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15 **UNITED STATES DISTRICT COURT**
16
17 **NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**
18

19 MARCIANO PLATA, et al.,

20 Plaintiffs,

21 v.

22 GAVIN NEWSOM, et al.,

23 Defendants.

CASE NO. 01-1351 JST

**PLAINTIFFS' REPLY BRIEF IN
SUPPORT OF MOTION FOR AN
ORDER MODIFYING CDCR'S
COVID-19 STAFF TESTING PLAN**

Date:

Time:

Crtrm.: 6, 2nd Floor

Judge: Hon. Jon S. Tigar

1 **I. INTRODUCTION**

2 The parties agree that to adequately protect the incarcerated population from an
3 unreasonable risk that staff will spread COVID-19 in the prisons, CDCR’s plan for staff
4 testing must meet current public health guidance. *See* Opp. at 6, 8. The question for this
5 Court is whether CDCR’s plan passes this test. For the reasons set forth below and in
6 Plaintiffs’ motion, CDCR’s plan falls dangerously short, leaving those living and working
7 in the state prison system at risk that the virus will continue to spread.

8 **II. ARGUMENT**

9 **a. This Court’s Action is Necessary Because CDCR’s Staff Testing Plan**
10 **Fails to Reasonably Mitigate the Risk that Symptomatic and Exposed**
11 **Staff Will Spread the Virus in the Prisons**

12 CDCR’s staff testing plan is insufficient to mitigate the risk posed by those staff
13 members most likely to transmit COVID-19: staff who are symptomatic, and staff likely to
14 be exposed during an outbreak. *See* Declaration of Adam Luring, ¶¶ 6-9 (ECF No. 3402-
15 1). To bring CDCR’s plan into compliance with public health recommendations, Plaintiffs
16 have requested the Court order CDCR to modify its plan to call for (1) testing symptomatic
17 staff members if their symptoms are discovered while they are at work, (2) a reasonable
18 protocol for symptomatic staff members who report symptoms from home, and (3) serial
19 re-testing of all staff members during an outbreak. *See* Proposed Order Re: CDCR’s Staff
20 Testing Plan for COVID-19 (ECF No. 3402-3).

21 Defendants argue Plaintiffs are not entitled to relief because this Court has not yet
22 found CDCR deliberately indifferent to the particular risks posed by COVID-19. Opp. at
23 4-8. As Plaintiffs demonstrated in their moving papers, an inquiry into Defendants’ state
24 of mind is not required at this stage of the litigation. Mot. at 8. Even assuming *arguendo*
25 that Plaintiffs are required to prove deliberate indifference anew, Defendants’ plan does
26 not pass constitutional muster. “Defendants themselves acknowledge that the virus
27 presents a ‘substantial risk of serious harm’ and that the Eighth Amendment therefore
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1 requires them to take reasonable measures to abate that risk.” Order Denying Plaintiffs’
 2 Emergency Motion to Modify Population Reduction Order (April 4, 2020) (ECF No. 3261
 3 at 9); *see also Helling v. McKinney*, 509 U.S. 25, 33 (1993) (recognizing that officials
 4 cannot be “deliberately indifferent to the exposure of inmates to a serious, communicable
 5 disease”). Defendants assert that their testing plan is a reasonable response to COVID-19
 6 because it is “based upon current CDC guidance and recommendations from CDPH
 7 experts.” Opp. at 6. However, on each of the key provisions identified in Plaintiffs’
 8 motion and below, CDCR’s plan fails to meet guidance from the Centers for Disease
 9 Control and Prevention (CDC) or the State’s own advice from the California Department
 10 of Public Health (CDPH). Thus, this issue here is not “[a] mere difference in medical
 11 opinion,” Opp. at 6; rather, it is CDCR’s failure to create a plan that is consistent with
 12 public health guidance.

13 **i. CDCR’s Plan to Direct Symptomatic Staff to Obtain a Medical**
 14 **Evaluation is Inadequate**

15 CDCR will not test staff with symptoms of COVID-19. Instead, CDCR plans to
 16 “direct[]” the employee “to obtain a medical evaluation to determine whether he or she
 17 should be tested for COVID-19.” Declaration of Sophie Hart, ¶ 11 & Ex. C (CDCR’s July
 18 23 Staff Testing Plan) (ECF No. 3402-2 at 17). In support of this provision, Defendants
 19 assert that “[t]he list of potential COVID-19 symptoms (according to the most recent CDC
 20 guidelines) is ‘very long’” and “includes symptoms that are often (and more likely)
 21 attributable to other causes.” Opp. at 6 (quoting Declaration of James Watt, ¶ 10 (ECF No.
 22 3413-1)). Thus, Defendants argue, employees with symptoms of COVID-19 must be
 23 evaluated by a medical professional before being offered a test, presumably because a
 24 doctor may decide that some symptoms are unlikely to be COVID-19-related, despite their
 25 inclusion on the CDC’s list. *See id.*

26 While it may be reasonable to limit testing in the general public to only those with
 27 more significant symptoms, national public health recommendations call for broader
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1 testing of employees working with vulnerable populations. The CDC has recently
2 explained: “[a]mong persons with extensive and close contact to vulnerable populations
3 (e.g., healthcare personnel [HCP]), even mild signs and symptoms (e.g., sore throat) of a
4 possible SARS-CoV-2 infection should prompt consideration for testing.” Hart Decl., ¶ 12
5 & Ex. D (CDC, *Overview of Testing for SARS-CoV-2*) (updated July 17, 2020) (ECF No.
6 3402-2 at 23). Defendants’ expert, Dr. James Watt, does not address this recommendation.
7 Moreover, even if a referral to a doctor is necessary, Defendants do not explain why
8 CDCR will not require employees to obtain a medical evaluation, or why CDCR could not
9 contract with clinical staff to perform such evaluations.

10 Defendants also offered no response to Plaintiffs’ broader concern with this
11 strategy: CDCR has no plan to determine whether an employee actually gets tested and, if
12 they do get tested, whether they test positive. *See* Mot. at 5-6. There is no requirement
13 that the employee report their results to CDCR. CDCR also lacks a plan for what to do if a
14 symptomatic employee who is “directed to obtain a medical evaluation” declines to do so,
15 or is simply unable to get a test in the community. CDCR’s plan thus fails to meet the
16 CDC’s recommendations to consider and address “staff who decline testing” and the
17 reporting of results to the employer when developing a staff testing plan. *See* Hart Decl.,
18 ¶ 13 & Ex. E (CDC, *Interim Considerations for SARS-CoV-2 Testing in Correctional and*
19 *Detention Facilities*) (July 7, 2020) (ECF No. 3402-2 at 31). In full, the provision
20 regarding symptomatic staff provides:

21 In all institutions, all staff should be screened for fever, respiratory
22 symptoms, or other COVID- related symptoms each time they enter any
23 institution. If a staff member has possible COVID-related symptoms, the
24 staff member shall be directed to obtain a medical evaluation to determine
25 whether he or she should be tested for COVID-19. To the extent possible,
26 the institution should limit staff movement among multiple yards to limit
27 exposure. Additionally, staff who are sick should stay home. Personnel who
28 develop fever, respiratory symptoms, or other COVID-related symptoms
should be instructed not to report to work and notify their supervisor.

Hart Decl., ¶ 11 & Ex. C (CDCR’s July 23 Staff Testing Plan) (ECF No. 3402-2 at

1 17).

2 The directive to “obtain a medical evaluation,” without follow-up, is inadequate, as
3 CDCR will only initiate further testing of staff, and CCHCS will only initiate such testing
4 of incarcerated patients, once a positive case is identified. *See id.* (CDCR’s July 23 Staff
5 Testing Plan) (ECF No. 3402-2 at 18-19) (explaining that re-testing of staff will occur
6 “after one (or more) COVID-19 positive individual(s) (inmate or staff) is identified in an
7 institution”); CCHCS, *COVID-19: Interim Guidance for Health Care and Public Health*
8 *Providers*, <https://cchcs.ca.gov/covid-19-interim-guidance> (last accessed August 3, 2020)
9 (calling for “outbreak response testing” “after one or more COVID-19 positive individuals
10 (patients or staff) are identified”). In other words, unless and until CDCR/CCHCS
11 receives confirmation that a staff member has tested positive, there is no call for any
12 outbreak investigation. Yet CDCR lacks a reasonable plan to ensure staff who are
13 symptomatic are tested and CDCR is informed of the result.

14 In this regard, Plaintiffs’ concerns are only heightened after receiving on July 26
15 data showing the percentage of prison staff that has received baseline testing. *See* Joint
16 Case Management Conference Statement (July 27, 2020), Ex. B (ECF No. 3405-2).
17 According to this data, hundreds of staff still have not been tested; at 13 prisons, 15% or
18 more of staff have not been tested. *Id.* At 5 prisons, more than 30% have not been tested.
19 *Id.* The data suggests that a substantial number of employees who were offered a test at
20 the prison and directed to get tested failed to do so. Especially in light of this, CDCR’s
21 plan to merely advise a symptomatic employee to seek a medical evaluation, with no
22 assurance that a test will occur or CDCR will receive the result, is unreasonable. This plan
23 leaves Plaintiffs—and staff—at risk that when it is discovered that an employee has
24 symptoms of COVID-19, no testing or investigation will occur, and the virus will spread
25 unabated within the prison. *See* Lauring Decl., ¶ 7 (ECF No. 3402-1).

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1 **ii. CDCR’s Plan to Confine Outbreak Response Testing to a**
2 **Particular Yard is Unreasonable**

3 CDCR’s plan for testing in response to a newly-identified COVID-19 case—to
4 serially retest just those employees “regularly assigned” to the same yard—will not prevent
5 the spread of the virus in the prison. *See* Luring Decl., ¶¶ 8-9 (ECF No. 3402-1). Indeed,
6 CDCR’s plan is inconsistent even with the guidance the State has received from its own
7 expert. In his declaration, Dr. Watt explained that “[t]he general approach for all settings
8 when there has been an exposure is to conduct a contact investigation and test anyone who
9 could have been exposed.” Watt Decl., ¶ 12 (ECF No. 3413-1). But, *CDCR’s plan does*
10 *not call for any contact tracing*. Instead, it calls for re-testing only those staff members
11 “regularly assigned” to the same yard. As Plaintiffs and this Court have repeatedly
12 explained, this is likely to miss staff members who were exposed. Despite
13 recommendations from the Receiver and requests from Plaintiffs to do so, CDCR has not
14 cohorted its staff members during this pandemic. *See* Order to Show Case re: Baseline
15 Staff Testing for COVID-19 (June 28, 2020) (ECF No. 3366, n.2). Thus, while an officer
16 may be “regularly assigned” to a particular yard, that officer is free to (and indeed
17 Defendants maintain must be able to) cover shifts on other yards. *See* Defendants’
18 Response to the Court’s April 29, 2020 Questions Concerning Dorms (May 1, 2020) (ECF
19 No. 3314 at 5-6) (asserting that “prisons need to have the flexibility to send custody staff
20 to locations where they are needed, which can change from day to day due to staff illness,
21 leave, emergencies, changes in programming, staffing shortages, promotions, and
22 transfers, among other reasons”). And, as explained in Plaintiffs’ motion, staff often
23 interact with other employees who are not regularly assigned to the same yard in carpools,
24 outside of work, and during shift change. Mot. at 6-7. CDCR’s testing plan will do
25 nothing to stop the virus from spreading through these contacts.

26 Defendants suggest that limiting retesting to a particular yard is reasonable in light
27 of anticipated challenges with testing resources. Opp. at 7-8. Defendants note that,
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1 generally, “testing resources are a challenge across the state,” but do not provide any
 2 evidence that they currently lack the resources to serially re-test all staff during an
 3 outbreak. *Id.* at 7. Indeed, Ms. Minnich attested that “[i]n July 2020, CDCR coordinated
 4 over 49,000 COVID-19 tests as part of its statewide staff testing efforts.” Declaration of
 5 Katherine Minnich, ¶ 4 (ECF No. 3143-2).

6 Rather, Defendants argue that testing resources must be prioritized when there is
 7 scarcity. *Opp.* at 7-8. Plaintiffs agree. But, testing of symptomatic and exposed staff
 8 members is key to controlling an outbreak, *see* Lauring Decl., ¶ 6 (ECF No. 3402-1), and
 9 should be prioritized in the event of scarcity. Defendants argue that limiting testing in
 10 response to an outbreak is reasonable, because it is consistent with Dr. Watt’s opinion that
 11 “surveillance testing is a lower priority than testing symptomatic people and people who
 12 may have been exposed.” *Opp.* at 7; Watt Decl., ¶ 13 (ECF No. 3413-1). Defendants
 13 misunderstand the issue. CDCR’s plan for surveillance testing—a minimal 10% of staff
 14 every 14 days—is not at issue in Plaintiffs’ instant motion. Rather, Plaintiffs’ motion takes
 15 issue with CDCR’s plan for testing in response to an outbreak—that is, testing of “people
 16 who may have been exposed.” This is precisely the type of testing Dr. Watt recognized
 17 has a higher priority. *See* Watt Decl., ¶ 13 (ECF No. 3413-1).

18 **b. This Court has the Authority to Order the Requested Relief**

19 **i. Separation of Powers Does Not Bar this Court from Acting**

20 The State urges the Court to refrain from ordering relief out of deference to prison
 21 authorities. *Opp.* at 3-4. While it is true that courts owe prison officials a degree of
 22 deference, the Supreme Court has counseled in this very case that where a “government
 23 fails to fulfill its obligation, the courts have a responsibility to remedy the resulting Eighth
 24 Amendment violation.” *Brown v. Plata*, 563 U.S. 493, 511 (2011). Thus, while courts
 25 should be sensitive to principles of federalism, “[c]ourts nevertheless must not shirk from
 26 their obligation to enforce the constitutional rights of all persons, including prisoners,” and
 27 “may not allow constitutional violations to continue simply because a remedy would
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1 involve intrusion into the realm of prison administration.” *Id.* (citations omitted).
2 Separation of powers principles do not bar this Court from acting where, as here,
3 Defendants have been given every opportunity to address these problems without this
4 Court’s intervention but have repeatedly failed to take necessary action. *See* Hart Decl.,
5 ¶¶ 3-4, 9 (ECF No. 3402-2).

6 **ii. Plaintiffs Are Entitled to Relief Under the PLRA**

7 Defendants argue that the relief sought by Plaintiffs violates the Prison Litigation
8 Reform Act because it “sets a harmful precedent that the testing plan must remain static at
9 a time when flexibility is demanded most.” *Opp.* at 4, 8. Not so. Plaintiffs’ proposed
10 order does not prohibit Defendants from modifying their staff testing plan in the future.
11 The parties have consistently recognized that this plan may change based on developing
12 public health guidance and factual circumstances, and Plaintiffs have never demanded that
13 this plan be static.

14 Similarly, Defendants argue that this Court’s intervention is unnecessary, because
15 CDCR’s staff testing plan is again in the process of being updated. *Opp.* at 2. But
16 Defendants do not state that these revisions will resolve the problems identified in
17 Plaintiffs’ motion. Defendants cannot avoid judicial review of their plan by continuing to
18 state indefinitely that it is being revised. Defendants have made such representations for
19 nearly two months, *see, e.g.*, Joint Case Management Conference Statement (June 8, 2020)
20 (ECF No. 3345 at 4), but in every iteration have failed to adequately address the issues
21 raised by Plaintiffs. In the meantime, cases continue to rise: since Plaintiffs filed their
22 motion on July 24, at least 150 more employees have tested positive, more than 1,000
23 incarcerated people have tested positive, and 7 more incarcerated people have died. *See*
24 CDCR, *CDCR/CCHCS COVID-19 Employee Status*,
25 <https://www.cdcr.ca.gov/covid19/cdcr-cchcs-covid-19-status> (last updated July 31, 2020);
26 CDCR, *Population COVID-19 Tracking*, [https://www.cdcr.ca.gov/covid19/population-](https://www.cdcr.ca.gov/covid19/population-status-tracking)
27 [status-tracking](https://www.cdcr.ca.gov/covid19/population-status-tracking) (last accessed August 3, 2020). CDCR’s failure to take reasonable steps to
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1 prevent the continued spread of the virus within the prisons requires this Court's urgent
2 intervention.

3 **III. CONCLUSION**

4 Plaintiffs respectfully request this Court order Defendants to modify CDCR's staff
5 testing plan, to bring CDCR's plan into compliance with public health recommendations
6 and adequately protect the people living and working in the state prisons.

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8 DATED: August 3, 2020

PRISON LAW OFFICE

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