

KEENAN & BHATIA, LLC

90 Broad Street, Suite 200
New York, NY 10004
Tel: (917) 975-5278

4600 Madison Avenue, Suite 810
Kansas City, MO 64112
Tel: (816) 809-2100

www.keenanbhatia.com

BY CM/ECF

June 4, 2021

The Honorable Katherine Polk Failla
United States District Judge
Southern District of New York

RE: *Azor-El, et al. v. City of New York, et al.*, 1:20-cv-03650-KPF (and related cases)
Joint Status Letter Regarding Second-Round Discovery

Dear Judge Failla:

We write this letter pursuant to the Court's directive to provide an update on the status of this matter following second-phase discovery.

Plaintiffs' Summary

Plaintiffs advocate for targeted injunctive relief in light of the information discovered and the ongoing challenges presented by COVID-19, and request a briefing schedule to formalize this request.

Discovery Conducted

Since this Court ordered a second phase of discovery, Plaintiffs have issued three additional sets of interrogatories and four additional sets of requests for production relating to mask compliance and sanitation.

In addition, Plaintiffs have conducted depositions. Three of the named plaintiffs (Jean Azor-El, Maurice Barnar, and Ronnie Cole) provided deposition testimony regarding their current observations regarding mask compliance and sanitation at Rikers. William Clanton, a detainee currently housed at the Vernon C. Bain Center, also provided deposition testimony on his observations relating to mask compliance and sanitation at VCBC. Another detainee, Jonathan Sanchez, also gave testimony.

Plaintiffs conducted four depositions pursuant to Fed. R. Civ. P. 30(b)(6). Becky Scott and Patricia Feeney testified as corporate representatives of the Department of Correction ("DOC"). Dr. Ross MacDonald testified as a corporate representative of the New York City Health and Hospitals Corporation ("H+HC"), which houses Correctional Health Services ("CHS"). Emily Turner testified as a corporate representative for the Board of Correction ("BOC").

Discovery Findings

The DOC continues to fall short of its constitutional obligations to protect those in the custody of the DOC from the risks of contracting and facing the negative health consequences (including death) from COVID-19.

Defendants acknowledge that COVID-19 continues to pose a significant risk to health and safety, especially in congregate settings like DOC facilities. Since the COVID-19 vaccine has been made available to all DOC staff and all people in DOC custody, the BOC has had concerns about low vaccination rates among both DOC staff and people in DOC custody. Turner Dep. 50:21-53:4. In addition, the overall population of DOC facilities is higher now than it was before the pandemic began, making it increasingly difficult for DOC staff and detainees alike to effectively social distance. Turner Dep. 72:16-73:21.

With the population in DOC facilities steadily rising and the rate of vaccine uptake among DOC staff and detainees lagging behind that of the general population, it is all the more important that Defendants remain vigilant and continue to implement and enforce COVID-related measures.

Mask Compliance

Mr. Azor-El testified that, in the month preceding his deposition, he observed about 70 percent of DOC officers in his housing area wearing masks improperly or not at all, even when within six feet of incarcerated individuals. Azor-El Dep. 10:4-17, 12:9-13:13. Mr. Azor-El interacts with correction officers who are not wearing their masks properly “pretty much every day.” Azor-El Dep. 53:24-54:18. Mr. Barnar testified that just a week or two prior to his deposition, about 60 percent of correction officers were not wearing their masks properly or at all. Barnar Dep. 8:18-9:8. Mr. Cole, when asked whether any officers wear masks, also testified that “most of them don’t” even when within six feet of detainees. Cole Dep. 12:8-25.

Mr. Clanton, who is currently housed at VCBC, testified that about 70 percent of the correction officers at the facility do not wear their masks properly or at all, even when within six feet of detainees. Clanton Dep. 15:05-18, 19:18-20:17. In fact, during his deposition, Mr. Clanton observed an officer sitting behind him was not wearing a mask. Clanton Dep. 12:7-21.

Throughout the course of the pandemic, the BOC has been conducting in-person audits of DOC facilities and monitoring live surveillance footage for compliance with various COVID-related policies and directives. The BOC’s findings on mask compliance at DOC facilities also paint a bleak picture. In January 2021, a BOC employee auditing live DOC surveillance footage observed that only three of eleven correctional staff were wearing their masks properly, and noted, “Particularly disturbing to observe an officer not practicing or enforcing social distancing, which is virtually impossible, but instead is laughing and touching detainees without any PPE.” Turner Dep. 146:22-147:10, 148:15-149:05.

In an email dated March 31, 2021, Dr. Bobby Cohen - who is a member of the Board of Correction and previously was a physician on Rikers - observed that “mask wearing by correctional staff at all levels was **extremely inconsistent, disturbingly so.**” Turner Dep. 64:13-65:6.

Ms. Turner, the BOC's representative, testified that in the two months preceding her deposition, she was personally concerned "to see staff operating without wearing masks properly" in intake areas at the RNDC facility. Turner Dep. 68:15-69:10. Plaintiffs find this observation especially troubling, given that it is especially important that correctional staff be compliant with mask requirements in intake areas where they are interacting with "people who have yet to be screened or yet to have completed a screening process because there's potential to be exposed and then travel around [...] the facility and transmit the virus once they are exposed." Turner Dep. 71:12-72:01.

On May 5, 2021, over one year since the beginning of the pandemic, the DOC finally issued a directive mandating that staff and officers wear face coverings at all times (the previous policy only required officers to wear face coverings when within six feet of someone else). But this directive is insufficient. For one, the DOC has not and does not differentiate between approved PPE (i.e., surgical masks and KN95 masks) and cloth masks, which are not PPE per the CDC. Scott Dep. Vol. I 87:12-87:25. Dr. MacDonald testified that there is a difference in terms of efficacy between N95, surgical, and cloth masks, with cloth masks being the least protective. MacDonald Dep. 24:9-25. The BOC believes that staff at the DOC should comply with CDC guidelines by wearing surgical masks or N95 masks rather than just cloth masks. Turner Dep. 82:17-20, 155:7-15. But the DOC continues to treat cloth masks, which are *not* PPE, as being adequate despite the BOC's recommendations. Turner Dep. 155:18-22.

More importantly, a policy is only effective when it is enforced and when there are real consequences for noncompliance. Otherwise, it's just a piece of paper. But the DOC is not imposing any *real* discipline for noncompliance with its mask policies. In fact, the DOC refuses to issue higher-level discipline for noncompliance with its mask policy. Scott Dep. Vol. I 70:16-71:07. The DOC is unaware of any instance where a DOC employee has been taken through the formal discipline process for mask noncompliance. Scott Dep. Vol. I 72:22-73:6. The BOC has raised the issue of discipline for mask noncompliance with the DOC because the BOC believes that disciplinary action is part of "an approach that is necessary to ensure staff compliance." Turner Dep. 163:17-164:4. The BOC agrees that mandatory discipline is an important tool to ensure that people follow the rules. Turner Dep. 164:12-16. When informed that the DOC has not initiated even one formal disciplinary process on a correction officer for mask noncompliance, the BOC was not surprised, stating, "[T]here's a long history of the Department not imposing discipline on staff for far more serious violations." Turner Dep. 165:1-15.

Despite current rates of mask noncompliance among DOC staff and the issuing of a more stringent mask directive, Defendants have *decreased* their efforts to monitor and audit staff behavior. At the beginning of the pandemic, the BOC had a dedicated "Genetec team" that monitored COVID-related issues, including mask compliance and sanitation. Turner Dep. 13:9-15:15. In January 2021, the BOC conducted a Genetec pilot program where BOC staff generated reports specifically pertaining to PPE usage and sanitation supply availability, but the BOC dropped the endeavor because it did not have the staff capacity to consistently implement the monitoring strategy. Turner Dep. 144:9-145:21.

The DOC's use of available technology to check compliance has actually taken a backslide in recent months. Chief Becky Scott, who oversees mask-related discipline at Rikers, testified that the technology exists for management to view video anywhere in Rikers remotely and in real-time. Until recently, DOC used this technology in part to spot-check mask compliance. The DOC

used to have a unit called the Compliance and Safety Center (“CSC”) that would continuously monitor video and call DOC staff who were not wearing masks properly. But the DOC eliminated the unit effective March 30, 2021. *See generally* Feeney Dep. Despite issuing its more stringent mask policy on May 5, 2021, the DOC has made no effort to reinstate the CSC to ensure staff compliance.

Sanitation

Defendants continue to fail to make cleaning/sanitation supplies readily available to detainees and fail to sanitize high-touch surfaces. Civilian cleaning crews (aside from not wearing masks while in the housing area) do not sanitize high-touch surfaces—they simply mop and sweep the floors. Azor-El Dep. 30:18-34:11; Barnar Dep. 14:12-20. The DOC is *still* not providing detainees with sanitizing solutions or wipes to disinfect phones. Azor-El Dep. 39:17-22. Mr. Barnar has never observed anybody sanitizing or cleaning phones or video booths. Barnar Dep. 18:22-25. And while Virex is available near the slop sink, Mr. Barnar testified that the DOC has never given him any guidance on how to use Virex or what is necessary to use Virex effectively. Barnar Dep. 34:21-35:15.

Giving sanitizing wipes to detainees to clean high-touch surfaces is feasible and safe: we know so because *DOC itself* gives out wipes to some detainees. For the past three or four months, the DOC has provided detainees at VCBC only with wet wipes before they enter the videoconference booths. Barnar Dep. 28:8-25, 29:17-30:22; *see also generally* Clanton and MacDonald Deps. But the DOC has yet to make sanitary wipes widely available inside other facilities. Turner Dep. 43:13-17. Even at VCBC, the DOC only makes wipes available for computer videoconference booths. It does not sanitize traditional phones at all, so detainees use a mildew remover and soap solution to clean phones themselves. Clanton Dep. 27:14-28:7.

As a practical matter, the BOC believes that for interventions to prevent COVID-19 to be effective, it is important to make them easy to use. Turner Dep. 47:13-17. The BOC does not see any immediate downside to providing detainees with alcohol prep pads to wipe down phones, and believes it is a reasonable and effective intervention. Turner Dep. 168:10-24. In fact, the BOC has recommended that the DOC provide detainees with sanitary wipes rather than buckets of Virex and sponges to clean phones. Turner Dep. 168:25-169:9. The DOC did not implement the BOC’s recommendation. Turner Dep. 169:5-9.

The BOC has also recommended that, in its sanitation audits, the DOC not only record whether sanitation supplies are available, but also record whether sanitation is actually occurring. Turner Dep. 156:16-158:1. But the DOC has failed to implement the BOC’s recommendation. Dep. 156:16-158:1. So, the BOC does not have access to information on whether or not phones are being consistently sanitized in DOC facilities because the DOC is not recording that information in a systematic way. Turner Dep. 158:5-14.

Requests for Relief

Given all the new evidence and information gathered through the discovery process thus far, Plaintiffs ask that the Court grant the following targeted relief:

1. Plaintiffs request that the Court order the DOC to mandate that staff use CDC-approved PPE masks, not cloth face coverings, and provide CDC-approved PPE masks to all detainees and staff.
2. Plaintiffs request that the Court assign a Special Master or Court Monitor to audit mask compliance at DOC facilities, with remote access to video footage inside DOC facilities and the ability to call to noncompliant units.
3. Plaintiffs request that the Court mandate that the BOC and DOC reinstate their respective surveillance review teams (Genetec and CSC).
4. Plaintiffs request that the Court order the DOC to implement the BOC's recommendation regarding the logging of additional information in sanitation audits.
5. Plaintiffs request that the Court order the DOC to provide detainees with COVID-effective sanitary wipes to use in phone and teleconference booths/areas.
6. Any other relief the Court finds warranted.

Defendants' Position

The focused discovery did not establish that a preliminary injunction is warranted. Even if Plaintiffs could present an overwhelming case of poor mask wearing--and the discovery has been inconsistent in this regard--and delays in providing necessary sanitizing materials, that would not, as a matter of law, justify judicial intervention in the DOC's operation of its correctional system. By themselves, any infirmities in these two discrete areas are more than offset by the many other COVID-19 strategies--which have already been found adequate by this Court--employed by DOC and thus cannot amount to a constitutional violation. This is further borne out by the indisputable statistical success of the DOC in preventing the spread of the virus in its detention system. Indeed, as of June 2, 2021, the seven-day average of test positivity in DOC facilities is just 0.31%.¹

In a March 2021 article co-authored and published in the Public Health Reports, the official journal of the U.S. Surgeon General and the U.S. Public Health Service, that was discussed at the deposition of the Chief Medical Officer of the non-party Correctional Health Services ("CHS"), Dr. Ross MacDonald noted as follows:

Since May 13, 2020, few new cases of COVID-19 have been identified in the New York City jail system, despite ongoing universal testing upon admission to the jail system and hospitals and before transfer to jail infirmaries. Factors that may have contributed to the eventual decline in COVID-19 incidence in New York City jails include infection control interventions undertaken by CHS and the New York City Department of Correction, a concurrent decrease in New York City community

¹ This percentage is calculated by dividing the number of positive tests by the sum of positive and negative tests. Corr. Health Servs., CHS COVID-19 Data Snapshot, NYC Health + Hospitals, available at <https://hhinternet.blob.core.windows.net/uploads/2021/06/CHS-COVID-19-data-snapshot-20210603.pdf> (last updated June 2, 2021).

transmission, and some degree of population-immunity in the jail system.

See Justin Chan, et al., COVID-19 in the New York City Jail System: Epidemiology and Health Care Response, March-April 2020, 136 Pub. Health Reps. 375, 381 (2021).² Against this epidemiological backdrop, and in light of the many counter-measures discussed in the record, it is highly unlikely that Plaintiffs can meet their burden of establishing entitlement to a mandatory injunction aimed at the minutia of infection control.

Mask Usage

While discovery has revealed that mask-wearing is at times inconsistent, this mirrors mask-wearing in the wider community. Moreover, many deponents acknowledged perfectly adequate mask-wearing in DOC facilities as well.³ While DOC continues to encourage officers to wear masks--and does discipline officers when warranted--experienced correctional managers do not endorse rote discipline to enforce the policy. It is difficult to wear a mask continuously while working a 7-hour shift (let alone one with overtime, which has been common during the pandemic), and this was acknowledged by the Board of Correction deponent, Emily Turner.

When discipline is imposed, it is typically in the form of a Command Discipline or a Corrective Interview. In its professional judgment, DOC does not believe that discrete instances of non-compliance with mask-wearing mandates to be the types of offense that should lead to the institution of charges with a formal hearing and possible termination as a penalty through the Memorandum of Complaint process. This is reserved for graver offenses, such as excessive force or being absent from an assigned post while on duty.

As noted by Dr. MacDonald, who is not a DOC employee, a heavy Departmental hand could undermine the salutary nature of the mask-wearing policy itself. He testified that the policy was perfectly adequate in conveying the spirit of the CDC and public health guidance, and considered the policy's reference to the potential imposition of discipline to be indicative of the seriousness with which the Department took the matter. He also testified that while there is a hierarchy of types of masks, there was nothing alarming in allowing officers to use their own cloth masks, and two DOC witnesses, Chief Becky Scott and Deputy Commissioner Patricia Feeney, stated that DOC allows staff to bring their own masks as a means of encouraging them to be masked. In addition, DOC is concerned that rote enforcement through discipline might foster staff resentment and decrease staff morale, further complicating its management of the jail system. Again, this reflects a nuanced judgment of those deeply invested in the daily operations of the City's detention centers.

As to the assertions that Defendants have decreased monitoring, we note that the reallocation of resources by the Board of Correction in terms of its overall jail monitoring cannot be ascribed to the Defendants. The BOC is an independent oversight board, and their appointed

² This article is also available on the publisher's website: <https://journals.sagepub.com/doi/10.1177/0033354921999385>.

³ Defendants have not received the transcripts of the depositions of incarcerated individuals as of June 3, 2021, and are thus unable to provide citations. Assertions made are based on notes of counsel attending the depositions.

Members exercise their discretion on what appears to be the most pressing concern at any given time.

In addition, the DOC's decision to temporarily reassign officers from its monitoring and mentoring unit (the Compliance and Safety Center, or "CASC")--which was designed primarily to help train newer officers in all facets of their jobs, not just to encourage compliance with mask-wearing mandates--was reluctantly made to address the serious Department-wide staffing issues that have been necessitating double and sometimes triple shifts in order to maintain institutional security. This is yet another nuanced exercise of discretion appropriately made by those entrusted with the management of a public safety agency.

As the Court is aware, both case law and 18 U.S.C. § 3626 discourage the second-guessing of correctional managers and the judiciary's undue involvement in the administration of correctional systems; thus, the Department's discretionary decisions on nuanced correctional issues should be given deference by this Court.

Provision of Sanitizing Supplies

As to alleged infirmities in the provision of soap and sanitizing supplies, there has only been slight evidence of deficiencies, and these are minor. The core dispute seems to circle back to the fact that (1) DOC will not provide sanitizing wipes as a matter of policy, relying instead on the multiple sinks with soaps in the dorms (the CDC preferred method); and (2) janitorial closets (with supplies) must be opened by an officer, and often this cannot be done *immediately* upon request, which tends to frustrate the requesting party.

As to this latter policy, DOC will not leave the closet open. This risks the hoarding of supplies and the potential use of brooms and mops as weapons. In any event, the CDC has recently reconsidered and lessened the importance of frequently sanitizing high-contact surfaces; a once-a-day sanitization is now sufficient, thus undermining any contention of high risk and danger posed by the lack of more frequent wipe-downs of surfaces.⁴ As noted by Deputy Commissioner Feeney in her recent deposition, however, DOC still requires wipe-down of high-contact surfaces every two hours.

It is incorrect to assert that limited distribution of wipes at one facility's teleconference booths only, contradicts DOC's policy of non-distribution of wipes. Deputy Commissioner Feeney testified that she was persuaded by the Warden to allow wipes because the facility has fewer televisit booths, and to prevent any unnecessary delays, she prefers that incarcerated individuals not spend time waiting for sanitization between visits. Thus, an officer will hand a wipe to an inmate in the booth and immediately discard it after use. They are not left with the inmate to potentially be flushed down a toilet and clog pipes, which addresses DOC's concerns of potentially exposing individuals to other pathogens found in sewage.

⁴ Ctrs. for Disease Control & Prevention, Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments (Apr. 5, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html>; see also Ctrs. for Disease Control & Prevention, Cleaning and Disinfecting Your Facility (Apr. 5, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html>.

Defendants' Legal Contention on the Merits

It is Defendants' contention that even if there are infirmities in the mask policy or even in the availability of sanitizing materials, these alone would not justify injunctive relief. "Under both the Eighth and Fourteenth Amendments, to establish an objective deprivation [of an inmate's rights], 'the inmate must show that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health.'" Darnell v. Pineiro, 849 F.3d 17, 30 (2d Cir. 2017) (quoting Walker v. Schult, 717 F.3d 119, 125 (2d Cir. 2013)). "Some conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need." Wilson v. Seiter, 501 U.S. 294, 304 (1991) (internal emphasis omitted). Yet "determining whether prison conditions pose a substantial risk of serious harm from COVID-19, or any other risk, must be determined '*after accounting for the protective measures [the prison system] has taken.*'" Chunn v. Edge, 465 F.Supp.3d 168, 200 (E.D.N.Y. 2020) (emphasis added) (quoting Valentine v. Collier, 956 F.3d 797, 801 (5th Cir. 2020)).

The two policies challenged by Plaintiffs in this stage of the litigation are only part of a comprehensive plan to keep the facilities safe which, as described in the prior preliminary injunction proceeding, includes the following:

- Ten- to fourteen-day quarantine period for newly admitted incarcerated individuals, the isolation of incarcerated individuals and controlling movement when there is known exposure, and conducting tests and contact tracing as required;
- Free onsite testing and vaccination offered to all inmates and staff through CHS or an outside vendor;
- Cleaning and sanitizing housing areas daily by trained work crews (and in the North Infirmary Command, by civilian employees);
- Cleaning and sanitizing of bathroom and shower areas three times a day;
- Screening staff and taking temperatures checks of all persons entering DOC facilities;
- Limiting internal movement as much as possible;
- Reopened (twice) a closed facility for screening and quarantine purposes;
- Initial reduction of the population through compassionate release and court-sanctioned releases;
- Multiple daily audits by Housing-Area Captains to ensure availability of soap and cleaning supplies, and operability of sinks;
- Daily audits of supplies by DOC Quality Assurance and Integrity staff;
- Educational posters and signage;

- Ready availability of masks to be handed out to inmates and staff;
- Each facility has a fully staffed clinic;
- A 98-bed Contagious Disease Unit with negative air pressure rooms is available; and
- Any person who gets sick and needs a higher level of care can be promptly transferred to the City's public hospitals.

The above measures are not challenged by Plaintiffs at this stage of the litigation, and the DOC's overall plan was previously pronounced adequate by this Court. Therefore, any deficiencies in mask wearing by staff, or availability of sanitizing solution, by themselves are not of constitutional import. See, e.g., LaPierre v. Dzurenda, 21-CV-0464(JS)(ARL), 2021 U.S. Dist. LEXIS 50853, at *20-21 (E.D.N.Y. Mar. 17, 2021) (finding that, although it was unclear whether the facility tested plaintiff for COVID-19, as soon as plaintiff experienced symptoms, he was isolated from others and seen by medical staff, and thus, *in light of the countermeasures that the facility had in place*, holding that the preliminary injunction record left substantial reason to doubt that plaintiff would succeed in making a showing of substantial risk of serious harm).

As noted by the CHS Chief Medical Officer, Dr. Ross MacDonald (who is not a DOC employee), while his agency has had some disagreement with DOC policies, CHS and DOC have collectively agreed on the appropriate countermeasures, following cooperative discussions in an attempt to find the proper balance between medical concerns and security concerns. He further testified that DOC staff has acted "heroically" in reporting to work during a pandemic in spite of DOC's own losses, that it has done a "fantastic job" in keeping the virus contained, and that he has "no contentions" about DOC's handling of the pandemic-related issues. Dr. MacDonald further noted that, a few months into the pandemic, DOC did not have a single case of on-island transmission for an approximate six-month period. Moreover, he noted that, during the second wave last wave last Fall, most positive cases were asymptomatic individuals, which he believes means that the DOC/CHS strategies have continued to be effective.

As to Plaintiffs' contention that the rate of vaccination among officers is below that of the community, that is not established. Dr. MacDonald testified that they only have data on staff who utilizes the on-island site; many officers may have been vaccinated off-site, and as that is protected medical information, would not necessarily be known to DOC, let alone CHS.

Finally, there is a degree of inequity in Plaintiffs' allegations that they face unreasonable risks of harm to their health and safety when they can largely mitigate any risk by simply accepting a free vaccination, as public health officials recommend. Dr. MacDonald testified about the many ongoing measures that CHS is taking to make vaccine administration convenient and to educate persons in custody about the benefits of vaccination. The record will show that jail officials have not been deliberately indifferent but have continually engaged in robust discussions, planning, and engagement about responding to a world-altering pandemic.

For these reasons, Defendants do not believe that the recent discovery warrants preliminary injunctive relief. While Defendants respectfully submit that it would be more sensible to continue with additional discovery on all open issues, with an eye towards motion practice or trial at the end of the year, we acknowledge that the decision to move for injunctive relief is up to

Plaintiffs. Clearly, these issues--especially pertaining to Plaintiffs' novel request for the appointment of a special master--should be subject to thorough briefing. In light of likely summer vacation schedules, if the Court is inclined to direct briefing of the second motion for preliminary injunctive relief, we respectfully suggest that counsel be permitted to confer and submit a briefing schedule.

We thank the Court for its consideration of this matter.

Respectfully submitted,

KEENAN & BHATIA, LLC

By: /s/ Sonal Bhatia & E.E. Keenan
Attorneys for Plaintiffs

Cc: Counsel of Record (by ECF)