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22 **UNITED STATES DISTRICT COURT**

23 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

24 **SAN FRANCISCO DIVISION**

25 MARCIANO PLATA, et al.,

26 Plaintiffs,

27 v.

28 ARNOLD SCHWARZENEGGER, et al.,

Defendants.

No. C01-1351 TEH

CLASS ACTION

**DEFENDANTS' RESPONSE TO THE
RECEIVER'S MOTION FOR A WAIVER
OF STATE LAW**

Defendants submit the following response to the Receiver's Motion for a Waiver of State Law, which was filed on September 12, 2006 (the Motion). Defendants reaffirm their commitment to working with the Receiver to improve the California Department of Corrections and Rehabilitation's (CDCR) medical health care system. Specifically, Defendants confirm that they support the salary increases requested in the Receiver's Motion. Although Defendants have

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RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

1 explained that they are not able to proceed as quickly as the Receiver desires in effectuating the
2 salary increases because Defendants must comply with the requirements of California law,
3 Defendants recognize the need to move faster and they support the Receiver's request for a
4 waiver of certain state laws in this particular instance.

5 Defendants believe that clarification is needed, however, regarding the scope and effect of
6 the requested waiver. Defendants respectfully request that the Court consider the comments
7 below in preparing its order in this matter.

8 **1. The Scope and Effect of the Requested Waiver.**

9 At page 14, lines 6-11, the Receiver's Motion states: "The waiver is not intended to
10 relieve the State of its duties and responsibilities under California law, including the obligation to
11 collectively bargain regarding salaries. Rather, the waiver is intended to make way for the
12 Receiver to direct the implementation, adjustment and administration of the proposed salaries and
13 structural changes to the pay system. To emphasize, the waiver only applies to actions and
14 determinations made by the Receiver and not any other party." Defendants are not sure exactly
15 how such a limited waiver will work in practice, and Defendants request that the Court's order
16 clarify the precise scope and effect of any waiver ordered. It appears that the Receiver is
17 requesting a waiver only for the Receiver's actions, and not for the actions by any state agency or
18 employee acting in support of the Receiver's goals and objectives. If that is the case, then
19 Defendants are concerned that the State may still be unable to assist the Receiver as quickly as the
20 Receiver desires, because the State would still be required to comply with the requirements of
21 applicable law.

22 **2. The Requested Continuous Nature of the Requested Waiver.**

23 At page 16, the Motion requests "ongoing" waivers in the event that the Receiver
24 "determines additional salary modifications are necessary" Defendants agree that the
25 Receiver should be able to move quickly to improve medical services in California's prisons.
26 Because the requirements of California law have slowed the State's ability to respond quickly to
27 the Receiver's requests, Defendants understand the Receiver's desire to obtain a continuous
28 waiver of California laws so the Receiver can move more quickly without having to seek

1 approval from the Court on a regular basis. At the same time, however, Defendants understand
2 this Court's February 14, 2006 Order to seek a careful balance between efficiency, on the one
3 hand, and a recognition of existing California law, on the other. The Court's Order stated that the
4 Receiver "shall make all reasonable efforts to exercise his powers, as described in this Order, in a
5 manner consistent with California state laws, regulations, and contracts, including labor
6 contracts." (Order at p. 5, lines 2-5.) The Order further stated that the Receiver can request a
7 waiver if the Receiver makes a finding that a law or rule is "clearly preventing the Receiver from
8 developing or implementing a constitutionally adequate medical health care system, or otherwise
9 clearly preventing the Receiver from carrying out his duties as set forth in this Order, and that
10 other alternatives are inadequate" The ongoing waiver requested by the Receiver would
11 certainly improve the Receiver's efficiency, because he would not have to make future findings
12 that particular laws are "clearly preventing" the Receiver from performing his duties or that
13 "other alternatives are inadequate." But it might also shift the careful balance crafted in the
14 Court's order regarding reasonable attempts to comply with California law. As a possible
15 alternative, Defendants propose that the requested ongoing waiver be granted for a specified
16 length of time, subject to renewal by the Court.

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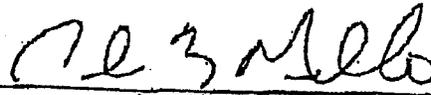
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3. Consideration of Future Fiscal Impact.

Counsel from the Department of Finance sent a letter to the Receiver, dated August 25, 2006 (attached as Ex. A). The letter detailed the fiscal impact of the proposed salary increases, including retirement ramifications, the effect on other State employers, and the stability of the CDCR's workforce. Defendants request that the Court consider these matters when ruling on the Receiver's Motion.

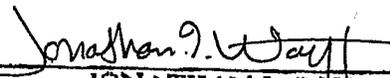
DATED: September 26, 2006

HANSON BRIDGOTT MARCUS
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By: 
PAUL B. MELLO
Attorneys for Defendants

DATED: September 26, 2006

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EXHIBIT A



DEPARTMENT OF
FINANCE
OFFICE OF THE DIRECTOR

ARNOLD SCHWARZENEGGER, GOVERNOR
STATE CAPITOL ■ ROOM 1145 ■ SACRAMENTO CA ■ 95814-4998 ■ WWW.DOF.CA.GOV

August 25, 2006

VIA FACSIMILE

John Hagar
Chief of Staff
Office of the California Prison Receivership

Dear Mr. Hagar:

The Department of Finance is in receipt of your letter to Louis Mauro, dated August 20, 2006. We understand your question for Finance is whether the Director of Finance (Director) will authorize the transfer of funds from schedule (5) of Item 5225-002-0001 of the Budget Act of 2006 (Schedule (5)), to pay salary increases the Receiver has determined to provide to various employees of the California Department of Corrections and Rehabilitation (CDCR).

In short, the answer to that question is, yes – the Director will authorize the transfer of funds from Schedule (5) to pay for the salary increases the Receiver wishes to establish once those salaries are approved by the Department of Personnel Administration (DPA) or the DPA approval process is superseded by court order.

Under Schedule (5) the Director is permitted to authorize the transfer of funds to other schedules within Item 5225-002-0001¹. Item 5225-002-0001 is for the support of CDCR, and Schedule (4) of the item is specifically for the support of correctional health care services. Pursuant to Section 3.00 of the Budget Act of 2006 (a copy of which is attached for your reference), appropriations for support may be used for the payment of approved salaries. We understand that you are receiving information on the salary approval process from DPA, and that you may seek a court order to supersede all or a portion of that process.

To assist you in making decisions in the future regarding salary augmentations, we provide you with the following information:

Items 9800-001-0001, 9800-001-0494 and 9800-001-0988 of the Budget Act of 2006 are legislative appropriations reflecting existing obligations in approved memoranda of understanding or schedules of salaries and benefits for employees excluded from

¹ The Director is also permitted to authorize the transfer of funds to other items of appropriation in the Budget Act of 2006 for a department or agency that is involved in the provision of health care to California inmates. For example, funds in Schedule (5) could be transferred to the applicable State Personnel Board appropriation for the purpose of establishing an on-line examination.

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bargaining. From these appropriations, Finance augments department support appropriations in accordance with salary and benefit schedules determined by DPA to comply with the memoranda of understanding. If the Legislature appropriates funding in these 9800 items for recruitment and retention bonuses directed by the Receiver and approved by DPA or future salary increases reached through the collective bargaining process, this tool would be available to augment department budgets.

Alternatively, Finance could seek funding through a separate legislative appropriation on behalf of CDCR or other departments that need to implement activities directed by the Receiver. Schedule (5) is available for a variety of purposes, and establishes a pool of funds that can be accessed without further legislative action. To the extent salary increases, or other expenditures, can be funded through a supplemental appropriation approved by the Legislature, the flexibility of Schedule (5) can be retained for periods during which the Legislature is unavailable.

In addition to answering the particular question posed in your letter, we would like to take this opportunity to provide the Office of the California Prison Receivership with some information that may assist the Receiver in crafting this salary increase proposal and future remedial actions.

Effect of December Salary Increases

As you know, CDCR's nurse classifications received an 18 percent salary differential in December of 2005. This, in addition to the 3.5 percent cost of living adjustment, effective July 1, 2006, places the salaries of CDCR's nurses at or above the median pay for nurses across the state. For example, a registered nurse in a CDCR facility now earns \$6,664 a month and, according to a survey conducted by Cooperative Personnel Services, the median monthly salary for registered nurses in the private sector is \$6,531. Additionally, it appears that salaries for CDCR's nurse practitioners, who earn \$9,483 a month, are well above those earned in the private sector. Information collected by Finance has found that the highest paid private sector nurse practitioners in California make between \$6,810 and \$8,103 a month, depending on location.

Approximately nine months have passed since CDCR's nurses received significant salary increases. During that time, the vacancy rate for CDCR's registered nurse classifications has dropped from 33 percent to 13 percent. Based on these figures, it appears that the recent salary enhancements have had a significant effect on CDCR's ability to recruit and retain nursing staff. If this trend continues, CDCR may be able to fill all of its nursing vacancies. We ask you to consider whether it is fiscally prudent to

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provide additional increases to nurses' salaries without determining if the current compensation package is sufficient to adequately staff CDCR facilities.

In light of the December salary increases, we ask that you consider certain benefits available to CDCR physicians that are not available to physicians in private practice. CDCR physicians do not have to purchase malpractice insurance and they are provided a generous pension benefit. We understand that certain large health care providers such as Kaiser provide malpractice insurance coverage and retirement benefits for their physicians, but we believe that the physicians' salaries are correspondingly adjusted.

Retirement Benefits "Revolving Door"

The State provides its employees with a generous defined benefit retirement program. The basic program provides a lifetime annuity with annual increases for inflation. The size of this annuity is determined by the multiplication of a factor that is dependent on an individual's age and number of years of State service by that person's highest 12 months of salary. This retirement program creates a significant incentive for State employees to change jobs near the end of their careers in order to obtain an increase in salary – even if only for 12 months.

Increasing an individual's final 12 months of salary would have a significant positive impact on his or her retirement benefits. For example, a doctor earning \$136,000 who receives a 20 percent increase in salary will receive \$27,200 in additional annual salary – but if that doctor is 54 years old, and has 29 years of State service, that 12 month salary increase would create an increase of \$16,300 in the first year of retirement (which would then be adjusted for inflation annually during the remainder of that person's life). The same salary increase given to a doctor who is 59 years old with 34 years of State service would result in a first year retirement benefit increase of almost \$22,000. To put these amounts in perspective, in order to provide similar lifetime retirement benefits, a 54 year old planning to retire in one year would have to deposit approximately \$320,000 into a 401(k) account. The 59 year old doctor planning to retire at age 60 would have to deposit approximately \$430,000.

A likely consequence of this retirement incentive is that a number of health care professionals working for other State agencies that are approaching the end of their careers will seek positions with CDCR solely to boost their retirement benefits. Health care professionals nearing retirement eligibility are attractive employment candidates because of their breadth of experience. However, to the extent they are seeking employment with CDCR *solely* to boost their retirement benefits, and plan to leave once they have worked for the required 12 month period, hiring them will not create the stable

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Chief of Staff
Office of the California Prison Receivership
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work force that CDCR will need to provide long-term improvement to the provision of health care to its inmate population.

This potentially negative "revolving door" effect can be avoided if the salary increases provided to CDCR health care professionals are not immediately included in the salary base used for the purpose of determining retirement benefits. There are several options for accomplishing this. There could be a waiting period of, perhaps, five or ten years before the salary increase is used in determining retirement benefits. Another alternative would be to include the salary increase in determining retirement benefits on a sliding scale – e.g., five percent counting toward retirement in the first year, with that percentage increasing in five percent increments each succeeding year. Finally, the salary increase could be excluded from the salary base used for determining retirement benefits, and, as an alternative the State could contribute an amount to a deferred compensation account on behalf of the employee.

To the extent the Receiver wishes to consider these options, we would be happy to discuss them with you further. We would like to work with the Receiver to avoid having salary increases create a "revolving door" of CDCR health care professionals.

Effects On Other State Entities

The proposed salary increases for virtually every medical classification in CDCR will have adverse effects on a number of State departments. There are medical facilities and medical classifications in the departments of Mental Health, Developmental Services, and Veteran's Affairs. Additionally, medical classifications are used in the departments of Education, Health Services, Managed Care, and the Managed Risk Medical Insurance Board, as well as others.

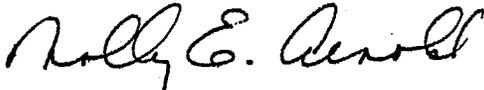
Setting salaries for medical classes within CDCR at disproportionate levels from the rest of the State workforce will result in significant migration of employees from other departments to CDCR. For example, the *Plata* court order which required a 10 percent increase in compensation for CDCR physicians generated an application pool from the Department of Mental Health which represented approximately 50 percent of their staffing. A similar result would likely occur for each of the other medical classes. While this may result in lower vacancy rates within CDCR, it will place other programs in jeopardy. Licensure of the mental health facilities, developmentally disabled facilities and veterans homes would be at risk if staffing levels fall too low. Without licensure, federal funding for these critical programs would be in jeopardy. The other departments may also be faced with civil rights lawsuits as a result of not being able to adequately staff critical functions.

John Hagar
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Office of the California Prison Receivership
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We request that you consider this information when determining what level of salary increases you wish to establish, and how to implement those increases.

We hope we have answered the question posed by your letter to Mr. Mauro, and that we have provided you with some information that will be helpful to the Receiver in the process of crafting remedial measures. Please do not hesitate to contact us if you would like to discuss these ideas further.

Sincerely,



MOLLY ARNOLD
Chief Counsel

Cc: Scott Reid, Cabinet Office, Office of the Governor
Michael Saragosa, Appointments Unit, Office of the Governor
Tami Bogart, Legal Affairs Office, Office of the Governor
Tom Dithridge, Program Budget Manager, Department of Finance
Todd Jerue, Program Budget Manager, Department of Finance

DECLARATION OF SERVICE BY U.S. MAIL

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

No. **C-01-1351 TEH**

I declare:

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

On September 26, 2006, I served the attached **DEFENDANTS' RESPONSE TO THE RECEIVER'S MOTION FOR A WAIVER OF STATE LAW**, with Exhibit A, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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450 Golden Gate Avenue
San Francisco, CA 94102

Jared Goldman, Staff Attorney
California Prison Health Care Receivership
1731 Technology Drive, Suite 700
San Jose, CA 95110

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 26, 2006, at San Francisco, California.

C Deuel
Declarant



Signature