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

21 MARCIANO PLATA, et al.,

22 Plaintiffs,

23 v.

24 GAVIN NEWSOM, et al.,

25 Defendants.
26

CASE NO. 01-1351 JST

**JOINT CASE MANAGEMENT
CONFERENCE STATEMENT**

Judge: Hon. Jon S. Tigar

Date: December 16, 2021

Time: 2:00 p.m.

Crtrm.: 6, 2nd Floor

1 The parties submit the following joint statement in advance of the December 16,
2 2021 Case Management Conference.

3 **I. COVID-19 VACCINE**

4 **A. Patients**

5 *Plaintiffs' Position:* According to CCHCS Vaccine Registry data as of December
6 14, 80% of the approximately 100,000 incarcerated in CDCR are fully vaccinated.
7 Another 2% have received a first dose (although it is not clear how many of those intend to
8 receive a second dose). 17% have refused the vaccine, and 1% have not been offered it
9 (the vast majority of the latter are new arrivals).
10

11 We believe these vaccination rates could be higher if incentives were offered,
12 particularly at prisons and yards where vaccine acceptance is lower than the overall rate.
13 On November 29, we asked the Receiver and Defendants to design and implement a robust
14 incentive program to encourage vaccination; such programs were established for staff
15 starting eight months ago. Such incentives could include money, free phone calls, and
16 special food, among other things. On December 9, we were told, "CCHCS and CDCR
17 continue to evaluate the efficacy of vaccine incentives among the patient population and
18 consider viable options that would encourage vaccinations." We appreciate an evaluation
19 is ongoing, and believe the Receiver should set a date in the near future for reporting on
20 what has been determined, including whether a patient vaccine incentive program will be
21 recommended.¹
22
23
24

25 _____
26 ¹ Defendants imply below that we are inconsistent in asking for patient vaccine
27 incentive programs because in June and July we expressed doubts about the efficacy of further
28 incentive programs for staff vaccinations. Defendants overlook that we did not criticize
vaccination incentives offered to staff earlier this year, including (1) the establishment in

1 Separately, the prompt offering of booster vaccine to all eligible patients is
2 imperative. A booster for eligible CDCR patients is necessary not just because federal
3 guidelines call for it (see below), but because, as the Receiver testified earlier this year, if
4 COVID were designing its ideal home it would build a prison (*see* ECF No. 3548 at 7:10-
5 12), and because there is currently no vaccine mandate in effect for all CDCR prison staff,
6 who are the primary vectors of COVID outbreaks in the prisons.

7 As previously reported (*see* ECF No. 3717 at 2:9-20), CCHCS had previously
8 offered vaccine boosters to the immunocompromised and patients fully vaccinated more
9 than six months ago with Pfizer, consistent with then-existing federal recommendations.
10 Current federal recommendations call for boosters for all who are six months beyond their
11 primary vaccination with Pfizer or Moderna, or two months beyond primary vaccination
12 with J&J's Janssen.

13 CCHCS now offers a booster to all such patients, and on November 29 stated
14 "efforts are underway to offer all eligible patients a COVID-19 booster by the end of the
15 year." On December 7, CCHCS elaborated that it was "currently utilizing all available
16 resources to offer boosters to eligible patients by the end of the year without compromising
17 other health care services or clinic resources, including the authorization of overtime,
18 hiring of registry staff, and engaging in patient discussions regarding boosters during
19 routine medical appointments."

20 According to December 14 CCHCS Vaccine Registry data, approximately 70,000
21 patients were as of that date eligible for a booster; 73% of those had received one, 18% had
22 refused, and 10% had not yet been offered it. We appreciate the efforts of the Receiver,
23 CCHCS, and prison staff to offer and provide vaccine, including boosters, to patients.

24 *Defendants' Position:* CCHCS began offering the Pfizer booster to eligible patients

25 _____
26 April of a program, retroactive to January 1, providing for 80 hours of full-pay
27 supplemental sick leave for those who got vaccinated (*see* ECF No. 3579 at 7:28 – 8:8),
28 and (2) the program instituted in May that provided vaccinated staff with gifts cards and
the possibility of other prizes through a kind of lottery. In contrast, no vaccine incentives
have been provided for patients.

1 shortly after the United States Food and Drug Administration (FDA) amended its grant of
 2 emergency use authorization. A statewide meeting was held on September 30, 2021 to
 3 provide direction to institutions and ensure all eligible patients were given access to the
 4 Pfizer booster, and a memorandum was released on October 1. Similarly, CCHCS began
 5 offering Janssen and Moderna boosters to patients the third week of October 2021, not
 6 long after the FDA released its emergency use authorization for those vaccines. CCHCS
 7 does not anticipate (and has not experienced) any barriers to procuring adequate supplies
 8 of the vaccine boosters. Additionally, CCHCS has indicated that it is presently using all
 9 available resources to offer booster doses to eligible patients by the end of the year,
 10 including through the use of overtime, hiring of registry staff, and encouraging the
 11 acceptance of boosters during routine medical appointments.

12 On November 29, 2021, Plaintiffs' counsel emailed CCHCS and advised that they
 13 believe the vaccination rate among the incarcerated population would be higher if they
 14 "were provided meaningful incentives to get vaccinated." Plaintiffs' counsel asked that
 15 CCHCS "promptly design and implement a robust incentive program that includes special
 16 meals or food, money, canteen resources, tablet credits, video calls, and any other
 17 meaningful resource to encourage [incarcerated] people to get vaccinated."² Defendants
 18 will consider these incentive ideas and continue to do all that they can to encourage
 19 vaccine acceptance by incarcerated persons.

20 **B. Staff**

21 *Plaintiffs' Position:* Mandating vaccination for staff, the primary vector of COVID
 22

23 ² Notably, Plaintiffs have previously doubted the efficacy of incentive programs in the
 24 context of staff vaccination. *See, e.g.*, ECF No. 3605 (June 25, 2021 Joint Case
 25 Management Conference Statement) at 5:5-7 ("Further incentive programs will not
 26 substantially increase staff vaccination rates, based on recent experience and studies of
 27 vaccine incentives in similar contexts."); *see also* ECF No. 3623 (July 27, 2021 Joint Case
 28 Management Conference Statement) at 5:6-8 (*id.*). Indeed, Plaintiffs advised both the
 Receiver and this Court that "[t]he low efficacy of incentives to date is not unexpected.
 Medical researchers believe that '[i]ncentives alone are unlikely to deliver the population
 immunity that will end the pandemic.'" ECF No. 3605-1 at 5.

1 infections in the prisons, is necessary to reduce the substantial risk of harm the virus poses
2 to incarcerated people. Unfortunately, on November 26, the Ninth Circuit Court of
3 Appeals granted Defendants' request for a stay of this Court's September 27 and October
4 27 orders requiring implementation of a vaccine mandate for all CDCR prison staff who
5 work in the prisons.

6 Vaccination thus remains voluntary for all prison staff except for, according to
7 CCHCS data, approximately 20,000 (of approximately 56,000 who work in the prisons)
8 who are subject to the August 19 California Department of Public Health (CDPH) order
9 that mandates their vaccination unless granted a medical or religious exemption. CDCR
10 and CCHCS implemented that mandate via an August 23 Memorandum, and staff were
11 required to be fully vaccinated or have requested an exemption by either October 14 or, if
12 a member of Bargaining Unit 6, by November 24.

13 Even though it applies to only approximately one-third of those who work in
14 CDCR, the CDPH mandate has worked to substantially increase vaccination rates among
15 that staff, and thus also the overall rate among staff statewide. The efficacy of the mandate
16 is perhaps best shown by the staff vaccination rates at California Health Care Facility
17 (CHCF) and California Medical Facility (CMF), the two prisons for which the CDPH
18 order required all staff be vaccinated (or exempted) due to the heightened vulnerabilities of
19 the people incarcerated in those prisons. In mid-July, approximately one month before the
20 CDPH order, the overall staff vaccination rates at CHCF and CMF, per CCHCS data, were
21 64% and 62%, respectively, with custody staff rates of 50% and 57%, respectively. As of
22 December 3, the overall vaccinate rates at those two prisons were 82% and 76%,
23 respectively, with custody staff rates of 79% and 87%, respectively.³ As for the overall
24 statewide prison staff vaccination rate, CCHCS data as of August 20, just before the

25 _____
26 ³ It is unfortunate that Defendants question the efficacy of the CDPH staff vaccine
27 mandate just weeks after having vigorously defended it from challenge by the very staff
28 whose safety it in part is designed to protect. *See Order Denying Plaintiff's Request for
Preliminary Injunction, Nov. 5, 2021, Robert Davis, Jr., et al. v. California Department of
Public Health, et al., No. BCV-21-102318 (Kern County Sup. Ct.).*

1 mandate was implemented, showed that 54% of CDCR prison staff had received at least
2 one dose of vaccine. As of December 3, CCHCS reports that 67% had received a dose.

3 Having required vaccination for certain staff, CDCR and CCHCS must take prompt
4 disciplinary action against those who fail to comply and have neither an exemption request
5 pending nor granted. Frustratingly, we cannot say whether that is being done. As
6 explained by Defendants below, data about who is not vaccinated or exempt is apparently
7 inaccurate. Further, and partly related to the data problem, we have yet to receive
8 complete and reliable information about how many total staff at each prison are required to
9 be vaccinated, the number of those currently unvaccinated who have neither a granted or
10 pending exemption request, and the disciplinary action, if any, initiated against those staff.

11 Further complicating our understanding is the lack of information to date regarding
12 contractor staff, who must comply with the CDPH mandate but, as we understand it,
13 cannot be disciplined for failing to comply by either CDCR or CCHCS. Contractors
14 constitute a substantial percentage of staff who work in the prisons. At CHCF and CMF,
15 the two prisons at which the CDPH mandate applies to all staff, contractors constitute 17%
16 and 26% of staff, respectively. Those contractors also have relatively low rates of
17 vaccination, according to CCHCS data: 61% at CHCF and 27% at CMF.

18 CCHCS and CDCR must promptly provide full and accurate reporting of staff
19 vaccination data, including in particular as it relates to those subject to the CDPH mandate,
20 and full and accurate reporting regarding efforts to progressively discipline or otherwise
21 take action regarding those to whom the mandate applies who remain unvaccinated and
22 have neither an exemption granted or a such a request pending, including contractor staff.

23 *Defendants' Position:* Defendants first reported in the Supplemental Declaration of
24 Connie Gipson in Support of Defendants' Reply for Motion to Stay Order Re: Mandatory
25 COVID-19 Vaccinations that her staff "at CHCF and CMF have discovered that CCHCS's
26 vaccine registry showed some correctional officers as noncompliant even though they had
27 actually been vaccinated." ECF No. 3741-1 at 2:20-22. After her staff meticulously
28

1 combed through the list of allegedly noncompliant staff at those institutions, the
2 percentage of noncompliant staff dropped from 10.14% to 2% at CMF and from 8.26% to
3 5.2% at CHCF. *Id.* at 2:22-27. Thus, the extent to which the CDPH order increased the
4 staff vaccination rate at these two institutions is still being assessed. But to the extent that
5 the CDPH order is succeeding in increasing staff vaccination rates, it would further
6 confirm that Defendants' targeted efforts are working.

7 CDCR has continued to investigate the issue and believes there is a potentially
8 serious issue with the source data for the vaccine registry that may be inflating the
9 denominator and the purported number of unvaccinated staff for at least some prisons. For
10 instance, it appears that staff who do not work at a particular prison are sometimes being
11 counted in the denominator for that prison, certain unvaccinated staff are counted multiple
12 times, and some vaccinated staff are showing up in the registry as unvaccinated. Officials
13 have also discovered that in some cases, visitors who were tested months ago at a
14 particular prison are included in the staff denominator for the prison they visited, even
15 though they are not employed at the prison. Indeed, when CMF and CHCF dedicated staff
16 to look into this issue, they discovered that many letters of instruction were mistakenly
17 issued to vaccinated staff. For example, 143 Letters of Instruction (LOIs) were issued at
18 CHCF on or about October 15, 2021 to healthcare staff who presented as unvaccinated and
19 out of compliance with the October 14, 2021 deadline set forth by the August 19, 2021
20 CDPH order. After receiving letters of instruction, numerous staff provided proof of
21 vaccination that had not previously been captured by Employee Health and Safety, others
22 obtained a religious or medical exemption, and a number of other staff were determined to
23 be out on long-term leave and thus not currently subject to the mandate. As a result,
24 approximately 69 of the 143 letters of instruction were rescinded. Similarly, an initial list
25 from CCHCS showed 207 custody staff were noncompliant at CHCF. But when
26 corrections to the data were made, including accounting for staff who had been vaccinated,
27 had obtained an exemption, or left the institution, the list dwindled to only 15
28

1 noncompliant staff, which means that only 15 staff were unvaccinated and had not
2 requested a medical or religious exemption. Letters of instruction were issued to 3 staff
3 members; 3 additional staff are mid-compliance (meaning, they have had one of two shots⁴
4 and are awaiting their third); and 9 letters are pending service (these staff members work
5 an irregular schedule (3-7 times per month) and will be served when they are onsite).⁵ At
6 CMF, the same analysis was performed for custody staff and CDCR discovered that, in
7 fact, all staff who had not left that institution had either been vaccinated or obtained an
8 exemption and thus were compliant. It is unclear how long CCHCS's reports have been
9 understating the number of vaccinated staff and whether the problems extend back to
10 August 2021 or even before.

11 CDCR is working with CCHCS on an expedited basis to determine the cause of the
12 data errors, the extent of the errors (including whether it is system-wide and to what
13 degree), and what can be done to correct the errors. All parties have an interest in
14 resolving this issue as soon as possible. Defense counsel met and conferred with
15 Plaintiffs' counsel on December 6, 2021 to apprise them of this development.

16 Plaintiffs demand that they immediately be provided with a "full and accurate
17 reporting" of staff vaccination data and the number of those subject to discipline appears to
18 be based on a misunderstanding of what the data reflects. This information is not a static
19 data point, as Plaintiffs seem to believe. Aside from staff who are, on an ongoing basis,
20 transferred into and out of certain positions and institutions that are subject to the CDPH
21 order, staff also continue to provide evidence of vaccination or have a pending request for
22 religious accommodation or medical exemption. Moreover, Plaintiffs' suggestion that they
23 have not received data on these subjects is misleading. For instance, on December 9,
24 2021, Plaintiffs received information pertaining to their request for the number of staff

25
26 ⁴ One staff member recently transferred to CHCF and two others recently returned from
27 long-term sick leave.

28 ⁵ These numbers are intended as a point-in-time illustration; compliance numbers fluctuate
as staff are transferred into and out of institutions.

1 statewide, and at each institution, who are subject to the CDPH order; how many are
2 vaccinated or unvaccinated; of the unvaccinated, how many (statewide and at each
3 institution) requested a religious or medical exemption, and how many of those
4 exemptions have been granted, denied or are pending. CCHCS's December 9, 2021
5 response to Plaintiffs also advised that "the California Department of Corrections and
6 Rehabilitation (CDCR) and CCHCS are beginning a process to perform manual review of
7 vaccination data at each institution to improve the accuracy of the vaccination data (e.g.,
8 excluding inactive staff in reports), ensuring vaccination records are correctly incorporated
9 for vaccinated staff."

10 **II. STAFF TESTING AND MASKING REQUIREMENTS**

11 *Plaintiffs' Position:* While mandatory vaccination for all prison staff is necessary to
12 reduce the substantial risk of harm to incarcerated people from COVID, the granting of a
13 stay of the order requiring such vaccinations underscores the importance of other measures
14 adopted by Defendants to reduce the risk of harm. In particular, requiring unvaccinated
15 staff to COVID test twice-weekly and wear a N95 mask while at work are crucial
16 measures to stop the spread of COVID-19. Indeed, Defendants have insisted that these are
17 reasonable measures that obviate the need for mandated vaccinations for staff. *See, e.g.,*
18 ECF No. 3715-1 at 15:9-10 ("Workers who cannot show proof of vaccination must be
19 tested for COVID-19 twice per week").

20 However, information recently provided by CDCR shows that large percentages of
21 staff required to be tested twice weekly are not doing so, and that most of those workers
22 face no consequences. Attached hereto as Exhibit A is a document provided on November
23 30, showing, per the document's title and column headings, the percentage of CDCR
24 custody and nursing staff who were compliant with COVID testing requirements statewide
25 and at each prison in recent weeks. The number of these staff who are required to test
26 twice-weekly is approximately 10,000. Statewide, the compliance rates were 69% (week
27 ending October 24), 68% (week ending October 31, 77% (week ending November 7), and
28

1 61% (week ending November 14, the most recent week reported). In other words, the data
 2 indicates that statewide in recent weeks approximately 20% to 40% of staff who were
 3 supposed to COVID test twice did not do so. Further, the rates at some prisons were
 4 substantially below the statewide averages, indicating that even larger percentages of staff
 5 did not comply with the testing requirement at those prisons. In sum, the table indicates
 6 that each week between approximately 2,000 to 4,000 staff statewide were required to but
 7 did not comply with twice-weekly COVID testing.

8 However, although thousands did not COVID test as required, CDCR between
 9 October 28 and November 24 issued progressive discipline against fewer than 20 staff
 10 members for failing to test. See CDCR Non-Compliance Tracking Log – 10/28/2021 to
 11 11/24/2021, attached hereto as Exhibit B. The lack of enforcement of the COVID testing
 12 requirement via progressive discipline is deeply concerning, as it puts incarcerated persons
 13 at risk of infection from unvaccinated staff who may be COVID positive. Defendants
 14 must promptly establish means to identify staff required to COVID test twice weekly, and
 15 couple that with a process that immediately identifies those who do not comply, disciplines
 16 them for that non-compliance, and bars them from prison grounds until they do.

17 *Defendants' Position:* Defendants agree that adherence to masking and testing
 18 policies is an important part of a multilayered response to the COVID-19 pandemic.
 19 Defendants continue to enforce a mask mandate for all staff, and require unvaccinated
 20 workers to wear N95 masks and submit to twice-weekly testing⁶—twice the frequency
 21 required by the July 26, 2021 CDPH directive. See Office Gov. Gavin Newsom,
 22 *California Implements First-in-the-Nation Measures to Encourage State Employees and*
 23 *Health Care Workers to Get Vaccinated* (Jul. 26, 2021)

24 <https://www.gov.ca.gov/2021/07/26/california-implements-first-in-the-nation-measures-to->
 25

26 _____
 27 ⁶ CDCR and CCHCS must certify their vaccination status with their supervisors so that the
 28 supervisors will know what type of mask each person should be wearing. Supervisors are tasked
 with ensuring all unvaccinated staff wear N95 masks, and wear them properly throughout their
 shifts.

1 [encourage-state-employees-and-health-care-workers-to-get-vaccinated/](#) (requiring weekly
2 COVID-19 testing).

3 However, Plaintiffs mischaracterize Defendants' position by suggesting they
4 "insist" any single measure "obviates" the need for a staff mandate. Defendants'
5 consistent position has been that their comprehensive COVID-19 response far exceeds the
6 requirements of the Eighth Amendment, and therefore a court-ordered staff vaccination
7 mandate would run afoul of the Prison Litigation Reform Act's (PLRA) restrictions on
8 prospective relief. *See, e.g.*, ECF Nos. 3660 & 3673. Defendants continue to encourage
9 staff and the incarcerated population to accept the vaccine in the largest possible numbers.
10 *Id.*

11 Based on the data discrepancy discussed in the COVID-19 Vaccine section above,
12 the data illustrating who is subject to twice-weekly testing is likely unreliable, partly
13 because fully-vaccinated staff who are not subject to the testing requirement may show as
14 noncompliant with testing. As discussed above, CDCR and CCHCS are working together
15 to address this issue on an urgent basis. CDCR intends to verify staff testing and discipline
16 data after resolving issues identified with vaccination data.

17 **III. VENTILATION**

18 *Plaintiffs' Position:* Those who live and work in CDCR housing units face
19 significant risk of airborne transmission of COVID-19. *See* ECF No. 3717 at 7:20 – 8:13.
20 In an effort to mitigate this risk, Defendants installed MERV-13 filters in housing unit Air
21 Handling Units (AHUs), where possible. They also inspected and evaluated AHUs and
22 ventilation systems, the results of which showed a substantial need for repair or
23 replacement in many prisons. *Id.* at 8:14 – 9:20. At the October 28 Case Management
24 Conference, Defendants agreed that housing unit ventilation improvements are an
25 important component of COVID-19 mitigation measures, and the Court expressed its
26 desire that they present a clear schedule for determining the heating and air conditioning
27 systems that are not properly functioning and repairing those that are not.
28

1 With regard to installation of MERV-13 filters, Defendants report below that all
2 AHUs which can accommodate such filters have had them installed.

3 With regard to a schedule for repairs, Defendants report below that two rounds of
4 re-inspections and possibly repairs (no specifics are provided) resulted in a reduction of
5 AHUs not performing below 90% of design specifications from nearly 500 (in August) to,
6 150, spread across ten prisons, as of December 6 (*see* Exhibit C). We only learned of this
7 great reduction in the number of AHUs in need of repair on December 11, when
8 Defendants provided a draft of this Statement which included that information, and we
9 plan to ask for further information. For example, documents previously provided by
10 CDCR indicated that AHUs in nearly three dozen large housing units at Avenal State
11 Prison had “outlived their lifespan” and that staff are “constantly making repairs and
12 tweaks to these units in any attempt to squeeze every minute of operation possible.” But
13 now, CDCR says no AHUs at that prison need replacement or repair.

14 Defendants on December 6 also provided a repair schedule (*see* Exhibit C) for the
15 AHUs that need repairs, with “estimated” completion dates between January and April
16 2022. Obviously, repairs will not be done at these ten prisons before winter, a crucial
17 misstep given the role of AHUs in recirculating housing unit air in cold weather months.
18 *See* ECF No. 3717 at 7:26 – 8:1.

19 Further, while improved filtration and repaired AHUs are important, housing unit
20 ventilation systems have other components which also must work adequately. *See* ECF
21 No. 3717 at 8:4-14 (describing March 2021 CalPROTECT report citing among other
22 things inoperative exhausts and unintended pressurizations leading to potential infection
23 scenarios). In that regard, we understand that CDCR’s ventilation system inspections this
24 past summer identified many problems with components other than AHUs, such as ducts
25 and exhaust fans. Defendants must address these problems as well.

26 In addition, we look forward to CalPROTECT’s report, said to be coming at the end
27 of this year, of its inspection of 11 other prisons earlier this year, which we hope will
28

1 provide further information on the risk of harm from COVID resulting from ventilation
2 systems. Finally, we continue to believe that CDCR must not only repair its ventilation
3 systems, but assess whether residents are safe from airborne spread of COVID-19 at
4 current population levels (and, if not, what population each housing unit could safely
5 support), so that it can be better prepared in the event of a vaccine-evading variant or
6 emergence of a similar airborne disease. *See* ECF Nos. 3717 at 10:6-10 and 3592 at 15-17.

7 *Defendants' Position:*

8 In addition to the previously reported air-filtration upgrades throughout the prison
9 system, CDCR has made significant progress on repairs to housing-ventilation units and
10 now provides a schedule for the completion of that work.

11 In the last Case Management Statement, Defendants reported that 29 housing units
12 were still awaiting replacement MERV-13 filters. It was later determined that one of those
13 housing units does not recirculate air and therefore does not need a MERV-13 filter, and
14 another of those housing units is unable to use a MERV-13 filter. The filter replacement
15 for the remaining 27 housing units is complete.

16 As of late August 2021, CDCR had identified 490 air-handling units that were
17 performing below 90% of design specifications. As identified in the last Case
18 Management Conference Statement, the Facility Planning, Construction, and Management
19 Division began performing prison site visits in September 2021 to review the procedures
20 followed by plant-operations staff in performing the original airflow measurements and to
21 review repair procedures and priorities. As a result of those site visits and additional
22 actions by plant-operations staff, 94 air-handling units that had previously measured below
23 90% of design specifications were repaired and are now operating at 90% or better of
24 design specifications.

25 On November 12, 2021, the prisons with the remaining 396 air-handling units
26 performing below 90% of design specifications were directed to perform another round of
27 inspection, part replacement (as needed), and repairs, and then to re-measure the airflow.

28

1 This round of inspections and repairs was completed on December 6, 2021, and now only
2 150 air-handling units at ten institutions are performing below 90% of design
3 specifications. These ten prisons have developed schedules for additional repair or
4 replacement activities, with expected completion dates ranging from January through April
5 2022.

6 Attached as Exhibit C is a chart listing for each prison the air-handling units now
7 performing at 90% or better of design specifications, the air-handling units performing
8 below 90% of design specifications, and a schedule for completion of the outstanding
9 maintenance and repairs.

10 **IV. IMPACT OF COVID-19 ON MEDICAL CARE SERVICES**

11 *Plaintiffs' Position:* Unfortunately, COVID continues to adversely impact medical
12 services. For example, there continue to be delays in specialty services for many patients;
13 there were as of October 27 more than 8,500 overdue specialty service appointments,
14 according to CCHCS-provided data. This total is essentially the same as reported in July,
15 and only approximately 500 fewer than reported in May. *See* ECF No. 3623 at 13:12-13.

16 Further, CCHCS data shows that as of October 27, there were 913 backlogged
17 (overdue) ultrasound exams for end stage liver disease patients. This total is greater than
18 the number overdue reported in July, and not materially different than the backlogged total
19 report in May. *Id.* at 13:16-17. As previously explained, these exams are a key cancer
20 screening procedure, and the failure to timely provide them has been identified as a key
21 factor in a number of possibly preventable deaths. *See* ECF No. 3605 at 13, n. 5.

22 CCHCS has also recently said that COVID has had a significant impact on the
23 providing of group counseling to patients diagnosed with substance use disorder who are a
24 part of the Integrated Substance Use Disorder Treatment (ISUDT) Program (this program
25 is discussed in more detail below). CCHCS says the virus has required reducing the size
26 of groups, limited the mixing of patients from different housing units, and limited the
27 ability to obtain the counselors who facilitate the group – all of which contributes to the
28

1 fact that most ISUDT patients are not yet even offered groups. It also said on December 1
2 that nearly 10% of those who are assigned to groups cannot attend because of COVID
3 quarantine restrictions.

4 *Defendants' Position:* Defendants will continue to work with the Receiver and
5 CCHCS to ensure the delivery of medical care services to patients to the full extent
6 possible during the COVID pandemic. More recent data provided by CCHCS indicates
7 that quarantines are preventing less than 10% of patients from attending ISUDT groups. In
8 fact, a December 3 report from CCHCS indicates that quarantines only prevented about
9 2.7% of patients from attending those groups.

10 **V. INTEGRATED SUBSTANCE USE DISORDER TREATMENT (ISUDT)**

11 *Plaintiffs' Position:* We continue to appreciate CCHCS's and CDCR's efforts to
12 increase the number of ISUDT patients, including those receiving Medication Assisted
13 Treatment (MAT). As of December 14, there were approximately 13,800 patients
14 receiving MAT, per the CCHCS public ISUDT Dashboard.⁷ Another approximately 3,200
15 are likely to be added to that total by July 2022, given the number currently pending initial
16 appointments and the rate at which such patients are being seen, as indicated in monthly
17 data provided by CCHCS. In addition, approximately 40,000 incarcerated people await
18 screening to determine if ISUDT services are necessary; it is anticipated a quarter to one-
19 third will need those services.

20 Almost all CCHCS primary care providers (PCPs) have the federal "x-waiver"
21 necessary to prescribe MAT, though only approximately 50% are currently actively
22 managing such patients. In addition to increasing the number of PCPs who manage MAT
23 patients, CCHCS is working to increase nursing staff so that it can adequately provide
24 MAT. It is also working to increase resources so that more patients can receive necessary
25 cognitive behavioral intervention (only about 40% of patients currently receive group
26 counseling, an integral part of the program). We are hopeful the Governor and Legislature

27
28 ⁷ See <https://cchcs.ca.gov/isudt/dashboard/>.

1 will provide additional funding so that so that necessary care can be adequately provided to
2 all substance use disorder patients who need it.

3 We also followed up with CCHCS about the information in the Receiver's most
4 recent Triennial Report indicating that in recent months approximately 40% of MAT-
5 prescribed patients were not been linked to a community-based medication source upon
6 release (*see* ECF Nos. 3668 at 12 and 3717 at 16:5-12). CCHCS staff said the Receiver's
7 reported data was incorrect due to documentation errors, and that only 12% of released
8 patients were not linked to a community provider. CCHCS said it was training staff to
9 correctly document this information, and making efforts to further increase the percentage
10 of patients linked to community services. We will continue to monitor these efforts.
11 Again, we appreciate the work being done to provide incarcerated people with necessary
12 ISUDT. It saves lives, and changes many for the better.

13 *Defendants' Position:* Defendants join Plaintiffs in applauding the success and
14 importance of the ISUDT and MAT programs, and agree with Plaintiffs' above summary
15 of a December 1, 2021 meeting with ISUDT staff. Defendants look forward to continued
16 collaboration with their CCHCS partners to expand its reach and effectiveness within the
17 incarcerated population.

18 **VI. INDIVIDUAL PRISON CONCERNS**

19 **A. California State Prison, Los Angeles County (LAC)**

20 *Plaintiffs' Position:* We recently asked CCHCS about three matters related to medical
21 services at LAC. First, the prison has a huge backlog of overdue Primary Care Provider
22 (PCP) appointments. The number of overdue PCP appointments at LAC, and the rate of
23 such appointments per 100 patients, have grown substantially in recent months. In June,
24 according to CCHCS data, there were 475 backlogged PCP appointments at the prison, and
25 the number has been rising ever since. The most recent data provided by CCHCS shows
26 1,997 overdue PCP appointments as of October 15 at LAC, with 1,300 of those overdue
27 for more than 30 days. These are by far the largest such numbers among the prisons.
28

1 LAC's reported rate of 71.0 overdue PCP appointments per 100 patients is nearly 15 times
2 higher than the statewide average, and its number of overdue appointments older than 30
3 days is greater than that number at all other prisons combined.

4 When asked in September about overdue provider appointments at the prison,
5 CCHCS in October said LAC had experienced a significant shortage of providers.
6 CCHCS data for the last six months, however, shows that LAC always reported that at
7 least 90% of its established staff PCP positions were filled when telemedicine and registry
8 staff were taken into account, and CCHCS, in its color-coded reports, has for each such
9 month indicated that the provider fill rate at the prison was adequate (in the green
10 zone). Given this, on November 16, we asked further about the shortage and the
11 appointments backlog.

12 We also on November 16 asked about the lack of stable medical clinic managers at
13 LAC, a problem that has persisted for years. Between mid-2017 and January, 2019, LAC
14 had six different Chief Medical Executives (CMEs), including those acting in that position,
15 and had experienced a similar turn-over among Chief Physicians. In the most recent
16 approximately two and one-half years, the prison has not had a permanent (CME); the
17 position has been vacant, sometimes for months at a time, or filled by a person in an acting
18 capacity.

19 On December 2, we asked CCCHS about the persistent problem of untimely
20 responses by LAC to patients' healthcare grievances. We first asked about this in April,
21 based on data showing that only 43% of such grievances were timely answered in
22 February. In May, CCHCS said the prison "anticipates the backlog will be resolved within
23 two months." However, the rate of timely responses has not markedly improved, with the
24 most recent data provided, covering the months of September and October, showing that
25 barely one-half of grievances were timely answered. LAC is the only prison in the state
26 with such persistently poor performance regarding timely responses to healthcare
27 grievances.

28

1 *Defendants' Position:* Defendants will continue to collaborate with the Receiver
2 and CCHCS as they work to address the backlogs of PCP appointments and responses to
3 healthcare grievances at LAC.

4 **B. Substance Abuse Treatment Facility and State Prison, Corcoran (SATF)**

5 *Plaintiffs' Position:* Defendants accurately describe below the recent actions of the
6 *Armstrong* court, that court's expert, and other matters related to staff misconduct at
7 SATF, which we discussed in the October 26 Case Management Conference Statement
8 (*see* ECF No. 3717 at 17:25 – 19:18). While we appreciate that upon further review,
9 twenty of the sixty-one Rule Violation Reports (RVRs) issued by medical staff were
10 voided, we are concerned that these RVRs were approved by both the regular RVR review
11 process at SATF, as well as the SATF CEO's review done in response to concerns we
12 raised after our August 2021 site visit. (*See* ECF No. 3717 at 19:21-21 ("The SATF CEO
13 reviewed the 61 RVR's referenced by Plaintiffs and determined that all were appropriate
14 and none should be rescinded.")) The voiding of these RVRs happened only after
15 inquiries made by Plaintiffs' counsel in both *Armstrong* and *Plata*, and only after the
16 involvement of the court expert in *Armstrong*. We believe the issuing of RVRs by medical
17 staff represents a larger issue at SATF of a staff culture of disrespect towards patients.
18 While the work in *Armstrong* on this matter is critical, and we will continue to coordinate
19 with our *Armstrong* colleagues to address these problems, the problems with medical staff
20 at SATF must also be addressed in *Plata*. We plan to continue our discussions with the
21 Receiver and CCHCS regarding how to implement reforms going forward.

22 *Defendants' Position:* On November 8, 2021, the *Armstrong* court issued an order
23 citing the parties' last Joint Case Management Conference Statement filed on October 26,
24 2021 in this case and referencing the parties' statements regarding RVRs issued at SATF.
25 *Armstrong v. Newsom*, U.S. Dist. Court for the Northern Dist. of California, Case No. 94-
26 cv-2307 CW, ECF No. 3338 (Nov. 8, 2021). The *Armstrong* court's November 8, 2021
27 order requires the *Armstrong* "Court Expert to investigate and report to the Court on the
28 issues raised by Plaintiffs' counsel in the above-referenced case management statements."

1 *Id.* at 3:14-16. The order permits the *Armstrong* Court Expert to interview staff and
2 request “whatever information he deems necessary.” *Id.* at 3:16-19. The order requires
3 coordination with the Receiver in this case and the *Coleman* Special Master. *Id.* at 3:22-
4 25. At the conclusion of his investigation, the Court Expert will file a written report with
5 the *Armstrong* court with any appropriate recommendations. *Id.* at 3:26-27. Defendants
6 defer further discussion of this topic pending conclusion of the *Armstrong* Court Expert’s
7 investigation. However, Defendants did recently inform Plaintiffs that twenty of the sixty-
8 one RVRs were voided in the interest of justice following a recent meeting between health
9 care and custody leadership at SATF.

10 C. California Health Care Facility (CHCF)

11 *Plaintiffs’ Position:* Defendants recently informed the Court that due to a “new
12 approach” by the Federal Centers for Medicare & Medicaid Services, the CDCR’s medical
13 parole process is now restricted to people on ventilators. *See* ECF Nos. 3704-1 at 7-8 and
14 3747-2 at 5-6. Defendants further indicated that people previously granted medical parole
15 and placed in community skilled nursing facilities, are expected to be returned to CDCR
16 prisons unless they are on a ventilator. *See* ECF No. 3747-2 at 5-6. On November 9, the
17 Receiver’s counsel told us the Receiver had concluded that 70 medical parolees will soon
18 be forced to return to CDCR prisons. That same date, we asked for further information
19 about this, including the names of the patients who will be returned to prison, and we are
20 awaiting a response. Among other things, we are concerned about the potential impact on
21 medical and particularly nursing services in the prisons if dozens of patients who require
22 substantial and in some cases total care, including with activities of daily living, are
23 returned to prison. In this regard, we believe CHCF, the prison primary site of CDCR
24 Correctional Treatment Center (CTC) beds, will be most impacted.

25 *Defendants’ Position:* As Plaintiffs note, Defendants recently advised the Court
26 and the parties of a change in federal regulations affecting CDCR’s medical parole
27 process. *See* ECF No. 3747, Ex. B at 5-6 & Attachment A. Defendants will continue to
28

1 apprise the Court and parties of updates regarding the program in the regular Three Judge
2 Panel status reports.

3 **D. Wasco State Prison (WSP)**

4 *Plaintiffs' Position:* In the October 26 Case Management Statement, we explained
5 that on October 13 we told Defendants that WSP was showering people with disabilities
6 and not known to have or to have been exposed to COVID in units housing people with
7 active COVID or are on quarantine because they possibly had COVID.⁸ See ECF No.
8 3717 at 12:15 – 13:5. Defendants below report that training was done and a procedure
9 issued that are designed to stop that practice. Those actions were necessary. It is telling
10 that this practice, which violated fundamental public health COVID prevention tenets, was
11 neither identified nor corrected until we brought it to Defendants' attention.

12 *Defendants' Position:* On October 26, 2021, Defendants reported remedial
13 measures implemented at WSP to ensure that wheelchair-using patients not on quarantine
14 or isolation have access to wheelchair-accessible showers in housing units not used for
15 quarantine or isolation. ECF No. 3717 at 13:6-15:3.⁹ Further to that update, all Facility B
16 and Receiving and Release staff were provided on-the-job training regarding the procedure
17 described in the previous statement. *Id.* That procedure has been formalized in a
18 memorandum WSP issued to all staff on November 2, 2021.

19 ///

21 ⁸ We thank Ben Bien-Kahn of Rosen, Bien, Galvan and Grunfeld, L.L.P. for
22 promptly bringing this dangerous practice at WSP to our attention after he was told about
23 it during interviews of incarcerated people done as class counsel in *Armstrong, et al. v.*
Newsom, et al (N.D. Cal. No. 94-cv-02307 CW).

24 ⁹ As previously reported in the October 26, 2021 case management conference statement,
25 WSP issued direction that all newly-arriving intermittent wheelchair users (DPO) and
26 permanent wheelchair users (DPW) are to be housed in a housing unit with ADA-
27 accessible showers not being used for quarantine or isolation. These patients remain in
28 this housing unit for the duration of the fourteen-day post-intake precautionary quarantine
period. After this fourteen-day period, dorm-eligible patients are moved to dorms, and
patients who are not dorm-eligible and require a wheelchair-accessible cell remain in that
housing unit pending transfer.

1 **VII. DELEGATIONS**

2 The Receiver has previously delegated authority for medical care back to
3 Defendants at 19 prisons. On October 29, the Court issued an Amended Receivership
4 Transition Order, and in an accompanying order stated that the Receiver is developing a
5 new model for evaluating when it is appropriate to delegate medical care at an individual
6 prison, and had strengthened the internal expertise of CCHCS to assist with the evaluation
7 process. The Court also stated the Receiver's evaluations need not be tied to the release of
8 an Office of Inspector General report on a particular prison. See ECF Nos. 3278 and 3279.

9 On November 29, the Receiver informed the parties he was scheduling a meet-and-
10 confer in late January regarding the delegation of medical care at the California
11 Rehabilitation Center (CRC), and provided his draft assessment of medical care at that
12 prison. On December 7, 2021, the Receiver scheduled these meet-and-confers as follows:
13 CRC, January 25, 2022; Richard J. Donovan Correctional Facility (RJD), February 24,
14 2022; Wasco State Prison (WSP), March 29, 2022; and California State Prison – Solano
15 (SOL), April 26, 2022.

16 *Plaintiffs' position:* The Receiver's draft assessment of care at CRC appears to
17 reflect the new model for evaluating the appropriateness of care the Court mentioned in its
18 October Order. On December 2, we asked the Receiver questions about the assessment so
19 that we can adequately understand the new model and the resulting conclusions regarding
20 care. These questions, among other things, concerned the "qualified, independent
21 physician" who conducted approximately 20 qualitative chart reviews used in the
22 assessment, the identities of the patients whose care was reviewed, whether a nursing care
23 expert was used, and why care related to a number of major medical delivery system
24 components was not reviewed after April 2021. On December 6, the Receiver's counsel
25 provided answers to some of the questions, and indicated that responses to the others
26 would be forthcoming. We appreciate the Receiver's help, so that we can adequately
27 consider the assessment and understand the new evaluation process. We will provide the
28

1 Receiver any relevant information regarding CRC before or at the meet-and-confer.

2 *Defendants' Position:* The receivership last delegated authority over medical care
3 services to CDCR at California State Prison – Corcoran in October 2018. Defendants look
4 forward to resuming the delegation meet-and-confer process.

5
6
7 DATED: December 14, 2021

HANSON BRIDGETT LLP

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DATED: December 14, 2021

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