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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

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MARCIANO PLATA, et al.,
Plaintiffs,
v.
ARNOLD SCHWARZENEGGER, et al.,
Defendants.

Case No. C01-1351 TEH

**REPLY MEMORANDUM OF RECEIVER
J. CLARK KELSO IN SUPPORT OF
MOTION FOR ORDER ADJUDGING
DEFENDANTS IN CONTEMPT FOR
FAILURE TO FUND RECEIVER'S
REMEDIAL PROJECTS AND/OR FOR
AN ORDER COMPELLING
DEFENDANTS TO FUND SUCH
PROJECTS**

Date: October 6, 2008
Time: 10:00 a.m.
Courtroom: Hon. Thelton E. Henderson

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1 Receiver J. Clark Kelso (“Receiver”) submits this Reply Memorandum in support of his
2 motion for an order adjudging Defendants Arnold Schwarzenegger and John Chiang (“Defendants”)
3 in contempt for their failure to fund or to make provision for funding the Receiver’s capital projects.

4 **PRELIMINARY STATEMENT**

5 Recent developments underscore why Defendants’ opposition to the Receiver’s motion is
6 without merit and why it is imperative that the Court grant the relief the Receiver requests.

7 First, the legislature has *now failed four times* since May 2008 to enact legislation to permit
8 bond financing of the Receiver’s capital projects. Just as the legislature twice defeated SB 1665, the
9 legislature failed on two occasions to bring a similar bill, AB 1819, to a vote before it adjourned.
10 Supplemental Declaration of Clark Kelso (“Kelso Supp. Decl.”), filed herewith, ¶ 19. In the face of
11 these repeated failures to enact enabling legislation, Defendants cannot credibly argue that the
12 Receiver should simply wait for the legislature to act. After all, the obligation to pay all costs to
13 implement the Receiver’s remedial plans rests on the *Defendants*, not on the legislature. It is time,
14 therefore, that Defendants complied with that obligation.

15 Second, Defendants’ dire predictions of financial disaster if the Court granted this motion in
16 the absence of a budget are now moot, and were significantly overstated in any event. The
17 legislature and Governor have finally reached agreement on a budget. Furthermore, filings by
18 Defendants in other proceedings demonstrate that their cries of poverty before this Court were
19 overblown and calculated to mislead. In addition, the Receiver has confirmed that, despite the
20 budget stalemate, \$250 million in General Fund money appropriated under AB 900 for CDCR
21 infrastructure is, and at all times material to this matter was, unencumbered and thus available for
22 use. Declaration of John Hagar (“Hagar Decl.”), filed herewith, ¶ 13.

23 Third, the contemplated California Infrastructure and Economic Development Bank (“I-
24 Bank”) bond transaction – which Defendants tout as evidence of their good faith efforts at
25 compliance – is going nowhere. Defendants point to the “164 hours” that the Attorney General’s
26 office purportedly spent on the deal, but fail to mention that: (1) absolutely nothing has come of
27 those “164 hours;” and (2) since the filing of this motion the Attorney General has refused to work
28

1 further on the transaction. The deal appears to be dead in the water. Kelso Supp. Decl., ¶¶ 11-18;
 2 Supplemental Declaration of Martin H. Dodd (“Dodd Supp. Decl.”), filed herewith, ¶ 7.¹

3 Defendants’ opposition to the Receiver’s motion is otherwise entirely without merit.
 4 Defendants have not shown that they have made all reasonable efforts to comply with this Court’s
 5 orders. Instead, they have sought to mislead the Court into believing that the scope and projected
 6 cost of the Receiver’s capital projects have somehow taken them by surprise. Plata Docket # 1483,
 7 pp. 14-20. This is dangerously close to an outright fabrication. State officials and employees, from
 8 the Governor’s Office, the Attorney General’s Office, the Department of Finance, CDCR, and all
 9 the way down to staff at individual prisons have known about, participated actively in the planning
 10 and development of and embraced the Receiver’s plans from the very beginning and at every step of
 11 the way. *See* Declaration of Steve Cambra (“Cambra Decl.”), filed herewith, ¶¶ 2-5; Hagar Decl.
 12 ¶¶ 2-8; Kelso Supp. Decl., ¶ 2.

13 Defendants have never objected to the multiple orders issued by this Court and the *Coleman*,
 14 *Perez* and *Armstrong* courts approving of the Receiver’s projects. To the contrary, Defendants have
 15 made representations to this Court and to the *Coleman* court acknowledging that the Receiver’s
 16 construction plans are those which the State intends to follow to bring the prison health care system
 17 up to constitutional standards. Dodd Supp. Decl. ¶¶ 4-6 and Exhs. D-1 through F thereto. Perhaps
 18 most important of all – without so much as a hint of an objection from Defendants – this Court
 19 specifically approved the capital projects *and their estimated cost* when it ruled that the Receiver’s
 20 Turnaround Plan of Action is the “plan for moving this case forward.” Plata Docket #1245, p. 4.

21 Lacking any real defense, therefore, Defendants engage in hyperbole in an effort to obscure
 22 the emptiness at the core of their argument. Contrary to Defendants’ hysterical assertions, the
 23 Receiver has not asked the Court to reach into the State treasury and pull out \$8 billion now. The
 24 Receiver’s proposed order – which Defendants seem not to have read – consists of remedies which,
 25 while coercive, are nevertheless limited, well within this Court’s discretion and designed solely to

26 ¹ Defendants criticize the Receiver because, in a private note to the Governor, he sought to strike a conciliatory and
 27 respectful tone to let the Governor know that this motion was not intended to be a personal attack. Instead, the Receiver
 28 hoped that this motion might prepare the ground for using the I-Bank transaction as a mechanism to resolve this dispute.
 Defendants’ dismissive attitude toward the Receiver’s gesture speaks volumes about how likely it is that they will
 voluntarily pursue the transaction.

1 compel Defendants to comply. If Defendants do not like the threatened remedies they can avoid
2 them by complying with their obligations, coming to the table and working with the Receiver to
3 craft a solution acceptable to everyone.

4 Finally, because the Receiver's projects, and Defendants' responsibility to pay for them, are
5 the subject of valid Court orders, Defendants' expositions on the Prison Litigation Reform Act
6 ("PLRA") and the Eleventh Amendment are just so much wasted paper. Neither the PLRA nor the
7 Eleventh Amendment has any bearing on proceedings to enforce valid and uncontested Court
8 orders. Defendants' arguments are red herrings and should be disregarded.

9 **ARGUMENT**

10 **A. Clear And Convincing Evidence Establishes That Defendants Failed To Comply With**
11 **This Court's Orders Requiring Them To Fund The Receiver's Capital Projects.**

12 It is the Receiver's burden to show by clear and convincing evidence that Defendants
13 violated a "specific and definite order of the court." *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir.
14 2002). The Receiver has easily met that burden.

15 **1. Defendants knew and understood that they were obligated to fund the capital**
16 **projects.**

17 The Order Appointing Receiver ("OAR") is explicit about Defendants' obligations.
18 Paragraph IV provides in clear, concise language as follows:

19 *All costs incurred in the implementation of the policies, plans, and decisions of the*
20 *Receiver relating to the fulfillment of his duties under this Order shall be borne by*
Defendants.

21 (Emphasis added.)

22 Defendants feebly contend that they did not understand the foregoing provision to be an
23 "order requiring the State to fund billions of dollars" for the Receiver's projects. Plata Docket #
24 1483, p. 6. What part of "all costs incurred in the implementation of . . . plans" did Defendants fail
25 to understand? And, if Defendants truly failed to grasp the meaning of Paragraph IV at the
26 inception, surely this Court's subsequent orders clarified things for them. Subsequent to the OAR,
27 this Court entered no less than six separate orders approving the Receiver's capital projects in whole
28 or in part. Plata Docket ## 700, 1026, 1107, 1245, 1292, 1293. This Court and the *Coleman*,

1 *Armstrong* and *Perez* courts authorized the Receiver to take the lead in completing construction
 2 required by the remedial plans in those cases as well, including specifically 5,000 beds in *Coleman*
 3 in addition to the 5,000 beds in *Plata*. Plata Docket # 1107. The construction coordination
 4 agreement, which was attached to the order, specifically described the 10,000 bed and facilities
 5 upgrade projects. No one reading that order could have had any doubt about the scope of the
 6 projects and that they would be costly. Of particular significance, this Court ordered that the
 7 Receiver's Turnaround Plan would be "the plan of action for moving this case forward." Plata
 8 Docket # 1245, p. 4. The Receiver's capital projects occupy a central place in the Turnaround Plan
 9 and the cost of those of projects was specifically estimated in the Turnaround Plan to be roughly \$7
 10 billion. Plata Docket # 1229, pp. 36-41 of 44.²

11 Defendants' convenient claim of ignorance on this motion is not only belied by the foregoing
 12 orders, their conduct exposes the lack of merit in their current position. For roughly two years, State
 13 representatives have been working closely with the Receiver's staff to plan and develop the very
 14 projects that Defendants now claim are so startling in scope and cost. See Cambra Decl. ¶¶ 2-5;
 15 Hagar Decl., ¶¶ 3-8. Furthermore, in *Coleman*, counsel for Defendants has acknowledged that the
 16 Receiver's construction projects would apply to the remedial plans in that case as well. Exhs. D-1
 17 through F to Dodd Supp. Decl. Thus, the Receiver has already incurred an estimated \$17 million
 18 applicable to *Coleman* beds. Hagar Decl., ¶ 8 In light of the Court's orders and the history of these
 19 projects, Defendants cannot honestly claim that they have been surprised by the scope of the
 20 projects, how much the projects will cost or that they are responsible for bearing those costs.

21 **2. Defendants have failed to cooperate with, and are thwarting, the Receiver in the**
 22 **exercise of his duties.**

23 In addition to the foregoing orders, Paragraph VI of the OAR requires the Defendants to
 24 "cooperate *fully*" with the Receiver in his remedial plans. A failure to cooperate with, or conduct
 25 that "thwarts," the Receiver is punishable by contempt. Following the legislature's failure to enact
 26 _____

27 ² Before the Receiver submitted the Turnaround Plan to the Court for approval, he specifically told the Defendants that
 28 he believed they had an obligation under Paragraph IV of the OAR to fund the capital projects, despite legislative
 inaction. Kelso Supp. Decl., ¶10. If Defendants truly thought that they had no such obligation, their failure to object to
 the Turnaround Plan before the Court approved it is inexplicable.

1 bonding legislation, Defendants have rejected or failed to pursue every alternate method of funding
2 suggested by the Receiver, including:

- 3 • The Receiver's suggestion that the Governor exercise his emergency powers to authorize
4 funding;
- 5 • The Receiver's suggestion that the State contract with him to fund the projects on a pay as
6 you go basis, perhaps in conjunction with the Governor's emergency powers;
- 7 • The Receiver's request for \$205 million to carry the projects through the end of the year;
8 and,
- 9 • The Receiver's efforts to move the I-Bank transaction forward as a basis for funding.

10 Plata Docket #1380, ¶¶ 22-25; Kelso Supp. Decl., ¶¶ 11-18; Dodd Supp. Decl., ¶ 7.

11 Defendants have not suggested *any* funding mechanisms other than legislation. Plata Docket
12 # 1483, p. 8. Defendants simply refuse to accept that the obligation under the OAR to fund the
13 Receiver's projects falls on *them*, and not on the legislature. And so the Receiver remains without
14 short term funding and no prospect of long term funding. That can mean only one thing: further
15 delay in bringing the prison medical system into compliance with the Constitution; indeed, failure to
16 undertake the capital projects may mean that the State will never come into compliance with the
17 Constitution. Defendants' failure to cooperate is thwarting the Receiver and that alone is a
18 sufficient basis upon which Defendants should be held in contempt.

19 **B. Defendants Cannot Meet Their Burden To Show That They Have Made "Every**
20 **Reasonable Effort" To Comply With Their Obligation To Fund The Capital Projects.**

21 Defendants are obligated "to consider all reasonable options to comply with [the orders],
22 regardless of how costly or politically unattractive they may be." *Carty v. Dejongh*, 2007 U.S. Dist.
23 LEXIS 23330, *63 (D.V.I., Feb. 27, 2007) (internal quotations and citations omitted). The burden
24 therefore shifts to them to demonstrate that they "made every reasonable effort to comply" with this
25 Court's orders. *Stone v. City and County of San Francisco*, 968 F.2d 850, 856 n. 9 (9th Cir. 1992);
26 *see also In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987) (alleged
27 contemnor must "take all reasonable steps within his power to insure compliance with the court's
28 order"). Defendants cannot satisfy this burden.

1 **1. Defendants failed to pursue multiple alternative methods for funding the**
 2 **Receiver's capital projects.**

3 Defendants have either rejected or failed to pursue any number of possible funding
 4 alternatives, claiming variously a lack of authority, a lack of an appropriation from the legislature
 5 and/or that, allegedly, no court order required them specifically to fund the Receiver's projects. *See*
 6 *Plata* Docket #1380, pp. 29-36 of 46. Defendants' "explanations" are unavailing because there were
 7 steps they could have taken to address any concerns they had.

- 8 • The Governor failed to exercise his authority under the Emergency Services Act and/or
 9 under the overcrowding Emergency Proclamation to assist the Receiver. *Plata* Docket #
 10 1380, pp. 8, 15-21 of 46. Nothing prevented him from using that authority. In fact, in June
 11 2007, Defendants filed pleadings in *Coleman* indicating that the Governor could use his
 12 emergency powers to undertake construction to satisfy the remedial orders in *Coleman and*
 13 *Plata*. The head of the Governor's Facilities Construction Strike Team stated:

14 The Facilities Construction Strike Team will meet with CDCR executives weekly
 15 and aggressively create and implement the . . . design, construction, and opening of
 16 these beds, on schedule. Moreover, *expediting construction will include waiving*
 17 *state laws, as needed, pursuant to the Governor's Emergency Proclamation.* ¶ Under
 18 my direction, the Facilities Construction Strike Team has commenced its work,
 including meeting with CDCR executives and the *Plata* Receiver. The Team has
 reviewed the *Coleman* bed plan and will review the bed and space plans for the *Plata*
 and *Perez* cases in order to meet the Team's objective of implementing AB 900
 compliance *with outstanding court orders.*

19 Exh. E-3 to Dodd Supp. Decl., ¶¶ 7-8 (emphasis added). The Governor's refusal to use his
 20 emergency powers to fund the Receiver's projects must be seen then for what it is: a choice not to
 21 do so.

- 22 • More than \$250 million in appropriated, but unencumbered, AB 900 funds for infrastructure
 23 projects has been available for months. Despite meetings with high level officials regarding
 24 the Receiver's construction funding needs, Defendants did not propose using those funds in
 25 response to the Receiver's request for \$205 million to keep the projects on track through the
 26 end of this calendar year. Hagar Decl., ¶ 13.³

27 _____
 28 ³ The Receiver has now specifically requested those funds. The State has not yet indicated whether it would agree to
 release them. *Id.*

- 1 • Defendants have permitted the I-Bank transaction to languish, although one would have
2 thought that the pendency of this motion would have stimulated some effort to move the
3 transaction forward. But Defendants have done next to nothing, and apparently cannot even
4 compel their own lawyers, the Attorney General's Office, to participate in documenting the
5 deal. Kelso Decl., ¶¶ 17-19; Dodd Supp. Decl., ¶ 7.
- 6 • Finally, and perhaps most important, if Defendants genuinely believed that the only thing
7 standing between them and funding for the Receiver's capital projects was the alleged lack
8 of a court order, a quick and easy solution to the problem existed: they could have come to
9 this Court and requested the authority they believed they needed. That would have erased
10 any doubts they may have had about their authority to fund the projects. *See White v. Davis*,
11 108 Cal. App.4th 197, 223 (2002). And, it is a safe bet that the Receiver would have joined
12 in the request. But Defendants have failed to act.⁴

13 Defendants failed to avail themselves of any number of alternative approaches for funding
14 the Receiver's capital projects. Such inaction justifies a finding of contempt. *See Carty*, 2007 U.S.
15 Dist. LEXIS 23330 at *65 (defendants' failure to utilize court-controlled account to remedy
16 deficiencies in jail "exposes them to contempt"); *Inmates of Allegheny County Jail v. Wecht*, 874
17 F.2d 147, 152 (3d Cir. 1989, vacated and remanded on other grounds, 493 U.S. 948 (1989) (officials
18 who "simply chose to take no steps to provide the Warden and his staff with the wherewithal to
19 comply" with consent order held in contempt).

20 **2. Defendants' argument that this Court had to waive State law before they were**
21 **required to comply is utterly without merit.**

22 As the Receiver demonstrated in his moving papers, it simply is not a defense to
23 enforcement of a valid federal court order that compliance would violate State law. *Spain v.*
24 *Mountanos*, 690 F.2d 742, 746 (9th Cir. 1982). Despite this well-settled principle, Defendants seek
25 to assert such a defense nonetheless, although it has been poorly dressed up in other guise.

26 Defendants contend that they cannot be held in contempt because they harbored a "good
27 faith" belief that compliance with this Court's orders was not required unless and until the Court

28 ⁴ The Receiver emphasizes again that he does not believe any further orders were actually necessary.

1 waived State law pursuant to Paragraph II.D of the OAR. Plata Docket # 1483, p. 6. This argument
 2 was plainly constructed by the lawyers since Defendants have presented no *evidence* of such “good
 3 faith” belief. And the circularity in the argument is apparent. A party subject to a valid federal
 4 court order must comply without regard to State law; if the party could nevertheless avoid
 5 compliance because of a belief that doing so would violate State law, then State law, not federal
 6 law, would be the supreme law of the land and federal courts would be hampered in their ability to
 7 enforce their orders. And, even if there was evidence that Defendants actually held this “belief,” it
 8 could not have been in good faith because the law is so abundantly clear that compliance with a
 9 valid federal court order is required despite countervailing State law. *Stone*, 968 F.2d at 862.

10 Finally, Defendants’ effort to use Paragraph II.D of the OAR as a shield to avoid compliance
 11 with other provisions of the OAR does not withstand scrutiny. Even a cursory reading of the
 12 “waiver of State law” provision reveals that it was designed to govern the *Receiver’s* actions, not to
 13 hand Defendants a “get-out-of-jail-free” card. OAR, ¶ II.D.

14 **3. The State had and has the financial resources necessary to fund the Receiver’s**
 15 **capital projects.**

16 Like Chicken Little, Defendants frantically proclaim that the State’s financial sky will fall if
 17 the Court grants this motion. Their feigned hysteria should be disregarded.

18 First, as the Receiver has previously emphasized, “financial constraints may not be used to
 19 justify the creation or perpetuation of constitutional violations.” *Rufo v. Inmates of Suffolk County*
 20 *Jail*, 502 U.S. 367, 392 (1992). *See Stone*, 968 F.2d at 858 (“financial constraints do not allow
 21 states to deprive persons of their constitutional rights”); *Wright v. Rushen*, 642 F.2d 1129, 1134 (9th
 22 Cir. 1981) (same); *Battle v. Anderson*, 564 F.2d 388, 393, 396 (10th Cir. 1977) (same); *see also*
 23 *Newman v. Alabama*, 559 F.2d 283, 286 (5th Cir. 1977 (“compliance with constitutional standards
 24 may not be frustrated by legislative inaction or failure to provide the necessary funds”), *rev’d in*
 25 *part*, 438 U.S. 781 (1978).

26 Second, the recent budget deal lets all the air out of Defendants’ balloon, since the lack of a
 27 budget was the premise for their argument that the State could not afford the relief requested. Plata
 28 Docket # 1483, pp. 3-5. That argument has now been mooted.

1 Third, the State had, and still has, more than \$250 million of AB 900 money in the General
 2 Fund that was appropriated, but unencumbered, and thus available for the Receiver's capital
 3 projects. Hagar Decl., ¶ 13. Defendants' contention, therefore, that the General Fund was
 4 "exhausted" and nothing was available for the Receiver is suspect to say the least.

5 Finally, and related to the foregoing, Defendants' own words belie the claims they have
 6 made in opposition. As a result of the State budget war, the Department of Personnel
 7 Administration ("DPA") brought an action, now pending in the Eastern District of California,
 8 against Defendant here, State Controller John Chiang (*Gilb v. Chiang*, No. 2:08-cv-01960 MCE
 9 DAD). In that action, the DPA sought to compel the Controller to comply with the Governor's
 10 directive to reduce the pay of State employees to the federal minimum wage and, in some cases, to
 11 zero. The Controller resisted the Governor, contending the State had sufficient cash to continue to
 12 pay its employees. Significantly for this motion, in his Answer to the Petition for Writ of Mandate
 13 in that case, filed on September 11, 2008, the Controller averred as follows:

14 ***...Respondents allege that the state will have sufficient cash to meet its financial***
 15 ***obligations, including debt service, during the budgetary impasse. . . .***

16 As of the end of July 2008, the State of California's General Fund cash position,
 17 comparing actual receipts and disbursements for the 2008-09 fiscal year to cash flow
 18 estimates prepared by the Department of Finance for the 2008-09 May Revision,
 19 indicated the state had \$10.1 billion remaining in unused borrowable resources
 (internal borrowing on a short-term basis from specific funds to the General Fund),
more than twice what was estimated in the Governor's May Revision. In addition,
the state's disbursements were \$306 million lower (-3.3%) than estimated in the
Governor's May Revision. . . .

20 Furthermore, in 19 of the last 20 years, the state has used external borrowing, [i.e.,]
 21 borrowing from sources other than from state special funds, as a cash management
 22 tool, which has included both Revenue Anticipation Notes (or RANs) and Revenue
 Anticipation Warrants (or RAWs).

23 Exh. A to Dodd Supp. Decl., pp. 7-8 (emphasis added).⁵ Even more recent filings by Defendants in
 24 *Gilb* confirm that the State continued to have adequate resources through August 2008. Exh. C to
 25 Dodd Supp. Decl.

26
 27 ⁵ This allegation was based on a declaration of Susan Griffith (Exh. B to Dodd Decl.), the same Susan Griffith who filed
 28 a declaration in this proceeding. Plata Docket # 1487. Defendants have not brought the inconsistencies in their position
 in the two cases to this Court's attention.

1 Thus, even leaving aside the \$250 million in AB 900 funds, at the very time that the
 2 Governor and the Controller were refusing to take steps to fund the Receiver's capital projects, the
 3 State had billions more in internal borrowable resources than previously estimated and had available
 4 to it mechanisms for external borrowing. And, at the very time that the Governor and the Controller
 5 were refusing to pay over to the Receiver the \$205 million he requested to carry his capital projects
 6 through the end of this year, the State had spent \$306 million less than anticipated. *In other words,*
 7 *the Receiver's projects could have been fully funded through the end of the year and the State would*
 8 *still have expended \$100 million less than expected.*

9 Because the State had, and surely now has, the actual ability to fund to the Receiver's capital
 10 projects, Defendants cannot claim that financial constraints made and make it impossible for them
 11 to do so. *Hook v. Arizona Dep't of Corrections*, 1997 U.S. App. LEXIS 8042, *18 (9th Cir. 1997),
 12 citing *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 628, 638 (3d Cir. 1982) (impossibility
 13 means "literal physical impossibility of compliance;" no impossibility if funds available).
 14 Defendants cannot show, therefore, that they pursued all reasonable efforts to comply with this
 15 Court's orders. As a result, they must be held in contempt.

16 **C. The PLRA Is Not Relevant To Any Issue On This Motion.**

17 Since there is no dispute that Defendants have failed to fund and failed to make provision for
 18 funding the Receiver's capital projects, they have launched a 15-page, multi-pronged assault on the
 19 projects themselves, contending that the Receiver's proposed construction violates the PLRA. Plata
 20 Docket # 1483, pp. 9-23. They argue that the projects exceed the constitutional minimum, that the
 21 Receiver has failed to show that no less intrusive alternative is available, and that the Court lacks
 22 the authority under the PLRA to order the proposed construction without "the State's consent."
 23 These arguments come to nothing because (1) the PLRA does not govern contempt proceedings to
 24 enforce valid Court orders; (2) Defendants are estopped from challenging the projects; and, (3)
 25 nothing about the projects is inconsistent with the PLRA, in any event.

26 **1. The PLRA has no bearing on this contempt proceeding.**

27 Defendants' arguments based on the PLRA do not even get out of the starting gate because it
 28 is settled that the PLRA does not govern contempt proceedings. In *Lancaster v. Tilton*, 2007 U.S.

1 Dist. LEXIS 48403 (N.D. Cal., June 21, 2007), defendants contended that they should not be held in
 2 contempt for violating a consent decree governing conditions at San Quentin because, they claimed,
 3 enforcement of the decree allegedly violated the PLRA. Judge Alsup easily dispensed with that
 4 argument:

5 Defendants do not actually contend that they are in compliance with the consent
 6 decree; they instead allege that because the consent decree requires *more* than the
 7 Constitution requires, the enforcement of many of the decree's provisions is
 impermissible under the Prison Litigation Reform Act of 1995 . . .

8 Defendants' contention -- that the terms of the consent decree are unenforceable to
 the extent they exceed the constitutional minimum -- lacks merit. . . . ¶ The law on
 9 this point is well-settled, and defendants cite no contrary authority. "The *enforcement*
 of a valid consent decree is not the kind of 'prospective relief' considered by §
 10 3626(a). As long as the underlying consent order remains valid -- neither party has
 made a 3626(b) motion to terminate -- the court must be able to enforce it." *Essex*
 11 *County Jail Annex Inmates v. Terffinger*, 18 F. Supp. 2d 445, 462 (D.N.J. 1998)
 (emphasis added) Thus, while the consent decree is still valid and binding,
 12 defendants must comply with its terms, and this Court retains the power to hold them
 in contempt for any violations. In this posture, it is irrelevant whether the consent
 13 decree provides protections above the constitutional minimum.

14 *Id.* at *10-*13 (emphasis in original). See also *Jones-El v. Berge*, 374 F.3d 541, 545 (7th Cir.
 15 2004).⁶ Similarly, one court has held that the PLRA does "not control the scope of remedies
 16 available to cure contempt stemming from a party's failure to comply with a prior court order."
 17 *Marion County Jail Inmates v. Anderson*, 270 F. Supp. 2d 1034, 1036 (S.D. Ind. 2003) (ordering,
 18 *inter alia*, prisoner population cap without appointment of three-judge court as remedy for
 19 contempt).

20 The Receiver seeks only to enforce valid orders that Defendants have never challenged. If
 21 Defendants were concerned about the requirement in Paragraph IV of the OAR that they must fund
 22 "all costs" relating to the implementation of the Receiver's remedial plans, or uncomfortable with
 23 the requirement in Paragraph VI of the OAR that they "cooperate *fully*" with the Receiver, or
 24 alarmed by the scope and cost of the Receiver's capital projects, they had ample opportunity to
 25 object, appeal or otherwise make their voices heard. They chose not do so, and indeed have actively
 26 participated in the development of the projects and have embraced them when it served their

27 ⁶ The Receiver does not concede, of course, that his construction projects exceed the constitutional minimum. The point
 28 here is that the Defendants have not challenged the orders authorizing the projects or the orders requiring that
 Defendants fund them. Therefore, they must comply with those orders.

1 purposes. Cambra Decl., ¶¶ 2-5; Hagar Decl., ¶¶ 3-8; Supp. Kelso Decl., ¶ 2; Exhs. D-1 through F
2 to Dodd Supp. Decl.; Section C(2), below. Since the Court's orders approving the capital projects
3 and Defendants' obligation to fund them, as well as the order requiring them to cooperate with the
4 Receiver are valid and enforceable, Defendants must comply. The PLRA does not say otherwise.

5 **2. Defendants are estopped to challenge the Receiver's construction projects.**

6 Defendants are estopped from challenging the capital projects because they have not
7 previously objected to them and, in fact, have specifically relied upon the Receiver's projects to
8 bolster their claims in other proceedings. *See generally New Hampshire v. Maine*, 532 U.S. 742,
9 749-752; *Carty*, 2007 U.S. Dist. LEXIS 23330, *84 n. 10.

10 This Court and the *Coleman*, *Perez* and *Armstrong* courts approved a coordination
11 agreement that gave the Receiver authority to undertake the 10,000 bed project and facilities
12 upgrades with all four remedial plans in mind. Plata Docket # 1107. Defendants did not oppose
13 conferring that authority on the Receiver and raised no objection to the description of the project in
14 that order. This Court has entered multiple orders authorizing waivers of State law to permit the
15 Receiver to proceed with various aspects of the construction projects. Defendants did not oppose
16 those applications. The Receiver has described his construction plans in reports to this Court. *E.g.*,
17 Plata Docket ## 4136, pp. 48-52 of 67; Plata Docket #1248, pp. 42-47 of 63. Defendants have
18 never questioned the wisdom, scope or cost of the projects in response to these various filings.

19 The Receiver's Turnaround Plan of Action described the 10,000 bed and facilities upgrade
20 projects as key components of his efforts to bring the prison medical care system up to
21 constitutional standards. *See* Docket # 1229, pp. 36-40 of 44. The Appendix to the Turnaround
22 Plan specifically indicated that the cost of these projects would approach \$7 billion. *Id.*, p. 41 of 44.
23 Defendants had an opportunity to review the Turnaround Plan of Action and they did not object to it
24 or to any of the goals and plans set forth therein. On June 16, 2008, this Court entered its order
25 approving the Turnaround Plan and ruling that it would be "the plan for moving this case forward."
26 Docket # 1245, p. 4. Defendants did not object to, seek reconsideration of or otherwise challenge,
27 that order. If Defendants objected to the scope or cost of the projects – as they now so loudly claim
28 – then given their obligation to fund for the projects, it was foolish at best and reckless at worst for

1 them to sit back and say nothing.⁷ The truth is, as shown below, Defendants supported the projects
 2 and *that* is why they did not object. Defendants' acquiescence in the foregoing orders, therefore, is
 3 alone a sufficient basis to conclude that they should be estopped to challenge the capital projects.

4 But there is more.

5 Defendants have filed pleadings in other proceedings which represent or presuppose that the
 6 Receiver's plans to construct 10,000 medical and mental health beds is the primary plan the State
 7 will follow. For example, in April 2008, attorneys from the Office of Attorney General – which
 8 represents Defendants here – filed an application in *Coleman* requesting an amendment to the bed
 9 plan in that case to permit a stand-alone facility at California Men's Colony ("CMC"). The
 10 application was brought because the "Receiver has been given authority over the construction of
 11 5,000 medical and 5,000 mental health beds . . . [,] has now undertaken the task of selecting sites for
 12 these consolidated care beds . . . [but] has no plans to build a consolidated care center at CMC . . ."
 13 Exh. D-1 to Dodd Supp. Decl., p. 2 (citations omitted). In a stipulation filed in *Coleman* at or about
 14 the same time, the Attorney General agreed that "the *Plata* Receiver has now been vested with a
 15 leadership role over the construction of mental health beds . . . and will meet with the *Coleman*
 16 parties on April 24, 2008 to discuss the construction of 5,000 mental health beds under his aegis."
 17 Plata Docket # 1251-3, p. 41 of 58.

18 In fact, Defendants relied in part upon the Receiver's plans as a basis for contesting the
 19 overcrowding claim in the three-judge panel proceeding. About 10 days ago, in support of
 20 Defendants' motion for summary judgment, a Deputy Attorney General filed a declaration and
 21 attached as an exhibit a bed plan submitted to the *Coleman* special master in July 2008. That bed
 22 plan is replete with references to how the *Coleman* plans have been subsumed within and modified
 23 to conform to the Receiver's plans to construct facilities as part of the 10,000 bed project. Plata
 24 Docket # 1478. Based on the updated *Coleman* bed plan, Defendants argued that improvements are
 25 being made in the delivery of health care, notwithstanding overcrowding in the prisons. Plata
 26 Docket # 1479, p. 26 of 27; Plata Docket # 1494, p. 8 of 8. Defendants cannot have it both ways.

27 ⁷ Defendants' argument that they had "no occasion" to challenge the Turnaround Plan because, at the time it was written
 28 the Receiver anticipated bond financing approved by the legislature (Plata Docket # 1438, p. 14), is just specious. Once
 again, *Defendants*, not the legislature, are obliged to fund the Receiver's projects.

1 They cannot rely upon the Receiver's construction plans in *Coleman*, but seek to challenge those
 2 same plans in this action. *New Hampshire v. Maine*, 532 U.S. at 749.

3 And there is still more. Not only have Defendants accepted and relied upon the Receiver's
 4 constructions plans in court filings, *State officials and State employees have been intimately*
 5 *involved in the planning and programming for the 10,000 bed and facilities upgrade projects from*
 6 *the very inception.* See Cambra Decl., ¶¶ 2-5 Kelso Supp. Decl., ¶2; Hagar Decl., ¶¶ 3-8. Plata
 7 Docket # 1478. At every step of the way, State employees have participated in the decisions about
 8 how the facilities should be designed, what the facilities should include and where they should be
 9 located. The cost of the facilities has been driven by that planning process and those cost estimates
 10 have been shared. The Receiver has incurred millions of dollars in planning these projects,
 11 including many millions in attempting to coordinate with the *Coleman* facility planning.
 12 Defendants cannot with a straight face challenge these projects as somehow unlawful when they and
 13 their employees have not just known about them, they have actively assisted and cooperated in their
 14 development.

15 **3. Defendants' contention that the PLRA precludes the Receiver's capital projects**
 16 **is incorrect as a matter of fact and as a matter of law.**

17 Defendants contend that the projects violate the PLRA because they allegedly exceed the
 18 constitutional minimum, are not the least intrusive remedy and the State has not consented to them.
 19 Plata Docket # 1483, pp. 9, 14. Defendants are wrong again. Although the Court need not even
 20 reach Defendants' PLRA arguments for the reasons discussed above, the Receiver nevertheless
 21 addresses them briefly.⁸

22 At the outset, even if Defendants' arguments based on the statute are correct – and they are
 23 not as discussed below – the State *gave its consent* to the capital projects by virtue of its failure to
 24 object to the series of orders approving the projects, culminating in this Court's approval of the
 25 Turnaround Plan. And Defendants have further indicated that consent by repeatedly and expressly
 26 relying upon the Receiver's construction plans in pleadings before this and the *Coleman* courts, and
 27

28 ⁸ The Receiver does not concede that his capital projects constitute "construction of prisons" within the meaning of the PLRA.

1 by their active participation at every step in the planning of the very projects they now claim not to
 2 support. Defendants can run, but they cannot hide from their own prior conduct, pleadings and
 3 actions.

4 The statute has not been violated in any event. This Court and the *Coleman, Perez* and
 5 *Armstrong* courts have approved the Receiver's capital projects to address decades of neglect in the
 6 prison health care system, not to relieve overcrowding or to effect "an overall improvement in
 7 prison conditions." *Plyler v. Moore*, 100 F.3d 365, 369 (4th Cir. 1996). In fact, this Court found
 8 that "the establishment of a Receivership, *along with those actions necessary to effectuate its*
 9 *establishment*, are narrowly drawn to remedy the constitutional violations at issue, extend no further
 10 than necessary to correct a current and ongoing violation of a federal right, and are the least
 11 intrusive means necessary to correct those violations." Findings of Fact and Conclusions of Law
 12 ("FFCL"), Oct. 3, 2005, p. 49 (emphasis added). By failing to object to the FCCL, the OAR, or the
 13 many orders entered since then in this and the other cases approving the Receiver's capital plans,
 14 Defendants have acknowledged that the Receiver's plans do not exceed the constitutional minimum
 15 and are the least intrusive remedies to correct the violations at issue.⁹

16 Finally, Defendants' interpretation of the PLRA is insupportable. Section 3626(a)(1)(A) of
 17 the statute sets out the requirements for prospective relief and provides that there must be a showing
 18 of need, that the relief must be narrowly drawn, and that the relief must be the least intrusive
 19 necessary to correct the constitutional violation. Subdivision (a)(1)(B) provides that no prospective
 20 relief can require a State official to violate State law unless Federal law permits the order violating
 21 State law, the relief is necessary to correct the violation of a Federal right and no other relief will
 22 correct the violation. Contrary to the suggestion in Defendants' opposition, these provisions were
 23 not a radical departure from pre-PLRA standards for entry of prospective relief. *Gilmore v.*
 24 *California*, 220 F.3d 987, 1006 (9th Cir. 2000).

25

26 ⁹ Defendants completely fail to address the fact that a substantial component of the capital projects is to remedy
 27 violations under the Americans with Disabilities Act ("ADA") found by the Court in *Armstrong*. Defendants do not
 28 explain why the PLRA should trump the ADA. *See, e.g., Handberry v. Thompsom*, 446 F.3d 335, 347-348 (2d Cir.
 2006)(remedial order which tracked Individuals with Disabilities in Education Act did not violate PLRA even if order
 "over inclusive.").

1 Subdivision (a)(1)(C) then provides that nothing in subdivisions (a)(1)(A) or (B) “shall be
2 construed to authorize the courts, in exercising their remedial powers, to order the construction of
3 prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the
4 remedial powers of the courts.” While Defendants contend that this language “absolutely bars” all
5 orders requiring prison construction, they cite no case or other authority that so holds. Indeed, such
6 a reading of the statute makes little sense.

7 A statute that does not “authorize” an act is not the equivalent of a statute that prohibits the
8 act. If the intent of the drafters was to bar all prison construction it would have been far simpler for
9 them to state: “Under no circumstances may prospective relief include prison construction.”
10 Because Congress chose the formulation that it did, the better understanding of the statute is that the
11 drafters were merely stressing that the previous subdivisions should not be construed to “authorize”
12 prison construction or certain other equitable remedies absent an appropriate showing.

13 This more reasonable reading of the statute also avoids the constitutional problem at the
14 heart of Defendants’ interpretation of subdivision (C). Defendants contend that subdivision (C)
15 precludes prison construction under any circumstances, even if a court applied a more stringent
16 remedial test in ordering such construction than that found in subdivisions (A) and (B).¹⁰ If
17 Defendants are correct, the statute plainly violates the Separation of Powers doctrine. “. . . Congress
18 is free to alter the standard that determines the scope of prospective relief for unconstitutional prison
19 conditions *so long as the restrictions on the remedy do not prevent vindication of the right.*”
20 *Gilmore*, 220 F.3d at 1002-1003 (emphasis added); *see also Dickerson v. United States*, 530 U.S.
21 428 (2000)(Congress may not overrule prophylactic remedy designed to prevent violation of
22 constitutional rights). Since courts must avoid a construction of a statute that renders it
23 unconstitutional (*Gilmore*, 220 F.3d at 997-998 & n. 12), the more sensible reading of subdivision
24 (C) is that it was intended to ensure that any existing limitations on equitable remedies found in law
25 would not be over-ridden by the language found in subdivisions (A) and (B). Subdivision (C) does
26 not by its language purport to establish any *new* limitations on a federal court’s equitable powers.

27 ¹⁰One court has recognized that comprehensive physical repairs to a jail facility will not violate the PLRA, even if those
28 repairs are “over inclusive,” so long as the standards of 18 U.S.C. § 3626(a)(1)(A) have been met. *Benjamin v. Fraser*,
343 F.3d 35, 53-54 (2d Cir. 2003).

1 **D. The Eleventh Amendment Is Not Relevant To Any Issue On This Motion.**

2 Defendants expend an enormous amount of energy arguing that the remedies requested by
3 the Receiver are barred by the Eleventh Amendment. Defendants could not be more incorrect.

4 The Eleventh Amendment bars “[r]elief that in essence serves to compensate a party injured
5 in the past by an action of a state official in his official capacity that was illegal under federal law
6 This is true if the relief is expressly denominated as damages. It is also true if the relief is
7 tantamount to an award of damages for a past violation of federal law, even though it is styled as
8 something else.” *Papasan v. Allain*, 478 U.S. 265, 278 (1986) (citations omitted). But since *Ex*
9 *parte Young*, 209 U.S. 123 (1908), it has become equally well-settled that “relief that serves directly
10 to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even
11 though accompanied by a substantial ancillary effect on the state treasury.” *Papasan*, 478 U.S. at
12 278. *See also Milliken v. Bradley*, 433 U.S. 267, 289-290 (1977). Where “fiscal consequences to
13 state treasuries” are the “necessary result of compliance” with prospective decrees, there is no
14 Eleventh Amendment issue. *Edelman v. Jordan*, 415 U.S. 651, 667-668 (1974). “State officials, in
15 order to shape their official conduct to the mandate of the Court’s decrees, would more likely have
16 to spend money from the state treasury than if they had been left free to pursue their previous course
17 of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable
18 consequence of the principle announced in *Ex parte Young, supra.*” *Id.* at 668.

19 In addition to appointing the Receiver, the OAR requires the State to fund “all costs” of
20 implementing the Receiver’s remedial plans “relating to” the fulfillment of his duty to bring the
21 prison medical care system up to constitutional standards. Although the financial impact of the
22 Receiver’s plans has been, and will continue to be, very substantial, Defendants had and have no
23 Eleventh Amendment basis upon which to challenge the OAR. Indeed, they did not challenge the
24 OAR on any ground; it remains a valid order with which they must comply. Nevertheless, faced
25 with the “fiscal consequences” which are the “necessary result of compliance” with the OAR,
26 Defendants have refused to comply and now seek to challenge the OAR *indirectly* by opposing the
27 contempt sanctions requested by the Receiver. The Court should reject this transparent ploy.

28

1 It is undisputed that the Eleventh Amendment does not bar financial penalties imposed by a
2 court exercising its inherent power to enforce its own orders. As the Supreme Court stated in *Hutto*
3 *v. Finney*, 437 U.S. 678 (1978):

4 In exercising their prospective powers under *Ex parte Young* and *Edelman v. Jordan*,
5 federal courts are not reduced to issuing injunctions against state officers and hoping
6 for compliance. Once issued, an injunction may be enforced. . . . If a state agency
7 refuses to adhere to a court order, *a financial penalty may be the most effective means*
8 *of insuring compliance*. The principles of federalism that inform Eleventh
9 Amendment doctrine surely do not require federal courts to enforce their decrees
10 only by sending high state officials to jail. The less intrusive power to impose a fine
11 is properly treated as ancillary to the federal court's power to impose injunctive
12 relief.

13 *Id.* at 690-691 (emphasis added).

14 Nor is the Eleventh Amendment because contempt sanctions may be costly implicate the.

15 As one court stressed:

16 [I]t is clear that sovereign immunity does not bar remedial or coercive fines that are
17 actually incurred, though theoretically avoidable. The court's power to order such
18 contempt fines, like its power to order prospective payments generally, is ancillary to
19 its power to order compliance with the law. That power does not evaporate when the
20 cost of compliance is high.

21 *Fortin v. Comm'r of Mass. Dept. of Public Welfare*, 692 F.2d 790, 797-798 (1st Cir. 1982) (1st Cir.
22 1982) (citations omitted.). Thus, courts have imposed very substantial, costly and coercive fines on
23 states and state agencies for contemptuous failure to comply with the courts' orders. *See, e.g.*,
24 *Flores v. Arizona*, 405 F. Supp. 2d 1112 (D. Ariz. 2005), *vacated on other grds* 204 Fed. Appx. 580
25 (9th Cir. 2006) (fines commencing at \$500,000 per day and increasing to \$2 million per day).

26 Finally, there are no "special sovereignty considerations" in this case. The case cited by
27 Defendants, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), involved a quiet title
28 action against the State of Idaho. Because the action involved the State's control over its own lands,
the Court concluded it involved "special sovereignty interests" that implicated the Eleventh
Amendment. *Id.* at 281. *Coeur d'Alene* had nothing to do with a federal court's inherent power to
enforce its own orders. Moreover, the Ninth Circuit has held that *Coeur d'Alene* represents a
"unique, narrow exception" to *Ex parte Young*. *Agua Caliente Band of Cahuilla Indians v. Hardin*,
223 F.3d 1041, 1048 (9th Cir. 2000). Thus, in a case seeking to enjoin the State of California from
collecting certain taxes, the Ninth Circuit rejected the appellant's argument that the State's interest

1 in protecting the treasury meant that the suit was barred by the Eleventh Amendment. The court
 2 stated: "This proves too much. The [Supreme] Court has repeatedly observed that prospective relief
 3 awarded pursuant to *Ex parte Young* may have a substantial ancillary effect on the State's treasury,
 4 but has nevertheless consistently held that this fact alone is insufficient to convert such actions into
 5 actions against the State for state sovereign immunity purposes." *Goldberg v. Ellet*, 254 F.3d 1135,
 6 1144 (9th Cir. 2001). The Eleventh Amendment does not bar the relief requested.

7 **E. Defendants' Remaining Arguments Should Be Rejected.**

8 Defendants remaining arguments can be dispensed with quickly. Their claim that no relief
 9 can be afforded against the Controller is baseless. The Receiver made no secret of why he wanted
 10 the Controller joined as a defendant and the Controller *did not object* to joinder. Plata Docket #
 11 1310. Thus, he has waived any challenge to enforcement of the orders against him. Moreover,
 12 without the Controller, as Defendants themselves have emphasized, an order requiring payment
 13 from the State cannot be physically implemented. Thus, joinder for relief purposes is entirely
 14 proper. *Spain v. Mountanos*, 690 F.2d at 744 (district court joined State officials, including
 15 Controller, as parties to effect payment of attorney's fees award previously ordered).¹¹

16 Defendants contend that the Receiver has not established that various State statutes that
 17 Defendants claim preclude compliance with this Court's orders should be waived. In the face of
 18 Defendants' contention that they cannot comply, lest they violate some or all of those same State
 19 statutes, this argument would be laughable if it were not so disingenuous. It ought to be obvious
 20 that the Receiver is requesting a waiver of State law solely to remove the impediments *Defendants*
 21 claim prevent their compliance.¹²

22 Nor is there any need for an evidentiary hearing. Defendants and the Attorney General
 23 clearly want one so that they can put on a show for the press. But the only issue that Defendants
 24 needed to address in their opposition was whether, and to what extent, they had complied with this

25 ¹¹ Even if the Controller was not a Defendant, he could be compelled to act by virtue of this Court's power under the All
 26 Writs Act [28 U.S.C. § 1651(a)] (*United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977)), and/or pursuant
 to Paragraph VI of the OAR which extends the contempt remedy to persons acting "in concert" with the Defendants.

27 ¹² Defendants take the Receiver to task for not catching a typographical error in the request for waiver of one group of
 28 statutes. Plata Docket # 1483, p. 23. It is true. California Government Code §§ 16740-16746 do not exist. The
 Receiver transposed numbers and meant to request a waiver of Government Code §§ 16470-16476. The Receiver
 suspects Defendants had already figured that out; they just did not want to pass up the opportunity to take a cheap shot.

1 Court's orders. It should now be abundantly clear that they have not complied and have not made
2 all reasonable efforts to comply. As such, there is nothing left for this Court to decide except what
3 remedies should be imposed on Defendants for their contempt.

4 **F. The Court Has Available To It A Wide Range Of Remedies.**

5 The Receiver has proposed a host of potential remedies which, singly or in combination,
6 would be appropriate to compel Defendants to comply with this Court's orders. That said, the
7 Receiver is mindful that the budget impasse of the last few months has not been easy for
8 Defendants. The Court may wish, therefore, to consider a step-by-step approach to requiring them
9 to fund the Receiver's capital projects. For example, the Court may wish to issue orders to ensure
10 that Defendants comply with their obligation to provide funding for the capital projects at least
11 through the end of this fiscal year. And, the Court could couple that with a requirement that, within
12 a short period of time, Defendants submit to this Court a demonstrably *workable* plan intended to
13 provide funding over the long term. If the Court adopts this approach, Defendants should also be
14 required to develop one or more backup plans in the event the preferred method is unsuccessful, to
15 avoid the necessity for repeated proceedings before this Court.

16 **CONCLUSION**

17 The Receiver submits that Defendants Arnold Schwarzenegger and John Chiang should be
18 adjudged in contempt and that appropriate sanctions and orders be imposed to ensure that the
19 Receiver's capital projects are funded as required by this Court's orders.

20 Dated: September 22, 2008

FUTTERMAN & DUPREE LLP

21 By: /s/ Martin H. Dodd
22 Martin H. Dodd
23 Attorneys for Receiver J. Clark Kelso
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CERTIFICATE OF SERVICE

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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 September 22, 2008, I served a copy of the following document(s):

REPLY MEMORANDUM OF RECEIVER J. CLARK KELSO IN SUPPORT OF MOTION FOR ORDER ADJUDGING DEFENDANTS IN CONTEMPT FOR FAILURE TO FUND RECEIVER'S REMEDIAL PROJECTS AND/OR FOR AN ORDER COMPELLING DEFENDANTS TO FUND SUCH PROJECTS

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

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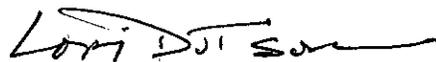
John Chiang
Richard J. Chivaro
State Controller
300 Capitol Mall, Suite 518
Sacramento, CA 95814

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19 I declare that I am employed in the offices of a member of the State Bar of this Court at
20 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.

21 Executed on September 22, 2008 at San Francisco, California.

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Lori Dotson

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