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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

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11 MARCIANO PLATA, et al.,

Case No. C01-1351 TEH

12 *Plaintiffs,*

13 v.

14 ARNOLD SCHWARZENEGGER, et al.,

**DECLARATION OF RECEIVER J.  
CLARK KELSO IN SUPPORT OF  
RECEIVER'S MOTION TO ADD STATE  
CONTROLLER AS PARTY-  
DEFENDANT AND FOR DISCOVERY IN  
AID OF ENFORCEMENT OF ORDER  
APPOINTING RECEIVER**

15 *Defendants.*

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Date: July 28, 2008  
Time: 10:00 a.m.  
Courtroom: Hon. Thelton E. Henderson

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1 I, J. Clark Kelso, declare as follows:

- 2 1. I am the Court-appointed Receiver in this matter, appointed pursuant to this Court's  
3 Order, dated January 23, 2008. I make this declaration in support of the Receiver's  
4 Motion To Add State Controller As Party-Defendant And For Discovery In Aid Of  
5 Enforcement Of Order Appointing Receiver. I have custody of the files pertaining to the  
6 Receivership and am familiar with the contents thereof. The facts set forth herein are  
7 based on my review of the Receivership records and documents which are a matter of  
8 public record as well as my own personal knowledge. If called as a witness, I could  
9 competently testify thereto.
- 10 2. On February 14, 2006, this Court entered its Order Appointing Receiver ("OAR"), which  
11 appointed the original Receiver in this matter. The OAR conferred on the Receiver all of  
12 the powers of the Secretary of CDCR insofar as the delivery of medical care is concerned  
13 and suspended the Secretary's exercise of those powers for the duration of the  
14 Receivership. Lest the Receiver be constrained by the same trained incapacity that had  
15 stymied efforts under the stipulated orders, the Court made it clear that State law could be  
16 waived when necessary to move the system toward compliance with the Constitution.  
17 And, to underscore that the Court expected the State to work with the Receiver as he  
18 undertook his efforts, the Court directed two provisions of the OAR, in particular, at the  
19 Defendants.
- 20 3. Paragraph IV of the OAR, entitled "COSTS," provides that "[a]ll costs incurred in the  
21 implementation of the policies, plans, and decisions of the Receiver relating to the  
22 fulfillment of his duties under this Order shall be borne by Defendants." Paragraph VI,  
23 entitled "COOPERATION," provides that "All Defendants, and all agents, or persons  
24 within the employ, of any Defendant in this action . . . and all persons in concert and  
25 participation with them, . . . shall *fully* cooperate with the Receiver in the discharge of his  
26 duties under this Order, . . . Any such person who . . . thwarts or delays the Receiver's  
27 performance of his duties under this Order, shall be subject to contempt proceedings

1 before this Court.” (Emphasis in original.) The Court ordered that the OAR be served on  
2 various State agencies, including the Department of Finance, Department of General  
3 Services and the State Personnel Board. (OAR, ¶ VI.B.)

- 4 4. Defendants did not take an appeal from the OAR.
- 5 5. On October 4, 2006, the Governor of California acknowledged the crisis in the prisons  
6 created by overcrowding and proclaimed that the crisis amounted to an emergency within  
7 the meaning of the California Emergency Services Act (Cal. Gov’t Code § 8550 *et seq.*).  
8 As a result of the Proclamation, the Governor conferred upon the Secretary of the CDCR  
9 a number of powers, including the authority to “contract for facility space, inmate  
10 transportation, inmate screening, the services of qualified personnel, and/or for the  
11 supplies, materials, equipment, and other services needed to immediately mitigate the  
12 severe overcrowding and the resulting impacts within California.” The Governor then  
13 suspended during the pendency of the emergency all provisions of the Government Code  
14 and Public Contracts Code as they pertained to state contracting. Attached hereto as  
15 Exhibit 1 is a true and correct copy of the Governor’s Proclamation, judicial notice of  
16 which is requested.
- 17 6. From early in the Receivership, the Receiver recognized that the prisons sorely lacked  
18 adequate medical facilities and that, if the system was to be brought up to Constitutional  
19 standards, very substantial renovation of existing facilities, and even more substantial  
20 construction of new facilities would be required. The original Receiver launched at least  
21 three significant construction-related initiatives: construction of new facilities at San  
22 Quentin State Prison, a health care Facility Improvement program designed to provide  
23 new and upgraded clinical space and clinical support space at each prison and a project  
24 for the construction of several major medical facilities for the medical and mental health  
25 treatment of prisoners that would result in up to 5,000 medical beds and 5,000 mental  
26 health beds.

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- 1 7. In the Receiver's Second Bi-Monthly Report to the Court, filed in September 2006, the  
2 Receiver reported that he was in the initial stages of planning for the foregoing projects.  
3 The Receiver reported that he had met with State officials in September 2006 to discuss  
4 planning for the 5,000 medical bed project and stressed that he would enter into  
5 discussions with the Special Master in *Coleman* for the purpose of determining whether  
6 the project should be expanded to include facilities to accommodate 5,000 mental health  
7 beds. In the Third Bi-Monthly Report, filed in December 2006, the Receiver reported  
8 that he had commissioned studies for the design and construction of the 5,000 medical  
9 bed project.
- 10 8. The Defendants neither objected to nor expressed any concerns about the Receiver's  
11 proposed capital projects described in his reports.
- 12 9. Meanwhile, commencing in May 2006, and continuing until the present, Judge Karlton in  
13 the *Coleman* case issued no less than 17, frequently very specific, orders for the provision  
14 and construction of additional mental health beds at various institutions. True and correct  
15 copies of Judge Karlton's orders are attached hereto as Exhibits 2 through 19, inclusive,  
16 judicial notice of which is requested. Pursuant to those orders, Judge Karlton required the  
17 Defendants to develop and submit to the court long range plans for accommodating the  
18 prison mental health population. And, in an order dated October 20, 2006, Judge Karlton  
19 required the Defendants to "address the feasibility of a 'Design and Build' approach for  
20 the construction projects specified in the consolidated plan and shall coordinate the use of  
21 such an approach with any related Design and Build efforts in the Plata case." Exh. 3  
22 hereto, p. 3.
- 23 10. On November 15, 2007, the original Receiver filed his Plan of Action ("POA"). Docket #  
24 929 *et seq.* Among the initiatives included within the POA was the Receiver's 5,000  
25 Prison Medical Bed Construction Initiative and the health care Facility Improvement  
26 Construction Initiative. Under the 5,000 bed project, the Receiver planned to  
27 "[c]oordinate and lead a program to construct up to 5000 medical beds and up to 5000  
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1 mental health beds, utilizing carefully planned patient demographic reports to establish  
2 the number and acuity levels of the beds needed.” Docket # 929, p.16 of 128. The  
3 Receiver originally planned that pre-construction work, including obtaining funding of  
4 the project, would be completed by the Spring of 2008 so that construction could  
5 commence by June 2008. *Id.* In addition, the Receiver anticipated completing  
6 construction in connection with the Facility Improvement Construction Initiative at 12  
7 prisons by November 2008. *Id.*

8 11. The Defendants neither objected to nor raised any concerns about the construction plans  
9 set forth in the POA.

10 12. Both the original Receiver and I have met with the Special Master in *Coleman* and the  
11 court representatives in *Armstrong* and *Perez* on a regular basis to coordinate activities  
12 and initiatives. Those meetings resulted in a series of coordination agreements that  
13 effectively gave the Receiver the lead role in projects designed to benefit the class  
14 members in the respective cases. In particular, on November 13, 2007, the courts in all  
15 four cases issued an order to show cause why the coordination agreement for the San  
16 Quentin, Facility Improvement and 5,000/10,000 bed projects should not be approved.  
17 Although the Defendants made a number of comments and suggestions about the  
18 language of the order approving the coordination agreement, the Defendants did not  
19 object to the projects or to the Receiver’s lead role in connection with the projects. On  
20 February 26, 2008, the courts in all four cases entered an order approving the  
21 Construction Coordination Agreement. Docket # 1107.

22 13. On January 23, 2008, this Court appointed me to act as Receiver. This Court stated that,  
23 “[t]he Receivership has reached a critical juncture at which it must now move from a  
24 primarily investigative and evaluative phase, during which the Receivership analyzed the  
25 current system to determine what reforms were necessary and worked to create an  
26 infrastructure to effectuate such reforms, into an implementation phase, during which the  
27 Receivership must translate the conceptualized reforms into reality. . . . [T]he  
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1 Receivership’s focus can and must now shift towards long-term reform that will achieve  
2 the implementation of a sustainable, constitutionally adequate system of delivering  
3 medical care to Plaintiffs – and, not inconsequentially, a system that must ultimately be  
4 transitioned back to the State of California’s control.” Order Appointing New Receiver  
5 (“OANR”) (Docket # 1063), p. 4:10-20.

6 14. On March 13, 2008, I issued the first draft of a Turnaround Plan of Action (“TPA”)  
7 entitled, “Achieving a Constitutional Level of Care in California’s Prison.” One of the  
8 primary Goals described in the TPA is the capital improvement projects to be undertaken,  
9 including both the Facility Improvement and 5,000/10,000 bed projects. The Facility  
10 Improvement project involves upgrading all existing institutions by 2012, and the  
11 5,000/10,000 bed project will involve the expansion of 6 or 7 existing facilities to serve  
12 the long-term chronic care medical and mental health needs of up to 10,000 patients. The  
13 upgrade program is projected to cost at least \$1 billion and costs for the expansion  
14 program are anticipated to be about \$6 billion.

15 15. The TPA was submitted for public comment for four weeks. The Defendants did not  
16 object to the construction program described therein or its costs. Following a one-day  
17 working session with the Court and its Advisory Working Group on May 3, 2008, I  
18 caused final modifications to be made to the TPA and filed it with the Court on June 6,  
19 2008. Docket # 1229. This Court approved the TPA on June 16, 2008. Docket # 1245.

20 16. The OANR emphasized that this “second phase of the Receivership demands a  
21 substantially different set of administrative skills and style of collaborative leadership.  
22 The Receivership . . . must work more closely at this stage with all stakeholders,  
23 including State officials, to ensure that the system developed and implemented by the  
24 Receivership can be transferred back to the State in a reasonable time frame. Such  
25 collaboration appears to be more important now than ever, given the current budget crisis  
26 faced by the State of California.” OANR, pp. 4-5. In keeping with this admonition, I  
27 have endeavored, when seeking funding for construction of medical facilities for inmates,  
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1 to work within the parameters of State law to the extent possible. For example,  
2 construction of new medical facilities at San Quentin State Prison are being financed by  
3 Legislatively-authorized funding of \$140 million in bond financing.

4 17. Unfortunately, more recent efforts I have made to work within the boundaries provided  
5 by State law have been met with opposition. As described in the TPA, the Facility  
6 Improvement and 5,000/10,000 bed projects are anticipated to require up to \$7 billion  
7 over the next three to five years. Given the scale of these projects and the substantial  
8 funding requirements, I attempted to work closely with the State to obtain financing.  
9 Specifically, I sought legislation to authorize financing of the project through revenue  
10 bonds, not unlike the process by which the San Quentin project is being financed.

11 18. Senator Mike Machado agreed to sponsor Senate Bill (“SB”) 1665, which embodied the  
12 proposal. On April 14, 2008, I made a presentation to the Legislature that described the  
13 Receivership’s “New Facilities Capital Program.” The presentation described both the  
14 Facility Improvement plans and the 5,000/10,000 bed project. The latter is to be  
15 accomplished by the construction of seven facilities at existing prison sites, each with  
16 approximately 1,500 beds to accommodate medical and mental health services and  
17 reassigning up to 10,000 existing beds to reduced overcrowding. The presentation  
18 pointed out that demographic projections in studies performed by two consulting firms  
19 demonstrated the need for the additional medical and mental health beds. I also  
20 attempted to describe each of the seven new facilities in some detail, the location and  
21 phasing of construction for each facility, and the projected direct and indirect costs.

22 19. SB 1665 was approved by the Senate Public Safety and Appropriations Committees. The  
23 bill was scheduled for a vote by the full Senate on May 15, 2008. One day before the  
24 vote, the Legislative Analyst’s Office (“LAO”) informed Senator Machado that the LAO  
25 intended to issue a report the following week that would suggest that SB 1665 somehow  
26 conflicted with the Prison Litigation Reform Act (18 U.S.C. § 3626). On May 16, 2008, I  
27 met with legislative staff, LAO representatives and representatives from the Office of  
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1 Legislative Counsel to discuss the LAO's concerns and to express my willingness to try  
2 and address those concerns.

3 20. The floor vote on SB 1665 was scheduled for May 27, 2008. Despite the meeting I had  
4 with the LAO on May 16, the LAO issued its report several days before the floor vote. A  
5 true and correct copy of the LAO Report is attached hereto as Exh. 20. The LAO Report  
6 contains a number of seriously misleading or factually inaccurate statements which are  
7 discussed at length in the Receiver's Eighth Quarterly Report, filed herein on June 17,  
8 2008. Docket #1248, pp. 49-56. Suffice it to say, as stated in that Report, "[s]tripped to  
9 its basics, the LAO recommends 'business as usual,' contemptuous of the existing *Plata*,  
10 *Coleman*, and *Armstrong* orders." *Id.*, p. 54.

11 21. The full Senate failed on two occasions to approve SB 1665. As a practical matter, a  
12 legislative solution to permit the necessary construction now seems to be foreclosed, at  
13 least in the short term.

14 22. Despite the setback in the Legislature, I have continued to try to work with the State  
15 Executive branch to obtain the necessary funding for the capital projects and to avoid  
16 seeking Court intervention. Specifically, I met with representatives of the State  
17 Controller's Office ("SCO"), the Department of Finance ("DOF"), the State Treasurer's  
18 Office, the Governor's Office and the Attorney General's Office to discuss possible  
19 mechanisms by which the State could provide funding, notwithstanding the Legislature's  
20 refusal to enact SB 1665.

21 23. In particular, I proposed two alternative approaches to funding, each of which was  
22 rejected by the State. First, I proposed to enter into a Memorandum of Understanding  
23 ("MOU") with the SCO and DOF to permit funding of the construction projects on a  
24 "pay-as-you-go" basis under the Emergency Services Act. The Governor's Emergency  
25 Proclamation, together with the Emergency Services Act, provide the Governor with  
26 substantial authority to authorize expenditures by departments in the Executive Branch  
27 from funds appropriated originally for other purposes or the Secretary of CDCR to  
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1 redirect Agency funds in light of the emergency. The obvious advantage to the pay-as-  
2 you-go approach is that the State would not have to obtain the full \$7 billion required for  
3 the capital projects at one time, and thus the impact on the State's financial well-being  
4 would be minimized. Second, I stressed that, in light of the OAR's requirement that the  
5 State pay all costs of the Receivership, the SCO could simply issue warrants on the State  
6 Treasury as necessary to fund the construction projects. The DOF rejected the first  
7 proposal and the SCO rejected both.

8 24. The DOF suggested that I seek private financing for the capital projects that would stretch  
9 out repayment over a 25-30 year period, and likely would require waivers of State law. I  
10 indicated that I was unwilling to adopt such an approach absent an MOU with the SCO  
11 and DOF that would provide for some kind of security for the borrowing. For its part, the  
12 SCO was unwilling to issue warrants on the State Treasury unless this Court issued an  
13 order for a sum certain, more specific than the cost provisions of the OAR.

14 25. In the face of the failure by the SCO and DOF to reach agreement on either of my  
15 proposed solutions to the funding problem, I have offered yet another potential solution.  
16 I sent the Governor's Office a letter on June 9, 2008 that proposed a contract between  
17 CPR, Inc. (the not for profit corporation through which the Receivership is operated), on  
18 the one hand, and the Office of the Governor and CDCR, on the other hand. Pursuant to  
19 the Governor's emergency powers, the Governor would authorize CPR to undertake the  
20 planning, design and construction of the proposed facilities. CPR would thereafter  
21 deliver ownership of the facilities to the State. Payment would be authorized by the  
22 Governor under the Emergency Services Act and/or as a result of the Costs provision of  
23 the OAR. I also proposed that the Governor would authorize payment on an annual basis  
24 (plus an additional advance – a construction contingency fund – of up to 25% of that  
25 year's annual construction needs). Unfortunately, this proposal, too, has been rejected.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman & Dupree LLP, 160 Sansome Street, 17<sup>th</sup> Floor, San Francisco, CA 94104. I am over the age of 18 and not a party to the within action.

I am readily familiar with the business practice of Futterman & Dupree, LLP for the collection and processing of correspondence.

On June 19, 2008 I served a copy of the following document(s):

**DECLARATION OF RECEIVER J. CLARK KELSO IN SUPPORT OF RECEIVER'S MOTION TO ADD STATE CONTROLLER AS PARTY-DEFENDANT AND FOR DISCOVERY IN AID OF ENFORCEMENT OF ORDER APPOINTING RECEIVER**

by placing true copies thereof enclosed in sealed envelopes, for collection and service pursuant to the ordinary business practice of this office in the manner and/or manners described below to each of the parties herein and addressed as follows:

X BY HAND DELIVERY: I caused such envelope to be served by hand to the address designated below.

John Chiang  
Richard J. Chivaro  
State Controller  
300 Capitol Mall, Suite 518  
Sacramento, CA 95814

and

X BY MAIL: I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated below. I am readily familiar with Futterman & Dupree's practice for collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.

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25 I declare that I am employed in the offices of a member of the State Bar of this Court at  
 whose direction the service was made. I declare under penalty of perjury, under the laws of the  
 26 united State of America, that the above is true and correct.

Executed on June 19, at San Francisco, California.



Lori Dotson