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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 **DECLARATION OF JOHN HAGAR IN SUPPORT OF RECEIVER'S MOTION FOR WAIVER OF STATE LAW RE RECEIVER CAREER EXECUTIVE ASSIGNMENTS**

I, John Hagar, declare as follows:

1. I am currently the Special Master in *Madrid v. Tilton* and have been engaged as Chief of Staff for Receiver Robert Sillen in the *Plata* case. I make this declaration in support of the Receiver's motion for an order waiving State law to permit the Receiver to develop a position to be called Receiver Career Executive Assignment ("RCEA") and to hire up to 250 employees to fill RCEA positions throughout the prison health care system. The facts set forth herein are based upon my own personal knowledge or upon information and belief based upon my investigation into this matter.

2. In my capacity as Chief of Staff for the Receiver, I have general operational oversight of most of the ongoing activities of the receivership and regularly confer with the Receiver and other staff members regarding those activities to ensure that the Receiver's goals and directives are being implemented.

3. I have reviewed the "Response Of State Personnel Board To Receiver's Amended Motion For Waiver Of State Law Re Receiver Career Executive Assignments" and "Plaintiffs' Response To Receiver's Amended Motion For Waiver Of State Law Re Receiver Career Executive Assignment Positions" filed and served in this matter. While the State Personnel Board ("SPB") and plaintiffs each claim to support the Receiver's need to recruit highly skilled and competent personnel, the objections raised by these respondents indicate that they have, at best, an imperfect understanding of the Receiver's proposal. Those objections are addressed below.

4. The SPB seems wary of the Receiver's proposal generally, implying that the creation of non-tenured RCEA positions will somehow work a dramatic change within the State personnel system. Not so. The Receiver's Motion has been narrowly drawn and the RCEA position departs only modestly from State law limiting competition for Career Executive Assignment ("CEA") positions to (a) permanent civil servants; and (b) non-civil service legislative and exempt employees. *See* Cal. Gov't Code §§ 18546, 18990, 18992 and 19889.3. CEA assignments are non-tenured, *i.e.*, "at will" and do not confer permanent status. Cal. Gov't Code §§ 19889.2, 19889.3. The only change to this

legislative scheme that the Receiver requests is to open up competition for the RCEA positions to any and all qualified applicants, including those from outside the State service, so that the best person for the job may be hired.

5. Any employee hired as an RCEA from outside the State service will, upon termination of their assignment, be required to compete successfully in a civil service examination if such employee wishes to attain permanent civil service status. It follows from the foregoing that such employees will be "at will," with no right to continue in their positions, and no preference in hiring or promotion to other positions over permanent civil service employees during or after their employment in the RCEA position. In other words, the Receiver already contemplates that the RCEA position will have many of the characteristics that the SPB requests – unnecessarily – that this Court impose on the position. SPB Response, p. 9:22-25.[1]

6. Eliminating the barriers that currently prevent the Receiver from hiring the best candidates for the job – as determined by a competitive examination – is the crux of the RCEA Motion because, as the Receiver has determined and as the long history of this case affirms, there are no, or virtually no, State employees with the skills, commitment and experience needed for RCEA jobs. The "at will" character of the positions serves the secondary purposes of (a) creating a cadre of executives who will, by necessity, be motivated to implement the Receiver's remedial program lest they be terminated; and, (b) providing the Receiver greater flexibility to engage in staffing changes as needs and circumstances demand. The Receiver and his staff have determined that without this flexibility, his plan cannot be implemented in a timely and cost effective manner.

[1] The SPB's unnecessary proposal is coupled with a request that employees in RCEA positions have "none of the statutory rights that apply to CEAs. . . ." Based on my extensive discussions with the SPB prior to the filing of this Motion, I believe that this overly broad request is a veiled attempt by the SPB to override California pension statutes as they may apply to RCEAs. Indeed, read literally, the SPB's startling request could mean, for example, that RCEAs would be ineligible for Family Medical Leave, ineligible for medical benefits and have no protection from unlawful discrimination.

7. It must also be emphasized, though, that the Receiver does not seek to waive State law concerning the support role that should be played in the RCEA process by SPB and the Department of Personnel Administration ("DPA"). The Receiver intends to work with both agencies to develop a number of different RCEA positions, including finding alternative assignments for State employees who may be displaced by the RCEA program (if such displacements in fact occur), reviewing job qualifications, establishing realistic health care salaries and the like, and to commence pilot projects at a limited number of California prisons before expanding the program statewide.

8. The SPB reacts especially negatively to the Receiver's suggestion that he may hire as many as 250 RCEAs, as if the number of appointments would constitute a watershed event for the State personnel system. Again, the SPB is unnecessarily alarmed. In an effort to be transparent, the Receiver believed it important to provide at the outset his best estimate of the total number of RCEAs he will need. The estimate of 250 was derived by assuming four RCEA for each of the 33 CDCR prisons, and then adding a sufficient number of regional and central office executives. This estimate may change; for example, with plans to pilot smaller regional offices, it may be possible to limit the number of RCEAs at prisons in close physical proximity to one another.

9. The Receiver faces unprecedented challenges in his attempt to bring the California Department of Corrections and Rehabilitation ("CDCR") prison medical delivery system up to constitutional standards. No one, not even SPB, disputes the fact that highly skilled, competent staff is needed to bring about this transformation. Other State agencies do not face challenges even remotely comparable to those confronting the CDCR. Nevertheless, the data shows that, not only are CEAs common throughout the State, other State agencies have relatively greater CEA support than will the CDCR *even if the Receiver appoints all 250 RCEAs.*

10. I asked the Receiver's staff to gather data about CEA positions within State agencies generally. Information reflecting the number of employees in each agency is contained in the Governor's budget proposal for the next fiscal year and the DPA provided the number

of CEA positions within each agency. This information, which has been compiled in the spreadsheet attached as Exhibit 1 hereto, demonstrates that at the agency level the number of CEAs, expressed as a percentage of the labor force, ranges from .007% to 1.1%. The median is .72%. At .2%, CDCR currently has the second lowest CEA utilization rate of any agency. Even if the Receiver fills all 250 RCEA positions, the CEA and RCEA positions would comprise only .57% of the CDCR labor force, *i.e.*, still well below the median for all State agencies. The CEA utilization rate at the department level varies even more widely. In some departments, CEAs comprise a vastly greater percentage of the labor force than in CDCR. The SPB, for example, operates with a percentage of CEAs *fifteen times greater* than CDCR.

11. The SPB also implies that RCEA positions recommended by the Receiver may not have the "high administrative and policy influencing character" required by Gov't Code § 18547. Nothing could be further from the truth. This claim ignores the abject state of the CDCR; ignores a culture of despair and defeat that affects many of the prison system's 65,000 employees; disregards the high level leadership that will needed to turn the present horrid situation around; ignores the size and widespread location of CDCR prisons; and, indicates a lack of understanding of the number of managers and executives needed to run a medical delivery system as huge and complex as that in the CDCR.

12. The SPB suggests that less "intrusive" alternatives to the Receiver's proposal would be to require the Receiver to hire existing State employees only into these key managerial positions and/or to afford new hires permanent civil service status after a probationary period. These "alternatives" are unworkable. First, as indicated above, there is an insufficient number State employees qualified for the RCEA positions. Second, the SPB's suggestion that RCEAs hired from outside the State service be given permanent civil service status is inconsistent with the California statutes providing that CEA positions be "at will." Third, and most importantly, the "due process" requirements that flow from the SPB's "alternatives" will place an additional burden on the Receivership which, in my opinion, threatens the entire the *Plata* remedial program. In my capacity as

Special Master in the *Madrid* case, I have monitored and tracked the SPB discipline process for more than 10 years. SPB has not provided adequate control over the employee discipline process; a lack of control which has, on occasion, rendered that process all but meaningless. The SPB policies and procedures, which are part and parcel of the "trained incompetence" that led to the Receivership, are simply not appropriate for personnel who will be assigned to high administrative and policy influencing positions. If the Receiver is not freed of the paralysis which the SPB's policies and procedures impose on California government, it may well be impossible to develop the necessary management team which will bring medical care up to constitutional standards.

13. Turning to the plaintiffs' Response, I note that plaintiffs agree with the Receiver that "there is a compelling need for adequate medical managers" and agree in principle "that using RCEA positions is an appropriate strategy for obtaining those managers." Plaintiffs, however, object to the Receiver's Motion, arguing that it is too vague and apparently assume that the Receiver will rush out and hire all 250 RCEAs without adequate preparation. These concerns are unfounded.

14. While the Receiver agrees with plaintiffs that the process to establish RCEAs should be "timely" and "transparent," the Receiver believes a third criterion is equally important: the RCEA process must also be "responsible." It would be infeasible, not to mention irresponsible, for the Receiver to prepare "job qualification requirements, a description of their duties, and an overall statewide medical manager organizational structure for the proposed RCEA positions" in 30 days as plaintiffs demand.

15. After careful review and analysis by his staff, the Receiver has concluded that the placement of RCEAs in specific prisons will be based on the model developed by Mercer Corporation following its exhaustive assessment and comparison of alternative, functioning health care delivery systems at Kaiser, Santa Clara County, the Veterans Administration, the Federal Bureau of Prison, and Tenet Healthcare. Mercer's proposed organizational model for CDCR prisons included as Exhibit 1 to the Receiver's Motion. Five years of remedial failure under the existing dysfunctional CDCR medical delivery

model is experience enough that significant changes are necessary. Without the organizational structure proposed by Mercer, and without RCEAs to fill key leadership positions, it will be impossible to provide the leadership necessary to bring California's massive and broken prison health care system back into constitutional compliance.

16. There are no plans to fill the RCEA positions immediately, however; in fact, the Receiver has requested funding for only 100 RCEAs in his next fiscal year's budget. And, even if the Receiver had budgeted for all 250 RCEA positions, he is not yet ready to begin hiring or even to say precisely what each position will entail. Instead, the responsible implementation of the RCEA proposal will require the following steps:

    a. coordination with *Coleman*, *Perez* and *Armstrong*;
    b. working with the SPB and DPA to establish positions and salaries;
    c. pilot projects at a limited number of California prisons;
    d. an appropriate recruitment and retention program; and,
    e. the timely but careful filling of high level regional and central office positions.

17. The pendency of several different class action cases, all of which involve the delivery of health care in California's prisons, presents the threat of establishing silos of health care delivery. That, in turn, may lead to non-communicative, duplicative, and overly expensive remedial efforts. In an effort to coordinate their remedial efforts, the Receiver, the Special Master in *Coleman* and the Court representatives in *Perez* and *Armstrong* meet every month to discuss a formal agenda of coordination issues. The question of the "governance" of CDCR health care has been discussed generally, and will be the primary topic for discussion at the June 2007 meeting. *The Receiver does not plan to move forward with top executive RCEA positions until appropriate efforts are made to coordinate this issue.* For example, should the prison specific Chief Executive Officer have authority over mental health and dental as well as medical? In a normal health care organization he or she would; however, given the existence of four class actions, this decision calls for discussion and agreement. Until these discussions take place, it would

be premature to produce detailed executive level job descriptions, to commence formalized salary surveys, etc.

18. As noted several times, the Receiver will approach actual implementation of the RCEA positions in specific prisons on a pilot basis. The initial plans call for three pilot prisons to begin to convert to the RCEA organization by Summer 2007. After pilot programs are established and measured, the prison element of the RCEA project will be expanded.

19. The Receiver also plans initially to utilize RCEA positions for higher level appointments in his Nursing and Physician operation. However, each new position, *e.g.*, the regional director of nursing position, will require extensive work, including cooperating with SPB, developing duty statements, obtaining relevant salary surveys, working with DPA to establish the salary for each specific position, recruitment, and hiring.

20. The Receiver was appointed because the stipulated statewide roll-outs and policies approved by defendants and plaintiffs failed. Plaintiffs' request for job qualifications and organizational structures – in contrast to the Receiver's plan to coordinate and use pilots to implement this project – amounts to putting the cart before the horse and is reminiscent of the same "statewide" roll outs which led to the collapse of the prison medical delivery system. Likewise, plaintiffs' argument for a *Madrid*-like order concerning RCEAs represents, in my opinion as the *Madrid* Special Master, a giant step backwards.

21. The challenge facing the Receiver is not a simple one. The Receiver should be allowed to proceed ahead as a Receiver, and to implement his staged, coordinated RCEA program in the manner that he and his staff deem most appropriate, without the constraints suggested by the SPB or the sort of rigid procedural requirements suggested by plaintiffs.

22. The Receiver will communicate to the Court about the status of this project. Given the concern which has been expressed, the Receiver recommends that he file an initial special report regarding the status of the RCEA project in ninety days and a second report in 180 days.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 25, 2007

/s/
John Hagar

I hereby attest that I have on file all holograph signatures for any signatures indicated by a "conformed" signature (/s/) within this efiled document.

Martin H. Dodd
Attorneys for Receiver Robert Sillen

EXHIBIT 1

State Agencies	May 07 Revised Total Positions	Number of CEA Positions May 07	%
K thru 12 Education	**2,914.60**	**31**	**1.1**
Education, Secretary	17.60		
Department of Education	2,525.70	21	0.83
State Library	191.60	6	3.1
Commission on Teacher Credentialing	162.40	3	1.8
Education Audit Appeals Panel	4.30	1	23
Higher Education	**120,419.0**	**8**	**0.007**
University of California	74,851.90		
California State University	44,916.40		
Board of Governors of Community Colleges	152.4	3	1.9
Student Aid Commission	191.9	3	1.6
Postsecondary Education Commission	21.2	2	9.4
Health and Human Services	**33,038.30**	**236**	**0.71**
Health and Human Services, Secretary	217.20	6	2.8
State Council-Developmental Disabilities	102.2	1	1
Statewide Health Planning & Development	412.4	7	1.7
Department of Aging	135	2	1.5
Department of Alcohol & Drug Programs	343.5	13	3.8
Department of Health Care Services	3,011.40	42	1.4
Department of Public Health	3,247.90	0	
Managed Risk Medical Insurance Board	87.00	7	8
Department of Developmental Services	7,711.00	47	0.6
Department of Mental Health	10,947.20	43	0.4
Department of Rehabilitation	1,862.80	7	0.38
Department of Child Support Services	550	15	2.7
Department of Social Services	4,215.50	40	0.9
Children & Families Commission	0.00	5	
Dept of Community Services & Development	109	1	0.92
Corrections and Rehabilitation	**65,915.40**	**123**	**0.2**
	Including 250 proposed RCEAs	**373**	**0.57**
Business, Transportation & Housing	**43,775.90**	**187**	**0.43**
Business Transportation & Housing, Secretary	63.6	5	7.9
Department of Alcoholic Beverage Control	459.2	4	0.9
Department of Financial Institutions	224.1	6	2.7
Department of Corporations	300.7	5	1.7
Dept of Housing & Community Development	597.2	4	0.7
California Housing Finance Agency	277.4	6	2.2
Department of Real Estate	336.5	7	2.1
Department of Managed Health Care	297.3	10	3.3

EXHIBIT 1

Department of Transportation	21,823.50	89	0.4
California Transportation Commission		1	
Dept of the California Highway Patrol	11,012.00	7	0.06
Department of Motor Vehicles	8,286.60	41	0.5
High-Speed Rail Authority	6.50	1	15.4
Office of Real Estate Appraisers	26.2	1	3.8
Resources	**16,604.90**	**146**	**0.88**
Resources, Secretary	77.3	7	9
California Conservation Corps	307.7	6	1.9
Energy Resource Conservation & Development Commission	534.8	16	3
Department of Conservation	680.3	11	1.6
Department of Forestry & Fire Protection	5,777.60	18	0.3
State Lands Commission	211.5	9	4.3
Department of Fish & Game	2,358.70	24	1
Coastal Commission	144.9	10	6.9
State Coastal Conservancy	76.7	3	3.9
Department of Parks & Recreation	3,221.20	19	0.6
Department of Water Resources	2,943.60	18	0.6
Department of Boating & Waterways	79.6	1	1.3
Tahoe Conservancy	48.4	1	2.1
Colorado River Board of California	11.3	1	8.8
SF Bay Conservation & Development Comm	41.8	2	4.8
Environmental Protection	**4,812.70**	**81**	**1.7**
Environmental Protection, Secy	68.6	10	14.6
Air Resources Board	1,170.50	18	1.5
Integrated Waste Management Board	466.8	9	1.9
State Water Resources Control Board	1,595.60	16	1
Department of Toxic Substances Control	1,024.60	17	1.7
Environmental Health Hazard Assessment	118.9	5	4.2
Department of Pesticide Regulation	367.7	6	1.6
State and Consumer Services	**16,121.20**	**143**	**0.89**
State & Consumer Services, Secy	23.7	2	8.4
Department of Consumer Affairs, Boards	1,351.30	18	1.3
Department of Fair Employment & Housing	228.2	2	0.88
Franchise Tax Board	5,197.40	44	0.85
Department of General Services	3,781.70	17	0.45
Victim Compensation/Government Claims Bd	297.2	5	1.7
State Personnel Board	161.3	5	3.1
Public Employees' Retirement System	1,962.20	33	1.7
State Teachers' Retirement System	778.1	7	0.9
Department of Technology Services	770.6	10	1.3
Labor and Workforce Development	**11,498.30**	**56**	**0.49**
Labor & Workforce Development, Secy	14.2	3	21.1
Employment Development Department	8,685.70	38	0.44
Department of Industrial Relations	2,739.00	15	0.55
General Government	**13,468.00**	**97**	**0.72**
Peace Officer Standards & Training Comm	117.8	5	4.2

Department of Personnel Administration	237.7	8	3.4
Workers' Compensation Benefits	6,768.00		
Department of Food & Agriculture	1,902.10	14	0.74
Public Utilities Commission	980.3	21	2.1
Fair Political Practices Commission	78.1	4	5.1
Bureau of State Audits	147	5	3.4
Department of Finance	541.7	27	5
Department of Veterans Affairs	1,619.00	7	0.43
Horse Racing Board	57.9	1	1.7
Electricity Oversight Board	21.9	1	4.6
Public Employment Relations Board	44	4	9.1
Legislative, Judicial, and Executive	**16,386.60**	**180**	**1.1**
Legislative Counsel Bureau	623	12	1.9
Office of Emergency Services	592.8	4	0.67
Department of Justice	5,544.60	60	1.1
State Controller	1,242.30	16	1.3
Department of Insurance	1,272.90	14	1.1
California Eathquake Authority		1	
State Board of Equalization	3,800.50	30	0.79
Secretary of State	477.3	9	1.9
State Treasurer	230.4	15	6.5
California Debt Advisory Commission		1	
California Health Facilities Authority		1	
California Pollution Control Financing Authority		1	
Gambling Control Commission	76	5	6.6
State Lottery Commission	0	11	
Miscellaneous State entities w/CEAs			
California Exposition and State Fair		1	
Commission on Government Organization & Economics		1	
Commission on State Mandates		1	
High-Speed Rail Authority		1	
Museum of Science and Industry (California Science Center)		4	
Office of Systems Integration		3	

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 May 25, 2007, I served a copy of the following document(s):

DECLARATION OF JOHN HAGAR IN SUPPORT OF RECEIVER'S MOTION FOR WAIVER OF STATE LAW RE RECEIVER CAREER EXECUTIVE ASSIGNMENTS

by placing true copies thereof enclosed in sealed envelopes, for collection and service pursuant to the ordinary business practice of this office in the manner and/or manners described below to each of the parties herein and addressed as follows:

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

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

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

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

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Dated: May 25, 2007

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