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7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

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11 MARCIANO PLATA, et al.,

12 *Plaintiffs,*

13 v.

14 ARNOLD SCHWARZENEGGER, et al.,

15 *Defendants.*

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Case No. C01-1351 TEH

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

Date: July 28, 2008

Time: 10:00 a.m.

Courtroom: Hon. Thelton E. Henderson

TABLE OF CONTENTS

	<u>Page</u>
1	
2	
3	NOTICE OF MOTION..... 1
4	MEMORANDUM OF POINTS AND AUTHORITIES2
5	PRELIMINARY STATEMENT2
6	FACTS.....3
7	A. The Stipulated Orders And The State’s Failure To Remedy The Crisis In
8	The Prison Medical Care System.....3
9	B. The Order Appointing Receiver.4
10	C. The Governor’s Emergency Prison Overcrowding Proclamation.4
11	D. The Receiver’s Plans For Constructing Medical And Mental Health
12	Facilities.....5
13	E. The Court Appoints The Current Receiver.....7
14	F. The Receiver Finalizes His “Turnaround Plan of Action,” Including The
15	Capital Improvements Program.7
16	G. The Receiver’s Ultimately Unsuccessful Effort To Obtain Legislative
17	Approval Of The Financing For The Upcoming Capital Projects.....8
18	H. The Receiver’s Continued, But Unsuccessful, Efforts In The Wake Of The
19	Failure Of SB 1665 To Obtain State Cooperation To Fund The Capital
20	Projects.9
21	ARGUMENT..... 11
22	I. THE COURT SHOULD ORDER THAT THE STATE CONTROLLER BE
23	MADE A PARTY-DEFENDANT TO ENSURE THAT ALL NECESSARY
24	PARTIES ARE BEFORE THE COURT WHEN, AND IF, THE COURT ISSUES
25	AN ORDER COMPELLING THE STATE TO DISPERSE FUNDS FOR THE
26	RECEIVER’S CAPITAL PROJECTS. 11
27	A. The Court May Issue An Order Requiring The Controller To Draw
28	Warrants Against The State Treasury To Fund The Receiver’s Capital
	Projects. 12
	B. The Court Should Order That The Controller Be Joined As A Party-
	Defendant..... 16
	1. The Receiver has satisfied the requirements for joinder under
	FRCP 19. 16
	2. Joinder is required pursuant to FRCP 20..... 19

1 II. THE COURT SHOULD PERMIT DISCOVERY DIRECTED AT STATE
2 OFFICIALS TO ASSIST IN OBTAINING THE FUNDING REQUIRED FOR
3 THE RECEIVER'S CAPITAL PROJECTS.....20

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
CONCLUSION.....20

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Cases

Arnold v. BLaST Intermediate Unit 17,
843 F.2d 122 (3d Cir. 1988)13

Benjamin v. Malcolm,
629 F.Supp. 713 (S.D.N.Y. 1986), *aff'd*, 803 F.2d 46 (2d Cir. 1986),.....14, 16, 17, 18

Berger v. Heckle,
771 F.2d 1556 (2d Cir. 1985)12

Board of Trustees, Local 295/Local 851, etc. v. Hail Air Freight, Inc.,
2008 U.S. Dist. LEXIS 31267 (S.D.N.Y., Apr. 16, 2008).....20

British Internat'l Ins. Co. v. Seguros La Republica,
200 FRD 586 (W.D. Tex. 2000).....20

Collins v. Thomas,
649 F.2d 1203 (5th Cir. 1981), *cert. denied* 456 U.S. 936 (1982).....13

Commodity Futures Trading Comm'n v. Kimberlynn Creek Ranch, Inc.,
276 F.3d 187 (4th Cir. 2002)17

Confederated Tribes of Chehalis Indian Reservation v. Lujan,
928 F.2d 1496 (9th Cir. 1991)16

Dixon v. Barry,
967 F.Supp. 535 (D.D.C. 1997)12

EEOC v. Peabody Western Coal Co.,
400 F.3d 774 (9th Cir. 2005)17

Gary W. v. Louisiana,
441 F. Supp. 1121 (E.D. La. 1977), *aff'd* 622 F.2d 804 (5th Cir. 1980)14

Gary W. v. Louisiana,
622 F.2d 804 (5th Cir. 1980), *cert. denied* 450 U.S. 994 (1981).....13

Gates v. Collier,
501 F.2d 1291 (5th Cir. 1974)14

Gates v. Collier,
616 F.2d 1268 (5th Cir. 1980)13, 14, 16

Hutto v. Finney,
437 U.S. 678 (1978)14

La Raza Unida v. Volpe,
545 F. Supp. 36 (N.D. Cal. 1982).....14

1 *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*,
558 F.2d 914 (9th Cir. 1977)19

2

3 *Peacock v. Thomas*,
516 U.S. 349 (1996)12

4 *Preston v. Thompson*,
565 F. Supp. 294 (N.D. Ill. 1983).....12, 13

5

6 *SEC v. Cherif*,
933 F.2d 403 (7th Cir. 1991)17

7 *SEC v. Colello*,
139 F.3d 674 (9th Cir. 1998)17

8

9 *SEC v. George*,
426 F.3d 786 (6th Cir. 2005)17

10 *Spain v. Mountanos*,
690 F.2d 742 (9th Cir. 1982)passim

11

12 *Stone v. San Francisco*,
968 F.2d 850 (9th Cir. 1992)14

13 *United Mine Workers v. Gibbs*,
383 U.S. 71519

14

15 *United States v. New York Telephone Co.*,
434 U.S. 15918

16

17 **Statutes and Rules**

18 Federal

19 18 U.S.C. § 36269

20 28 U.S.C. § 1651(a)18

21 42 U.S.C. § 198813

22 FRCP 1916, 17, 19

23 FRCP 19(a)(1)(A)16

24 FRCP 19(a)(1)(B)(ii)18

25 FRCP 2019

26 FRCP 2116, 19

27 FRCP 6912, 13, 20

28

1 FRCP 69(b).....20

2 FRCP 7012, 13, 20

3 State

4 Cal. Gov't Code § 12440.....17

5 Cal. Gov't Code § 8550 *et seq.*.....4

6

7 **Other Authorities**

8 Advisory Committee Notes to 1966 Amendment to FRCP 19.....16

9 Schwarzer et al., *California Practice Guide: Federal Civil Procedure Before Trial*, (2008)

10 ¶ 7:57.116

11 ¶ 7:13819

12 ¶ 7:85.1016

13

14 **Constitutional Provisions**

15 Cal. Const., Art. XVI, § 7.....17

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NOTICE OF MOTION

TO JOHN CHIANG, CONTROLLER FOR THE STATE OF CALIFORNIA AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 10:00 a.m. on July 28, 2008, or such other date and time as the Court may order, in the above-entitled Court, Receiver J. Clark Kelso ("Receiver") will and hereby does move the Court for an Order, pursuant to FRCP 19, 20 and 21, requiring that John Chiang, Controller for the State of California ("Controller") be joined as a party-defendant in this matter and for an Order, pursuant to FRCP 69 and 70, permitting the Receiver to take discovery in aid of enforcement of this Court's Order Appointing Receiver ("OAR"), dated February 14, 2006.

The motion will be made on the grounds that the Receiver has sufficient reason for joinder of the Controller as a party-defendant and that joinder is feasible. The Controller is an essential party if the Receiver deems it necessary to seek an order, pursuant to paragraphs IV and VI of the OAR, compelling the State to fund the cost of the Receivership. Because it is the Controller who is empowered by the State Constitution to draw warrants on the State treasury, any such order requiring payment to the Receiver must be directed to the Controller. In addition, the motion will be made on the grounds that discovery directed to the Controller and other State employees with respect to how and where State funds are held will aid enforcement of the OAR, should the Receiver deem it necessary to seek an order compelling the funding of the Receivership.

The motion will be based on this Notice, on the Memorandum of Points and Authorities and Declaration of J. Clark Kelso, filed herewith, on all the pleadings and papers on file herein and on such other oral and documentary evidence as may be presented at the hearing of this matter.

Dated: June 19, 2008

FUTTERMAN & DUPREE LLP

By: /s/ Martin H. Dodd
Martin H. Dodd
Attorneys for Receiver J. Clark Kelso

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **PRELIMINARY STATEMENT**

3 By this motion, the Receiver requests that the Court order that John Chiang, the State
4 Controller, be joined as a party-defendant to this action. The reason is simple: the State has
5 declined to fund major capital projects the Receiver considers essential to fulfilling the charge
6 given to him by this Court. As a result, the Receiver may find it necessary to ask this Court to
7 order the Controller to draw warrants on the State Treasury to provide the Receiver with the
8 necessary funds.¹

9 The Receiver does not bring this motion lightly. He recognizes that the State is in the
10 midst of a financial crisis. But, as this Court emphasized in its orders leading to the appointment
11 of the Receiver, the inmates in California state prisons have been living – and dying – in a state
12 of crisis for decades. Indeed, the situation remains so dire that the Governor himself proclaimed
13 that overcrowding in State prisons amounts to an emergency affecting every aspect of prison
14 conditions. The Governor's proclamation was the necessary predicate to the sweeping authority
15 conferred upon the Executive branch under the California Emergency Services Act.
16 Unfortunately, neither the Governor nor any other State official seems willing to use that
17 authority to cooperate with the Receiver.

18 In the face of years of malfeasance, misfeasance, neglect and incompetence in the prison
19 medical care system, this Court has made it abundantly clear that *prompt* and *forceful* action is
20 necessary to bring prison medical care up to Constitutional standards. With the State's fiscal
21 woes in mind, the Receiver has made repeated efforts to collaborate with State officials in the
22 Legislative and Executive branches to find a creative and appropriate mechanism to fund
23 essential capital improvements to prison medical facilities – capital improvements that the State
24 has known about and approved of for the better part of two years. Sadly, the paralysis and failure
25 of will that this Court decried in its Findings leading to the appointment of the Receiver have
26 reared their head again. The State is either incapable of taking, or unwilling to take, the steps

27 ¹ As discussed below, the issues in this motion also implicate funding of the remedial plan in *Coleman v.*
28 *Schwarzenegger*, No. CIV S-9-0520 LKK JFM P (E.D. Cal.) ("*Coleman*"), pending before Hon. Lawrence K.
Karlton. This Court may wish to consider holding a joint hearing on this motion with Judge Karlton.

1 required to provide the Receiver the funding that he needs and that this Court has ordered be
2 provided.

3 The State's failure to act points in only one direction: this Court may have to exercise its
4 authority under the U.S. Constitution to order that State funds be drawn directly from the State
5 Treasury and transferred to the Receiver so that he can fulfill the duties with which he has been
6 charged by this Court. But because the Receiver is committed to giving the State every
7 opportunity to cooperate before requesting that the State be compelled to act, this motion is only
8 a first step. The Receiver asks only – at this point – that the Controller be made a party. If the
9 State continues to fail to provide the necessary funding, the Receiver will have little choice but to
10 take the next step and seek an order compelling payment.

11 **FACTS²**

12 **A. The Stipulated Orders And The State's Failure To Remedy The Crisis In**
13 **The Prison Medical Care System.**

14 In 2002, the defendants stipulated to injunctive relief intended to bring the prison medical
15 system up to Constitutional standards. The parties entered into several other stipulations over the
16 ensuing three years in an effort to address specific issues pertaining to the delivery of
17 constitutional care. It is essentially undisputed that the series of stipulated orders failed
18 miserably. Accordingly, on October 3, 2005, following a six-day evidentiary hearing, this Court
19 entered Findings of Fact and Conclusions of Law ("FCCL") that set forth in painstaking detail
20 the systemic breakdowns that had brought about the horrendous conditions in the prison medical
21 care system and that were preventing even sincere remedial efforts from succeeding. In addition
22 to specific failings in the medical care system, the Court focused on the "trained incapacity" of
23 the State bureaucracy at every level to address the multiple and overlapping crises in the delivery
24 of medical care. Unwilling to accept continued failure, this Court appointed a Receiver to take
25 control of the system and transform it into a functioning, and Constitutional, system of care.

26
27
28 ² In addition to matters of record in this action, the Facts are based upon the Declaration of J. Clark Kelso ("Kelso Decl."), filed herewith.

1 **B. The Order Appointing Receiver.**

2 The OAR conferred on the Receiver all of the powers of the Secretary of CDCR insofar
3 as the delivery of medical care is concerned and suspended the Secretary's exercise of those
4 powers for the duration of the Receivership. Lest the Receiver be constrained by the same
5 trained incapacity that had stymied efforts under the stipulated orders, the Court made it clear
6 that State law could be waived when necessary to move the system toward compliance with the
7 Constitution. And, to underscore that the Court expected the State to work with the Receiver as
8 he undertook his efforts, the Court directed two provisions of the OAR, in particular, at the
9 Defendants.

10 Paragraph IV, entitled "COSTS," provides that "[a]ll costs incurred in the implementation
11 of the policies, plans, and decisions of the Receiver relating to the fulfillment of his duties under
12 this Order shall be borne by Defendants." Paragraph VI, entitled "COOPERATION," provides
13 that "All Defendants, and all agents, or persons within the employ, of any Defendant in this
14 action . . . and all persons in concert and participation with them, . . . shall *fully* cooperate with
15 the Receiver in the discharge of his duties under this Order, . . . Any such person who . . .
16 thwarts or delays the Receiver's performance of his duties under this Order, shall be subject to
17 contempt proceedings before this Court." (Emphasis in original.) The Court ordered that the
18 OAR be served on various State agencies, including the Department of Finance, Department of
19 General Services and the State Personnel Board. (OAR, ¶ VI.B.)

20 Defendants did not take an appeal from the OAR.

21 **C. The Governor's Emergency Prison Overcrowding Proclamation.**

22 On October 4, 2006, the Governor of California acknowledged the crisis in the prisons
23 created by overcrowding and proclaimed that the crisis amounted to an emergency within the
24 meaning of the California Emergency Services Act (Cal. Gov't Code § 8550 *et seq.*). As a result
25 of the Proclamation, the Governor conferred upon the Secretary of the CDCR a number of
26 powers, including the authority to "contract for facility space, inmate transportation, inmate
27 screening, the services of qualified personnel, and/or for the supplies, materials, equipment, and
28 other services needed to immediately mitigate the severe overcrowding and the resulting impacts

1 within California.” The Governor then suspended during the pendency of the emergency all
2 provisions of the Government Code and Public Contracts Code as they pertained to state
3 contracting. *See* Exh. 1 to Kelso Decl.

4 **D. The Receiver’s Plans For Constructing Medical And Mental Health**
5 **Facilities.**

6 From very early on, the Receiver recognized that the prisons sorely lacked adequate
7 medical facilities and that, if the system was to be brought up to Constitutional standards, very
8 substantial renovation of existing facilities, and even more substantial construction of new
9 facilities would be required. The Receiver launched at least three significant construction-related
10 initiatives: construction of new facilities at San Quentin State Prison, a health care Facility
11 Improvement program designed to provide new and upgraded clinical space and clinical support
12 space at each prison and a project for the construction of several major medical facilities for the
13 medical and mental health treatment of prisoners that would result in up to 5,000 medical beds
14 and 5,000 mental health beds.

15 As early as his Second Bi-Monthly Report to the Court in September 2006, the Receiver
16 reported that he was in the initial stages of planning for these projects. Specifically, the Receiver
17 met with State officials in September 2006 to discuss planning for the 5,000 medical bed project
18 and stressed that he would enter into discussions with the Special Master in *Coleman* for the
19 purpose of determining whether the project should be expanded to include facilities to
20 accommodate 5,000 mental health beds. In his Third Bi-Monthly Report in December 2006, the
21 Receiver reported that he had commissioned studies for the design and construction of the 5,000
22 medical bed project.

23 The Defendants neither objected to nor expressed any concerns about the Receiver’s
24 proposed capital projects described in his reports.

25 Meanwhile, commencing in May 2006, and continuing until the present, Judge Karlton in
26 *Coleman* issued no less than 17, frequently very specific, orders for the provision and
27 construction of additional mental health beds at various institutions.³ Pursuant to those orders,

28 ³See Exhs. 2 through 19 to the Kelso Decl.

1 Judge Karlton required the Defendants to develop and submit to the court long range plans for
2 accommodating the prison mental health population. And, in an order dated October 20, 2006,
3 Judge Karlton required the Defendants to “address the feasibility of a ‘Design and Build’
4 approach for the construction projects specified in the consolidated plan and shall coordinate the
5 use of such an approach with any related Design and Build efforts in the Plata case.” Exh. 3 to
6 Kelso Decl., p. 3.

7 On November 15, 2007, the Receiver filed his Plan of Action (“POA”). Docket # 929 *et*
8 *seq.* Among the initiatives included within the POA was the Receiver’s 5,000 Prison Medical
9 Bed Construction Initiative and the health care Facility Improvement Construction Initiative.
10 Under the 5,000 bed project, the Receiver planned to “[c]oordinate and lead a program to
11 construct up to 5000 medical beds and up to 5000 mental health beds, utilizing carefully planned
12 patient demographic reports to establish the number and acuity levels of the beds needed.”
13 Docket # 929, p. 16 of 128. The Receiver originally planned that pre-construction work,
14 including obtaining funding for the project, would be completed by the Spring of 2008 so that
15 construction could commence by June 2008. *Id.* In addition, the Receiver anticipated
16 completing construction in connection with the Facility Improvement Construction Initiative at
17 12 prisons by November 2008. *Id.*

18 The Defendants neither objected to nor raised any concerns about the construction plans
19 set forth in the POA.

20 The Receiver, the Special Master in *Coleman* and the court representatives in *Armstrong*
21 and *Perez* had been meeting regularly to coordinate their activities and initiatives. Those
22 meetings resulted in a series of coordination agreements that effectively gave the Receiver the
23 lead role in projects designed to benefit the class members in the respective cases. In particular,
24 on November 13, 2007, the courts in all four cases issued an order to show cause why the
25 coordination agreement for the San Quentin, Facility Improvement and 5,000/10,000 bed projects
26 should not be approved. Although the Defendants made a number of comments and suggestions
27 about the language of the order approving the coordination agreement, the Defendants did not
28

1 object to the projects or to the Receiver's lead role in connection with the projects.⁴ On
 2 February 26, 2008, the courts in all four cases entered an order approving the Construction
 3 Coordination Agreement. Docket # 1107.

4 **E. The Court Appoints The Current Receiver.**

5 On January 23, 2008, this Court appointed the current Receiver. In making the
 6 appointment, the Court stressed that, "[t]he Receivership has reached a critical juncture at which
 7 it must now move from a primarily investigative and evaluative phase, during which the
 8 Receivership analyzed the current system to determine what reforms were necessary and worked
 9 to create an infrastructure to effectuate such reforms, into an implementation phase, during which
 10 the Receivership must translate the conceptualized reforms into reality. . . . [T]he Receivership's
 11 focus can and must now shift towards long-term reform that will achieve the implementation of a
 12 sustainable, constitutionally adequate system of delivering medical care to Plaintiffs -- and, not
 13 inconsequentially, a system that must ultimately be transitioned back to the State of California's
 14 control." Order Appointing New Receiver ("OANR") (Docket # 1063), p. 4:10-20.

15 **F. The Receiver Finalizes His "Turnaround Plan of Action," Including The**
 16 **Capital Improvements Program.**

17 On March 13, 2008, the Receiver issued the first draft of his Turnaround Plan of Action
 18 entitled, "Achieving a Constitutional Level of Care in California's Prison." As one of the
 19 primary Goals under the draft plan, the Receiver described the capital improvement projects he
 20 plans to undertake, including both the Facility Improvement and 5,000/10,000 bed projects. The
 21 Facility Improvement project involves upgrading all existing institutions by 2012, and the
 22 5,000/10,000 bed project will involve the expansion of 6 or 7 existing facilities to serve the long-
 23 term chronic care medical and mental health needs of up to 10,000 patients. The Receiver
 24 estimated costs for the upgrade program at \$1 billion and costs for the expansion program at
 25 \$6 billion.

26 _____
 27 ⁴ In fact, in a stipulation filed in *Coleman* on or about April 22, 2008, the State agreed that the "*Plata* Receiver has
 28 now been vested with a leadership role over the construction of mental health beds . . . and will meet with the
Coleman parties on April 24, 2008 to discuss the construction of 5,000 mental health beds under his aegis." Exh. 19
 to Kelso Decl., p.2.

1 The Receiver accepted public comment on the plan for four weeks. The Defendants did
2 not object to the construction program or its costs. Following a one-day working session with the
3 Court and its Advisory Working Group on May 3, 2008, the Receiver made final modifications
4 to the plan and filed it with the Court on June 6, 2008. Docket # 1229. This Court approved the
5 Turnaround Plan of Action on June 16, 2008. Docket # 1245.

6 **G. The Receiver's Ultimately Unsuccessful Effort To Obtain Legislative**
7 **Approval Of The Financing For The Upcoming Capital Projects.**

8 The OANR emphasized that this "second phase of the Receivership demands a
9 substantially different set of administrative skills and style of collaborative leadership. The
10 Receivership . . . must work more closely at this stage with all stakeholders, including State
11 officials, to ensure that the system developed and implemented by the Receivership can be
12 transferred back to the State in a reasonable time frame. Such collaboration appears to be more
13 important now than ever, given the current budget crisis faced by the State of California."
14 OANR, pp. 4-5. In keeping with this admonition, the Receiver has endeavored, when seeking
15 funding for construction of medical facilities for inmates, to work within the parameters of State
16 law to the extent possible. Thus, to complete the construction of new medical facilities at San
17 Quentin State Prison, the Receiver sought and successfully obtained Legislative approval from
18 the State legislature for more than \$140 million in bond financing.

19 Unfortunately, more recent efforts by the Receiver to work within the boundaries
20 provided by State law have been met with opposition. As described in the Turnaround Plan of
21 Action, the Facility Improvement and 5,000/10,000 bed projects are anticipated to require up to
22 \$7 billion over the next three to five years. Given the scale of these projects and the substantial
23 funding requirements, the Receiver undertook to work closely with the State to obtain financing.
24 Specifically, the Receiver requested legislation to authorize financing of the project through
25 revenue bonds, not unlike the process by which the San Quentin project is being financed.

26 Senator Mike Machado agreed to sponsor Senate Bill ("SB") 1665, which embodied the
27 Receiver's proposal. On April 14, 2008, the Receiver made a presentation to the Legislature that
28 described the Receiver's "New Facilities Capital Program." Specifically, the Receiver described

1 the Facility Improvement plans and that he intended to construct seven facilities at existing
 2 prison sites, each with approximately 1,500 beds to accommodate medical and mental health
 3 services and reassigning up to 10,000 existing beds to reduced overcrowding. The presentation
 4 pointed out that demographic projections in studies performed by two consulting firms
 5 demonstrated the need for the additional medical and mental health beds. The Receiver then
 6 described each of the seven new facilities in some detail, the location and phasing of construction
 7 for each facility, and the projected direct and indirect costs.

8 SB 1665 was approved by the Senate Public Safety and Appropriations Committees. The
 9 bill was scheduled for a vote by the full Senate on May 15, 2008. One day before the vote, the
 10 Legislative Analyst's Office ("LAO") informed Senator Machado that the LAO intended to issue
 11 a report the following week that would suggest that SB 1665 somehow conflicted with the Prison
 12 Litigation Reform Act (18 U.S.C. § 3626). On May 16, 2008, the Receiver met with legislative
 13 staff, LAO representatives and representatives from the Office of Legislative Counsel to discuss
 14 the LAO's concerns and to express his willingness to try and address those concerns.

15 The floor vote on SB 1665 was scheduled for May 27, 2008. Notwithstanding the
 16 meeting between the Receiver and LAO on May 16, the LAO issued its report several days
 17 before the floor vote. *See* Exh. 20 to Kelso Decl. As the Receiver detailed in his Eighth
 18 Quarterly Report, filed herein on June 17, 2008 (Docket # 1248), the LAO report contained a
 19 number of misleading and inaccurate statements that effectively misrepresented the factual and
 20 conceptual bases for the capital improvement projects. *See* Docket # 1248, pp. 49-56.

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

24 **H. The Receiver's Continued, But Unsuccessful, Efforts In The Wake Of The**
 25 **Failure Of SB 1665 To Obtain State Cooperation To Fund The Capital**
Projects.

26 Despite the setback in the Legislature, the Receiver has continued to make efforts to work
 27 with the State Executive branch to obtain the necessary funding and to avoid seeking Court
 28 intervention. Specifically, the Receiver met with representatives of the State Controller's Office

1 (“SCO”), the Department of Finance (“DOF”), the State Treasurer’s Office, the Governor’s
2 Office and the Attorney General’s Office to discuss possible mechanisms by which the State
3 could provide funding, notwithstanding the Legislature’s refusal to enact SB 1665. The Receiver
4 posed two alternative approaches to funding, each of which was rejected by the State.

5 First, the Receiver proposed that the Receiver enter into a Memorandum of
6 Understanding (“MOU”) with the SCO and DOF to permit funding of the construction projects
7 on a “pay-as-you-go” basis under the Emergency Services Act. The Receiver noted that the
8 Governor’s Emergency Proclamation, together with the Emergency Services Act, provided the
9 Governor with substantial authority to authorize expenditures by departments in the Executive
10 Branch from funds appropriated originally for other purposes or the Secretary of CDCR to
11 redirect Agency funds in light of the emergency. The obvious advantage to the pay-as-you-go
12 approach is that the State would not have to obtain the full \$7 billion required for the Receiver’s
13 projects at one time, and thus the impact on the State’s financial well-being would be minimized.
14 Second, the Receiver emphasized that, in light of the OAR’s requirement that the State pay all
15 costs of the Receivership, the SCO could simply issue warrants on the State Treasury as
16 necessary to fund the construction projects. The DOF rejected the first proposal and the SCO
17 rejected both.

18 The DOF suggested that the Receiver seek private financing that would stretch out
19 repayment over a 25-30 year period, and likely would require waivers of State law. The Receiver
20 indicated an unwillingness to adopt that approach absent an MOU with the SCO and DOF that
21 would provide for some kind of security for the borrowing. For its part, the SCO was unwilling
22 to issue warrants on the State Treasury unless this Court issued an order for a sum certain, more
23 specific than the cost provisions of the OAR.

24 In the face of the failure by the SCO and DOF to reach agreement with the Receiver on
25 either of the proposed, creative solutions to the funding problem, the Receiver offered yet another
26 solution in his ongoing effort to work with State officials. In a letter sent to the Governor’s
27 Office on June 9, 2008, the Receiver proposed a contract between CPR, Inc. (the not for profit
28 corporation through which the Receivership is operated), on the one hand, and the Office of the

1 Governor and CDCR, on the other hand. Pursuant to the Governor’s emergency powers, the
2 Governor would authorize CPR to undertake the planning, design and construction of the
3 proposed facilities. CPR would thereafter deliver ownership of the facilities to the State.
4 Payment would be authorized by the Governor under the Emergency Services Act and/or as a
5 result of the costs provision of the OAR. The Receiver proposed that the Governor would
6 authorize payment on an annual basis (plus an additional advance – a construction contingency
7 fund – of up to 25% of that year’s annual construction needs). Unfortunately, this proposal, too,
8 has been rejected.

9 The facts recited above demonstrate that the State has moved from “trained incapacity” to
10 outright obstruction. This motion followed.

11 **ARGUMENT**

12 **I. THE COURT SHOULD ORDER THAT THE STATE CONTROLLER BE MADE**
13 **A PARTY-DEFENDANT TO ENSURE THAT ALL NECESSARY PARTIES ARE**
14 **BEFORE THE COURT WHEN, AND IF, THE COURT ISSUES AN ORDER**
15 **COMPELLING THE STATE TO DISPERSE FUNDS FOR THE RECEIVER’S**
16 **CAPITAL PROJECTS.**

17 The Receiver brings this motion to ensure that all necessary State officers are before the
18 Court when, and if, the Receiver seeks an order directing the Controller to draw warrants against
19 the State Treasury to fund the costs of the Receivership, including specifically all or any portion
20 of the \$7 billion required for the Receiver’s proposed capital projects. This Court has laid a
21 foundation for bringing other parties before the Court to ensure that the State complies with its
22 orders. In addition to the State agencies that were required to be served with the OAR, Paragraph
23 VIA of the OAR provides:

24 All Defendants, and all agents, or persons within the employ, of any Defendant in
25 this action . . . and all persons in concert and participation with them . . . shall
26 fully cooperate with the Receiver in the discharge of his duties under this Order, .
27 . . . Any such person who . . . thwarts or delays the Receiver’s performance of his
28 duties under this Order, shall be subject to contempt proceedings before this
Court.

29 The facts recited above demonstrate that both the Legislative and Executive branches of
30 the State government have failed and refused to provide funding of the costs of the Receivership
31 – despite the plain language of the OAR. As a result, a request for orders specifically directed to

1 the State to fund the capital projects, including possible orders to show cause re contempt, are
 2 now a distinct possibility. As discussed below, the Court undeniably has the power to order the
 3 State to transfer funds to the Receivership, but any such order must be directed to the Controller
 4 to ensure that payment is actually made. Under these circumstances, the Court should order that
 5 the Controller be joined as a party-defendant.

6 **A. The Court May Issue An Order Requiring The Controller To Draw**
 7 **Warrants Against The State Treasury To Fund The Receiver's Capital**
 8 **Projects.**

9 The underlying premise for this motion is that the Court may enforce Paragraph IV of the
 10 OAR by ordering the Controller to draw warrants on the State Treasury to fund the Receivership,
 11 including the Receiver's capital projects, without regard to whether such an order contravenes
 12 State law governing procedures for expenditures of State funds. A review of the relevant case
 13 law reveals that this Court's power to make such an order is unassailable.

14 This Court, like all federal courts, has "inherent power to enforce its judgments. Without
 15 jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be
 16 incomplete and entirely inadequate to the purposes for which it was conferred by the
 17 Constitution.'" *Peacock v. Thomas*, 516 U.S. 349, 356 (1996). Thus, a district court may "take
 18 broad remedial action to effectuate compliance with its orders." *Dixon v. Barry*, 967 F.Supp.
 19 535, 550 (D.D.C. 1997). "[A] court has an affirmative duty to protect the integrity of its decree.
 20 This duty arises where the performance of one party threatens to frustrate the purpose of the
 21 decree." *Berger v. Heckler* (2d Cir. 1985) 771 F.2d 1556, 1568. The courts agree, therefore,
 22 that when state or local governments fail or refuse to satisfy or comply with federal judgments,
 23 any or all of the enforcement remedies provided FRCP 69 and FRCP 70 may be used to compel
 24 "the governmental defendant to make payment." *Preston v. Thompson*, 565 F. Supp. 294, 303
 25 (N.D. Ill. 1983).⁵

26 In *Spain v. Mountanos*, 690 F.2d 742 (9th Cir. 1982), for example, in a case involving
 27 conditions at San Quentin, plaintiff had been awarded a judgment of attorneys fees pursuant to

28 ⁵ Rule 69 is concerned with enforcement of money judgments, while Rule 70 provides for a variety of equitable remedies, including contempt, which federal courts may utilize to enforce their orders.

1 42 U.S.C. § 1988 against the State of California. The Attorney General submitted a claim to the
2 State Board of Control for funds to pay the award and the Board of Control in turn submitted the
3 claim to the State legislature to be included in an omnibus appropriations bill. Although the
4 Assembly approved the appropriation, the Senate specifically refused to do so and the
5 appropriation was deleted from the final bill.

6 The Ninth Circuit ruled that the plaintiffs were not limited to attempting to levy execution
7 on State property to satisfy the award. “[U]nder the extraordinary circumstances here where the
8 judgment is against a state, which refuses to appropriate funds through the normal process
9 provided by state law, the district court should not necessarily be reduced to satisfying a
10 judgment through the cumbersome procedure of attempting to execute against state property or
11 bank accounts. It may, instead, pursue any remedy provided in Rule 69 or Rule 70 to enforce the
12 award, including ordering state officials to pay.” *Id.* at 745.

13 Cases from other circuits are fully in accord. *See Collins v. Thomas*, 649 F.2d 1203 (5th
14 Cir. 1981), *cert. denied* 456 U.S. 936 (1982) (affirming a Rule 69 order that required defendant
15 sheriff to pay attorney fee award out of county funds under his control, notwithstanding a state
16 law prohibiting the execution of judgments against counties); *Gary W. v. Louisiana*, 622 F.2d
17 804, 807 (5th Cir. 1980), *cert. denied* 450 U.S. 994 (1981) (holding that district court had the
18 power to order state agency to pay money judgment from its funds, notwithstanding a provision
19 of state constitution prohibiting payment of a judgment against the state except from funds
20 appropriated for such purpose by state legislature; court stated that “an order directing the
21 responsible state official to satisfy the judgment out of state funds is the only reasonable way to
22 ensure compliance with a valid federal judgment.”); *Gates v. Collier*, 616 F.2d 1268 (5th Cir.
23 1980) (district court within its authority in ordering state auditor to issue warrant upon the state
24 treasurer and ordering state treasurer in turn to satisfy the judgment). *See also Arnold v. BLAST*
25 *Intermediate Unit 17*, 843 F.2d 122 (3d Cir. 1988) (writ of mandate issued to compel quasi-
26 public agency to pay judgment, despite fact that funds for judgment not budgeted or authorized);
27 *Preston v. Thomas, supra*, 565 F.Supp. 294 (surveying law and acknowledging court has power
28 to issue order compelling payment of judgment by state officials, but denying motion without

1 prejudice until showing made that state would refuse to pay); *Gary W. v. Louisiana*, 441 F. Supp.
2 1121 (E.D. La. 1977), *aff'd* 622 F.2d 804 (5th Cir. 1980) (court orders state to pay attorneys fee
3 award despite state constitutional provision requiring specific appropriation to pay judgments).

4 As the authorities make clear, a corollary to the rule that federal courts may compel state
5 and local government officials to comply with federal court judgments is that state or local
6 officials cannot avoid compliance by claiming that enforcement of the judgment would
7 contravene state law. "Under the Supremacy Clause of the United States Constitution, a court, in
8 enforcing federal law, may order state officials to take actions despite contravening state laws."
9 *Spain*, 690 F.2d at 746. As the court in *Gates v. Collier* stated: "[W]here a state expresses its
10 unwillingness to comply with a valid judgment of a federal district court, the court may use any
11 of the weapons generally at its disposal to ensure compliance. 'Federal courts are not reduced to
12 issuing (judgments) against state officers and hoping for compliance.'" 616 F.2d at 1271,
13 quoting *Hutto v. Finney*, 437 U.S. 678, 690 (1978). *See also La Raza Unida v. Volpe*, 545 F.
14 Supp. 36, 39 (N.D. Cal. 1982) (states may not avoid payment of federal judgments by enacting
15 laws requiring legislative appropriations prior to payment; "[o]therwise, states would in effect be
16 immune from attorneys' fee awards. . . .").

17 Finally, in view of the State's current budgetary circumstances, it bears emphasizing that
18 if state law may not be used to impede enforcement of federal orders and judgments, neither may
19 claims by state officials that compliance would be overly burdensome or unduly expensive.
20 *Stone v. San Francisco*, 968 F.2d 850, 858 (9th Cir. 1992) (ruling that "financial constraints do
21 not allow states to deprive persons of their constitutional rights."); *Benjamin v. Malcolm*, 803
22 F.2d 46, 51 (2d Cir. 1986) (state may not "avoid its federal constitutional responsibilities with
23 respect to prisoners on the grounds that to require it . . . to accept state-ready prisoners from the
24 City will create problems for the State The numerous burdens faced by the State in meeting
25 its constitutional obligations with respect to housing of its prisoners does not provide it with a
26 legal basis for avoiding those obligations."); *Gates v. Collier*, 501 F.2d 1291, 1303 (5th Cir.
27 1974) ("It seems that the most onerous aspect of the district court's judgment, as far as the State
28 of Mississippi is concerned, is that compliance will cost the State a considerable amount of

1 money. But the district court. . . simply held, in keeping with a plethora of precedent on the fund
2 shortage problem, that if the State chooses to run a prison it must do so without depriving
3 inmates of the rights guaranteed to them by the federal constitution.”).

4 This Court could not have been clearer that the State of California is required to bear
5 “[a]ll costs incurred in the implementation of the policies, plans, and decisions of the Receiver
6 relating to the fulfillment of his duties under this Order” OAR, ¶ IV (emphasis added). The
7 OAR does not say “some costs,” or “those costs approved by the State” or “costs for which funds
8 have been appropriated;” it says *all costs*. The State did not appeal from the OAR and cannot
9 now be heard to claim that it is not bound by the plain language of Paragraph IV.

10 Moreover, for the better part of two years, both the original Receiver and the current
11 Receiver have emphasized that *very* substantial capital improvements would be required if the
12 Receiver is to fulfill his duties under the OAR and both Receivers have been explicit about what
13 those capital improvements would entail. Not once has the State objected, complained or
14 otherwise suggested that the Receiver’s proposed capital projects were anything other than
15 completely appropriate and necessary to bringing the prison medical care system up to
16 Constitutional standards. Indeed, the Defendants have never objected to the Receiver’s various
17 applications to this Court for waivers of State contracting law to permit the initial phases of the
18 capital projects to proceed.

19 Nevertheless, despite the State’s longstanding knowledge and approval of the Receiver’s
20 capital projects, the State is now relying on State law to erect barriers to funding those same
21 capital projects. This the State may not do. Settled authority establishes that the State cannot
22 hide behind State law or procedures to immunize itself from compliance with the OAR. The
23 Receiver has made repeated efforts to work collaboratively and creatively with the State to find a
24 mechanism consistent with State law to obtain the necessary funding – authorization by the
25 Legislature of bond financing, contracts with or cooperation of the SCO on a “pay-as-you-go”
26 basis, use of the Governor’s emergency powers – but the State has rebuffed those efforts at every
27 turn.

28

1 In the absence of the State's willing compliance, the Receiver must begin turning to this
 2 Court for assistance. The first step is this motion to join the Controller as a party-defendant. The
 3 Receiver remains hopeful that the Court will not be required to utilize the formidable tools at its
 4 disposal to compel the State's compliance, but brings this motion to prepare the ground should a
 5 further motion to enforce the "Costs" provision of the OAR become necessary.

6 **B. The Court Should Order That The Controller Be Joined As A Party-**
 7 **Defendant.**

8 **1. The Receiver has satisfied the requirements for joinder under**
 9 **FRCP 19.**

10 The Court may require joinder of new or additional parties where, in the party's absence,
 11 "the court cannot accord complete relief among existing parties." FRCP 19(a)(1)(A). Rule 19
 12 "permits the joinder of third parties whose absence would prevent the court from granting such
 13 relief as is necessary to adjudicate the rights of existing parties." *Benjamin v. Malcolm, supra*,
 14 803 F.2d at 53. "Where both a valid reason for joinder and feasibility of joinder are shown,
 15 nonparties are frequently referred to as 'necessary' parties – meaning that the court will, on
 16 motion, order their joinder." Schwarzer et al., *California Practice Guide: Federal Civil*
 17 *Procedure Before Trial*, ¶ 7:57.1 (2008) [hereinafter "Schwarzer"], citing *Confederated Tribes of*
 18 *Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991).

19 A person may be added as a necessary party under Rule 19 "at any stage of the action on
 20 motion or on the court's initiative." Advisory Committee Notes to 1966 Amendment to Rule 19.
 21 *See also* FRCP 21. Of particular relevance here, the Court may order that new defendants be
 22 added to ensure enforcement of a judgment previously entered by the court. *See Spain v.*
 23 *Mountanos, supra*, 690 F.2d at 744 (district court joined State officials, including Controller, as
 24 parties to effect payment of attorney's fees award previously ordered); *Gates v. Collier, supra*,
 25 616 F.2d at 1270 (district court ordered State Auditor and Treasurer joined as defendants to pay
 26 judgment from State funds).

27 Similarly, federal courts permit joinder of a defendant to effectuate full relief in a case,
 28 even if there is no direct claim against the party to be joined as a defendant or if the defendant to
 be joined did not actively participant in the alleged wrongdoing. Schwarzer, ¶ 7:85.10 citing

1 *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 781 (9th Cir. 2005). Thus, so-called
2 “nominal” or “relief” defendants, for example, are made “part of a suit only as the holder of
3 assets that must be recovered in order to afford complete relief; no cause of action is asserted
4 against a nominal defendant.” *Commodity Futures Trading Comm’n v. Kimberlynn Creek*
5 *Ranch, Inc.*, 276 F.3d 187, 192 (4th Cir. 2002). *See also SEC v. George*, 426 F.3d 786, 798 (6th
6 Cir. 2005); *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998); *SEC v. Cherif*, 933 F.2d 403, 414
7 (7th Cir. 1991). Even nominal defendants are subject to the court’s powers in equity to ensure
8 “the availability of permanent relief.” *CFTC v. Kimberlynn Creek Ranch, supra*, 276 F.3d at
9 193.

10 Joinder is also appropriate if the current parties will be unable to comply with existing
11 court orders absent joinder of the new party. In *Benjamin v. Malcolm*, 629 F.Supp. 713, 715-716
12 (S.D.N.Y. 1986), *aff’d*, 803 F.2d 46 (2d Cir. 1986), for example, plaintiff-inmates in New York
13 City jails had established that their constitutional rights had been violated by overcrowded
14 conditions, effectively requiring the City to transfer prisoners to state prisons. To ensure
15 compliance with the court’s orders, the City of New York brought motions to enjoin the State
16 from refusing to accept certain prisoners and to add State officials as third-party defendants on
17 the grounds that “the State defendants must be joined in order to assure full compliance with the
18 existing decree which assures the plaintiffs’ protection of their constitutional rights.” *Id.* at 715.
19 The court ordered joinder under FRCP 19 because the “State defendants’ presence in the litigation
20 is required, at a minimum, to dispose finally of the fact questions raised by the City defendants’
21 motion”(*id.* at 720), *i.e.*, “whether the State’s actions or proposed actions do or would hereafter
22 place the City in a position of noncompliance with the court’s decrees.” *Id.* *See also Benjamin v.*
23 *Malcolm, supra*, 803 F.2d at 53.

24 It is apparent from the foregoing that joinder of the Controller is appropriate and that the
25 Receiver has valid reasons for requesting that the Controller be made a party-defendant. The
26 Controller is the State officer empowered by the State constitution to draw warrants upon the
27 State Treasury. *See Cal. Const., Art. XVI, § 7; Cal. Gov’t Code § 12440.* An order requiring
28 payment of the costs of the Receivership must be directed ultimately to the Controller. *E.g.*,

1 *Spain v. Mountanos, supra*, 690 F.2d at 744. Without the Controller's participation in the
 2 litigation, the other Defendants could claim that they literally could not cause State funds to be
 3 transferred to the Receiver, even if they wished to comply with an order requiring such a
 4 transfer.⁶ "Full relief against [the] unconstitutional conditions, cannot, therefore, be obtained
 5 through an order against the [existing defendants] alone." *Benjamin v. Malcolm, supra*, 803 F.2d
 6 at 53. Rather, the Controller is a gatekeeper to State funds and thus occupies a position not
 7 unlike a relief defendant: no monetary relief can be afforded the Receiver without an order
 8 directed to the Controller.

9 If the Controller is not added as a party-defendant, and the Defendants are unable to cause
 10 the Controller to transfer funds in the face of an order requiring such a transfer, the Court would
 11 then be faced with determining if the Controller was a co-participant with the Defendants subject
 12 to contempt under Paragraph VI of the OAR or deciding whether to exercise its authority under
 13 the All Writs Act (28 U.S.C. § 1651(a)) to enter an order against the Controller and others as
 14 necessary to effectuate the fund transfer order. *Benjamin v. Malcolm, supra*, 803 F.2d at 53.⁷
 15 While these other mechanisms are potentially available, they may be more draconian or
 16 complicated than necessary and may lead to more delay. For it is possible that the Controller will
 17 simply comply with a direct order to transfer funds to the Receiver, thereby streamlining any
 18 future enforcement proceedings.⁸

20 ⁶ Joinder is therefore also appropriate pursuant to FRCP 19(a)(1)(B)(ii). Under that provision, joinder is required if
 21 absence of the party to be joined would "leave an existing party subject to a substantial risk of incurring double,
 22 multiple, or otherwise inconsistent obligations." The Controller is the only party who can issue warrants on the
 Treasury, but the existing Defendants would potentially be subject to contempt proceedings for failure to comply
 with a payment order.

23 ⁷ A federal court may "issue such commands under the All Writs Act [28 U.S.C. § 1651(a)] as may be necessary or
 24 appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction
 otherwise obtained. . . ." *United States v. New York Telephone Co.*, 434 U.S. 159, 172.

25 The power conferred by the Act extends, under appropriate circumstances, to persons who, though not
 26 parties to the original to the original action or engaged in wrongdoing, are in a position to frustrate the
 implementation of a court order or the proper administration of justice, . . . and encompasses even those
 who have not taken any affirmative action to hinder justice.

27 *Id.* at 174 (citations omitted). Although the Receiver can properly request that non-parties who interfere with his
 duties be compelled to act or be held in contempt, requiring that the Controller be joined as a party-defendant in
 advance of any payment order will simplify enforcement of such an order.

28 ⁸ Courts generally should avoid adopting draconian remedies when less drastic measures may suffice. *Benjamin*, 803
 F.2d at 53 (and cases cited therein).

1 An additional reason for joining the Controller now is that, as discussed below, the
 2 Receiver may wish to undertake discovery into the location and availability of State funds that
 3 may be recovered in response to an order to transfer funds, as well as discovery into the specific
 4 steps that must be taken to ensure that payment is actually made. Such discovery will be made
 5 substantially easier if the Controller is a party to the action, subject to this Court's orders.

6 Finally, it is certainly feasible to join the Controller as a defendant inasmuch as other
 7 agencies in the Executive branch are already named Defendants. There is no legal or other
 8 impediment to joining the Controller. The Receiver submits, therefore, that he has satisfied the
 9 requirements of joinder under Rule 19.

10 **2. Joinder is required pursuant to FRCP 20.**

11 Alternatively, the Receiver has satisfied the requirements for permissive joinder under
 12 FRCP 20. Permissive joinder may be ordered "at any time, on just terms." FRCP 21. The rules
 13 requiring joinder are "construed liberally in order to promote trial convenience and to expedite
 14 final determination of disputes." Schwarzer, ¶ 7:138 [citation omitted]. "[J]oinder of claims,
 15 parties and remedies is strongly encouraged." *United Mine Workers v. Gibbs*, 383 U.S. 715, 724.

16 Joinder of a defendant under Rule 20(a)(2) may be ordered if:

17 (A) any right to relief is asserted against them jointly, severally, or in the
 18 alternative with respect to or arising out of the same transaction, occurrence, or
 series of transactions or occurrences; and

19 (B) any question of law or fact common to all defendants will arise in the action.

20 These tests are easily met. Any order directed to the State to transfer funds to the
 21 Receiver must be made to the Controller. Whether or not the other Defendants are also subject to
 22 a specific order directing payment, the Receiver's right and need to obtain such an order will be
 23 based on the provisions of the OAR to which all Defendants are currently subject. *League to*
 24 *Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914, 917-918 (9th Cir. 1977)
 25 (joinder of multiple developer defendants proper since right to relief against them based on same
 26 facts). Moreover, Defendants' collective responsibility to pay the costs of the Receivership is an
 27 issue common to all. Joinder under Rule 20 is thus appropriate.

28

1 **II. THE COURT SHOULD PERMIT DISCOVERY DIRECTED AT STATE**
2 **OFFICIALS TO ASSIST IN OBTAINING THE FUNDING REQUIRED FOR THE**
3 **RECEIVER'S CAPITAL PROJECTS.**

4 Discovery in aid of enforcing judgments and orders is permissible under both FRCP 69
5 and FRCP 70. See FRCP 69(b); *Board of Trustees, Local 295/Local 851, etc. v. Hail Air*
6 *Freight, Inc.*, 2008 U.S. Dist. LEXIS 31267, *5, *12 (S.D.N.Y., Apr. 16, 2008) (ordering
7 compliance with post-judgment discovery under Rule 70); *British Internat'l Ins. Co. v. Seguros*
8 *La Republica*, 200 FRD 586, 589 (W.D. Tex. 2000) (Rule 69; scope of "post-judgment discovery
9 is broad.").

10 Prior to seeking any order directed at the Controller and other defendants to transfer
11 funds, the Receiver may wish to take focused discovery from State officials (including the
12 Controller, State Treasurer, the Director of Finance and others as necessary) into the amount and
13 location of State funds that may be available to satisfy a transfer order, as well as how and by
14 whom those funds are held; and what, if any, specific procedures or language should be included
15 in a fund transfer order to ease and ensure compliance without the necessity of multiple trips to
16 this Court for amendments to such order.

17 Although the Receiver does not believe that he is required to seek permission of this
18 Court to pursue such discovery, out of an abundance of caution he requests that any order
19 requiring the Controller be joined as a party-defendant also include a provision permitting the
20 Receiver to undertake the discovery described above.

21 **CONCLUSION**

22 For all the foregoing reasons, the Receiver requests that this Court enter an order
23 requiring John Chiang, Controller the State of California, be added as a party-defendant and that
24 the Receiver be permitted the opportunity to take discovery from the Controller and other State
25 officials as described above.

26 Dated: June 19, 2008

FUTTERMAN & DUPREE LLP

27 By: /s/ Martin H. Dodd

Martin H. Dodd

Attorneys for Receiver J. Clark Kelso

28

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman & Dupree LLP, 160 Sansome Street, 17th 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):

NOTICE OF MOTION AND MOTION OF RECEIVER J. CLARK KELSO 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.

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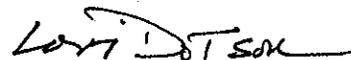
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25 I declare that I am employed in the offices of a member of the State Bar of this Court at
26 whose direction the service was made. I declare under penalty of perjury, under the laws of the
united State of America, that the above is true and correct.

27 Executed on June 19, at San Francisco, California.



28 Lori Dotson