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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **OAKLAND DIVISION**

13 MARCIANO PLATA, et al.,
14
15 Plaintiffs,
16 v.
17 GAVIN NEWSOM, et al.,
18 Defendants.

CASE NO. 01-1351 JST

**DEFENDANTS' RESPONSE TO ORDER
RE: QUARANTINE AND ISOLATION
SPACE; PROPOSED ORDER**

Judge: Hon. Jon S. Tigar

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21 **INTRODUCTION**

22 Defendants' respectfully submit this response to the Court's July 7, 2020 order regarding
23 quarantine and isolation cells. The Receiver only provided the final proposed methodology to
24 determine reserved bed needs and the data concerning the numbers of beds that must be kept in
25 reserve for isolation and quarantine purposes under his proposed methodology on Monday, July
26 13, at about 8:30 p.m. It is not surprising that the Receiver was unable to provide this information
27 the previous week because the issue and task at hand are complex and not suitable for a rushed
28 process. Undoubtedly, the process and the Receiver's final product would have benefited

1 significantly if more time had been permitted. Because this process has been rushed, Defendants
2 and their public health expert have not had sufficient time to fully evaluate the appropriateness of
3 the Receiver's proposed methodology or assess its likely impact on the institutions and prison
4 operations. But even a cursory review of the Receiver's methodology and calculations for each
5 institution raises a number of significant issues. Below, based on an initial review of the
6 Receiver's documents, Defendants have identified a number of issues and concerns regarding the
7 Receiver's methodology.

8 Defendants' recent decisions and actions to release significant numbers of additional
9 inmates address the concerns underlying the Court's July 7 order in a much more meaningful way
10 than could this response or any expert declaration. As the Court stated last week, the release of
11 more inmates from the institutions "would make all of this less necessary, maybe even
12 unnecessary." (ECF No. 3387; Hr'g Tr. 40:10-12, July 7, 2020.) And releasing additional
13 inmates under new and modified criteria is precisely what CDCR has decided to do, as described
14 in more detail below. In sum, on top of the reduction in the population by approximately 10,000
15 inmates that has already occurred since the COVID-19 pandemic hit California, CDCR will reduce
16 its population by about 8,000 inmates before the end of August, and releases under these measures
17 will continue on a rolling basis as long as is necessary.

18 In light of this new significant effort to further reduce the inmate population, and the need
19 for more time to develop a better method for determining the extent to which institutions need
20 additional reserved space, Defendants submit a proposed order that directs the parties and the
21 Receiver to continue to meet and confer regarding this subject and to try to reach agreement within
22 two weeks. If the parties are unable to do so, and if the Court still believes an order might be
23 necessary despite the numerous planned releases and other remedial measures Defendants have
24 taken, the Court should request that the parties submit additional briefing and evidence on the
25 subject and consider whether an order can or should be made.

26 In the meantime, the additional time will allow the Receiver, the parties, and their public
27 health experts to further vet the Receiver's proposed methodology and to devise possible
28 alternative approaches that would be better tailored to address each of the institutions. Additional

1 time would also allow all stakeholders to observe how the newly planned releases will improve
2 physical distancing and possibly affect the analysis for determining space needs.

3 **I. CDCR WILL RELEASE ABOUT 8,000 INMATES BEFORE THE END OF**
4 **AUGUST AND HAS TAKEN OTHER STEPS TO ENSURE ADEQUATE**
5 **SPACE IN THE EVENT OF OUTBREAKS.**

6 Even before the new rounds of releases described below began, CDCR's previous
7 decompression efforts in response to the pandemic have reduced its prison population by about
8 10,000 inmates since mid-March 2020. (Decl. Diaz ¶ 2.) CDCR now plans to build on its
9 previous efforts. As the Court requested, CDCR has expanded the scope of the 180-day inmate
10 cohort and has implemented additional measures to increase the number of inmates who will be
11 released in the coming weeks. (*Id.*) Indeed, these releases are already underway, and their impact
12 on the institutions should be seen beginning this week.

13 CDCR modified the criteria for its plan to release inmates who are scheduled for release
14 within 180 days (180 Day Plan). (*Id.* ¶ 3.) Under the modified criteria, more inmates will be
15 released and the releases will happen quicker. (*Id.*) With the modifications, approximately 4,800
16 inmates will be released under the 180 Day Plan by the end of July 2020. (*Id.*) And inmates will
17 thereafter continue to be released under the 180 Day Plan on a rolling basis until the plan is no
18 longer necessary. (*Id.*)

19 CDCR is also implementing a new plan to release certain inmates who are within one year
20 of their release dates (One Year Plan). (*Id.* ¶ 4.) The One Year Plan focusses on eight specific
21 prisons that were selected based on several factors, including, but not limited to, the size of the
22 population of high-risk inmates and the physical plant layout: San Quentin, Central California
23 Women's Facility, California Health Care Facility, California Institution for Men, California
24 Institution for Women, California Medical Facility, Folsom State Prison, and Richard J. Donovan
25 Correctional Facility. (*Id.*) Under the One Year Plan, about 700 inmates age thirty or over will
26 become immediately eligible for release and should be released before the end of July 2020, and
27 about 300 additional inmates who are under age 30 will be considered for release on a case-by-
28 case basis. (*Id.*) The One Year Plan will also continue on a rolling basis until it is no longer
29 necessary. (*Id.*)

1 CDCR will also implement a new plan to award twelve weeks of positive programming
2 credits to all inmates except inmates who are serving a life sentence without the possibility of
3 parole, inmates who are condemned to death, and inmates who received a serious rules violation
4 between March 1 and July 5, 2020 (Credit Plan). (*Id.* ¶ 5.) CDCR estimates that about 108,000
5 inmates will be awarded the credits and that the Credit Plan will result in approximately 2,100
6 additional releases between July and the end of August 2020. (*Id.*) And the impact of the Credit
7 Plan will continue indefinitely because it will advance the release dates or parole-consideration
8 dates for every inmate who is awarded the credits. (*Id.*)

9 CDCR has also established criteria for releasing medically high-risk inmates who will be
10 evaluated for release on a case-by-case basis (High Risk Medical Plan). (*Id.* ¶ 6.) Because of the
11 nature of the High Risk Medical Plan, CDCR is currently unable to estimate the number of
12 releases that will result from its implementation. (*Id.*)

13 Additionally, CDCR is reviewing potential release protocols for incarcerated persons who
14 are in hospice or pregnant because they are considered at high risk for COVID-19 complications.
15 (*Id.* ¶ 7.) And CDCR will be expediting the release of incarcerated persons who have been found
16 suitable for parole by the Board of Parole Hearings, but who have not yet been released from
17 prison. (*Id.*)

18 Like the Court, CDCR is concerned about the institutions' preparedness for significant
19 outbreaks. (*Id.* ¶ 8.) That is why on July 2, 2020, CDCR ordered the activation of Incident
20 Command Posts at each institution. (*Id.* ¶ 8, Ex. A.) The purpose of that order was to enhance
21 each institution's ability to mitigate, prepare for, respond to, and recover from a COVID-19
22 outbreak in accordance with the Department All-Hazards Emergency Operations Plan. (*Id.*) All
23 CDCR institutions have now activated an Incident Command Post in response to the pandemic
24 and have submitted strategic plans for dealing with outbreaks. (*Id.*)

25 The objectives of the Incident Command Posts include, among many other things, the
26 following:

- 27 • Identifying logistical needs and resource deployments;
- 28 • Identifying potential challenges in responding to outbreaks;

- 1 • Conducting advance planning;
- 2 • Managing COVID-19 testing; and
- 3 • Identifying new or potential COVID-19 cases. (*Id.* ¶ 9.)

4
5 One of the objectives of the Incident Command Posts will be to assess and identify the
6 need for quarantine and isolation space in the institutions. (*Id.* ¶ 10.) CDCR has already taken
7 some steps to ensure additional space is readily available if it is needed, such as securing a
8 contract with a vendor that can erect fully functional tents to provide additional housing or
9 treatment spaces within 72 hours. (*Id.*) CDCR has also obtained advanced approval from the
10 State Fire Marshal to convert gymnasiums into housing spaces in a number of institutions, and has
11 already outfitted some gymnasiums with beds and lockers so that they can be used for housing at a
12 moment's notice. (*Id.*)

13 In light of the new significant efforts to reduce the population, it does not make sense to
14 rush the imposition of orders mandating the implementation of reserved spaces at every institution
15 based on an unvetted and overly simplistic methodology to address a highly complex issue. As
16 the party responsible for running California's prison system, Defendants cannot simply rubber-
17 stamp the Receiver's one-size-fits-all approach for identifying reserve-bed needs, and neither
18 should the Court.

19 Furthermore, although Defendants want to implement a reasonable plan to ensure adequate
20 isolation and quarantine space in the institutions, Defendants object to the issuance of any order
21 mandating that this be done. The Court cannot reasonably conclude that CDCR is deliberately
22 indifferent or has otherwise ignored a threat to the health and safety of inmates, a prerequisite for
23 issuing injunctive relief under the Prison Litigation Reform Act (PLRA). 18 U.S.C. § 3626(a)(1).
24 Nor can the Court reasonably conclude that an order mandating the reservation of space under the
25 Receiver's methodology satisfies the PLRA's needs-narrowness-intrusiveness requirements. *Id.*
26 As the Court itself recognized last week, such an order might not be necessary if CDCR were to
27 release more inmates, which is exactly what CDCR is now doing.

28

1 **II. DEFENDANTS AND THEIR EXPERTS HAVE NOT HAD SUFFICIENT TIME**
 2 **TO EVALUATE THE RECEIVER’S PROPOSED DIRECTIVES.**

3 On Tuesday, July 7, the Court issued its order regarding quarantine and isolation beds,
 4 which seemed to assume that the Receiver’s production of a draft plan for determining the need
 5 for isolation and quarantine beds was imminent and that the parties would have the remainder of
 6 the week to evaluate the plan and its impact on the institutions before submitting their court
 7 ordered responses on Monday, July 13.¹ (ECF No. 3381 at 1.) But this did not happen. Instead,
 8 the Receiver produced a three-page draft document on Wednesday, July 8, that the parties had a
 9 number of questions about and that Defendants were not able to fully comprehend. (Decl.
 10 McClain ¶ 2, Ex. A.) The only guidance the draft document provided regarding the number of
 11 beds that should be reserved for quarantine and isolation—found in the very last paragraph of the
 12 document—was especially challenging to understand. (*Id.* Ex. A at 3.) The draft document did
 13 not specify the number of beds that should be reserved at any institution. (*Id.* Ex. A.)

14 The Receiver’s office advised that it would provide additional information on Thursday,
 15 July 9, and proposed a meeting with the parties on July 9 to discuss the draft document. (Decl.
 16 McClain ¶ 3.) On July 9, the Receiver’s office provided a new document to the parties that
 17 purported to demonstrate how the Receiver’s proposed methodology would be used to determine
 18 how many reserved quarantine and isolation beds would be needed at each institution. (*Id.* ¶ 3,
 19 Ex. B.) The document addressed a single prison—California Correctional Institution—but the
 20 parties were advised during the meeting that the numbers used for the example were likely
 21 incorrect. (*Id.*) No explanation was provided regarding a public-health basis for the methodology
 22 that the Receiver selected. (*Id.*)

23 During the July 9 meeting, the Receiver acknowledged that the methodology document
 24 needed revision and clarification and advised that a new draft might be provided by July 10.

25
 26
 27 ¹ The report of a COVID-19 positive inmate at the Correctional Medical Facility seemed to be a
 28 primary reason for the urgency and rushed process contemplated by the Court. Thus, it is
 significant that it was later determined that the report regarding the inmate at the California
 Medical Facility was the result of a false positive COVID-19 test.

1 (Decl. McClain ¶ 4.) The Receiver also indicated that a document—similar to the one prepared
2 for California Correctional Institution—would be prepared for each of the other institutions so that
3 the parties could see the number of isolation and quarantine beds that should be held in reserve at
4 each prison under the Receiver’s proposed methodology. (*Id.*) Neither the revised methodology
5 nor the documents showing the amount of reserved space needed at the institutions were provided
6 to the parties on July 10. (*Id.*)

7 On Saturday, July 11, the Receiver sent the parties a revised methodology document and
8 calculations for all 35 institutions. (Decl. McClain ¶ 5, Exs. C-D.) The parties then conferred and
9 agreed to seek an extension of time to Wednesday to either file a stipulated order or competing
10 orders if no agreement is reached. (*Id.*) Defendants believed it was important to seek more time
11 to try to understand the documents, which were confusing, and to ask for additional clarification
12 from the Receiver. (*Id.*) The parties asked the Receiver for another meeting on Monday, July 13,
13 to further discuss those subjects. (*Id.*)

14 During the Monday, July 13 conference call, the Receiver acknowledged that the document
15 describing the methodology for determining space needs required further revisions, in part because
16 the methodology document still did not comport with the method that was actually used for the
17 Receiver’s calculations of needed reserved space at the institutions. (Decl. McClain ¶ 6.) The
18 Receiver sent the parties a new revised methodology document on Monday night, July 13. (*Id.*
19 Ex. E.)

20 Although Defendants and their public health expert have had time to conduct a
21 preliminary review of the Receiver’s documents—a review that has revealed a number of potential
22 problems with the Receiver’s methodology—they have not had enough time to fully evaluate the
23 Receiver’s methodology or to devise ways to improve it. (Decl. McClain ¶ 7.) There simply has
24 not been sufficient time since Monday night, when the final draft of the Receiver’s proposed
25 methodology was provided, for Defendants or their public health experts to fully evaluate the
26 Receiver’s documents. (*Id.*) Nor have they had enough time to fully assess the impact on the
27 institutions and prison operations if the Court were to order that the Receiver’s plan to be
28 implemented. (*Id.*) Nor have Defendants or their expert had sufficient time to determine and

1 demonstrate possible alternatives to the Receiver’s proposal that might be superior, better tailored
2 to each institution’s needs, and less intrusive. (*Id.*)

3 Defendants recognize the importance and urgency of ensuring adequate space is available
4 at each institution for responding to an outbreak, but strongly believe that a more nuanced
5 approach should be developed with more input from the parties and public health experts.
6 Because this is an important issue, the Receiver and the parties should not be forced to rush the
7 completion and implementation of measures that have not been thoroughly evaluated and
8 discussed. Nor should the Court be in a rush to order such measures.

9 **III. THERE ARE PROBLEMS WITH THE RECEIVER’S PROPOSED**
10 **METHODOLOGY FOR DETERMINING SPACE-RESERVATION NEEDS AT**
11 **THE INSTITUTIONS.**

12 Defendants appreciate the Receiver’s efforts to develop an approach for determining the
13 need to reserve quarantine and isolation spaces within the institutions, and those efforts have
14 helped advance the discussion on this subject among the parties and stakeholders. But the
15 Receiver’s planned methodology is far from fully developed. It would be inappropriate for the
16 Court to issue an order mandating that CDCR implement it.

17 The Receiver’s own statements about the proposed methodology make clear that it is not
18 fully developed. His attorney’s cover email from July 13 states: “We reiterate that this is not a
19 formal policy or procedure document and reflects current thinking. It is, therefore, subject to
20 modification or reconsideration as and if circumstances warrant.” (Decl. McClain Ex. E.) And
21 the most current draft of the Receiver’s methodology document itself states:

22 A number of caveats apply to use of this document:

- 23 1) This product was intended to guide the decision of how many beds
24 are needed to house the residents of an institution, and not to
25 determine where they will go or whether they need to be released.
- 26 2) Use of the word “shall” does not result in this document being
27 directive. It is not directive and does not constitute policy or
28 procedure.
- 29 3) Realities on the ground might require exceptions to the points
30 noted in these documents.

31 (*Id.* Ex. F at 1.) These statements do not support the notion that the Receiver’s methodology

1 should be mandated by a Court order. And “realities on the ground” should be considered and
2 addressed before the Court considers mandating the Receiver’s proposal by Court order.

3 The newest draft of the portion of the Receiver’s proposed methodology that addresses the
4 formula for calculating the reserved space needed at each institution in case of an outbreak states:

5 To plan for the possibility of a large-scale outbreak of COVID-19, each facility
6 in each prison shall identify space that will allow for rapid isolation and
7 quarantine of impacted patients. Each facility shall identify its largest
8 congregate living space. Each facility shall maintain empty beds equivalent to
the capacity of its largest congregate living space or 20% of the current
population of the facility, whichever is larger.

9 (Decl. McClain Ex. F at 3.) On Monday, the Receiver’s staff advised that there are no public-
10 health guidelines describing this proposed methodology for determining space needs and that the
11 Receiver did not obtain input from his own public health experts in developing the methodology.

12 (*Id.* ¶ 8.) The Receiver’s staff further advised that they are aware of no other prison system that
13 uses this methodology for determining reserved space needs, and in fact, are aware of no other
14 prison system that is addressing this issue as proactively as CDCR. (*Id.* ¶ 9.)

15 The Receiver’s staff acknowledged that their assessment of space needs is based solely on
16 a simple formula, and that in arriving at the calculated space needs for each institution, no
17 consideration was given to the unique layout of each institution, the specific population in each
18 institution (e.g., the medical acuity or average age of the population at each institution), or the
19 number of patients in each institution who have already contracted and recovered from COVID-
20 19. (*Id.* ¶ 10.) Nor did the Receiver adjust the calculations of needed space at any institution
21 based on the availability of alternative spaces for housing patients, such as gyms, tents, and other
22 buildings that could be readily converted into housing. (*Id.*) In developing the methodology, the
23 Receiver did not consider the possibility of housing recovered COVID-19 patients with COVID-
24 19 positive patients. (*Id.* ¶ 11.) Nor did the Receiver consider the possibility of moving recovered
25 patients into denser housing arrangements to create more space for isolation and quarantine
26 patients in other locations. (*Id.*) The Receiver’s staff also acknowledged that if a safe transfer
27 protocol is developed, the ability to transfer patients to locations with more space would change
28 the space needs at institutions. (*Id.*) And the Receiver’s staff advised that the documents provided

