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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURTS
FOR THE EASTERN DISTRICT OF CALIFORNIA
AND THE NORTHERN DISTRICT OF CALIFORNIA
UNITED STATES DISTRICT COURT COMPOSED OF THREE JUDGES
PURSUANT TO SECTION 2284, TITLE 28 UNITED STATES CODE

RALPH COLEMAN, et al.,

Plaintiffs,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants

) No. Civ S 90-0520 LKK-JFM P
) **THREE-JUDGE COURT**

) **PLAINTIFFS' RENEWED MOTION FOR AN**
) **ORDER REQUIRING DEFENDANTS TO**
) **DEMONSTRATE HOW THEY WILL**
) **ACHIEVE THE REQUIRED POPULATION**
) **REDUCTION BY JUNE 2013**

MARCIANO PLATA ,et al.,

Plaintiffs,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants

) No. C01-1351 TEH
) **THREE-JUDGE COURT**

INTRODUCTION

Defendants have announced that by mid-2013 they will be out of compliance with the January 12, 2010, Order to reduce prison crowding. In their recently-published document called “The Future of California Corrections,” Defendants indicate no present intent to change course. Instead, they say that they will ask the Court to change the Order so the State doesn’t have to reduce crowding to 137.5% of capacity. But unless and until the Court actually modifies its Order, Defendants must take all reasonable steps now to avoid a default next year.

Defendants have been aware that they are on a path to default since at least mid-2011, when they first calculated that their realignment plan would not reduce the prison population enough to comply with the Order. Yet Defendants have taken no steps to avert the expected violation of the Order, nor have they even informed the Court of the impending default.

The Court should order Defendants to submit a plan within thirty days to come into full compliance with the Court’s January 12, 2010, Order. The plan should describe what additional measures Defendants will take, and also include a contingency plan giving the Secretary of CDCR authority to take all necessary steps to comply with the Order if the State’s plan does not produce the expected population reduction.

BACKGROUND

On May 23, 2011, the United States Supreme Court affirmed this Court’s Order requiring Defendants to reduce California’s prison crowding to 137.5% of design capacity by June 2013. On April 23, 2012, Defendants announced that they will not comply with the Order; the population in June 2013 will be 141% over capacity, and it will grow even larger in the following years. CDCR, *The Future of Cal. Corrections*, at 50, and Appendix G.¹

Defendants do not plan to take any steps to comply with the Order; they will take no further action to reduce prison crowding with the hope that they can convince this Court that the crowding cap should be raised to 145% of capacity. *Id.* at 50.

¹ “The Future of California Corrections” is published at <http://www.cdcr.ca.gov/2012plan/index.html> (site last visited April 30, 2012). Appendix G is also reproduced in the Declaration of James Austin, filed herewith.

1 This is not the first time Defendants have announced their intention not to comply with
2 this Court's crowding reduction Order.

3 On August 4, 2009, this Court issued an order requiring Defendants to submit a plan
4 "that will in no more than two years reduce the population of the CDCR's adult institutions to
5 137.5% of their combined design capacity." Aug. 4, 2009, Opinion & Order at 183. In
6 defiance of that order, Defendants submitted a plan that would only reduce crowding to 166%
7 of design capacity. *See* Oct. 21, 2009, Order Rejecting Plan at 2.

8 The Court rejected Defendants' plan, and ordered Defendants to submit another one,
9 noting that it was "unaware of any excuse for the state's failure to comply" with the August 4,
10 2009, Order, and averring that it would view "with the utmost seriousness any further failure to
11 comply with our orders." *Id.* at 6.

12 On November 12, 2009, Defendants submitted a new plan, this time to reduce the prison
13 population to 137.5% of capacity in two years. Nov. 12, 2009, Def. Resp. to Order. On
14 January 12, 2010, this Court ordered Defendants to reduce the prison population on the
15 schedule set forth in Defendants' plan. Jan. 12, 2010, Order at 4.

16 After the Supreme Court issued its decision in this case, however, Defendants informed
17 the Court that they had revised their plan, and that they would accomplish the population
18 reduction primarily through the "crowding reduction measures" in Assembly Bill 109 (often
19 referred to as "realignment"), as well as through diversion and credit earning adopted in Senate
20 Bill 18XXX, and construction. June 7, 2011, Def. Status report at 3-6. Defendants stated that
21 they would "keep the court fully informed of their progress in implementing these and other
22 measures." *Id.* at 3.

23 Yet as early as September 2011, and likely before then, Defendants understood that
24 their current plan would not bring the State into compliance with the Court Order.

25 Defendants' Fall 2011 Population Projections revealed that the State would miss the
26 court-ordered crowding reduction by approximately 6,000 prisoners. *See* Feb. 7, 2012 Pltf.
27 Mot, at 2-3. Defendants have nonetheless provided misleading assurances to the Court that
28 "there is no need at this time to undertake additional crowding-reduction measures to achieve

1 compliance” because “the current population and projections indicate that Defendants will
 2 achieve the *next* benchmark . . .” April 13, 2012, Def. Status Report at 2 (emphasis added).
 3 They have made the same statement in each status report going back to September, 2011.
 4 None of their reports have addressed the coming default in June 2013.

5 In February 2012, Plaintiffs’ filed a motion seeking an order requiring Defendants to
 6 demonstrate how they will achieve the required crowding reduction by June 2013. Feb. 7,
 7 2012, Pltf. Mot. In response, Defendants argued that their own Fall 2011 Population
 8 Projections were “speculative” and based on “stale data” and suggesting that the State *might* be
 9 on track to meet the court-ordered reduction because “the actual population reduction to date
 10 has exceeded these projections.” Feb. 27, 2012, Def. Opp. at 2, 3.²

11 Despite their statements to the Court that the Fall 2011 Projections were unreliable,
 12 Defendants’ new long-term population projections remain essentially unchanged. Spring 2012
 13 Adult Population Projections at 2 (short term population projections are lower than Fall 2011,
 14 but the population projections in the “remaining three years are expected to be similar to the
 15 Fall 2011 Projections.”)³

16 In “The Future of California Corrections” Defendants affirmatively state that they will
 17 not achieve the court-ordered crowding reduction, expressing the hope that this Court will
 18 relieve them of their obligation to do so. The Future of California Corrections at 50 and
 19 Appendix G.

20 Defendants expect that the population in June 2013 will be approximately 141% of
 21 capacity, a shortfall of more than 2,900 prisoners. *Id.* at Appendix G. In the following three
 22 years, Defendants expect the shortfall to grow to more than 5,000 prisoners. *Id.*

24 ² The Court denied Plaintiffs’ motion “without prejudice to the filing of a new motion
 25 following the publication of the State’s Spring 2012 Population Projections and the completion
 26 of the State’s master bed plan, but in any event a new motion may be filed at any time on or
 after May 1, 2012.” March 22, 2012, Order at 1-2.

27 ³ CDCR’s “Spring 2012 Population Projections” is published at
 28 http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Projections/S12Pub.pdf (site last visited April 30, 2012)

This estimate of the shortfall is rather optimistic, however. The shortfall in 2013 will likely be more than 6,600 prisoners, and will then balloon to more than 10,000 because Defendants are bringing the 9,500 prisoners housed in out-of-state prisons back to California, and closing one California prison with a design capacity of 2,491 prisoners. May 9, 2012, Declaration of James Austin, ¶¶ 5-6 and Table 1; Future of Cal. Corrections, at 28.⁴

ARGUMENT

A. The Court Should Order Defendants to Submit a Revised Plan to Reduce Prison Crowding to 137.5% of Design Capacity.

Because Defendants concede that they are on course to violate the court-ordered crowding reduction, they should be required to submit a new plan to bring the prisons into full compliance with the January 12, 2010, Order. Defendants' plan should identify what further steps Defendants will take to reduce prison crowding to 137.5% of design capacity by 2013, and what steps they will take to maintain this level of crowding thereafter. Since Defendants plan to bring 9,500 prisoners back from out-of-state prisons in 2015-2016, and to close one prison in 2016, Defendants' plan should also include detailed projections for the overall population of the 33 prisons by 2013, and for the next five years.

The Plan must also include a statement of what steps Defendants will take in the event that their population projections prove overly optimistic, and they are not on track to achieve the court-ordered crowding reduction. This is necessary because, as Defendants have stated, "[p]opulation projections are inherently speculative." Feb. 27, 2012, Def. Opp. at 3. And indeed, Defendants' population projections appear to assume a level of prison admissions that is far lower than the actual admissions in 2011-2012, and even their assumption that they will achieve 145% of capacity assumes that they will build 3,400 prison beds that have not even been funded or approved by the Legislature. Austin Decl., ¶¶ 5-6, Table 1. Accordingly,

⁴ This increase in population will not be offset by construction. The CDCR is on track to complete a new 1,722 bed facility (Stockton) in mid-2013. Future of Cal. Corrections at 39. That capacity is included in Plaintiffs' analyses of the projected shortfall. The State's other proposed construction (1,100 bed DeWitt Annex, and 2,400 infill beds) are not yet approved by the Legislature or funded, and therefore cannot be expected to have any impact on crowding in the foreseeable future. Future of Cal Corrections at 39-40.

1 Defendants need a contingency plan that gives the Secretary of CDCR authority to take all
2 necessary steps to meet the court Order.

3 Defendants already have the legal authority to do so. The Governor's Prison
4 Overcrowding State of Emergency remains in effect, giving the Governor authority to reduce
5 crowding on his own initiative. Cal. Gov't Code § 8658 (Governor's emergency power
6 specifically covers releasing prisoners); *Id.* at § 8571 (under state of emergency, Governor may
7 "suspend any regulatory statute, or statute prescribing the procedure for conduct of state
8 business, or the orders, rules, or regulations of any state agency . . ."); *Id.* at § 8627 (under state
9 of emergency, Governor has "complete authority over all agencies of the state government and
10 the right to exercise . . . all police power vested in the state by the Constitution and laws of the
11 State of California . . .").

12 **B. Further Delay in Planning is Inappropriate and Will Prejudice Plaintiffs.**

13 Defendants have suggested they may be coming back to this Court to ask it to change
14 the Population Reduction Order. They have not yet done so, and the Order remains in effect.
15 Unless and until the Order is amended, Defendants must take all necessary steps to comply
16 with the Order.

17 Time is of the essence. Defendants project that they will violate the Court's Order next
18 June. Despite the projected default, the State has disavowed any present intention to
19 "undertake additional crowding-reduction measures." April 13, 2012, Def. Status Rpt. at 2.

20 The history of this case makes it crystal clear that designing and implementing
21 population reduction plans takes significant time. Defendants cannot wait until the deadline is
22 just months away before creating a viable population reduction plan; that will only result in a
23 violation of the Order. Any failure to take reasonable steps to avert a violation of this Court's
24 Order would amount to contempt of court. *See, e.g., Hook v. Arizona Dept. of Corr.*, 107 F.3d
25 1397, 1403-1404 (9th Cir. 1997).

26 Furthermore, any delay in planning or implementing the population reduction would
27 prejudice Plaintiffs. While improvements have been made, health care in California's prisons
28 remains below the constitutional threshold. It is now almost three years since this Court

1 ordered Defendants to come up with a plan to reduce crowding to 137.5% of capacity. Aug. 4,
2 2009, Order at 183. Defendants have had more than enough time to create a workable plan.
3 There should be no further delays.
4

5 **CONCLUSION**

6 For the foregoing reasons, Plaintiffs request that the Court issue an order requiring
7 Defendants to submit a revised population plan.

8 Dated: May 9, 2012

9 Respectfully submitted,

10 /s/ Rebekah Evenson

11 Rebekah Evenson
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13 Attorneys for Plaintiffs
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RALPH COLEMAN, et al.,

Plaintiffs,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants

No. Civ S 90-0520 LKK-JFM P

THREE-JUDGE COURT

**DECLARATION OF JAMES AUSTIN IN
SUPPORT OF PLAINTIFFS' RENEWED
MOTION FOR AN ORDER REQUIRING
DEFENDANTS TO DEMONSTRATE HOW
THEY WILL ACHIEVE THE REQUIRED
POPULATION REDUCTION BY JUNE 2013**

MARCIANO PLATA ,et al.,

Plaintiffs,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants

No. C01-1351 TEH

THREE-JUDGE COURT

1 I, James Austin, hereby declare:

2 2. I am a criminologist retained by Plaintiffs' counsel in this action. I have
3 previously submitted expert reports in this action, and have testified before the Court. I have
4 personal knowledge of the matters set forth herein and if called as a witness I could and would
5 competently so testify.

6 3. I have reviewed the State's "Spring 2012 Population Projections," which are
7 published on CDCR's website, as well as the data underlying those projections, including data
8 reflecting population changes between October 1, 2011 (the date that AB 109 Realignment
9 went into effect) and April 27, 2012, and prison admission numbers since January 2011. I
10 have also reviewed the CDCR report titled "The Future of California Corrections," released in
11 April 2012 and available on CDCR's website.

12 4. On the following page is a reproduction of Appendix G to CDCR's "Future of
13 California Corrections," which shows (at the second to last row) that CDCR will not be able to
14 comply with the final court-ordered crowding reduction.

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Base Line Gap Chart
(New Capacity is added into Design Capacity to Rated Capacity)

Fiscal Year	06/27/12	12/27/12	06/27/13	12/27/13	06/30/14	06/30/15	06/30/16
Spring 2012 Population Projections	133,768	129,691	127,674	125,844	125,006	123,649	123,363
Other Population Reduction Strategies							
Law Changes (civil addicts)		300	300	300	300	300	300
Alternative Custody Program (ACP)	22	200	200	200	200	200	200
Revised Population	133,746	129,191	127,174	125,344	124,506	123,149	122,863
Capacity							
Current Design Capacity							
Institutions	79,756	79,756	81,478	81,478	82,611	82,611	82,496
Prison Closure ¹							-2,491
Level I/II/III/RC/Female	59,643	59,643	61,476	61,476	62,609	62,609	62,494
IV/SHU Cells	20,113	20,113	20,002	20,002	20,002	20,002	20,002
Camps ²	4,480	3,800	2,500	2,500	2,500	2,500	2,500
New Construction							
DJJ Renovation or Activations		0	0	0	1,133	1,133	1,133
CHCF			1,722	1,722	1,722	1,722	1,722
Infill Level II				0	0	0	2,376
Mental Health Capacity	109	109	109	109	109	109	109
Contract Capacity							
MCCF	600	600	600	1,825	1,825	1,825	1,825
FRCCC/CPMB	99	99	99	99	99	99	99
Out of State Capacity ³	9,588	8,988	8,988	4,596	2,696	1,160	0
Total Capacity (Assumes 137.5% at 33 prisons)	124,541	123,261	126,050	122,883	123,674	122,138	123,196
Total Capacity (Assumes 145% at 33 prisons)	130,522	129,242	132,161	128,994	129,870	128,334	129,383
Institution Population	118,979	115,704	114,987	116,324	117,386	117,565	118,439
Overcrowding Rate	149.2%	145.1%	141.1%	142.8%	142.1%	142.3%	143.6%
Goal at 137.5%	123,622	117,241	112,032	112,032	113,590	113,590	113,432
Goal at 145%			118,143	118,143	119,786	119,786	119,619
Surplus/Deficit at 137.5% Overcrowding	4,643	1,537	(2,955)	(4,292)	(3,796)	(3,975)	(5,007)
Surplus/Deficit at 145% Overcrowding	N/A	N/A	3,156	1,819	2,400	2,221	1,180

¹ Assumes the closure of CRC in FY 15/16.

² Assumes the Camp beds will reduced to the current level of offenders that will not be eligible for AB 109.

³ Assumes reducing the COCF beds by 600 in FY 12/13, deactivating the Oklahoma and Mississippi contracts by 12/27/13, deactivating 1900 contract beds in Arizona by 6/30/14, 1536 contract beds in Arizona by 6/30/15 and deactivating 1160 contract beds in Arizona by 6/30/16.

1 5. I was able to replicate CDCR's estimates using the data that has been provided to
 2 me, the Spring 2012 Population Projections, and the assumptions set forth in CDCR's "Future
 3 of California Corrections." I agree that under its existing plan, CDCR will not be able to meet
 4 the court-ordered crowding reduction by June 30, 2013, but I believe that the CDCR's
 5 projected "deficit" is likely to be far greater than CDCR estimates because

- 6 a) CDCR's projection assumes that all 1,722 beds of CHCF (the Stockton
 7 facility) will be available and part of the 33-prison capacity on June 30, 2013,
 8 even though the Receiver states that the Stockton facility will not be available to
 9 house prisoners until July 2013, and will not be filled until January 2014;
 10 b) CDCR's projection assumes the completion of two facilities (DJJ renovation
 11 project and Infill Level II), that have not been approved or funded by the
 12 Legislature; and
 13 c) CDCR's population projections assume that there would be about 23,000 new
 14 prison admissions in the first full year of AB510. Currently, the actual new
 15 prison admissions for the first six months (October 1, 2011 to March 31, 2012)
 16 suggest the annual number to be closer 25,000, or 2,000 higher than originally
 17 estimated. The higher admissions number is especially significant since the non-
 18 AB109 cases have longer sentences and/or good time restrictions which will
 19 increase their length of imprisonment.

20 6. Table 1 shows the magnitude of CDCR's "deficit" in complying with the court order
 21 a) assuming that Stockton is filled pursuant to the Receiver's schedule, b) assuming that the
 22 not-yet funded or approved facilities are not completed per CDCR's schedule; and c) assuming
 23 that current (higher) prison admissions trends continue.

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Table 1. Deficit in Meeting Court-Ordered Population Level Under Varying Assumptions

	Jun-13	Jun-14	Jun-15	Jun-16	Jun-17
CDCR Estimated Deficit in achieving 137.5% of capacity	-2,955	-3,796	-3,975	-5,007	-5,506
a) Deficit assuming Stockton filled per Receiver's schedule	-4,677	-3,796	-3,975	-5,007	-5,506
b) Deficit assuming unapproved DJJ and infill projects not completed	-4,677	-4,909	-5,088	-6,120	-6,619
c) Deficit assuming current (higher) prison admission	-6,677	-7,909	-9,088	-10,120	-10,619

7. The State has readily-available options to both comply with the court ordered crowding reduction and still implement its Bed Plan. As I explained in my August 15, 2008, Report, and my testimony to this Court, the State has two basic options available for reducing the prison population safely: reducing the length of stay (LOS) of prisoners and/or diverting low-level, low-risk prisoners and parole violators away from prison. To date, the State has chosen to focus its efforts primarily on the diversion option; under AB 109, the State is now diverting substantial numbers of low-level offenders and parole violators away from prison to the local jails. The State could easily reduce prison crowding to the level ordered by the court by implementing additional good time credit programs, enhancing its Alternative Custody Program, commuting the sentences of prisoners with ICE holds (who are due to be deported upon completion of their sentences), and other reasonable reforms.

8. As shown in Table 2, the current CDCR population as of December 31, 2011 consisted of large numbers of prisoners who are at low and moderate risk of recidivism. Prior studies done by the CDCR and other criminologists have consistently shown that a prisoner's length of stay can be reduced by four to six months without altering recidivism rates or overall crime rates.

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**Table 2. Current Recidivism Risk Levels
CDCR Inmate Population
December 31, 2011**

Risk Level	Inmates	Percent
Not Assessed	5,756	3.9
Low	58,611	39.4
Moderate	39,071	26.3
High Drug	6,911	4.6
High Property	12,180	8.2
High Violent	26,226	17.6
Total	148,755	100

Source: CDCR data file

9. If the State is to meet its June 2013 population reduction deadline, time is of the essence. Implementing population reduction plans takes time and planning, and the full effects of measures such as good time credits and alternative custody programs are not felt immediately unless the policies have been made retroactive to the current prison population. Accordingly, I recommend that the State immediately draft its plans for additional population reduction measures beyond AB 109 that will ensure it will be able it to safely reduce its prison population in line with the Court's order and without compromising public safety.

I declare under penalty of perjury under the laws of the State of California and of the United States of America that the foregoing is true and correct, and that this declaration was executed May 9, 2012, in Los Angeles, California.

/s/

James Austin

(approval to e-file obtained by Plaintiffs' counsel)

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THREE-JUDGE COURT

MARCIANO PLATA ,et al.,
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v.

ARNOLD SCHWARZENEGGER, et al.,
Defendants.

No. C01-1351 TEH

THREE-JUDGE COURT

[PROPOSED] ORDER REQUIRING
DEFENDANTS TO DEMONSTRATE
HOW THEY WILL ACHIEVE THE
REQUIRED POPULATION REDUCTION
BY JUNE 2013

1 This matter comes before the Court on Plaintiffs' Renewed Motion for An Order
2 Requiring Defendants to Demonstrate How They Will Achieve the Required Population
3 Reduction By June 2013.

4 Defendants project that they will not comply with the court-ordered prison crowding
5 reduction by June 2013, and that crowding will increase significantly thereafter.

6 Good cause therefore appearing, the Court now ORDERS that, within 30 days,
7 Defendants shall submit to the Court a revised plan to reduce crowding in the 33 adult prisons
8 to 137.5% of design capacity pursuant to this Court's January 12, 2010, Order. The plan shall:

- 9 (1) Describe what crowding-reduction methods the State will employ to comply
10 with the January 12, 2010, Order, and explain the numerical impact that each
11 method is expected to have on the population;
12 (2) Include detailed population projections showing the projected population of
13 the 33 adult prisons through June 2017; and
14 (3) Grant the Secretary of CDCR authority to take additional steps as necessary
15 to comply with the Order, if the State's plan does not produce the expected
16 population reduction.

17
18 **IT IS SO ORDERED**

19 Dated: May __, 2012

20 _____
21 HON. STEPHEN REINHART
22 UNITED STATES CIRCUIT JUDGE
23 NINTH CIRCUIT COURT OF APPEALS
24
25
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1 Dated: May __, 2012

2
3 HON. LAWRENCE K. KARLETON
4 SENIOR UNITED STATES DISTRICT JUDGE
5 EASTERN DISTRICT OF CALIFORNIA

6 Dated: May __, 2012

7 HON. THELTON E. HENDERSON
8 SENIOR UNITED STATES DISTRICT JUDGE
9 NORTHERN DISTRICT OF CALIFORNIA
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