

I. DR. GOTTLIEB’S POLICY CONCESSION REGARDING NATURALLY ACQUIRED IMMUNITY

On Monday, August 30, 2021, former Food and Drug Administration (“FDA”) Commissioner Dr. Scott Gottlieb, who currently sits on the Board of Pfizer, admitted that “[i]t’s fair to conclude ...” “[t]he balance of the evidence demonstrates that natural immunity confers a durable protection.” Gottlieb Interview, *Squawkbox CNBC* (Aug. 30, 2021) available at <https://twitter.com/i/status/1432321613467357187> (last visited Sept. 7, 2021) (on the video, Dr. Gottlieb calls natural immunity not just “durable” but “robust”).¹

Most importantly, Dr. Gottlieb told CNBC that it cannot be disputed that officials “*should start assimilating [naturally acquired immunity] into our policy discussions.*” Exh. 1 (emphasis added). Contrary to this commonsense policy position, as the Complaint and Plaintiff’s brief in support of her Motion for Preliminary Injunction show, MSU has *not assimilated* naturally acquired immunity into its vaccine requirement (“Directive”). Worse yet, MSU stubbornly and overtly refuses to recognize the importance of this scientific reality, ignoring the best and most up-to-date research, to the detriment of the health and safety of those subject to its Directive.

Now, Dr. Gottlieb did try in his CNBC interview to resist the full implications of the recently released landmark Israeli study concluding that naturally acquired immunity is *superior* to vaccine-immunity,² asserting that whether naturally acquired immunity is more effective than the two-shot mRNA vaccination regimen “isn’t that material” for purposes of setting public policy. But that is an issue for summary judgment or trial, where Plaintiff is confident that the factfinder

¹ Dr. Gottlieb received his medical degree at the Icahn School of Medicine at Mount Sinai, and he completed his residency at Mount Sinai Hospital.

² See Dkt. #1, Compl. at ¶ 36, page 12; Dkt. #1-1, at ¶ 20, page 8 (comparing vaccinated individuals to naturally immune individuals, the Israeli study demonstrates that vaccinated individuals face a 13.1 times higher risk of testing positive for COVID-19 and about an 8.1 times higher risk of being hospitalized).

will instead conclude that naturally acquired immunity's superiority to vaccine-acquired immunity is *highly relevant* to assessing the legality of MSU's Directive.

More significant at this procedural juncture of the case, however, is that Dr. Gottlieb's concessions strongly support Plaintiffs' arguments in favor of a preliminary injunction. While the ultimate questions surrounding the efficacy of naturally acquired immunity should be resolved later, there is scientific consensus, in the wake of the most rigorous studies available to date, to justify this Court's taking the modest step of protecting Plaintiff and those similarly situated from being forced to take the vaccine or lose their jobs while this litigation is pending. Put otherwise, Dr. Gottlieb's admission is a bombshell, not least of all because of his identity (both as a former chief federal government regulator and current Pfizer Board member). It strikes a serious blow against the flawed notion that vaccine mandates should be imposed in a fashion heedless of whether members of the public possess naturally acquired immunity or not. Any attempt on MSU's part to maintain that such immunity is irrelevant to assessing the validity of its Directive is simply untenable.

MSU has tried to disregard the fact that, as Dr. Gottlieb concedes, naturally acquired immunity "confers a durable protection." (Exh. 1). Indeed, MSU has done worse than ignore the existence of such immunity: it overtly refuses to exempt those who have recovered from COVID-19 from its vaccine requirement, based on the flimsy and unsubstantiated contention that the vaccine confers "additional protection." MSU does not even provide the opportunity for a hearing to allow its employees to present evidence or make any type of argument to show that it is entirely appropriate to grant medical exemptions based on naturally acquired immunity. *See* Dkt. #1, Compl. at ¶ 89, at pages 22-23 (citing an MSU frequently asked question ("FAQ") telling employees that even if they have evidence of COVID-19 antibodies in their own bodies, they still

must receive a vaccine against their will or face the prospect of being fired). This amounts to willful blindness on MSU's part. Inevitably and needlessly, many MSU employees will suffer irreparable injury under the blunt instrument of the university's unscientific policy.

II. SPECTRUM HEALTH'S VACCINE POLICY

Spectrum Health is a not-for-profit, integrated, managed health care system located in Grand Rapids, Michigan. Its subsidiaries include hospitals, treatment facilities, urgent care facilities, and physician practices. It is *the largest employer* in western Michigan, with 31,000 staff, including 4,200 physicians and advanced practice providers. *See Spectrum Health*, WIKIPEDIA, (June 17, 2021) https://en.wikipedia.org/wiki/Spectrum_Health (last visited Sept. 7, 2021).

On September 2, 2021, Spectrum sent an email to employees stating that “[a]s new research has emerged as recently as last week, our committee (made up of vaccine and infectious disease experts) has recommended to allow an exemption for those who have antibodies to COVID-19” since “there is increasing evidence that natural infection affords protection from COVID-19 reinfection and severe symptoms for a period of time.” (Exh. 2, Email to Spectrum Employees). Accordingly, Spectrum will “consider exemptions for individuals who have had COVID-19.” *Id.* Spectrum also noted that exemptions based on naturally acquired immunity will be subject to change if future evidence demonstrates significant waning of protection. *Id.*

Notably, the committee responsible for developing Spectrum's vaccine mandate is composed of vaccine and infectious disease experts; it is not merely the product of non-expert school administrators. By contrast, MSU has offered no relevant scientific support for its Directive, the origins of which remain a mystery. MSU's one-size-fits-all approach—and its unyielding refusal to recognize the importance of naturally acquired immunity—contrasts poorly with Spectrum Health's evidentiary-based policy.

Comparing the MSU and Spectrum methodologies further, Spectrum’s policy was obviously developed from the most available up-to-date research. By contrast, MSU has simply made an assertion that those with naturally acquired immunity should get the vaccine because it provides “additional protection,” Dkt. # 4-1 (Attach. G). MSU has offered no scientific evidence to support its claim that those with naturally acquired immunity should be required to attain this speculative “additional protection.” Nor does MSU explain why its Directive treats those with naturally acquired immunity more harshly when their immunity makes them at least as safe to others as vaccinated employees are—and much safer than those vaccinated with inferior foreign vaccines that MSU readily accepts, such as the Sinovac and Sinopharm. Finally, as a health care system that employs over 4,000 physicians and advanced practice providers, Spectrum’s approach represents a policy drawn from accepted science that fits comfortably inside the mainstream of COVID public health policy.

III. CONCLUSION

Dr. Gottlieb’s admissions and Spectrum Health’s new vaccination policy constitute additional support for the conclusion that Plaintiff will succeed on the merits of her claim. *Contrast* Dkt. #4-1 at 10 (flagging that the MSU FAQ asserts that natural immunity is *not* a basis for obtaining a medical exemption at MSU), 13-14 (proving no scientific data was cited to support the MSU FAQ), 16 (demonstrating that MSU’s consideration of the durability of natural immunity vs. vaccine immunity, another part of Dr. Gottlieb’s and Spectrum Health’s analysis, is somewhere between inadequate and non-existent).

For these reasons, as well as those stated in Plaintiff’s Motion for Preliminary Injunction (Dkt. # 4) and Brief in Support (Dkt. # 4-1), MSU should be enjoined from enforcing its vaccine mandate against Plaintiff and those similarly situated during the pendency of this action.

Respectfully submitted,

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EXHIBIT 1



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"The balance of the evidence demonstrates that natural immunity confers a durable protection," says [@ScottGottliebMD](#). "We should start assimilating that into our policy discussions. I'd be careful about concluding that natural immunity is more robust."



8:37 AM · Aug 30, 2021 · Wildmoka

100 Retweets 49 Quote Tweets 363 Likes



EXHIBIT 2

----- Original message -----

From: [REDACTED]
Date: 9/2/21 3:45 PM (GMT-05:00)
To: [REDACTED]
Subject: Fwd: FW: INFORM: COVID vaccine exemption update

[REDACTED]

Exemption update

FYI – update on COVID vaccine exemptions.

COVID-19 antibodies exemption update

As new research has emerged as recently as last week, our committee (made up of vaccine and infectious disease experts) has recommended to allow an exemption for those who have antibodies to COVID-19. While we still recommend vaccination for people with prior COVID-19 infection, there is increasing evidence that natural infection affords protection from COVID-19 reinfection and severe symptoms for a period of time. Current studies are not clear on how long natural immunity protects from reinfection. Vaccine trials and real-world data have shown that it is safe for previously infected individuals to receive the COVID-19 vaccine; side effects following vaccination were no greater in this group. Spectrum Health is reviewing current and emerging research on this topic, and will consider exemptions for individuals who have a history of COVID-19. Indicate this on the exemption forms by checking the 'Other' box and include the date of the positive test for COVID-19.

While we recommend vaccination after prior infection (as it likely confers even more immunity than either on their own), our plan is to offer a temporary deferral for the vaccine requirement for team members who have had a positive PCR or antigen test from a CLIA-certified lab at any time in the past, plus a positive qualitative antibody test within the past three months (this test will be free to team members in our own lab, but accepted from any other CLIA-certified lab). Should evidence in the future demonstrate significant waning of this protection, demonstration of longer-lasting protection, or evidence of a validated quantitative antibody titer result confirming immunity, then the deferral requirements will be updated (either canceled, extended or modified).

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