EDMUND G. BROWN JR.
Attorney General of the State of California
CHRISTOPHER E. KRUEGER
Senior Assistant Attorney General
ROCHELLE C. EAST
Senior Assistant Attorney General
CONSTANCE L. LELOUIS
Supervising Deputy Attorney General
DANIEL J. POWELL, State Bar No. 230304
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5830
Fax: (415) 703-1234
Email: Daniel.Powell@doj.ca.gov

Attorneys for State Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MARCIANO PLATA, et al., Plaintiffs, **v.** **ARNOLD SCHWARZENEGGER, et al.,** Defendants.	3:01-cv-01351 **REDACTED OPPOSITION TO MOTION FOR ORDER ADJUDGING DEFENDANTS IN CONTEMPT FOR FAILURE TO FUND RECEIVER'S REMEDIAL PROJECTS AND/OR FOR AN ORDER COMPELLING DEFENDANTS TO FUND SUCH PROJECTS** Hearing: October 6, 2008 Time: 10:00 a.m. Judge: The Honorable Thelton E. Henderson

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF FACTS 3

A. Contrary To The Receiver's Representations, California's General Fund Is Exhausted And Cannot Provide The $8 Billion He Seeks. 3

B. The Receiver's Request Exacerbates an Already Difficult Budget Climate. 4

ARGUMENT 5

I. THE STATE DEFENDANTS HAVE NOT VIOLATED ANY SPECIFIC AND DEFINITE ORDER OF THIS COURT SUCH THAT CONTEMPT PROCEEDINGS ARE NOT JUSTIFIED 5

II. THE PLRA PROHIBITS THE ALTERNATIVE RELIEF SOUGHT BY THE RECEIVER, THE ENTRY OF AN ORDER AUTHORIZING HIM TO SEIZE $8 BILLION FOR HIS PRISON HEALTHCARE CONSTRUCTION PROGRAM 9

A. For the First Time, the Receiver Seeks an Order Mandating the Payment of the $8 Billion Cost for Construction of Prison Healthcare Facilities in Violation of the PLRA 9

1. The Receiver's Prison Healthcare Facilities Construction Plan Involves the Construction of Prisons as that Phrase Is Used in the PLRA 10

2. The Court Lacks Equitable Authority to Order the Construction of the Receiver's Prison Healthcare Facilities 10

3. State Defendants Have Not Waived the Argument that the Receiver's Construction Projects Are Barred By the PLRA 13

B. The Receiver Has Not Shown that His Request is the Least Intrusive Means to Bring the State's Healthcare System Into Compliance with Constitutional Requirements 14

1. The Receiver's Motion Ignores the Myriad Other Improvements to the Provision of Healthcare, all of Which Are Less Intrusive than Construction 15

2. The Receiver Has Not Shown that $8 Billion is Needed to Cure a Constitutional Violation 17

TABLE OF CONTENTS (continued)

Page

3. The Receiver's Request for $8 Billion Fails to Consider the $7.4 Billion for Prison Reform Measures Already Approved by the Legislature and Completely Ignores the Legislature's Role in Improving Prison Health Care 18

4. At the Very Least, Further Proceedings Are Necessary to Rule on the Receiver's Request 22

5. The Receiver Has Failed to Show that State Law Must Be Waived Under the PLRA 22

III. CALIFORNIA'S SOVEREIGN IMMUNITY BARS THE RELIEF SOUGHT BY THE RECEIVER 23

A. The Relief Sought Does Not Fit Within the *Ex Parte Young* Exception 23

1. The Receiver's Attempt to Directly Raid the State Fisc Violates the Eleventh Amendment As the Controller Lacks Any Connection with the Eighth Amendment Violations 24

2. The Relief Sought By the Receiver Implicates "Special Sovereignty Interests" 26

3. Because the Receiver's Request Implicates the State's Financial Viability, all Doubts Should Be Resolved in Favor of California's Sovereign Immunity 28

B. Because the Prior Consent Decrees in this Case Only Provide for Injunctive Relief, the State Has Not Waived its Sovereign Immunity with Respect to the Receiver's Request For Monetary Relief 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Agua Caliente Band of Cahuilla Indians v. Hardin
223 F.3d 1041 (9th Cir. 2000) 27

ANR Pipeline Co. v. Lafaver
150 F.3d 1178 (10th Cir. 1998) 26

Baird v. Kessler
172 F. Supp. 2d 1305 (E.D. Cal. 2001) 29

Battle v. Anderson
708 F.2d 1523 (10th Cir. 1983) 13

Cason v. Seckinger
231 F.3d 777 (11th Cir. 2000) 14

Castillo v. Cameron County
238 F.3d 339 (5th Cir. 2001) 15

Clement v. California Dept. of Corrections
364 F.3d 1148 (9th Cir. 2004) 15

Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Bd.
527 U.S. 666 (1999) 29

Edelman v. Jordan
415 U.S. 651 (1974) 23

Ex Parte Young
209 U.S. 123 (1908) 2, 23, 25, 28

Ford Motor Co. v. Dep't. of Treasury of Indiana
323 U.S. 459 (1945) 26

Gilmore v. California
220 F.3d 987 (9th Cir. 2000) 9

Hallett v. Morgan
296 F.3d 732 (9th Cir. 2002) 17

Hans v. Louisiana
134 U.S. 1 (1890) 23

Harris v. City of Philadelphia
35 F.3d 840 (3rd Cir. 1994) 13

Hill v. Blind Indus. and Serv. of Maryland
179 F.3d 754 (9th Cir. 1999) 29

TABLE OF AUTHORITIES (continued)

Page

Idaho v. Coeur d'Alene Tribe of Idaho
521 U.S. 261 (1997) 24, 26, 28

In re Dual-Deck Video Cassette Recorder Antitrust Litigation
10 F.3d 693 (9th Cir. 1993) 6

In re Dyer
322 F.3d 1178 (9th Cir. 2003) 6

In re Ellett
254 F.3d 1135 (9th Cir. 2001) 27

Miller v. French
530 U.S. 327 (2000) 12

Okpalobi v. Foster
244 F.3d 405 (5th Cir. 2001) 24

Olagues v. Russoniello
770 F.2d 791 (9th Cir. 1985) 15

Papasan v. Allain
478 U.S. 265 (1986) 25

Plyler v. Moore
100 F.3d 365 (4th Cir. 1996) 12

Reno Air Racing Ass'n Inc v. McCord Inc.
452 F.3d 1126 (9th Cir. 2006) 7

Rufo v. Inmates of Suffolk County Jail
502 U.S. 367 (1992) 20

Snoeck v. Brussa
153 F.3d 984 (9th Cir. 1998) 24, 25

United Commercial Ins. Service, Inc v. Paymaster Corp.
962 F.3d 853 (9th Cir. 1992) 22

Webb v. Goord
340 F.3d 105 (2d Cir. 2003) 12

TABLE OF AUTHORITIES (continued)

Page

Constitutional Provisions

United States Constitution

Eighth Amendment	17, 24
Eleventh Amendment	23-25, 28

California Constitution

Article XVI, Section 7	7, 25

Statutes

United States Code, Title 18

§ 3626	9
§ 3626(a)(1)(B)	7, 22
§ 3626(a)(1)(C)	2, 14
§ 3626(g)(5)	10

Government Code

§ 12440	7

Other Authorities

AB 900, Stats. 2007, c. 7, eff. May 3, 2007	18
H.R. Rep. No. 21, 104th Cong., 1st Sess. 24 n.2 (1995)	12
The End of the Prison Law Firm 29 Rutgers L. J. 361 (1998)	22

INTRODUCTION

In his Motion for an Order Adjudging Defendants in Contempt for Failure to Fund Receiver's Remedial Projects and/or for an Order Compelling Defendants to Fund Such Projects ("Motion"), the Receiver seeks an order that is quite literally unprecedented in this nation's history. At its core, his Motion seeks to compel the State to pay $8 billion from the State Treasury over the next 5 years, including an encumbrance of over $3 billion in this fiscal year alone. The basis of his request is a contempt finding that is not supported by any order of this Court. Moreover, any such an order would violate federal law. Underlying the Receiver's contempt proceeding is a massive prison healthcare facilities construction project that, if ordered by this Court, would violate the Prison Litigation Reform Act ("PLRA"). In any event, the Receiver has offered woefully inadequate justification for the amount requested in his Motion. The order requested by the Receiver would also violate fundamental principles of federalism and would work an egregious violation of California's sovereign immunity. Accordingly, the Receiver's request must be denied.

The contempt order sought by the Receiver is unwarranted. He asserts that the Order Appointing Receiver ("OAR") is clear on its face, but the OAR only makes an ambiguous reference to "costs" and does not specifically authorize the raiding of the State Treasury in a manner contrary to state law to fund prison construction. Given the magnitude of his request, it is clear that the OAR is insufficient authority to compel the defendants to pay $8 billion from the State Treasury. In any event, the OAR requires compliance with state law. As the Receiver implicitly acknowledges in his request that it be waived, state law prohibits the State Defendants from making such payments. The PLRA and the OAR require the Court to make specific findings in waiving state law, which it has not done with respect to California's laws governing appropriations. By following state law, then, the State Defendants were in compliance with the OAR. At the very least, their belief that they could not violate state law without a specific waiver by this Court is a good faith interpretation of the OAR. Accordingly, the requirements for finding the State Defendants in contempt have not been met.

Moreover, an order approving the Receiver's multi-billion dollar demand would violate

federal law. The PLRA makes clear that a court may not force a state to pay for prison construction without its consent. 18 U.S.C. § 3626(a)(1)(C). Yet that is precisely what the Receiver is asking the Court to do. In his Turnaround Plan of Action, the Receiver has outlined goals to construct new facilities that will contain 10,000 new beds for the incarceration of prisoners with acute and long-term health needs. While the State Defendants obviously desire to provide constitutionally adequate care, it has not been established that the Receiver's construction plan is the most effective and least intrusive alternative. The Receiver has offered little evidence that the $8 billion prison construction program is required by the Constitution, or that it is the least intrusive means necessary to meet constitutional requirements. He fails to address the fact that $7.4 billion has already been authorized by the Legislature for prison construction, and that numerous other improvements and reforms to the prison healthcare system have already begun to bear fruit. Moreover, it is simply beyond the power of this Court to force the State to fund prison construction without its consent. The PLRA has completely supplanted this Court's equitable powers to do so.

Although the Receiver's request on the surface appears to fall within the exception to the Eleventh Amendment provided by *Ex Parte Young*, 209 U.S. 123 (1908), core principles of sovereign immunity and subsequent case law make clear that *Young* does not extend so far as to allow the Receiver to seize $8 billion from California's Treasury. While the State has consented to injunctive relief, for which it does not have sovereign immunity under *Young*, it has never consented to the monetary relief sought by the Receiver in his motion. *Young* by its own terms does not apply here, but even if it did, relief is not warranted in a case such as this. At its core, the Eleventh Amendment and the concept of sovereign immunity embodied in that Amendment are intended to protect the State's Treasury from federal intrusion. While the Receiver's request has been styled as injunctive relief, the fact remains that, if granted, the Receiver's request would authorize him to take billions of dollars from the State's General Fund. Granting the Receiver's request, and those that are sure to follow, would impose an extraordinarily intrusive hardship on the State. It is this precise intrusion that the Eleventh Amendment was intended to protect against. For these reasons, the Court must deny the Receiver's Motion.

1
STATEMENT OF FACTS

2 The Receiver's Motion, if granted, would have a catastrophic effect on California's already
3 precarious financial condition. California is already facing a $15.2 billion dollar budget deficit,
4 and is now 77 days into the 2008-09 fiscal year without a budget. Seizing the accounts specified
5 in the Motion could cause the State to have difficulty meeting constitutionally imposed
6 obligations to fund public schools and payments to its investors. Further, the Receiver's Motion
7 is riddled with factual inaccuracies regarding the State's cash balances and their availability for
8 seizure. The State's ability to access capital markets for its normal operations and routine
9 borrowing is already compromised by the State's fiscal situation, and the Receiver's Motion, if
10 granted, would cause fiscal catastrophe.

11
12
A. Contrary to the Receiver's Representations, California's General Fund Is Exhausted and Cannot Provide the $8 Billion He Seeks

13 In his Motion, the Receiver implies that California has numerous sources from which it
14 could pay the $8 billion necessary to fund the Receiver's prison healthcare facilities construction
15 plan. Nothing could be further from the truth. On July 31, 2008, the Governor issued an
16 Executive Order to address the cash crisis, ordering state agencies to reduce state expenditures in
17 order to preserve cash. (Exhibit A to Declaration of Daniel J. Powell ("Powell Decl.").)
18 Currently, the General Fund is exhausted, and the State is meeting its legal obligations by
19 internal short-term loans. (Declaration of Susan Griffith ("Griffith Decl.") ¶ 6.) This routine
20 practice allows state operations to continue without interruption; without it, the State would
21 periodically run out of cash and be unable to meet its operational needs. (*Id.*)

22 As with private individuals, while the State has to make payments on a daily basis, the cash
23 to fund those payments does not flow into its coffers each day. Rather, the funds come in
24 periodic lumps such as on tax day, much like a private individual's periodic paycheck. To
25 ensure that it has enough cash on hand to pay for day-to-day operations, the State routinely
26 borrows from other accounts, which are then repaid when the State receives sufficient cash. The
27 $14 billion in internal borrowable resources identified in the Receiver's Motion consists of these
28 routine short-term special fund loans that are used to pay appropriations for which there is not

cash on hand. (Griffith Decl. ¶ 6.) Even more troubling is the Receiver's suggestion that the Court could seize funds in the Surplus Money Investment Fund ("SMIF"). (Mot. at 11.) The $31 billion in SMIF consists of special fund and trust monies. (Griffith Decl. ¶ 8.) Loans from these funds must be made so that they can be repaid when the special fund or trust fund has need of the funds. (*Id.*) Most of the $14 billion in the special fund loans described above are loans from the SMIF. Moreover, that $14 billion identified by the Receiver fails to reflect the fact that $5.6 billion of that amount has already been spent (Declaration of Douglas D. Spittler ("Spittler Decl.") ¶ 6), and an additional $3.6 billion in General Fund payments are payable from that amount once a budget is passed (Griffith Decl. ¶ 7). If the Receiver were to seize part of the $14 billion, the State would quickly run out of money to pay for its day-to-day operations.

Similarly, the $930 million in cash that the Receiver identified is effectively the State's checking account (spread over seven banks), and the balance, which changes on a daily basis, is that amount that the Treasurer deems to be minimally necessary to pay banking fees and the warrants that are drawn on the Treasury. (Spittler Decl. ¶¶ 5, 6.) If the Receiver were permitted to seize those funds, the State would fail to pay pending warrants and not be able to make the daily payments through which the State operates, the equivalent of bouncing its checks.

In short, the Receiver's assertions that the State is flush with cash are simply incorrect. (Mot. at 11.) The State Defendants have repeatedly informed the Receiver that the short-term cash flow borrowing mechanism is unavailable for long-term borrowing. (Declaration of Martin H. Dodd ("Dodd Decl.") ¶¶ 3, 5.) Despite the State's repeated answers to the Receiver's discovery requests, he persists in misrepresenting that the State has billions of dollars available to fund his proposed construction projects. (Mot. at 11.) The funds identified in his Motion are not available to meet the Receiver's needs, and the fact that the Receiver thinks otherwise shows the danger in granting his Motion.

B. The Receiver's Request Exacerbates an Already Difficult Budget Climate

As of today's date, California's budget for the fiscal year beginning July 1, 2008 is 77 days late. (Declaration of Ana Matosantos ("Matosantos Decl.") ¶ 6.) The budget deficit is approximately $15.2 billion. (*Id.* ¶ 15.) On August 21, 2008 the Governor released an update

stating that "California's Budget has reached crisis proportions" and in addition to raising the State sales tax by 1 percent, includes recommended program cuts of $11.3 billion, which constitute approximately 11 percent of the proposed 2008-09 General Fund budget. (Ex. B ("August 2008-09 Updated Proposed Compromise") to Powell Decl. at pp. 1, 4.) Revenues are predicted to decline significantly: by as much as $5 billion over the next two years. (*Id.* at 2.) Adding the $8 billion requested by the Receiver to that amount would increase California's current budget deficit by 50 percent, to $23.6 billion.

The mere fact of the Receiver's request has already impacted the State's ability to grapple with this deficit. California's credit rating is currently the lowest credit rating, among other states, in the country. (Declaration of Katie Carroll ("Carroll Decl.") ¶ 3.) The State's bankers are already agitated by the State's fiscal circumstances, and the fact that this Motion is pending exacerbates the situation. (*Id.* ¶ 4; Griffith Decl. ¶ 9.) If the Court grants the Receiver's $8 billion request, and the State is forced to pay this amount out of cash rather than through a long-term financing, this 50 percent increase in the current budget deficit will wreak havoc on the State's ability to access the credit markets for external borrowing and could even preclude it from borrowing the funds necessary to operate the State. (Carroll Decl. ¶ 5.)

ARGUMENT

I.

THE STATE DEFENDANTS HAVE NOT VIOLATED ANY SPECIFIC AND DEFINITE ORDER OF THIS COURT SUCH THAT CONTEMPT PROCEEDINGS ARE NOT JUSTIFIED

Because the State Defendants have not violated a specific order of this Court in refusing to provide the Receiver with the $8 billion he asserts is needed for his proposed construction project, contempt proceedings are not appropriate in this case. Indeed, the Receiver himself appears not to think contempt is warranted. In a handwritten note to the Governor, the Receiver stated that this filing is "simply the technically correct legal approach to securing the necessary order" to support a mechanism to secure the very funding the Receiver seeks through this Motion. (Ex. A to Declaration of Dan Dunmoyer ("Receiver's Letter").) It is outrageous that he

states in his Motion that the State should have "work[ed] with the Receiver to develop a mutually acceptable alternative funding plan" (Mot. at 17) when that is exactly what the State has been doing. (Declaration of Constance L. LeLouis ("LeLouis Decl." ¶ 2.) More importantly, as the Receiver appears to recognize in his Motion, the Controller and Governor are bound to adhere to State law absent a waiver from this Court. In fact, the OAR expressly provides for compliance with state law, and adopts a process for waiving state laws. Since the Court has not waived state law governing how payments are made from the Treasury, the Governor and Controller's compliance with state law is consistent with the OAR. As the Receiver himself believes that the Governor's "personal commitment to corrections reform and the Receivership is unquestioned," (Receiver's Letter) his contempt motion is clearly inappropriate.

"The standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite court order of the court." *In re Dyer*, 322 F.3d 1178, 1190–91 (9th Cir. 2003). A "person should not be held in contempt if his actions appear to be based on a good faith and reasonable interpretation of the court's order." *In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 10 F.3d 693, 695 (9th Cir. 1993) (citations omitted). Neither the Governor nor the Controller violated the OAR, which required State officials to comply with state law that the Court had not expressly waived. Moreover, their interpretation of the OAR as not requiring the State to pay $8 billion for a prison healthcare facilities construction project in violation of state law is a good faith, reasonable interpretation. Although the OAR references payment of the Receiver's "costs," the word "costs" has never been interpreted or understood as an order requiring the State to fund billions of dollars for prison construction.

The OAR provides for procedures whereby the Receiver can request that this Court waive state law where such state law is clearly interfering with the Receiver's ability to carry out his duties. (OAR at 5.) This presumes that absent a specific order from this Court, such state law will continue in effect. The provision that the Court expressly waive state law is a requirement of the PLRA, which directs that courts "shall not order any prospective relief that requires or

permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law" unless the court makes specific findings required by the PLRA. 18 U.S.C. § 3626(a)(1)(B). The State Defendants' compliance with state law that has *not* been waived by this Court is thus not a violation of the OAR. At the very least, it is a reasonable, good faith interpretation of the OAR that it did not authorize state officials to act in violation of state law without a specific order from the Court waiving state law. As the Receiver acknowledges in his Motion, the Court has not waived state constitutional and statutory laws requiring that the Controller withdraw money from the treasury only pursuant to a valid appropriation. (*See* Mot. at 25 [requesting that the Court waive Cal. Const. Art. XVI, Sec. 7 and Gov. Code § 12440, which allow the Controller to draw warrants only pursuant to a Legislative appropriation].) Accordingly, absent an order from this Court or an acceptable alternative bond financing mechanism, the only way for the Receiver to obtain funds is through a legislative appropriation, which has not yet occurred.

Moreover, the OAR does not "specifically and definitely" require the State to pay for construction of prison healthcare facilities that constitute "the equivalent of 70 Wal-Mart stores." (Mot. at 10.) The OAR states that

> The Receiver shall have the power to acquire, dispose of, modernize, repair, and lease property, equipment, and other tangible goods as necessary to carry out his duties under this Order, including but not limited to information technology and tele-medicine technology.

(OAR at 4.) Nowhere does this list include construction of new prison healthcare facilities. Nor is that a reasonable construction of the OAR. The OAR must be interpreted in light of the circumstances of its entry. *See Reno Air Racing Ass'n Inc v. McCord Inc.*, 452 F.3d 1126, 1133 (9th Cir. 2006). The OAR was entered in response to the State's alleged failure to meet the requirements of the Stipulation for Injunctive Relief entered into on June 13, 2002, and the Stipulated Order re Quality of Patient Care and Staffing ("Patient Care Order") entered into on September 17, 2004. The Stipulation for Injunctive Relief required the State to staff emergency clinics with registered nurses, provide for inter-institution transfers, adhere to certain treatment protocols, establish a priority ducat system consistent with CDCR regulations, and provide

outpatient special diets for patients with liver and kidney end-stage organ failure. (Stipulation for Injunctive Relief ¶ 6.) The Patient Care Order "required defendants to engage an independent entity to (a) evaluate the competency of physicians employed by the CDCR and (b) provide training to those physicians found to be deficient. It also required defendants to undertake certain measures with respect to the treatment of high-risk patients, to develop proposals regarding physician and nursing classifications and supervision, and to fund and fill Quality Management Assistant Teams ("QMAT") and other support positions." (Findings of Fact and Conclusions of Law re Appointment of Receiver at 3.) Since the OAR was entered as a result of the defendants' alleged failure to adhere to these orders, the Receiver's authority as described in the OAR should be interpreted in light of these orders. Moreover, the OAR says that the Receiver stands in the shoes of the CDCR Secretary for purposes of prison medical care. The CDCR Secretary cannot unilaterally take billions of dollars and construct prison facilities without State approval. It is clear that the Receiver's office was conceived of as implementing administrative, policy, and personnel changes, not to undertake a massive prison construction program. Accordingly, neither the provision governing the powers of the Receiver nor the provision that the State pay for the Receiver's costs can be stretched so far as to cover an $8 billion construction program.

Finally, contrary to the Receiver's assertions, the State has been working for months with the Receiver and his representatives to craft an alternative funding mechanism that would fund his prison healthcare facilities construction program, a fact acknowledged in the Receiver's recent letter to the Governor. The State and the Receiver have worked on an additional legislative vehicle to fund the Receiver's construction program. This remains the preferred funding method. AB 1189 is the current version of that legislation. (LeLouis Decl. ¶ 7.) Alternatively, the State and the Receiver have been working on a bond offering by California's Infrastructure and Economic Development Bank ("I-Bank"). (*Id.* ¶¶ 2–4.) It is incredible that the Receiver suggests to this Court that the State failed to work with him on a funding mechanism when he acknowledged the very existence of that alternative source of funding in his letter to the Governor. The fact of the State's cooperation with the Receiver is one more reason

why the Governor and Controller are not in contempt of court.

Because the Receiver has not established that the requirements for contempt have been met, nor that the State Defendants have violated a specific order of this court, contempt proceedings—including the levying of fines, the sequestering of state funds such as the SMIF, and ordering the waiver state law regarding appropriations—are inappropriate.

II.

THE PLRA PROHIBITS THE ALTERNATIVE RELIEF SOUGHT BY THE RECEIVER, THE ENTRY OF AN ORDER AUTHORIZING HIM TO SEIZE $8 BILLION FOR HIS PRISON HEALTHCARE CONSTRUCTION PROGRAM

Having failed to establish that the OAR authorizes the Controller or the Governor to provide the $8 billion the Receiver asserts is needed to fund the construction of his prison healthcare facilities, the Receiver alternatively seeks an order from this Court that would compel the Controller to draw a warrant on the State Treasury for $8 billion. The PLRA absolutely bars this Court from ordering the State to fund the construction of the prison healthcare facilities, the stated intent of the Receiver's request for $8 billion. Even if the Court had such authority, the Receiver has not met his burden in showing that construction in general, or the specific plan detailed in his Facility Program Statement, is necessary and the least restrictive means available to cure a constitutional violation.

A. For the First Time, the Receiver Seeks an Order Mandating the Payment of the $8 Billion Cost for Construction of Prison Healthcare Facilities in Violation of the PLRA

Recognizing that no specific prior order authorizes the extraordinary relief sought by the Receiver—a requirement that the State be ordered to pay $8 billion for the construction of prison healthcare facilities—the Receiver now requests such a specific order from this Court. Such relief is beyond the Court's authority. In 1996, Congress passed the PLRA, restricting the ability of courts to order prospective relief with respect to prison litigation. *See* 18 U.S.C. § 3626. The intent of the PLRA was to limit federal court oversight of state prisons. *See Gilmore v. California*, 220 F.3d 987, 996–97 (9th Cir. 2000). The PLRA accomplishes this goal in part by limiting the ability of federal courts to provide certain injunctive relief, and expressly prohibits

courts from ordering the construction of prisons. Section 3626(a)(1)(C) provides:

> Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, *to order the construction of prisons* or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(Emphasis added.) The PLRA defines a prison as "any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law." 18 U.S.C. § 3626(g)(5).

1. The Receiver's Prison Healthcare Facilities Construction Plan Involves the Construction of Prisons as that Phrase Is Used in the PLRA

The Receiver's requested order violates the PLRA insofar as the requested order would mandate the construction of prisons without the State's consent. The purpose of the Receiver's Motion is to allow him to "upgrade clinical space and clinical support at each prison and a project to construct facilities to house up to 5,000 medical and 5,000 mental health beds." (Mot. at 4.) The scope of the construction project is enormous. As stated in the Receiver's Motion, "the Facility Improvement project will touch virtually every prison in the state" and the 5,000/10,000 bed project "will result in the construction of **7 million** square feet of new medical facilities—the equivalent of 70 Wal-Mart stores. . . ." (Mot. at 10.) While these facilities are intended to provide healthcare to inmates, there can be no doubt the individuals housed and treated in the facilities will be incarcerated and detained adults convicted of violations of the criminal law, and thus the Receiver's plan involves the construction of prisons as that term is used in the PLRA. All the new buildings will be constructed at existing prisons within a secure prison perimeter, further reflecting that these healthcare facilities involve the construction of prisons. Accordingly, the Court, and by extension the Receiver, lacks authority to compel the State to fund the construction of the prison healthcare facilities.

2. The Court Lacks Equitable Authority to Order the Construction of the Receiver's Prison Healthcare Facilities

The PLRA removes any inherent equitable authority the Court might otherwise have to order the construction of these prison healthcare facilities. In the Receiver's Eighth Quarterly

Report, the Receiver contended that

> [s]ection 3626(a)(1)(C) was written to ensure that the limitations placed on equitable relief contained in Section 3626(a)(1)(A) were not creatively transformed into an independent source of power to order the construction of prisons or the raising of taxes (that is the purpose of the 'nothing in this section' language at the beginning of Section 3626(a)(1)(C)). Section 3626(a)(1)(C) by its plain language and ordinary construction does not place any new or additional limitation on the Court's equitable powers to order appropriate relief for constitutional violations.

(p. 52.) This argument, however, ignores the text of the statute, Congressional intent, and relevant Supreme Court and Ninth Circuit caselaw.

The text of section 3626 itself shows that it is a limitation on the authority and on the court's equitable power. The Receiver's argument appears to be that the limitation on the construction of prisons in section 3626(a)(1)(C) is only aimed at any purported statutory authority granted by sections 3626(a)(1)(A)–(B), such that courts retain their general equitable powers to order the construction of prisons that existed prior to the PLRA. The Receiver, however, ignores language in section 3262(a)(1)(C) that expressly applies the restriction on the construction of prisons to courts' equitable powers. The prohibition concerning the construction of prisons is directly stated as a limitation on courts' "exercising their remedial powers." 18 U.S.C. § 3626(a)(1)(C). The only reasonable interpretation of the modifier "in exercising their remedial powers" is that Congress intended section 3626(a)(1)(C) to be a limitation on courts' remedial powers, and not simply a limit on the scope of any purported statutory authority that may have been granted by section 3626(a) generally. This natural reading of subsection (a)(1)(C) is confirmed by the title of subsection 3626(a) as "requirements for relief," as well as the description of subsection (a) contained in section 3626(c)(1) and (c)(2) as constituting "limitations on relief." As the Ninth Circuit observed in *Gilmore*, "[s]ection 3626(a) . . . operates simultaneously to *restrict the equity jurisdiction of federal courts* and to protect the bargaining power of prison administrators—no longer may courts grant or approve relief that binds prison administrators to do more than the constitutional minimum." 220 F.3d at 999 (emphasis added).

An interpretation of section 3626(a)(1)(C) as limiting the equitable authority of district

courts to order prison construction also comports with Congress's intent to limit federal courts' involvement in state prison systems. In Because The Prior Consent Decrees In This Case Only Provide For Injunctive Relief, The State Has Not Waived Its Sovereign Immunity With Respect To The Receiver's Request For Monetary Relief. *Miller v. French*, 530 U.S. 327, 340 (2000), the Supreme Court recognized that "curbing the equitable discretion of district courts was one of the PLRA's principal objectives." The House Report accompanying the original version of the PLRA further notes that subsection (a) was intended to "stop judges from imposing remedies intended to effect an overall modernization of local prison systems or provide an overall improvement in prison conditions." *Plyler v. Moore*, 100 F.3d 365, 369 (4th Cir. 1996) (quoting H.R. Rep. No. 21, 104th Cong., 1st Sess. 24 n.2 (1995)). Mandating the construction of new prison healthcare facilities without the State's consent would, of course, be completely contrary to this intent. In enacting the provision barring the construction of prisons, Congress meant to curb federal courts' power, not simply to provide interpretative guidance. *See, e.g., Webb v. Goord*, 340 F.3d 105, 111 (2d Cir. 2003) (noting that there is "no argument over whether or not the PLRA represents a fundamental break" with the history of appointing federal masters to oversee prison conditions).

That Congress intended to sharply limit the scope of courts' equitable authority is confirmed by the Supreme Court's decision in *Miller*. There, the Supreme Court interpreted similar language to bar a court from exercising its inherent equitable authority beyond that provided in the PLRA. *Miller*, 530 U.S. at 340. At issue was section 3626(e)(2), which provides that "[a]ny motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay," such that while a motion to terminate prospective relief is pending, that relief is stayed. The Court rejected the Government's argument that the district court retained traditional equitable authority to stay the operation of the stay, concluding that the language "shall operate" in section 3626(e)(2) removed any such equitable authority. *Miller*, 530 U.S. at 340.

Here too, it is clear that in enacting section 3626(a)(1)(C) Congress intended to restrict the scope of courts' equitable powers to order the construction of prisons. Unlike in *Miller*,

subsection (a)(1)(C) expressly references courts' remedial powers, indicating Congress fully intended to limit courts' equitable authority. The fact that Congress intended to restrict the ability of courts to order the construction of prisons "in exercising their remedial powers" is thus an even clearer indication of Congressional intent than the provision at issue in *Miller*. Moreover, as in *Miller*, the fact that Congress intended to limit a court's equitable powers to order construction of prisons is clear from the statutory scheme. It would have been nonsensical for Congress to have provided requirements for injunctive relief in subsection (a) while contemplating that courts retained some additional equitable authority not limited by those subsections.

Finally, if the Receiver is correct that subsection (a)(1)(C) merely states an interpretative principle and does not actually restrict the authority of district courts, it is unclear why Congress singled-out prison construction. The only possible reason would be that Congress feared that courts would interpret subsection (a) as granting authority to courts beyond the authority that they possessed prior to the passage of the PLRA. Carving out prison construction, however, would make sense only if courts had previously concluded that they lacked the equitable authority to order such construction; otherwise, there would be no reason to limit the PLRA's theoretical addition of equitable authority to construction of prisons since courts would have already had that authority. That is to say, Congress would not be concerned that the PLRA would be extended to permit prison construction unless courts otherwise lacked that authority. There are no cases prior to the PLRA, however, in which courts questioned their ability to order the construction of prisons where such relief was otherwise warranted. Indeed, there are numerous examples of consent decrees prior to 1996 that required states to construct new prison facilities. *See, e.g., Harris v. City of Philadelphia*, 35 F.3d 840 (3rd Cir. 1994); *Battle v. Anderson*, 708 F.2d 1523 (10th Cir. 1983). Quite simply, the PLRA means what it says: courts lack the power to order the construction of prisons.

3. State Defendants Have Not Waived the Argument that the Receiver's Construction Projects Are Barred By the PLRA

Defendants have in no way waived the PLRA's restriction on the power of courts to order

the construction of prisons. The Receiver's Motion is the first time the Receiver has sought a *court order* mandating that the State fund the construction of his proposed prison healthcare facilities. Until now, the Receiver's construction plans have contemplated the active participation of the California Legislature, and accordingly did not rely on the authority of this Court. In Appendix A to the Receiver's Turnaround Plan of Action, the Receiver states that the funding for the prison construction plan will be obtained through lease revenue bonds. (Turnaround Plan of Action at 30.) Such lease revenue bonds require the approval of the Legislature. Although the Court issued its Order Approving Receiver's Turnaround Plan of Action, it did not order the State to fund the construction of the Receiver's proposed prison healthcare facilities in a manner unacceptable to the State and contrary to state law. Since the State Defendants had no objection to the construction of the healthcare facilities through legislative action, they had no occasion to object to the Turnaround Plan of Action. Now that the Receiver has indicated that he intends to pursue his construction projects without State approval, however, the State Defendants' objection to his requested relief is timely. Moreover, section 3626(a)(1)(C) is a limitation on the court's authority to order the construction of prisons. *See* 18 U.S.C. § 3626(a)(1)(C) ("Nothing in this section shall be construed *to authorize the courts*. . . .") (emphasis added); *see also id.* § 3626(c)(1) ("*[T]he court shall not enter or approve* a consent decree unless it complies with the limitations on relief set forth in subsection (a).") (emphasis added). Accordingly, while the State can agree to fund the construction of the Receiver's prison healthcare facilities, the Court cannot order the State to do so without its consent.

B. The Receiver Has Not Shown that His Request Is the Least Intrusive Means to Bring the State's Healthcare System Into Compliance with Constitutional Requirements

Even if the Court were to conclude that the PLRA permits the construction outlined in the Receiver's Turnaround Plan of Action, the construction of the prison healthcare facilities contemplated by the Receiver's Motion does not satisfy the PLRA's requirements for injunctive relief insofar as the Receiver has not established that it is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means

necessary to correct the violation of the Federal right." Section 3626(a)(1)(A). These findings must be made based on the *current* record, and cannot be based on prior findings. *See Cason v. Seckinger*, 231 F.3d 777, 784 (11th Cir. 2000). Conclusory statements that the PLRA's requirements are met are likewise insufficient; "[p]articularized findings, analysis, and explanations should be made as to the application of each criteria to each requirement" imposed by the PLRA. *Id.* at 784–85; *see also Castillo v. Cameron County*, 238 F.3d 339, 354 (5th Cir. 2001). The Receiver bears the burden of proof in making these showings. *See, e.g., Olagues v. Russoniello*, 770 F.2d 791, 799 (9th Cir. 1985). In interpreting the PLRA's least restrictive means requirement, the Ninth Circuit has observed that "[a]n injunction employs the 'least intrusive means necessary' when it heels close to the identified violation, and is not overly intrusive and unworkable and would not require for its enforcement the continuous supervision by the federal court over the conduct of state officers." *Clement v. California Dept. of Corrections*, 364 F.3d 1148, 1153 (9th Cir. 2004) (internal citations and quotations omitted). Because he has failed to show that the relief he seeks—an $8 billion prison healthcare facilities construction program—is narrowly drawn, extends no further than necessary, and is the least intrusive means to cure an alleged ongoing constitutional violation, the Receiver's Motion should be denied. If the Court believes that some relief is appropriate, at a minimum the Court should conduct further proceedings to determine whether the PLRA's requirements are met.

1. The Receiver's Motion Ignores the Myriad Other Improvements to the Provision of Healthcare, All of Which Are Less Intrusive than Construction

Given the numerous improvements to the prison healthcare system in California since the appointment of the Receiver, the Receiver has not shown that his request for an $8 billion prison healthcare facilities construction program is narrowly drawn, extends no further than necessary, and is the least restrictive means to improve prison healthcare. As detailed in his Eighth Quarterly Report ("EQR") filed on June 17, 2008, the Receiver has already made substantial progress in improving the health care provided to inmates, with many more improvements

scheduled to be implemented in the near future.[1] For instance, the pilot program for the Receiver's Access Unit for Health Care Operations at San Quentin Prison came online April 1, 2008. (EQR at 7.) The results as described the Receiver were encouraging: 66% of inmates received a priority ducat for either medical, dental, or mental healthcare, of which 91% were seen by a clinical provider. (*Id.*) This program has also been instituted at the California Medical Facility, and "has also greatly reduced the number of missed appointments due to a lack of correctional officers or vehicles and increased the ability for more inmates to access care." (*Id.* at 8). As Health Care Access Units are established at other prisons, further gains in access to care are anticipated.

Further, the Receiver has been successful at recruiting health care professionals, which also promises to improve prison health care. Currently, 86% of nursing positions are filled. The goal of 90% has been met at 22 institutions, 15 of which have less than 5% of their nursing positions vacant. (*Id.* at 16.) Moreover, 81% of physician positions have been filled, including 95% of the chief medical officer positions and 89% of the physician and surgeon positions. (*Id.*) These improvements have certainly had an impact on the level of care being provided to prisoners.

Moreover, the Eighth Quarterly Report details numerous improvements to health care that are due to be implemented in the near future. The Receiver has created an inter-discipline reception model at eight core reception facilities. (EQR at 4–5.) There will be an automated system for tracking medical appointments, as well as a new utilization management system, both of which will ensure that prisoners receive timely care. The Receiver has planned an overhaul of the manner in which prescription medications are delivered, including an update of the procedures manual, changes to the formulary, and implementation of the Guardian RX operating system. (*Id.* at 27–31.) The Receiver has hired Navigant Consulting to improve laboratory

---

1. Moreover, the Receiver filed his Ninth Quarterly Report today. Although the State has not had a chance to review this filing, it expects this more recent and timely report will include further improvements. The State Defendants reserve the right to augment the record with the information contained in the Receiver's Ninth Quarterly Report. Moreover, at a recent hearing of the California Rehabilitation Oversight Board, the Receiver made additional statements regarding improvements to the provision of healthcare. The State Defendants will supplement the record with the relevant portions of the transcript from that meeting when it becomes available.

services and McKenzie Stephenson, Inc. to audit radiology services. (*Id.* at 33–34.) Numerous information technology improvements include a standardized health records practice and a clinical information system that will store key patient information. (*Id*. at 35.)

Each of these improvements represents a much less intrusive means of improving the healthcare provided by CDCR, and must be given a chance to function before the Court embarks on the drastic step of ordering the seizure of billions of dollars from the State Treasury to construct 7 million square feet of space for new prison healthcare facilities and remodel existing healthcare clinics in numerous CDCR prisons. A decision concluding that a prison healthcare facilities construction program is the least intrusive means available would contradict the success of the Receiver's actions over the past two years, and coupled with the other reforms envisioned in the EQR and the Turnaround Plan of Action, fail to recognize that significant progress is being made to achieve adequate prison healthcare.

2. The Receiver Has Not Shown that $8 Billion Is Needed to Cure a Constitutional Violation

The Receiver has not established that $8 billion is necessary to bring the State into compliance with the dictates of the Eighth Amendment. It is important to note that the court may authorize only that which is *necessary* to bring the State into compliance with the Eighth Amendment. Thus, the Receiver must show that the *entire $8 billion* is necessary to ensure that the State is providing care such that officials are not deliberately indifferent to prisoners' serious medical needs. *Hallett v. Morgan*, 296 F.3d 732, 743 (9th Cir. 2002). That, of course, is the constitutional standard. That standard, however, appears nowhere in the Receiver's prison healthcare facilities construction plan or in his Motion.

Without any reference to that constitutional standard, it is not surprising that the construction plan envisions projects far in excess of constitutional requirements. Even a cursory look at the Facility Program Statement (Second Draft, Revised on July 22, 2008) reveals that the construction plan is not simply designed to prevent "deliberate indifference," but rather will provide prisoners with health care and quality of life better than that received by most law-abiding Californians. (Ex. A to the Declaration of Christopher Lief ("Facility Program

Statement").) For instance, it provides [redacted]

It is incredible to believe that these amenities are required to provide the minimum constitutional level of health care.

3. The Receiver's Request for $8 Billion Fails to Consider the $7.4 Billion for Prison Reform Measures Already Approved by the Legislature and Completely Ignores the Legislature's Role in Improving Prison Health Care

The Receiver's Motion fails to address the fact that funds have already been appropriated that will address the alleged constitutional violations. In 2007, the Legislature authorized $7.4 billion in prison construction, and authorized and provided for lease-revenue bond financing in that amount. *See* AB 900, Stats. 2007, c. 7, eff. May 3, 2007.[2] That amount, of course, reflects almost as much money as what is being sought by the Receiver. Of that amount, $1.14 billion is allocated for prison construction projects "to provide medical, dental, and mental health

---

2. Although the AB 900 funds have not been paid out due to various legal challenges, the State has so far been successful in defending against such challenges, and expects that all such challenges will be rejected. In addition to providing the AB 900 funds, the State is continuing to work on various amendments to AB 900 to expedite the use of those funds, as well as exploring a separate lease revenue bond legislation and alternative bond financing. (LeLouis Decl. ¶¶ 5–7.)

treatment or housing" for a total of 8,000 inmates. (*Id.* §§ 15819.40(c), 15819.403(a), 15819.41(b), 15819.413(a).) Having already been allocated those funds, the Receiver should be required to exhaust those funds before seeking yet more money from the State. There is no evidence in the record to addressing whether the $7.4 billion in projects *already authorized* will remedy at least a significant part of the constitutional deficiency. Clearly, it will have *some* effect, and may well reduce the need for further construction. The Receiver simply has not met his burden to justify why the state should spend *another* $8 billion, for a total of $15.4 billion, in order to provide constitutionally adequate medical care. Finally, there is no indication that this $8 billion is the Receiver's last request, and that more requests will not be forthcoming. As noted above, there has been no determination as to what level of care is constitutionally sufficient. Absent that determination, the State has no way of knowing when, in the Court's view, it has complied with the dictates of the Eighth Amendment. In this vacuum, it also is impossible to judge whether the Receiver's prison healthcare facilities construction projects are necessary to achieve a constitutionally adequate level of care, or what steps the State must take on its own initiative to reach that level. The fact that the Receiver's plans to provide constitutionally adequate healthcare have changed so dramatically over time indicates that the standard has not been established. As described above, *supra* at 8–9, the Stipulation for Injunctive Relief, which was "designed to meet *or exceed* the minimum level of care necessary to fulfill the defendants' obligation to plaintiffs under the Eighth Amendment to the United States Constitution" (p. 2–3), dealt only with the staffing of emergency clinics by registered nurses, protocols for inter-institution transfers and treatment, a priority ducat system, and outpatient diets. (*Id.* at 4.) Those policies and procedures, which were intended to be sufficient to remedy any constitutional violation, are a far cry from the Receiver's request to seize $8 billion for his prison healthcare facilities construction program. So too does the Patient Care Order contemplate a much less invasive method of improving prison health care than the Receiver's massive construction program. That Order provided for the training of physicians (Patient Care Order at 2), the development of criteria and methods for identifying and treating high-risk patients (*id.* at 4), and the appointment of regional medical directors and regional

directors of nursing to supervise line physicians and nurses (*id*. at 4–5). As described above, substantial progress has been made in developing new treatment criteria, and hiring both nurses and physicians. If the Patient Care Order truly represented the constitutional standard of care, the State would already be in compliance with constitutional requirements. The fact that the Receiver is now planning much more confirms that the Receiver's concept of constitutionally adequate healthcare is a moving target that has no basis in law.

As his draft Facility Program Statement makes clear, the Receiver wishes to go farther than any previous order of this Court has contemplated. There is simply no discussion of what standard is being applied in determining that the construction of 10,000 new beds, coupled with extensive renovations to existing facilities, is constitutionally required. Nor is there any assurance that even if these facilities are constructed, the Receiver will be satisfied that a constitutional level of care has been reached. Moreover, because the Receiver intends to construct new facilities at the same time that they upgrade existing facilities, some duplication is inevitable. And despite the Court's statement that "the Receivership shall remain in place no longer than the conditions which justify it make necessary, (OAR at 7), the Receiver has stated that he does not intend to ever relinquish control over the prisons he seeks to construct to CDCR, but rather intends to create an entirely new state agency that also has jurisdiction over California prisoners. This further illustrates the extent to which the Receiver would have the Court manage a huge swath of the State's operations. Moreover, this plan to create a separate, duplicate state agency is an unacceptable intrusion into the State's operations and is beyond federal authority.

As discussed above, *supra* at 5–6, Legislators are currently grappling with a deficit of more than $15 billion. The Receiver's $8 billion prison healthcare facilities construction project, which far exceeds any constitutional requirement, ignores the other pressing needs facing California. This is why our democracy entrusts such decisions to Legislatures rather than Courts. As the Supreme Court has recognized, "the public interest and '[c]onsiderations based on the allocation of powers within our federal system,' require that the district court defer to local government administrators, who have the 'primary responsibility for elucidating, assessing, and solving' the problems of institutional reform. . . ." *Rufo v. Inmates of Suffolk County Jail*,

502 U.S. 367, 391 (1992) (citations omitted). Moreover, the Receiver's motion, if granted, would have tremendous adverse consequences on the Legislature's ability to fund vital programs. Because of supervening law, including as voter-approved initiatives, constitutional limitations, and federal law, approximately 80% of California's budget expenditures are not discretionary. (Matosantos Decl. ¶ 12.) Of the $102.3 billion in authorized expenditures in the 2007-2008 Budget Act, these represent $41.493 billion to education as required by the State Constitution, $1.3023 billion to debt service, $3.453 billion to federally required payments, $16.849 billion to meet pre-existing labor contracts, and $18 billion for the State's participation in federal programs (participation in which resulted in $29 billion in federal grants to the State). (Matosantos Decl. ¶¶ 7–11.) Other General Fund expenditures authorized in the 2007–08 Budget Act represent $1.123 billion in support of the retirement system for state teachers, and $576 million is for state entity lease obligations which ultimately secure payments to investors in the State's lease revenue bonds. (Matosantos Decl. ¶ 13.) The remaining funds are used to fund such programs as services to developmentally disabled citizens, state hospitals, food benefits and cash assistance payments to legal immigrants, payments to parents with of eligible adopted children with special needs, and emergency services for abused and neglected children. (*Id.*) And while the 2008-2009 Budget Act has not yet been passed by the Legislature, the Governor has recommended program cuts of $11.3 billion which constitute 11% of the proposed 2008–09 General Fund Proposed Budget. (August 2008-09 Updated Proposed Compromise at 4.) To the extent that the Court orders the State to pay a specific amount, that amount would be required to be set aside such that it is in effect unavailable for appropriation, and would cause a tremendous impact on these programs, which are already facing cuts in the 2008-09 Budget.

Thus, while many of the provisions in his Facility Program Statement may be desirable, their construction should be left to a Legislative determination, and not to the Receiver or this Court, who are institutionally not able to consider the full panoply of California's needs. That is particularly true where the Court's role has expanded from overseeing the hiring of medical professionals and the development of treatment protocols to overseeing an $8 billion prison healthcare facilities construction program, coupled with the creation of a new state agency, the

complete overhaul of CDCR's information technology system, the provision of pharmaceuticals, oversight of laboratories and radiology services, the development of a clinical information system, and myriad other reforms to the prison healthcare system. As the PLRA recognizes, such a massive overhaul of a state's prison system is simply beyond the province of the federal courts. *See, e.g., The End of the Prison Law Firm*, 29 Rutgers L. J. 361, 369–380 (1998) (describing history of federal courts' involvement in prison reform and the provisions of the PLRA intended to curtail such oversight). Thus, the Receiver's failure to justify the need for the extra prison healthcare facilities space or the $8 billion price tag is particularly troubling in this case.

4. At The Very Least, Further Proceedings Are Necessary to Rule on the Receiver's Request

Because there is woefully insufficient evidence in the record supporting the Receiver's request such that the Court cannot possibly make the findings necessary under the PLRA, the motion should be denied. If, however, the Court believes that some relief is appropriate, further proceedings are needed to evaluate the Receiver's request. Where, as here, "factual questions are not readily ascertainable from the declarations of witnesses," further proceedings are appropriate. *United Commercial Ins. Service, Inc v. Paymaster Corp.*, 962 F.3d 853, 858 (9th Cir. 1992). The Receiver has given little information to the State to explain what how he intends to use the $8 billion, and what little information he has given to the State has been provided in secret. Moreover, there has been no determination as to what constitutes a constitutional level of care.

5. The Receiver Has Failed to Show that State Law Must Be Waived Under the PLRA

The Receiver also fails to meet his burden in showing that state law must be waived in order to obtain the construction funding he requests. Indeed, he has taken a shotgun approach to waiving state laws, and lacks any argument as to why the provisions he cites should be waived.

(Mot. at 25.) Not only has he thus failed to make the showing required by the PLRA, *see* 18 U.S.C. § 3626(a)(1)(B), his assertion that such laws should be waived without any legal argument makes it impossible for the State to respond. For instance, he cites to the section of the Government Code that establishes the existence of the State's General Fund, *see* Government Code § 16300, which is the primary source of funding for State government and has existed since the State's inception. Some of the sections he cites, such as Cal. Gov. Code sections 16744-16746, do not even exist. Having failed to show why the provisions of state law the Receiver wishes to have waived are even relevant to this case, the Receiver has not met the strict requirements of the PLRA, and the Court should not grant the request for their waiver.

III.

CALIFORNIA'S SOVEREIGN IMMUNITY BARS THE RELIEF SOUGHT BY THE RECEIVER

Even if it were permitted under the PLRA, the relief requested by the Receiver—an order ultimately compelling the State to pay $8 billion from its treasury—is barred by principles of sovereign immunity reflected in the Eleventh Amendment. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment, and the concept of sovereign immunity inherent in it, "largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals." *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). Under the Eleventh Amendment, then, a suit against a State is permissible only when Congress, pursuant to its power under Section 5 of the Fourteenth Amendment, has clearly abrogated States' sovereign immunity, or the state has unequivocally waived the protections of sovereign immunity. *Pennhurst*, 465 U.S. at 99. In addition, an individual may, in limited circumstances, sue a state official for prospective injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908). *See Edelman v. Jordan*, 415 U.S. 651, 664–65 (1974) (describing the scope of the *Young* exception). None of these exceptions, however, apply to the relief being sought here. Although the State has agreed to a consent decree, it did so only with respect to *injunctive* relief.

For the first time, the Receiver has sought monetary relief that does not fall within the *Ex Parte Young* exception, and accordingly, the State's assertion of sovereign immunity is appropriate and timely. Accordingly, the Receiver's motion should be denied.

A. The Relief Sought Does Not Fit Within the *Ex Parte Young* Exception

Under the Supreme Court's decision in *Young*, a state official may, in limited circumstances, be sued for prospective injunctive relief without running afoul of the Eleventh Amendment. The Supreme Court has cautioned, however, that the *Young* exception should not be interpreted in such a manner as to eviscerate the underlying protections of the Eleventh Amendment and state sovereign immunity. Even where state officials are being sued, "the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997). As a result, the Supreme Court has cautioned that "[t]o interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism. . . ." *Id.* The proper application of *Young* in this case must recognize that it is one thing to order something to be done that would necessarily cost money; it is another thing to order the direct payment of money as is being sought here.

1. The Receiver's Attempt to Directly Raid the State Fisc Violates the Eleventh Amendment as the Controller Lacks any Connection with the Eighth Amendment Violations

The ultimate relief requested by the Receiver—an order compelling the Controller to draw a warrant on the State Treasury—has an insufficient connection to the alleged unconstitutional conduct—the provision of inadequate healthcare violating the Eighth Amendment—to meet the requirements of *Young*. In order for a suit to fall within in the *Young* exception, the official being sued "must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Ex Parte Young*, 208 U.S. at 157; *see also Okpalobi v. Foster*, 244 F.3d 405, 411–12 (5th Cir. 2001) (en banc) (discussing history of *Young*'s connection requirement). The Ninth Circuit has explained that this connection must be "fairly direct." *Snoeck v. Brussa*, 153 F.3d

984, 986 (9th Cir. 1998).

Here, the Controller has absolutely no connection to the Eighth Amendment violations being challenged by the Receiver, revealing that the relief sought by the Receiver is in fact against the State itself.[3] Whether there is a sufficient connection for purposes of *Young* "must be determined under state law depending on whether and under what circumstances a particular defendant has a connection with the challenged state law." *Snoeck*, 153 F.3d at 987. Under California law, the Controller is responsible for drawing warrants on the State Treasury. *See* Cal. Const., Art. XVI, § 7. He has no responsibility for overseeing the prison system: that is left to the Governor and officials at CDCR. Accordingly, the Controller has no "connection with the challenged state law" and the suit against him cannot be maintained under *Young*. *See Papasan v. Allain*, 478 U.S. 265, 277 (1986) ("In accordance with its original rationale, *Young* applies only where the underlying authorization upon which the named official acts is asserted to be illegal.").[4]

Of course, the Receiver did not sue the Controller to cure the constitutional violation at issue in this litigation: he sued him to seize money directly from the State Treasury. Indeed, the first sentence of his Motion reflects this fact. As he candidly acknowledges, "the Receiver seeks the Court's assistance in securing payment *by the State of California* of the $8 billion in funding necessary for the Receiver's construction program" (Mot. at 2 (emphasis added). *See also* Receiver's Mem. re Joinder of State Controller as Party Def. (June 19, 2008) at 3 ("State funds [could] be drawn directly from the State Treasury and transferred to the Receiver. . . .").) Such a suit, however, is not contemplated by *Young* and runs afoul of core Eleventh Amendment

---

3. While the Motion also names the Governor, only the Controller can draw warrants on the State Treasury, the relief sought by the Receiver. *See* Cal. Const., Art. XVI, § 7.

4. This is in contrast with prior Court orders, which have been directed at officials that are in charge of the prison system, including the Governor and officials at CDCR. Those orders have all been justified by the federal Constitution's mandate that prisoners be afforded medical care that meets the requirements of the Eighth Amendment. Because those actions were constitutionally compelled, they fit within the fiction of *Young* that if the state officials had acted otherwise, they would have been acting outside their state-granted authority and would not be cloaked with the authority of the state for purposes of sovereign immunity.

concerns. The Receiver, however, has not identified any federal law that the Controller has violated or is threatening to violate. Having failed to identify any unconstitutional act that strips the Controller "of his official or representative character," *Ex Parte Young*, 208 U.S. at 160, the *Young* exception is simply inapplicable.

Consequently, the suit should properly be viewed as against the State, not the Controller, and is thus barred by the Eleventh Amendment and California's sovereign immunity. "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Dep't. of Treasury of Indiana*, 323 U.S. 459, 464 (1945). Accordingly, even though the relief sought is framed as injunctive, prospective relief, the fact remains that it is the State's interests, not that of the officer, that are paramount in this case. To "adher[e] to an empty formalism" in this case would render the Eleventh Amendment ineffective, and contravene the Supreme Court's instruction "that Eleventh Amendment immunity represents a real limitation on a federal court's federal question jurisdiction." *Coeur d'Alene,* 521 U.S. at 270. The *Young* exception does not apply to the Receiver's Motion.

2. The Relief Sought by the Receiver Implicates "Special Sovereignty Interests"

Because of the unprecedented amount being sought, the Receiver's request also implicates "special sovereignty interests" that strongly weigh in favor of recognizing California's sovereign immunity. In *Coeur d'Alene*, the Supreme Court dismissed a suit against the State of Indiana despite its acknowledgment that"[t]he Tribe has alleged an ongoing violation of its property rights in contravention of federal law and seeks prospective injunctive relief," which "is ordinarily sufficient to invoke the *Young* fiction." 521 U.S. at 281. Citing the "special sovereignty interests" of a State in its lands and navigable waterways, however, the Court nevertheless concluded that the suit was barred by principles of sovereign immunity. *Id*. at 287. Courts have recognized that *Coeur d'Alene* created an exception to *Ex Parte Young* for suits that implicate a state's "special sovereignty interests." *See, e.g., ANR Pipeline Co. v. Lafaver*, 150

F.3d 1178, 1191 (10th Cir. 1998). The Ninth Circuit has suggested that *Coeur d'Alene* bars injunctive relief that would otherwise fall under the *Young* exception where "the relief requested would be so much of a divestiture of the state's sovereignty as to render the suit as one against the state itself." *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1048 (9th Cir. 2000). Making this determination "requires an assessment of the intrusion on state sovereignty of the *specific relief* requested by the plaintiff." *In re Ellett*, 254 F.3d 1135, 1144 (9th Cir. 2001).

Examining the specific relief requested by the Receiver, it is clear that his request implicates special sovereignty interests such that *Young* should not apply even if, contrary to Supreme Court case law, its requirements were technically met. The relief sought in this case is unprecedented: an $8 billion levy on the State's Treasury over a period of three years. Such a usurpation of the State's finances is clearly a divestiture of California's sovereignty and implicates the Eleventh Amendment, the primary purpose of which was"the prevention of federal-court judgments that must be paid out of a State's treasury." *Hess*, 513 U.S. at 39. Moreover, given the amount of money at stake, the Receiver's request is tantamount to reordering completely the State's financial priorities in contravention of California's democratic processes. This is not simply an attempt to ensure that the warrants drawn from the Treasury by the Controller are performed in a manner consistent with federal law, *see, e.g., In re Ellett*, 254 F.3d at 1143; *Agua Caliente*, 223 F.3d at 1049, but is rather much more invasive of California's sovereignty. The Receiver's attempt to bypass the normal legislative process of appropriating funds, particularly funds on such a massive scale, plainly implicates special sovereignty interests. California faces a fiscal crisis that has resulted in a delayed budget as the Legislature debates how best to resolve a $15-plus billion deficit. Adding a $8 billion liability on top of that—a 50% increase—would "place unwarranted strain on the State's ability to govern in accordance with the will of [its] citizens." *Alden*, 527 U.S. at 750–51.

By bypassing the Legislature, the Receiver and this Court would insert itself in a process that is one of the most basic decisions a State makes, as "[t]he allocation of the state's financial resources among competing needs and interests lies at the heart of the political process." *Id.* at

751. As the founders recognized, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 307–08 (James Madison) (Modern Library ed., 2000). The State thus has a special sovereign interest in the disposition of the money being sought by the Receiver, particularly given the magnitude of his request. As the Supreme Court noted in *Alden*:

> If the principle of representative government is to be preserved to the States, the balance between competing interests [for scarce resources] must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

Id. These decisions are precisely the sort of special interest the Court contemplated in *Coeur d'Alene* as requiring application of the Eleventh Amendment, even where the Court to conclude that the formal requirements of *Ex Parte Young* are met.

3. Because the Receiver's Request Implicates the State's Financial Viability, all Doubts Should Be Resolved in Favor of California's Sovereign Immunity

As discussed above, the protection of the states' treasuries was the primary motivation behind the passage of the Eleventh Amendment, and the reason states were so protective of their sovereign immunity in federal courts at the time of the founding. Accordingly, the "Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." *Hess*, 513 U.S. at 48; *see also id.* at 49 ("[T]he state treasury factor is the most important factor to be considered . . . and, in practice, [courts] have generally accorded this factor dispositive weight.").

In this case the Receiver seeks a direct levy on the State Treasury. Unlike in *Hess*, if the Receiver's motion is granted, California will be forced to make mandatory payments totaling more than $8 billion, a significant percentage of the State's General Fund. If there are any doubts as to whether this type of relief is contemplated by the *Ex Parte Young* line of cases, *Hess* makes clear that the direct impact on the State's treasury should resolve those doubts in favor of finding that the State is protected by its sovereign immunity.

B. Because the Prior Consent Decrees in this Case Only Provide for Injunctive Relief, the State Has Not Waived its Sovereign Immunity with Respect to the Receiver's Request for Monetary Relief

As the Receiver's Motion is attempting for the first time to directly attach funds from the State's Treasury, the State's invocation of the Eleventh Amendment at this stage of the proceedings is timely, and the State has not waived its sovereign immunity. The "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Bd.*, 527 U.S. 666, 675 (1999). For a state to have waived its sovereign immunity, there must be "unequivocal evidence of the state's intention to subject itself to the jurisdiction of the federal court." *Hill v. Blind Indus. and Serv. of Maryland*, 179 F.3d 754, 758–59 (9th Cir. 1999). The State has not unequivocally waived its sovereign immunity in this case, either by statute, *Atascadero*, 473 U.S. at 241, or through any pleading in this litigation.

The State has similarly not constructively waived its sovereign immunity. *Hill*, 179 F.3d at 756. While the State signed a consent decree, it did so only with respect to injunctive relief; in no way did it agree to the monetary relief being sought by the Receiver. Until the Receiver's Motion, all of the relief requested by the plaintiffs and the Receiver has been injunctive in nature, and thus fallen within the *Young* exception to the Eleventh Amendment. Accordingly, the State did not have occasion to raise the defense until this Motion was filed and the Receiver went beyond the *Young* exception and sought to directly levy the State's Treasury. So long as a state raises a sovereign immunity defense when it appears clear that defense applies, it is timely even if the defense is raised for the first time relatively late in the proceedings. *See Baird v. Kessler*, 172 F. Supp. 2d 1305, 1313–14 (E.D. Cal. 2001) ("Because it was not obvious from the face of the complaint whether they were effectively being sued in their official or individual capacity, it was not until the close of discovery that defendants felt they could support a defense of sovereign immunity. Thus, defendants have not unambiguously waived their right to assert the defense of sovereign immunity under the Eleventh Amendment."). Here, it was only when the Receiver filed this Motion did the State have a valid sovereign immunity defense. Moreover, given the enormous sum of money sought by the Receiver, all inferences should be drawn

against waiver. Having raised the defense at the first occasion where it was implicated, California has not unequivocally waived the defense.

//

//

CONCLUSION

For the foregoing reasons, the State Defendants respectfully request that the Receiver's Motion be denied.

Dated: September 15, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California
CHRISTOPHER E. KRUEGER
Senior Assistant Attorney General
ROCHELLE C. EAST
Senior Assistant Attorney General
CONSTANCE L. LELOUIS
Supervising Deputy Attorney General

/s/ Daniel J. Powell

DANIEL J. POWELL
Deputy Attorney General
Attorneys for Defendants

20144585.wpd
SA2008303384

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Marciano Plata, et al. v. Arnold Schwarzenegger, et al.**

No.: **3:01-cv-01351-TEH**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 15, 2008, I served the attached

Redacted Opposition to Motion for Order Adjudging Defendants in Contempt for Failure to Fund Receiver's Remedial Projects and/or for an Order Compelling Defendants to Fund such Projects

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Andrea Hoch
Legal Affairs Secretary
Office of the Governor
State Capitol Building, 1st Floor
Sacramento, CA 95814

Warren C. Stracener
Paul M. Starkey
Dana Brown
Labor Relations Counsel
Department of Personnel Admin. Legal Division
1515 S Street - North, Suite 400
Sacramento, CA 95814 D-22

Donald Currier
Legal Counsel
CDCR, Legal Division
P.O. Box 942883
Sacramento, CA 94283-0001

Robin Dezember, Director
Division of Correctional
CDCR
P.O. Box 942883
Sacramento, CA 94283-0001

Molly Arnold
Chief Counsel
Department of Finance
State Capitol, Room 1145
Sacramento, CA 95814 A-15

Matthew A. Lopes, Jr.
Pannone Lopes & Devereaux, LLC
317 Iron Horse Way, Suite 301
Providence, RI 02908

Laurie Giberson, Senior Staff Counsel
Department of General Services
Office of the Chief Counsel
707 Third Street, 7th Floor, Suite 7-330
West Sacramento, CA 95605 C-1

David Shaw
Inspector General
Inspector General's Office
P.O. Box 348780
Sacramento, CA 95834-8780

Donna Neville
Senior Staff Counsel
Bureau of State Audits
555 Capitol Mall, Suite 300
Sacramento, CA 95814

Al Groh
Executive Director
UAPD
1330 Broadway Blvd., Ste. 730
Oakland, CA 94612

Peter Mixon, Chief Counsel
California Public Employees Retirement System
Office of the General Counsel
400 Q Street, Lincoln Plaza
Sacramento, CA 95814

Yvonne Walker
Vice President for Bargaining
SEIU - Local 1000
1108 "O" Street
Sacramento, CA 95814

Jay Shulman, DMD, MA, MSPH
9647 Hilldale Drive
Dallas, TX 75231

Pam Manwiller
Director os State Programs
AFSCME
555 Capitol Mall, Ste. 1225
Sacramento, CA 95814

Richard Tatum
CSSO State President
CSSO
1461 Ullrey Avenue
Escalon, CA 95320

Tim Behrens
President
ACSS
1108 "O" Street
Sacramento, CA 95814

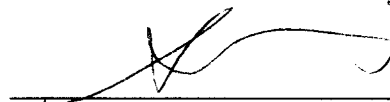
Elise Rose
Chief Counsel
State Personnel Board
801 Capitol Mall
Sacramento, CA 95814

Stuart Drown
Executive Director
Little Hoover Commission
925 L Street, Suite 805
Sacramento, CA 95814

Joseph D. Schalzo, DDS, CCHP
3785 N. 156th Lane
Goodyear, AZ 85395

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 15, 2008, at San Francisco, California.

Susan Chiang
Declarant


Signature

20144157.wpd