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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 **REPLY MEMORANDUM OF RECEIVER J. CLARK KELSO IN SUPPORT OF MOTION TO ADD STATE CONTROLLER AS PARTY-DEFENDANT AND FOR DISCOVERY IN AID OF ENFORCEMENT OF ORDER APPOINTING RECEIVER** Date: July 14, 2008 Time: 10:00 a.m. Courtroom: Hon. Thelton E. Henderson

PRELIMINARY STATEMENT

The parties and the State Controller ("Controller") have all filed statements of non-opposition to the Receiver's request for an order requiring the Controller to be joined as a party-defendant. Docket ## 1295, 1296, 1298. The Receiver files this brief reply to address the opposition expressed by the Controller and the defendants to an order permitting the Receiver to take discovery from the Controller. As discussed below, there should be no impediment to such discovery since the Controller will be a party and discovery in aid of enforcement of judgments and orders is liberally permitted. The Receiver is not interested in wide-ranging or lengthy discovery proceedings. To the contrary – and because time is increasingly of the essence – the Receiver intends to focus his inquiries and expects the Controller (and the defendants, as necessary) to respond promptly and thoroughly.

THE COURT SHOULD PERMIT DISCOVERY DIRECTED AT STATE OFFICIALS TO ASSIST IN OBTAINING THE FUNDING REQUIRED FOR THE RECEIVER'S CAPITAL PROJECTS.

The Controller objects to the Receiver's expressed intent to take discovery on the grounds that "[j]oinder for the purpose of effecting discovery is not contemplated" by the Federal Rules of Civil Procedure and that "discovery from the Controller would be premature." Docket # 1295, p. 2. The defendants join in these objections. Docket #1296, p. 2. The Controller's objections reflect confusion about the Receiver's intentions and are, therefore, not well-taken.

The Receiver has no quarrel with the proposition that joinder for the sole purpose of effectuating discovery is not permitted by Rules 19, 20 or 21 of the Federal Rules of Civil Procedure. But the Receiver has not requested joinder of the Controller for purposes of obtaining discovery. The Receiver has requested that the Controller be joined as a defendant to ensure that the provisions of this Court's Order Appointing Receiver including, in particular, paragraph IV governing costs of the Receivership, can be enforced without delay. Joinder of parties in aid of enforcement of prior judgments and orders is clearly permissible under the Federal Rules. *See Spain v. Mountanos,* 690 F.2d 742, 744 (9th Cir. 1982); *Gates v. Collier,* 616 F.2d 1268, 1270 (5th Cir. 1980); *see also Benjamin v. Malcolm*, 629 F.Supp. 713 (S.D.N.Y. 1986), *aff'd*, 803 F.2d

46 (2d Cir. 1986). The Controller apparently agrees since he does not oppose the Receiver's joinder motion.

Furthermore, discovery against the Controller is not "premature." As the Receiver emphasized in his motion – and the Controller does not dispute – discovery in aid of enforcing judgments and orders is permissible under both FRCP 69 and FRCP 70. *See* FRCP 69(b); *Board of Trustees, Local 295/Local 851, etc. v. Hail Air Freight, Inc.*, 2008 U.S. Dist. LEXIS 31267, *5, *12 (S.D.N.Y., Apr. 16, 2008) (ordering compliance with post-judgment discovery under Rule 70); *British Internat'l Ins. Co. v. Seguros La Republica*, 200 FRD 586, 589 (W.D. Tex. 2000) (Rule 69; scope of "post-judgment discovery is broad.").

The Receiver is not required to make informal efforts to obtain information from the Controller and wait to commence discovery only after those informal efforts have failed. As detailed in the Receiver's moving papers, prior to bringing this motion the Receiver made substantial efforts to utilize State processes to obtain the necessary funding for his capital projects and was unsuccessful. Since then, the Legislature has failed to pass a budget despite the clear State constitutional requirement that a budget be enacted by the beginning of the fiscal year. As a result, there is no immediate prospect that funding for the Receiver's projects will be forthcoming in any amount or at all.[1] The Receiver will not stand idly by while the State fails to live up to its constitutional responsibilities in this matter. Therefore, the Receiver wishes to commence discovery at the earliest opportunity and requests an order from the Court indicating that the Receiver may proceed without delay.

If the Controller and the other defendants wish to avoid having to respond to discovery directed at the State's financial resources and its funding methods and procedures, nothing prevents them from utilizing whatever statutory or State constitutional authority they already possess to secure funding for the Receiver's projects or from proposing a stipulation for an appropriate order waiving any State law they believe may be an impediment to securing such funding. In the meantime, the Receiver intends to proceed and requests an order from this Court

[1] Last year, the Legislature's perennial budget deadlock lasted 52 days.

approving the commencement of prompt discovery from the Controller and other State defendants.

CONCLUSION

For all the foregoing reasons, the Receiver requests that this Court enter an order requiring John Chiang, Controller the State of California, be added as a party-defendant and authorizing the Receiver to commence discovery from the Controller and other State officials at the earliest opportunity.

Dated: July 8, 2008

FUTTERMAN & DUPREE LLP

By: /s/ Martin H. Dodd
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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 July 8, 2008, I served a copy of the following document(s):

REPLY MEMORANDUM OF RECEIVER J. CLARK KELSO IN SUPPORT OF MOTION TO ADD STATE CONTROLLER AS PARTY-DEFENDANT AND FOR DISCOVERY IN AID OF ENFORCEMENT OF ORDER APPOINTING RECEIVER

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 July 8, 2008 at San Francisco, California.

Lori Dotson