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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al., *Plaintiffs*, v. ARNOLD SCHWARZENEGGER, et al., *Defendants*.	Case No. C01-1351 TEH **NOTICE OF MOTION AND MOTION OF RECEIVER J. CLARK KELSO 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: September 22, 2008 Time: 10:00 a.m. Courtroom: Hon. Thelton E. Henderson

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 10:00 a.m. on September 22, 2008, or as soon thereafter as the matter may be heard in the above-entitled Court, Receiver J. Clark Kelso ("Receiver") will and hereby does move the Court (1) for an Order, pursuant to FRCP 70 and the Court's inherent power to enforce its own orders, adjudging Defendants ARNOLD SCHWARZENEGGER and JOHN CHIANG in contempt of this Court for failing and refusing to fund, and/or to make provision for funding, the Receiver's court-approved capital projects in violation of paragraphs IV and VI of this Court's Order Appointing Receiver ("OAR"), dated February 14, 2006, and of this Court's subsequent orders specifically authorizing such capital projects, and, (2) for Orders compelling Defendants to fund such capital projects, as described more fully in the Proposed Order filed herewith and incorporated by reference herein.

The motion will be made on the grounds that the OAR and the subsequent Orders are valid and enforceable, that the OAR requires Defendants to pay "all costs" incurred by the Receiver in connection with his remedial plans, that the Receiver has determined that he requires approximately $205 million through December 31, 2008 and an additional $7.8 billion over the next five years for the construction and rehabilitation of medical facilities at prison sites throughout the state, that the Receiver has made demand on Defendants to fund such capital projects, that Defendants have failed and refused to do so and, therefore, that this Court should exercise its enforcement powers to effectuate the OAR and subsequent Orders by holding Defendants in contempt and compelling them to comply with such Orders.

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

Dated: August 13, 2008

FUTTERMAN & DUPREE LLP

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

It is with great reluctance, and yet a sense of firm conviction, that the Receiver seeks the Court's assistance in securing payment by the State of California of the $8 billion in funding necessary for the Receiver's construction program. This funding will be used to complete all major facility upgrades and expansions required for the medical, mental health and dental programs consistent with the requirements of the Americans with Disabilities Act, consistent with this Court's prior orders and consistent with the expectations established by the four-court coordination order, entered on November 13, 2007. Absent the planned construction, the state's prison health care program will remain out of compliance with federal constitutional requirements.

As this motion makes clear, the Receiver has fully explored and exhausted every avenue for securing funding pursuant to normal state processes. The California Senate twice refused to approve the bill authorizing bond funding for the Receiver's construction program, a refusal born of the Senate Republican Caucus's insistence that funding for the Receiver be tied to unrelated changes in other legislation. Subsequent to the legislature's refusal, California's Governor and Controller – Defendants in this action – have repeatedly refused to provide construction funding to the Receiver. Their outright refusal to fund the Receiver's construction program stands in stark contrast to their recent public assertions of extraordinary powers to control state spending regarding state employee salaries and their acknowledgement that the state retains very substantial financial resources to fund necessary programs. In short, the legislature, Governor and Controller have made deliberate choices to reject the Receiver's funding request.

California's dire fiscal condition – which has devolved into an open conflict between the Governor and the Controller over the extent of the state's cash crisis – combined with the legislature's failure to enact an on-time budget that includes authorization for the Receiver's construction activities, raises the very real, immediate prospect that the Receiver's construction program will fail for lack of a clear source of funding. To avert such a failure, the Receiver seeks an order that will guarantee payment by the state of up to $8 billion in construction costs.

II. FACTS[1]

A. The State's Failure To Remedy The Crisis In The Prison Medical Care System And The Appointment Of The Receiver.

Commencing in 2002, Defendants stipulated to a series of orders intended to bring the prison medical system up to Constitutional standards. It is undisputed however, that the state was incapable of remedying the years of neglect in the prison medical care system. Unwilling to accept continued failure, this Court appointed a Receiver to take control of the system and transform it into a functioning, and Constitutional, system of care.

The Order Appointing Receiver ("OAR") conferred on the Receiver all of the powers of the Secretary of CDCR insofar as the delivery of medical care is concerned and suspended the Secretary's exercise of those powers for the duration of the Receivership. The Court directed two provisions of the OAR, in particular, at Defendants. Paragraph IV, entitled "COSTS," provides that "[a]ll costs incurred in the implementation of the policies, plans, and decisions of the Receiver relating to the fulfillment of his duties under this Order shall be borne by Defendants." Paragraph VI, entitled "COOPERATION," provides that "All Defendants, and all agents, or persons within the employ, of any Defendant in this action . . . and all persons in concert and participation with them, . . . shall *fully* cooperate with the Receiver in the discharge of his duties under this Order, ... Any such person who . . . thwarts or delays the Receiver's performance of his duties under this Order, shall be subject to contempt proceedings before this Court." (Emphasis in original.) Defendants did not appeal the OAR.

B. The Governor's Emergency Prison Overcrowding Proclamation.

On October 4, 2006, the Governor acknowledged the crisis in the prisons created by overcrowding and proclaimed an emergency within the meaning of the California Emergency Services Act (Cal. Gov't Code § 8550 *et seq.*). As a result of the Proclamation, the Governor conferred upon the Secretary of the CDCR a number of powers, including the authority to "contract for facility space . . . and/or for the supplies, materials, equipment, and other services needed to

[1] In addition to matters of record in this action, the Facts are based upon the Declarations of J. Clark Kelso ("Kelso Decl."), Martin H. Dodd ("Dodd Decl.") and William Proctor ("Proctor Decl."), filed herewith.

immediately mitigate the severe overcrowding and the resulting impacts within California." During the pendency of the emergency, the Governor suspended all provisions of California law as they pertained to state contracting. *See* Exh. 1 to Kelso Decl.

C. The Receiver's Construction Plans.

The Receiver determined that the prisons lacked adequate medical facilities and that if the system was to be brought up to Constitutional standards, extensive renovation of existing facilities and substantial new construction would be required. The Receiver launched three construction-related initiatives: construction of new facilities at San Quentin, a health care Facility Improvement program to upgrade clinical space and clinical support space at each prison and a project to construct facilities to house up to 5,000 medical and 5,000 mental health beds.

As early as his Second Bi-Monthly Report in September 2006, the Receiver reported that he had begun planning for these projects and stressed that he would enter into discussions with the Special Master in *Coleman v. Schwarzenegger* for the purpose of determining whether the project should be expanded to include facilities to accommodate 5,000 mental health beds. In his Third Bi-Monthly Report in December 2006, the Receiver reported that he had commissioned studies for the design and construction of the 5,000 medical bed project. Defendants neither objected to nor expressed any concerns about the proposed capital projects.

Meanwhile, commencing in May 2006, Judge Lawrence Karlton in *Coleman* issued a series of specific orders for the provision and construction of additional mental health beds at various institutions. Pursuant to those orders, Judge Karlton required the state to develop and submit to the court long range plans for accommodating the prison mental health population. Judge Karlton required the state to "address the feasibility of a 'Design and Build' approach for the construction projects specified in the consolidated plan and shall coordinate the use of such an approach with any related Design and Build efforts in the Plata case." Exh. 3 to Docket # 1251, p. 3.

On November 15, 2007, the Receiver filed his Plan of Action ("POA"), which specifically included the 5,000 Prison Medical Bed Construction Initiative and the health care Facility Improvement Construction Initiative. The Receiver announced that he would "[c]oordinate and lead a program to construct up to 5000 medical beds and up to 5000 mental health beds, utilizing

carefully planned patient demographic reports to establish the number and acuity levels of the beds needed." Docket # 929, p. 16 of 128. Pre-construction work, including obtaining funding for the project, was to be completed by the Spring of 2008 so that construction could commence by June 2008. *Id.* Construction in connection with the Facility Improvement Construction Initiative was to be completed at 12 prisons by November 2008. *Id.* Defendants neither objected to nor raised any concerns about the construction plans set forth in the POA.

Meanwhile, the Receiver, the Special Master in *Coleman* and the court representatives in *Armstrong* and *Perez* met regularly to coordinate their activities and initiatives. Those meetings resulted in a series of coordination agreements designed to avoid overlapping remedial projects and to achieve efficiencies and which gave the Receiver the lead role in projects designed to benefit the class members in all four cases. On November 13, 2007, the courts in all four cases issued an order to show cause why the coordination agreement for the San Quentin, Facility Improvement and 5,000/10,000 Bed projects should not be approved. Defendants did not object to the projects or to the Receiver's lead role in connection with the projects. On February 26, 2008, the courts in all four cases entered an order approving the Construction Coordination Agreement. Docket # 1107.

D. The Court Appoints The Current Receiver.

On January 23, 2008, this Court appointed the current Receiver. In making the appointment, the Court stressed that, "[t]he Receivership has reached a critical juncture at which it must now move . . . into an implementation phase. . . . [T]he Receivership's focus can and must now shift towards long-term reform that will achieve the implementation of a sustainable, constitutionally adequate system of delivering medical care to Plaintiffs – and, not inconsequentially, a system that must ultimately be transitioned back to the State of California's control." Order Appointing New Receiver ("OANR") (Docket # 1063), p. 4:10-20.

E. The Receiver Finalizes His "Turnaround Plan of Action," Including The Capital Improvements Program.

On March 13, 2008, the Receiver issued the first draft of his Turnaround Plan of Action. A primary Goal under the draft plan was completion of the capital improvement projects, including both the Facility Improvement and 5,000/10,000 Bed projects. The Receiver estimated costs for the

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

F. The Receiver's Ultimately Unsuccessful Effort To Obtain Legislative Approval For Financing The Capital Projects.

The Receiver endeavored, when seeking funding for construction of medical facilities for inmates, to work within the parameters of state law to the extent possible. For example, to complete the construction of new medical facilities at San Quentin, the Receiver sought and obtained legislative approval for more than $140 million in bond financing.

More recent efforts by the Receiver to work within the boundaries provided by state law have been unsuccessful. Given the scale and very substantial cost of the Facility Improvement and 5,000/10,000 Bed projects, the Receiver requested legislation to authorize financing of the projects through revenue bonds, not unlike the process by which the San Quentin project is being financed. Senator Mike Machado agreed to sponsor Senate Bill ("SB") 1665, which embodied the Receiver's proposal. The Receiver met with legislators and legislative committees and made a presentation to the legislature itself to explain the projects in detail. Thereafter, SB 1665 was approved by the Senate Public Safety and Appropriations Committees. The bill was scheduled for a vote by the full Senate on May 15, 2008. One day before the vote, the Legislative Analyst's Office ("LAO") informed Senator Machado that the LAO intended to issue a report the following week that would suggest that SB 1665 somehow conflicted with the Prison Litigation Reform Act (18 U.S.C. § 3626). On May 16, 2008, the Receiver met with legislative staff, LAO representatives and representatives from the Office of Legislative Counsel to discuss the LAO's concerns and to express his willingness to try and address those concerns.

The floor vote on SB 1665 was scheduled for May 27, 2008. Notwithstanding the meeting between the Receiver and LAO on May 16, the LAO issued its report shortly before the floor vote,

criticizing the project and recommending sharply reduced funding. *See* Exh. 20 to Docket # 1251.[2] The full Senate twice failed to approve SB 1665, essentially killing the bill. More than two-and-a-half months have elapsed since those votes without any further legislative progress on funding the Receiver's capital projects. In the meantime, the legislature has failed to pass a state budget and it is unclear when a budget will be enacted. Given the chaotic status of budget discussions, the prospects are dim that a legislative solution for the Receiver's capital projects can be achieved.

G. The Receiver's Continued, But Unsuccessful, Efforts To Obtain State Cooperation To Fund The Capital Projects.

Despite the setback in the legislature, the Receiver continued to make efforts to work with the state to obtain the necessary funding and to avoid seeking Court intervention. Specifically, the Receiver met with representatives of the State Controller's Office ("SCO"), the Department of Finance ("DOF"), the State Treasurer's Office, the Governor's Office and the Attorney General's Office to discuss possible mechanisms by which the state could provide funding, despite the legislature's refusal to enact SB 1665. The Receiver posed two alternative approaches to funding, each of which was rejected by the state.

First, the Receiver proposed that the Receiver, SCO and DOF enter into a Memorandum of Understanding ("MOU") to fund the construction projects on a "pay-as-you-go" basis under the Emergency Services Act ("ESA"). The Receiver noted that the Governor's Emergency Proclamation, together with the ESA, provided the Governor with substantial authority to authorize expenditures by departments in the Executive Branch from funds appropriated for other purposes or the Secretary of CDCR to redirect Agency funds in light of the emergency. The obvious advantage to the pay-as-you-go approach is that the state would not have to obtain the billions of dollars required for the Receiver's projects at one time, and thus the impact on the state's financial well-being would be minimized. Second, the Receiver emphasized that, in light of the OAR's requirement that the state pay all costs of the Receivership, the SCO could simply issue warrants on the state treasury as necessary to fund the construction projects. The DOF rejected the first proposal

[2] The LAO report contained misleading and inaccurate statements that effectively misrepresented the factual and conceptual bases for the capital improvement projects. *See* Docket # 1248, pp. 49-56.

and the SCO rejected both.

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

In the face of the failure by the SCO and DOF to reach agreement with the Receiver on either of the proposed solutions to the funding problem, the Receiver offered yet another suggestion. In a letter to the Governor on June 9, 2008, the Receiver proposed a contract between CPR, Inc. (the not for profit corporation through which the Receivership is operated), on the one hand, and the Office of the Governor and CDCR, on the other hand. Pursuant to the Governor's emergency powers, the Governor would authorize CPR to plan, design and construct the proposed facilities. CPR would thereafter deliver ownership of the facilities to the state. Payment would be authorized by the Governor under the ESA and/or as a result of the costs provision of the OAR. The Receiver proposed that the Governor authorize payment on an annual basis (plus an additional advance – a construction contingency fund – of up to 25% of that year's annual construction needs). This proposal, too, was rejected. Nevertheless, the Receiver tried again to obtain cooperation from the state.

On July 15 and 28, 2008, respectively, counsel for the Receiver sent letters to counsel for Defendants informally requesting information pertaining to potential funding sources for the Receiver's projects. The first of the letters specifically asked whether the state intended to fund the Receiver's projects and, if so, how it proposed to do so. *See* Exh. 1 to Dodd Decl. On July 22, 2008, counsel for Defendants responded by letter, asserting that the General Fund was "exhausted" and that absent legislative authorization or a "court order," the state was precluded from transferring funds to the Receiver, borrowing or otherwise making provision to provide the funding for the Receiver's capital projects. Exh. 2 to Dodd Decl. Of equal importance, counsel for the state asserted – for the first time – that the OAR did not require the state to fund the Receiver's capital

projects. Id., p. 4. On August 5, counsel for Defendants responded to the second letter sent by Receiver's counsel, and reiterated that the Defendants will not fund the Receiver's projects without an appropriation from the legislature. Exh. 4 to Dodd Decl., p. 3.

Meanwhile, on July 16 and 21, 2008, the Receiver sent a letter to Defendants Schwarzenegger and Chiang, respectively, demanding that they transfer or caused to be transferred to the Receiver by July 25, 2008, $204.6 million required for the Receiver's projects through December 31, 2008. *See* Exhs. 2 and 3 to Kelso Decl. The letter stated:

> [M]y cash on hand for construction costs, as incurred, will be exhausted in October or November. This will likely cause my construction program management and design-build teams to stand down and disassemble, resulting in irreparable delays and thereby posing a grave threat to the health and safety of our inmate-patients. I will not, indeed cannot, let this occur.

Defendant Schwarzenegger responded on July 25, 2008. Although he acknowledged "support for your [the Receiver's] Turnaround Plan of Action and the construction programs that you have determined are necessary to fulfill your duties as receiver," the Governor declined to provide any assurances that the Receiver would be provided the required funds. The Governor stated that, "[i]n the absence of legislative authorization, it is not within my power to appropriate state funds for the Receiver's construction projections. Therefore, I am not in a position to provide you written assurance that your request of $204.6 million will be met." Exh. 4 to Kelso Decl., p. 2.

Similarly, Defendant Chiang responded by letter, dated July 28, 2008, stating that "I cannot comply with your request" to transfer the $204.6 million. Exh. 5 to Kelso Decl., p. 2. Defendant Chiang also asserted that the July 22 letter from counsel for the state to the Receiver's counsel was intended to apprise the Receiver "about the . . . defendants' views concerning the *limitations* of the [OAR]. Id. (Emphasis added.) Subsequently, counsel for Defendants explicitly asserted that the OAR and this Court's various orders authorizing the Receiver's capital projects "do *not* authorize the state defendants to spend hundreds of millions of dollars this year and billions of dollars in the future without a valid appropriation by the Legislature." Exh. 4 to Dodd Decl., p. 2 (emphasis added).

H. The Current Estimated Funding Requirements For The Receiver's Capital Projects And State Resources Potentially Available.

1. The need to ensure funding now for the Receiver's projects.

Although the Facility Improvement project will touch virtually every prison in the state, it alone is not sufficient to remedy the need for clinical space in the prisons. The 5,000/10,000 Bed project, which will result in the construction of **7 million** square feet of new medical facilities – the equivalent of 70 Wal-Mart stores – is the essential component to bringing the system up to Constitutional standards; it must be accomplished within the next few years.

To undertake construction projects of this magnitude and complexity within the very tight time frames envisioned by the Receiver and this Court, the Receiver is utilizing a unique and innovative design and construction process. First, the project management team is comprised of a joint venture drawn from two large construction firms: URS and Bovis. Second, pursuant to waivers previously granted by the Court, three teams of competing contractors, architects and designers, will work together to develop the basic design for each of the seven new facilities. Then the teams will bid for the right to construct one or more of the facilities. In view of the size and sophistication of the projects and the design/build process, ensuring funding now is essential to the projects. Neither the project management joint venture nor the design/build teams can be expected to pursue projects of this nature without assurances that a funding stream exists. The Receiver does not have the luxury to begin the process and, then if funding dries up, await further funding to begin again. The design/build teams are likely to disband and scatter. In such a scenario, the Receiver would be farther behind than when the projects commenced.

The Receiver's current capital needs in total and on a cash flow based are described below.

Encumbrance Needs	2008/09	2009/10	2010/11	2011/12	2012/13	Totals
10,000 Bed Project	2,466,588,245	1,912,814,369	1,620,597,386			6,000,000,000
33 Prison Project	669,758,485	1,058,164,539	269,617,285	2,459,691		2,000,000,000
TOTAL	**3,136,346,730**	**2,970,978,908**	**1,890,214,671**	**2.459,691**		**8,000,000,000**
Cash Flow Needs						
10,000 Bed Project	213,969,815	1,681,635,423	2,028,583,445	1.576,846,590	498,964,727	6,000,000,000
33 Prison Project	148,132,134	987,771,354	845,854,293	18,242,219		2,000,000,000
TOTAL	**362,101,949**	**2,669,406,777**	**2,974,437,738**	**1,595,088,809**	**498,964,727**	**8,000,000,000**

The approximately $205 million demanded by the Receiver in his letter to Defendants is included within the capital needs for 2008/09. To date, the state has failed to transfer the $204.6 million demanded by the Receiver for his needs through December 31, 2008 and has made no provision for payment of the approximately $7.8 billion additional he requires to complete the facility upgrades and to construct the facilities for the 10,000 Bed project.

2. The state's existing resources.

The state has asserted that the General Fund is "exhausted." That does not mean, however, that funds are not potentially available that could be brought to bear to meet the Receiver's needs. For example, Section 28 of AB 900 appropriated $300,000,000 for "infrastructure" capital outlays by the CDCR and the Receiver understands that roughly $250,000,000 of that amount remains unencumbered. In addition, state law permits the General Fund to borrow from a variety of sources "internally," including from special funds, when the General Fund is exhausted. Cal. Gov't Code § 16310. As of July 29, 2008, the state held more than **$930 million** in cash spread between seven banks and the state had internal "borrowable resources" of approximately **$14 billion**. Exh. 4 to Dodd Decl., p. 5 and Exh. 1 thereto. The state also holds more than **$31 billion** in an account known as the Surplus Money Investment Fund ("SMIF"), the funds in which are available to borrowed by the General Fund. *See* Exh. 2 to Dodd Decl. Interest is and has been accruing on funds in the SMIF at the rate of more than a $1 billion per year. Exh. 4 to Dodd Decl., p. 6

Finally, Defendant Chiang has acknowledged publicly that the state is continuing to pay certain General Fund obligations required under state and federal law. *See* http://www.sco.ca.gov/eo/fiscalissues/payments.shtml. Indeed, Defendants Chiang and Schwarzenegger are in litigation with one another over Defendant Chiang's unwillingness to pay state workers at federal minimum wage, in part because Defendant Chiang insists that the state has adequate resources to continue to pay state workers at their regular rates. Defendant Chiang has estimated that he can make and will have made a total of approximately **$35-40 billion** in payments to a variety of recipients in the absence of a budget in the months of July and August 2008 alone. Id. In addition, the state has made provision to borrow billions of dollars held in special fund accounts to continue to make payments from the General Fund for state obligations. Exh. 4 to Dodd

Decl. and Exh. 1 thereto.

III. ARGUMENT

A. Defendants Should Be Held In Contempt Of This Court For Their Refusal To Fund And To Make Provision For Funding The Receiver's Capital Projects.

This Court has "inherent power to enforce its judgments. Without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'" *Peacock v. Thomas*, 516 U.S. 349, 356 (1996). Thus, when state or local governments fail or refuse to comply with federal judgments, any or all of the enforcement remedies provided in FRCP 70 may be used to compel "the governmental defendant to make payment." *Preston v. Thompson,* 565 F. Supp. 294, 303 (N.D. Ill. 1983).

Among the enforcement remedies available to this Court is the power to hold a noncompliant defendant in contempt. FRCP 70(e). "[C]ourts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States,* 384 U.S. 364 (1966). This Court has "wide latitude in determining whether there has been a contemptuous defiance of its order." *Gifford v. Heckler*, 741 F.2d 263, 266 (9th Cir. 1984). The law applicable to civil contempt proceedings was recently articulated by Judge William Alsup of this Court:

> "If a person disobeys a specific and definite court order, he may properly be adjudged in contempt. A person fails to act as ordered by the court when he fails to take all the reasonable steps within his power to insure compliance with the court's order. It does not matter what the intent of the appellants was when they disobeyed the court's order." The Ninth Circuit has also explained that "[s]ubstantial compliance with the court order is a defense to civil contempt, and is not vitiated by a few technical violations where every reasonable effort has been made to comply." "The standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply."

Lancaster v. Tilton, 2007 U.S. Dist. LEXIS 48403, *13-*14 (N.D. Cal. June 21, 2007) (citations omitted). Good faith attempts at compliance are not a defense to a claim of civil contempt. *Stone v. City and County of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992).

For the reasons discussed below, the clear and convincing evidence before the Court demonstrates that the state has failed and refused to fund or to assure the funding of the Receiver's

court-approved capital projects. Defendants should be held in contempt.

1. The OAR and the other orders entered by this Court require the state to fund the Receiver's capital projects.

The OAR and the subsequent orders approving the Receiver's capital projects are sufficiently specific and definite to support a contempt finding for failure to comply with their provisions. Paragraph VI of the OAR provides that:

> All defendants, and all agents, or persons within the employ, of any Defendant . . . and all persons in concert and participation with them, and all counsel in this action, shall *fully* cooperate with the Receiver in the discharge of his duties under this Order. . . . Any such person who . . . thwarts or delays the Receiver's performance of his duties under this Order, shall be subject to contempt proceedings before this Court.

Paragraph IV provides in pertinent part as follows:

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

Paragraph IV does not say "some costs," or "costs for which funds have been appropriated;" or "those costs approved by the Defendants;" it says *all costs*. Because Defendants chose not to appeal from the OAR, the state is foreclosed from seeking to challenge it now. *Stone*, 968 F.2d at 857 n.11.[3]

Subsequent orders of this Court have served to flesh out the Receiver's remedial plans, the costs of which the state must bear. For the better part of two years, both the original Receiver and the current Receiver have emphasized that *very* substantial capital improvements would be required if the Receiver is to fulfill his duties under the OAR and both Receivers have been explicit about what those capital improvements would entail. The Receiver has emphasized that these capital improvements are not just preferable, they are essential to bringing prison medical care up to

[3] Recently, Defendants have made the astonishing claim that the "all costs" provision of Paragraph IV of the OAR applies only to the Receiver's "Duties" in Paragraph I of the OAR and therefore the state has no obligation to fund the capital projects. Exh. 3 to Dodd Decl., p. 4. This argument does not bear even minimal scrutiny. Paragraph I.A. provides that the "Receiver shall have the duty to control, oversee, supervise, and direct all administrative, personnel, *financial*, accounting, contractual, legal, *and other operational functions* of the medical delivery component of the CDCR." Paragraph II provides that the Receiver shall have "all powers necessary to fulfill the above duties" including power over "*financing*" (II.A.), and over "Property" (II.C). The latter includes the "*power to acquire, dispose of, modernize, repair, and lease property . . . as necessary to carry out his duties* under this Order. . . ." (Emphasis added.) It cannot be – and surely Defendants do not honestly contend – that this Court intended to require the state to fund the Receiver's "duties," but not the necessary exercise of his authority to accomplish those duties, including his authority over the acquisition of and construction on real property. Such a reading of the OAR is nonsensical.

Constitutional standards. It is not too much to say that the proposed capital projects are at the very heart of the Receiver's remedial plan. This Court has entered at least four orders waiving state law to permit the Facility Improvement project and the 5,000/10,000 Bed project to proceed. *See* Docket ## 700, 1026, 1292 and 1293. In addition, this Court approved the Turnaround Plan of Action, which specifically described both projects as key components of the Receiver's remedial plans and specifically emphasized that the Receiver's capital projects would cost roughly $7 billion. Docket # 1245. The cost has increased to approximately $8 billion based on new estimates of the cost necessary to construct facilities consistent with the remedial plans in *Coleman*, *Armstrong* and *Perez*, as well as *Plata*. The Turnaround Plan, this Court stated, is "the plan of action form moving this case forward." Id., p. 4.

Obtaining assurances that the projects will be funded is itself essential to the remedial plan. The Receiver is endeavoring to construct these very substantial projects using a design/build process that is unique for state projects. If funding is not assured, not only will the teams disassemble, the contractors, architects and the project managers may simply withdraw their interest. The teams cannot be expected to remain together, nor can the contractors and others be expected to forego other work and to continue to commit resources to such major projects, on the mere prospect that funding may be authorized in the future. If the design/build teams evaporate, then the Receiver's capital projects will be irreparably damaged and substantially delayed. It is the class members who will suffer.

The Receiver has made these points repeatedly and in different contexts as he has sought approvals for his capital projects and the waivers of state law necessary to move them forward. Not once have Defendants objected, complained or otherwise suggested that the Receiver's proposed capital projects were anything other than completely appropriate and necessary to bring the prison medical care system up to Constitutional standards. Surely, the combination of the "all costs" provision of the OAR, the various orders permitting the Receiver to enter into contracts to commence the capital projects and the order approving the Turnaround Plan to which Defendants acquiesced are sufficiently detailed and clear that the state knew and understood that it would be obligated to bear the current and future costs associated with them. Were it otherwise, the Court's

orders waiving state law and permitting the Receiver to proceed would be only so much paper.

2. The State has failed to fund the Receiver's capital projects.

There is no real dispute that the state has failed and refused to fund the Receiver's capital projects and is therefore failing to bear "all costs" of the Receiver's remedial plan. As described in detail above, the Receiver worked diligently to develop a legislative solution to obtain the necessary funding. After objection by the LAO – and despite the Receiver's best efforts to meet the LAO's objections – SB 1665 failed on two occasions. Thereafter, the Receiver made repeated efforts to work collaboratively and creatively with Defendants to find a mechanism consistent with state law to obtain the necessary funding – including contracts with or cooperation of the Controller on a "pay-as-you-go" basis and use of the Governor's emergency powers – but Defendants rebuffed those efforts.

Even so, the Receiver tried again. Rather than demand immediate payment of the full amount necessary to fund the capital projects, the Receiver requested that defendants Schwarzenegger and Chiang transfer to him only $70 million – a mere fraction of the amount that will ultimately be needed – to address immediate funding requirements and thereby keep the capital projects on track. Defendants failed to respond or to comply. *See* Exhs. 2 and 3 to Kelso Decl. As anticipated costs continued to mount, the Receiver sent Defendants Schwarzenegger and Chiang a letter, demanding that the State immediately allocate or make provision for the payment of $204.6 million to defray such costs through December 31, 2008. The Receiver was explicit that without such funding:

> my cash on hand for construction costs, as incurred, will be exhausted in October or November. This will likely cause my construction program management and design-build teams to stand down and disassemble, resulting in irreparable delays and thereby posing a grave threat to the health and safety of our inmate-patients. I will not, indeed cannot, let this occur.

Exh. 2 to Kelso Decl. Defendants claimed that they were without any method or ability to comply. Instead, they offered only their hope and expectation that a solution could eventually be found. Exh. 4 to Kelso Decl.; Exh. 5 to Dodd Decl., p. 2. But this much is clear: the state is no longer funding nor has it made provision to fund the Receiver's capital projects.

3. The state cannot rely on state law as a justification for failing to fund the Receiver's capital projects.

The foregoing is alone sufficient to show that Defendants should be held in contempt. Defendants will likely continue to claim that it was not possible for them to comply because the legislature has not appropriated monies for the Receiver's projects and, without such an appropriation, they are precluded from acting and potentially subject to individual liability. *See* Cal. Gov't Code § 12440; Exh. 2, p. 3 and Exh. 4, p. 3 to Dodd Decl. To rely on a defense of impossibility, however, the alleged contemnor must show "'literal physical impossibility of compliance.'" *Hook v. Arizona Dep't of Corrections*, 1997 U.S. App. LEXIS 8042, *18 (9th Cir. 1997). And it is settled that the fact that compliance with a federal court order contravenes state law does not render compliance "impossible."

A state or local law that has the effect of thwarting a federal court order enforcing federal rights "cannot survive the command of the Supremacy Clause of the United States Constitution." *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979). "Federal courts are not reduced to issuing (judgments) against state officers and hoping for compliance." *Hutto v. Finney,* 437 U.S. 678, 690 (1978). Thus, federal courts have uniformly concluded that a contemnor may not rely upon state or local law to justify noncompliance with a federal court order. "Otherwise valid state laws . . . cannot stand in the way of a federal court's remedial scheme if the action is essential to enforce the scheme." *Stone*, 968 F.2d at 862. Accordingly, "[u]nder the Supremacy Clause of the United States Constitution, a court, in enforcing federal law, may order state officials to take actions despite contravening state laws." *Spain v. Mountanos*, 690 F.2d 742, 746 (9th Cir. 1982). *See also Hook v. Arizona*, 907 F. Supp. 1326, 1342 (D. Ariz. 1995), *aff'd* 1997 U.S. App. LEXIS 8042 (9th Cir. 1997).

Defendants admit – as they must – that "when federal law places an obligation upon the state promptly to make payments of public funds, the Controller is authorized to make such payments independent of the enactment of an appropriation." Exh. 2 to Dodd Decl., p. 4. *See White v. Davis*, 108 Cal.App.4th 197, 223 (2002). Despite this recognition of the supremacy of this Court's orders, the state has not only failed to fund the Receiver's projects, Defendants have asserted that this

Court's orders do not compel them to fund the capital projects. Exh. 4 to Dodd Decl., p. 3.

It is plain, however, that Defendants' failure to comply is actually a *refusal* to comply and nothing more than a delay tactic. If Defendants were truly concerned that compliance with this Court's orders as written would subject them to liability under state law, nothing prevented them from (a) working with the Receiver to develop a mutually acceptable alternative funding plan and then (b) seeking approval from this Court of such a plan, with any and all necessary language to immunize them from liability under state law. Their failure even to attempt such an approach underscores that they have *chosen* not to comply with this Court's orders.

4. The state's alleged financial constraints cannot be used as an impediment to funding the Receiver's projects.

a. Financial difficulties do not justify noncompliance with Constitutional duties.

If states may not rely upon state law as a defense to compliance with federal court orders, neither may they rely upon financial constraints as a basis for failing to comply. Federal law has long been settled that "financial constraints may not be used to justify the creation or perpetuation of constitutional violations." *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 392 (1992). *See Stone*, 968 F.2d at 858 ("financial constraints do not allow states to deprive persons of their constitutional rights"); *Wright v. Rushen*, 642 F.2d 1129, 1134 (9th Cir. 1981) (same); *Battle v. Anderson*, 564 F.2d 388, 393, 396 (10th Cir. 1977) (same); *see also Newman v. Alabama,* 559 F.2d 283, 286 (5th Cir. 1977) ("compliance with constitutional standards may not be frustrated by legislative inaction or failure to provide the necessary funds"), *rev'd in part*, 438 U.S. 781 (1978).

As one court recently said, "[L]ack of financing is not a defense to the failure . . . to provide minimum constitutional standards in the operation of a . . . jail. . . Defendants are obligated to consider all reasonable options to comply with [the order], regardless of how costly or politically unattractive they may be." *Carty v. Dejongh,* 2007 U.S. Dist. LEXIS 23330, *63 (D.V.I. Feb. 27, 2007) (internal quotations and citations omitted). Otherwise, to allow "a governmental entity to plead budgetary constraints [would be to] allow[] it to second-guess the Court's determination of what the law requires and to argue, in essence, that it is exempt from constitutional standards." Kritchevsky, *Is There A Cost Defense? Budgetary Constraints as a Defense in Civil Rights*

Litigation, 35 Rutgers L.J. 483, 560 (2004).

b. The state has adequate financial resources to fund the Receiver's capital projects.

The state chose for decades to permit the prison medical system to rot and decay. That the state is faced with the financial consequences of those years of neglect at a time when the budget is otherwise constrained is surely unfortunate, but it does not relieve the state of its obligation to make provision *now* for the funds necessary to comply with this Court's orders.[4] Nor are the state legislative and executive branches without some measure of blame for the financial circumstances in which the state now finds itself; the state's budgetary problems did not arise overnight.

Even so, the state is not penurious and cannot credibly claim that it "ha[s] insufficient funds and [is] financially incapable of making the payments." *Hook*, 1997 U.S. App. LEXIS 8042 at *18. For example, the legislature appropriated $300 million as part of AB 900 "to renovate, improve, or expand infrastructure capacity at existing prison facilities." Public Safety and Offender Rehabilitation Services Act of 2007, § 28. The Receiver understands that only a small portion of these already appropriated funds has been expended. None, however, has been offered to the Receiver, despite the Receiver's repeated requests for funding of a similar nature.[5]

Moreover, the state admittedly has billions of dollars in internal "borrowable resources" and tens of billions more sitting in investment accounts. Exh. 3 to Dodd Decl., pp. 8-9; Exh. 4 to Dodd Decl. and Exh. 1 thereto. The SMIF – an investment account with more than $31 billion in assets – is potentially available to be loaned to the General Fund if the General Fund is exhausted. Cal. Gov't Code § 16130. Interest on funds held in the SMIF is accruing at the rate of more than $1 billion per year. Exh. 4 to Dodd Decl., p. 6. Cash held in special funds is and has been regularly borrowed by the General Fund without any particular time horizon for repayment. *E.g.*, Exh. 3 to

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[4] Nearly 40 years ago, another judge faced with unconstitutional conditions in a state's jails had this to say:

> Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970).

[5] Although "infrastructure" is not defined in AB 900, the legislature has elsewhere defined "infrastructure" to mean "real property, including land and improvements to the land, structures and equipment integral to . . . structures . . . ." Cal. Gov't Code § 13101.

Exh. 4 to Dodd Decl. The state has not offered to borrow from such sources to fund the Receiver's capital projects.

Defendant Chiang acknowledges on his website (*see* www.sco.ca.gov) that, even in the absence of a budget, the state will have expended roughly $35-40 billion in July and August 2008 alone to comply with a host of pre-existing funding obligations. He states:

> As the State of California's chief fiscal officer, I have created this new web page to outline what bills my office can and cannot pay if a State budget isn't enacted by July 1, the beginning of the new fiscal year. *Please be assured that I will do everything within my authority to continue to provide payments for essential services.* For example, my office can continue to make the following payments:
>
> - Federally-mandated services such as Supplemental Security Income/State Supplementary Payment (SSI/SSP), and In-Home Support Services.
> - Debt service and other payments required by the State Constitution.
> - Payroll for state employees covered by the Federal Fair Labor Standards Act.
> - Vendor payments for services provided in the last fiscal year.
> - Expenses with ongoing appropriations from the Legislature, including Medi-Cal, CalWORKs, income tax refunds and payments on claims for unclaimed property.

(Emphasis in original.)

Despite Defendants' recognition that compliance with federal law does not require a specific appropriation from the legislature, despite the clear provisions of Paragraph IV of the OAR and the many other orders of this Court authorizing and approving the Receiver's capital projects, and despite the Receiver's specific requests for funding, notably absent from the Controller's list of "must pays" is any provision to fund the Receiver's specific and ongoing needs. No doubt the payments the Controller will continue to make are required and cannot be avoided. But what this Court should emphasize to Defendants is that compliance with the OAR is equally required and cannot be avoided.

5. Defendants have failed to take all reasonable steps to comply with this Court's orders.

Without exception, the answer the state has given to the Receiver's funding suggestions has been, in effect, "Sorry. Not possible. Nothing we can do. Our hands are tied." And, as if to add insult to injury, Defendants have continued to assert that "the way to fund the Receiver's proposed construction projects is to obtain authorization from the California Legislature" and to point to ***SB 1665*** as the sort of legislative authorization to which they are referring. *See* Exh. 2 to Dodd Decl.,

p. 1; Exh. 4 to Dodd Decl., p. 3. Similarly, both the Governor and Controller express only their hope that a solution involving bond financing consistent with state law can be achieved. Exhs. 4 and 5 to Kelso Decl.

While such a solution would certainly be welcome, the Receiver cannot continue to wait for the state to do what it should have done months ago, particularly given the confusion engulfing the state legislature as it struggles to adopt a budget. Thus, Defendants' failure to develop a funding strategy to submit for this Court's approval and their admonition that the Receiver should just redouble his efforts to seek a legislative solution demonstrate the extent to which the Defendants do not take *their* obligation under the OAR seriously enough. It is *they* who are obligated under the OAR and it is *their* failure to comply with the Receiver's requests that is threatening the Receiver's ability to bring the prison medical system up to Constitutional standards. Defendants' vow to continue to work with the Receiver and the legislature to arrive at a solution is "only evidence [of] Defendants' attempt to comply with [state law] *not* with the court's orders to pay" the costs necessary for the Receiver's remedial plans. *Hook*, 907 F. Supp. at 1342 (emphasis in original). Their failure to act in the face of the legislature's failure to act underscores that the bureaucratic foot dragging, finger pointing and institutional paralysis that led to the appointment of the Receiver in the first instance still rules the day in Sacramento.

The Receiver submits that Defendants specifically and the state generally have failed to make "every reasonable effort to comply" (*Stone,* 968 F.2d at 856 n.9) with the requirement to fund the Receivership's capital needs. By failing and refusing to provide or make provision for the funding the Receiver will require, Defendants have violated and are continuing to violate Paragraph IV of the OAR. In addition, Defendants Schwarzenegger and Chiang are failing and refusing to cooperate *fully* with the Receiver and are thereby thwarting and interfering with the performance of his duties in violation of Paragraph VI of the OAR. Defendants are in contempt and the Court should act, and act forcefully, to ensure that Defendants respect, and comply with, the OAR.

B. The Court Has Broad Discretion To Punish The Defendants' Contempt And Otherwise To Enforce Its Orders.

The Court has broad equitable powers and the choice of remedies is within the Court's

discretion. *Stone*, 968 F.2d at 861. Although considerations of federalism and federal-state comity must weigh in the balance when federal courts impose remedies on state and local governments (*Rizzo v. Goode*, 423 U.S. 362, 379 (1976)), and federal courts should "exercise the least possible power adequate to the end proposed" (*Spallone v. United States*, 493 U.S. 265, 276 (1990)), "when the least intrusive measures fail to rectify the problems, more intrusive measures are justifiable." *Stone*, 968 F.2d at 861.

1. The Court can order the Controller to draw warrants on the State's accounts to fund the Receiver's programs.

This Court can require the state to expend funds, even a substantial amount of funds, ancillary to the equitable remedies required to bring the prison system up to Constitutional standards. *Milliken v. Bradley*, 433 U.S. 267, 289 (1977). Moreover, courts may compel contemnors to "perform affirmative acts, even acts not required by the initial [order]." *Carty*, 2007 U.S. Dist. LEXIS 23330 at *88 (internal quotations and citations omitted). Thus, federal courts faced with refusals by state and local governments to pay judgments have simply ordered state and local officials to pay, even where such orders contravened state law.

In *Spain*, 690 F.2d 742, for example, plaintiff had been awarded a judgment of attorneys fees pursuant to 42 U.S.C. § 1988 against the State of California. The Attorney General submitted a claim to the State Board of Control for funds to pay the award and the Board of Control in turn submitted the claim to the state legislature to be included in an omnibus appropriations bill. Although the Assembly approved the appropriation, the Senate specifically refused to do so and the appropriation was deleted from the final bill. The district court joined the Controller as a party-defendant and then ordered the Controller to draw warrants on the state treasury in the amount of the award, despite the lack of an appropriation.

The Ninth Circuit affirmed, stating that "under the extraordinary circumstances here where the judgment is against a state, which refuses to appropriate funds through the normal process provided by state law, the district court should not necessarily be reduced to satisfying a judgment through the cumbersome procedure of attempting to execute against state property or bank accounts. It may, instead, pursue *any* remedy provided in Rule 69 or Rule 70 to enforce the award, including

ordering state officials to pay." *Id.* at 745 (emphasis added).

Cases from other circuits are in accord. *See Collins v. Thomas*, 649 F.2d 1203 (5th Cir. 1981), *cert. denied* 456 U.S. 936 (1982) (defendant sheriff must pay attorney fee award from county funds, despite state law prohibiting execution of judgments against counties); *Gary W. v. Louisiana*, 622 F.2d 804, 807 (5th Cir. 1980), *cert. denied* 450 U.S. 994 (1981) (state agency must pay money judgment from its funds, despite provision of state constitution prohibiting payment of judgments except from funds appropriated for such purpose); *Gates v. Collier,* 616 F.2d 1268 (5th Cir. 1980) (district court within its authority in ordering state auditor to issue warrant upon the state treasurer and ordering state treasurer to satisfy judgment). *See also Arnold v. BLaST Intermediate Unit 17*, 843 F.2d 122 (3d Cir. 1988) (writ of mandate issued to compel quasi-public agency to pay judgment, despite fact that funds for judgment not budgeted or authorized).

Defendants have declined to transfer the necessary funds to the Receiver, contending that absent an appropriation from the legislature or a court order, it would be unlawful for them do so. This Court should accept Defendants' invitation and order Defendant Chiang to draw warrants on the state treasury sufficient to pay the amounts required by the Receiver currently *and going forward.* To the extent that the General Fund is exhausted and borrowing from other funds is required to comply with this Court's orders and the Receiver's needs, the Court should also waive any state laws that may restrict the state's ability, absent an appropriation, to borrow internally from special funds, including the SMIF, for the benefit of the Receivership. *United States v. Government of Guam*, 2008 U.S. Dist. LEXIS 5450, *12-15 (D. Guam, Jan. 24, 2008)(voiding local law that interfered with funding of remedial project); *Hook,* 907 F. Supp. at 1341-1342 (same).

2. The Court may impose coercive fines as a remedy for contempt.

A number of courts have imposed coercive fines on state and local governments as a remedy for continued failure to comply with the courts' orders. *See, e.g., Alberti v. Klevenhagen,* 46 F.3d 1347, 1360 (5th Cir. 1995) ($50.00 daily coercive contempt fines for each inmate over population cap); *Marion County Jail Inmates v. Anderson*, 270 F.Supp.2d 1034 (where existing facility overcrowded and defendant failed to obtain beds from another facility, fines of $40 per day per unfilled bed until all beds filled; $40 per day per unfilled bed until sufficient staff hired; $40 per

inmate per day until population reduced to appropriate levels); *Essex County Jail Inmates v. Amato,* 726 F.Supp. 539, 550 (D.N.J. 1989) (fines exceeding $3 million for violations of population and exercise provisions). Of particular significance here, "the court may exercise its equitable power and order that the sanction be used to remedy the problems underlying the contempt finding." *Carty*, 2007 U.S. Dist. LEXIS 23330 at *87. Thus, courts have required that fines be placed in court controlled accounts and the funds used to remedy the constitutional violation if the defendants continue to fail to comply. *See, e.g., Stone*, 968 F.2d at 853-854; *Marion County Jail Inmates*, 270 F.Supp.2d at 1039.

To be effective, fines must be sufficiently onerous that compliance is preferable to noncompliance. In *Flores v. Arizona,* 405 F.Supp.2d 1112 (D. Ariz. 2005), *vacated on other grds* 204 Fed. Appx. 580 (9th Cir. 2006) , for example, the plaintiffs sued the State of Arizona for failing to obtain funding for the English Language Learners ("ELL") program, as earlier ordered by the court. Specifically, the court had ordered the legislature to enact legislation to fund the program. Although it did so, the legislation was vetoed by the governor, and continual fighting between the branches impeded the passage of further legislation. The court stated that whether or not the legislative or executive branch was right or wrong, and whether or not either had acted in good faith was irrelevant, because nearly six years had passed since the court had issued its original order requiring the state to establish adequate funding for ELL programs. *Id.* at 1114. The *Flores* court held defendants in contempt and imposed a series of increasingly coercive fines for noncompliance, commencing at $500,000 per day and escalating to $2 million dollar per day as time went by without compliance.

In view of the substantial sums necessary to fund the Receiver's capital programs, the Receiver suggests that any fine imposed by this Court should commence at no less than $2 million per day and should increase substantially over time until the state complies. Moreover, the Receiver suggests that such fines should be held in a Court-controlled account for potential release to the Receiver as and when necessary.

3. In addition to the remedies above, the Court should sequester available state funds to ensure the Receiver's capital projects are funded.

In addition to ordering payments and imposing fines, federal courts faced with non-complying state and local governments have exercised their equitable powers to preclude state and local governments from using available financial resources for purposes other than to remedy the violations of the federal right at issue. *See, e.g., United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977)(district court properly enjoined payment of federal revenue sharing funds to defendant pending compliance with court's order); *Marion County Jail Inmates*, 270 F.Supp.2d at 1039 (defendants must account to court for use of specific funds to ensure funds "are devoted to the upkeep of the jail facility and are not being diverted to other governmental uses"); *see also* FRCP 70(c)(court may issue writ of attachment or sequestration to ensure compliance with court order).

The state does not lack for financial resources that could be utilized to fund the Receiver's capital projects. The Receiver suggests therefore that the Court select a source of funds, such as the investment earnings and interest derived from the billions held in the SMIF, and enjoin the state from allocating those earnings to the constituent funds or expending or encumbering them and requiring that they be held in reserve for the Receiver pending compliance by the state with the OAR. The state can continue to invest and reinvest the earnings, and eventually the funds can be returned to full control of the state when the state provides evidence to the Court that it is otherwise funding the capital projects.

IV. CONCLUSION

The Receiver requests the following orders:

1. An order finding Defendants in contempt, and imposing fines against Defendants to be paid into a Court-controlled account, commencing immediately at not less than $2 million per day, and escalating in the amount of $1 million per day at 10-day intervals thereafter until Defendants establish to the satisfaction of the Court that the Receiver's capital programs *will* be funded in full.

2. An order permitting the Receiver to request payment from the above referenced Court-controlled account as necessary until Defendants have demonstrated to the satisfaction of the Receiver and the Court that full funding Receiver's capital programs will be provided.

3. An order enjoining and restraining Defendants and all persons acting in concert with them from allocating the investment earnings derived from the funds in the SMIF to the constituent funds therein and from expending or encumbering such earnings for any purpose other than the Receiver's capital projects without authorization from the Court.

4. An order waiving Article XVI, § 7 of the California Constitution and California Government Code §§ 12440, 13324, 13332, 16300, 16304, 16310, 16381, 16383, 16384, 16740-16746, 17241, 17300 to the extent necessary to permit the state to transfer funds to the Receiver.

5. An order requiring Defendant Chiang to submit to the Court, within three business days, a plan to draw warrants on the state treasury sufficient to pay the Receiver's needs for his capital projects commencing immediately, and continuing until the Receiver's capital programs are completed.

6. An order requiring Defendants, and each of them, to notify the Receiver and this Court in writing within three days of any other state law or regulation they believe should be waived to effectuate the orders set forth above.

The Receiver also requests an interim order that compels Defendants Schwarzenegger and Chiang, and the Director of Finance, Michael Genest, to appear and be prepared to testify concerning the matters at issue in this motion at the hearing calendared for September 22, 2008. As the Court is aware, during the long course of this litigation, argument has been presented by counsel representing the state that has not always proved helpful to the remedial process. Having Defendants and Mr. Genest available for testimony until this motion is submitted will help ensure the issues raised herein are addressed in a timely and appropriate manner.

Dated: August 13, 2008

FUTTERMAN & DUPREE LLP

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

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 August 13, 2008, I served a copy of the following document(s):

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

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

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

Executed on August 13, 2008 at San Francisco, California.

Lori Dotson