

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al.,
Plaintiffs,
v.
GAVIN NEWSOM, et al.,
Defendants.

Case No. 01-cv-01351-JST

**ORDER TO SHOW CAUSE RE:
RECEIVER’S RECOMMENDATION
ON MANDATORY VACCINATION**

Re: ECF No. 3638

The question of whether COVID-19 vaccinations should be mandatory for CDCR staff has been present in this case since at least February 2021. *See* ECF No. 3548 at 4-5. On August 4, 2021, the Receiver filed a report and recommendation concluding that:

based on the advice of medical and public health professionals, including Dr. Joseph Bick, Director of Healthcare Services, California Correctional Health Care Services (CCHCS), that given the rapid and ongoing spread of the Delta variant in California, *mandatory COVID-19 vaccination for institutional staff is necessary to provide adequate health protection for incarcerated persons*. Once COVID-19 infection has been introduced into a prison, it is virtually impossible to contain, and staff are indisputably a primary vector for introducing into the prison the infection now spreading rapidly in the larger community. Therefore, the only method to ensure adequate protection and care for incarcerated persons is vaccination of all persons who can bring infections into the prison. The Receiver also accepts the view of medical and public health professionals that such a policy protects the health of staff and the surrounding communities.

ECF No. 3638 at 5 (emphasis added). The Receiver recommends “that access by workers to CDCR institutions be limited to those workers who establish proof of vaccination (or have established a religious or medical exemption to vaccination),” and he further recommends “that incarcerated persons who desire to work outside of the institution (e.g., fire camps) or to have in-person visitation must be vaccinated (or establish a religious or medical exemption).” *Id.* at 2.

United States District Court
Northern District of California

1 He has also concluded that “[d]elaying a mandatory vaccination policy until the next wave is upon
2 us will not produce results until it is too late and the worst of the wave is over.” *Id.* at 26.

3 On August 5, 2021, the State Public Health Officer issued an order mandating full
4 COVID-19 vaccination for workers in certain health care facilities, including skilled nursing
5 facilities, dialysis centers, hospice facilities, and clinics and doctor offices. Cal. Dep’t of Pub.
6 Health (“CDPH”), *Order of the State Public Health Officer Health Care Worker Vaccine*
7 *Requirement* (Aug. 5, 2021), [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Health-Care-Worker-Vaccine-Requirement.aspx)
8 [19/Order-of-the-State-Public-Health-Officer-Health-Care-Worker-Vaccine-Requirement.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Health-Care-Worker-Vaccine-Requirement.aspx).

9 The order defines “worker” to include “all paid and unpaid individuals who work in indoor
10 settings where (1) care is provided to patients, or (2) patients have access for any purpose,” and to
11 specifically include “persons not directly involved in patient care, but who could be exposed to
12 infectious agents that can be transmitted in the health care setting,” including “security.” *Id.*

13 The State Public Health Officer explained that vaccination “is the most effective means of
14 preventing infection with the COVID-19 virus, and subsequent transmission and outbreaks”; that
15 “[r]ecent outbreaks in health care settings have frequently been traced to unvaccinated staff
16 members”; and that he was issuing the order “to reduce the chance of transmission to vulnerable
17 populations.” *Id.* He also characterized the settings in which vaccines were being mandated as
18 “particularly high-risk settings where COVID-19 outbreaks can have severe consequences for
19 vulnerable populations including hospitalization, severe illness, and death,” and explained that
20 “the settings in this order share several features. There is frequent exposure to staff and highly
21 vulnerable patients, including elderly, chronically ill, critically ill, medically fragile, and disabled
22 patients. In many of these settings, the patients are at high risk of severe COVID-19 disease due
23 to underlying health conditions, advanced age, or both.” *Id.*

24 These descriptors would appear to apply equally to CDCR prisons, all of which include
25 clinics, and some of which include other health care facilities specifically identified in the order.
26 Perhaps for that reason, the California Correctional Peace Officers’ Association (“CCPOA”) has
27 indicated that the order, “if legal, would appear to potentially preempt the Receiver’s
28 Recommendation.” ECF No. 3644 at 2. However, CDPH has so far taken the position that the

1 August 5 order does not apply to “State and Local Correctional Facilities” and has stated its intent
2 to issue “forthcoming guidance . . . that considers the unique circumstances of health care
3 integrated into a congregate setting.” CDPH, *FAQ – Health Care Worker Vaccine Requirement*
4 (Aug. 5, 2021), [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/FAQ-Health-
5 Care-Worker-Vaccine-Requirement.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/FAQ-Health-Care-Worker-Vaccine-Requirement.aspx). Thus, the Receiver’s recommendations are not moot.

6 Accordingly, the Court orders the parties to show cause as to why it should not order that
7 the Receiver’s recommendations be implemented.¹ The Court has reviewed the proposed briefing
8 schedules submitted by the parties, the Receiver, and CCPOA, ECF Nos. 3642-45, and now orders
9 as follows:

10 1. The parties shall file written responses to this order to show cause no later than
11 August 23, 2021. CCPOA may file a response by the same date, with or without seeking
12 intervention.

13 2. Any requests for intervention or permission to file amicus briefs shall be filed by
14 the same date. Requests for intervention shall be accompanied by the proposed complaint in
15 intervention as well as the proposed brief in response to this order to show cause. Proposed
16 intervenors shall indicate in their request for intervention whether the parties oppose or support
17 intervention. Requests to appear as amicus curiae shall be accompanied by the proposed brief in
18 response to this order to show cause.

19 3. The parties, CCPOA, and any intervenors whose requests to intervene have been
20 granted may file reply briefs no later than September 3, 2021. The Receiver may file a reply by
21 the same deadline. Unless otherwise ordered, amicus curiae and proposed intervenors whose
22 requests to intervene are denied may not file reply briefs.

23 4. In addition to making any legal arguments, the parties, CCPOA, and any proposed
24 intervenors must state their opinion on whether they agree or disagree with the public health
25 conclusions described in the Receiver’s report. If they disagree, they shall support their position
26 by declarations. They must also state their position, supported by argument or admissible

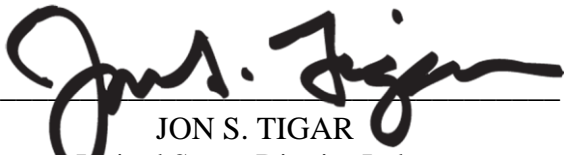
27 _____
28 ¹ Nothing in this order precludes the Receiver from implementing his recommendations without a
court order if he determines that it is appropriate to do so.

1 evidence as appropriate, on whether the rationale behind the State Public Health Officer Order of
2 August 5, 2021, applies to some or all of CDCR's employees.

3 5. The Court tentatively sets this matter for hearing on September 16, 2021, at
4 2:00 p.m. This date is subject to change if, for example, the Court concludes that an evidentiary
5 hearing is necessary to explore whether there is any public health basis for rejecting the Receiver's
6 recommendations, particularly in light of the State Public Health Officer's August 5, 2021 order.

7 **IT IS SO ORDERED.**

8 Dated: August 9, 2021

9 
10 _____
11 JON S. TIGAR
12 United States District Judge

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
United States District Court
Northern District of California