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15 **UNITED STATES DISTRICT COURT**
16 **CENTRAL DISTRICT OF CALIFORNIA**

17 KELVIN HERNANDEZ ROMAN,
18 MIGUEL AGUILAR ESTRADA,
19 BEATRIZ ANDREA FORERO
CHAVEZ, on behalf of themselves and
others similarly situated,

20 Petitioners-Plaintiffs,

21 v.

22 CHAD F. WOLF, Acting Secretary, U.S.
Department of Homeland Security;
23 MATTHEW T. ALBENCE, Deputy
Director and Senior Official Performing
24 the Duties of the Director, U.S.
Immigration and Customs Enforcement;
25 DAVID MARIN, Director of the Los
Angeles Field Office, Enforcement and
26 Removal Operations, U.S. Immigration
and Customs Enforcement; and JAMES
27 JANECKA, Warden, Adelanto ICE
Processing Center,

28 Respondents-Defendants.

Case No. 5:20-cv-00768-TJH-PVC

ADELANTO COVID

**PLAINTIFFS' MOTION FOR
ENFORCEMENT OF
PRELIMINARY INJUNCTION'S
CDC GUIDANCE PROVISION**

HON. TERRY J. HATTER, JR.

1 Plaintiffs move this Court for an order directing Defendants to comply with
2 the provision of its April 23, 2020 preliminary injunction that remains in force.
3 Paragraph 13 of that injunction required that Defendants “immediately put into
4 effect at Adelanto all mandates, best practices, recommendations and guidelines
5 issued by the United States Centers for Disease Control and Prevention.” On May 5,
6 2020, the Ninth Circuit stayed other portions of the preliminary injunction, but not
7 the CDC Guidance provision. Instead, the Ninth Circuit held “to the extent that
8 paragraph 13 ... requires substantial compliance with [CDC] guidelines ... the
9 motion for stay is denied.”¹ ECF No. 73. Thus Defendants remain under an
10 injunction to “substantial[ly] compl[y]” with CDC Guidance. *Id.*

11 Defendants have violated that obligation in three respects: transfers, testing,
12 and the use of disinfectants. Specifically, (1) Defendants continue to accept routine
13 transfers in from other facilities—including those with active COVID-19
14 outbreaks—and also transfer detainees out to other facilities; (2) Defendants test
15 new arrivals, but not individuals already inside the facility, *even if symptomatic*, and
16 even though they have sufficient testing capacity *on-site* to do comprehensive
17 testing; and (3) Defendants use the highly dangerous chemical spray HDQ Neutral
18 as a disinfectant inside Adelanto on a daily basis.

19 Each of these practices violates the applicable CDC Guidance. Each also
20 recklessly endangers the health and safety of detainees at the facility, as the threat of
21 the pandemic in California, and particularly in San Bernardino, only continues to
22 grow. Defendants’ own description of the steps they have taken inside the facility
23 confirm their continued use of these impermissible practices. *See* Ex. C at 3-5

24
25 ¹ The Court specifically required compliance with the CDC’s *Interim Guidance on*
26 *Management of Coronavirus Disease 2019 (COVID-19) in Correctional and*
27 *Detention Facilities*. The CDC has issued updates to this guidance over time.
28 Attached as Ex. A is the CDC’s Guidance updated as of March 23, 2020, which is
the guidance the Ninth Circuit referenced. Attached as Ex. B are excerpts from the
CDC’s Guidance updated as of July 22, 2020. It contains greater emphasis on the
need for testing, among other changes. For the document in its entirety, *see*
[https://www.cdc.gov/coronavirus/2019-ncov/community/correction-
detention/guidance-correctional-detention.html](https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html)

1 (Defendants’ description as of July 24, 2020); Ex. D at 16 (admitting use of HDQ
2 Neutral). This Court should promptly mandate compliance with the April 23
3 injunction by prohibiting these practices.

4 **I. Defendants’ Transfer Policy Violates the Preliminary Injunction**

5 The CDC Guidance of March 27, 2020, directs facilities to “[r]estrict
6 transfers of incarcerated/detained persons to and from other jurisdictions and
7 facilities unless necessary for medical evaluation, medical isolation/quarantine,
8 clinical care, extenuating security concerns, or to prevent overcrowding.” Ex. A. at 9
9 (emphasis added). This provision prohibits transfers outside of these five discrete
10 exceptions. And it makes clear that even the exceptions should be construed
11 narrowly. *Id.* (describing protocol to apply if transfer is “absolutely necessary”).

12 Likewise, the CDC Guidance updated as of July 22, 2020, directs facilities to
13 “[l]imit transfers of incarcerated/detained persons to and from other jurisdictions and
14 facilities unless necessary for medical evaluation, medical isolation/quarantine,
15 clinical care, extenuating security concerns, release, or to prevent overcrowding.” Ex.
16 B at excerpt p. 1. Furthermore, if (as in Adelanto) there is an individual with suspected
17 COVID-19 inside the facility, including detainees, staff, or visitors who have recently
18 been inside, the facility must “[s]uspend all transfers of incarcerated/detained persons
19 to and from other jurisdictions and facilities (including work release), unless necessary
20 for medical evaluation, medical isolation/quarantine, health care, extenuating security
21 concerns, release, or to prevent overcrowding.” *Id.* at 13.

22 Defendants have flagrantly violated this provision for weeks. Indeed, it
23 appears to be their official policy. ICE’s guidelines, announced on July 28, 2020,
24 establish a sixth purported “exception” which is not contemplated by the CDC
25 Guidance: transfers “to facilitate release or removal.”² Defendants apparently read

26 _____
27 ² *See* [https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.p](https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf)
28 [df](https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf), at 20. Even if that guidance were operative, it is not obvious that it should be read
to permit transfers for routine immigration enforcement, rather than just transfers *out*
of the facility once removal becomes imminent.

1 that to permit business as usual, which is what they continue to do. They have
2 continued to introduce new individuals into Adelanto and send others out
3 irrespective of the CDC’s transfer limitations, as part of routine immigration
4 enforcement. From March 1 to July 15, 2020, Defendants have transferred 102
5 individuals into Adelanto from facilities with *confirmed COVID cases* at the time of
6 the transfer or within two weeks after the transfer, such as FCI Lompoc, Victorville,
7 and Chuckawalla State Prison. Ex. E at 14-22. *See also* Second Yboy Flores Dec. ¶ 4
8 (describing transfers in last few weeks from Victorville); Second Davtyan Dec. ¶ 5
9 (recent transfers from Lompoc federal prison). For example, Chuckawalla Valley
10 State Prison in nearby Riverside went from zero to nearly 1,000 confirmed cases
11 over the course of three weeks in late May and June. Similarly, when the
12 government conducted widespread testing at FCI Lompoc in May, nearly 70% of all
13 prisoners tested positive.³ Defendants then cohorted many of these individuals with
14 other detainees when they arrived at Adelanto. *See id.*

15 Transferring an individual from a facility with an active outbreak into
16 Adelanto creates an enormous risk of an infected person entering the facility and
17 spreading the virus—either through contact with other detainees, or with the guards
18 and other employees who circulate through the general population. Defendants’
19 refusal to limit transfers even from facilities with active outbreaks plainly violates
20 CDC Guidance.

21 During the meet and confer discussion prior to filing this motion, Defendants’
22 counsel asserted that immigration enforcement transfers were justified under the
23 CDC Guidance as “extenuating security concerns.” However, there is no evidence
24 that Defendants have determined that the transfers at issue here are justified on that

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26 ³ *See Nearly 1,000 infected at Chuckawalla Valley State Prison in worst coronavirus*
27 *outbreak to hit prison system*, L.A. Times, June 8, 2020 (available at
28 <https://ktla.com/news/local-news/nearly-1000-infected-at-chuckawalla-valley-state-prison-in-worst-coronavirus-outbreak-to-hit-prison-system/>); Richard Winton, *70% of inmates test positive for coronavirus at Lompoc federal prison*, L.A. Times, May 9, 2020 (available at <https://www.latimes.com/california/story/2020-05-09/coronavirus-cases-lompoc-federal-prison-inmates>) (last checked August 6, 2020).

1 basis. To the extent they argue that every immigration transfer from a jail is, by
2 definition, justified as an “extenuating security concern,” that argument is patently
3 meritless.

4 Similarly, Defendants continue to transfer individuals *out* of Adelanto on a
5 regular basis—including one individual who had a bail application in process last
6 week. *See generally* Ex. E at 23-24 (78 people transferred between March 1 and July
7 15, including seven who had reported COVID symptoms prior to the transfer); Dkt.
8 302 (Supplemental Brief re Mario Flores Giron Bail Application) (describing
9 transfer to ICE facility in Florence, Arizona). Nothing in the documents produced to
10 Plaintiffs suggests that all of these transfers were needed for “medical evaluation,
11 medical isolation/quarantine, clinical care, extenuating security concerns, or to
12 prevent overcrowding.” Rather, Defendants transferred most if not all of these
13 individuals in order to continue business-as-usual “immigration enforcement,”
14 notwithstanding the CDC’s guidance that such operations must dramatically change
15 during the pandemic.

16 **II. Defendants’ Testing Protocol Violates the Preliminary Injunction**

17 Defendants have also violated the testing provisions of the CDC Guidance.
18 The current CDC Guidance recognizes the obvious: that testing “can help prevent
19 spread of SARS-CoV-2 in correctional and detention facilities.” The Guidance also
20 incorporates separate CDC guidance specific to testing. *See* Ex. B at excerpt p. 3.
21 The testing guidance provides that, at a minimum, individuals who have COVID-19
22 symptoms should be tested. “Consistent with CDC’s recommendations, individuals
23 with COVID-19 signs or symptoms should be referred to a healthcare provider for
24 evaluation for testing (including staff and IDP).” Ex. F at 2. It also references the
25 possibility of universal testing in “communities with moderate to substantial levels
26 of community transmission.” *Id.* at 4.

27 But Defendants appear to be ignoring these testing provisions. Since May 27
28 Defendants have tested *new* arrivals for COVID-19, but do not test individuals *already*

1 in the facility, even when they are *symptomatic*. Ex. C at 3-4 (listing the steps
2 Defendants have taken to comply with CDC Guidance, but not mentioning the testing
3 of symptomatic individuals); *see also id.* at 2 (specifying that new detainees are tested,
4 but not others). Indeed, Defendants’ own discovery responses plainly show that
5 Defendants are *not* testing all symptomatic individuals. Extraordinarily, between
6 March 1 and July 15, 2020, 305 detainees presented with COVID symptoms, but only
7 *one* of them was tested. Ex. E at 9-13, 40-44. Indeed, as one current detainee puts it,
8 “No one I know has gotten tested for COVID-19 at Adelanto. No staff have told us
9 how to get a test.” Second Yboy Flores Dec., ¶ 10; *see also* Second Mythong Dec. ¶ 5
10 (same). Instead of testing people who have symptoms, Defendants claim to assess
11 whether someone is a “suspected positive” case *without testing*, and then to place those
12 individuals in some form of isolation. *See* Ex. C at 4. Such blind assessments do not
13 comport with CDC’s Guidance.⁴

14 Defendants’ refusal to test is particularly shocking because they have *ample*
15 *tests available*. They have simply chosen *not to use them*. Defendants have had
16 sufficient testing capacity on-site to test every individual imprisoned at Adelanto
17 since approximately May 20, 2020. On May 15, Adelanto’s Facility Administrator
18 James Janecka (an employee of GEO corporation, the contractor running Adelanto)
19 sent a memo to Paul Laird, the Vice President for the Western Region, describing a
20 detailed plan to test everyone – all staff and detainees (unless they refuse the test) –
21 upon receipt of sufficient testing kits, which were expected to arrive on May 19. *See*
22 Ex. L. Then, on May 19, Janecka wrote an email to Assistant Field Office Director
23 Gabriel Valdez stating that “[t]he Company (GEO) has overnight shipped
24 approximately 1,900 COVID [test kits] that are expected to arrive at the facility

25 _____
26 ⁴ The testing guidance acknowledges a degree of flexibility in its mandates,
27 specifying that “[i]mplementation should be guided by what is feasible, practical,
28 and acceptable, and be tailored to the needs of each facility.” Ex. F at 1. However,
because Defendants have a massive surplus of testing capacity on-site, it is feasible
for them to follow the CDC Guidance recommendation to test individuals who show
COVID-19 symptoms, and probably to test everyone at the facility even without
procuring more tests.

1 today.” 1,900 would have been more than enough to test all of the facility’s staff and
2 detainees at that time. Ex. G at RES 01150. He stated GEO “will begin offering
3 testing to all staff and all detainees tomorrow (May 20, 2020).” *Id.*

4 Shockingly, ICE *stopped* that comprehensive testing program. In response to
5 the message from Mr. Janecka, Gabriel Valdez, the ICE Officer In Charge at
6 Adelanto, stopped the plan, stating “until I receive guidance from my chain of
7 command *I don’t want any detainees tested through this voluntary process.*” *See id.*
8 at RES01150-51 (emphasis added). As Valdez wrote in a subsequent email, “What
9 contingency plans have been developed to address a potential for a large number of
10 positive test results in the detainee population?” Ex. I. at 001228.

11 Nonetheless, one week later, correspondence from Deportation Officer
12 Michael Vuong, of ICE’s “Los Angeles Statistics and Taskings Unit” confirmed that
13 universal testing was appropriate. A memo he distributed titled “COVID-19 Testing
14 Operational Plan,” dated May 27, 2020, explained that because “asymptomatic or
15 pre-symptomatic detainees . . . can transmit the virus to other detainees,” ICE
16 should expand testing to all detainees in an attempt to slow the virus. Ex. H at
17 RES00843. Under the proposal he described, “[t]esting will begin with *all existing*
18 *detainees* and continue with new intake.” *Id.* (emphasis added). The memo described
19 four detention centers that ICE had selected for immediate implementation of this
20 process, and a timetable for completing it at other facilities. *Id.* It recommended this
21 approach because it “will assist in slowing transmissions within a detention setting.”
22 *Id.* The memo acknowledged “ERO recognizes it may also increase the number of
23 COVID-19 positive tests reflected on the agency’s public website. However, ERO
24 will be able to better utilize this information for the management of an outbreak at
25 the affected facility.” *Id.* at RES00844.

26 But, again, ICE did not follow through with the recommendation from that
27 memo. Instead, on May 27, 2020, ICE instituted the current protocol, which tests
28 only *new* arrivals at Adelanto, not individuals already held at Adelanto. *Id.* at

1 RES00845. As of today, even symptomatic individuals at Adelanto *still* cannot
2 obtain tests, which explains why almost no one who is not a new arrivals has been
3 tested there. *See, e.g.*, Second Yboy Flores Dec., ¶ 10; Second Mythong Dec. ¶ 5.

4 During the meet and confer process for this motion, Defendants took the
5 position that they do in fact test symptomatic individuals, but provided no
6 evidentiary support for that claim, and it is notably absent from their list of steps
7 taken to respond to the pandemic. Ex. C at 3-4. Defendants asserted that the large
8 number of individuals who reported symptoms but remain untested could be
9 explained by the fact that those individuals may have been found, upon medical
10 examination, to not actually be experiencing them. While this could explain some
11 small number of cases, the fact that only one of the 305 people who reported
12 symptoms has in fact been tested strongly suggests this explanation is false.

13 Last week, the district court hearing a parallel challenge to ICE's response to
14 COVID-19 at the Mesa Verde Detention Center in Bakersfield excoriated the
15 government for very similar conduct. As Judge Chhabria explained,
16 the documentary evidence shows that the defendants have avoided widespread
17 testing of staff and detainees at the facility, not for lack of tests, but for fear
18 that positive test results would require them to implement safety measures that
19 they apparently felt were not worth the trouble. This conduct by the
20 defendants has put the detainees at serious risk of irreparable harm. The
21 defendants have also jeopardized the safety of their own employees. And they
22 have endangered the community at large.

23 ECF 500, Order Granting Motion for Temporary Restraining Order, *Zepeda Rivas v.*
24 *Jennings*, No. 20-cv-02731 (N.D. Cal. August 6, 2020). The court ordered ICE to
25 rapidly test every detainee at the facility and prohibited all transfers into the facility
26 (absent court order).

27 Defendants' failure to test even symptomatic individuals (let alone all
28 detainees, as both GEO and the internal ICE memo apparently proposed, and as the
Zepeda Rivas court ordered), despite having enough tests to do so, violates both the

1 CDC Guidance and common sense.⁵

2 **III. Defendants’ Use of the HDQ Neutral Chemical Violates the**
3 **Preliminary Injunction**

4 The CDC Guidance specifies that all cleaning agents be used in accordance
5 with the “label instructions.” *See* Ex. A at 9 (“Cleaning and Disinfecting Practices”);
6 Ex. B at excerpt p. 2. They also recommend the use of “EPA-registered disinfectants
7 effective against SARS-CoV-2,” *See* Ex. A at 9 (“Cleaning and Disinfecting
8 Practices”); Ex. B excerpt p. 2. Defendants have violated this provision through their
9 use of HDQ Neutral within Adelanto in a manner inconsistent with the chemical’s
10 labelling instructions.

11 HDQ Neutral is a “corrosive” chemical listed as an “acute health hazard.”
12 Accordingly, its safety labeling clearly specifies that it should *only* be used outdoors
13 or in well-ventilated areas.⁶ The product label further warns users to “avoid
14 breathing spray mist,” in part because it “causes irreversible eye damage and skin
15 burns.” *See* Ex. M at RES 005347. Even in diluted form, it should not be used
16 without splash goggles, rubber gloves, and respiratory protection in cases where it
17 causes respiratory irritation. *Id.* at RES 005354.⁷

18 ⁵ The testing guidance also recommends testing in other circumstances. In particular,
19 it suggests universal testing may be appropriate in communities with widespread
20 transmission. *See* Ex. F at 4. Because San Bernardino, where many of the staff
21 working inside Adelanto reside, is currently experiencing widespread community
22 transmission, universal testing at Adelanto would be appropriate under that
23 recommendation of the guidance. *See also* Memorandum of Decision at 33, *Savino*
24 *v. Souza*, No. 20-10617-WGY (D. Mass. May 12, 2020) ECF No. 175 (on
25 preliminary injunction, after detailed explanation of why COVID-19 prevention is
26 virtually impossible without testing, ordering that “all immigration detainees at
27 [Bristol County jail] and staff who come into contact with them must be tested for
28 COVID-19.”) (attached as Ex. J); Order to Show Cause at 7, *Juarez v. Asher*, No.
C20-700-JLR-MLP (W.D. Wash. May 28, 2020) ECF No. 78 (order to show cause
why universal testing should not occur for all ICE Detainees at Northwest Detention
Center in Washington, after which government tested all detainees) (attached as Ex.
K).

⁶ The instructions are unequivocal and frightening: “Use only outdoors or in a well-
ventilated area”; “Do not breathe mist, vapors, or spray”; “Harmful if inhaled”;
“Causes severe skin burns and serious eye damage.” *See* Spartan Chemical
Company, Inc. Safety Data Sheet – HDQ Neutral (“Safety Sheet”) at 2, 6, 1 (Sep.
10, 2019), <https://www.spartanchemical.com/sds/downloads/AGHS/EN/1202.pdf>.

⁷ In a prior filing to this Court regarding HDQ Neutral, Defendants suggested it
would be permissible to use “undiluted disinfectants,” presumably including HDQ

1 Yet Defendants use this spray multiple times a day *inside* Adelanto, where
2 detainees inevitably touch and inhale it. *See* Second Mythong Dec., ¶¶ 6-10 (coming
3 into cell after HDQ Neutral cleaning “feels like walking into a plume of smoke”);
4 Second Yboy Flores Dec., ¶¶ 13-16 (exposure gives him awful, near-constant
5 headaches); Second Davtyan Dec., ¶¶ 7-14. *See also* Decl. of Kelvin Hernandez
6 Roman (“Hernandez Roman Decl.”) ¶ 42, Apr. 20, 2020, ECF No. 42-4; Decl. of
7 David Nahman (“Nahman Decl.”) ¶ 17, May 18, 2020, ECF No. 87-12; *see also* Ex.
8 D at 16 (admitting use of HDQ Neutral); Decl. of Gabriel Valdez ¶ 23(a), ECF No.
9 50-1.⁸

10 Predictably, Plaintiffs’ exposure to such a harsh chemical irritates their noses,
11 eyes, skin, and stomachs, has caused some Class Members to sneeze or cough blood,
12 and has given others horrific headaches. *See* Hernandez Roman Decl. ¶ 42 (the spray
13 gave a detainee “very, very dry” hands), Nahman Decl. ¶ 17 (the spray gives
14 detainees headaches, nose bleeds, and burning eyes); Yboy Flores Dec. *supra*.

15 Those effects are particularly disturbing because the symptoms caused by
16 Defendants’ use of HDQ Neutral increase the likelihood that Class Members will
17 contract and become seriously ill from COVID-19. Because COVID-19 spreads
18 through respiratory droplets produced when an infected person coughs or sneezes,
19 Findings of Fact and Conclusions of Law ¶ 13, ECF No. 53, the use of a chemical
20 that irritates detainees’ noses and throats, causing them to cough or sneeze, increases
21 the risk of deadly infection. Moreover, decreased lung function may impact how ill a
22 person becomes from COVID-19. *See, e.g.*, Decl. of Todd Schneberk ¶ 14, ECF No.
23 9-3 (patients with chronic respiratory disease are disproportionately likely to need to

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25 Neutral, at Adelanto. Dkt. 127 at 3 n.1. However, in subsequent deposition
26 testimony and during the meet and confer process, Defendants claim they have
27 always used HDQ Neutral only in diluted form. *See also* Ex. M.

28 ⁸ *See also* Complaint by Inland Coalition for Immigrant Justice to Department of
Homeland Security Office of Civil Rights and Civil Liberties at 2 (May 21, 2020),
<https://www.documentcloud.org/documents/6923000-Adelanto-CRCL-Complaint-052120.html> (“CRCL Complaint”) (describing reports that Adelanto detainees
cannot avoid breathing the chemical, and complaining of its harmful effects that
cannot be avoided because “there is no fresh air”).

1 be hospitalized due to COVID-19), Decl. of Robert B. Greifinger ¶ 10, ECF No. 9-2
2 (lung disease may increase the risk of serious COVID-19). For example, exposure to
3 ordinary air pollution is associated with an increase in mortality from COVID-19.
4 See Xiao Wu et al., *Exposure to air pollution and COVID-19 mortality in the United*
5 *States*, <https://projects.iq.harvard.edu/covid-pm> (showing long-term exposure to air
6 pollution is closely associated with an increase in COVID-19 mortality).

7 **CONCLUSION**

8 For these reasons, Plaintiffs respectfully request the Court find Defendants in
9 violation of the April 23 injunction, and order Defendants to: a) cease transferring
10 people into or out of Adelanto other than for the five reasons specified in the CDC
11 Guidance; b) specify that routine immigration enforcement is not an “extenuating
12 security concern,” within the meaning of the CDC Guidance governing transfers; c)
13 test all individuals who report symptoms of COVID-19 or, alternatively, all
14 individuals at the facility; and d) cease using HDQ Neutral except in accordance with
15 its labeling instructions, including by ensuring adequate access to personal protective
16 equipment; and e) order any other relief necessary to ensure Defendants’ substantial
17 compliance with the CDC Guidance.

18 Respectfully submitted,

19
20 Dated: August 10, 2020

/s/ Ahilan T. Arulanantham
21 AHILAN T. ARULANANTHAM
22 Counsel for Petitioners-Plaintiffs
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