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2
3 **IN THE UNITED STATES DISTRICT COURT**
4 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

5 ALEJANDRO MADRID, et al.,)
6 Plaintiffs)
7 v.)
8 JAMES E. TILTON et al.,)
9 Defendants,)
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NO. C90-3094-T.E.H..

SPECIAL MASTER'S FINAL REPORT
RE STATUS OF STATE OF CALIFORNIA
CORRECTIVE ACTION PLANS FOR
ADMINISTRATIVE INVESTIGATIONS
AND DISCIPLINE; RECOMMENDATIONS

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I.

INTRODUCTION

A. The Special Master's Final Post Powers Report and Recommendations.

On June 24, 2004 the Special Master issued a Final Report Re Department of Corrections "Post Powers" Investigations and Employee Discipline" ("Final Report") concerning the California Department of Corrections' (since renamed the California Department of Corrections and Rehabilitation ["CDCR"]) "Post Powers"¹ investigations. The report found that CDCR internal affairs investigations and administrative discipline were plagued by systemic problems that, in terms of actual practice, rendered investigations and discipline entirely ineffectual. In addition, the report found a pervasive code of silence in the CDCR (a problem so ingrained in California prisons that there was a code of silence about the code of silence itself), a pattern and practice of interference with administrative and criminal investigations at Pelican Bay State Prison ("PBSP") by representatives of the California Correctional Peace Officers Association ("CCPOA"), and the inappropriate termination of the Post Powers investigations by the former Director of Corrections, Edward Alameida and Thomas Moore, the former Deputy Director of the Office of Investigative Services.

At the conclusion of the Final Report, the Special Master informed the Court that the State of California's response to these problems was, at first, entirely inadequate.

The CDC's initial response to the Court's scrutiny of the Post Powers investigation shut-down was poor. CDC officials focused their attention downward, suggesting the Office of Investigative Services ("OIS") agent was responsible instead of a lack of leadership within the Central Office. Promises were made of a review of OIS by a retired annuitant, while Moore and Alameida put great stock in ordering the three administrative investigations to be re-opened as criminal investigations. The Office of the Inspector General, which had done a

¹ These administrative investigations had been opened to look into allegations that correctional officers had perjured themselves during the trial of Sergeant E.M. Powers ("Powers") and Correctional Officer J. R. Garcia ("Garcia"), who were charged in the United States District Court for the Northern District of California (case CR-00-0105-MJJ) with a conspiracy to violate civil rights (18 U.S.C. § 241) and a substantive count of violations of civil rights (18 U.S.C. § 242). Following a trial by jury, Powers and Garcia were each convicted of one count of conspiracy to violate civil rights and sentenced to prison.

1 diligent and professional job auditing and analyzing the serious systemic shortfalls
2 of both OIS and the Employment Law Unit (“ELU”), was essentially gutted by
3 budget cuts. At first, there was no indication that the CDC had an interest in
4 solving the investigation and discipline shortfalls described above.

5 Report at 106.

6 However, the State’s response changed for the better in dramatic fashion following the
7 election of Governor Arnold Schwarzenegger. As explained in the report:

8 The State of California’s response to the problems described in the draft
9 report changed significantly for the better after Arnold Schwarzenegger was
10 elected as Governor. Roderick Hickman has replaced Robert Presley as the
11 Secretary of the Youth and Adult Correctional Agency (“YACA”). Thomas
12 Moore, Robert Gaultney, and Edward Alameida either transferred to new
13 positions or retired. Jeanne Woodford, the former Warden of San Quentin, has
14 been appointed as Director of Corrections.

15 Under Mr. Hickman’s leadership, a Post Powers remedial team was
16 established in YACA. Warden Joe McGrath from PBSP was placed on a special
17 assignment to help develop this remedial plan. Martin Hoshino, formerly of
18 Office of the Inspector General (“OIG”), was appointed as Assistant Director of
19 OIS and has brought in a team of former OIG staff to make improvements to OIS
20 operations. To date, significant progress has been made in terms of policies,
21 procedures, consistency, and computer controls over case work. Kathleen
22 Keeshen, Deputy Director of Legal Affairs, has begun a series of corrective
23 actions in ELU and started work developing a plan for long term changes to the
24 unit.

25 Mr. Hickman has announced a “zero tolerance” policy concerning the code
26 of silence . . . YACA and CDC officials, counsel for plaintiffs, and the Special
27 Master have engaged in a series of meetings concerning possible remedial efforts.
28 The Special Master characterizes the progress as positive. All in all, defendants’
effort to formulate an adequate remedial plan is better organized and staffed today
than at any time in the past nine years.

In addition, Governor Schwarzenegger made the decision to re-institute a
strong Office of the Inspector General. Matthew Cate has been nominated as the
Inspector General and has actively participated in the Post Powers remedial
process. Michael Gennaco, an experienced civil rights litigator who manages the
Office of Independent Review that monitors the internal affairs investigations of
the Los Angeles County Sheriff, has been appointed the Court’s expert to assist
the parties with the remedial process.

Report at 106-107.

Because of the expressed determination by the Schwarzenegger Administration to address
the serious problems found in the Final Report, the Special Master recommended that he:

1 [C]ontinue to work with defendants concerning the development and
2 implementation of an adequate remedial plan to address the problems with
3 investigations, adverse action discipline and the code of silence identified in the
4 Special Master's Final Report re Department of Corrections "Post Powers"
Investigations and Employee Discipline. The Special Master should report to the
Court as necessary during this process, and submit recommendations for further
Court orders if warranted.

5 Recommendation 3.A., Report at 122.

6 B. The Court's Post Powers Remedial Orders.

7 On July 29, 2004, the Court issued an interim Order adopting the Special Master's
8 proposed interim monitoring plan. Specifically, the Court instructed the parties to consider the
9 following:

10 The Special Master's monitoring shall encompass investigations and discipline
11 cases arising from violations of the use of force policies, including integrity issues
12 such as the code of silence. This monitoring shall, of necessity, involve
13 monitoring Defendants' and the BIR's handling of casework from prisons other
14 than Pelican Bay State Prison . . .

15 Pursuant to the July 29, 2004 Order, the Special Master continued working with the
16 parties concerning investigations, adverse action discipline, and the code of silence. At the same
17 time, the Office of the Inspector General began to organize a new bureau, the Bureau of
18 Independent Review ("BIR"). The BIR was to function as a "real time" oversight agency that
19 monitored CDCR use of force and code of silence investigations from inception through the
20 completion of the State's discipline process.

21 On November 17, 2004 the Court issued its final order concerning monitoring, entitled
22 "Order re Special Master's 'Post-Powers' Report re Investigations and Employee Discipline and
23 (2) CCPOA's Motion to Intervene." At page 25, paragraph 3, the Court ordered as follows:

24 The Special Master shall continue working with defendants concerning the
25 development and implementation of an adequate remedial plan to address the
26 problems with investigations, adverse action discipline and the code of silence
27 identified in the Special Master's Final Report re Department of Corrections "Post
28 Powers" Investigations and Employee Discipline, and shall keep the Court fully
informed as to defendants' progress.

1 C. The Purpose and Timing of this Report.

2 Pursuant to the November 17, 2004 order, the Special Master, working closely with
3 counsel, the CDCR, Court experts, and the Inspector General, has continued to monitor progress
4 toward improving the CDCR's administrative investigation and discipline process. This report
5 sets forth the Special Master's findings and recommendations concerning the current status of the
6 Post Powers remedial program. It is submitted at this time for two reasons. First, the initial
7 phase of the Post Powers remedial process is nearing completion and, as explained below, the
8 BIR has begun to assume monitoring oversight over CDCR use of force and code of silence
9 investigations and discipline. Second, a recent series of disturbing events signals an abrupt
10 reversal of policy by the Governor's Office, a retreat from prison reform that may threaten the
11 Court's ability to enforce the Post Powers remedial plan, including the elimination of the code of
12 silence.

13 To summarize, the initial phase of the Post Powers' remedial plan, which took place
14 during the first twenty-four months of the governorship of Arnold Schwarzenegger, marked one
15 of the most productive periods of prison reform in California history. In addition to re-
16 organizing the California corrections system, eliminating several agencies and modifying the
17 missions and structure of others, Governor Schwarzenegger and his appointees, working with the
18 Special Master and counsel, agreed to implement a number of critical remedial programs which
19 started the process of improving CDCR investigation and employee discipline practices.

20 Once again however, California has taken three steps forward and then three steps back
21 when attempting to reform its troubled prison system. Following the appointment of Susan
22 Kennedy as the Governor's Chief of Staff on January 1, 2006, a series of disturbing
23 developments have taken place which signal a return to the prior Davis Administration's practice
24 of allowing the CCPOA to over-rule the most critical decisions of the CDCR Secretary. In a
25 period of six weeks, two CDCR Secretaries committed to reform, Rod Hickman and Jeanne
26 Woodford, left state service, stating as their reasons the CCPOA's influence with the Governor's
27 Office. The top ranking leadership of the CDCR is confused, understaffed, dispirited, and most
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1 important, uncertain who is really in charge: the Acting Secretary or the President of the CCPOA.
2 At the same time, a quiet purge of the leadership of the Department of Personnel Administration
3 (“DPA”) was instituted by the Governor’s Office, removing the State’s experienced labor
4 administrators. Ms. Kennedy also allowed the CCPOA to over-rule Acting Secretary Jeanne
5 Woodford’s appointment for CDCR Assistant Secretary of Labor relations, thereby reducing the
6 bargaining credibility and authority of State negotiators on the eve of the 2006 negotiations
7 concerning the CCPOA’s more than one *billion* dollars per year contract, negotiations which, as
8 explained below, potentially impacts on numerous aspects of the Post Powers remedial plan. The
9 sum total of this turn-about by the Governor’s Office raises serious questions of whether the
10 Court’s Post Powers remedial plan is now in jeopardy.

11 II.

12 FINDINGS

13 A. The Post Powers Corrective Action Plan.

14 1. *Introduction.*

15 As explained in the Special Master’s Final Report, the Order of July 29, 2004, and the
16 Order of November 17, 2004, there are four major elements to the State of California Post
17 Powers Remedial program: (1) eliminating the code of silence; (2) improving internal affairs
18 investigations; (3) improving the CDCR’s handling of employee adverse action discipline cases;
19 and (4) establishing a “real time” process for monitoring use of force and code of silence related
20 investigations by the Office of the Inspector General.

21 The State’s efforts to address these challenges was instituted by Governor
22 Schwarzenegger. It was led by Rod Hickman, CDCR Secretary, and Matthew Cate, Inspector
23 General. Court approved remedial programs involved the re-structuring and improvement of the
24 internal affairs and employment law units, the promulgation of new legislation, establishing new
25 and effective department operating policies, establishing new data processing systems, and
26 creating the Bureau of Independent Review. Throughout the reform process, CDCR officials
27 (including but not limited to Rod Hickman, Joe McGrath, Mark Gant, Martin Hoshino, Bruce
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1 Slavin, Kathleen Keeshen, and Debra Ashbrook) have worked closely with the Special Master
2 and Court experts Dr. Patrick Maher and Michael Gennaco. Meetings were conducted on a
3 regular basis that included counsel for the parties. A chart displaying the status of the remedial
4 plan is attached as Exhibit 1. A descriptive summary is set forth below.

5 2. *Providing CDCR Officials With the Authority to Manage Investigations,*
6 *Discipline, and the Code of Silence.*

7 I. Introduction.

8 While giving prison officials the authority to do their job would seem to be a given, in the
9 State of California the power to manage has been delegated to a significant degree to the
10 CCPOA. Thus, perhaps the most important energizing aspect of the reform process was
11 Governor Schwarzenegger's decision not to accept money from the CCPOA.

12 ii. Managing the Labor Relations Process.

13 During the first two years of the Schwarzenegger administration, the Governor's Office
14 did not allow the CCPOA to interfere with the management prerogatives of CDCR officials.
15 Governor Schwarzenegger's approach to prison management was in striking contrast to the
16 policy of the Davis Administration. During the Davis Administration, CCPOA officials
17 exercised their close relationship with the Governor and his Chief of Staff, Susan Kennedy, to
18 interfere with the management discretion necessary to run the largest prison system in the United
19 States. For example, the Davis administration required the Director of Corrections to meet
20 directly with CCPOA officials whenever the CCPOA wanted to talk, and regardless of the topic
21 for discussion. The Special Master's Final Report describes examples of inappropriate contacts,
22 including Chuck Alexander's telephone call to Director Edward Alameida concerning the status
23 of an internal affairs investigation involving CCPOA members (Final Report at 58-59) and Lance
24 Corcoran's telephone call to Director Alameida objecting about the fact that CDCR investigators
25 were assisting the United States Attorney concerning a criminal prosecution against a CCPOA
26 member (Final Report at 89-90; *see also* Exhibit 38 to the Final Report).

27 In contrast, in 2004 Governor Schwarzenegger, former Legal Secretary Peter Siggins,
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1 iv. Re-Negotiating the CCPOA Memorandum of Understanding in 2006.

2 The State of California/CCPOA MOU impacts upon all aspects of CDCR operations.
3 Not only are the respective rights of investigators and subjects defined by the MOU, so is a
4 Warden's ability to assign officers and prison managers to key posts, including special housing
5 units and units with investigation responsibility. As described below, problems of interpretation
6 in the existing MOU provisions which affected investigations have been addressed by the Special
7 Master. However, the clarifications do not apply to changed language or new language which
8 may be negotiated in the 2006 contract renewal process. Therefore, the need to make changes to
9 the MOU, and the need to protect those MOU provisions which relate to investigations and
10 discipline, was designated by the Administration as a necessary part of the Post Powers remedial
11 plan.

12 To accomplish this objective, beginning in 2005, CDCR officials began to meet with
13 DPA. Plans were developed for Ms. Hanson and Mr. Virga to negotiate all issues involving
14 CDCR management during the 2006 bargaining sessions. This strategy was developed and
15 approved by the Director of DPA, Mike Navarro, and by Deputy Director Bill Avritt. Assurances
16 were provided to counsel and to the Court that in 2006 the Governor of California would finally
17 put a stop to the "Capitol walk" (a process whereby, in past bargaining years, the President of the
18 CCPOA has walked away from formal bargaining with DPA straight into the Capitol building to
19 get whatever he wanted directly from the Governor). With the groundwork established for
20 CDCR officials to use their authority and discretion to implement prison reform without "back
21 door" interference by the CCPOA, the State of California began to correct the problems set forth
22 in the Final Report.

23 3. *Correcting the Primary CDCR Cultural Problem That Allows Prisoner Abuse,*
24 *Thwarts Investigations, and Renders Administrative Discipline Difficult To*
25 *Administer - The Code of Silence.*

26 a. *The Leadership of Rod Hickman:* Without question, the most important
27 step in the Post Powers remedial process was the decision by Secretary Hickman to take timely
28

1 and definite steps to end the code of silence. The process was initiated by Mr. Hickman's "Zero
2 Tolerance" letter of February 17, 2004 (Exhibit 3), when Hickman displayed the courage to do
3 what no leader of California's prisons has ever done - take steps to end the code of silence. As
4 explained below, integrity and commitment to reform cost Mr. Hickman his job.

5 b. *The Code of Silence Corrective Action Plan*: The initial code of silence
6 corrective action plan had two primary components:

7 I. Policy Statements and Standards: Rules prohibiting the code of
8 silence were established, and documented in the letter of February 17, 2004 (distributed to all
9 employees and posted on the CDCR website). A new Code of Conduct was published on March
10 30, 2005, and later incorporated into Article 22, and a revised Law Enforcement Code of Ethics
11 was published on June 16, 2004 (the date that the new oath was provided to new cadets and
12 direction given from the Director's Office to Hiring Authorities to publish the revised oath in IST
13 bulletins for existing staff's review).

14 ii. Training: Thereafter, the CDCR began development of an eight
15 hour interactive training program concerning the code of silence. Working with the Court
16 experts, a program was established to provide code of silence training for all CDCR personnel.
17 The program began in late 2004 and continued, until fully implemented, for a one year period.

18 4. *Professionalizing the Internal Affairs Investigation Process.*

19 a. *Introduction*: The problems within the CDCR's internal affairs
20 operation were so severe that a wide range of corrective actions were needed to initiate the path
21 to reform. Six major changes to operation and policy have now begun.

22 b. *Establishing Consistent and Professional Policies and Procedures*:
23 Internal affairs policies were almost entirely re-written, including fundamental changes in the
24 manner in which investigation conclusions are reported. One significant change in CDCR
25 operations implemented in 2005 was for the prison's hiring authority (warden or health care
26 manager) to be responsible for determining the "result" of an investigation (e.g. whether the
27 charges against the employee should be "sustained" or "not sustained") rather than the

1 investigator making this finding. The change of policy is consistent with the preferred practices
2 of progressive California law enforcement agencies.

3 c. *Establishing a Central Intake Unit:* After several months of struggling
4 with the need for operational consistency and the sound initiation of investigations, the decision
5 was made to form a “Central Intake” unit at CDCR headquarters. In essence, the initiation of all
6 internal affairs cases in the CDCR must now be approved by a team of professional investigators
7 and attorneys.² Requests for investigations which lack foundation are rejected, requests that can
8 be dealt with through the local institution’s discipline process are referred back to the prisons for
9 action, and cases where the investigation request is too vague or uncertain are returned for
10 clarification. Central Intake has had an initial significant impact on improving the quality and
11 fairness of CDCR investigations.³

12 d. *Establishing and Enhancing the Case Management System:* A Case
13 Management System was developed to track the status of investigations and discipline cases
14 pending in the CDCR’s thirty-three institutions, central office, and parole facilities. Over time,
15 the CDCR’s internal affairs unit has begun to move from a system with no controls into a system
16 that is beginning to provide the ability for the “real time” monitoring of all agent activity. A
17 summary of the tracking of each implementation stage is attached as Exhibit 4.

18 e. *Training:* Training has been provided to internal affairs agents.
19 Concerning many important issues, e.g. sexual assault investigations and critical incident review,
20 specific agent-oriented training materials have been prepared and distributed to staff. New and
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22 ² Participating in decisions made by the Central Intake Unit are attorneys from the Bureau of
23 Independent Review (“BIR”) and the Employment Advocacy Prosecution Team (“EAPT”), both
24 entities which are discussed later in this report. The participation of the BIR and EAPT in these
25 decisions ensures the presence of independent voices and strengthens the work of the Central Intake
26 Unit.

27 ³ Establishing a central intake unit serves to protect correctional officers and other employees
28 from local retaliation. A warden or health care manager can no longer initiate an investigation
without Central Office approval. This employee protection is an example of many such protections
that were part of the reforms instituted by Secretary Hickman.

1 important forms have been prepared, and old forms revised (including the 989 form, and the 402
2 and 403 forms).⁴

3 *f. Securing Necessary Staff:*

4 At the time of the Special Master's Final Report, internal affairs was understaffed and
5 under funded. To implement the reforms above, including Central Intake, additional
6 investigators and support staff were required. To its credit, the Schwarzenegger Administration
7 has fulfilled the first phases of a staged plan to staff internal affairs, and the recent shortage of
8 investigators caused by the need to staff the unfunded intake unit has now been addressed.
9 Additional resources will be required in the future, however, and the Special Master should
10 continue to monitor the adequacy of investigator staffing.

11 *g. Leadership:* Martin Hoshino provided the leadership and integrity to
12 get the internal affairs reforms off to a timely and effective start. Subsequently joined by Mark
13 Gant, these two leaders oversaw the implementation of the reform of the CDCR's investigative
14 process. Without the tireless work of Mr. Gant and Mr. Hoshino, the important changes
15 described above would not have taken place. They have consistently demonstrated
16 professionalism and integrity that is very opposite of the official misconduct by their predecessor,
17 as described in the Special Master's Final Report.

18 *5. Improving the CDCR Employee Discipline Process.*

19 *a. Introduction.*

20 The Post Powers remedial process pertaining to discipline involved two separate
21 programs: (1) improving CDCR legal support for investigators and hiring authorities and (2)
22 developing a fair and consistent discipline matrix.

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27 ⁴ This training, much of which focused on due process rights and consistency, serves to ensure
28 the appropriate protections for staff who are under investigation.

1 *b. Changing How the Office of Legal Affairs Provides Support for*
2 *Investigations and Employee Discipline Litigation.*

3 I. *Introduction:* If anything, problems with lack of organization,
4 poor morale, and the ineffectual leadership of the Employment Law Unit (that section of the
5 Office of Legal Affairs responsible for representing the CDCR during employee discipline
6 litigation), were more severe than those faced by internal affairs. As found in the Final Report:

7 The Special Master previously reported to the Court about the *Mayo* cases, which
8 involved MTA's at PBSP who were not disciplined for very serious violations of
9 CDC policy because the CDC's investigation and discipline process took more
10 than one year. Because of the *Mayo* cases, in 2001 the Special Master requested
11 that the OIG conduct an audit of the CDC's adverse action process. Similar to the
12 OIG's findings in the OIS audit, the OIG audit report of March 2002 (which has
13 previously been filed under seal with the Court), found numerous systemic
14 problems with the processing of adverse action cases, including a lack of
15 coordination between ELU and OIS, inadequate or non-existent policies
concerning important issues such as when to file an appeal or how to settle a case,
inadequate training for OIS agents and the Employee Relations Officers in the
prisons, inadequate tracking of discipline related processes, confusion about the
POBAR one year statute of limitations, and a lack of clarity concerning the roles
and responsibilities of the CDC officials involved with employee discipline. The
OIG found that these problems led to *forty percent* of all adverse actions being
dismissed or otherwise compromised because the CDC was unable to complete
the cases in a one year period of time.

16 *Final Report* at 82-83.

17 Structurally reorganizing the former ELU was necessary prior to initiating the Post
18 Powers remedial plan pertaining to employee discipline. The remedial actions implemented for
19 the unit, which has been re-named the Employment Advocacy & Prosecution Team ("EAPT"),
20 include the following.

21 ii. *Management Reviews:* To its credit, the CDCR sought the
22 advice of outside consultants, who performed a detailed evaluation of the management,
23 organization, and attitudes of the employees of what is now EAPT. Numerous recommendations
24 of the consultants have been, over time, successfully implemented.

25 iii. *Establishment of the Vertical Advocate Model of Litigation*
26 *Control:* The manner in which the EAPT monitors investigation and discipline cases has
27 improved. Instead of the past practice of EAPT lawyers first becoming involved with an
28

1 time, lead to the end of Federal Court monitoring of the CDCR's investigation and employee
2 discipline process.

3 *b. Creation of the BIR.*

4 In late 2004 the Special Master and counsel for the parties met with Peter Siggins, the
5 Governor's Legal Secretary, to discuss the Post Powers remedial process. One of the issues that
6 was discussed was how to develop a procedure whereby the State of California could adequately
7 monitor CDCR investigations, and report to the Legislature and public about administrative
8 misconduct, employee discipline, special incidents, and corruption. The concept of forming an
9 agency to conduct "real time" monitoring of CDCR investigations and discipline was first
10 developed during those meetings.

11 Governor Schwarzenegger displayed the courage to reverse an earlier decision to
12 eliminate the Office of the Inspector General. He not only re-established the Office, he instituted
13 a plan to restore to the Office the scope of operations it had prior to a wave of budget cuts
14 implemented during the final years of the Davis Administration. In addition, the Governor took
15 an additional step; he added a new Bureau to the Inspector General's Office, the Bureau of
16 Independent Review. Credit should also be given to two California Senators, Gloria Romero and
17 Jackie Speier, who sponsored important Administration bills that re-instituted the Office of the
18 Inspector General and established the BIR.

19 *c. The BIR Concept.*

20 The BIR provides the Legislature and public with real-time monitoring of critical CDCR
21 administrative investigations. In other words, the BIR is involved in the initial CDCR decision
22 to accept or reject a request for an internal affairs investigation during the Central Intake process,
23 it subsequently tracks the progress of the investigative agent, the decisions of the hiring authority
24 after he or she receives a completed investigation, and the work of the EAPT attorney during the
25 employee discipline process. Modeled after the successful Office of Independent Review in Los
26 Angeles County, the BIR provides expertise, experience, access to internal processes, and a new
27 window of transparency into the world of prison misconduct that should prove to be far superior
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1 to a more traditional (and often politicized) “civilian review panel” model.

2 In addition, the BIR has the expertise and flexibility to respond to special incidents; for
3 example, prison disturbances, officer deaths or injuries, misconduct by clinical personnel, etc.
4 Furthermore, working with the fiscal side of the Inspector General’s Office, BIR staff can refer
5 for investigation cases that they encounter which involve fiscal misconduct or corruption.

6 B. Documenting the Post Powers Remedial Plan.

7 The policies listed below provide insight concerning the detail and the scope of planning
8 that was necessary to begin to implement the Post Powers remedial effort:⁵

9 1. *“Zero Tolerance” Code of Silence Letter*: The letter was signed by Secretary Hickman
10 on February 17, 2004 and included as a paycheck stuffer in February 2004. It has been posted
11 indefinitely on the CDCR webpage.

12 2. *Law Enforcement Code of Ethics*: On June 16, 2004 the oath was implemented for
13 new cadets and direction given from the Director's Office to Hiring Authorities to publish the
14 revised oath in IST bulletins for existing staff's review (with a revised oath published in local IST
15 bulletins in July and August 2004). The staff Code of Conduct was established on March 30,
16 2005 (the date that Secretary Hickman distributed the Code of Conduct). The Code itself was
17 posted statewide at local sites on or before April 29, 2005, and was redistributed to all CDCR
18 ee's on September 28, 2005 with information regarding how and where to report misconduct
19 (Code later incorporated into Article 22).

20 3. *Article 22 of CDCR “Department Operations Manual” (“DOM”)*: On March 8, 2005
21 direction was given to the field to implement Article 22 following statewide training; initial draft
22 submitted to Special Master on February 25, 2005, secondary draft submitted on December 5,
23 2005; order filed on December 22, 2005; direction provided to implement in field on January 3,
24 2006).

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27 ⁵ This list is not exhaustive. Furthermore, it does not include policies, procedures, training plans,
etc. from the BIR.

1 C. The Status of Post Powers Remedial Efforts.

2 1. *Investigations.*

3 The CDCR internal affairs operation is significantly stronger today than in 2004. As
4 noted above, improvements have been made in case initiation, processing, and documentation.
5 In addition, new policies have been implemented, limited staffing enhancements have been
6 provided, and investigators are now supported (and monitored) by the EAPT and BIR.

7 Additional investigators are needed, however, to ensure timely completion of all
8 investigations (a limited number of cases continue to languish unnecessarily, and some of the
9 timeliness improvements achieved for use of force investigation has been achieved by shifting
10 investigators and slowing down the processing of other cases). Certain investigators have proven
11 unable to meet the standards for casework defined by Articles 22 and 14 of the DOM, which will
12 require re-training and in some cases, reassignment or progressive discipline. A number of high
13 level internal affairs positions still need to be filled with competent personnel.⁶ Additional
14 remedial work is necessary to complete the essential computer based controls on pending
15 investigations and discipline. Finally, internal affairs needs additional, well trained investigators
16 skilled in, or adequately supported for, cases that involve overlapping issues such as the code of
17 silence combined with medical malpractice.

18 2. *Employee Discipline.*

19 Similar to internal affairs, the CDCR's legal support for employee investigations and
20 discipline is significantly more complete and sophisticated today than in 2004. Nevertheless, the
21 EAPT suffers from continued unacceptable levels of turn over, caused in part by inadequate
22 salaries for EAPT attorneys. More training is needed for new attorneys, and for the ERO's who
23 serve on the front line of the employee discipline process inside the CDCR's thirty-three prisons.
24 Similar to EAPT attorneys, ERO's turn over is so excessive that a team approach to employee

25 _____
26 ⁶ As explained below, one of the CDCR officials who helped initiate the improvements in
27 internal affairs, Assistant Secretary Mark Gant, retired following the resignation of Secretary
28 Hickman.

1 discipline (hiring authority, ERO, and EAPT attorney) is often difficult, if not impossible, to
2 accomplish in day-to-day practice.

3 As mentioned above, two of the more important changes in CDCR operations put in place
4 by the Post Powers remedial plan are (1) having the hiring authority instead of the investigator
5 make the final determination concerning whether charges are sustained or not sustained; and (2)
6 using the CDCR discipline matrix for imposing consistent and fair sentences for charges that are
7 sustained. Again, however, unacceptably high level of turn over among prison wardens and
8 health care managers have created what one CDCR official has termed an ongoing “training
9 nightmare.” Inexperienced hiring authorities who are unskilled in making sustained or not
10 sustained findings, and who are also unfamiliar with using the discipline matrix, have generated
11 case problems and/or delays which have increased the burdens on the EAPT and BIR.

12 Simply stated, the Post Powers remedial plan is encountering certain implementation
13 problems because of fundamental problems within the CDCR, and it may be necessary to modify
14 the remedial plan in the future. In addition, it may be necessary to staff internal affairs, the
15 EAPT, and the BIR with more agents and attorneys than originally anticipated, assuming that the
16 current levels of warden and health care manager turn over continues into the future.

17 3. *The Code of Silence.*

18 As explained above, the CDCR has completed its code of silence training program.
19 Investigators and State attorneys close to the administrative investigation process have indicated
20 some improvement in staff conduct when faced with code of silence issues as a result of the
21 training and Secretary Hickman’s “Zero Tolerance” letter.

22 The CCPOA leadership, however, continues to refuse to acknowledge the existence of the
23 code of silence, and continues to attack efforts to eliminate the code. Typical of CCPOA
24 attempts to ridicule, identify, and attack those who report force is the “rat trap” case out of
25 Calipatria State Prison.

26 After observing a use of force incident at Calipatria, a prison Captain believed that staff
27 misconduct had taken place. He reported his observations to the Warden, as required by policy.

1 The CCPOA's top ranking representative at the prison, however, objected to the Captain's report,
2 and also objected to the investigation which followed. Thereafter, the Calipatria local president
3 hung a rat trap and note inside the CCPOA bulletin board at the entrance to the prison's
4 administrative building (see Exhibit 5). Note use of the words "rat trap" on the pictured mouse
5 trap.⁷ The implications of the words "the CCPOA will attempt to catch them" should be
6 obvious.⁸

7 Meanwhile, in Sacramento, Secretary Rod Hickman was subject to repeated attacks by
8 the CCPOA's leadership because of his decision to address the Code of silence in the CDCR.
9 Indeed, any doubts about the importance of the Code of silence for CCPOA President Mike
10 Jimenez and Executive Vice President Chuck Alexander have been dispelled by their repeated
11 denials that the Code exists, and their subsequent attempts to criticize and humiliate Secretary
12 Hickman. For examples of CCPOA attacks, *see* the fake money ridiculing Secretary Hickman
13 and insults posted on various blog sites affiliated with the CCPOA (for example, a "Hickman
14 Has to Go" posting accusing the Secretary of being "either a liar or a rat" or the "official resume
15 translated" posting, claiming that Governor Arnold Schwarzenegger "didn't know sh*t from
16 Shinola about corrections" (Exhibits 6 - 8).⁹ ¹⁰ The Court has previously commented on the
17 troubling questions posed by the CCPOA's response to Post Powers corrective actions, including
18

19 ⁷ The term "rat" is used by prison inmates to designate a prisoner who reports crimes or
20 misconduct to prison staff. The term has been adopted by the CCPOA and its blogs to enforce the
21 Code of silence by labeling officers who report the misconduct of fellow officers as "rats." For
example, *see* Final Report at page 121.

22 ⁸ When an internal affairs investigation was initiated to look into the matter, CCPOA President
23 Mike Jimenez accused the CDCR of launching an attack on all local CCPOA presidents.

24 ⁹ The attacks on Secretary Hickman are part of a CCPOA program of "attack your enemies and
25 reward your friends." To a large degree, this confrontational strategy is based on Ronald G.
DeLord's rendering of Saul Alinsky's community organizing theory, which is taught to CCPOA
representatives at the guard's union annual convention (*see* Exhibit 9).

26 ¹⁰ The CCPOA denies an official connection with these blogs; nevertheless, blog founders sell
27 tee-shirts at CCPOA's annual conferences and on occasion, official CCPOA telephone messages
28 direct union members to blog sites.

1 the union's juvenile attacks on plaintiffs' counsel (*see* Order Re (1) Special Master's "Post
2 Powers" Investigation and Employee Discipline; and (2) CCPOA Motion to Intervene filed
3 November 17, 2004, at page 22).

4 A more recent example of the ridicule, threats, and humiliation delivered by the CCPOA
5 to competent CDCR employees to enforce this code of silence is found at Exhibit 10, a large full
6 color picture which the CCPOA leadership had posted on the CCPOA Bulletin Board at CDCR
7 Headquarters:¹¹ an unflattering picture of Governor Arnold Schwarzenegger, naked except for
8 shorts, and standing to the right side of the Governor are cut-and pasted photographs of the faces
9 of former Assistant Secretary of CDCR Labor Relations Brigid Hanson and the Chief of CDCR
10 Labor Relations Tim Virga. CCPOA executives adopt the schemes of the convicts they guard.
11 Identical to the biggest bully in the prison yard, CCPOA leaders deliberately select out specific
12 individuals to embarrass and publically humiliate, as it is now attempting to do with Brigid
13 Hanson and Tim Virga. The purpose of this very public attack is simple, to terrorize CDCR
14 employees so they will not report, or attempt to correct, inappropriate behavior by CCPOA
15 leaders.¹² By the use of flyers, bulletin board postings, and blog sites, the CCPOA leadership
16 continues to encourage the code of silence. To summarize, some progress has been made by the
17 CDCR to train about the code of silence and investigate incidents where the code of silence is

18
19
20 ¹¹ In its Response, the CCPOA claims that this poster has not been placed on all prison bulletin
21 boards as was stated by the Special Master in his draft report. Instead, the CCPOA argues, this
22 poster was placed only in the CCPOA bulletin board at CDCR headquarters. Therefore, the Special
23 Master has modified this section of his report. In doing so, however, the Special Master emphasizes
24 that he does not believe that the Declaration of Charles ("Chuck") Alexander is accurate in this
25 regard. The Special Master has been informed that this picture of the Governor has appeared in
some prison CCPOA bulletin boards. In some institutions, to their credit, Chapter Presidents,
offended by this poster, have refused to display it. In other facilities the picture was posted and
promptly removed. Without question, there are many correctional officers who do not approve of
Mr. Alexander's depiction of the Governor, and a considerable number of CDCR employees who
work at CDCR headquarters believe that it violates State of California rules against an offensive
work environment.

26 ¹² Concerning this specific poster, the underlying issue which angers the leadership of the
27 CCPOA is not allegation of an abuse of force by its members, but the fact that Ms. Hanson and Mr.
Virga had taken steps to stop the misuse of vacation days and sick leave credits by CCPOA leaders.

1 used to cover up abuses or thwart investigations. CCPOA leaders, nonetheless, continue to
2 attempt to preserve the code of silence.

3 *4. The Bureau of Independent Review.*

4 *a. Establishing the BIR.*

5 Establishing the BIR as an operational agency involved numerous and difficult
6 challenges, including developing duty statements for attorneys, investigators, and administrative
7 support personnel, developing policies and procedures, recruiting, hiring, and appointing key
8 personnel, establishing offices in the same three locations where internal affairs agents are
9 located, Sacramento, Bakersfield, and Rancho Cucamonga, training lawyers and investigators,
10 establishing positive working relationships with prison wardens and health care managers,
11 establishing positive working relationships with local, State, and Federal law enforcement
12 agencies and District Attorneys and U.S. Attorneys, meeting and conferring and establishing
13 relationships with the numerous public and private agencies and interest groups who are involved
14 with CDCR operations, establishing relationships with the Legislature and Federal Court, and
15 developing a systematic method of accurately reporting the details of internal affairs
16 investigations and discipline to the Legislature and public in a manner that does not compromise
17 the effectiveness of the investigation nor the due process rights of the employees under
18 investigation.

19 These challenges have been met in a timely manner by the Office of the Inspector
20 General. Credit is due Matthew L. Cate, David R. Shaw, Barbara Sheldon, Howard Moseley,
21 Robert Barton, Stephen Miller, and Tim Rieger among many others. Examples of the quality of
22 BIR public reporting is found at Exhibit 11, the May 2006 BIR Report for the period of July -
23 December 2005. An example of the quality of Inspector General special reviews is found in the
24 report entitled Special Review Into the Death of Correctional Officer Manuel A. Gonzalez, Jr.
25 (issued March 16, 2005) (Exhibit 12).

1 b. *Monitoring the BIR.*

2 Initially, the Special Master tracked pending internal affairs and discipline cases directly
3 through the CDCR, receiving formal presentations from internal affairs and EAPT. As BIR
4 operations expanded, however, the Special Master modified the bi-monthly presentation process
5 so that BIR became responsible for overall case tracking as well as the specific case
6 presentations. Counsel has attended all of these meetings, and actively participated. State
7 officials from control agencies such as the DPA were invited to certain meetings as necessary, as
8 were the Court experts.

9 Now that the BIR is fully operational, the Special Master will monitor the status of the
10 CDCR's Post Powers' reform through presentations by BIR. In other words, the Special Master
11 will monitor the effectiveness of the BIR's monitoring. This change-over in monitoring began
12 January 2006.

13 In addition, the Special Master will begin monitoring BIR case management with the
14 assistance of Court expert Michael Gennaco and the Office of Independent Review of Los
15 Angeles County. Mr. Gennaco's monitoring will also include monitoring the BIR's update of its
16 protocols to reflect current operational practices and expectations, a process which has begun and
17 is anticipated to be completed by October 2006.

18 The Court expert's monitoring of the BIR is appropriately characterized as a form of peer
19 review, complimented by public reporting. The decision to intensify case specific monitoring is
20 a positive step, indicating that the BIR is fully operational and performing effectively. Despite
21 decades of State neglect concerning correctional officer investigations and discipline, the Special
22 Master has confidence with the Inspector General assuming primary responsibility for monitoring
23 CDCR investigations and discipline.

24 The Special Master's intensified review of BIR operations should not be confused with
25 BIR monitoring of the CDCR. BIR monitoring of CDCR investigations and discipline, as
26 explained above, is the heart of the Post Powers remedial plan. Given the powerful outside
27 influences that impact on investigations and discipline, and given the inherent challenges in
28

1 operating an effective investigation and discipline process within an organization the size of the
2 CDCR, it is anticipated that BIR monitoring will become an established structure of California
3 State Government, and that it will continue indefinitely. The Special Master's enhanced review
4 of the BIR, however, is temporary, anticipated to be limited to a two-year period commencing
5 January 1, 2006 and ending in January 2008.

6 The Special Master's proposed Peer Monitoring Plan, prepared by Mr. Gennaco, has been
7 reviewed and approved by the Inspector General. It is attached to this report as Exhibit 13. As
8 set forth below, the Special Master recommends that the Court adopt this monitoring program.

9 *c. Future Challenges to an Effective BIR Operation.*

10 The initial effort to create the BIR has been remarkable. The BIR, however, is charting
11 unknown waters as it begins to monitor on a real time basis the internal affairs investigations of
12 the CDCR. Without question, the number of important cases and/or events that require BIR
13 oversight are increasing. The term "real time" encompasses a wide range of oversight: from
14 periodic monitoring, to the critical juncture review, to monitoring important cases on a day to day
15 basis. At present, the BIR does not have enough attorneys and investigators to monitor as
16 intensely as necessary each pending investigation. Furthermore, there are indications that the
17 salary offered to candidates for BIR positions is no longer competitive, given the quality and
18 necessary background required for these critical State positions and there are also indications that
19 it may be appropriate, as some time in the near future, to transfer the BIR lawyers into civil
20 service positions. Each of these issues calls for continued monitoring by the Special Master.

21 *5. Summary.*

22 The State of California attempted to initiate its Post Powers remedial plan concerning the
23 elimination of the code of silence, adequate investigations, adequate and timely discipline, and
24 the formation of the BIR in a timely manner. The initial progress has been appropriate; however,
25 for each critical element of the remedial plan, more work is needed. No one involved with the
26 Post Powers remedial plan takes the position that the job is done; indeed, the results thus far,
27 while positive, are best described as tenuous. The loss of a leader of a unit, an increase in turn
28

1 over among key personnel, the failure to obtain needed budget enhancements, and numerous
2 other factors can quickly turn what so far has been a success into a long term failure. Simply
3 stated, at this point in time, timely investigations, fair discipline, the elimination of the code of
4 silence, and adequate investigation oversight are not well established practices in the CDCR, and
5 they are certainly not immune from outside influences.

6 D. Memorandum of Understanding Issues.

7 The Special Master's Final Report also included a recommendation that he investigate the
8 real life impact of certain provisions of the MOU on the Court's use of force remedial plans. The
9 November 17, 2004 Order instructed the Special Master to investigate, hold hearings if
10 necessary, prepare a report, consider comments from the parties and the CCPOA, and issue
11 recommendations as to whether certain provisions of the MOU or the August 12, 2004
12 Addendum to the MOU violated, by their terms or practice, the Court's use of force remedial
13 plans.¹³ In the same order, the Court granted intervenor-party status to the CCPOA for the
14 following purpose: (1) taking part in the Special Master's investigation and, (2) in the event that
15 the Special Master, as a result of this investigation, issues a draft or final report which
16 recommends that the Court find that one or more provisions of the MOU violate, by their terms
17 or practice, the Court's remedial orders and/or that the Court should consider overriding such
18 provision(s) in order to cure the constitutional violations at issue in this case, the CCPOA may
19 raise any objection(s) it has to either the draft or final report, and (3) in the event that any such
20 objection(s) are not sustained by this Court, it may appeal such decision, to the extent such
21 decision is otherwise appealable by law.

22 Working with the parties, including the CCPOA, and following numerous meetings and
23

24 ¹³ The specific provisions of the Agreement Between the State of California and the California
25 Correctional Peace Officers Association Covering Bargaining Unit Six, Corrections (July 1, 2001
26 through July 2, 2006) that were examined by the Special Master included Sections 2.07, 2.10, 5.02,
27 6.01, 9.05, 9.06, 9.09, 9.16, 10.10, 10.12, Appendix #9, Side Letter #12, Side Letter #14, and the
28 following sections of the 2004 Addendum: Continuous appropriation, CDC/CYA Video Access,
Transfer of Peace Officers Between Departments, Chapter President Release, Addendum Grievance
Provision, Side agreement re post and bid for supervisors.

1 revisions a stipulation was prepared, modified, finalized and signed by the State and CCPOA
2 which addresses the concerns expressed by the Special Master in the Final Report. Both the
3 CCPOA and DPA participated in this process in a cooperative and professional manner. The
4 Special Master filed his Report and Recommendations Re Investigation into Selected Provisions
5 of CCPOA/CDCR Memorandum of Understanding on March 26, 2006, which included the
6 executed stipulation.

7 E. The 2006 Retreat From Prison Reform.

8 1. *Introduction.*

9 For more than a quarter of a century, the State of California's efforts to comply with
10 Federal Court orders have been inconsistent at best. Long term, permanent improvement in
11 corrections has proven elusive; most short term enhancements were followed by sullen retreats to
12 mediocrity. As a consequence, Federal oversight of CDCR operations has, of necessity,
13 continued for decades, regardless of whether the underlying constitutional violation involved
14 conditions of segregated confinement, abuses of force, medical care at specific prisons, medical
15 care state-wide, mental health care at specific prisons, mental health care state-wide, parole
16 practices, or care for disabled inmate/patients.

17 Unfortunately, there are now strong indications that the Post Powers remedial process
18 will be no exception. While the beginning of substantial and significant reform was achieved,
19 the Special Master has very serious concerns as to whether the Post Powers remedial order can
20 continue to be effectively implemented in light of recent developments.

21 2. *The Appointments of Susan Kennedy and Fred Aguiar.*

22 Following the defeat of propositions submitted to California voters in late 2005,
23 Governor Schwarzenegger appointed Susan Kennedy as his Chief of Staff on November 30,
24 2005. Kennedy, who was Chief of Staff for Governor Davis, assumed her new position on
25 January 1, 2006. The Governor appointed Fred Aguiar as Cabinet Secretary on December 9,
26 2005.

1 3. *The Resignations of Secretary Rod Hickman and Acting Secretary Jeanne*
2 *Woodford.*

3 Chief of Staff Susan Kennedy did not meet with CDCR Secretary Rod Hickman during
4 January or February of 2006. She and Fred Aguiar did, apparently, commence meetings with the
5 CCPOA, including CCPOA President Mike Jimenez. Neither Kennedy nor Aguiar informed Mr.
6 Hickman. From what has been stated publically, Secretary Hickman learned of the meetings and
7 observed CCPOA lobbyists entering the Governor's Office. Understanding that a lack of
8 support from the Governor's office would mean an end to prison reform, and realizing that a
9 return to the Davis era practice of allowing the CCPOA to over-rule decisions of the CDCR
10 Secretary would render his efforts to end the code of silence impossible, Mr. Hickman made the
11 decision to resign as CDCR Secretary on February 28, 2006. His retirement from state service
12 was effective May 31, 2006.

13 The Special Master has also learned that following Mr. Hickman's decision to retire, key
14 CDCR officials responsible for moving the Post Powers remedial plan forward have left State
15 service. For example, Joe McGrath, Assistant Secretary over Adult Operations, the primary
16 CDCR contact for all Post Powers reforms, retired effective May 31, 2006. Mark Gant, Assistant
17 Secretary, Internal Affairs, separated from State service on April 7, 2006.

18 Secretary Hickman was replaced on an acting basis by the Undersecretary of the CDCR,
19 Jeanne Woodford. Ms. Woodford had been the Director of Corrections prior to the CDCR re-
20 organization, and had personal knowledge of the Post Powers remedial plan. She was also one of
21 the driving forces behind the Governor's efforts to bring rehabilitation back into California's
22 prisons. However, within six weeks, Ms. Woodford also stepped down from the Acting
23 Secretary position to Undersecretary, and will retire from State service effective July 6, 2006.

24 The Special Master has obtained information indicating that Ms. Woodford's decision
25 was motivated by the fact that her request to the Governor's Office that Tim Virga, the CDCR
26 Chief of Labor Relations be appointed as Acting Assistant Secretary of Labor Relations was not
27 approved by the Governor's Office because placing Mr. Virga into this crucial position was not
28

1 to the liking of the leaders of the CCPOA. Apparently, Ms. Woodford's appointment
2 recommendations were the subject of discussion between Susan Kennedy, Fred Aguiar and
3 CCPOA leaders. Kennedy and Aguiar, without the Acting Secretary Woodford's knowledge,
4 were conducting regular meetings with CCPOA officials.¹⁴ Given the rumors circling around
5 CDCR headquarters and in the prisons, additional resignations may be pending, and several
6 highly regarded candidates for promotion within the CDCR have decided to "keep their heads
7 down," and reject promotion opportunities.

8 *4. The Purge of the State of California Labor Relations Negotiating Team.*

9 At the same time, the Special Master has learned that Susan Kennedy and Fred Aguiar
10 have taken steps, on the eve of the July 1, 2006 contract negotiations between the State and the
11 CCPOA, to remove the senior Department of Personnel Administration executives who manage
12 contract negotiations with the CCPOA and other State labor unions. Sometime in either late
13 April or early May 2006, Mike Navarro, the Director of DPA, and Bill Avery, the Deputy
14 Director of DPA were told to resign.¹⁵ The timing of these retirements, in conjunction with the
15 other developments discussed above, give rise to the question of whether the State is in a position
16 to adequately negotiate a contract which protects the court's remedial plans.

17 *5. Summary.*

18 Former Secretary Rod Hickman's decision to call for a zero tolerance policy concerning
19 the code of silence was the heart of the Post Powers remedial plan, and rightfully so. Integrity
20 and remedial plan efforts must begin at the top, and then percolate down. Beginning January
21 2006, however, it appears that the requisite leadership has been absent from the Governor's
22 Office. Evidence before the Special Master indicates that the Governor's Office may have given
23

24 ¹⁴ On Monday, April 17, 2006 Ms. Woodford learned that Susan Kennedy and Fred Aguiar had
25 scheduled a meeting with CCPOA officials. Later on the 17th, Aguiar found out that Woodford had
26 learned of this meeting. On the morning of April 18th, Aguiar called Woodford, told her of the
meeting she already knew about and informed her that she could not attend.

27 ¹⁵ Mr. Navarro and Mr. Avritt retired effective July 1, 2006.

1 the code of silence in California's prisons a new lease on life. Considering the turn-over of
2 CDCR Secretaries, the DPA purge, the meetings that Susan Kennedy and Fred Aguiar have
3 arranged with the CCPOA without telling the CDCR Secretary, and the continuation of concerted
4 efforts by the CCPOA to embarrass and humiliate CDCR employees who have the courage to
5 report misconduct, the Special Master is seriously concerned that the entire Post Powers remedial
6 plan is now in jeopardy. For this reason, he recommends that the Court direct him to hold
7 hearings, open to the public, that investigate whether developments since January 2006, are, in
8 fact, threatening the effective implementation of the Court's Post Powers remedial orders, and if
9 so, whether the Court's remedial orders should be modified in any way to ensure their effective
10 implementation.

11 III.

12 COMPLIANCE WITH THE ORDER OF REFERENCE

13 A. Introduction.

14 The Special Master filed a draft version of this report on June 21, 2006 and pursuant to
15 the Order of Reference filed January 23, 1995 he conducted a hearing on the record about the
16 draft report on Wednesday July 12, 2006. At page 34 of the draft report the Special Master set
17 forth a procedure for interested non-parties to submit briefs in amicus curiae. In response to the
18 invitation, three non-parties submitted briefs in amicus curiae: the Office of the Governor, the
19 CCPOA, and Steven Nemeč, a prisoner incarcerated at San Quentin State Prison. In addition,
20 plaintiffs and defendants submitted written comments and objections.¹⁶

21 In order to consider the objections and concerns of the non-parties as thoroughly and
22 carefully as possible, the Special Master allowed non-parties to present oral argument at the
23

24 ¹⁶ As explained at the hearing of July 12, 2006 the Special Master decided to deny Mr. Nemeč's
25 application to appear as amicus concerning the draft report. Individual inmates have been
26 competently represented by the Prison Law Office as class members for more than fifteen years.
27 Nothing in Mr. Nemeč's submission convinced the Special Master to allow an exception concerning
28 the draft report. After the hearing of July 12, 2006 the Special Master traveled to San Quentin State
Prison, met with Mr. Nemeč, and explained the rationale for his decision. In addition, the Special
Master has provided copies of Mr. Nemeč's brief to counsel and the Inspector General.

1 hearing of Wednesday, July 12, 2006. Thus, the Office of the Governor and CCPOA were not
2 limited to filing written briefs, the usual practice concerning amicus submissions. The transcript
3 of the July 12, 2006 hearing, which lasted approximately two hours and forty-five minutes, has
4 been filed with the Court.

5 The Special Master responds to the comments and objections below.

6 B. Plaintiffs' Objections to the Draft Report.

7 Plaintiffs' comments concerning the draft report are set forth in a brief filed July 7, 2006
8 (Exhibit 14). Plaintiffs' concerns are limited to seeking assurances that the Special Master will,
9 when monitoring the BIR, also monitor the BIR's revision of its protocols, a process that is
10 anticipated to be completed by October 2006. The BIR informed the Special Master that it does
11 not object to a clarification about monitoring the protocol revision process. Therefore, the
12 Special Master has modified the final report at page 25 to include Mr. Gennaco's monitoring of
13 the BIR protocol revision process.

14 C. Defendants' Objections to the Draft Report.

15 Defendants' comments and objections to the draft report are set forth in a letter dated July
16 7, 2006 (Exhibit 15). Defendants raise two objections.

17 First, defendants oppose the Special Master's recommendation for a \$900.00 per month
18 recruitment and retention bonus for EAPT attorneys. Defendants raise two objections in this
19 regard. First, defendants point out that a new contract with the State of California's attorney
20 union provides a 5.9% salary increase for all rank and file State attorneys.

21 This argument is not persuasive. Turn-over in the EAPT primarily involves EAPT
22 lawyers leaving EAPT for what they perceive as easier assignments elsewhere in State
23 employment (e.g. the Department of Forestry).¹⁷ Therefore, a blanket increase for all State
24

25 ¹⁷ EAPT attorneys are involved with a constant stream of administrative law litigation. The
26 nature of the assignment also requires regular travel to the prisons for which each vertical advocate
27 is responsible, as well as attending Skelly and SPB hearings inside the prisons. Alternative State
28 attorney assignments do not require similar levels of litigation and travel.

1 attorneys does not solve the problem; indeed, the very purpose of the Special Master
2 recommendation is to reward and recognize the difficult tasks faced by EAPT attorneys by
3 providing a recruitment and retention bonus.

4 Second, defendants contend that the “link” between EAPT salaries and the constitutional
5 violations that led to the Post Powers remedial plan is “tenuous at best.” The Special Master
6 disagrees. The Final Report contained an extensive discussion of the systemic failures of the
7 EAPT’s predecessor organization (the ELU), including responsibility for a 40% failure to
8 prosecute rate based on the fact that the ELU did not adequately manage its litigation and
9 allowed cases to linger on past the one-year statute of limitations. No one disputes the fact that
10 (1) the EAPT and its vertical advocate program are an essential element of the Post Powers
11 remedial plan and that (2) without adequate salaries this portion of the plan will fail.¹⁸

12 There are numerous alternative solutions to the problem, including hiring private law
13 firms to assume EAPT duties, permanent salary increases, the establishment of a new
14 classification of state attorney, etc. The Special Master’s recommendation, however, is designed
15 to be the least intrusive possible: a limited recruitment and retention differential, consistent with
16 State policy concerning issues of this nature.

17 Defendants, at page two of Exhibit 15, request that the Court permit the CDCR to explore
18 with the DPA alternative solutions such as the creation of a specialist class for EAPT attorneys.
19 While it is disappointing that the CDCR and DPA waited until the draft report issued before
20 considering this alternative, in a abundance of caution and deference the Special Master has
21 modified his recommendation concerning the \$900.00 to allow the CDCR and DPA 30 days
22 from the date of the Court’s order to establish an adequate alternative program that will fairly
23 compensate EAPT lawyers for the duties they perform.¹⁹

24
25 ¹⁸ See Transcript of Proceedings of the July 12, 2006 Hearing [“Transcript”] at 20.

26 ¹⁹ The Special Master informed counsel for defendants about his decision to allow the CDCR and
27 DPA additional time to establish an alternative immediately after the July 12, 2006 hearing. Thus
28 by the time the Court issues an order concerning this issue, defendants and the DPA will have had

1 Defendants second objection relates to the Special Master's recommendation for an
2 investigation and public hearings. This objection is similar in substance to the objections
3 received from the Office of the Governor. Therefore, the Special Master will respond to this
4 objection at the same time he responds to the Office of the Governor's objections, directly below.

5 D. Office of the Governor's Objections to the Draft Report.

6 1. *Introduction.*

7 The Office of the Governor sought permission to file a non-party response to the draft
8 report on June 30, 2006 (Exhibit 16). The request was granted by the Special Master on July 3,
9 2006 (Exhibit 17). The Office of the Governor's submission, consisting of a Letter brief
10 ("Letter") from Andrea Lynn Hoch, and declarations from Susan Kennedy and Fred Aguiar is
11 attached as Exhibit 18.

12 The Letter begins by commenting that the Special Master recognizes the positive steps
13 taken by the Schwarzenegger Administration, and points out that the 2006-2007 budget contains
14 the funding necessary for the continuation of the Post Powers remedial programs. The Special
15 Master does not dispute the significant achievements of 2004-2005. As stated above, "the first
16 twenty-four months of the governorship of Arnold Schwarzenegger, marked one of the most
17 productive periods of prison reform in California history."

18 2. *The Governor's Prerogative to Seek Input From Stakeholders.*

19 The Letter stresses the Governor's prerogative to "seek input from stakeholders," and
20 attempts to characterize the Kennedy/CCPOA connection as being one element of this process.
21 The Special Master is not critical of the Governor's decision to seek input from stakeholders.
22 The Special Master is seriously concerned, however, for the reasons discussed above, that the
23 Kennedy/CCPOA connection goes far beyond the traditional process of "seeking input from
24 stakeholders" and threatens the future of the Post Powers remedial plan. In this regard the
25 Special Master notes that the Governor's Legal Secretary was unable to identify even one CDCR
26 _____
27 more than three months to develop and implement their proposed alternative.

1 CDCR prison reform ground to a halt following Susan Kennedy's February 14, 2006 lunch with
2 Mike Jimenez.

3 The Office of the Governor submitted declarations from Susan Kennedy and Fred Aguiar
4 to support its position that the Special Master's concerns are based on incomplete information
5 and unsupported inferences and therefore no investigation is warranted. The Special Master
6 finds, however, that these limited and incomplete declarations raise more questions than they
7 answer.

8 For example, Ms. Kennedy states that in her role as Cabinet Secretary for Governor
9 Davis, she was "not involved in contract negotiations and was not privy to the details of contract
10 negotiations" (Kennedy Declaration at 1:12 to 1:14). The Letter, at page 3, attempts to use this
11 as proof that her conduct in 2006 does not signal a return to the Davis era practice of allowing the
12 CCPOA to over-rule decisions of the CDCR Secretary. The declaration is limited however to
13 Ms. Kennedy's duties as Cabinet Secretary. She also served as Governor Davis' Deputy Chief of
14 Staff, where she had direct and numerous contacts with the CCPOA (*see* the Office of the
15 Governor web-site press release attached as Exhibit 19). The Governor's Chief of Staff also
16 explains that she did not recall meeting with CDCR Secretary Rod Hickman during January and
17 February 2006 (Kennedy Declaration 1:19 to 2:6) because she was occupied with the Governor's
18 Strategic Growth Plan ("SGP"), a multi-billion dollar investment package to address California's
19 future infrastructure needs. A key element of the SGP was the construction of more than 80,000
20 jail and prison beds, however, and the declaration does not explain why the Chief of Staff did not
21 communicate with Secretary Hickman concerning the project, nor why she failed to involve Mr.
22 Hickman in critical meetings about prison bonds. Not surprisingly, absent the Secretary's
23 participation, the Administration's plan to construct jail and prison beds failed after the
24 Governor's Legislative Unit met with CCPOA lobbyists, who refused to assist the Governor with
25 prison bonds in the SGP (*see* Kennedy Declaration at 2:8 to 2:13). This portion of the
26 declaration supports the Special Master's recommendations for an investigation. It also confirms
27 statements made by Rod Hickman as to why he resigned as Secretary of the CDCR.

1 Similarly, Mr. Aguiar's declaration does not persuade the Special Master that there is no
2 grounds for further investigation. First, it is exceedingly vague concerning meetings with
3 CCPOA officials. Second, it raises credibility questions. For example, Mr. Aguiar's claim that
4 he told Secretary Hickman that it was unlikely that he would be confirmed by the Senate (Aguiar
5 Declaration at 1:20) is flatly contradicted by the former Secretary, and his description of a call to
6 the Special Master (Aguiar Declaration at 2:9 to 3:2) omits that fact that he began the
7 conversation by asserting that "[i]t's too bad that Jeanne Woodford is leaving the department to
8 spend more time with her family." The Special Master has come to believe that Mr. Aguiar
9 knew this was not the case.

10 4. *Defendants' and the Office of the Governor's Argument That an Investigation*
11 *is Premature.*

12 Defendants and the Office of the Governor argue that an investigation is premature
13 because the Post Powers remedial process continues, no serious harm to the remedial process has
14 yet occurred, and the Governor is committed to prison reform (*see* Exhibit 15 at page 5 & Exhibit
15 18 at page 8). These assertions ignore the fact that within a space of six weeks two Secretaries
16 resigned from State service because of concerns about CCPOA influence in the Governor's
17 Office, that key CDCR officials involved with the Post Powers remedial plan implementation
18 subsequently left the Department, that the current Acting Secretary of the CDCR is serving on a
19 temporary basis and has not, as of yet, agreed to stay permanently (*see* Transcript at 31:6-24),
20 that the leadership of DPA was purged on the eve of CCPOA contract negotiations, and that
21 Jeanne Woodford's appointment for Assistant Secretary of Labor Relations, Tim Virga, was
22 rejected by the Office of the Governor one day after Susan Kennedy and Fred Aguiar met with
23 CCPOA officials. These events have demoralized the staff at CDCR and may have put the
24 fledgling Post Powers remedial programs at risk. Given this, the Special Master sees no reason
25 to wait for additional remedial plan setbacks to occur, especially since the counsel for the
26 prisoners, CDCR, CCPOA, and the Office of the Governor all agree that California's prisons face
27 unprecedented crisis on a variety of fronts, including over-crowding, serious shortages of
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1 correctional officers, constitutionally inadequate medical care, constitutionally inadequate mental
2 health care, parole practices which require oversight by a Special Master, and a continuation of
3 very high levels of turnover among wardens and health care managers.

4 Finally, significant portions of the Letter are not relevant to the concerns raised in this
5 report. For example, the Governor's decision to address prison overcrowding through a Special
6 Session of the Legislature and his plans for the creation of a high risk sex offender task force are
7 far outside the scope of issues raised in this report. As emphasized at the July 12, 2006 hearing,
8 the *Madrid* litigation does not encompass prison overcrowding. The Special Master also
9 emphasizes that he is not, at this time, recommending modifications to the Court's remedial plan,
10 nor additional Court intrusion into CDCR operations. The issue pending is whether an
11 investigation should commence to ensure that the Court is fully informed with respect to the
12 continuing viability of the Post Powers remedial plan.²⁰

13 E. CCPOA Objections to the Draft Report.

14 1. *Introduction.*

15 The CCPOA sought permission to respond to the Special Master's draft report in a letter
16 dated June 28, 2006. The CCPOA claimed, in the letter, that it had the right to respond based on
17 the limited intervention granted by the Court concerning the Special Master's MOU review in
18 2005 (see Exhibit 20). The intervention order, however, is extremely limited and clearly did not
19 provide CCPOA with a right to comment on the draft report. Nevertheless, the Special Master
20 allowed the CCPOA to respond as a non-party to those portions of the draft report which discuss
21 the actions of the CCPOA, its officers, and members (Exhibit 21). The Special Master notes,
22 however, that the pleadings filed by the CCPOA refer to the union as an "intervenor" rather than
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24
25 ²⁰ The Special Master also notes the following point made by plaintiffs during the hearing of July
26 12, 2006: the Post Powers remedial plan came about because CCPOA Executive Vice President
27 Chuck Alexander made a phone call to Director of Corrections Edward Alameida about a pending
28 force related investigation. That call led to the shut-down of that investigation. There is no reason
to wait and allow this sort of CCPOA/CDCR dynamic to re-occur prior to the Special Master
commencing an investigation. *See* Transcript at 52-53.

1 “amicus.” To the extent that the CCPOA is contending that it has some right to respond to the
2 Special Master’s draft report pursuant to the Court’s intervention order, this error by the CCPOA
3 should be corrected. Therefore, the Special Master has added a recommendation to the final
4 report that the Court inform the CCPOA that its appearance before the Special Master was as a
5 non-party amicus and not as an intervenor.

6 *2. Summary of the CCPOA’s Responsive Pleadings.*

7 As explained above, the Special Master recently completed a year-long series of meetings
8 with counsel for the parties, CCPOA, and DPA concerning clarifications to certain sections of
9 the CDCR/CCPOA MOU. At the conclusion of the process, counsel for DPA and CCPOA
10 stated that the clarification proceedings had been conducted in a fair manner (*see also*, Transcript
11 at 57:12 - 15). Given this positive experience, the Special Master welcomed input from the
12 CCPOA and hoped that meaningful information would be provided through its amicus
13 submission.

14 Because of the sheer volume of material submitted by the CCPOA (a responsive brief,
15 numerous declarations including declarations from counsel, copies of dated pleadings which
16 have previously been considered by the Special Master, numerous exhibits including transcripts
17 of depositions involving State Court litigation filed by the CCPOA, DVD’s of selected California
18 Senate hearings, and a request for judicial notice), the Special Master devoted several days to
19 sorting through the CCPOA filing in an effort to understand what the union was attempting to
20 say. Following this review, however, the Special Master concludes that much of what was
21 submitted by the CCPOA is not relevant to the issues raised in the draft report. Taken as a
22 whole, the CCPOA’s response to the draft report appears to attempt to construct an alternative
23 reality, a world where the CCPOA is the victim and its repeated, public and personal attacks on
24 Rod Hickman, Brigid Hanson, Tim Virga, and Court initiated code of silence reforms are
25 legitimate responses by the union to alleged “retaliation.” This false world is easily refuted;
26 indeed, several of the CCPOA contentions not only defy reality, they support the need for an
27 investigation as recommended by the Special Master.

1 *Knowles/Palmer Investigation*. To summarize, the Special Master found that Alexander and
2 other CCPOA representatives had been involved, over the course of many years, with the
3 obstruction of both administrative and criminal investigations at Pelican Bay State Prison. *See*
4 Final Report at 38-39; *see also* the Knowles/Palmer Report (Exhibit 23), an internal affairs report
5 which explains how CCPOA representatives worked to obstruct investigations, and Court expert
6 Dr. Patrick Maher's May 31, 2004 Memorandum entitled "Qualitative Review of 1997 Internal
7 Affairs Investigation of PBSP CCPOA Personnel Investigation 105-96" (Exhibit 24), which
8 explains how CCPOA representatives engaged in conduct to promote the code of silence at PBSP
9 in violation of the Court approved use of force remedial plan.

10 To cite another example, footnote 12 states that CCPOA leaders posted an unflattering
11 picture of Governor Schwarzenegger in the CCPOA bulletin board at CDCR Headquarters
12 because they were angered by the fact that Brigid Hanson and Tim Virga had taken steps to stop
13 the misuse of vacation days and sick leave credits. The CCPOA Response objects to this
14 statement. Arguing that the posting of Governor Schwarzenegger was done for other purposes,
15 the CCPOA claims, at footnote 6 of the Response (utilizing bold letters): "this is the first time
16 CCPOA has heard of such a claim." Steve Weiss, CCPOA's Chief of Labor, has also submitted
17 a declaration concerning this assertion. However, CCPOA President Mike Jimenez began an
18 exchange of letters with Tim Virga and Brigid Hanson concerning the reporting of vacation days
19 and sick leave as far back as February 2006. *See* Exhibits 26 - 28. Furthermore, the CCPOA has
20 been involved in arbitrations and State Court litigation concerning the "Relief Time Bank"
21 ("RTB") for approximately eighteen months, and the union is aware that President Mike Jimenez
22 and Executive Vice President Chuck Alexander have for many years failed to report vacation
23 days and sick leave. Thus, the CCPOA's assertion that the draft report was "the first time
24 CCPOA has heard of such a claim" is not accurate.²¹

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26
27 ²¹ After the July 12th hearing the Inspector General issued an audit of the RTB which found
28 serious abuses of the RTB process (*see* Exhibit 25).

1 reforms as follows:

2 A. Continue periodic meetings with counsel, CDCR officials, and the Inspector
3 General concerning CDCR investigations and discipline;

4 B. Monitor and report to the Court concerning the adequacy of staffing for the
5 BIR, Internal Affairs, and the EAPT, including the adequacy of the salaries and
6 benefits for the BIR, Internal Affairs, and the EAPT;

7 C. Issue a report and recommendations, no later than January 31, 2008,
8 concerning future Court oversight of CDCR investigations and discipline
9 (including the end of the proposed peer review monitoring of the BIR by Court
10 Expert Michael Gennaco).

11 2. Monitoring the BIR's Monitoring.

12 Now that the BIR has assumed systemic oversight over internal affairs investigations and
13 CDCR discipline related casework, the Special Master and the Inspector General have approved
14 a plan developed by Court Expert Michael Gennaco which provides a policy and mechanism for
15 the Special Master to monitor the adequacy of BIR monitoring. The plan, attached as Exhibit 13,
16 provides an appropriate and comprehensive tool to determine whether the newly created BIR is
17 providing adequate oversight over CDCR investigations which warrants the end of, or some
18 reduction of, Court oversight. Therefore, the Special Master recommends that the Court adopt
19 the BIR monitoring plan submitted by Court Expert Michael Gennaco.

20 3. Establishing an Appropriate Salary Enhancement for EAPT Attorneys.

21 The salaries of the lawyers who serve in the critical EAPT unit are woefully inadequate.
22 The Special Master has listened for months to various reports about why the State's salary system
23 cannot self-adjust so that these attorneys, essential to the Post Powers remedial plan, are
24 adequately compensated so that turn over in the EAPT is not excessive. Furthermore, it would
25 have been helpful if defendants could have provided the Special Master with relevant
26 comparative salary data. It appears, however, that such information is simply not compiled by
27 the State. Therefore, in order to determine an appropriate salary enhancement, the Special
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1 Master met and conferred with EAPT staff (including those who were leaving for other [and
2 perceived easier] State attorney assignments), the Court experts, and representatives from the
3 BIR. While the \$900.00 per month recruitment and retention differential proposed by the
4 Special Master may be too conservative, hopefully the State will conduct an appropriate survey
5 that considers both the job and the competition and thereafter further increase the salaries of
6 EAPT staff.

7 Therefore, Special Master recommends that the Court order defendants to establish and
8 implement, effective August 1, 2006, a recruitment and retention differential for all EAPT
9 attorneys, up to and including the Assistant Chief Counsel of the Employment Advocacy Team,
10 of \$900.00 per month. The Special Master further recommends that the Court stay this Order for
11 thirty days to allow defendants, the DPA, and the State Personnel Board the opportunity to
12 consider and implement an alternative solution, such as the creation of a specialist class of state
13 attorneys that will provide at least \$900.00 per month more in salary to each EAPT attorney, up
14 to and including the Assistant Chief Counsel. If such a program is established within 30 days the
15 Special Master should notify the Court. If it is not, the Order should go into effect.

16 4. Conducting an Investigation, Including Public Hearings, to Preserve the Post Powers
17 Remedial Plan and Move Forward the CDCR's Effort to Eliminate the Code of Silence.

18 There exists a compelling need to achieve, in a timely manner, the objectives of the
19 *Madrid* and Post Powers remedial plans. Indeed, given the years which have elapsed and the
20 limited results, the need is more compelling today than ever before. The Schwarzenegger
21 Administration's 2006 reversal of policy, however, may threaten the entire Post Powers remedial
22 plan. For example, it is absolutely essential for the timely and effective implementation of the
23 Post Powers remedial plan that the Assistant Secretary of CDCR Labor Relations position is
24 staffed by an individual who can effectively protect investigation and discipline related
25 management rights set forth in the MOU. Susan Kennedy, however, appears to have given the
26 CCPOA veto power over this critical appointment. If the CCPOA is allowed to select the next
27 Assistant Secretary of CDCR Labor Relations, all that has been achieved during the past two
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1 years may be lost. Likewise (given an environment in Sacramento and the prisons where
2 CCPOA leaders continue to enforce the code of silence), compliance with the Court's orders will
3 not take place without competent, ethical prison executives who are willing to face up to CCPOA
4 attacks. Two CDCR Secretaries with unquestioned ethics, however, have retired from State
5 service – apparently because of the CCPOA's influence in the Governor's Office.

6 In similar fashion, the 2006 MOU negotiations may negatively impact on contract
7 provisions tied directly to use of force and other remedial plan requirements. The CCPOA
8 Sunshine Package (Exhibit 29), released July 3, 2006 (several weeks *after* the 2006 negotiations
9 pursuant to the Ralph C. Dills Act began), provides ample reason for concern about the union's
10 designs concerning investigations, correctional officer discipline, the expansion of post and bid
11 into the investigation and discipline arena, and the placement of CCPOA representatives on
12 management committees involving investigations and discipline. *See*, for example, the tone and
13 content of the second entry on page 24 of Exhibit 29:

14 CCPOA proposes to enhance the section pertaining to Representation on
15 Committees. Under the current administration, this section of the MOU has
16 become nothing more than a bookmark as the state bends to the Federal Courts
17 and their whims.

18 *See also* Exhibit 29 at pages 4, 5, 9, 10, 12, 13, 14, 15, 18, 24, 25, 26, 28, 33, 36. Taken
19 as a whole, the CCPOA demands appear to be nothing less than a concerted attack on the Post
20 Powers remedial plan and CDCR policies which were developed in 2004-2005 in order to
21 improve investigations and discipline.

22 Because of the developments described above the Special Master recommends that the
23 Court order the Special Master to investigate, hold public hearings as necessary, and report to the
24 Court concerning whether the *Madrid* and Post Powers remedial plans have been compromised,
25 and if so, whether the Court's remedial orders should be modified.

1 5. Clarification Concerning the CCPOA's Non-Party Status Concerning This Report and
2 the Investigation Recommended by the Special Master.

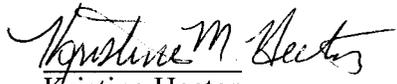
3 The Special Master also recommends that the Court clarify that the CCPOA is a non-
4 party concerning responses filed to this report, and concerning the investigation recommended in
5 this report.

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7 Dated: August 21, 2006.

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11 _____
12 John Hagar
13 Special Master
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21 I declare under penalty of perjury under the laws of the State of California that the foregoing is
22 true and correct. Executed on August 22, 2006 at San Francisco, California.

23 
24 Kristina Hector

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