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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 DENYING MOTIONS TO
STAY PENDING APPEAL**

Re: ECF Nos. 3715, 3722

United States District Court
Northern District of California

Before the Court are motions to stay filed by Defendants and Intervenor California Correctional Peace Officers’ Association (“CCPOA”). ECF Nos. 3715, 3722. Defendants and CCPOA seek to stay pending appeal this Court’s order mandating vaccination against COVID-19 and its order setting a January 12, 2022 implementation deadline. *Plata v. Newsom*, ___ F. Supp. 3d ___, 2021 WL 4448953 (N.D. Cal. Sept. 27, 2021) (ECF No. 3684); ECF No. 3721. The Court will deny both motions.

The issuance of a stay is a matter of judicial discretion, not a matter of right, and the “party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.” *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). The Court must consider four factors in exercising its discretion: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* at 434 (citation omitted). Under Ninth Circuit precedent, the movant “must show that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the

1 [movant’s] favor.” *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (per curiam).

2 On the merits, the Court already considered and rejected the majority of Defendants’ and
3 CCPOA’s arguments in its September 27, 2021 Order re: Mandatory Vaccinations. *Plata*, 2021
4 WL 4448953. Nothing in the parties’ briefs persuades the Court to change any of the conclusions
5 it reached in that order. Nonetheless, several issues warrant further discussion.

6 Both movants point to the Ninth Circuit’s opinion in *Fraihat v. U.S. Immigration and*
7 *Customs Enforcement*, 16 F.4th 613 (9th Cir. 2021), as intervening authority that requires
8 reconsideration of the Court’s order. In that case, the Ninth Circuit vacated a nationwide
9 preliminary injunction that “imposed a broad range of obligations on the federal government”
10 related to protecting immigration detainees from COVID-19. *Id.* at 618.

11 *Fraihat* did not change the deliberate indifference standard this Court applied when it
12 determined that a mandatory vaccination order was required by the Eighth Amendment. Nor does
13 *Fraihat*’s reasoning require a different outcome when applied to the facts of this case. First, in
14 contrast to the broad preliminary relief ordered in *Fraihat*, *see id.* at 629-34, this Court’s order is
15 narrowly focused. Additionally, unlike the preliminary injunction reviewed in *Fraihat*, the
16 Court’s order comes nearly two years into the pandemic, not “almost immediately” into “an
17 unprecedented and evolving public health problem.” *Id.* at 619. The district court in *Fraihat*
18 issued its preliminary injunction order on April 20, 2020, *id.* at 629 – three days after this Court
19 concluded that Defendants were not, at that time, acting with deliberate indifference, *Plata v.*
20 *Newsom*, 445 F. Supp. 3d 557, 562-69 (N.D. Cal. 2020) (ECF No. 3291).

21 Many months later, the record in this case now establishes deliberate indifference – and in
22 ways that were not present in *Fraihat*. Here, Defendants are ignoring undisputed medical and
23 scientific evidence, as well as the opinions of their own expert. Nothing similar was present in
24 *Fraihat*. Defendants attempt to manufacture a medical dispute based on a study published in the
25 *Lancet* on October 28, 2021, ECF No. 3742-2, but Defendants misrepresent the findings of that
26 study.¹ They assert that the study found that vaccinated individuals “are just as likely to spread

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28 ¹ It is not clear that this study presents “fact[s] that [are] not subject to reasonable dispute,” as
required for the Court to take judicial notice, but the Court nonetheless considers it. Fed. R. Evid.

1 the delta variant to contacts in their household as those who have not had a vaccination.” ECF
 2 No. 3741 at 11. However, while the study confirms that vaccinated individuals who are infected
 3 with the delta variant have similar peak viral loads and can spread the disease as readily as
 4 infected individuals who have not been vaccinated, it also reports that its findings are “consistent
 5 with the known protective effect of COVID-19 vaccination against infection.” ECF No. 3742-2 at
 6 11. As the summary to the study explains, “*Vaccination reduces the risk of delta variant infection*
 7 *and accelerates viral clearance*. Nonetheless, fully vaccinated individuals *with breakthrough*
 8 *infections* have peak viral load similar to unvaccinated cases and can efficiently transmit infection
 9 in household settings, including to fully vaccinated contacts.” *Id.* at 2 (emphasis added). In other
 10 words, the study stands for the proposition that vaccinated individuals, *once infected*, may, at least
 11 initially, spread the delta variant to the same extent as unvaccinated individuals. But it does not
 12 support Defendants’ misrepresentation that vaccinated individuals are “*just as likely* to spread the
 13 delta variant to contacts in their household as those who have not had a vaccination.” ECF No.
 14 3741 at 11 (emphasis added). To the contrary, because vaccinated individuals are less likely to
 15 become infected in the first place and also experience accelerated viral clearance, it remains
 16 undisputed that vaccinated individuals are less likely to infect others. The *Lancet* study therefore
 17 does not undermine the Court’s prior conclusions.

18 Moreover, subsequent to the Court’s mandatory vaccination order, Defendants’ own expert
 19 has now concluded that “COVID-19 vaccination of all employees of the CDCR without a valid
 20 contra-indication or exemption is the single most effective intervention available to prevent cases
 21 and outbreaks of COVID-19, both among those who are vaccinated and those who cannot be
 22 vaccinated.” ECF No. 3738-1 at 15. Defendants’ expert has also opined that prisons “are highly
 23 unlikely to be able to prevent or control outbreaks of COVID-19 solely through the application of
 24 non-pharmaceutical interventions,” *id.*, thus undercutting Defendants’ and CCPOA’s contention

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 27 201(b). Similarly, the Court has considered the news articles for which Defendants have requested
 28 judicial notice, even though it is unclear whether those articles – and, in particular, the facts
 contained therein – are proper subjects of judicial notice. ECF Nos. 3715-4, 3742; *see, e.g., Ali v.*
Intel Corp., No. 18-cv-03981-LHK, 2018 WL 5734673, at *3 (N.D. Cal. Oct. 31, 2018) (“Courts
 do not take judicial notice of newspaper articles for the truth of the contents of the articles.”).

1 that other COVID-preventive measures are sufficient to reasonably protect Plaintiffs. In other
2 words, Defendants' position is that, notwithstanding all other measures they continue to
3 implement, staff working at two institutions and in healthcare areas systemwide must be
4 vaccinated to protect the incarcerated population – but Defendants and CCPOA have presented no
5 basis for reaching a different conclusion as to all other institutions. It is unreasonable, and shows
6 reckless disregard, for Defendants to refuse to implement what their own expert has determined is
7 the “single most effective intervention available.” *Id.* This is not a case where medical opinions
8 differ.

9 The State's adoption of vaccine mandates for other groups of state employees further
10 underscores Defendants' deliberate indifference. The Court previously described the California
11 Department of Public Health's August 5 and August 19 orders, which mandated vaccines for
12 workers in healthcare facilities and healthcare areas in correctional settings. *Plata*, 2021 WL
13 4448953, at *3. The day after the Court's September 27 order, CDPH issued a third vaccine
14 mandate that covers workers at “adult and senior care facilities and in-home direct care settings.”
15 CDPH, Order of the State Public Health Officer re: Adult Care Facilities and Direct Care Worker
16 Vaccine Requirement, [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Adult-Care-Facilities-and-Direct-Care-Worker-Vaccine-Requirement.aspx)
17 [of-the-State-Public-Health-Officer-Adult-Care-Facilities-and-Direct-Care-Worker-Vaccine-](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Adult-Care-Facilities-and-Direct-Care-Worker-Vaccine-Requirement.aspx)
18 [Requirement.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Adult-Care-Facilities-and-Direct-Care-Worker-Vaccine-Requirement.aspx) (Sept. 28, 2021). All three of these orders were premised on the State's desire
19 to protect vulnerable populations in settings where workers have frequent contact with such
20 individuals. Notably – in contrast to Defendants' position in this case, where they suggest that a
21 mandatory vaccine for incarcerated persons is a better solution than a mandatory vaccine for staff
22 members – none of the CDPH orders, nor any other directive from the State, requires any
23 members of vulnerable populations to become vaccinated. Instead, consistent with Defendants'
24 expert's view that staff vaccination is the most effective intervention available, the CDPH orders
25 adopt that intervention. Defendants' different treatment of incarcerated persons, except for those
26 who are confined at the two facilities covered by the August 19 CDPH order, shows reckless
27 disregard for the safety of those persons.

28 In sum, for the reasons set forth above and those discussed in the Court's September 27

1 order, the facts of this case satisfy the “formidable” standard for deliberate indifference. *Fraihat*,
 2 16 F.4th at 636. Defendants have “disregarded an excessive risk to [Plaintiffs’] health and safety
 3 by failing to take reasonable and available measures that could have eliminated that risk.” *Id.*
 4 (quotation and alteration marks omitted). As the Court previously explained, “Defendants are
 5 aware of a substantial risk of serious harm to incarcerated persons, and, although they have taken
 6 many commendable steps during the course of this pandemic, they have nonetheless failed to
 7 reasonably abate that risk because they refuse to do what the undisputed evidence requires.”
 8 *Plata*, 2021 WL 4448953, at *1. Defendants and CCPOA have demonstrated neither “a strong
 9 likelihood of success on the merits” nor “a substantial case on the merits,” and their motions to
 10 stay must therefore be denied. *Leiva-Perez*, 640 F.3d at 970.

11 Even if Defendants and CCPOA had made a showing of likelihood of success on the
 12 merits, the balance of hardships and the public interest weigh sharply against a stay. Defendants’
 13 and CCPOA’s dire predictions of what might happen in the absence of a stay are speculative.
 14 Although some staff might choose to resign or retire rather than comply with a vaccine mandate,
 15 the level of staff departures is unknown at this time.² Defendants also base their predictions of
 16 harm on circumstances resulting from implementation of the August 19 CDPH order, yet – in
 17 contrast to their position in this case – they persist in implementing that order, including defending
 18 it against CCPOA’s legal challenges. Similarly, notwithstanding its claims of irreparable harm,
 19 CCPOA acknowledged at the hearing on these motions that it has not sought immediate review of
 20 the state court’s denial of its motion to preliminarily enjoin the August 19 CDPH order.
 21 Additionally, to the extent that Defendants and CCPOA rely on potential staff shortages in arguing
 22 for a stay, they have not considered that COVID outbreaks – which mandatory vaccination would
 23 help prevent – also result in staff shortages. *See, e.g., Plata*, 2021 WL 4448953, at *6 (noting that
 24 approximately 5,500 staff had to quarantine in the past year “either because they have themselves
 25 contracted COVID-19 or because they ‘are identified as close contacts of an infected individual’”).

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 27 ² It is also not clear to the Court that, in seeking a stay, a party can rely on harm that might occur if
 28 employees choose not to follow directives that implement a court order. That would appear to
 give contumacious employees an undue ability to determine when a court can enforce orders that
 require an employer to comply with the law.

1 CCPOA argues that some of its members will face irreparable harm absent a stay because
 2 they will be forced to choose between maintaining their employment or taking a vaccine that they
 3 do not want. The vast majority of courts to have considered this issue have concluded that such a
 4 choice does not constitute irreparable harm that warrants enjoining a vaccine mandate.³ *E.g.*,
 5 *Smith v. Biden*, No. 1:21-cv-19457, 2021 WL 5195688, at *8 (D.N.J. Nov. 8, 2021), *appeal filed*
 6 (3d Cir. Nov. 10, 2021) (“To date, every court that has considered the allegation that the potential
 7 loss of employment due to an employee’s decision not to comply with an employer’s COVID-19
 8 vaccine mandate constitutes irreparable harm has rejected it.”); *Bauer v. Summey*, ___ F. Supp. 3d
 9 ___, 2021 WL 4900922, at *18 (D.S.C. Oct. 21, 2021) (rejecting plaintiffs’ assertion of irreparable
 10 harm where plaintiffs argued that the challenged policies “leave them with effectively two options:
 11 receive the COVID-19 vaccine and give up their constitutionally protected rights to bodily
 12 autonomy and privacy, or refuse to receive the COVID-19 vaccine and risk losing their jobs, a
 13 constitutionally protected property interest”); *Mass. Corr. Officers Federated Union v. Baker*, ___
 14 F. Supp. 3d ___, 2021 WL 4822154, at *7 (D. Mass. Oct. 15, 2021) (“While Plaintiffs’ members
 15 may suffer the harm of losing employment, it is well settled that the loss of employment is not
 16 considered irreparable for the purposes of an injunction.”); *Beckerich v. St. Elizabeth Med. Ctr.*,
 17 ___ F. Supp. 3d ___, 2021 WL 4398027, at *7 (E.D. Ky. Sept. 24, 2021), *reconsideration denied*,
 18 2021 WL 4722915 (E.D. Ky. Sept. 30, 2021) (finding no irreparable harm where “Plaintiffs are
 19 choosing whether to comply with a condition of employment, or to deal with the potential
 20 consequences of that choice”); *but see BST Holdings, L.L.C. v. OSHA*, ___ F.4th ___, 2021 WL

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 23 ³ In addition, that Defendants and CCPOA waited approximately one month before filing their
 24 motions to stay weighs against a finding of irreparable harm. *E.g.*, *Dahl v. Swift Distrib., Inc.*, No.
 25 CV 10-00551 SJO (RZx), 2010 WL 1458957, at *4 (C.D. Cal. Apr. 1, 2010) (18-day delay
 26 between filing of complaint and motion for temporary restraining order “implies a lack of urgency
 27 and irreparable harm”). Both movants argue that they did not delay in seeking a stay because the
 28 September 27 order did not set a timeline for implementation, but this argument is unpersuasive.
 The September 27 order imposed a vaccine mandate and required an implementation plan to be
 filed, thus giving all parties notice that a vaccine mandate would be imposed. Defendants argue
 that the implementation deadline was unclear, but they jointly filed an implementation plan with
 the Receiver setting forth a November 29, 2021 deadline. ECF No. 3694 at 5. Moreover,
 Defendants and CCPOA appealed the Court’s September 27 order, and Defendants filed their
 motion for a stay pending appeal, without waiting for the Court to order a specific implementation
 deadline. ECF Nos. 3693, 3714, 3715.

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1 5279381, at *8 (5th Cir. Nov. 12, 2021) (finding irreparable harm because a vaccine-or-test
2 mandate “threatens to substantially burden the liberty interests of reluctant individual recipients
3 put to a choice between their job(s) and their jab(s)” (footnote omitted)).⁴

4 Finally, even assuming that Defendants and CCPOA might face some irreparable harm, the
5 balance of hardships and the public interest would still weigh against a stay. This Court has
6 determined that its mandatory vaccination order is required to protect the constitutional rights of
7 persons incarcerated by the State of California, and that Plaintiffs face a substantial risk of serious
8 harm, including serious illness and death, in the absence of a vaccine mandate. Defendants
9 “cannot suffer harm from an injunction that merely ends an unlawful practice,” even if they were
10 to “face[] severe logistical difficulties in implementing the order.” *Rodriguez v. Robbins*, 715
11 F.3d 1127, 1145-46 (9th Cir. 2013), *abrogated on other grounds sub. nom Jennings v. Rodriguez*,
12 138 S. Ct. 830 (2018). And, “[e]ven considering the economic impact on [CCPOA members] if
13 they choose not to be vaccinated, when balancing that harm against the legitimate and critical
14 public interest in preventing the spread of COVID-19 by increasing the vaccination rate,
15 particularly in congregate facilities, the Court finds the balance weighs in favor of the broader
16 public interests.” *Mass. Corr. Officers*, 2021 WL 4822154, at *8.

17 Defendants’ and CCPOA’s motions for a stay pending appeal are denied.

18 **IT IS SO ORDERED.**

19 Dated: November 17, 2021



JON S. TIGAI
United States District Judge

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27 ⁴ *BST Holdings* has since been consolidated and assigned by the Judicial Panel on Multidistrict
28 Litigation to the United States Court of Appeals for the Sixth Circuit. *In re: OSHA, Interim Final
Rule: COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402,
Issued on Nov. 4, 2021, MCP No. 165, ECF No. 3 (JPML Nov. 16, 2021).