 that are actively involved in a COVID-19 outbreak. (*Id.* at 170:17-24.) As Dr. Bick testified,  
10 “closing” an institution does not prevent all movement in and out of that institution—it simply  
11 adds a higher level of review. (*Id.* at 171:7-12.) This Court should not order Defendants to take  
12 actions that will necessarily *increase* the risk of infection and death to DSH’s patient population.

13 Third, Plaintiffs propose that COVID-19 positive patients be transferred to DSH. This  
14 proposal is irresponsible. Without any evidence that a class member’s mental health was harmed  
15 by Defendants’ screening and transfer protocols, Plaintiffs ask the Court to order dangerous and  
16 unnecessary transfers. Defendants have repeatedly demonstrated, including at trial, why they  
17 could not responsibly and ethically transfer COVID-19 positive patients to DSH’s care based  
18 solely on Program Guide timeframes. The Court should reject Plaintiffs’ cavalier approach to this  
19 insidious disease. Plaintiffs’ position demonstrates a fundamental failure to grasp the dangers  
20 posed by COVID-19 to patients housed in DSH’s congregate environment.

## 21 CONCLUSION

22 Defendants addressed the Court’s three questions concerning *Coleman* patients’ access to  
23 DSH inpatient beds and demonstrated that they are continually developing guidelines to keep  
24 patients safe amidst an ongoing pandemic. Plaintiffs’ proposed relief is irresponsible and will  
25 undermine the protection to patients and staff provided by these guidelines. The Court should  
26 reject Plaintiffs’ requests that unreasonably interfere with Defendants’ efforts to prevent the  
27 spread of COVID-19 among patients and staff.  
28

1 Dated: November 18, 2020

Respectfully Submitted,

2

XAVIER BECERRA  
Attorney General of California

3

*/s/ Elise Owens Thorn*

4

ELISE OWENS THORN  
Deputy Attorney General  
*Attorneys for Defendants*

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28