

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CESAR FERNANDEZ-RODRIGUEZ, ROBER GALVEZ-CHIMBO, SHARON HATCHER, JONATHAN MEDINA, and JAMES WOODSON, individually and on behalf of all others similarly situated,

Petitioners,

-v.-

MARTI LICON-VITALE, in her official capacity as Warden of the Metropolitan Correctional Center,

Respondent.

No. 20 Civ. 3315 (ER)

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law in Support of Petitioners' Motion for a Preliminary Injunction dated May 26, 2020; the Declaration of Arlo Devlin-Brown dated May 26, 2020 and the exhibits thereto (including the expert report of Dr. Homer Venters and declarations from Petitioners and other MCC inmates); the Declaration of Ishita Kala dated May 26, 2020 and the exhibits thereto; the Declaration of Andrew A. Ruffino dated May 26, 2020; the Declaration of Deirdre D. von Dornum dated April 27, 2020 (ECF No. 7), and the exhibits thereto; the Declaration of Jonathan Giftos, M.D. dated April 27, 2020 (ECF No. 8); the Petition (ECF No. 1), and Declarations filed by Petitioners Cesar Fernandez-Rodriguez (ECF No. 9), Rober Galvez-Chimbo (ECF No. 11), Sharon Hatcher (ECF No. 12) and James Woodson (ECF No. 14) on April 28, 2020, and all other prior pleadings and proceedings in this action, Petitioners, by their counsel, will move this Court on June 2, 2020 at 10:00 a.m., at the United States Courthouse for the Southern District of New York, 40 Foley Square, New York, New York, before The Honorable Edgardo Ramos, United States District Judge, for an Order,

pursuant to Federal Rule of Civil Procedure 65, granting preliminary injunctive relief against Respondent as set forth in Appendix A hereto, and granting such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to the schedule previously approved by the Court, Respondent's opposition papers, if any, shall be served no later than May 29, 2020, and Petitioners' reply papers, if any, shall be served no later than June 1, 2020 at 5:00 p.m.

Dated: New York, New York
May 26, 2020

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APPENDIX A

Petitioners seek an order providing the following relief:

I. Testing

1. The MCC shall promptly begin testing the following categories of inmates for COVID-19:
 - A. All inmates upon admission, with newly admitted inmates who report or are determined to have COVID-19 symptoms (as identified by the CDC) but have a COVID-19 negative test result re-tested, with the second test sent to a commercial laboratory;
 - B. All symptomatic inmates (with two consecutive COVID-19 negative test results required to discharge an inmate from isolation);
 - C. All inmates who were in close contact with an inmate who has tested positive for COVID-19 or has COVID-19 symptoms (“COVID-19 Inmate”);
 - D. All inmates under quarantine, before their release from quarantine;
 - E. All inmates returning from civilian health care system visits or hospitalizations;
 - F. All inmates vulnerable to COVID-19, as determined by the CDC;
 - G. All staff who report or are determined to have COVID-19 symptoms; and
 - H. All asymptomatic staff identified as being exposed to COVID-19 through the contact tracing described in Section II, to extent such staff return to the MCC within two weeks of exposure.

II. Contact Tracing and Quarantine

2. The MCC shall identify close contacts of COVID-19 Inmates, or staff who have tested positive for COVID-19 or have COVID-19 symptoms (“COVID-19 Staff”), in accordance with CDC guidelines, within 2 days of the MCC’s discovery of a new COVID-19 Inmate or COVID-19 Staff.
3. The MCC shall promptly quarantine all inmates who have been in close contact with COVID-19 Inmates or COVID-19 Staff, in single cells where space permits.
4. The MCC shall record and preserve the results of each contact tracing investigation.

III. Symptoms Reporting, Monitoring, and Response:

5. Inmates shall be provided with the opportunity to report COVID-19 symptoms on at least a daily basis.

6. The MCC shall record and preserve each COVID-19-related sick call request and response thereto.
7. Medical personnel shall evaluate all inmates who report or are determined to have COVID-19 symptoms within 24 hours of the report or determination being made.
8. All inmates in a quarantine or isolation unit shall be evaluated for COVID-19 symptoms on a twice-daily basis.
9. All inmates in the general population shall be evaluated for COVID-19 symptoms on a twice-weekly basis. Should any inmate in the general population test positive, daily symptom screening shall be conducted for all inmates at the facility, until no inmate tests positive for COVID-19 for at least two consecutive weeks.

IV. Isolation and Treatment of COVID-19 Patients

10. All COVID-19 Inmates shall be isolated in single cells in a medically appropriate manner as soon as practicable, but in no event later than 12 hours from either a positive test result or awareness by medical personnel that an inmate has COVID-19 symptoms.
11. Isolation shall not occur in a setting normally used for punishment, such as the Special Housing Unit.
12. Medical monitoring, on a twice-daily basis, shall be conducted of all COVID-19 Inmates for the duration of their time in isolation.
13. All COVID-19 Inmates shall be provided with sufficient blankets and clean drinking water.
14. Counsel for, and one family member of, each COVID-19 Inmate shall be notified with 24 hours following an initial positive test result.

V. Masks and other Personal Protective Equipment (PPE)

15. All inmates shall promptly be provided, free of charge, with masks effective for preventing transmission of COVID-19.
 - a. If non-washable surgical masks are distributed, each inmate shall receive a minimum of five masks per week.
 - b. If washable cloth masks are distributed, each inmate shall receive a minimum of two properly fitting masks per week, and be provided adequate means to launder them or have them laundered.
16. All staff shall be required to wear N95 masks if they will be exposed to isolated or quarantined inmates, and surgical or cloth masks at all other times.

VI. Sanitation and Hygiene

17. All inmates shall be promptly provided, free of charge, with adequate sanitation supplies, including soap, paper towels, toilet paper, facial tissue, and disinfectant products effective against COVID-19, including cleaning spray and/or disinfecting wipes that can be used on the shared telephones, computer terminals, sinks, toilets, and shower handles.
18. Each inmate shall have daily access to showers and weekly access to clean laundry.
19. A qualified professional cleaning service shall be promptly retained to clean and disinfect, on at least a weekly basis, all parts of the MCC where inmates are present.

VII. Overcrowding / Release

20. The inmate population of 11 South, and each tier on 11 South, shall be reduced to 50% of capacity as soon as practicable but in any event within 30 days.
21. All inmate requests for COVID-19-related compassionate release shall be decided within 14 days of receipt of the request. The results shall be reported to the Court and the Petitioners, indicating the inmates for whom the BOP will or will not seek compassionate release and, for those for whom it will not, the basis for not seeking compassionate release.
22. The MCC shall promptly adopt and implement a written policy (which shall be disclosed to Petitioners and the Court) that maximizes and accelerates the use of home confinement and residential re-entry center placements, consistent with the MCC's legal authority, Attorney General Barr's March 26, 2020 and April 3, 2020 directives, and BOP policies and guidance, and that takes into account the following:
 - a. the age and vulnerability of the inmate to COVID-19, in accordance with CDC guidelines;
 - b. the inmate's prior criminal conduct shall not render the inmate ineligible;
 - c. a more than minimum PATTERN score shall not render the inmate ineligible;
 - d. the percentage of the inmate's sentence served shall not render the inmate ineligible;
 - e. an inmate's gang activity not while in jail or prison shall not render the inmate ineligible; and
 - f. other factors, consistent with the BOP's exercise of home confinement and residential re-entry center release authority to the maximum extent possible under the relevant statutes, regulations and BOP policies and guidance.
23. The MCC shall promptly adopt and implement a written policy (which shall be disclosed to Petitioners and the Court) that maximizes and accelerates the use of furlough placements, consistent with the MCC's legal authority and BOP policies and guidance.

24. Sufficient staff shall be assigned to review, in an expeditious manner, inmates' eligibility for compassionate release, as well as placements in home confinement, residential re-entry centers, and furlough.
25. The results of the foregoing policy adoptions and implementations shall be promptly reported to the Court and the Petitioners, indicating which inmates have and have not been released or recommended for release and, for those who have not, the basis for not releasing them or recommending them for release.
26. The MCC shall eliminate the 14-day pre-release quarantine requirement for inmates leaving the facility based on compassionate release, home confinement, residential re-entry center placement, or furlough, so long as the inmate has a place in which the inmate can safely quarantine and has tested negative for COVID-19.

VIII. Reporting and Monitoring

27. Reports shall be submitted to the Court and Petitioners, every 10 days, describing Respondent's compliance with this Order, including but not limited to the following information:
 - a. number of inmates tested for COVID-19 and results of that testing;
 - b. number of staff tested for COVID-19 and results of that testing;
 - c. number of inmates who have reported COVID-19 symptoms or were found to have COVID-19 symptoms;
 - d. number of inmates in quarantine and in isolation and their respective locations within the facility;
 - e. information regarding sick calls, including the times elapsed between calls and subsequent visits by medical personnel;
 - f. information regarding PPE and hygiene supplies provided to inmates;
 - g. information regarding cleaning of the facility; and
 - h. number of inmates considered for release on home confinement, to residential re-entry centers, on furlough or based on compassionate release, the results, and the basis for any denials.
28. The Court shall appoint an Independent Monitor to oversee implementation of the Court's Order and to make recommendations to the Court regarding actions to be taken at the MCC to mitigate the risk of COVID-19 and to otherwise comply with the Order.

IX. Provisional Class Certification

1. The Court will conditionally certify the proposed class of MCC inmates or award class-wide relief under the Court's general equity powers.