

1 Brian M. Hoffstadt (State Bar No. 187003)  
bhoffstadt@jonesday.com  
2 K. Chris Palamountain (State Bar No. 183246)  
kcpalamountain@jonesday.com  
3 JONES DAY  
555 South Flower Street  
4 Fiftieth Floor  
Los Angeles, CA 90071-2300  
5 Telephone: (213) 489-3939  
Facsimile: (213) 243-2539  
6  
7 Counsel for Referee and Consultant

8 IN THE UNITED STATES DISTRICT COURTS  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
10 AND THE NORTHERN DISTRICT OF CALIFORNIA  
11 UNITED STATES DISTRICT COURT COMPOSED OF THREE JUDGES  
12 PURSUANT TO SECTION 2284, TITLE 28 UNITED STATES CODE  
13

14 **RALPH COLEMAN, et al.,**  
15 **Plaintiffs,**

16 **v.**

17 **ARNOLD SCHWARZENEGGER, et al.,**  
18 **Defendants.**

**Case No. CIV S-90-0520 LKK JFM P**  
**THREE-JUDGE COURT**

19 **MARCIANO PLATA, et al.,**  
20 **Plaintiffs,**

21 **v.**

22 **ARNOLD SCHWARZENEGGER, et al.,**  
23 **Defendants.**

**Case No. C01-1351 TEH**  
**THREE-JUDGE COURT**  
~~**CONFIDENTIAL STATUS REPORT**~~  
~~**[UNDER SEAL]**~~

24  
25  
26 **I. INTRODUCTION**

27 On July 23, 2007, the District Courts in two separate actions—*Coleman et al. v.*  
28 *Schwarzenegger et al.*, No. CIV S-90-0520 LKK JFM P (E.D. Cal.) and *Plata et al. v.*

1 *Schwarzenegger et al.*, No. C01-1351 TEH (N.D. Cal.)—granted motions by the Plaintiffs in each  
2 action to issue orders pursuant to the Prison Litigation Reform Act (“PLRA”), 18 U.S.C. § 3626,  
3 convening a three-judge panel to ascertain whether prison overcrowding is the “primary cause” of  
4 the constitutional violations regarding the provision of mental health and medical services found  
5 by the District Courts in those cases and, if so, whether no relief short of a “prison release order”  
6 would cure those violations. This Court was thereafter constituted to address these issues  
7 between the Plaintiffs and the State. Pursuant to § 3626(a)(3)(F), five groups exercised their  
8 statutory right to intervene in these proceedings—namely, the California Correctional Peace  
9 Officers Association; several county governments; a group of District Attorneys; and group of  
10 Republican members of the California Legislature; and a group of law enforcement officials  
11 (police chiefs, chief probation officers, and sheriffs) (collectively, “Intervenors”).

12 On November 1, 2007, this Court appointed Elwood Lui as Settlement Referee and Peter  
13 Siggins as Settlement Consultant. Brian Hoffstadt, Elwood Lui’s partner at Jones Day, and Chris  
14 Palamountain have served as counsel for the Referee and Consultant. The Court charged the  
15 Referee and Consultant with the duty of working with the Plaintiffs, the State, and the  
16 Intervenors, in ascertaining whether it was possible craft a settlement to the issues pending before  
17 this Court.

18 The Referee and Consultant hereby submit this Report to the Court on the progress of the  
19 settlement discussions. This Report contains three sections. The first part describes the course of  
20 the settlement discussions. These discussion have culminated in the creation of a Referee’s  
21 Proposal. This Proposal has been created by the Referee and Consultant and has not yet been  
22 signed by any Party or Intervenor. However, it represents the collective input of the Parties and  
23 Intervenors, and is a document that, with minor additional changes, the Referee and Consultant  
24 believe could resolve this matter. The second part summarizes the terms of the Referee’s  
25 Proposal. The Referee and Consultant have not attached a copy of the Proposal at this time  
26 because one of the Intervenors would not consent to its submission, and the Referee and  
27 Consultant did not want to create any basis for objection; should this final Intervenor provides its  
28 consent, a copy of the Proposal will be submitted to this Court prior to the Status Conference.

1 The final part lists the market value of the services donated Settlement Referee and his counsel, as  
2 well as the out-of-pocket expenses of the Referee, the Consultant, and their Counsel, which they  
3 will present to the State for reimbursement. At the upcoming May 30, 2008, status conference in  
4 this matter, both the Referee and Consultant will be present to answer questions regarding the  
5 matters contained in this Report.

## 6 **II. COURSE OF SETTLEMENT DISCUSSIONS**

### 7 **A. Initial Discussions and Follow-Up**

8 On November 13, 2007, the Referee and Consultant met separately with each of the  
9 Parties and each of the Intervenors in San Francisco. Prior to this meeting, each litigant was  
10 asked to submit a confidential written summary of their positions and proposals for settlement.  
11 At the in-person meeting, the litigants were given the opportunity to explain their positions and  
12 proposals in greater detail.

13 As follow-up from these initial meetings, the Referee and Consultant:

14 (a) Asked *all* of the county- and city-level Intervenors to generate a list of proposals  
15 for reducing the population in state prison facilities;

16 (b) Asked the Legislator-Intervenors to generate a list of proposals for alleviating  
17 overcrowding aside from Assembly Bill 900 (which was enacted in May 2007, among other  
18 things, to authorize funding for adding capacity to the State's prisons);

19 (c) Met with two of the Republican Intervenors in Sacramento on December 11, 2007  
20 (namely, Assembly Member Todd Spitzer, who has taken the lead on behalf of the Republican  
21 Intervenors, and Assembly Republican Leader Mike Villines); and

22 (d) Organized a site visit of the California Institution for Men and the California  
23 Institute for Women on December 17, 2007, in order to view the conditions within the prisons  
24 firsthand. Several litigants or their attorneys (more than a dozen people in all) participated in one  
25 or both of these site visits.

26 The Referee and Consultant informed all parties that the discussions involved in this  
27 process were confidential and not to be discussed publicly.

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**B. Consultation with Experts**

Pursuant to independent discussions, the Plaintiffs and State had agreed to have a panel of three experts (one chosen by the Plaintiffs, one by the State, and one chosen mutually) examine the likely numerical impact of a list of population-reducing measures proposed by the Plaintiffs. The Parties agreed to the following experts: Dr. James Austin (President, JFA Institute, Washington, DC); Dr. Jeff Beard (Secretary of Corrections, State of Pennsylvania); and Joseph Lehman (Secretary of Corrections, State of Washington). The panel initially presented its findings to the State, Plaintiff, Referee and Consultant on December 11, 2007 in Sacramento. On March 14, 2008, Drs. Austin and Beard again presented their findings, to a meeting of the Parties and Intervenors.

**C. Formation of 20-Member Working Group**

Following this Court’s issuance of an order permitting greater participation by Intervenors (and the Intervenors concurrent withdrawal of their appeals challenging the Court’s prior order), the Referee and Consultant convened a meeting of the Parties and Intervenors in Sacramento on March 14, 2008. Nearly 70 people attended this meeting. As noted above, Drs. Austin and Beard presented their findings regarding the numerical impact of various population-reducing proposals. Their presentation concentrated on those prison inmates who place the greatest strain on the medical personnel in prisons—namely, those who serve very short sentences. In their view, proposals that aimed to reduce that population by keeping them from entering the prison system in the first place would likely have the greatest impact on the availability of services. In light of the size of the group of Parties and Intervenors, the Referee and Consultant decided to designate a group of approximately 20 persons representing the Plaintiffs, the State, and each Intervenor to move forward in examining the suggestions proposed by the expert panel.

**D. Formation of Substantive Smaller Working Groups**

On March 20, 2008, the 20-member working group met in Burbank. At that meeting, the Referee and Consultant created four smaller working groups to study and suggest proposals on the following topics:

1 (a) *Low-level parole violators.* Namely, whether parolees who commit lower-level  
2 parole offenses and pose a lower risk to public safety, as determined through the use of a  
3 validated risk assessment tool, should be disciplined with a variety of sanctions aside from  
4 placement in state prison for short sentences.

5 (b) *Diversions alternatives.* Namely, whether it is possible to identify certain  
6 individuals who pose a lower risk to public safety who could be diverted to county- and local-  
7 level programming rather than placed in state prisons for short sentences.

8 (c) *Risk Assessment Tool.* Namely, the status and acceptability of the risk assessment  
9 tool currently being developed by the California Department of Corrections and Rehabilitation  
10 (“CDCR”), in conjunction with the University of California, Irvine.

11 (d) *Credits.* Namely, whether the system by which inmates earn credits toward a  
12 shorter sentence should be modified (i) regarding “good behavior” credits; or (ii) to add a new  
13 category of “programming” credits to be earned for completing programs designed to rehabilitate  
14 and educate the inmates.

15 On April 18, 2008, the 20-member working group again met in Burbank. At that meeting,  
16 the chairs of the respective smaller working groups reported on the progress of those groups’  
17 findings and proposals. The 20-member group provided feedback and suggestions on whether the  
18 proposals were feasible and acceptable. The Referee and Consultant also formed a fifth smaller  
19 working group to examine the issue of what remedies would be available to ensure that these  
20 various measures reduced the prison population in such a manner as to alleviate the  
21 unconstitutional conditions. The smaller working groups were assigned further follow-up tasks.

#### 22 **E. Drafting of a Proposal**

23 At the next meeting of the 20-member working group on April 29, 2008, in Sacramento,  
24 the group discussed the additional proposals from the five smaller working groups. At the  
25 conclusion of that debate, the Referee and Consultant formed a Drafting Group consisting of six  
26 individuals who would meet to attempt to translate the fruits of the smaller working groups’ work  
27 into a single, unified document.

28

1 On May 6 and May 7, 2008, the Drafting Group met in San Francisco under the  
2 supervision of the Referee and Consultant. At the conclusion of those meetings, the Referee and  
3 Consultant took the outline of negotiated proposals and began drafting a Memorandum of  
4 Understanding (“MOU”).

5 A week later, on May 13, 2008, the 20-member working group met in Sacramento. At  
6 that point in time, the Parties were continuing to make edit the working draft of the MOU, so the  
7 MOU was not circulated to the 20-member group. However, the Referee and Consultant  
8 reviewed the broad proposals encompassed in the MOU and obtained feedback.

#### 9 **F. Circulation of Referee’s Proposal**

10 On May 19, 2008, the Referee and Consultant released to the 20-member working group a  
11 draft Referee’s Proposal based on the MOU that the Drafting Group prepared. That afternoon,  
12 and in response to unauthorized release of the document to the press, the Referee and Consultant  
13 held a brief conference call with members of the press to explain the general contours of the  
14 Proposal and to explain the context of the settlement talks.

15 On May 20, 2008, the Referee met with the law enforcement, county, and legislative  
16 Intervenors in Sacramento and made a brief presentation regarding the Referee’s Proposal.

17 On May 22, 2008, the Referee and Consultant met with the 20-member working group to  
18 obtain their constituents’ feedback and comments on the Referee’s Proposal. Where the Referee  
19 and Consultant felt it was appropriate, they modified the Proposal to incorporate those  
20 suggestions.

### 21 **III. SUMMARY OF REFEREE’S PROPOSAL**

22 The Referee and Consultant prepared the Referee’s Proposal as the culmination of the  
23 settlement process described above. At this point in time, the Proposal is just that—a proposal  
24 that has yet to be signed by any Party or Intervenor. It is nevertheless a synthesis of the  
25 discussion of the Parties and Intervenors and is thus the document, in the opinion of the Referee  
26 and Consultant, with the best chance of obtaining the approval and concurrence of each litigant in  
27 this matter. This section provides a brief overview of the structure of the Proposal, its key terms,  
28 and the rationale behind its components.

1 The Proposal has a four-fold purpose: (i) ensure that the constitutional violations are  
2 remedied; (ii) ensure that the most dangerous criminals remain incarcerated and that public safety  
3 is not compromised; (iii) invest in rehabilitative programs that have been proven to reduce  
4 recidivism and thereby reduce the “revolving door” nature of much state incarceration; and (iv)  
5 reach a long-term solution that draws upon the economies of scale and special aptitudes of each  
6 of the pertinent constituencies.

7 Toward these ends, the Proposal (i) requires that various programs be implemented; (ii)  
8 erects a compliance mechanism to monitor these programs and ensure that they are having the  
9 desired, collateral effect of reducing the prison population in a public-safety-conscious fashion;  
10 and (iii) requires that legislation be enacted by mid-September 2008 to provide for the funding  
11 and authorization of the Proposal’s provisions. Each is discussed briefly below.

#### 12 **A. Implementation of Programs**

13 The Proposal provides for the following three programs. The Secretary of Corrections, as  
14 well as the counties, retain the authority to implement additional programs if they wish to do so.  
15 Many of the programs set forth in the Proposal require additional funding, and that is to be  
16 provided in a legislative bill described more fully below. None of these programs entails early  
17 release of prisoners from incarceration.

#### 18 **1. Local Diversionary Alternatives for Low-Risk Individuals**

19 The thrust of this program is to identify individuals who pose a minimal public safety risk  
20 and who show the greatest promise for rehabilitation, and to divert them to county-administered  
21 programs rather than into state prison facilities for short time periods (e.g., four to six months).  
22 The Proposal specifies that two groups are presumptive eligible to participate, subject to a limited  
23 judicial override: (i) individuals convicted of a probation-eligible offense who have less than 12  
24 months to serve in state prison at the time of sentencing (after accounting for any “good time”  
25 credits); and (ii) should a county wish to include them, individuals who are on probation and  
26 commit a new probation-eligible offense that could subject them to revocation. The county-  
27 administered programs into which these individuals are to be diverted will be developed using  
28 “seed money,” and approved and overseen by a re-vamped Corrections Standards Authority

1 comprised of representatives from the State and local governments. The programs will be funded  
2 in part upon their success at diverting individuals away from state prisons. Jurisdiction over the  
3 individuals will remain with the committing authority, however (the State will retain jurisdiction  
4 over its prisoners, as will counties over probationers).

## 5 **2. Alternative Sanctions for Lower-Level Parole Violators**

6 The goal of this program is to replacement incarceration as the default sanction for  
7 parolees who violate the terms of their parole where that violation is not severe and where the  
8 parolee poses a lesser risk to public safety. The severity of the violation will be determined by  
9 CDCR and the risk posed by the parolee will be evaluated using a validated risk assessment tool  
10 developed by CDCR, subject to a monitored override by the parole officer. Instead of a short  
11 stint in prison, these individuals will be disciplined using a series of graduated sanctions short of a  
12 full-scale return to state prison (e.g., adjustment in intensity of supervision, “flash” incarceration,  
13 placement in an in-house treatment program).

## 14 **3. Amendments to Credit System**

15 Under this program, the system by which State inmates earn credits while incarcerated  
16 will be adjusted. Currently, inmates are automatically awarded “good time” credits as a matter of  
17 right; that system (called the “bridging program”) would be replaced with a system of behavior  
18 credits that are earned at the same rate but are subject to forfeiture (and subject to reinstatement in  
19 certain cases). CDCR would add a second credits-earning system as well, for inmates who  
20 participate in and complete programming; these programming credits would be earned in addition  
21 to behavioral credits, and thus could reduce sentences.

### 22 **B. Compliance with Population Levels**

23 The programs outlined above are designed to improve public safety *and* reduce the inmate  
24 population. To ensure that both goals are met, the Proposal erects a compliance mechanism to  
25 monitor and enforce population level targets. It operates as follows:

26 (1) *Setting an ultimate Population Level.* The Parties will agree to a Population Level  
27 to be reached by September 2012. The Referee has initially set that level at 158% of the design  
28 capacity of the State’s in-state facilities, or 132,500 inmates. The Parties will convene an

1 advisory group to perform a more detailed analysis of the operational capacity of each in-state  
2 facility. If the number fixed by this advisory group is not within plus-or-minus 2,650 inmates of  
3 the 132,250 figure, then the Plaintiffs and State have the option of withdrawing from the MOU.  
4 If the advisory group's number is within this range, that number—which will be expressed as a  
5 percentage of design capacity—will become the operative target Population Level under the  
6 MOU. The State will have the right to seek modification of that capacity number based on  
7 changed circumstances (e.g., increases due to changed circumstances).

8 (2) *Monitoring through compliance with interim Population Levels.* To ensure that  
9 CDCR will be able to meet the Population Level by September 2012, the Proposal also erects  
10 several interim population levels by which the State has to demonstrate progress toward the  
11 Population Level (10% of the gap between an agreed-upon population level of 158,931 (the  
12 CDCR adult population as of May 1, 2008) and the current in-state population must be eliminated  
13 within the first year; another 20% by the second year; another 20% by the third year; and the  
14 remainder in the final year.) The State's progress toward each interim goal will be monitored by  
15 a 15-member Prison Population Advisory Committee ("PPAC").

16 (3) *Authority to take action to ensure compliance.* CDCR is given a 120-day grace  
17 period during which it may be out of compliance with the interim Population Levels without  
18 being the subject of court action. The PPAC has the responsibility to provide its  
19 recommendations on how the State may again become compliant, including resort to (i)  
20 emergency legislation to increase capacity; (ii) expansion of the pool of persons eligible for the  
21 diversionary program; (iii) increasing the rate at which credits would be earned; or (iv) requiring  
22 counties to divert additional persons or have an additional number of inmates released into those  
23 counties, depending upon the counties' past success at diverting individuals from state prison.  
24 Ultimately, however, the Secretary of Corrections has the discretion to decide which option to  
25 exercise, including release of prisoners by order of shortest time remaining to serve if no other  
26 option is effective.

1           **C. Legislative Package**

2           The Proposal also requires that the State Legislature enact legislation by September 15,  
3 2008, or else the settlement does not take effect. The Proposal envisions legislation that includes  
4 nine proposal, most of which are designed to ensure the legality of the provisions of the Proposal  
5 and, equally important, to provide funding for those provisions.

6           **D. Role of Three-Judge Panel Under Proposal**

7           Because the Proposal falls within the PLRA's broad definition of "prison release order," it  
8 may only be adopted as consent decree if this Court finds that the prerequisites for such an order  
9 set forth in the PLRA are met. Moreover, to ensure that the Proposal is subject of enforcement,  
10 this Court would need to maintain jurisdiction until the State reaches compliance, and for a year  
11 thereafter (at which point in time the consent decree that would enforce the Proposal would  
12 automatically terminate upon the State's notification of that fact to this Court).

13       **IV. TIME AND EXPENSES**

14           Thus far, the Referee, Consultant, and their counsel have devoted a substantial amount of  
15 time to this matter free of charge. Thus far, the Referee and his counsel at Jones Day have  
16 donated approximately \$500,000 of their time. The Referee and his counsel have also incurred  
17 approximately \$15,000 in expenses. The Referee, Consultant and their counsel will prepare a  
18 detailed accounting of these out-of-pocket expenses and will seek reimbursement of them from  
19 the State at a later time.

20       **V. CONCLUSION**

21           The Referee and Consultant have endeavored to find the areas of commonality between  
22 the diverse perspectives of the Parties and Intervenors in this action, and to build upon those  
23 commonalities in fashioning a settlement proposal that would be acceptable to the litigants and  
24 effective at remedying the population problem that underlie the constitutional violations found in  
25 the *Coleman* and *Plata* cases. The fruit of the intensive settlement negotiations that have taken  
26 place since November 2007 is the Referee's Proposal, which the Referee and Consultant believe  
27 represent a workable, palatable, and public-safety-minded solution to the matters before this  
28 Court. Because the Parties and Intervenors have reviewed the Proposal, they should be able to

1 report to the Court at the Status Conference on their view of the likelihood of settlement on the  
2 basis of the Proposal.

3 Dated: May 27, 2008

4 Respectfully submitted,

5

6

7

By:



Elwood Lui  
Settlement Referee

By:



Peter Siggins  
Settlement Consultant

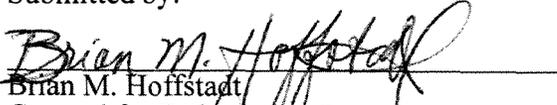
8

9

10

Submitted by:

11



Brian M. Hoffstadt  
Counsel for Referee and Consultant

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

**MEMORANDUM OF UNDERSTANDING**

The Parties in the three-judge panel proceedings convened pursuant to 28 U.S.C. § 3626(a)(3) in the matters of Coleman et al. v. Schwarzenegger, No. CIV-S-90-0520-LKK-JFM-P (E.D. Cal.) and Plata et al. v. Schwarzenegger, No. C01-1351-TEH (N.D. Cal.), have entered into this Memorandum of Understanding (“MOU”) to resolve these two proceedings.

For purposes of this Agreement, the Parties in the three-judge panel proceedings shall include the following:

**I. Recitals**

WHEREAS Plaintiff-prisoners in the California state prison system have filed the Coleman and Plata suits pertaining to medical care and mental health care provided by the California Department of Corrections and Rehabilitation (“CDCR”);

WHEREAS the Defendants include the Governor, the Director of Finance, the Secretary of the Department of Corrections and Rehabilitation, and the Deputy Director of the Health Care Services Division, and are sued in their official capacities as state officials responsible for the operation of CDCR (collectively, the “State”);

WHEREAS the Plaintiff-prisoners in Plata et al. v. Schwarzenegger, Case No. C01-1351 TEH (N.D. Cal.), and Coleman et al. v. Schwarzenegger, Case No. Civ. CIV-S-90-0520-LKK-JFM-P (E.D. Ca.), filed motions to convene a Three-Judge Panel to consider issuing a prisoner release order pursuant to 18 U.S.C. § 3626(a)(3);

WHEREAS the district courts in Plata and Coleman granted those motions and a Three-Judge Panel was convened to hear the consolidated motions from both district court actions;

WHEREAS the Three-Judge Panel subsequently granted the motions of five groups of Intervenor—the California Correctional Peace Officers Association, a group of California legislators, a group of Counties, a group of District Attorneys, and a group of local law enforcement officers;

WHEREAS the Parties, including Intervenor, have conducted informal negotiations since November 2007 in an effort to resolve Plaintiffs’ motions for a prisoner release order. Those negotiations have been undertaken at arm’s length and in good faith between Plaintiffs’ counsel and high ranking state officials and their counsel;

WHEREAS the Parties and Intervenor have reached agreement on efforts to be undertaken by State and local officials to reduce the prison population housed in CDCR adult facilities; and

WHEREAS nothing in this MOU impairs any obligations of CDCR under any outstanding collective bargaining agreements;

NOW THEREFORE, THE PARTIES AGREE, SUBJECT TO COURT APPROVAL, TO RESOLVE THE THREE-JUDGE PANEL PROCEEDINGS ACCORDING TO THE FOLLOWING TERMS AND CONDITIONS:

II. **Statement of Jurisdiction**

A. The Consent Order attached to this agreement as Exhibit B satisfies the requirements of 18 U.S.C. § 3626, and the Three-Judge Court has and specifically retains jurisdiction to enforce its terms.

B. The Court shall have the power to enforce the Consent Order through all remedies permitted by law, subject to the limitations otherwise described herein.

III. **Terms and Conditions**

A. **Enactment of Legislation.** This Agreement and entry of the Consent Order is contingent upon the enactment into law on or before the date that the State budget is adopted or, in any event, by September 15, 2008, of legislation described generally in the legislative proposals set forth in Exhibit A. The Parties agree to the following procedure with respect to the full and complete development of this legislation:

1. **Assessment of Needed Appropriations.** By June 5, 2008, the Parties will submit Exhibit A to a six-person working group consisting of three representatives on behalf of the California Department of Finance and three representatives on behalf of local government (to be selected by the Referee). By June 15, 2008, this working group shall determine the amount of funding, including the size of grants, necessary to implement the local government programs that will be authorized as part of the legislation. In the event this working group cannot reach agreement, the Settlement Referee and his Consultant shall meet with the working group and make a recommendation to the Legislature for the necessary appropriations.

2. **Drafting of Legislation.** The Settlement Referee will designate a working group to prepare in bill form and submit to the Office of Legislative Counsel the legislation required by Exhibit A. The Legislative Counsel shall finalize the draft into a legislative bill that effectuates each of the changes in state law prepared by the parties and described in Exhibit A. The legislative bill shall contain authorization for sufficient appropriations to fund all of the bill's proposals, including appropriations for local government programs at or above the level determined by the working group described in the preceding paragraph.

3. **Submission of Legislation.** As soon as possible following submission of the language to Legislative Counsel, the legislation will be introduced for consideration by the state legislature.

B. **Implementation of Programs.** This Agreement also requires the Parties to implement the programs set forth in this MOU as a means to achieve the required population levels. The State retains the right to revise or eliminate any or all of these programs and implement additional programs in order to achieve the population levels set forth in this MOU. The Parties recognize that the Governor's May Revise proposal continues to include summary

parole as a means to reduce prison overcrowding in a responsible way and to achieve budget savings. Nothing in this MOU affects the Governor and the Legislature from continuing to consider this proposal. Local governments do not waive their rights to maintain programs currently under local jurisdiction.

**C. Local Diversionary Alternatives to Incarceration for Low-Risk Individuals**

1. **Local Administration.** All programs and sanctions shall be developed and administered at the local level. For those counties and other local entities that opt into this diversion program, these programs will be financed by the State through contractual agreements. In the event that there are insufficient appropriations to fund a program, the county or local entity shall have the option to cease its programs and all participants revert back to the control of the authority that committed those participants (that is, the State for individuals diverted from State prison and the counties for probationers).

2. **Oversight.** Funding and technical support shall be provided by the Corrections Standards Authority (“CSA”), once redesignated by the Legislature as a quasi-independent agency pursuant to the legislation to be enacted pursuant to this MOU. The Authority shall be comprised of 13 members. The members shall include six representatives from the State and six representatives from the local governments. The thirteenth member shall be the CDCR Secretary who shall be the Chair

(A) **Duties.** With respect to this MOU, the CSA shall have the duty to (i) distribute funds for the programs and sanctions outlined in this MOU (which may include incarceration by local jurisdictions) to the local government agencies that administer them; (ii) provide technical support; and (iii) gather data regarding the effectiveness of these programs, including but not limited to the number of local diversions away from state prison as compared to the previous three years.

(B) **Powers.** With respect to this MOU, the CSA shall have the power to:

(i) Distribute one-time “seed money” to local government agencies to enable them to engage in planning activities for the programs they seek to administer. The amount of one-time “seed money” available to the counties shall be developed by the working group described in Section III.A.1. above;

(ii) Review program proposals submitted to the Authority by local governmental agencies for participation in this program. These program proposals shall be based upon those contained in the legislation contemplated in the MOU, and shall address rehabilitation and mental health issues. As part of their proposals, the local governmental agencies shall retain the authority to implement graduated sanctions for violations of their programs’ terms;

(iii) Distribute funds to operate programs, as a combination of (i) a fixed amount per county taking into consideration the county’s population, the number of individuals currently subject to diversion, and the historical efforts and success at diverting

individuals from state prison; (ii) a performance-based adjustment (that may vary annually depending on the diversion of admittees from state prison); and (iii) equitable distribution among the counties. The amount of funds available and the criteria for the distribution of the funds shall be developed by the working group described in Section III.A.1., above;

(iv) Adjust the performance-based portion of the funding according to the success of the local program at diverting admittees from State prison as measured by a decrease in the number of admittees compared with a benchmark based on the average number of admittees over the most recent three-year period. These performance measures shall take into consideration a county's historical efforts and success at diverting individuals from state prison prior to the implementation of the program(s).

(C) **Local Steering Committees.** Each local government shall form a planning committee pursuant to the community corrections act to implement the terms under the MOU and distribute the State funds and report to the CSA.

### **3. Targeted Populations.**

(A) **County Probation Populations.** Individuals eligible to participate are identified by local jurisdictions of those who are already on probation and who commit a new, probation-eligible offense that would otherwise result in revocation of probation and incarceration in state prison.

(B) **State Diversion Population of Lower-Risk Individuals.** Individuals eligible to participate in the diversionary programs implemented under this MOU are those whose offense is eligible for a probationary sentence and who would otherwise serve 12 months or less in prison at the time of sentencing (after accounting for any applicable reduction in sentence due to anticipated behavior credits). For these individuals, their diversionary sentences shall constitute a prior prison term under Penal Code 667.5 as amended by legislation provided for by this MOU.

4. **Narrow Judicial Discretion To Deny Participation.** An individual who is eligible to participate in a diversionary program (as defined above) is not automatically entitled to such participation. Instead, the judicial authority imposing sentence may in unusual cases where necessary for public safety state, on the record, that a particular individual should not participate notwithstanding eligibility. The number of judicial overrides shall be tracked by CSA on a county-by-county basis, to be used by the CSA, the Prison Population Advisory Committee ("PPAC") and the Secretary of the Department of Corrections and Rehabilitation in assessing which tools should be used to ensure compliance with the population levels, as set forth in Part IV, below.

5. **Oversight of Individuals Selected for Diversion.** Although the local government personnel overseeing a diversionary program will monitor the diverted individuals insofar as the program is concerned, the jurisdiction over those individuals (including revocation from participation in a diversionary program for violations of that program's terms) remains with the authority that committed the individual. The State shall have jurisdiction over individuals

participating in diversion programs pursuant to Section III.C.3.B as parolees. The local governments shall have jurisdiction over probationers.

D. **Alternative Sanctions For Lower-Level Parole Violators.** The parolees eligible for the alternative sanctions shall be identified as follows:

1. **Decision-Making Instrument.** Parole agents shall use a decision-making instrument that evaluates parolees along two criteria: (i) severity of the parole violation; and (ii) the parolee's risk level as a threat to public safety.

(A) **Severity.** The severity of a particular parole violation shall be determined based on a scoring system developed by CDCR in which the violation shall be placed in one of three categories of severity—low, medium, or high.

(B) **Risk.** The risk posed by a particular parolee shall be assessed using the California Static Risk Assessment Tool being developed by the California Department of Corrections and Rehabilitation in conjunction with the Center for Evidence-Based Corrections at the University of California at Irvine. The Prison Population Advisory Committee (described later in this MOU) shall meet at least annually to discuss the use of the California Static Risk Assessment Tool and to recommend improvements to the tool or its use.

2. **Eligibility for Alternative Sanctions.** The individuals eligible for alternative sanctions shall be identified through use of the Decision-Making Instrument. Parolees determined to be eligible for alternative sanctions by this Instrument shall not be automatically referred to the State Board of Parole Hearings for revocation or other sanction.

3. **Override Authority.** Notwithstanding a particular parolee's eligibility or ineligibility for alternative sanctions, parole officers shall have the authority to override a determination in exceptional circumstances if, in the exercise of his or her discretion, such sanctions would be inappropriate for a parolee. In making this determination, a parole officer may use any data appropriate in assessing risk and severity, including the Static-99 assessment tool for parolees who are sex offenders. To effectuate an override, the parole officer must record the reasons for the override determination. If a CDCR official other than the assigned parole officer overrides the assigned parole officer's decision, that person must confer with the parole officer regarding the decision and record the results in the parolee's case or central file .

4. **Quality Assurance Review of Override Decisions.** The CDCR shall perform a quality assurance review to ensure that override decisions are being exercised appropriately.

E. **Earned Credits for Inmates**

1. **Revisions to Credits.**

(A) **Establishment of Credits for Rehabilitative Programs.**

(1) **Use of "Block Credits."** Inmates who accomplished specified rehabilitative goals will receive a "block credit" relative to that accomplishment, which

will range in days depending upon the amount of time expected to earn that credit. The percent of the credit inmates receive will depend on their credit-earning status. For example, an inmate who is eligible to receive 50% credits will receive 50% of the credit available for that rehabilitative accomplishment.

(2) **Eligible Programs.** Program credits will be available for completing specific program accomplishments, including but not limited to, the following programs:

- Completion of Adult Basic Education I
- Completion of Adult Basic Education II
- Completion of Adult Basic Education III
- Passing each of the 5 GED sub-tests (Reading Comprehension, Social Studies, Mathematics, Science, and U.S. History)
- Completion of each of the 11 components required for a high school diploma.
- Completion of college credits
- Completion of vocational modulars
- Achievement of vocational training certifications
- Completion of evidence-based criminogenic programs
- Compliance with all aspects of rehabilitation and treatment case management plans

CDCR will continue to modify and update the list of program accomplishments eligible for “block credits” as new program opportunities are developed.

(3) **Calculation of “Time to Serve.”** Program credits are not to be included in the initial calculation of an inmates “time to serve” and will not be assumed or applied to an inmate’s sentence until after the inmate has completed the specified program accomplishment.

(B) **Credits for Good Behavior**

(1) **Retention of Prior Credit-Earning Status Rubric.** Inmates will continue to earn behavior credits (and, by extension, rehabilitative program credits) according to one of several classifications (i.e., 50%, 20% or 15%).

(2) **Replacement of “Bridging Program” With A “Yours To Lose” System.** The State will establish a statutory “Yours to Lose” credits system linked to actual behavior and subject to temporary or permanent forfeiture should an inmate violate behavior rules set forth by CDCR. If an inmate receives a “disciplinary action” (i.e., a “serious” rule violation), CDCR regulations will specify whether the inmate is to lose credits and whether the inmate can earn back lost credits (i) after a specific period of discipline-free time or (ii) after the inmate has demonstrated an ability to remain discipline-free for a period of time, as determined by the inmate’s classification committee.

(3) **Commencement of Earning Status.** Inmates will begin to earn behavior credits upon conviction (either by plea or by trial), whether or not they are housed in State or local facilities.

(4) **New Credit Earning Status for Community Crews.** Credit-earning status will be increased to 2:1 for inmates placed on community crews (in addition to those in fire camps). These inmates (community crews and fire camps) will be eligible for 2:1 credits beginning at the time of training.

2. **Applicability of Revisions to Credit System**

(A) **Election to Participate in New System.** Upon enactment of this new system, every inmate will be provided a waiver to enroll in the new system as part of their annual review. If an inmate decides to enroll in the new system, the inmate will receive any credits earned through the previous system up until the effective date of the new system.

(B) **Consideration of Retroactive Application.** CDCR will also consider whether to accord inmates "block credits" retroactively.

3. **Annual Review and Evaluation.** CDCR will conduct a review at least annually of the application and impact of behavior and program credits to determine whether changes are necessary to provide the incentives for good behavior and program participation.

IV. **Compliance with CDCR Population Levels.**

A. **Defining Population Levels.** The population levels shall be referenced as a percentage of the design capacity of each CDCR adult institution and of the CDCR in-state prison system as a whole.

1. **Setting the Population Levels.** The population levels shall be referenced as a percentage of the design capacity of each CDCR adult institution and of the CDCR in-state prison system as a whole.

(A) **Initial Statewide Population Level.** For purposes of this Agreement, the initial Statewide Population Level is 158% of design capacity. As of the date of this Agreement, this percentage equates to 132,500 inmates in the 33 existing CDCR adult institutions.

(B) **Permanent Statewide Population Level.**

(i) **Process to Determine Permanent Statewide Population Level.** The Parties agree that there shall be a permanent Statewide Population Level. The permanent Statewide Population Level shall be a percentage of design capacity calculated by dividing the sum of the maximum population levels at the 33 existing CDCR adult institutions by the sum of the design capacity of the 33 existing CDCR adult institutions. Subject to the conditions and procedures in subdivisions (iii) and (iv) below, these permanent levels shall be

determined after consultation with an advisory group that, on a one-time basis, shall provide recommendations on the maximum population level at each of the CDCR adult institutions.

(ii) **Advisory Group.** The advisory group shall consist of: (i) one representative and one expert for the Plaintiffs; (ii) one representative and one expert for the State; (iii) Fresno City Chief of Police Jerry Dyer; (iv) Los Angeles County Assistant Sheriff Marvin Cavanaugh; and (v) any further experts agreed to by the Plaintiffs and the State. In assessing the maximum population levels for each CDCR adult institution, the advisory group shall consider the mission of a facility and constitutionally adequate medical and mental health care so the inmates are not subject to substantial risk to their health and safety. In making these determinations, the advisory group may make requests for information from the Special Master in Coleman et al. v. Schwarzenegger, No. CIV-S-90-0520-LKK-JFM-P (E.D. Cal.) and the Receiver in Plata et al. v. Schwarzenegger, No. C01-1351-TEH (N.D. Cal.), each of whom shall cooperate with those requests to the extent permitted by law. The advisory group shall provide its recommendations by June 27, 2008.

(iii) **Population Level Outside of 10% of Initial Statewide Population Level.** If the Statewide Population Level recommended by the advisory group is outside the range of the initial Statewide Population Level by more than 10% (that is, if the Statewide Population Level is less than 129,850 or is greater than 135,150), either the Plaintiffs or the State may opt out of this MOU by July 7, 2008.

(iv) **Population Level Within 10% of Initial Statewide Population Level.** If the recommended population levels for all of the CDCR institutions are lower or higher than the initial Statewide Population Level, then the State and Plaintiffs shall meet and confer regarding an appropriate Statewide Population Level, including modifying the interim population levels to avoid the imposition of additional population reduction measures to maintain compliance and adjusting applicable timeframes. The State and Plaintiffs shall also meet and confer regarding an appropriate population level for each of the 33 CDCR adult institutions. If the State and Plaintiffs cannot reach agreement on an appropriate population level for one or more of the CDCR adult institutions, then either party may seek modification of the specific CDCR adult institution(s) from the Three-Judge Panel, as long as the requested modifications are within 10% of the initial Statewide Population Level.

2. **State's Right to Increase Capacity.** Nothing in this Agreement shall restrict the State's authority or ability to construct additional State prison capacity. The Parties recognize the unique role of the judges in the Plata case, the Coleman case and the Three-Judge Panel proceedings to assist the State in its efforts to reduce prison overcrowding, while also considering the effect of increased capacity on the State's ability to provide constitutional adequate medical and mental health care. The State, in consultation with the Receiver in Plata and Special Master in Coleman, may increase capacity without leave from any party or the Three-Judge Panel. However, the State and Plaintiffs retain their existing rights to challenge any decision of the Receiver or Special Master before their respective single district court judge.

3. **Adjustments Based on Changed Circumstances.** Based on a significant change in circumstances, the State and the Plaintiffs may obtain an assessment from the advisory group described in subdivision IV.A.1.B of this MOU of the maximum population level for a

specific CDCR adult institution. The State and Plaintiffs shall then meet and confer. If the State and Plaintiffs cannot reach agreement, then either party may seek modification of the disputed population level from the Three-Judge Panel.

4. **Emergency Situation.** The Parties recognize that the State may have to temporarily increase population levels at one or more CDCR adult institutions to address an emergency situation to mitigate substantial risk to the health and safety of the inmates and staff. Such temporary increases due to an emergency situation shall not be used to demonstrate noncompliance with any of the population levels contained in this MOU. For purposes of this paragraph, emergency situations include such conditions as riot, urgent repair, disease, epidemic, earthquake, fire, storm, flood, sewage spill, or other types of emergencies that threaten the health and safety of inmates and staff.

B. **Preliminary Interim Population Levels.** Set forth below are preliminary interim population levels designed to make progress towards reaching the Statewide Population Level by September 15, 2012. In particular, the State shall (on a both a system-wide and a per-facility basis) reduce the “gap” between the established Population Level and the population of adult inmates currently housed in CDCR adult institutions (which the Parties have stipulated is 158,931) by the following percentages by the following dates:

1. **First Interim Level.** By September 15, 2009, the State shall reduce the “gap” by 10%;

2. **Second Interim Level.** By September 15, 2010, the State shall reduce the “gap” by an additional 20% (for a cumulative total reduction of 30%); and

3. **Third Interim Level.** By September 15, 2011, the State shall reduce the “gap” by an additional 20% (for a cumulative total reduction of 50%).

C. **Prison Population Advisory Committee.** There shall be a Prison Population Advisory Committee (“PPAC”) established by the State.

1. **Composition of the Prison Population Advisory Committee.** The PPAC shall consist of the following representatives: (i) one representative from the California Department of Corrections and Rehabilitation; (ii) one technical expert agreed upon by Plaintiffs and the State; (iii) one academic expert agreed upon by Plaintiffs and the State; (iv) one designee of the Plaintiffs; (v) one representative from the California State Sheriffs’ Association; (vi) one representative from the California Police Chiefs Association; (vii) one representative of the California District Attorneys Association; (viii) one representative from the California Public Defenders Association; (ix) one representative of the Chief Probation Officers of California; (x) one representative of the California League of Cities; (xi) one representative of the County Supervisors Association of California; (xii) the Sheriff from the county that sent the most new admissions to the CDCR in the previous 12 months; (xiii) one representative for victims’ rights, to be selected from a slate nominated and elected by the members of the PPAC; (xiv) one designee of the California Judicial Council; and (xv) the Secretary of the Department of Corrections and Rehabilitation or a designee. The Secretary or the Secretary’s designee shall be the Chair of the PPAC. The member-representatives of the PPAC shall be selected no later than

September 30, 2008. If the State and the Plaintiffs are unable to agree upon particular individuals to serve on the PPAC, the Referee will select those individuals.

2. **Duties of the Prison Population Advisory Committee.**

(A) **Monitoring and Advice.** The PPAC shall meet every six months to review the progress of the State in meeting the Population Levels set forth above and advise the State on operational issues that affect compliance with the Population Levels, and make recommendations on how to achieve compliance.

(B) **Consideration of Options If Population Exceeds Population Levels.** If the CDCR Secretary or PPAC believes that the Population Levels will be exceeded after the expiration of the Safe Harbor period, the PPAC shall recommend options to achieve compliance as necessary to each population level, including but not limited to:

(i) **Emergency Legislation To Increase Capacity.**  
Emergency Legislation to increase capacity.

(ii) **Expanding Eligible Pool for Diversion.** Extend the threshold for local diversion to individuals who would otherwise serve 24 months or less in prison at the time of sentencing (after accounting for any applicable reduction in sentence due to behavior credits).

(iii) **Increasing Credits.** CDCR shall increase credits, as determined by the Secretary.

(iv) **Additional Diversion By Counties.** CDCR shall inform each county of its proportionate share of the necessary population reduction. Each counties' share shall be determined by taking into account the number of offenders that have been diverted from state prison pursuant to the reform measures set forth herein. Each county must determine whether to divert the additional offenders or accept additional inmates to be released to the county from a list of all inmates determined to be eligible for release for each county by the Secretary. A county that accepts additional inmates has the discretion whether to incarcerate them locally at its own expense or to release them into the community with any lawful conditions it wishes to place on their release. If a county fails to choose, then PPAC shall make a recommendation to the CDCR Secretary on the additional inmates to be released to each county, determined based on the county of conviction.

3. **Secretary's Authority After Considering PPAC's Recommendations.** After considering the recommendations of the PPAC, the Secretary shall, pursuant to state law, take adequate action(s) to reduce the population to the required level. If the PPAC's recommendations are not implemented or are not effective to reduce the population levels, the Secretary shall release inmates based on the shortest time left to serve in order to comply with the population levels contained herein.

D. **Safe Harbor Provision.** No relief shall be requested or granted to enforce population levels set forth above unless a prison population level has been exceeded for 120 consecutive calendar days. During the 120 consecutive calendar days, the State shall convene

and consult with the PPAC to identify potential solutions to reach compliance with the applicable Interim or Population Level. The PPAC shall make recommendations to the State for achieving such compliance.

**V. Other Litigation**

**A. Limitations on Future Lawsuits.** With the exception of the Plaintiffs' right to seek individual relief in cases involving the award of credits, the Parties and Intervenors agree not to file any additional litigation challenging the State's implementation of the reforms contained in Parts III.C, III.D, or III.E of this MOU, or any other reforms implemented by the State to comply with the population level requirements of this MOU, including any provision contained in the legislation enacted pursuant to this MOU.

**B. Joint Action If Implementation of MOU Halted By Court Order.** If implementation of any reforms contained in this MOU or any other reforms implemented by the State to comply with the population level requirements of this MOU, including any provision contained in the legislation enacted pursuant to this MOU, is prohibited or significantly delayed by a court order, then the State and Plaintiffs will jointly seek relief from the appropriate court to allow the affected reforms to be effective. With regard to any of the State's actions to increase capacity, Plaintiffs will not oppose the State's efforts to seek relief from the appropriate court to allow the capacity increase to proceed.

**C. Existing Litigation.**

**VI. Settlement Referee.** The Settlement Referee Justice Elwood Lui and the Settlement Referee's Consultant Justice Peter Siggins shall continue to be available to assist the Parties in resolving any disagreements regarding the meaning of the MOU.

**VII. Termination.**

**A. Standards for Terminating MOU, Consent Decree, and Jurisdiction of Three-Judge Panel.** Notwithstanding the Prison Litigation Reform Act or any other law, upon motion of the State, the Three-Judge Panel must terminate its Order enforcing this MOU and its jurisdiction over this matter if the State has complied with the Statewide Population Level as set forth in this MOU for a period of 365 consecutive calendar days.

**B. Measuring Compliance with Population Caps.** In determining compliance, the Three-Judge Panel shall consider the average statewide population level during the applicable 365-day period, as well as the average population level at each of the CDCR adult institutions during the same period. For purposes of undertaking this analysis, the State is not out of compliance with the population level fixed for a particular facility unless it exceeds that level by 15%.

**VIII. Dismissal of Intervenors.** Upon the entry of the order approving this Agreement, the intervenors agree to dismiss their petitions for intervention without prejudice.

**IX. Attorney's Fees.**

**EXHIBIT A: LEGISLATIVE PACKAGE**

The Parties in the three-judge panel matter convened pursuant to 28 U.S.C. § 3626(a)(3) arising out of Coleman et al. v. Schwarzenegger, No. CIV-S-90-0520-LKK-JFM-P (E.D. Cal.) and Plata et al. v. Schwarzenegger, No. C01-1351-TEH (N.D. Cal.), have entered into an Agreement to resolve issues before the three-judge panel. As part of that Agreement, the Parties have agreed to seek enactment of legislation that effectuates the following legislative proposals:

**Proposal No. 1:** Amend Penal Code § 667.5 to specify that placement in a non-custodial diversionary program in lieu of state incarceration qualifies as a term in state prison for purposes of sentencing enhancement.

**Proposal No. 2:** Measures intended to provide funding and streamline implementation of AB 900 and duty of State to use “best efforts” to increase population capacity, including: (i) authority for integrated project delivery; (ii) authority for expedited contracting procedures; (iii) shortened timelines for the CEQA process; (iv) flexibility on project scope (number and types of beds) for Phase I; and (v) changes necessary to facilitate a clean opinion on AB 900 bonds.

**Proposal No. 3:** Require the counties to divert qualified persons to properly approved local-level programs for individuals with 12 months or less to serve in state prison from the time of commitment.

**Proposal No. 4:** Amend Penal Code to provide that CDCR shall use alternative sanctions for parole violators based on a decision-making instrument.

**Proposal No. 5:** Eliminate mandatory referrals to the Board of Parole for all parole violations.

**Proposal No. 6:** Authorize funding for diversionary programs contained in Memorandum of Understanding, at levels at or above those recommended by working group evaluating funding requirements.

**Proposal No. 7:** Update and fund the Community-Based Corrections Act of 1994, as necessary to facilitate the implementation of this MOU.

**Proposal No. 8:** Enhance the authority of the Secretary of the Department of Corrections and Rehabilitation to ease systemic population pressures through transfer prisoners to out-of-state public or private facilities, and take other actions necessary to comply with the population levels recommended by the Prison Population Advisory Committee.

**Proposal No. 9:** Reclassify the Corrections Standard Authority as an independent board, separate from the Department of Corrections and Rehabilitation.

**ORDER**

It is anticipated a court order will contain recitals required to comply with the Prison Litigation Reform Act, Population Level Provisions, Enforcement Provisions, a Termination Clause, Attorneys Fees Provision, a provision restricting the parties ability to bring other litigation based upon the same claims as in this case, and dismissal of intervenors without prejudice. The exact language of an order will be crafted to reflect the elements of the MOU that will be subject to federal court enforcement.