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

15 RALPH COLEMAN, et al.,

16 Plaintiffs,

vs.

17 ARNOLD SCHWARZENEGGER, et al.,

18 Defendants

) No. Civ S 90-0520 LKK-JFM P
) **THREE-JUDGE COURT**
) **PLAINTIFFS' RESPONSE TO**
) **DEFENDANTS' SEPTEMBER 17, 2012**
) **RESPONSE TO SEPTEMBER 7, 2012,**
) **ORDER**

20 MARCIANO PLATA ,et al.,

21 Plaintiffs,

vs.

22 ARNOLD SCHWARZENEGGER, et al.,

23 Defendants

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

1 The Court should issue an order requiring the parties to propose plans for reducing
2 crowding to 137.5% of capacity by June 27, 2012. Such an order is necessary because, despite
3 this Court's August 3, 2012, order requiring Defendants to take "all steps necessary to comply
4 with the Court's June 30, 2011 order, including the requirement that the prison population be
5 reduced to 137.5% by June 27, 2013," Defendants have not done so and nothing indicates that
6 they intend to change course.

7 In their September 17 Response, Defendants identify the steps that would be necessary
8 for them to come into full compliance – mainly, obtaining legislative authority for sentencing
9 reform and good time credits – but they apparently have made no effort to seek the needed
10 legislation or take other steps to bring themselves into compliance, and state that they will not
11 do so unless the Court "insists" on enforcing its order. Def. Resp. to Sept. 7 Order at 1, 6 (Dec.
12 17, 2012).

13 This is not the first time that Defendants defied this Court's crowding reduction order.
14 In violation of this Court's 2009 Order to develop a plan to reduce crowding to 137.5% of
15 capacity, Defendants submitted a plan that would only reduce crowding to 166% of design
16 capacity. *See* Oct. 21, 2009, Order Rejecting Plan at 2. The Court rejected Defendants' plan,
17 and ordered Defendants to submit another one, noting that it was "unaware of any excuse for
18 the state's failure to comply" with the August 4, 2009, Order, and averring that it would view
19 "with the utmost seriousness any further failure to comply with our orders." *Id.* at 6. Now,
20 three years later Defendants are doing essentially the same thing.

21 Although they concede they will not comply with the Court's order by the June 2013
22 deadline, Defendants make plain that they will not develop a plan to comply absent further
23 court order. Def. Resp. to Sept. 7 Order at 1 (only if the court "insists"). They state that any
24 plan to comply would be "developed under Defendants' protest." *Id.*

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Moreover, Defendants' claim that it would take six months to identify low risk prisoners and develop a good-time credit program is simply wrong. *Id.* at 5.¹ Defendants have two validated risk assessment instruments that measure each prisoner's risk of recidivism in a way that is much more accurate than the criteria used in their Realignment legislation. Austin Decl., ¶¶ 4-5; *see* California Rehabilitation Oversight Board Sept. 15, 2012 Biannual Report at 14 ("Data provided by the department indicates that as of July 2012, 96.0 percent of inmates and 96.5 percent of parolees have [risk assessment] scores"), available at <http://www.oig.ca.gov/media/crob/reports/C-ROB%20Biannual%20Report%20September%202015%202012.pdf> (site last visited Sept. 23, 2012). In other words, Defendants have *already* identified the inmates who are least likely to reoffend. *Id.* Plaintiffs' expert, who has worked in several other states to develop good time credit programs, affirms that it should not take more than 30 days to develop a good time credit program for low risk prisoners in California. Austin Decl., ¶¶ 6-7.

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In light of Defendants' failures to take all necessary steps to comply with the crowding reduction order, and their evident resistance toward doing so in an appropriate and timely manner, Plaintiffs propose that the Court establish the following procedure for both parties to develop crowding reduction plans:²

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- 1) Each party should be required to develop a proposed plan that will reduce the prison population sufficiently to comply with the June 27, 2013 deadline, taking into account the population reducing measures that this Court found in the August 4, 2009, Order would not have an adverse impact on public safety or the operation of a

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¹ Defendants also warn that because they haven't yet "developed or implemented a particular population reduction plan" apart from Realignment, "they cannot state when or how such an additional plan would reduce the prison population to 137.5%." *Id.* This further hedging does not give confidence about any plan they might develop.

² Plaintiffs note that this plan may need to fill a larger-than-expected gap in compliance with the Court's order. Preliminary data now show that Defendants will be 8-9,000 prisoners over the cap in June 2013 – even if prisoners remain in out-of-state prisons. Austin Decl., ¶¶ 2-3. The State is continuing to base its population estimates on the Spring 2012 Population Projections, which may be outdated. While the State typically issues "Fall Population Projections" in August of each year, it has not yet published the revised fall projections.

1 criminal justice system, and to circulate a draft of such plan to the opposing party
2 within 30 days;

- 3 2) The parties should be ordered to meet and confer about their respective plans, and to
4 submit final proposals to the Court within 60 days;
- 5 3) If the Parties do not agree upon a joint proposal within 60 days, on the 60th day each
6 party should submit a) its own proposal; and b) any objections to the other party's
7 proposal.
- 8 4) Defendants should be required to identify all state laws that would have to be waived
9 for them to implement any provision in the joint proposal, Plaintiffs' proposal or
10 their own proposal.
- 11 5) The Court should further require Defendants to immediately provide Plaintiffs with
12 full and immediate access to current data about CDCR's population, admissions, and
13 releases, and enable Plaintiffs' expert to confer freely with CDCR's data analysts
14 about CDCR's population projection models. *See Austin Decl.*, ¶¶ 3, 7.

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16 Dated: September 24, 2012

17 Respectfully submitted,

18 /s/ Rebekah Evenson

19 Rebekah Evenson
20 PRISON LAW OFFICE
21 Attorneys for Plaintiffs