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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ANGEL DE JESUS ZEPEDA RIVAS, <i>et al.</i> ,)	CASE NO. 3:20-cv-02731-VC
)	
Plaintiffs,)	FEDERAL DEFENDANTS' OPPOSITION TO
)	PLAINTIFFS' MOTION FOR TEMPORARY
v.)	RESTRAINING ORDER
)	
DAVID JENNINGS, <i>et al.</i> ,)	
)	
Defendants.)	
)	
)	
)	

INTRODUCTION

Federal Defendants respectfully submit this response and opposition to Plaintiffs’ motion for temporary restraining order (TRO) (ECF No. 911). Yuba County (County) and the County Health Officer, Dr. Ngoc-Phuong Luu, have been closely directing and overseeing measures being taken at the Yuba County Jail (YCJ) to address COVID. Federal Defendants have agreed to a number of additional measures with respect to ICE detainees. The situation is fast-moving; YCJ is continuing to take new measures to address COVID. Additionally, the County is subject to a consent decree before the United States District Court for the Eastern District of California with respect to conditions at YCJ. Amend. Consent Decree, *Hedrick v. Grant*, No. 2:76-cv-00162-EFB (E.D. Cal. Jan. 30, 2019), ECF No. 258 (attached as Declaration of Shiwon Choe (Choe Decl.) Ex. 1).¹ The *Hedrick* plaintiffs are actively engaging the County under the Consent Decree regarding measures being taken at YCJ to address COVID. *See* Choe Decl. Ex. 2, at 3–4. In light of this, Plaintiffs have not made a clear showing that a TRO by this Court with respect to YCJ is necessary or appropriate. Additionally, Plaintiffs’ proposed TRO, which would direct Federal Defendants to “ensure that” various measures are taken at a facility operated by the County — a non-party to the litigation that Federal Defendants do not control — is inappropriate and unwarranted. For the foregoing reasons, Federal Defendants respectfully request that the Court deny Plaintiffs’ motion for TRO.²

STATEMENT OF FACTS

YCJ has the capacity to house 420 detainees.³ Declaration of Johnny Bailey (Bailey Decl.) ¶ 4. As of today, there are 211 County inmates and 20 ICE detainees at YCJ. *Id.* There currently are 78

¹ The Consent Decree covers both County inmates and ICE detainees. *See* Consent Decree 4, ¶ 6 (defining “Inmate” as “A person incarcerated within the Yuba County Jail, including pretrial detainees, sentenced inmates, and inmates held in cooperation with other agencies including Immigration and Customs Enforcement.”).

² Plaintiffs filed their motion for TRO today at 11:53 a.m. ECF No. 911. The Court ordered Federal Defendants to respond today by 6:00 p.m., ECF No. 916, and subsequently by email to the parties extended the deadline to 9:00 p.m. Federal Defendants previously had requested the Court for more time for a response; the Court denied the request. Federal Defendants have attempted to respond as fully as they can in the limited time allotted to them. Among other things, as Federal Defendants previously alerted the Court in their request for additional time, Federal Defendants have had difficulties in obtaining declarations on this abbreviated timeframe. Federal Defendants have done their best to assemble declarations in the time allotted to them.

³ As used herein, “detainees” refers collectively to both ICE detainees and County inmates.

detainees at YCJ who have tested positive. Bailey Decl. ¶ 9. Two current ICE detainees have tested positive. *Id.*⁴ Two ICE detainees are in medical isolation cells, fourteen are in C Pod, and four are in A Pod in single cells. *Id.* ¶ 6.

As Federal Defendants informed Plaintiffs prior to their filing of their motion, Federal Defendants have agreed to various measures with respect to ICE detainees at YCJ. Federal Defendants have agreed and agree to the following:

- In addition to saturation testing of all detainees last week, ICE additionally had all ICE detainees Abbott tested last Friday. Bailey Decl. ¶¶ 6–7.
- Federal Defendants have agreed to have Abbott tested ICE detainees identified by medical staff who are symptomatic. Choe Decl. Ex. 2, at 5. Federal Defendants also have Abbott tested detainees identified by class counsel as symptomatic. Bailey Decl. ¶ 5; *accord* Choe Decl. Ex. 3, at 4; Choe Decl. Ex. 4, at 2. While perhaps not explicitly stated before, Federal Defendants agree to continue to have ICE detainees identified by class counsel as symptomatic be Abbott tested.
- Federal Defendants have agreed to have Abbott tested ICE detainees who come into close contact with anyone who tests positive for COVID. Choe Decl. Ex. 2, at 5. While perhaps not explicitly stated before, Federal Defendants agree to include in this ICE detainees who were housed in the same housing unit in the past two days with another detainee who tests positive.
- Federal Defendants have agreed to inform class counsel of any ICE detainee who refuses testing, with a subsequent offer to test the detainee after the detainee communicates with class counsel. Choe Decl. Ex. 2, at 5.

Additionally, while not explicitly stated before, Federal Defendants agree not to add any new ICE detainees to YCJ until YCJ has the COVID outbreak under control and positive detainees have recovered. *Accord* Bailey Decl. ¶ 10.

While Federal Defendants cannot speak for or enter into agreements on behalf of the County, at

⁴ A third ICE detainee who had tested positive was released today pursuant to a bond order issued by the San Francisco Immigration Court. *See* Choe Decl. Ex. 3, at 1–3.

this time, Federal Defendants have received the following information regarding the County's COVID testing measures. The County is testing for COVID all detainees (ICE and County) weekly and all staff twice a week.⁵ Choe Decl. ¶ 7. The County will continue this detainee and staff testing until there are no new positive tests among any detainees or staff for two consecutive weeks. *Id.* This is not broken out between detainees and staff, e.g., if there are no new positive tests among staff in a given week but there are new positive tests among detainees that week, or vice versa, both detainee and staff testing will continue for at least two more weeks until there are no new positive tests among either detainees or staff. *Id.*⁶

Federal Defendants have received the following information regarding the County's housing-placement measures. The County is categorizing detainees into four categories: (1) detainees who have tested negative and are asymptomatic, (2) detainees who have not tested positive but who are symptomatic, (3) detainees who have tested positive, and (4) detainees who have tested positive who have recovered. The County plans to house detainees in category (2) in cells with solid doors. Such detainees generally will be housed in cells with solid doors individually (except perhaps in circumstances such as two symptomatic detainees being housed in a single cell prior to being isolated, in which case they could be isolated in the same cell as well).⁷ The County further plans to separate detainees in category (1) from detainees in category (3) and not house them in the same housing units.

⁵ Not including detainees or staff who previously have tested positive.

⁶ Plaintiffs say that "Since Monday's emergency Status Conference, Defendants have provided no substantive details concerning the policies and practices of housing symptomatic and COVID-positive class members, or of testing those in custody. Despite the Court's inquiry, and repeated inquiries from Plaintiffs, Defendants have failed to provide *any* specific information concerning staff testing." Pls. Mot. 3 (emphasis in original). This is not accurate. Before the status conference, Federal Defendants told Plaintiffs that all ICE detainees had been lab-tested and Abbott tested and would be re-tested. Choe Decl. Ex. 4, at 3. Following the status conference — and prior to Plaintiffs' filing their motion — Federal Defendants further told Plaintiffs that detainee testing would continue until there were no new positive cases for two weeks and, additionally, that all staff were being tested twice a week as well and would continue to be tested until there were no new positive cases for two weeks. Choe Decl. Ex. 2, at 2–4. Federal Defendants further told Plaintiffs the information regarding housing placements that they had at the time. *Id.* Federal Defendants followed up with Plaintiffs provided additional information once they had more information to provide. *Id.* at 1–2.

⁷ The County noted that the situation is ever-changing (e.g., it is possible that the number of symptomatic detainees who have not tested positive might at some point exceed the number of cells with solid doors), but the County's plan is to house symptomatic detainees who have not tested positive in cells with solid doors. Choe Decl. Ex. ¶ 7.

Housing-placement decisions are being closely directed and overseen by the County Health Officer, Dr. Luu. Choe Decl. ¶ 8. Dr. Luu opines that any court order restricting her ability to house classified inmates based on medical need will be detrimental to her ability to prevent further infections. Bailey Decl. ¶ 8. Dr. Luu is providing all support and direction necessary to the jail medical and custody staff and needs the freedom and flexibility to do that based on the minute to minute changes that are occurring in real time within the jail. *Id.*

Federal Defendants do not at this time have all of the specifics with respect to all measures being taken at YCJ. The situation is fast-moving, with new measures being implemented on a real-time basis.⁸ The fact that Federal Defendants have not received updates on the specifics of each measure the County is taking (during a time when the County and County Health Officer are working to implement the measures and also are responding to and engaging with the *Hedrick* plaintiffs) does not mean that measures are not being implemented or that anyone is acting with deliberate indifference.

In response to the Court's order of 4:45 p.m. today calling for information about cells at YCJ, ECF No. 917, Federal Defendants respectfully direct the Court to Exhibit 5 to the Choe Declaration.⁹

ARGUMENT

“A restraining order is an ‘extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.’” *Rovio Entm't Ltd. v. Royal Plush Toys, Inc.*, 907 F. Supp. 2d 1086, 1093 (N.D. Cal. 2012) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). Plaintiffs have not made a clear showing that their proposed TRO is necessary or appropriate.

Plaintiffs have not demonstrated a likelihood of success on the merits of their claim (either on a theory that Federal Defendants have been deliberately indifferent or that their detention is tantamount to punishment), immediate irreparable injury, or that the equities and public interest tip in their favor. YCJ is taking numerous measures in response to COVID and the safety of detainees under the direction and oversight of the County and the County Health Officer, Dr. Luu. The County and Federal Defendants,

⁸ See Choe Decl. ¶ 7 n.2 (discussing updates to measures between this morning and this afternoon); Bailey Decl. ¶ 8 (County Health Officer needs the freedom and flexibility to make decisions based on minute-to-minute changes occurring in real time).

⁹ Federal Defendants have not been able to independently verify this information in the limited time available to them before the filing deadline.

between them, have committed to weekly testing of all detainees, twice-weekly testing of staff, and supplemental Abbott testing of ICE detainees who are symptomatic or have close contacts. The County Health Officer is directing and overseeing housing-placement decisions. Among other things, a TRO here with respect to YCJ operations may interfere with YCJ operations and limit the ability of YCJ and the County Health Officer to make decisions in the interest of the health and safety of detainees at YCJ. Bailey Decl. ¶ 8. *Cf. Hernandez Roman v. Wolf*, 977 F.3d 935, 946 (9th Cir. 2020) (“[T]he district court should, to the extent possible, avoid imposing provisions that micromanage the Government’s administration of conditions at [detention facility]” and not “wade into facility administration at a granular level beyond what is required to remedy the constitutional violation identified. These types of considerations are better left to the ‘professional expertise of corrections officials.’”) (quoting *Bell v. Wolfish*, 441 U.S. 520, 540 n.23 (1979)). Additionally, the conditions at YCJ are the subject of a consent decree in the Eastern District of California, and the County is engaging with the plaintiffs there regarding COVID measures under that consent decree. A TRO here would threaten to interfere with the process there. *Cf. Gonzalez v. Ahern*, No. 19-cv-07423-JSC, 2020 WL 3470089, at *6 (N.D. Cal. June 25, 2020) (“[I]t would not be in the interests of Plaintiffs or the members of the putative class for two different judges to manage the same claims given that resources are already stretched thin responding to this ever-changing public health crisis.”).

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that Plaintiffs’ motion for TRO be denied.

DATED: December 23, 2020

Respectfully submitted,

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s/Shiwon Choe

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