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10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 MARCIANO PLATA, et al.,

14 *Plaintiffs,*

15 v.

16 ARNOLD SCHWARZENEGGER, et al.,

17 *Defendants.*

Case No. C01-1351 TEH

**RECEIVER'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR AN ORDER DIRECTING
RECEIVER TO COMPLY WITH THE
APRIL 4, 2003 ORDER RE
PRODUCTION AND ACCESS TO
DOCUMENTS AND/OR MODIFYING
THE ORDER APPOINTING RECEIVER**

Date: August 27, 2007
Time: 10:00 a.m.
Courtroom: 12

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1 Receiver Robert Sillen (“Receiver”) submits this memorandum of points and authorities
2 in opposition to the Plaintiffs’ Motion For An Order Directing The Receiver To Comply With
3 The April 4, 2003 Order Re Production And Access To Documents And/Or Modifying The
4 Order Appointing The Receiver (“Pltfs. Motion”).

5 **PRELIMINARY STATEMENT**

6 The disparate elements in plaintiffs’ motion are tied together by three underlying themes:
7 (1) plaintiffs’ counsel’s are having difficulty accepting that their relationship to the remedial
8 process has changed now that the Receiver has been appointed; (2) they hope the Court will
9 return them to the central role in the remedial process they believe they occupied previously; and,
10 most troubling of all, (3) they apparently believe that the Receiver should answer to them rather
11 than to this Court.

12 Under the remedial model that existed prior to the Receiver’s appointment – *i.e.*, the
13 remedial model that failed – plaintiffs’ counsel had responsibility for monitoring the defendants’
14 progress toward bringing the prison medical system up to constitutional standards. Defendants
15 were unable or unwilling to meet the requirements imposed upon them by the stipulated orders
16 that governed the prior remedial process and plaintiffs’ monitoring was unsuccessful in forcing
17 defendants’ compliance. Once it became clear that the process was failing to remedy the failures
18 in the prison medical system, the Court appointed the Receiver.

19 Just as the Court headed in a new and different direction by appointing the Receiver, the
20 Receiver determined that an entirely new and different remedial model is required. The
21 Receiver’s remedial model is not only conceptually different, it is operationally different, from
22 the remedial efforts previously made. *See generally* Plan of Action (“POA”), filed herein on
23 May 10, 2007. The Receiver’s approach is far more comprehensive in breadth and depth than the
24 piecemeal approach to reform attempted previously. As part of his remedial efforts, the Receiver
25 is establish a monitoring system that is independent of the parties and will provide meaningful
26 answers to whether, and to what extent, the prison medical system is being brought into
27 compliance with constitutional mandates.

28

1 Rather than applaud the Receiver's efforts to take a dramatically new and more effective
 2 approach, plaintiffs' counsel stubbornly cling to the prior model and their role within it, and
 3 insist that the Receiver comply with the requirements of the earlier, failed remedial model even
 4 when such requirements serve no purpose in the present context. Thus, plaintiffs' motion asks
 5 this Court to treat the Receiver as nothing more than a stand-in for the CDCR with respect to
 6 document production, disclosure of information and responsiveness to plaintiffs' counsel's
 7 demands. Needless to say, the Receiver is not a mere substitute for defendants nor is he bound to
 8 the same requirements and limitations as were the defendants. He is this Court's agent, imbued
 9 with such authority and responsibility as the Court may deem appropriate to correct the failings
 10 in the prison medical care system.

11 The orders requested by plaintiffs' counsel in this motion will not advance or further the
 12 Receiver's remedial measures. To the contrary, they will serve only to burden the Receiver's
 13 staff, increase expense to the Receiver's estate and, in the process, slow down the remedial
 14 process. The motion should be denied.

15 ARGUMENT

16 A. The Receiver Is Not, And Should Not Be, Subject To The April 4, 2003 Order.

17 1. The Receiver does not "stand in the shoes" of CDCR.

18 Plaintiffs' motion to require the Receiver to comply with the April 4, 2003 stipulated
 19 order ("April 4 Stipulation") is premised on the contention that "[t]he Receiver stands in the
 20 same shoes as the person or entity for which he has been appointed." *See* Pltfs. Motion, pp. 13-
 21 15, 19-20, citing 28 U.S.C. § 959(b); *Lank v. New York Stock Exchange*, 548 F.2d 61 (2d Cir.
 22 1977); and *Ledo Financial Corp. v. Summers*, 122 F.3d 825 (9th Cir. 1977). Plaintiffs are
 23 incorrect. The principle that a receiver "stands in the shoes" of the entity for which he has been
 24 appointed is inapplicable in cases, such as this, in which the receiver has been appointed pursuant
 25 to a federal court's remedial and equitable powers.

26 To remedy federal constitutional violations and to effect sweeping changes in the
 27 California prisons, this Court appointed the Receiver pursuant to the Court's powers in equity.
 28 *See* Findings Of Fact And Conclusions Of Law ("FFCL"), filed herein on October 3, 2005, pp.

1 34, 42 (and cases cited therein). The “district court has broad powers and wide discretion to
2 determine the appropriate relief in an equity receivership.” *SEC v. Lincoln Thrift Ass’n*, 577 F.2d
3 600, 606 (9th Cir. 1978). *See also SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980) (power of
4 federal court to appoint receiver “derives from the inherent power of a court of equity to fashion
5 effective relief.”). The receiver is an agent of the Court, and *not* of any of the parties. *SEC v.*
6 *American Capital Investments*, 98 F.3d 1133, 1143 (9th Cir. 1996); *SEC v. American Principal*
7 *Holding, Inc. (In re San Vicente Medical Partners Ltd.)*, 962 F.2d 1402, 1409 (9th Cir.), *cert.*
8 *denied*, 506 U.S. 873 (1992); FFCL, p. 32. The scope of the receiver’s authority is governed by
9 the court’s order appointing him. *RTC v. Bayside Developers*, 43 F.3d 1230, 1241 n.8. It
10 follows, therefore, that “an equity receiver *does not merely inherit an owner’s rights*; the receiver
11 is an officer of the court entrusted with administration of the property.” *Gaskill v. Gordon*, 27
12 F.3d 248, 251 (7th Cir. 1994) (emphasis added).

13 The Ninth Circuit has squarely rejected the notion that a federal equity receiver merely
14 “stands in the shoes” of an entity in receivership. In *SEC v. American Capital Investments*,
15 *supra*, a receiver had been appointed in a securities fraud action to take control of assets
16 belonging to American Capital Investments (“ACI”) “and its affiliates.” ACI was the general
17 partner of certain limited partnerships formed under California law. The limited partnership
18 agreements in two instances provided that the partnerships were dissolved upon appointment of a
19 receiver; another “partnership” was never actually formed. The receiver undertook to sell real
20 property owned by the actual and purported limited partnerships. A number of limited partners
21 objected, contending in part that the receiver merely “stood in the shoes” of ACI as general
22 partner. Since ACI had no contractual or other basis upon which to sell the property, they
23 argued, the receiver had no authority to do so. *Id.* at 1145. The district court and the Ninth
24 Circuit both disagreed.

25 The court of appeal framed the issue as “does California partnership law or the federal
26 law of equity receivership control the Receiver’s power to convey title?” 98 F.3d at 1142.
27 Relying in part on its earlier decision in *San Vicente Medical Partners, supra*, 962 F.2d 1402, the
28 court stated that “the receiver was acting as an officer of the court who directly controlled the

1 limited partnership's property under the authority of an equity receivership." *Id.* at 1143.
2 Because the receiver was not merely the "agent of ACI, the ousted General Partner. . . .neither the
3 partnership agreement nor the California law of partnership applies." *Id.* at 1144. Furthermore,
4 the receiver was exercising "'complete control' over receivership assets under [28 U.S.C.] § 754,
5 a conclusion firmly rooted in the common law of equity receiverships." *Id.* Consequently, the
6 receiver did not merely stand in the shoes of ACI when exercising his powers as an equity
7 receiver and had full authority to sell the property. *Id.* at 1145.

8 The cases cited by plaintiffs are thus readily distinguishable. In *Ledo Financial Corp. v.*
9 *Sumner*, 122 F.3d 825, the Federal Deposit Insurance Corp. ("FDIC") had been appointed
10 receiver for a failed savings institution. The governing statute by which the FDIC is appointed
11 receiver – *without* court intervention – is 18 U.S.C. § 1821(c)(2)(A)(ii). That statute specifically
12 states that the FDIC, as receiver, is merely the successor to the failed entity. 18 U.S.C. §
13 1821(d)(2)(A)(i). See *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994). As a result, the Ninth
14 Circuit in *Ledo* held that the FDIC, as receiver, was not asserting any interest "of the United
15 States or any of its agents or contractors." 122 F.3d at 829. Thus, the receiver could not assert
16 claims or defenses that were unavailable to the institution in receivership. *Id.*

17 Similarly, in *Lank v. New York Stock Exchange*, 548 F.2d 61, the issue was whether a
18 receiver for a corporation could bring suit under the federal securities laws on behalf of the
19 corporation's creditors, where there was no dispute that the corporation itself could not have
20 brought such a claim. The court held that the receiver could not assert such an affirmative claim,
21 noting that the receiver had been appointed under a Delaware statute that did not confer any
22 greater rights on the receiver than the entity possessed. *Id.* at 66-67.

23 The Receiver has not been appointed pursuant to any statute that limits his authority.
24 Instead, where, as here, the Receiver has been appointed pursuant to the court's equitable powers,
25 his authority is derived from the order appointing him and the broad remedial powers of the court
26 sitting in equity. The Receiver is not constrained by orders to which CDCR has stipulated or by
27 State law, except to the extent this Court's order may impose such limitations on him. The
28

1 receivership order does not provide that the Receiver is required to comply with the April 4, 2003
2 order. Thus, plaintiffs' claim that the receiver is bound by that order must be rejected.

3 **2. The Court should not require the Receiver to comply with the unnecessarily**
4 **burdensome requests in the April 4 Stipulation.**

5 Perhaps because they recognize how unreasonable it would be if the Receiver were
6 saddled with the requirements of the April 4 Stipulation, plaintiffs' counsel contend that they are
7 only seeking, by this motion, "letters from prisoners raising medical concerns received by the
8 Receiver, the responses thereto, and the more focused reviews of certain prisoner medical
9 complaints by or at the direction of his office." Pltfs. Motion, p. 2. Neither the Notice of Motion
10 nor plaintiffs' proposed order is so limited, however. The Notice of Motion requests "an order
11 directing the Receiver to comply with the April 4, 2003 Stipulation and Order Re Production
12 And Access To Documents And Other Information." Pltfs. Motion, p. 2. The proposed order
13 tracks that same language. Proposed Order, filed herein on June 29, 2007. Thus, if granted, the
14 order would require the Receiver to comply in all respects with the April 4 Stipulation.

15 The April 4 Stipulation requires monthly and quarterly production of a mountain of
16 documents from CDCR, including "Management Reports," "Minutes and Reports" from various
17 committees within each "roll-out" institution, budgeting information, medical staffing reports
18 and medical vacancy reports for roll-out institutions, QMAT staff training reports, class members
19 records, central files, scheduling logs, request for service slips, medical and non-general housing
20 unit log books, medical tracking system records and staff training reports, just to name some of
21 the many categories of documents that counsel request. *See* Exh. I to the Declaration of Steven
22 Fama, filed on June 29, 2007.

23 Significantly, plaintiffs' counsel make no attempt to justify why the Receiver should be
24 required to ferret out and turn over the tsunami of documentation required under the April 4
25 Stipulation. Indeed, there is no such justification. The April 4 Stipulation is a subsidiary order
26 designed to implement provisions of the June 13, 2002 Stipulation for Injunctive Relief. These
27 stipulated orders, together with other orders entered prior to the receivership, attacked problems
28 in the medical care system piecemeal, and proceeded from a top-down, central planning model

1 for the development and implementation of remedial measures. Such “remedial” measures were
2 developed in the abstract and then were to be applied “in a predetermined, *en bloc* fashion rather
3 than on a pilot basis.” POA, p. 16. Suffice it to say, the Receiver was appointed because the
4 prior remedial model failed. *See generally* FFCL, pp. 2-3. Pursuant to the Order appointing him,
5 the Receiver has moved to modify the stipulated injunctions and other orders that governed the
6 earlier remedial process because the requirements of those orders are either unworkable,
7 unnecessary or inconsistent with the Receiver’s approach.

8 The April 4 Stipulation assumes, however, that the prior model remains in effect. One
9 aspect of that model was that plaintiffs’ counsel were given the role of monitoring the “remedial”
10 processes. In connection with that monitoring, the State agreed to, and did, produce reams of
11 paper to plaintiffs’ counsel. Whether all that paper actually resulted in any improvement in the
12 prison medical care system is an open question, but the issue is now effectively moot. For, if the
13 model itself is a dead end, no good purpose is served by continuing monitoring efforts under that
14 model. It is simply a waste of time, energy and resources. *See* Declaration of John Hagar In
15 Support Of Receiver’s Motion For Order Modifying Stipulated Injunction And Other Orders,
16 filed herein on May 10, 2007 (“Hagar May 10 Decl.”), ¶¶ 9-11.

17 As the POA reflects, and as the Receiver has repeatedly said, the Receiver’s remedial
18 approach is dramatically different from the prior model. Unlike the prior model, which did not,
19 and could not, produce a constitutionally-adequate health care delivery system, the Receiver has
20 concluded that “the CDCR requires an entirely new infrastructure of medical delivery *before*
21 necessary programs of clinical remediation can be effectively implemented in a sustainable
22 manner.” Receiver’s Report re Overcrowding, filed herein on May 15, 2007, p. 7:17-18
23 (emphasis added). The Receiver is developing his own monitoring system with its own
24 meaningful metrics to determine if the remedial measures are succeeding. POA, pp. 43-50.
25 Requiring the Receiver and his staff to comply with the April 4 Stipulation will do nothing other
26 than overburden the Receiver with functionally pointless document gathering and production,
27 just as the Receiver’s own remedial efforts are beginning to pick up steam. Hagar May 10 Decl.,
28

1 ¶¶ 9-11. The Receiver should not be subjected to requirements that have not resulted, and will
2 not result, in a constitutionally-adequate medical care delivery system.

3 **3. Even if the motion is limited to production of inmate patient letters and**
4 **related materials, the motion should be denied because compliance will chill**
5 **the Receiver's ability to undertake meaningful reform.**

6 Even if, as plaintiffs' counsel contend, this motion is limited only to inmate letters sent to
7 the Receiver and related materials, it should still be denied. Plaintiffs' counsel's request, if
8 granted, will abrogate that portion of the Order appointing the Receiver permitting confidential
9 communications between the Receiver and inmates, will interfere with inmate-patients'
10 legitimate expectations of privacy and will threaten the Receiver's ability to work with clinicians
11 in the prisons and on his staff. The request should therefore be denied.

12 **a. Description of the inmate complaint process.**

13 The Receiver has developed a procedure for recording, responding and following up on
14 requests and complaints received from inmates regarding medical care. The Receiver has
15 described this procedure in his last three reports. *See* Third Bi-Monthly Report, pp. 41-45;
16 Fourth Bi-Monthly Report, pp. 81-86; Fifth Quarterly Report, pp. 41-45. Briefly, the Receiver is
17 currently receiving as many as 300 letters per month from inmates throughout the prison system,
18 as well as from their families, this Court and others. The topics discussed in those letters range
19 widely, from concerns about delays in specialty care to pain management to lack of access to care
20 to problems with medical staff. Fifth Quarterly Report, p. 43.

21 Each letter is logged when received. The Receiver's staff responds to each letter, and
22 includes contact information for the Prison Law Office so that the inmate may communicate with
23 class counsel. Each letter is individually reviewed and evaluated by a physicians on the
24 Receiver's medical staff. The reviewer makes a determination as to whether the letter raises
25 issues of sufficient seriousness that further inquiry is required, and if so, what that further inquiry
26 should be. At the reviewer's suggestion and direction, the inmate's medical records may be
27 requested for further review. In some cases, the physician corresponds directly with the prisoner
28 or contacts prison medical staff concerning the need for additional medical care. A file for each
inquiry that merits further review is set up to permit staff to track progress on such inquiries.

1 Perhaps 20% of all inmate letters merit further inquiry, but only a handful of letters, perhaps 10-
 2 15 to date, have resulted in further action beyond the initial follow up inquiry. Declaration of
 3 John Hagar (“Hagar Decl.”), filed herewith, ¶ 7.

4 **b. The inmate letters of complaint are, or should be, confidential**
 5 **pursuant to the Order Appointing Receiver.**

6 This Court provided in the Order appointing the Receiver that the “Receiver shall have
 7 unlimited access to prisoners . . . including the authority to conduct confidential interviews with .
 8 . . prisoners.” Order Appointing Receiver, dated February 14, 2006, p. 5. Plaintiffs’ counsel
 9 recognize that this provision of the Order, properly understood, effectively shuts the door on their
 10 request for access to inmate-Receiver communications. They argue, therefore, that an
 11 “interview” cannot be a letter and, by implication, that any such “interview” must be initiated by
 12 the Receiver. Pltfs. Motion, p. 15. This important provision should not be given the crabbed,
 13 indeed nonsensical, construction favored by plaintiffs’ counsel.

14 Under their construction of confidential communication provision, if the Receiver
 15 initiates a discussion with a prisoner in person, the inmate may raise a specific complaint about
 16 medical care during the “interview” and the communication would be confidential. But, that
 17 very same communication, if conducted entirely in writing, would not be confidential and would
 18 be subject to disclosure. Furthermore, if the inmate made a detailed medical complaint in writing
 19 to the Receiver, and the Receiver then initiated a formal “interview” with the inmate in response
 20 to the letter, the letter would not be confidential, but the interview would. The Receiver could
 21 provide still other examples that demonstrate the flaws in plaintiffs’ counsel’s interpretation of
 22 the provision, but it is unnecessary. Suffice it to say, that it should be apparent that plaintiffs’
 23 counsel absurdly constrained construction of the provision collapses of its own weight.

24 Even if the confidentiality provision of the Order was not specifically directed at inmate
 25 letters to the Receiver, the Court should give it such an interpretation. Surely, a prisoner ought to
 26 be able to instigate a “confidential” communication with the Receiver – *which is, after all, a*
 27 *confidential communication with this Court* – about concerns related to medical care in the
 28 prisons. Such communications provide valuable, unfiltered information about the prison medical

1 system. Indeed, that is the purpose of permitting the Receiver to have “unlimited” access to and
 2 confidential communications with the prisoners. If such communications – which involve in
 3 some cases highly personal medical issues – are open and available for all to see simply because
 4 they have been conducted in written form, then inmates may be reluctant to contact the Receiver
 5 or this Court and an important avenue for information about conditions in the prisons will be shut
 6 down. Inmates may not feel comfortable, for whatever reason, communicating their concerns to
 7 or through class counsel. Accordingly, there should be an open channel to permit such inmates
 8 an opportunity to speak freely and directly to the Court’s eyes and ears, *i.e.*, the Receiver. Hagar
 9 Decl., ¶ 11.

10 Plaintiffs’ counsel attempt to justify their request by speculating that disclosure of the
 11 letters and related materials will avoid duplication of effort among prison staff who are asked by
 12 the Receiver and by plaintiffs’ counsel to review the same records. This purported justification is
 13 unavailing. To begin with, it is pure speculation on counsel’s part that there is or has been any
 14 materially adverse duplication of effort. Plaintiffs’ counsel has not identified any examples to
 15 suggest that the Receiver’s staff is being burdened. Any such duplication of effort is unlikely to
 16 occur in any event. The Receiver has staff physicians to review inmate letters and files, and
 17 requests assistance from the prison staff in only a small number of cases. Hagar Decl., ¶ 7. If
 18 duplication of effort occurs it will be rare and surely does not outweigh the significant benefits
 19 that accrue to the Receiver and this Court from having a channel for confidential communication
 20 about conditions in the prison.¹

21 **c. Patient privacy rules preclude disclosure of the inmate letters.**

22 There are also patient privacy reasons for rejecting plaintiffs’ counsel’s request for
 23 disclosure of the inmate letters and related materials. If the Receiver discloses these letters and
 24 related materials, including documents regarding the follow up inquiries, without authorization
 25 by the inmate-patients, the Receiver risks violating the Health Insurance Portability And
 26 Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (“HIPAA”). *See* 45 CFR §

27 ¹ The Receiver cannot let pass the irony that plaintiffs’ counsel express such concern about the burden on the
 28 Receiver’s staff in this instance, whereas, when it comes to their unnecessary and unduly burdensome demands in
 connection with prison monitoring, they are not the least concerned about the impact on the Receiver’s staff.

1 164.508(a)(1). It is no answer that because plaintiffs' counsel are counsel for the class they are
2 "entitled" to the information. Conceivably, an inmate may not wish to have his/her medical
3 information disclosed without authorization or may simply lack trust, for whatever reason, in
4 class counsel. Plaintiffs' counsel are not foreclosed from obtaining the documents and
5 information directly from their inmate-clients, if their clients wish to share such information with
6 them. In fact, specifically for the purpose of facilitating such communication between inmates
7 and plaintiffs' counsel, each response by the Receiver to an inmate includes contact information
8 for class counsel. Hagar Decl., ¶ 7.

9 **d. The request for disclosure of the materials will interfere with the**
10 **Receiver's relationship with his clinical staff and is nothing other than**
11 **an effort by plaintiffs' counsel to monitor the Receiver.**

12 Plaintiffs' counsel's request also threatens to intrude on the Receiver's relationship with
13 his clinical staff. The documents requested include material pertaining to the clinical decisions
14 about which the inmates have inquired in the first instance, as well as the judgments and
15 determinations made by the Receiver's own staff as a result of their review of inmate letters and
16 files. *Id.*, ¶¶ 7-8. Plaintiffs' counsel have not retained any physician experts to assist their
17 review of medical records. *Id.*, ¶ 12. As a result, they are not qualified to review such records
18 and it would be inappropriate for them to be in the position of reviewing the clinical judgments
19 and decisions made by the Receiver's staff. If local clinicians and the Receiver's staff must be
20 concerned that their records, decisions and judgments will routinely be reviewed – and subject to
21 second guessing – by plaintiffs' *counsel*, then that could have a substantial chilling effect on the
22 clinicians' willingness to the records in the first instance and to be honest and forthright in their
23 review of records. *Id.* Just such considerations underlie the protection against disclosure of peer
24 review proceedings set forth in Section 1157 of the California Evidence Code. Similar
25 protections should be afforded to the material requested by plaintiffs' counsel. The Receiver
26 cannot be expected to hire, retain and motivate a highly qualified and committed clinical staff if
27 clinicians must be concerned that their decisions will routinely find their way into the hands of
28 plaintiffs' counsel. Hagar Decl., ¶ 12.

1 Finally, it must be said that plaintiffs' counsel's request for access to this information is a
2 barely disguised attempt to look over the Receiver's shoulder for the purpose of monitoring the
3 decision making and activities of the Receiver and his staff. Counsel's belief that it is their job
4 to monitor the Receiver has become a near constant refrain in their recent pleadings.² But
5 plaintiffs' counsel do not control the remedial process; the Receiver does, with oversight by the
6 Court. The Receiver does not answer to plaintiffs' counsel; he answers to this Court. *SEC v.*
7 *American Capital Investments*, supra, 98 F.3d at 1143; *San Vicente Medical Partners Ltd.*, supra,
8 962 F.2d at 1409.

9 The motion for access should be denied.

10 **B. Plaintiffs' Request For A Summary Of Death Reviews Must Be Denied.**

11 The Receiver does not dispute the importance of tracking deaths in the prisons and of
12 attempting to determine if they are medically preventable. POA, p. 49. Up to now, however, the
13 process has been haphazard and ad hoc at best, largely because the prisons lack both the staff and
14 training to perform such reviews appropriately. In addition, the current process, such as it is,
15 suffers from conceptual flaws that prevent it from providing meaningful information. Hagar
16 Decl., ¶¶ 15-16.

17 To accomplish "disciplined reviews," the Receiver will establish an Office of Evaluation,
18 Measurement and Compliance, one responsibility of which will be to develop and implement "an
19 accurate and objective system of mortality reviews." POA, p.50. The Receiver is developing a
20 multi-faceted and interdisciplinary program for mortality reviews that will bring together the
21 various stakeholders in the system. Thus, the Receiver intends to utilize an enhanced peer review
22 process, together with personnel from CDCR Legal and CDCR Internal Affairs, among others to
23 develop appropriate protocols for performing such reviews. Methods of reporting such
24 information to ensure transparency, while at the same time respecting the sensitive nature of the
25 information developed in connection with such reviews, will also be included in the system to be
26 developed. Hagar Decl., ¶¶ 17-18. As stated in the POA, the Receiver intends to have this

27 ² See, e.g., Plaintiffs' Response To The Receiver's Plan Of Action, filed herein on June 29, 2007, p. 14; Plaintiffs'
28 Opposition To Receiver's Motion For Order Modifying Stipulated Injunction And Other Orders Entered Herein,
filed June 29, 2007, p. 23.

1 program operational by November 15, 2007, only a few months from now. POA, p. 49; Hagar
2 Decl., ¶ 19.

3 Not content to wait for the Receiver's program, plaintiffs' counsel demand that the
4 Receiver establish a separate, and independent, process for their benefit and provide them with
5 the information they demand now. There is a serious question whether such an interim program
6 – particularly before adequate systems are in place for appropriate data gathering and analysis –
7 can provide meaningful mortality review information. POA, pp. 48-49. Moreover, requiring the
8 Receiver to develop a separate program solely for plaintiffs' counsel's benefit will unnecessarily
9 duplicate the Receiver's proposed program, while simultaneously diverting resources from "the
10 longer term goal of constructing a meaningful mortality review process." Hagar Decl., ¶ 20.
11 The Receiver should be permitted to do his job and develop a workable mortality review process
12 in the manner, and within the time frames, that he has proposed. When the Receiver presents
13 that process for the Court's consideration and approval, plaintiffs' counsel will surely have an
14 opportunity to express their views with regard to it.

15 **C. The Receiver Will Continue To Take Immediate And/or Short Term Actions To**
16 **Improve Medical Care.**

17 Among the many unwarranted charges leveled at the Receiver by plaintiffs' counsel
18 lately, surely the most unwarranted is the suggestion that the Receiver is not undertaking, or will
19 not continue to undertake, immediate or short term measures to address the failings in the
20 medical care system. Just to be absolutely clear: the Receiver is fully committed to solving the
21 crisis in the prison medical care system and is proceeding ahead vigorously on all appropriate
22 fronts simultaneously. That includes, and will continue to include, taking necessary immediate
23 and short term actions to address critical needs. For plaintiffs' counsel even to suggest otherwise
24 is deeply offensive.

25 Lest there be any doubt that the Receiver has been fully engaged in addressing both short
26 and long term issues in the prisons, Mr. Hagar's declaration includes a partial list of the
27 immediate and short term measures that the Receiver has undertaken. Hagar Decl., ¶ 20. The
28 many remedial efforts reflected in that list demonstrate both the Receiver's ongoing commitment

1 to addressing the crisis in the prisons and that plaintiffs' counsel's charges are truly without
2 foundation.³

3 Nevertheless, as evidence of what plaintiffs' counsel consider to be the Receiver's
4 unwillingness to take short term remedial efforts, they focus on a single issue out of the literally
5 hundreds or thousands of issues large and small that are presented by the crisis in the prisons, *i.e.*
6 they claim that the Receiver ignored issues concerning specialty care at Avenal and PVSP. That
7 is simply incorrect, as demonstrated in Mr. Hagar's Declaration. Hagar Decl., ¶ 24(c). But
8 counsel's own words – written before they had decided to turn on the Receiver – are the best
9 indicators that the current charges are, at a minimum, overstated. On May 30, 2007, Mr. Fama
10 wrote a letter discussing his recent visit to Avenal. In it, he stated:

11 Despite the immense challenges, Avenal has made progress in recent months. *The*
12 *Receiver's January 2007 authorization of 50 medical and medical-related*
13 *positions, plus additional custody positions, increased the prison's ability to*
14 *provide medical care. The current medical management team . . . are [sic]*
15 *motivated to improve care The prison has started a few pilot projects or*
16 *special initiatives . . . that if successful and expanded should greatly improve care.*
17 *. . . Off-site specialty scheduling is now computer as well as paper-based and is*
18 *highly organized. Efforts to self-monitor have begun, including identifying*
19 *problems and potential solutions*

20 Exh. H to Fama Decl., filed herein on June 29, 2007, p. 2 (emphasis added).

21 Mr. Fama discussed the problems of delay in specialty care scheduling to be sure. But he
22 noted that the situation was improving (*id.*, p.4) and, most important, that “the *main reason* for
23 the substantial delays in the vast majority of these urgent/high priority cases is the *failure of the*
24 *specialty consultant* to provide Avenal with an appointment date.” *Id.* (emphasis added). He
25 commended the prison for “attempting to establish contracts with other providers,” but noted that
26 whether that would eliminate the backlog “is unknown.” *Id.* In short, the Receiver's initiatives

27 ³ Indeed, these days the Receiver can do no right in plaintiffs' counsel's eyes. Following three deaths at Avenal in
28 December 2006, the Receiver intervened aggressively by diverting primary care providers to Avenal from other
facilities, hiring 50 additional clinical staff and ordering the hiring of 20 additional custodial staff to address the
specific needs at the prison. The Receiver reported about these efforts in his Fourth Bi-Monthly Report. *See* pp. 52-
53. Rather than commend the Receiver for these dramatic efforts, counsel complain that the Receiver should have
acted sooner, and furthermore, that he did not answer all their questions about the changes at Avenal. This, they say,
is evidence that the Receiver acts “in secret.” The changes were no secret to the inmates and staff at Avenal who,
after all, are the people about whom the Receiver must be most concerned. The changes were no secret to anyone –
including plaintiffs' counsel – who took the time to read the Receiver's Report. Presumably, therefore, plaintiffs'
counsel meant the Receiver acted in secret because he did not consult with them first before making the changes at
Avenal. The receivership order does not obligate the Receiver to clear his decisions with plaintiffs' counsel.

1 were making improvements at Avenal, and delays in specialty care were largely caused by the
2 providers – not the prison or prison staff.

3 More telling still is Mr. Fama’s discussion of delays in specialty care at PVSP. In his
4 post-visit letter, dated October 12, 2006, he makes it clear that he believed that solving the
5 problem of delay in specialty care was beyond the prison’s or, by implication, the Receiver’s,
6 control. He wrote that, even with additional transport vehicles, “plaintiffs are extremely
7 skeptical of [sic] whether additional specialists of the kind and number needed can be timely
8 obtained. The *lack of adequate numbers of specialty providers* in ‘prison valley’ and specifically
9 available for PVSP and ASP [Avenal] has been long identified as a severe problem.” Exh. F to
10 Fama Decl., p. 3 (emphasis added). In Mr. Fama’s opinion, “the *only* actual solution is to reduce
11 the need for specialty services at PVSP and ASP by reducing the number of prisoners.” Id.
12 (emphasis added).

13 It was not long ago that plaintiffs’ counsel called the Receiver “a bold and creative
14 leader” and lauded his “ambitious projects” as “impressive.” Plaintiffs’ Response To Receiver’s
15 Motions For An Extension Of Time, etc., filed herein on December 1, 2006, pp. 4, 6. What then
16 has changed, such that now plaintiffs’ counsel demonize the Receiver and rewrite history to
17 accuse him of failing to solve problems they believed were not his responsibility a mere few
18 months ago? The Receiver suspects the answer is that plaintiffs’ counsel are having difficulty
19 adjusting to their diminished role in the remedial process and are lashing out at him because he
20 now occupies the central position they believe is rightfully theirs.

21 The Receiver’s priorities are to attack the problems systemically and systematically and in
22 a manner that, in his best judgment, will have lasting effect. Which of the many, immediate
23 crises the Receiver intends to address and how and when he intends to address them may not
24 always conform to plaintiffs’ counsel’s lists, timetables or desires. Thus, the Receiver may
25 choose not to respond to plaintiffs’ counsel’s specific inquiries about specific problems in
26 specific prisons in the specific time frames or in the specific order that they prefer. That is the
27 inevitable, but nonetheless laudable, consequence of having an *independent* Receiver to direct
28 the remedial process.

1 None of the foregoing means that the Receiver does not intend to or will not listen or
2 consider issues brought to his attention by counsel for the parties. He expects them to advocate
3 for their clients and to bring their concerns forward for his review and consideration. That is
4 how he has operated up to now and how he intends to continue operating. But, it would be
5 unrealistic and inappropriate for counsel to expect the Receiver, as an independent agent of the
6 Court, always to agree with them as to what are the most important or critical issues to be
7 addressed. Nor should the Receiver be required to proceed as if plaintiffs' counsel is the arbiter
8 of what steps he must take and when he must take them to remedy the constitutional violations in
9 the prison medical care system.

10 **D. The Court Should Deny Plaintiffs' Request That The Receiver Be Required To**
11 **"Cooperate" In Their Purported Monitoring Efforts.**

12 Plaintiffs' counsel lament what they call the Receiver's "oppositional" attitude toward
13 their "monitoring" efforts and ask that he be forced to "cooperate" with those efforts. Far from
14 requiring the Receiver to "cooperate" with plaintiffs' counsel's monitoring activities, the Court
15 should sharply curtail those activities, as the Receiver has requested in his motion to modify the
16 stipulated orders. Responding to those monitoring activities has not advanced the Receiver's
17 remedial efforts, and indeed has increasingly burdened clinical and other staff who are needed to
18 provide appropriate care to the inmates. The Receiver is developing an alternative monitoring
19 program that will provide meaningful answers to whether, and to what extent, the remedial
20 processes are working. POA, p. 49; Hagar May 10 Decl., ¶¶ 12-13. The Court should reject
21 plaintiffs' counsel request that the Receiver be required to cooperate with their disruptive and
22 unnecessary monitoring efforts.

23 **CONCLUSION**

24 For all the foregoing reasons, plaintiffs' motion should be denied.

25 Dated: July 23, 2007

FUTTERMAN & DUPREE LLP

26 By: _____/s/
27 Martin H. Dodd
28 Attorneys for Receiver Robert Sillen

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 July 23, 2007, I served a copy of the following document(s):

RECEIVER'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR AN ORDER DIRECTING RECEIVER TO COMPLY WITH THE APRIL 4, 2003 ORDER RE PRODUCTION AND ACCESS TO DOCUMENTS AND/OR MODIFYING THE 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:

___ BY HAND DELIVERY: I caused such envelope(s) to be served by hand to the address(es) designated below.

X BY MAIL: I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated. 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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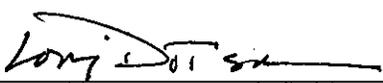
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