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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al.,  
Plaintiffs,  
v.  
EDMUND G. BROWN JR., et al.,  
Defendants.

NO. C01-1351 TEH  
ORDER RE: RECEIVERSHIP  
TRANSITION PLAN AND  
EXPERT EVALUATIONS

On May 30, 2012, this Court issued an order proposing a plan to transition away from the Receivership toward a monitor or special master, and also to begin expert evaluations to determine when an adequate level of care had been achieved. The Court has considered the parties' responses to the proposed plan, as well as their replies to each other's responses, including Plaintiffs' August 30, 2012 supplemental reply. Plaintiffs moved to strike portions of Defendants' reply as inappropriately presenting new evidence or, alternatively, moved to allow consideration of a sur-reply. The Court grants Plaintiffs' alternative motion and has considered both Defendants' reply in its entirety as well as Plaintiffs' sur-reply. The Court addresses the parties' concerns below before entering its order concerning the Receivership transition and expert evaluations.

**I. Plaintiffs' Concerns**

Plaintiffs suggest two modifications to the Court's order. First, Plaintiffs' counsel request that they be included in the process to determine when tasks should be transitioned from the Receiver to Defendants. The Court agrees to the extent that the Receiver and Defendants should consider Plaintiffs' counsel's views, but it denies the request to the extent that Plaintiffs' counsel seek the ability to prevent the Receiver from implementing a

1 transition schedule to which he and Defendants have agreed. However, as ordered below, the  
2 transition shall occur by revocable delegation, and Plaintiffs may file a motion before this  
3 Court if the Receiver declines to revoke a delegation of authority as to any particular task for  
4 which Plaintiffs believe revocation is warranted.

5 Second, Plaintiffs suggest that an insignificant decrease in OIG scores need not trigger  
6 another expert evaluation if the experts have already determined that care at that institution is  
7 adequate. The Court agrees and will modify its proposed order to incorporate this  
8 suggestion.

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10 **II. Defendants' Concerns**

11 Defendants' primary objection is that they believe the Receivership should end  
12 immediately. Defendants accurately quote the Court's original appointment order as  
13 providing that:

14 The Receivership shall remain in place no longer than the conditions  
15 which justify it make necessary, and shall cease as soon as the Court is  
16 satisfied, and so finds in consultation with the Receiver, that  
17 Defendants have the will, capacity, and leadership to maintain a  
system of providing constitutionally adequate medical health care  
services to class members.

18 Feb. 14, 2006 Order Appointing Receiver at 7. Defendants also accurately report that the  
19 Receiver has made much progress on implementing his Court-ordered Turnaround Plan of  
20 Action, and that the scores on the Office of Inspector General's ("OIG's") medical  
21 inspections have shown improvement. However, evidence of progress made under the  
22 direction and control of the Receiver does not constitute evidence of Defendants' own will,  
23 capacity, and leadership to maintain a constitutionally adequate system of inmate medical  
24 care; indeed, Defendants have not always cooperated with, and have sometimes actively  
25 sought to block, the Receiver's efforts. Likewise, while Defendants assert that the 2012  
26 Budget Act signed by the Governor on June 27, 2012, demonstrates their willingness and  
27 ability to provide constitutionally adequate care, the Court need look no further than the  
28 history of Assembly Bill 900 to understand that passing legislation and implementing

1 legislation are two very different things.<sup>1</sup> In addition, evidence of increasing OIG scores  
2 demonstrates only that the system is improving; the inspection instrument has never been  
3 validated as demonstrating constitutional compliance at any particular score level.  
4 Defendants argue that “[t]here can be little doubt that a score above 85% on the OIG  
5 standards is compliant with minimally adequate constitutional conditions,” Defs.’ Response  
6 at 10, but nothing in the record supports this bald assertion. As the Court has previously  
7 noted, the parties have not agreed on the significance of any particular OIG score, nor does  
8 the record contain any evidence correlating OIG scores with constitutionality of care. Thus,  
9 the Court continues to find that court expert evaluations are required to determine whether  
10 care is adequate; that the record lacks sufficient evidence to justify ending the Receivership;  
11 and that a transition plan that includes revocable delegations of authority is necessary. The  
12 process ordered below will allow Defendants an opportunity to demonstrate that they are able  
13 to maintain the reforms achieved by the Receiver, which would in turn, if Defendants are  
14 successful, demonstrate that the Receivership is no longer necessary.

15 Defendants next ask the Court to set a six-month time limit for transitioning medical  
16 care back to Defendants, but the Court finds it inappropriate to set calendar-based deadlines  
17 for ending the Receivership. Deciding when the Receivership should transition to a monitor  
18 or special master must be based on need and not time. However, the Court anticipates, based  
19 on input from the Receiver, that the first areas will be delegated to Defendants within the  
20 next thirty days.

21 Finally, Defendants raise several concerns about the proposed expert evaluations.  
22 Defendants first argue that the experts need not evaluate every institution, and that the  
23 experts can determine whether the inmate medical care system is adequate by analyzing eight  
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25 <sup>1</sup>See, e.g., *Coleman v. Schwarzenegger*, 2009 WL 2430820, at \*64-66 (Aug. 4, 2009)  
26 (three-judge court opinion and order discussing AB 900 delays, noting, for example, that  
27 “AB 900 construction has already been delayed for more than two years due to the absence  
28 of funding. At the start of trial not a single facility had been constructed under AB 900. As  
far as we are aware, it remains the case today, eight months later, that there is no funding for  
AB 900 and no ground has been broken on the AB 900-authorized re-entry facilities.”  
(citations omitted)).

1 to twelve institutions. In response, Plaintiffs correctly observe that the parties' original  
 2 stipulation contemplates evaluations of each institution as the least intrusive manner of  
 3 determining compliance. June 13, 2002 Stip. & Order for Injunctive Relief ¶¶ 19-23, 31.  
 4 The parties further agreed that the stipulated relief "satisfies the requirements of 18 U.S.C.  
 5 § 3626(a)(1)(A)," *id.* ¶ 29, the portion of the Prison Litigation Reform Act that requires a  
 6 court to find that prospective relief "is narrowly drawn, extends no further than necessary to  
 7 correct the violation of the Federal right, and is the least intrusive means necessary to correct  
 8 the violation of the Federal right," 18 U.S.C. § 3626(a)(1)(A). While the Court terminated  
 9 the specific provisions of the original stipulation and order defining how substantial  
 10 compliance would be measured, Sept. 6, 2007 Order at 16-17 (vacating paragraphs 5 and  
 11 19-23), the Court did not vacate the termination provision, which provides that Defendants  
 12 may move to "dismiss the case on the ground that *each institution subject to this stipulation*  
 13 *has been found to be in substantial compliance.*" June 13, 2002 Stip. & Order ¶ 31  
 14 (emphasis added). That the experts did not look at every institution before testifying in the  
 15 receivership proceedings does not alter this fact. Moreover, whether a receivership is  
 16 necessary is a different question from whether Plaintiffs are receiving constitutionally  
 17 adequate care throughout the California prison system. Unless and until the Court approves a  
 18 stipulation or grants a motion modifying the above termination provision, every institution  
 19 must be found to be in substantial compliance before this case can end.<sup>2</sup>

20 Second, Defendants suggest that the experts begin work immediately and need not  
 21 wait for the results of a third-round OIG score or for an institution to achieve an overall OIG

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23 <sup>2</sup>This does not mean that the case will end as soon as all institutions have been found  
 24 to be in substantial compliance. To the contrary, the parties' intent appears to have been for  
 25 each institution to be in substantial compliance for at least one year. *See* June 13, 2002 Stip.  
 26 & Order ¶ 23 ("If the experts find substantial compliance, the experts shall return a year later,  
 27 or as soon thereafter as possible, to determine whether the institution has maintained  
 28 substantial compliance."). In addition, the Receiver's court-ordered Turnaround Plan of  
 Action provides additional items that may need to be completed prior to termination of this  
 case. However, the Court notes that, pursuant to the parties' stipulation, the court in *Perez v.*  
*Cate*, Case No. C05-5241 JSW (N.D. Cal.), recently dismissed that case following successful  
 dental audits at each institution but retained jurisdiction over outstanding construction items.  
 A similar model may be appropriate when this case reaches a similar stage.

1 score over 85%. Notwithstanding that some institutions have already achieved third-round  
2 OIG scores over 85% and work could therefore begin immediately under this standard, the  
3 Court will modify its proposed order to allow the Receiver and court experts additional  
4 flexibility in scheduling evaluations.

5 Third, Defendants ask the Court to prohibit the experts from engaging in ex parte  
6 communications. However, the parties agreed, and the Court ordered, that “[t]he experts  
7 shall be available to meet with the plaintiffs or defendants separately or jointly as the  
8 occasion may warrant.” June 13, 2002 Order Appointing Experts ¶ 7. If Defendants want to  
9 modify that order, they must bring an appropriate motion establishing good cause to set aside  
10 the parties’ prior agreement.

11 Fourth, Defendants request that the experts be asked to evaluate whether care is  
12 constitutionally adequate. Plaintiffs correctly observe in response that the experts have  
13 clinical but not legal expertise. However, the parties intended for their original stipulation to  
14 provide the minimum level of care that is constitutionally adequate, June 13, 2002 Stip. &  
15 Order ¶ 4, and they therefore agreed that any institution found by the experts to be in  
16 substantial compliance would be providing minimally constitutionally adequate care.  
17 Consequently, although the Court will not ask the experts to evaluate the constitutionality of  
18 care directly, the experts’ conclusions will nonetheless form a basis for addressing that issue.

19 Fifth, Defendants raise concerns about the impact of a finding by the experts that an  
20 institution is providing adequate care. They object that Plaintiffs need not have access to  
21 documentary evidence because the OIG inspection reports and the Receiver’s regular reports,  
22 including the dashboard, will be continued, and they also argue that a decline in an  
23 institution’s OIG score should not automatically trigger a new evaluation. The Court agrees  
24 with the latter suggestion and will modify the proposed order to allow additional discretion in  
25 conducting re-evaluations. The Court denies the prior suggestion based on its understanding  
26 that the Receiver’s reporting does not cover every aspect of care that may be relevant to  
27 substantial compliance. However, it will modify the proposed order to limit Plaintiffs’  
28 access to documents to one year after an institution is found to be in substantial compliance.

1 Such an order is consistent with the parties' expectation that an institution should remain in  
2 compliance for at least one year. *See id.* ¶ 23.

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4 **II. Order**

5 Having addressed the parties' responses to the Court's proposed plan, the Court now  
6 enters the following order. The Court finds that the order below is narrowly drawn, extends  
7 no further than necessary to correct the violation of Plaintiffs' constitutional rights  
8 concerning inmate medical care, and is the least intrusive means necessary to correct the  
9 violation of those rights.

10 **A. Receivership Transition**

11 With good cause appearing, the following is HEREBY ORDERED regarding the  
12 transition away from the Receivership toward a monitor or special master:

13 1. To provide Defendants with an opportunity to demonstrate their ability to  
14 maintain a constitutionally adequate system of inmate medical care, and in accord with the  
15 Court's prior orders, "the ultimate transfer of power back to the State [from the Receivership]  
16 will be transitional," and the Receiver must "attempt to engage Defendants in assuming  
17 responsibility over portions of the system that are within Defendants' demonstrated ability to  
18 perform." Feb. 14, 2006 Order Appointing Receiver at 7-8. To accomplish the transfer of  
19 responsibility while also ensuring appropriate Court oversight, the Receiver shall enter into  
20 revocable delegations of authority – a practice that has already been used once and to which  
21 no party has objected.

22 a. The Receiver shall meet and confer with the parties to determine when  
23 Defendants shall assume responsibility for particular tasks. If Defendants and the Receiver  
24 cannot agree on the timing of a particular delegation of authority after considering their  
25 respective positions and that of Plaintiffs' counsel, then they shall work with the  
26 Court-appointed Special Assistant to attempt to reach agreement. The Special Assistant shall  
27 notify the Court if he is unable to mediate any particular dispute.

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1           b. The Receiver shall not revoke any delegation of authority until after meeting  
2 and conferring with the parties. Any party who disagrees with the Receiver’s decision on  
3 revocation may challenge that decision by filing a motion before this Court. The moving  
4 party shall bear the burden of persuasion.

5           2. The parties, the Receiver, and the Court must have sufficient time to evaluate  
6 whether Defendants have successfully managed all delegated tasks. Consequently, the  
7 Receivership will not end until after a reasonable period of time following the final revocable  
8 delegation of authority. The Receiver shall meet and confer with the parties, and shall also  
9 seek input from the court experts, regarding how long a period of evaluation is necessary and  
10 the evaluation criteria that should be used. The parties have already agreed that the transition  
11 from the Receivership to a special master or monitor shall not be tied to any particular set of  
12 OIG scores or findings by the court experts on the adequacy of care, and they have further  
13 agreed that the Court may transition away from the Receivership even if it has not been  
14 established that care throughout the system is constitutionally adequate.

15           3. The parties and Receiver agree that all outstanding items in the Receiver’s  
16 Turnaround Plan of Action (“Plan”) remain necessary. However, it is not clear that the  
17 Receivership must exist until the Plan is completed, and the Court may transition from the  
18 Receivership to a special master or monitor prior to the Plan’s full completion if Defendants  
19 are able to demonstrate both (1) the ability to maintain a system that provides care as good as  
20 or better than that being provided under the Receivership and (2) that any outstanding Plan  
21 items, including construction of the California Health Care Facility, renovations of the  
22 DeWitt Correctional Facility, and completion of the Health Care Facility Improvement  
23 Program, will not be jeopardized if the Receivership were to end.

24           4. The Receiver and Defendants shall continue to identify and secure appropriate  
25 revisions or additions to state law and regulations, as well as to CDCR’s Department  
26 Operations Manual, that institutionalize changes made during the Receivership and  
27 eliminate, to the extent possible, the need for any waivers of state law following the  
28 termination of the Receivership.

1           5. Pursuant to the parties' and the Receiver's agreement, the Court modifies the  
2 February 14, 2006 Order Appointing Receiver to require Defendants, rather than the  
3 Receiver, to submit a plan for post-Receivership governance. The Court construes Exhibit 4  
4 to the Declaration of Martin Hoshino filed on May 7, 2012, as Defendants' proposed plan but  
5 finds consideration of that plan to be premature. The Court reserves for subsequent  
6 proceedings questions related to post-Receivership governance and Court supervision.

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8           **B. Expert Evaluations**

9           The Court will not require substantial compliance at individual institutions before  
10 transitioning from the Receivership to a monitor or special master. Nonetheless, the Court  
11 finds good cause to enter orders at this time concerning expert evaluations of individual  
12 institutions because Defendants and the Receiver have expressed their opinion that at least  
13 some institutions may now be providing adequate care. In the original stipulation and order  
14 for injunctive relief, the parties agreed that an institution would be in substantial compliance  
15 if it both achieved a score of at least 75% on an audit instrument and received a favorable  
16 expert evaluation. June 13, 2002 Stip. & Order ¶ 22. The parties further agreed on the  
17 stipulation's intent "to require defendants to provide only the minimum level of medical care  
18 required under the Eighth Amendment," *id.* ¶ 4, thus agreeing that any institution found to be  
19 in substantial compliance would necessarily be providing constitutionally adequate care.  
20 Using the parties' agreements as an initial framework, the Court now **HEREBY ORDERS**  
21 the following:

22           1. With input from the parties, the Receiver shall work with the court experts to  
23 establish a schedule for evaluating each institution.<sup>3</sup> As was the case before the  
24 Receivership, the experts shall be paid by Defendants through the Court's registry, and  
25 Defendants shall promptly deposit additional funds with the Court when ordered to do so.  
26 The procedure for payment and objections set forth in the September 16, 2002 stipulation and

27           <sup>3</sup>After the Receivership has transitioned to a monitor or special master, the monitor or  
28 special master shall fulfill all roles of the Receiver with respect to the evaluation process.  
These responsibilities shall not be subject to the delegation process described above.

1 order shall remain in effect, except that the new hourly rates will be as follows: \$275.00 for  
2 Joe Goldenson, M.D., and Michael Puisis, D.O., and \$200.00 for Madeleine LaMarre,  
3 F.N.P.-B.C., with compensation for travel time paid at half of these hourly rates.

4       2. The experts shall complete a written evaluation of any institution that receives an  
5 overall third-round OIG score of 85% or higher as soon as feasible, and no later than six  
6 months after the publication of the OIG report awarding that score. Evaluations may, at the  
7 Receiver's and experts' discretion, also be scheduled at institutions that have received overall  
8 OIG scores of between 75% and 85% in any round of the OIG inspections.

9       3. Unless the parties reach an alternate agreement or file a successful motion to  
10 modify, an institution shall be deemed to be in substantial compliance, and therefore  
11 constitutionally adequate, if it receives an overall OIG score of at least 75% and an  
12 evaluation from at least two of the three court experts that the institution is providing  
13 adequate care. Among other factors, the experts must consider whether any pattern or  
14 practice exists at the institution, or systemwide, that presents a serious risk of harm to  
15 inmates that is not being adequately addressed. The experts shall also make themselves  
16 available to discuss with the parties any other criteria that the parties believe must be  
17 examined to determine whether an institution is in substantial compliance.

18       4. Plaintiffs' monitoring visits shall cease after an institution has been found to be in  
19 substantial compliance. Visits may resume if an institution is subsequently found to be out of  
20 substantial compliance, but such visits shall be limited only to the areas of non-compliance.

21       5. Plaintiffs shall maintain access to documentary evidence for one year following a  
22 finding that an institution has been found in substantial compliance. This period shall reset if  
23 an institution is subsequently found to be out of substantial compliance, but only for those  
24 areas found to be non-compliant.

25       6. The court experts shall not re-evaluate any institution that has been found to be in  
26 substantial compliance unless (a) all parties agree or (b) the Receiver and court experts find  
27 that good cause exists for re-evaluation. Good cause shall include, but not be limited to, new  
28 evidence of a pattern and practice at the institution that is likely to present a serious risk of

1 harm to inmates, a decrease in the institution’s overall OIG score to below 75%, or a  
2 decrease in the institution’s overall OIG score of more than 10%. The parties may present a  
3 request for re-evaluation to the Receiver and court experts if they believe good cause exists,  
4 and the Receiver and court experts shall meet and confer with the parties prior to conducting  
5 any re-evaluation. Any party who disagrees with the determination by the Receiver and  
6 court experts on whether to schedule a re-evaluation may file a motion requesting relief from  
7 this Court.

8         7. The court experts shall notify the Court if, at any time, they develop confidence  
9 that any particular overall OIG score or set of sub-scores is sufficient to establish the  
10 adequacy of care without a subjective evaluation. They shall also notify the Court if, at any  
11 time, they conclude that they need not examine every institution individually to determine  
12 that the overall system is adequate.

13         8. The court experts and the Receiver, in consultation with the parties, shall consider  
14 whether appointment of additional experts or hiring of other clinical personnel is necessary  
15 or desirable. Any proposed additional experts or personnel, along with proposed hourly  
16 rates, shall be presented to the Court for approval, preferably by stipulation. All such  
17 individuals shall follow the methodology adopted by the three original court experts when  
18 conducting their evaluations.

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20 **IT IS SO ORDERED.**

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22 Dated: 09/05/12

  
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THELTON E. HENDERSON, JUDGE  
UNITED STATES DISTRICT COURT

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