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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 RECEIVER'S MOTION FOR ORDER MODIFYING STIPULATED INJUNCTION AND OTHER ORDERS ENTERED HEREIN

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL:

PLEASE TAKE NOTICE that Receiver Robert Sillen ("Receiver") hereby moves the Court, pursuant to Paragraph I.B of the Order Appointing Receiver, dated February 14, 2006, for an order modifying the Stipulation For Injunctive Relief, entered herein on June 13, 2002 ("Stipulated Injunction"), the Stipulated Order Re Quality Of Patient Care And Staffing, entered herein on September 13, 2004 ("Patient Care Order") and the Order Re Interim Remedies Relating To Clinical Staffing, entered herein on December 1, 2005 ("Clinical Staffing Order"). The Stipulated Injunction, Patient Care Order and Clinical Staffing Order shall be referred to collectively as the "Subject Orders." A briefing schedule and hearing date, if any, shall be established by the Court.

The specific aspects of the Subject Orders as to which the Receiver requests modification are set forth below in Section B.2 of the Memorandum of Points and Authorities and incorporated by reference herein.

The motion will be made on the grounds that, pursuant to its equitable discretion and FRCP Rule 60(b), the Court may modify the Subject Orders on the basis of changed and unexpected circumstances. Such changed circumstances include the failure of the defendants fully to comply with the Subject Orders, the subsequent appointment of the Receiver, and the fact that specific provisions of the Subject Orders are unnecessary in light of, or inconsistent with, the Receiver's Plan of Action or are impeding or will impede the Receiver's ability to implement the Plan of Action.

The motion will be based on this Notice, the Memorandum of Points and Authorities and Declaration of John Hagar, filed herewith, on all the pleadings and papers on file herein, and on such further and additional evidence as may be presented at any hearing on this motion.

ISSUE TO BE DECIDED

Should the Court modify the Subject Orders in light of the appointment of the Receiver, and to facilitate implementation of the Receiver's Plan of Action?

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

In its order, dated February 14, 2006 appointing the Receiver ("Receivership Order"), this Court directed the Receiver to file a Plan of Action "designed to effectuate the restructuring and development of a constitutionally adequate medical health care delivery system" in the State prisons. Receivership Order, p. 2:21-22.[1] In addition to describing the program the Receiver intends to implement, the Court directed the Receiver to include in the Plan "recommendations to the Court of which provisions of the (1) June 13, 2002 Stipulation for Injunctive Relief, and (2) September 17, 2004 Stipulated Order re Quality of Patient Care and Staffing Order (and/or policies or procedures required thereby), should be carried forward and which, if any, should be modified or discontinued due to changed circumstances." Id., p. 2:22-27.

This Motion addresses those provisions of the Subject Orders the Receiver believes should be modified. In a number of areas the Subject Orders impose requirements that are inconsistent with the Receiver's Plan of Action or are simply no longer necessary in light of the appointment of the Receiver. Indeed, certain of those requirements are actually impeding or threaten to impede the Receiver as he continues his work. Consistent with the Court's inherent equitable discretion and its authority under FRCP 60(b) to modify its orders to take account of changed circumstances, the Subject Orders should be modified as more specifically discussed below.

II.

FACTS

This action commenced on April 5, 2001. Counsel for the parties had been engaged in negotiations over medical care in the prisons even from before the date the complaint was filed. Those negotiations ultimately led to the Stipulated Injunction that this Court signed on June 13, 2002. The Stipulated Injunction is lengthy and detailed, but its general outlines are the following:

[1] The Receiver has filed his Plan of Action simultaneously herewith.

- CDCR was required to implement certain policies and procedures for management of the prison health care system;
- in a process informally termed the "roll out," those policies and procedures were to be implemented at specifically identified prisons in each year from 2003 through 2008;
- commencing in 2003, CDCR was required to begin making certain staffing and hiring changes with regard to clinical staff, as well as specific changes in treatment protocol and procedures;
- the inmate grievance and appeal process was incorporated into the policies and procedures, and plaintiff's counsel was entitled to demand and receive on a monthly basis information on behalf of inmates who had claimed that their medical grievances remained unresolved;
- plaintiff's counsel was authorized to tour the prisons on a regular basis to investigate and monitor the medical delivery system as well as to receive, review and discuss with prison officials, information about inmates receiving medical care;
- the parties requested that the Court appoint, and the Court did appoint, three independent experts to monitor the healthcare system and to report to the Court;
- the progress at each prison in implementing the policies and procedures was to be assessed through an audit and a scoring system to determine when an institution had been brought into substantial compliance; a score of 85% was required to establish substantial compliance; and,
- requirements for modifying the procedures and a dispute resolution mechanism were included and the Court retained jurisdiction to enforce the stipulated relief.

Subsequently, the parties executed the stipulation for the Patient Care Order, which the Court signed on September 17, 2004. The Patient Care Order provided for:

- the evaluation of physicians employed by CDCR and set forth criteria to determine whether and to what extent those physicians would be permitted to continue to provide care;
- the identification and treatment of high risk patients;
- the classification and reclassification of physicians and nurses, salary adjustments and hiring of supervisory staff, and establishment of on-site clinics;
- the implementation of the Inmate Medical Scheduling and Tracking System ("SATS-LITE"); and,
- the expansion of the Quality Management Assistant Teams ("QMAT").

Thereafter, on December 1, 2005, this Court entered the Clinical Staffing Order. The Clinical Staffing Order imposed a number of requirements on the defendants pertaining to the hiring and retention of clinical line and supervisory staff, including:

- recruitment and retention differentials for various levels of clinical staff;
- hiring procedures and policies, including times lines for hiring decisions;
- specific requirements for hiring, retention and payment of contract clinical staff; and,
- appointment of State personnel responsible for implementing the order.

The defendants failed to comply with the Subject Orders or otherwise to make significant improvement in the delivery of health care to inmates. In its Order To Show Cause Re Civil Contempt And Appointment Of A Receiver, dated May 10, 2005 ("OSC"), this Court found that defendants had failed to bring any of the prisons into compliance pursuant to the Stipulated Injunction under the "roll out" process and had failed to "meet the terms of the Patient Care Order." OSC, p. 3:1-23. *See also* Findings Of Fact And Conclusions Of Law ("FCCL"), dated October 3, 2005, pp. 27-32. After evidentiary hearings and lengthy and detailed findings, this Court placed the system into Receivership and appointed the Receiver in February 2006.

In the Receivership Order, the Court ordered the Receiver to submit a Plan of Action for implementing constitutionally adequate health care in the prisons. Among the issues that the Court asked the Receiver to address in the Plan of Action were the following:

> This Plan shall include recommendations to the Court of which provisions of the (1) June 13, 2002 Stipulation for Injunctive Relief, and (2) September 17, 2004 Stipulated Order re Quality of Patient Care and Staffing Order and Injunction (and/or policies or procedures required thereby), should be carried forward and which, if any, should be modified or discontinued due to changed circumstances.

Receivership Order, p. 2:22-27.[2]

As a result of his investigation and analysis over the last 15 months, the Receiver has identified a number of specific provisions in the Subject Orders that he believes should be discontinued or modified. *See generally* Declaration of John Hagar ("Hagar Decl."), filed herewith. Those specific provisions are discussed more fully below.

III.

ARGUMENT

A. This Court Has The Equitable Discretion, As Well As The Authority Under FRCP 60, To Modify The Subject Orders.

1. This Court may modify its orders, including consent decrees, when warranted by changed circumstances.

Federal district courts have the inherent discretion to rescind or modify their orders in the face of changed circumstances. *System Federation No. 91, Railway Employees' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961); *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002); *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 885, 886-887 (9th Cir. 2001). In particular, courts have the discretion to modify "the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *System Federation No. 91, supra*, 364 U.S. at 647.

A motion to modify a consent decree, like the Stipulated Injunction and Patient Care Order, is also subject to the provisions of Rule 60(b) of the Federal Rules of Civil Procedure. In particular, subdivisions 5 and 6 of Rule 60(b) provide as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have

[2] This Court invited the Receiver to request modifications as necessary only to the Stipulated Injunction and Patient Care Order. Although modification of the Clinical Staffing Order was not mentioned in the Receivership Order, the Receiver also requests modification of that order in light of the Receiver's Plan of Action.

> prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . .

In *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992), the Supreme Court emphasized that, just as under traditional equity jurisprudence, Rule 60(b) confers on the federal courts in institutional reform litigation broad flexibility to modify consent judgments "in response to changed circumstances." *Id.* at 380, citing *System Federation No. 91, supra*, 364 U.S. at 647. The "party seeking modification . . . bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.* at 383. That burden can be met by showing that "changed factual conditions make compliance with the decree substantially more onerous," the decree has proven "to be unworkable because of unforeseen obstacles," or "enforcement of the decree without modification would be detrimental to the public interest." *Id.* at 384.

If the moving party meets its initial burden, the court must determine "whether the proposed modification is suitably tailored to the changed circumstances." *Id.* at 383, 391. In making that determination, the Supreme Court cautioned that the modification itself must not "create or perpetuate a constitutional violation." *Id.* at 391. Instead, "the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances." *Id.* Moreover, "the public interest and 'considerations based on the allocation of powers within our federal system'" (*id.* at 392), must be factored into the mix. Courts generally should defer to state and local officials charged with the responsibility of carrying out the modification. While "[f]inancial constraints may not be used to justify the creation or perpetuation of constitutional violations . . . they are a legitimate concern of government defendants in institutional reform litigation and therefore they are appropriately considered in tailoring a consent decree modification." *Id.* at 392-393.

Finally, the new circumstances must have been unanticipated at the time of the original decree.

> [M]odification should not be granted where a party relies upon events that were actually anticipated at the time it entered into a decree. [Citations omitted.] If it is clear that a party anticipated changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, that party would

> have to satisfy a heavy burden to convince a court that that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b).

Id. at 385.

2. The court retains its equitable discretion to modify consent orders even following the passage of the Prison Litigation Reform Act.

Passage of the Prison Litigation Reform Act (18 U.S.C. § 3626) ("PLRA") did not abrogate the Court's authority, at common law or under Rule 60, to modify consent decrees. *Gilmore v. California*, 220 F.3d 987, 1007 (9th Cir. 2000). *See also Lancaster v. Tilton*, 2006 U.S. Dist. LEXIS 75121, *43 n.4 (N.D. Cal. 2006) (noting the existence of the test for modification under *Rufo* and its distinction from the test under the PLRA); *Jones 'El v. Schneiter*, 2006 U.S. Dist. LEXIS 53213, *10-*11 (W.D. Wis. 2006) ("no reason to think that the PLRA supplanted all pre-existing rules regarding modification . . . of consent decrees"); *Giles v. Coughlin*, 1997 U.S. Dist. LEXIS 11129, *16 (S.D.N.Y. 1997) (grounds for modification of judgments under Rule 60(b) and PLRA "coexist").

Instead, in one primary respect PLRA imposed a "more exacting standard" on federal courts than the test under *Rufo*. *Gilmore,* 220 F.3d at 1007. Whereas *Rufo* cautioned against courts "rewrit[ing] a consent decree so that it conforms to the constitutional floor" (502 U.S. at 391), the PLRA requires termination of prospective relief in those instances where the relief "exceeds the constitutional minimum" necessary to remedy the constitutional wrong. *Gilmore*, 220 F.2d at 999, 1006, 1007. In particular, the PLRA requires termination of prospective relief that is not "narrowly drawn," extends "further than necessary to correct the violation of the Federal right" and is not "the least intrusive means necessary to correct" the violation of that right. 18 U.S.C. § 3626(b)(2); *Gilmore*, 220 F.3d at 999.

The Receiver does not bring this motion pursuant to the PLRA. To the contrary, the Subject Orders specifically included findings that conformed to the requirements of the PLRA and the Receiver fully concurs in the continued need for this Court's intervention to remedy the constitutional violations in the prison health care system. Indeed, the Court appointed the Receiver – with the findings required by the PLRA – precisely because the Subject Orders had

not been successful at remedying those violations. This motion is directed, instead, to this Court's "equitable discretion" to modify the Subject Orders, discretion that remains undisturbed by the PLRA. *Gilmore*, 220 F.3d at 1007.

B. The Test For Modification Of The Subject Orders Has Been Met.

1. The current circumstances are substantially different from those existing when the Subject Orders were entered.

Undoubtedly, the circumstances that existed when the Court entered the Subject Orders have changed substantially. Particularly telling is that, despite the Court's efforts in the Subject Orders "to move defendants toward meeting constitutional standards" (FCCL, p. 27:25-26), the defendants either could not or would not come into compliance with those Orders. OSC, pp. 3-8. The Receivership, though a drastic remedy, was compelled precisely because this Court found that the Subject Orders had been unsuccessful in causing defendants to address the profound problems in the prison health care system. FCCL, pp. 27-32, 38-39; OSC, p. 17. Viewed from this perspective, defendants' failures to comply with this Court's directives, and the stark recognition that they were unwilling or unable to comply, were themselves changed circumstances that prepared the ground for a subsequent modification of the Subject Orders.

The Receivership, of course, is the most dramatic and profound change that justifies modification of the Subject Orders. The Subject Orders, though wide ranging, nevertheless addressed only discrete "remedial medical policies and procedures" within the system. FCCL, p. 28:3. The Subject Orders having failed to produce the desired effect, this Court appointed the Receiver to be its agent, with a broad mandate to impose change on the health care delivery system as a whole to bring it into compliance with the Constitution. The Receiver's charge necessarily carried with it the duty and responsibility to investigate and analyze the failings in the system with a fresh eye and to develop a program for addressing those problems, in light of the "facts on the ground" and the Receiver's own knowledge and experience.

The Receiver has been engaged in the investigative process for just over a year, although numerous changes in the system have already been made or are in process. *See* Plan of Action, Section G, "Organizational Transformation Strategies." The Plan of Action represents the

Receiver's comprehensive approach to building a constitutionally adequate health care system. As this Court underscored in deciding to appoint a Receiver (FCCL, p. 38), and as the Plan of Action and the Receiver's reports to date have demonstrated, the prison health care system is just that: a system, in which the breakdowns and failures in one area lead to or exacerbate breakdowns and failures in other areas, while simultaneously preventing successes from being fully realized.

The Receiver's more global perspective and his charge to remedy the entire system, rather than merely discrete problems within the system, have important implications for the continued vitality and utility of the Subject Orders. As the Receiver has stated in the Plan of Action:

> [T]he care standards set forth in the June 2002 Stipulated Injunction and the September 2004 Patient Care Order . . . cannot be met and sustained without the appropriate and necessary support provided by a well-functioning, administratively-sound health care organization. Attempts to implement these standards in isolation have proven to be ineffective—indeed prior remedial efforts have wasted time and resources—because nearly every area within the CDCR, *e.g.*, procurement, custody support, population, and personnel, affects and potentially hinders each process of health care delivery. Each function of the organization as a whole, as well as pertinent functions of other State agencies, must be analyzed and modified appropriately to support a redesigned, effective, constitutionally-adequate health care operation. As the Office of the Receiver learned at San Quentin, the inter-relatedness of the problems and processes within the institution, as well as between the institution, CDCR, State overhead and control agencies, the Legislature, and the Governor is an immense barrier. The Receiver's Plan of Action addresses the impact and inter-relatedness of all the pertinent processes within the CDCR and the State.

Plan of Action, p. 10. The Receiver has found that the "original remedial processes . . . worked to establish 'silos' of health [care] delivery in California's prisons, driving up the overall cost of care and creating unnecessary tensions between the medical, mental health, and dental disciplines." Report Re Plan of Action, filed herewith, p. 5:11-13. In the Receiver's view, the problems are so great and the need so urgent, that nothing should be sacrosanct, including the parties' and this Court's previous best efforts to bring the system into compliance with the Eighth Amendment.

> The June 2002 Stipulated Injunction and the September 2004 Patient Care Order specified a number of worthy patient care standards, but for multiple reasons the defendants had little chance of achieving them. For example, the stipulations

> stopped short of addressing the requisite custody and support staff, technology, space, and personnel processes. Furthermore, the State attempted to apply innovations in a pre-determined, *en bloc* fashion rather than on a pilot basis, and the delivery system remained dominated by the solo physician model rather than team-based care. These errors will not be repeated. Instead, the Receiver will apply an entirely new method of transformation to the medical delivery system in California's prisons.

Plan of Action, p. 10.

A critical conceptual difference between the "roll out" methodology contemplated in the Subject Orders and the Receiver's approach under the Plan of Action is the use of pilot projects. The Receiver has determined that the most effective methodology is "to pilot changes before attempting system-wide implementation. The San Quentin project and the Receiver's takeovers of contracting and pharmacy management have piloted new programs, processes, positions, and software prior to full-scale implementation. The Receiver is determined to avoid the pre-determined, entire-system 'roll-out' projects that were characteristic of prior State efforts, most of which were clumsy affairs that fell short of full implementation." Plan of Action, p. 40; *see also* Report Re Plan of Action, p. 4.

In the Report Re Plan of Action, the Receiver has summarized the other fundamental differences between his Plan and the approach reflected in the Subject Orders:

> b. The original remedial stipulations contained no provisions for the State infrastructure necessary to implement the stipulations themselves. . . . [T]he Receiver's Plan begins with an essential infrastructure that will support a successful remedial effort.
>
> c. The stipulations call for a cumbersome and expensive physician based medical delivery system. . . . [T]he Receiver's Plan calls for a more appropriate team based system utilizing nursing, mid-level, and physician providers.
>
> d. The original plan failed to provide essential elements of an adequate medical delivery system, including information technology ("IT"), clerical support personnel, transportation vehicles, custody access teams, special contract support programs, an established network of specialty providers, etc. The Receiver's Plan of Action provides for these essential services.
>
> e. The original remedial plan failed to consider and coordinate different aspects of the CDCR's health care delivery program, resulting in failed remedial efforts and increased expenses. . . . [T]he Receiver took prompt action to manage this situation, and his Plan of Action calls for the complete restructuring of the CDCR's specialty services, registry and hospital contracting program.

Report Re Plan of Action, pp. 4-5. Simply put, the Receiver seeks to construct "an entirely new and different medical delivery system . . . from the ground up." Id., p. 3:13-14.

This Court indicated in the Receivership Order that it would not hesitate to sweep away obstacles in the Receiver's path as and to the extent necessary to permit the Receiver to accomplish the goals this Court has set for him. Thus, this Court properly recognized that even the Subject Orders – designed as they were to bring much needed change to the delivery of health care to the inmates – might require modification. As described in more detail below, certain aspects of the Subject Orders are no longer necessary in light of, or will be superseded by, the Receiver's program. Others are simply inconsistent with the Receiver's plans as currently conceived. And still others may be having the unintended effect of interfering with the remedial measures necessary to bring the prison health care system into compliance with constitutional standards. Whether they are unnecessary, redundant or now constitute impediments, those elements of the Subject Orders should be modified or eliminated.

2. Certain aspects of the Subject Orders are no longer necessary, are or have become unworkable and/or are impeding or will impede the Receiver's ability to carry out his Plan of Action.

Many of the requirements of the Subject Orders either have been accomplished or the Receiver intends to carry them out. Report Re Plan of Action, pp. 9-18. The Receiver focuses here on those requirements in the Subject Orders that he requests be modified or eliminated. Each such requirement, together with a citation to the particular Order that imposed the requirement, is first set forth and then followed by a brief description of why, in view of the changed circumstances, the Receiver believes modification or elimination is appropriate.[3]

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[3] The factual basis for the modifications requested is set forth in the Hagar Declaration. Unless otherwise indicated, the facts stated in the text are drawn from that Declaration.

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a. Provisions of the Stipulated Injunction that should be modified.

(i) Implement Inmate Medical Services Program (IMSP) Policies and Procedures in accordance with multi-year roll out schedule (Stipulated Injunction, ¶¶ 4-5.)

The Receiver recognizes that implementation of the policies and procedures under the roll out schedule was a significant component of the Stipulated Injunction, and the defendants' failure to comply with this requirement was important to the Court's decision to appoint the Receiver. FCCL, p. 28. Nevertheless, the Receiver moves to eliminate this requirement.

The roll-out schedule in the Stipulated Injunction may have appeared workable when the Stipulated Injunction was entered five years ago, but it is inconsistent with the Receiver's current, and more comprehensive, Plan of Action. Having reviewed the system from top to bottom, prison by prison, the Receiver has determined that the roll-out schedule is not the most efficacious method for implementing significant change. Plan of Action, p. 40. The Receiver's implementation strategies "are far different than the 'phased roll out' strategy of defendants and therefore some [care] standards are prioritized differently" than under the roll out strategy. Id., p. 9. As discussed above, the Receiver has begun to institute, and will continue to utilize, a "pilot project" model for developing and implementing appropriate practices and services. *See, e.g.*, Id., p. 40 and Goal B and Objectives B.3.1, B.7, B.12; Goal C and Objectives C.2, C.3; Goal D and Objectives D.1, D.3.4, D.4.1, D.4.2, D.5.1, D.5.2; Goal E and Objectives E.1, E.2.

The Receiver will be unable to implement the interconnected and time sensitive elements of his Plan of Action if he is constrained by the multi-year "pre-determined, entire-system" roll out schedule model contained in the Stipulated Injunction. Plan of Action, p. 40. Instead, the Receiver proposes to review and modify the current IMSP Policies and Procedures in accordance with the schedule of the Plan of Action. For example, the chronic care requirements will be reviewed and modified to be consistent with community chronic care standards. *See* Plan of Action, Goal B, Objective B.2.6.3; *see also* Objectives B.3.1.2, B.5. The format of the IMSP

Policies and Procedures may be modified as well; modification and addition of new material in the policies and procedures will be considered as the Receiver progresses.

(ii) Implement following requirements regardless of roll out status: 24 hour coverage by RNs in emergency clinics; intrasystem transfers per policy; treatment protocols implemented as resources allow; priority ducat system implemented; outpatient special diets available for patients with liver and kidney end-stage failure (Stipulated Injunction, ¶¶ 6a-6e).

The Receiver requests that the Court eliminate these provisions of the Stipulated Injunction. First, these provisions will not be easily integrated with the interconnected and time sensitive elements of the Plan of Action. Second, these provisions are at once too vague from an operational perspective (*e.g.* "emergency clinics," "intrasystem transfers," and "as resources allow"), while at the same time addressing problems identified as if they were isolated and independent of the system as a whole. These requirements were imposed without consideration of other needed corrections to the system and without consideration for their impact on the overall health delivery system. As indicated above, the Receiver has undertaken to approach the failures in the prisons systemically, rather than addressing discrete problems in isolation. The Receiver believes that the particular issues highlighted in these provisions of the Stipulated Injunction are better resolved as part of his overall Plan. Thus, as part of the Plan the Receiver will have programs to deal with clinic coverage (*see* Plan of Action, Goal B, Objective B.7; Goal F); inter-prison transfers (*see* Goal B, Objective B.2.1); access to medical care (*see* Goal B, Objectives B.2 and B.3); and special diets (*see* Goal B, Objective B.9).

(iii) Institute Director's level review for inmate appeals (Stipulated Injunction, ¶ 7).

The Receiver requests that this requirement be eliminated. The Receiver does not believe that it is appropriate that a CDCR "Director," *i.e.*, a custody official, perform the final level of review for medical appeals. In practice, this provision has meant that the final CDCR review

concerning a clinical question is structured as an evaluation limited to "due process" considerations only (*e.g.,* did the State follow the appropriate rules). The underlying clinical issue is ignored. In contrast, the Receiver intends to develop an entirely new medical complaint and appeal process, coordinating with the needs of the *Coleman*, *Perez*, and *Armstrong* remedial plans and building on the information learned from the San Quentin patient advocacy model. Over time, this pilot project will be expanded to consider appeal requirements and then implemented throughout California prison system. *See* Plan of Action, Goal C, Objective C.3.

(iv) Audit each prison's compliance with IMSP Policies and Procedures consistent with roll out schedule; develop audit instrument and file it with the court; achieve 85% overall compliance with IMSP Policies and Procedures and conduct minimally adequate death reviews and quality management proceedings to reach substantial compliance (Stipulated Injunction, ¶¶ 19-23).

The Receiver requests that these compliance standards be eliminated. As indicated above and in the Plan of Action, the Receiver has developed a detailed remedial program that is not dependent upon – indeed, is frankly inconsistent with – the roll out model that is reflected in and at the heart of the Stipulated Injunction. When implemented, the Receiver's Plan of Action is intended to bring the entire system into compliance with constitutional standards and the Plan makes provision for returning the system to State control once compliance is achieved. Plan of Action, Goal G. The Plan also includes its own metrics for determining when compliance has been achieved and for maintaining quality of performance within the system. Plan of Action, pp. 43-50; *see, e.g.,* Goal A, Objective A.8; Goal B, Objective B.10.1; Goal C, Objectives C.1.1, C.2, C.6; Goal D, Objective D.2. *See also* Report Re Plan of Action, pp. 6-9. In addition, the Plan of Action sets forth specific programs to develop, review and implement policies and procedures on an ongoing basis, including policies and procedures for death reviews and quality management programs. *See* Plan of Action, p. 48; Goal C and Objectives C.4 – C.8; Goal D, Objective D.3.1; Report Re Plan of Action, pp. 6-9.

(v) Institution and patient monitoring by plaintiffs' counsel and institutional information access and reporting to plaintiffs' counsel (Stipulated Injunction, ¶¶ 7, 9-15).

The Receiver requests that the monitoring procedures developed under the Stipulated Injunction be modified substantially. Taken together, these provisions of the Stipulated Injunction impose five ongoing, and overlapping, requirements that the Receiver believes should be eliminated or sharply curtained. A brief description of those requirements, as implemented, follows below.

(1) Pursuant to Paragraph 7 of the Stipulated Injunction (as subsequently modified), plaintiffs' counsel visit on average one prison per week. The Receiver understands that those visits last from one to three days. Prior to, and during the inspections, plaintiffs' counsel request hundreds of pages of documents. The Receiver understands that staff attorneys from both the Attorney General's office and CDCR also attend these inspections.

(2) Also pursuant to Paragraph 7, plaintiffs' counsel may request medical information about specific inmates. These requests have grown ever more numerous. The Receiver understands that CDCR received 90 such requests in January 2007 alone. The Receiver also understands that one full time DCHCS staff person has been assigned to responding to these inquiries. Other personnel are routinely diverted to assisting in responding to these requests as well.

(3) Also pursuant to Paragraph 7, plaintiffs' counsel schedule conference calls on up to three Fridays of each month to follow up regarding particular inmates. The Chief Medical Officers ("CMOs") and staff must spend many hours preparing and obtaining documents for, and then participating in, these calls. In addition, an attorney for CDCR sits in on the calls. The Receiver understands that in January 2007 alone, plaintiffs' counsel requested information about 99 inmates during these calls.

(4) Paragraph 7 also requires the CMOs to meet with plaintiffs' counsel once each month, in addition to the foregoing telephone calls and visits. Plaintiffs' counsel typically sends a detailed agenda in advance, and expects the CMOs to be prepared to discuss the items on the agenda. While the conference calls themselves usually last only an hour, the CMOs and their staff must gather documentation and be prepared to answer questions during the calls. Invariably, additional documents and information are requested during the calls.

(5) The Stipulated Injunction and the Patient Care Order (¶ 8) require defendants to produce documents upon request to plaintiffs' counsel. The Receiver has been informed that the DCHCS must produce over 500 pages per month to plaintiffs' counsel. These document productions are disproportionately burdening Health Care Managers and their clerical staff at the roll out institutions.

See Hagar Decl., ¶¶ 9A-E.

These provisions of the Stipulated Injunction effectively create a program by which plaintiffs' counsel monitor the performance of the prison health care system. Class counsel have undoubtedly made important contributions in this case. And the Receiver recognizes the duty imposed on plaintiffs' counsel to communicate with and assist class members, as well as the need for counsel to be kept appraised of the remedial efforts and ongoing changes to conditions of confinement.

Nevertheless, plaintiffs' counsel have not been empowered to monitor the Receivership or to impose – even unintended – burdens on the Receiver's staff. Whatever oversight and reporting functions that these provisions may have served in the past are now substantially less important with the Receivership in place. Indeed, the Receiver believes that the burden and expense caused by these provisions of the Stipulated Injunction outweigh the current benefits.

The monitoring program has expanded over time and has grown to proportions where it now has an adverse impact on the *Receiver's* ability to direct CDCR and DCHCS staff. Such

staff serve under the Receiver's direction and are needed to implement his remedial programs in a timely manner. Time and resources that could be put to use on the Receiver's behalf are being diverted instead to responding to demands made by counsel for plaintiffs. Id., ¶ 10. If the information gathered as a result of these meetings, calls and requests was significantly improving the Receiver's ability to address the problems in the system, the effort expended by prison and DCHCS staff might be justified. But the Receiver has obtained only minimal, if any, benefit from the many inspections, telephone calls and document requests.

The Receiver also understands that in addition to becoming more frequent, these meetings and requests have become increasingly adversarial. Moreover, the timing of the inspections, in particular, appears driven more the schedules of plaintiffs' counsel than by institutional need.

The Receiver requests, therefore, that the Stipulated Injunction be modified to permit him to present for the Court's consideration a compliance monitoring pilot project designed with the existence of the Receivership (and the Receiver's metrics) in mind. While it is important that counsel be able to represent their clients, monitoring of the remedial progress be restructured so that is more objective, more clinically oriented, more independent, less expensive and less intrusive. To this end, the Receiver has suggested that the Office of Inspector General ("OIG") assume an oversight and reporting role and the OIG has indicated its willingness to assist in this case. As the Court is aware, the OIG has participated in the *Madrid* remedial process in an effective manner. Involving the OIG on a pilot basis has a number of potential benefits, including the following: (1) the proposed process will provide the State with much needed experience and expertise in monitoring and reporting on compliance that could prove invaluable when the health care system is ultimately returned to State control; (2) having one independent agency perform on-site reviews will substantially reduce the cost of the review as teams of attorneys from the Prison Law Office, Attorney General's Office, and CDCR Office of Legal Affairs will not participate in those reviews; and, (3) the OIG has special skills concerning prison inspection and objective review processes and should bring an improved measure of objectivity to the inspection reports. Id., ¶¶ 11-12.

The Receiver anticipates coordinating this effort through his new Office of Evaluation, Measurement and Compliance to be established. He will submit his pilot proposal to the Court within 60 days and will involve counsel for both parties with this aspect of his remedial efforts. Id., ¶ 13.

b. Provisions of the Patient Care Order that should be modified.

(i) Develop criteria and method to identify high-risk patients; identify all patients who meet high-risk criteria, beginning with 2003 rollout institutions, and complete a plan for identifying patients at all other institutions for court review; ensure that high-risk patients are treated by qualified primary care providers; provide nursing and administrative support necessary to assist court-approved independent physicians in evaluating and treating high-risk patients at SAC, COR, CCWF, and SVSP by November 11, 2004 (Patient Care Order, ¶¶ 13-16).

The Receiver requests that these requirements be eliminated as they are unnecessary or redundant in light of the Plan of Action. In practice, CDCR never fully complied with these requirements from the Patient Care Order. FCCL, ¶ 89. In any event, requiring the Receiver to address the needs of high-risk patients precisely as set forth in the Patient Care Order would interfere with his ability to implement the interconnected and time sensitive elements of his Plan of Action. That said, the Receiver appreciates the concern that underlies these requirements, and therefore has addressed the health care needs of the high-risk population in the Plan of Action. *See* Goal B, Objective B.3.1.2. As with other requirements imposed by the Subject Orders, the Receiver does not wish to address these requirements independently of his efforts to remedy the system as a whole, but rather wishes to address them as part of his overall Plan.

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(ii) **Submit proposal to control agencies to reclassify all physician categories, including a Regional Medical Director classification, complete a salary survey prior to submission of the proposal, address the need for salary adjustments in the proposal, and hire additional central office and regional medical directors while the proposal is considered by control agencies; submit a plan to the court to hire and retain central office and regional medical directors; submit a proposal to control agencies for a director of nursing and regional directors of nursing; establish and fill these positions on an interim basis (Patient Care Order, ¶¶ 17-18).**

The Receiver requests that these provisions of the Patient Care Order be eliminated on the grounds that they are no longer necessary, and are unduly restrictive as framed in any event. As this Court is aware, the need to increase clinical salaries, including physician salaries, has already been addressed by the Receiver. Plan of Action, p. 38. Furthermore, a motion to waive State law in order to establish Receiver Career Executive Assignments for prison, regional, and central office medical administrators is currently pending before the Court. Id. And the Receiver's overall approach to hiring staff, including supervisory staff, is addressed in Goal A, Objectives A.7 and A.8. These provisions of the Patient Care Order also reflect the somewhat incremental nature of the stipulated requirements imposed on the defendants. The Receiver should not be limited to submitting proposals to California's control agencies regarding hiring, but instead should be allowed to exercise the full range of authority provided in the Order of February 14, 2006.

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(iii) Submit a plan to the Court to change the hiring process from a local process to a central or regional process for physician, nurse practitioner, and physician assistant positions (Patient Care Order, ¶ 19).

The Receiver requests that this provision be eliminated on the grounds that it is no longer necessary, and is unduly restrictive as framed in any event. The Receiver has already taken decisive action to improve hiring processes, including the hiring of registered nurses, licensed vocational nurses, mid-level practitioners, and physicians. Furthermore, the Receiver's ongoing approach to hiring processes is addressed in the Plan of Action. *See* Goal A, Objectives A.7 and A.8. The Receiver should not be limited to submitting plans to the Court, but should be allowed to exercise the full range of authority provided in the Order of February 14, 2006.

(iv) Develop a plan to establish a program for on-site clinics through a residency program affiliation to provide care for patients with complex medical conditions (Patient Care Order, ¶ 20).

The Receiver requests that this provision of the Patient Care Order be eliminated on the grounds that it is inconsistent with his Plan of Action. The Receiver shares the concerns that motivated inclusion of this provision in the Patient Care Order and has provided for options related to patients with complex medical conditions in his Plan. *See, e.g.,* Goal B, Objectives B.3 and B.5. But, as framed, this provision of the Patient Care Order calls for an overly restrictive answer to a serious problem that can and should be addressed through a variety of clinical options. For example, improved medical care for patients with complex problems might best be dealt with in ways other than through a "residency program affiliation." The Receiver wants the flexibility to propose clinical solutions more finely calibrated to the particular problems at issue rather than being limited to a "one size fits all" approach.

An even more practical concern with this provision is that many prisons do not currently have the space for "on-site" specialty clinics. Such clinics, if they are to be utilized, have yet to be constructed. That, too, is part of the Plan. *See* Goal F. This provision of the Patient Care

Order, therefore, is yet another example of how even the best intentions on the part of the defendants were doomed from the outset. It should be eliminated in favor of the Receiver's more comprehensive, and more flexible, approach.

(v) Fund, establish, and begin to fill one position at each institution for support of the SATS-LITE system (Patient Care Order, ¶ 23).

The Receiver requests that this requirement be eliminated on the grounds that it is unworkable and outmoded. The SATS-LITE system, which has never been fully and effectively implemented, is an outdated tracking system which the Receiver wishes to replace with a time-phased clinical information technology program. The Receiver contends that it would be fiscally irresponsible to continue to expend limited State resources on an automation proposal that does not work. The Receiver's plan for automated scheduling and tracking systems is addressed in the Plan of Action. *See generally* Goal D.

(vi) Fund, establish, and begin to fill no less than nine additional Quality Management Assistance Team ("QMAT") positions (Patient Care Order, ¶ 24).

The Receiver requests that this requirement be eliminated because it has proven to be unworkable. Pursuant to the Patient Care Order, QMAT personnel were to visit the various prisons and measure performance by utilizing an audit instrument. QMAT related orders have never been effectively implemented and draw too many resources away from necessary patient care. Nor has QMAT improved the quality of physician care in California's prisons.

> While well-intentioned, this measurement strategy suffered from multiple flaws. The electronic tracking system consisted of unconnected, unsupported Access databases that soon varied from location to location and contained unreliable data. . . .[T]he individual measures were unvalidated and yielded results that often flew in the face of direct observation. . . . Most critically, the findings, even had they been trustworthy, were not actionable. The available management infrastructure could not support development and implementation of appropriate interventions . . . .

Plan of Action, pp. 43-44.

In light of these and other shortcomings, the Receiver determined that the QMAT program is not an adequate quality improvement process. With the Court's permission, the

Receiver plans to eliminate QMAT, and institute the clinical staffing models set forth in Goal A, Objectives A.7 and A.8 and Goal C, Objective C.6 of the Plan of Action.

c. Provisions of the Clinical Staffing Order that should be modified

(i) Establish recruitment and retention differentials for physicians, mid-level providers, and registered nurses, in addition to all existing recruitment and retention differentials; modify all written and digital recruitment documents accordingly (Clinical Staffing Order, ¶¶ 2a-2c (pp. 6-10)).

The Receiver requests that this provision of the Clinical Staffing Order be eliminated as it is inconsistent with the Receiver's approach. Under the Receiver's program, clinical salaries are not dependent upon rigid "differentials." Instead, the Receiver believes that hiring and retaining quality clinical personnel in California's prisons will depend upon paying salaries based upon honest and forthright assessments of experience and performance. The Receiver has already begun to implement his approach and believes that he should have the flexibility to continue, without being bound to formulas.

(ii) Establish a program to process physician, mid-level practitioner, and registered nurse job applicants within 5 business days from receipt of application; establish a monitoring program to ensure standard is met for 90% of all applicants (Clinical Staffing Order, ¶ 3a (pp. 10-11)).

The Receiver requests that these requirements be eliminated because they are inconsistent with his Plan of Action. These requirements were based on Court expert recommendations concerning an emergency salary increase ordered by the Court prior to the effective date of the Receiver's appointment. That order recognized that the Receiver needed the flexibility to make additional modifications to salaries and hiring processes. A new, expedited hiring process is therefore being tested on a pilot basis. Expedited hiring is also addressed in the Plan of Action. *See* Goal A, Objective A.8.3.3; *see also* Objective A.8.2. Finally, the Receiver

finds that the paperwork and tracking processes required to monitor compliance with this order has proven to be unduly time consuming and expensive.

(iii) Establish a program to interview, evaluate, and render a hiring decision to all physician, mid-level practitioner, and registered nurse job applicants within 10 business days from receipt of application; establish a monitoring program to ensure standard is met for 90% of all applicants (Clinical Staffing Order, ¶ 3b (p. 11)).

The Receiver requests that his requirement be eliminated for the reasons identified in (ii) above.

(iv) Establish and implement a policy requiring that recently hired physicians be supervised by the regional medical Director when the physician is hired at an institution where the CMO and Chief Physician and Surgeon positions are vacant (Clinical Staffing Order, ¶5a (p. 12)).

The Receiver requests that this requirement be eliminated for many of the reasons set forth in (ii) above. The Receiver does not believe that the specificity required by this provision, *i.e.*, utilizing regional medical directors to supervise physicians under certain circumstances, is conducive to providing a flexible yet appropriate program for adequate clinical supervision in California's prisons. The Receiver will undertake programs to provide appropriate clinical management as set forth in the Plan of Action. *See* Goal A, Objectives A.1 and A.7.

(v) Establish and implement a program to hire physicians, mid-level practitioners, and registered nurses on a regional basis to allow for placement at prisons with the most need (Clinical Staffing Order, ¶ 5c (p. 12)).

The Receiver requests that this requirement be eliminated for many of the reasons set forth in (ii) above. The Receiver has outlined his program to provide appropriate clinical staff in the Plan of Action. *See* Goal A, Objectives A.7 and A.8. The Receiver does not believe that the

specificity of this requirement, *i.e.*, hiring clinicians on a regional basis, is conducive to providing a flexible yet appropriate program for adequate clinical supervision in California's prisons. While hiring clinicians on a regional basis may be explored in the future, an order mandating this specific practice is neither necessary nor appropriate at this time. In the interim, the Receiver is exploring innovative methods of staffing the prisons, including the concept of an "air force" whereby physicians who live in the Bay Area, Sacramento, Los Angeles, and San Diego will be flown to remote prisons for work, and then returned to their homes. *See* Goal A, Objective 8.6; Plan of Action, p. 42. Other relevant programs to increase staffing include the use of part time State registry staff, tuition reimbursement, etc. *See* Goal A, Objectives A.8.2 and A.8.3.

(vi) Verify credentials, licensure, and security clearance of all contract providers on a provisional basis within 2 business days of presentation by CMG and NOAH; complete final verification within 5 business days (Clinical Staffing Order, ¶ 6d (p. 13)).

The Receiver requests that this requirement be eliminated for many of the reasons set forth in (ii) above. The Receiver does not believe that the specificity set forth in this order, *i.e.*, using a two and five day standard for only two out of dozens of registry providers, is conducive to providing a flexible yet appropriate program for ensuring timely access to registry personnel. While timely verification is appropriate, this requirement is overly rigid. The Receiver notes, for example, that problems with timely access to personnel from some registries are caused by the registry failing or refusing to perform credentialing and licensure verification. The Receiver is moving to modify registry contracts to correct this problem. The Receiver's program for timely credentialing, licensure verification, and security clearances is set forth in the Plan of Action. *See, e.g.,* Goal A., Objective A.8.5.3.

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(vii) Complete hiring interview and make provisional decision to hire or reject CMG or NOAH contract providers within 4 days of submission for 90% of applicants (Clinical Staffing Order, ¶ 6e (p. 13)).

The Receiver requests that this requirement be eliminated for many of the reasons set forth in (ii) and (vi) above. The Receiver does not believe that the specificity set forth in this requirement, *i.e.*, using a four day standard for only two out of dozens of registry providers, is conducive to providing a flexible yet appropriate program for ensuring timely access to registry personnel. The Receiver's program for the timely retention of contract providers is set forth in the Plan of Action. *See* Goal A, Objectives A.6.1, A.6.2, A.6.3.

(viii) Establish an adequate program to monitor prisoner health services provided by CMG/MHA/Staff Care (Clinical Staffing Order, ¶ 6g (p. 14)).

The Receiver requests that this requirement be eliminated. In reality, this requirement was never implemented by defendants because CDCR was unable to hire and retain physicians to perform the necessary quality review functions called for in the order. Moreover, and in any event, the Receiver does not believe that the specificity in this order, *i.e.*, monitoring only three providers (one of which no longer provides services to CDCR), is conducive to providing a flexible yet appropriate program to measure and ensure appropriate levels of quality from registry personnel. The Receiver's program for measuring the quality of contract providers is set forth in the Plan of Action. *See* Goal A, Objectives A.6.1 and A.6.2.

3. The modifications requested are "suitably tailored" to the change in circumstances.

Before ordering the modifications requested (at least with respect to the Stipulated Injunction and the Patient Care Order), this Court must find that they are "tailored to resolve the problems created by the change in circumstances." *Rufo, supra*, 502 U.S. at 391. This requirement under *Rufo* is easily met.

The proposed modifications are intended to bring the requirements of the Subject Orders in line with the Receiver's responsibility for bringing about change, as well as with the Receiver's findings regarding and approach to remedying the failures in the prison health care system. Absent the proposed modifications, the Subject Orders will be inconsistent or incompatible in important respects with the Plan of Action. In some cases, the provisions of the Subject Orders will actually impede the Receiver's ability to implement the Plan. If the Receiver is to effect necessary change, he should not be constrained by requirements that are no longer relevant or have become outright obstacles.

The Receiver has identified still other areas, such as the current compliance monitoring program utilizing plaintiffs' counsel, where the Subject Orders are placing an unnecessary burden on prison staff and resources, and indirectly are interfering with the Receiver himself. Eliminating financial and other burdens on the system is a particularly important consideration in determining whether modification is appropriate. *Id.* at 384, 392-393.[4] The alternative, pilot monitoring program utilizing the OIG suggested by the Receiver will be designed to be at once less intrusive, less burdensome and more efficacious.

Finally, the Receiver has identified areas where the Subject Orders either have not been or could not be implemented for any number of reasons. No purpose is served by continuing in effect provisions of the Subject Orders which will not be carried out.

4. The changed circumstances requiring modification of the Stipulated Injunction and Patient Care Order were unanticipated when those orders were entered.

As indicated above, modification of a consent decree or judgment is permissible if the changed circumstances were unanticipated at the time the decree was entered. *Rufo, supra*, 502 U.S. at 385. *See, e.g., Parton v. White*, 203 F.3d 552, 556 (8th Cir. 2000); *cf. Giles, supra*, 1997 U.S. Dist. LEXIS at *12-*15 (modification of consent decree not permitted where changed circumstances anticipated). There is no indication that the parties or the Court anticipated that defendants would fail so completely to comply with the Stipulated Injunction and the Patient

[4] Although this motion is not brought under the PLRA, the Receiver notes that the PLRA requires termination of prospective relief that is not "the least intrusive means necessary to correct" the violation of the constitutional right. 18 U.S.C. § 3626(b)(2).

Care Order, that appointment of the Receiver would become necessary or that the Receiver would determine that the stipulated orders would become unworkable, unnecessary or overly burdensome in important respects. Nor has there been any suggestion that the defendants did not in good faith intend to comply with those orders when they executed them. All indications were that defendants understood the need for action, but the problems turned out to be so overwhelming, and the "trained incapacity" in the State bureaucracy was so great (FCCL, p. 39), that defendants were simply incapable of taking appropriate or sufficient steps to address the crisis. *See, e.g.*, OSC, pp. 6-7, 15-23; FCCL, pp. 7, 37-40. It was only after all other alternatives had failed that this Court issued its Order to Show Cause and thereafter appointed the Receiver. FCCL, pp. 2-3. As this Court stated: "[Receivership] is not a measure that the Court has sought, nor is it one the Court relishes. Rather, the Court is simply at the end of the road with nowhere else to turn." *Id.*, p. 47:13-15.

Now that the Receiver is in place, it has become clear to him that the Stipulated Injunction and Patient Care Order (as well as the Clinical Staffing Order) are inadequate to the task of addressing the crisis in the prison health care system and, indeed, if complied with in full, would interfere with the carefully calibrated plan that the Receiver has proposed. These developments, like the need for the Receiver in the first instance, are significant, and previously unexpected, changes in the circumstances obtaining at the time the Stipulated Injunction and Patient Care Order were entered. As such, those orders can and should be modified as proposed.

IV.

CONCLUSION

For all the foregoing reasons, the Receiver requests modification of the Stipulated Injunction, Patient Care Order and Clinical Staffing Orders as set forth above.

Dated: May 10, 2007

FUTTERMAN & DUPREE LLP

By _____
Martin H. Dodd
Attorneys for Receiver Robert Sillen

PROOF OF SERVICE BY MAIL

I, Kristina Hector, declare:

I am a resident of the County of Alameda, California; that I am over the age of eighteen (18) years of age and not a party to the within titled cause of action. I am employed as the Inmate Patient Relations Manager to the Receiver in *Plata v. Schwarzenegger*.

On March 10, 2007 I arranged for the service of a copy of the attached documents described as NOTICE OF MOTION AND RECEIVER'S MOTION FOR ORDER MODIFYING STIPULATED INJUNCTION AND OTHER ORDERS ENTERED HEREIN on the parties of record in said cause by sending a true and correct copy thereof by pdf and by United States Mail and addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 10, 2007 at San Francisco, California.

Kristina Hector