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

10
11 MARCIANO PLATA, et al.,
12 *Plaintiffs,*
13 v.
14 ARNOLD SCHWARZENEGGER, et al.,
15 *Defendants.*

Case No. C01-1351 TEH
**RECEIVER'S SUPPLEMENTAL
APPLICATION NO. 3 FOR ORDER
WAIVING STATE CONTRACTING
STATUTES, REGULATIONS AND
PROCEDURES, APPROVING
RECEIVER'S SUBSTITUTE
PROCEDURE FOR BIDDING AND
AWARD OF CONTRACTS**

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INTRODUCTION

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Receiver Robert Sillen (“Receiver”) submits this Supplemental Application No. 3 for an order (1) waiving any requirement that the Receiver comply with State statutes, rules, regulations and/or procedures governing the notice, bidding, award and protests with respect to contracts (collectively “State Contracting Procedures”) necessary for the planning, development, design and construction of certain improvements to clinical space at Avenal State Prison that were not included within the Receiver’s Master Application for a Waiver of State Contracting Law, filed April 17, 2007 (“Master Application”); and, (2) approving substituted notice, bidding and contract award procedures for such projects identical in form to the procedures approved by this Court in its order, dated June 4, 2007, granting Receiver’s Master Application for certain projects (the “June 4, 2007 Order”).

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The Receiver makes this application on the grounds that if he were required to comply fully with existing State Contracting Procedures, he would be unreasonably constrained in his ability to accomplish the goals the Court has set for him. In order for the Receiver to fulfill in a timely fashion the charge this Court has given him, the Receiver requires the waiver requested in this application so that he is not hampered by the same bureaucratic procedures that have prevented the State itself from solving the problems of the California prison medical delivery system. Adherence to the streamlined contracting procedures approved by this Court in its June 4, 2007 Order will further the goals of the State Contracting Procedures, but without stalling the Receiver’s progress in implementing the changes necessary to provide constitutional medical care.

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FACTUAL BACKGROUND

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A. Appointment of the Receiver

In the face of the unprecedented and ongoing crisis in the California prison health care system and the apparent inability of the State to address that crisis, on February 14, 2006, this Court appointed the Receiver and gave him a mandate to move forward expeditiously to remedy the deficiencies in the system. The Court vested in the Receiver the duty to control, oversee, supervise and direct all administrative, personnel, financial, accounting, contractual, legal and

1 other operational functions of the medical delivery component of the California Department of
2 Corrections and Rehabilitation (“CDCR”). In addition to those very broad powers, this Court
3 established a procedure by which the Receiver could request waivers of State laws and contracts
4 when necessary for him to accomplish his work.

5 In the event, however, that the Receiver finds that a state law, regulation, contract,
6 or other state action or inaction is clearly preventing the Receiver from developing
7 or implementing a constitutionally adequate medical health care system, or
8 otherwise clearly preventing the Receiver from carrying out his duties as set forth
in this Order, and that other alternatives are inadequate, the Receiver shall request
the Court to waive the state or contractual requirement that is causing the
impediment.

9 Order Appointing Receiver (“Order”), filed February 14, 2006, p. 5:4-9.

10 **B. Receiver’s Master Application**

11 On April 17, 2007, the Receiver filed the Master Application for an order (1) waiving any
12 requirement that the Receiver comply with State Contracting Procedures with respect to the
13 contracts necessary to implement certain projects described therein; and (2) approving substituted
14 notice, bidding and contract award procedures for such projects. In that Master Application, the
15 Receiver set out in some detail the complex web of State Contracting Procedures impeding his
16 ability to fulfill his court-ordered mandate to provide constitutional medical care to the State’s
17 prisoners, and his proposed process to streamline those procedures to accomplish the goals the
18 Court has set out for him. The Master Application was designed to thoroughly address the legal
19 and factual rationale for waivers of State Contracting Procedures in the context of this
20 receivership, and to permit subsequent follow-up waiver applications (such as this one) without
21 the need to repeat such rationale. Master Application, p. 3:11-15.

22 **C. The June 4, 2007 Order Granting the Master Application**

23 In the June 4, 2007 Order, the Court granted the Receiver’s Master Application. In that
24 Order, the Court noted “that absent a waiver, the Receiver would ultimately be constrained by the
25 very burdens that have impeded the State in dealing with the undisputed challenges in the prison
26 health care system. It would be a hollow gesture to appoint a Receiver only to let him to become
27 entangled in the same bureaucratic quagmire that has thwarted prior efforts to provide
28 constitutional medical care. As such, the Court concludes that the instant application for a

1 waiver has merit.” June 4, 2007 Order at p. 4:23-5:2 (citations and quotations omitted).

2 The Court also approved a streamlined contracting procedure for the Receiver’s use in
3 connection with the projects listed in the Master Application. The three alternative bidding
4 processes approved in the June 4, 2007 Order are:

5 (1) Expedited Formal Bids

6 The Receiver shall utilize the expedited formal bidding process on all higher cost
7 contracts – i.e., those contracts whose total contract price is estimated to be valued at \$750,000 or
8 more. The expedited formal bidding process shall also presumptively apply to contract whose
9 total contract price is estimated to be valued at between \$75,000 - \$750,000, unless the Receiver
10 determines that urgent circumstances require use of the urgent informal bidding process. June 4,
11 2007 Order at p. 6:6-11.

12 *Expedited Formal Bidding Procedures*

- 13 1. The Receiver shall develop and issue a Request for Proposal (“RFP”) and will
14 formally solicit at least three bids by posting the RFP on the Receiver’s website
15 and publishing the solicitation in a trade publication of general circulation and/or
16 an internet-based public RFP clearinghouse for a period of at least one week (7
17 calendar days). The Receiver shall notify the parties whenever an RFP is posted
18 on the Receiver’s website. The Receiver may, in his discretion, identify and
19 solicit additional bidders. If fewer than three bidders respond to the RFP, the
20 Receiver shall make reasonable, good faith efforts to identify additional bidders
21 and solicit their responses to the RFP.
- 18 2. The period for response to the RFP shall be at least 30 days.
- 19 3. The Receiver will appoint a 3-person selection committee consisting of persons
20 with relevant experience, none of whom are affiliated with, or otherwise have any
21 conflict with, any bidder or the Receiver (or any member of his staff).
- 22 4. Criteria for selection of the successful bidder may, in the reasonable determination
23 of the Receiver, include but not be limited to such factors as cost, reputation of the
24 bidder for responsiveness and timeliness of performance, quality of service or
25 product performance, ability of the bidder to provide innovative methods for
26 service delivery, and other similar factors the Receiver deems relevant.
 - 24 a. The Receiver (or, at his direction, the selection committee) may conduct
25 interviews of some or all bidders, answer questions posed by bidders and
26 provide additional information to bidders. For contracts whose total
27 contract price is estimated to be valued at \$750,000 or more, the selection
28 committee shall conduct interviews of at least the top two bidders.
 - 27 b. The selection committee shall provide a recommendation to the Receiver.

1 c. The Receiver will retain the discretion to reject the recommendation of the
2 selection committee and award the contract to another bidder deemed
more qualified or to no one.

3 5. The Receiver shall list all bidders in his quarterly progress reports to the Court
4 and identify the successful bidder. If fewer than three bidders responded to the
RFP and/or any bidder responded to a direct solicitation by the Receiver, the
5 Receiver will so note that fact in the report.

6 June 4, 2007 Order at p. 6:13-7:9.

7 (2) Urgent Informal Bids

8 The Receiver may use an alternative second process when urgent circumstances require
9 the Receiver to move more quickly than permitted by the expedited formal bidding process, but
10 competitive bidding is still required to the extent possible. The Receiver may utilize the urgent
11 informal bidding process for contracts whose total contract price is estimated to be valued at
12 between \$75,000 - \$750,000 if he determines that urgent circumstances do not permit sufficient
13 time to utilize the expedited formal bidding process because:

- 14 a) the additional delay that would result from utilizing the expedited formal
15 bidding process would substantially risk endangering the health or safety
16 of inmates or staff, or
- 17 b) the contract is essential to the "critical path" of a larger project, and the
18 additional delay that would result from utilizing the expedited formal
19 bidding process would significantly interfere with timely or cost-effective
20 completion of the larger project.

21 The Receiver may also utilize the urgent informal bidding process for any contract whose
22 total contract price is reasonably estimated to be valued at less than \$75,000.

23 June 4, 2007 Order at p. 7:11-25.

24 *Urgent Informal Bidding Process*

- 25 1. The Receiver will make reasonable, good faith efforts to identify and solicit at
26 least three proposals and will accept additional unsolicited bids that may be
submitted.
- 27 2. The Receiver may, in his discretion, develop an RFP prior to soliciting bidders,
28 establish a response period with respect to any such RFP and/or establish a
selection committee to assist in the selection of the successful bidder.

- 1 3. Criteria for selection of the successful bidder, in the reasonable determination of
- 2 the Receiver or his staff, may include, but will not be limited to, cost, reputation
- 3 of the contractor for responsiveness and timeliness of performance, quality of
- product or service, ability of the bidder to provide innovative methods for service
- delivery, and other similar factors the Receiver deems relevant.
- 4 4. The Receiver will retain the discretion to award the contract to any bidder or to no
- bidder.
- 5 5. The Receiver will identify all bidders, including the successful bidder, in his
- 6 quarterly progress reports to the Court. For contracts whose total contract price is
- 7 estimated to be between \$75,000 - \$750,000, the Receiver shall also provide the
- 8 explanation for his determination that one (or both) of the criteria for using the
- urgent informal bid process were satisfied. If the Receiver is unable to obtain at
- least three bidders, he will note that fact in the report.

9 (3) Sole Source Bidding

10 Finally, the Receiver may utilize a sole source when he has determined, after reasonable
11 effort under the circumstances, that there is no other reasonably available source. Sole source
12 bidding shall only be used as a last resort. The Receiver shall identify any contract that is sole-
13 sourced in the Receiver's quarterly progress reports to the Court along with an explanation as to
14 the basis for the Receiver's determination that no other sources are reasonably available.

15 June 4, 2007 Order at p. 8:16-23.

16 **D. Description Of The Projects That Are The Subject Of This Supplemental**
17 **Application.**

18 **Health Care Facility Improvements and Modifications At Avenal State Prison¹**

19 a. *Description of problem.* The Receiver's "Health Care Facility
20 Improvement Program" is designed to create new clinical and clinical support space to provide a
21 safe environment for staff to deliver appropriate care to inmate patients. Avenal State Prison
22 ("ASP") was selected by the Receiver as the second site (after San Quentin) in which to begin
23 remediation of the deficient clinical treatment space throughout the CDCR prisons. The
24 Receiver mandated that all planning efforts be coordinated with the remedial plans under way in
25 other litigation affecting inmate-patients (e.g., *Coleman* and *Armstrong*), as well as CDCR AB-
26 900 construction efforts.

27
28 ¹ The facts set forth in this Section are based upon the Declaration of Joseph McGrath, filed herewith.

1 Background. ASP was opened in 1987. The prison was originally designed to house
2 approximately 2,920 inmates in dormitory housing units. The prison has experienced severe
3 overcrowding, including double bunking, triple bunking, gym conversions to dormitory housing
4 units and construction of additional dormitory housing units within the facilities. The CDCR has
5 increased the capacity of the inmate population to 8,038 and is presently housing 7,525 inmates.

6 The clinic/treatment space provided in the original design of ASP is inadequate for the
7 number of inmate-patients housed there. Facility 1 and Facilities 2 through 6 within the
8 institution were originally planned to house 455 and 516 inmates, respectively, and were
9 provided with a single exam room, a nurse screening room, and a small pill room with pill
10 window. No space exists for nursing or provider charting. Now that each facility is housing
11 between 1,000 and 1,400 inmates, the number of exam spaces is inadequate. The limited number
12 of exam rooms available to serve the inmate populations, has created a significant backlog of
13 medical requests that continues to increase. Additionally, the lack of additional exam space
14 limits the ability of the health services team to hire additional providers and to increase the
15 number of inmate-patients seen to meet the medical needs of the inmate population. The lack of
16 space within the facility resonates down to the single pill window available to distribute
17 medications to the inmate-patients. The process for distribution of daily doses of medication can
18 take upwards of hours with inmates standing in line in temperatures in excess of 90 degrees as
19 well as inclement weather. Additional pill windows at each facility are needed to allow staff to
20 effectively provide daily medications.

21 The ASP original construction also provided a 100 bed Administrative Segregation
22 Housing Unit ("ASU") for inmates displaying problem behavior. The ASU building did not
23 provide clinical treatment space within the unit necessary to minimize the need to escort inmate-
24 patients across the prison for medical care. The unit has no medical exam space which requires
25 inmates to be escorted outside to the Infirmary building where specialty services to other inmates
26 must be shut down to accommodate access by the individual ASU inmate. The closure of the
27 Infirmary further exacerbated the ability of the health services team to meet the medical needs of
28 the remaining inmate population. It is imperative that adequate clinical treatment spaces be

1 available in the ASU to effectively deal with the day to day healthcare issues in a timely manner.
2 This unit now has been overcrowded to 175% of design capacity, aggravating the problem. ASP
3 staff has identified the ASU inmate-patient group as the most underserved in the prison.

4 ASP has also experienced CDCR mission change decisions that have increased inmate-
5 patient clinical acuity levels at the prison. ASP now houses mobility impaired inmates, mentally
6 ill inmates and a significant number of elderly inmates. These program changes were made with
7 minor or no accommodation of additional medical, mental health or dental facilities to serve the
8 increased inmate-patient needs. One significant affect of these program changes in combination
9 with the overcrowding can be directly seen by the impact to the Pharmacy and its ability to
10 effectively and correctly process prescriptions. The existing pharmacy is less than 300 square feet
11 in size and attempts to accommodate the 10 and 12 staff needed to process and fill the
12 prescriptions on a daily basis. As a result of these space constraints, record keeping and accuracy
13 and control of medication distribution is challenging. In an institution of this size with this type
14 of population and medical needs, a pharmacy of at least 1,400 s.f. is needed.

15 ASP, over the years, has been provided with additional staffing resources as the
16 overcrowding increased and the facility missions were changed. The CDCR did not construct
17 appropriate space to accommodate the additional staffing resources augmented to the institution,
18 causing the existing space designed for inmate program or treatment space to be converted to
19 non-clinical office space to provide accommodations for the increased staff arriving at the prison.
20 Such conversions further reduced the already insufficient clinical areas within the institution that
21 can be used for direct inmate care and services. These factors had an adverse effect upon the
22 prison's clinical/treatment space. The foregoing factors have combined to create a crisis
23 situation at ASP and are adversely affecting the delivery of appropriate health care services to the
24 inmate population.

25 Prior waiver. In the June 4, 2007 Order the Court granted a waiver of contracting
26 procedure with respect to the Temporary Medical Facility Project ASP to permit the installation
27 of temporary buildings. Thereafter, during the process of developing the programming and
28 planning for the temporary medical facility at ASP, two issues became apparent: (1)

1 simultaneously with the development of the temporary facilities, certain modifications to existing
2 physical plant of a more permanent nature will be necessary to provide critically needed health
3 care to inmates; (2) such permanent modifications or additions would comprise a cost effective
4 solution in addressing the immediate needs. The Receiver anticipates that renovating permanent
5 structures in addition to longer term modular construction will address most of the facility
6 expansion needs that were expected to be implemented in the next three to five years.

7 *b. Description of the Project.* The plan has been broken down into two types
8 of facility upgrades, shorter term (60 to 90 days) and longer term (longer than 90 days).

9 Shorter term projects provide the quickest approach to providing immediate additional
10 temporary clinic space through the use of prefabricated trailers with finished, turnkey space for
11 clinical exam rooms, administration areas, supply storage, etc. These temporary facilities were
12 the subject of the Master Application and June 4, 2007 Order. However, as part of the shorter
13 term project, certain minor renovations to the interior spaces of the existing Infirmary must also
14 be completed to permit that building to be used for inmate treatment, thereby increasing the
15 ability of the health services team both to contract with specialty providers and to see inmate-
16 patients on-site rather than undertake costly transports out to alternate facilities. Contracts for the
17 modifications to the Infirmary were not included within the Master Application and are,
18 therefore, made part of this application.

19 Longer term projects make use of various construction methods and systems, including
20 modular building units assembled in standard sizes placed on concrete slab on grade for more
21 long term use that responds to the functional and operational configurations and needs of the
22 institution. This solution in some instances may more closely resemble a permanent solution
23 depending upon the programmatic needs and the facility conditions within which they are
24 developed and applied.

25 The project team will plan, design and construct clinical treatment space that will be
26 provided by three complex clinics to support the six facilities. Each complex clinic will provide
27 needed medical and mental health clinic treatment space for the inmate-patients housed in the
28 two adjacent facilities for which it serves. Clinical treatment spaces will be constructed within

1 the ASU to provide appropriate care and minimize escorting outside of the building. The team
2 will additionally plan, design and construct modular office space to allow for the full conversion
3 of Central Infirmiry Building space to specialty clinic/treatment space and remodel and expand
4 the pharmacy. The modular building will additionally provide for health services training space
5 to ensure that health care providers are trained on appropriate clinical process and protocols.
6 Clinical support spaces will be planned for and constructed and will include the expansion of
7 medication distribution areas in the existing facility clinics, and construction of a permanent
8 medical supply warehouse to allow proper storage, inventory control, access, and distribution of
9 supplies and equipment to clinical areas throughout the institution.

10 *Description of the contracts necessary to implement the Project.* The facility
11 construction project at ASP will require contracts for the planning, design and construction of the
12 renovations to existing structures and the planning, design and construction of the new clinical
13 space, including the modular buildings. The Receiver anticipates that most of the contracts will
14 be awarded utilizing the expedited formal bidding process, although there may be some contracts
15 awarded under the urgent informal bidding process, particularly in connection with the
16 emergency phase of the project.

17 **E. Good Cause Exists To Waive State Contracting Law And Procedures For The**
18 **Above-Referenced Projects To Ensure That Receiver Can Achieve His Court-**
19 **Ordered Mandate To Provide Constitutional Medical Care To The State's**
20 **Prisoners.**

21 As set forth in Receiver's Master Application, the State Contracting Procedures are
22 complex, cumbersome and extremely time-consuming and have had real, day-to-day and very
23 serious adverse impacts on the CDCR's ability to provide adequate medical care in its prisons
24 and on the Receiver's ability to implement necessary, timely, and inter-related remedial
25 measures. The Receiver submits that, on their face, State Contracting Procedures are much too
26 slow, much too bureaucratic and insufficiently nimble to accommodate the Receiver's efforts to
27 bring the projects described to fruition or to make meaningful change to the prison healthcare
28 system in a timely fashion.

This Court has found that the process by which State contracts are developed, reviewed,

1 bid and awarded contributes to and exacerbates the numerous failings in the prison health care
2 system. *See* Findings of Fact and Conclusions of Law, filed October 3, 2005, at pp. 26-27. In the
3 June 4, 2007 Order, the Court noted that “[t]here is no dispute that it would effectively stymie the
4 Receiver’s efforts to implement the projects identified in his [Master] Application in a timely
5 manner if full compliance with the State’s traditional contracting processes were required.” June
6 4, 2007 Order at p. 3:18-20. Based on the Receiver’s showing in the Master Application, the
7 Court granted a waiver of State Contracting Procedures for those projects listed in Receiver’s
8 Master Application in the June 4, 2007 Order.

9 For the same reasons, the Court should grant this Supplemental Application No. 3. The
10 projects at issue are critical to the systemic changes necessary to achieve constitutional medical
11 care in the State’s prisons. Without a waiver of State Contracting Procedures, Receiver will be
12 forced to spend months if not years obtaining vendors before these projects could move forward.
13 Receiver submits that compliance with State Contracting Procedures will prevent him from
14 accomplishing his mandate. Given what is at stake, Receiver does not have months or years to
15 wait before implementing significant changes. A waiver is appropriate.

16 Based on the foregoing, the Receiver requests a waiver of State Contracting Procedures to
17 the extent they would otherwise apply only to the projects and contracts described above,
18 including but not limited to, the following:

19 Government Code (“Gov’t Code”) §§ 14825 – 14828 and State Contracting Manual
20 (“SCM”) §§ 5.10A, 5.75, 5.80 (governing advertisement of State contracts).

21 Public Contracts Code (“PCC”) §§ 10290 – 10295, 10297, 10333, 10335, 10351, 10420 –
22 10425; Gov’t Code § 14616; SCM §§ 4.00 – 4.11; (governing approval of contracts by
23 Department of General Services (“DGS”) and exemption from and consequences for failure to
24 obtain DGS approval).

25 PCC §§ 10308, 10309, 10314; SCM vol. 2, State Administrative Manual (“SAM”) §§
26 3500 – 3696.3 (governing procurement of goods).

27 PCC §§ 6106, 10109 – 10126, 10129, 10140, 10141, 10180 – 10185, 10220, 10301 –
28 10306, 10340 – 10345, 10351, 10367, 10369; Gov’t Code §§ 4525 – 4529.20, 4530-4535.3,

1 7070-7086, 7105-7118, 14835-14837; and Mil. & Veterans Code §§ 999-999.13; 2 CCR §§ 1195
2 – 1195.6; SCM §§ 5.00 – 6.40 and Management Memo (“MM”) 03-10 (governing competitive
3 bidding, required language in bid packages, Non-competitive Bid (“NCB”) procedures,
4 preferential selection criteria, contractor evaluations and notice, contract award and protest
5 procedures for service, consulting service, construction project management and public works
6 contracts).

7 PCC §§ 10314, 10346 (progress payment limitations).

8 Gov’t Code § 13332.09 and MM 06-03 (governing vehicle purchases).

9 PCC §§ 12100 – 12113, 12120 – 12121, 12125 – 12128; SCM vol. 3; SAM §§ 4800 –
10 4989.3, 5200 – 5291 (governing procurement of IT, telecommunication and data processing
11 goods and services and applicable alternate protest procedures).

12 Gov’t Code §§ 13332.10, 14660, 14669, 15853 (governing acquisition and leasing of real
13 property).

14 Gov’t Code §§ 13332.19, 15815 (governing plans, specifications and procedures for
15 major capital projects).

16 PCC §§ 10365.5, 10371; SCM § 3.02.4 (governing restrictions on and approval for
17 multiple contracts with same contractor).

18 **F. The Receiver Will Comply With The Substitute Bidding Process Procedures**
19 **Approved By The Court In Its June 4, 2007 Order, Which Comply With The**
20 **Essential Goals Of State Contracting Procedures.**

21 As discussed above, in approving the Master Application, the Court approved three
22 bidding processes: Expedited Formal Bidding; Urgent Informal Bidding; and Sole Source
23 Bidding. June 4, 2007 Order at p. 6:18:8:23. For the projects described in this supplemental
24 waiver application, as indicated above, the Receiver proposes to follow the bidding procedures
25 approved by the Court in the June 4, 2007 Order. The Receiver submits that the streamlined
26 processes approved by the Court will permit him to move expeditiously to accomplish his
27 mandate while at the same time providing sufficient safeguards to the public and the public fisc
28 in the contracting process. He seeks approval of those bidding procedures for the projects
subject to this application.

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 November 27, 2007 I served a copy of the following document(s):

RECEIVER'S SUPPLEMENTAL APPLICATION NO. 3 FOR ORDER WAIVING STATE CONTRACTING STATUTES, REGULATIONS AND PROCEDURES, APPROVING RECEIVER'S SUBSTITUTE PROCEDURE FOR BIDDING AND AWARD OF CONTRACTS

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.

___ BY OVERNIGHT COURIER SERVICE: I caused such envelope(s) to be delivered via overnight courier service to the addressee(s) designated.

___ BY FACSIMILE: I caused said document(s) to be transmitted to the telephone number(s) of the addressee(s) designated.

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