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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
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13 MARCIANO PLATA, et al.,
14 Plaintiffs
15
16 v.
17 ARNOLD SCHWARZENEGGER, et al.,
18 Defendants.
19

No. C01-1351 T.E.H.

**PLAINTIFFS' SUPPLEMENTAL
OPPOSITION TO RECEIVER'S
MOTION FOR WAIVER OF
STATE LAW RE PHYSICIAN
CLINICAL COMPETENCY
DETERMINATIONS**

20 **INTRODUCTION**

21 Plaintiffs file this supplemental opposition pursuant to the Court's January 11,
22 2008, Order, and after review of the Receiver's Report and Supplemental Memorandum
23 in Support of Motion for Waiver of State Law re Physician Clinical Competency
24 Determinations (Supplemental Memorandum), filed January 7, 2008.
25

26 Plaintiffs' most recent pleading on this matter raised concerns regarding a number

1 of issues related to the Receiver's motion. See Plaintiffs' Reply to the State Personnel
2 Board Response to the Receiver's Motion re Physician Clinical Competency
3 Determinations (Plaintiffs' Reply), June 15, 2007. Plaintiffs stated that the Receiver's
4 proposal prohibited the State Personnel Board (SPB) from reviewing clinical
5 determinations, and thus divested the SPB of any real authority to review CDCR
6 physician employee discipline. *Id.* at 5:9-21. Accordingly, plaintiffs concluded (contrary
7 to the Receiver) that a waiver of a California constitutional provision would be necessary
8 if the Receiver's proposal were adopted. *Id.* Plaintiffs further stated in this regard that it
9 was not clear that the standard for waiving state law had been met. *Id.* at 6:6-12.

10 Yet the Receiver had also stated that he was "willing to withdraw" that part of his
11 proposal limiting SPB's authority. As to this offer, plaintiffs stated that the Receiver's
12 proposal was unclear, and suggested that the Court, inter alia, direct the Receiver to
13 provide revised policy provisions incorporating any new position regarding the SPB role
14 in review of physician discipline determinations. *Id.* at 5:22 - 6:5. Plaintiffs also stated
15 that the Receiver's proposal raised concerns regarding how non-clinical defenses and
16 issues raised by physicians, including whistle-blowing, would be adjudicated. *Id.* at 6:13
17 - 17. Finally, plaintiffs stated that the Receiver's proposed peer review process,
18 including the "Judicial Review Committee" (JRC) proceedings, would be conducted
19 entirely in secret; plaintiffs requested that if the proposal was adopted that the Court
20 provide for monitoring by plaintiffs' counsel or an independent expert. *Id.* at 6:17 - 7:2
21 and fn. 7.

22 In the months since plaintiffs (and others') brief on these matters was filed, the
23 Receiver reports that he has continued to discuss the matter with the SPB, including the
24 sending of a "draft Stipulation" and "proposed process" to the SPB in late October, which
25 the SPB rejected in mid-November. Supplemental Memorandum at 3:6-8 and
26 Supplemental Declaration of Linda Buzzini at ¶¶ 5-6. Unfortunately, plaintiffs were

1 neither invited to nor apprised of these supplemental discussions. This is regrettable
2 given that plaintiffs are the party that is supposed to benefit from the proposal before the
3 Court. As the Receiver states, “Since at least August 2006, the Receiver has been
4 working with various stakeholders to craft policies and procedures that will meet the
5 legitimate needs and interests of physicians, the Union of American Physicians . . . SPB
6 and, most of all, the inmate-patients who bear the brunt of unconstitutional care.”
7 Supplemental Memorandum at 1:24-27.

8 **ARGUMENT**

9 **I.**

10 **THE RECEIVER’S MOTION SHOULD BE DENIED WITHOUT**
11 **PREJUDICE BECAUSE HIS PROPOSAL REMAINS UNCLEAR**
12 **REGARDING THE ROLE OF THE SPB IN REVIEWING PHYSICIAN**
13 **COMPETENCY DETERMINATIONS .**

13 The Receiver continues to argue that no waiver of a California constitutional
14 provision is necessary to implement his proposal, but that if it is required the Court should
15 defer consideration of the issue until such time as an actual case and controversy arises
16 (as would be the case if the JRC and SPB reached differing conclusions in a specific
17 case). Supplemental Memorandum at 12:1-24. The Receiver also states that he is
18 “willing to accept” a modification to his proposal to permit the SPB to provide the
19 Administrative Law Judges (ALJs) who preside over JRC proceedings, so long as special
20 training is provided. *Id.* at 10:6-9. The Receiver further states “there is no reason” that
21 the ALJs who preside at the JRC hearing should not decide affirmative defenses, such as
22 retaliation based on whistle-blowing, that “may not be strictly addressed by the JRC peer
23 review process.” *Id.* at 9:1-11. The ALJ decision on such a defense “could” nullify a
24 privileging decision by the JRC peer review. *Id.*

25 Plaintiffs believe there is merit in the Receiver’s suggestion that the Court avoid
26 determining whether waiver of a constitutional provision is necessary until such time as

1 an actual case or controversy arises. However, approval of his underlying proposal
2 should not be granted until an actual modified policy and procedure is presented for
3 review by the parties and the Court. When the Receiver's proposal was initially
4 presented, it was in the form of a 27 page detailed policy and procedure that
5 comprehensively set forth the physician competency determination process. Motion for
6 Waiver of State Law re Physician Competency Determinations, April 25, 2007, at 11:8-
7 13:12 and Exhibit 3 thereto ("*Plata* Professional Clinical Practices Peer Review and
8 Disciplinary Hearing Policies and Procedures"). No such policy, as modified,
9 accompanies the Supplemental Memorandum. Instead, the language in the Supplemental
10 Memorandum regarding changes to the policy and procedure does not appear to fully
11 commit the Receiver to those changes. As stated above, the Receiver states he is "willing
12 to accept" one particular change, that there is "no reason" that another change should not
13 take place, and that if that latter change did take place it "could" mean yet another change
14 might occur. All this is too uncertain. Plaintiffs have no idea what the Receiver actually
15 intends to do, and what SPB's role, and the limits of its role, would be in the physician
16 competency review process. The Receiver should be directed to provide a revised policy
17 and procedure so that the matter can be adequately reviewed and determined.

18 **II.**

19 **IF THE COURT GRANTS THE RECEIVER'S REQUEST, IT SHOULD**
20 **ALSO ESTABLISH A PROGRAM FOR MONITORING THE PHYSICIAN**
21 **COMPETENCY DETERMINATION PROCESS.**

22 Although it is not entirely clear given that no revised policy and procedure was
23 filed with the Supplemental Memorandum, it appears that the physician competency
24 determination process, or at least that part before any public SPB proceeding, would take
25 place entirely in secret. Given that this process is part of a Court-ordered remedy,
26 monitoring is necessary, even though peer review is traditionally privileged. Although
27 plaintiffs raised this matter in June, 2007, the Receiver has not addressed it in the

1 Supplemental Memorandum. At Pelican Bay in the *Madrid* case, monitoring of peer
2 review was the responsibility of the Court physician and registered nurse experts. Similar
3 monitoring is necessary here. The Office of Inspector General is the natural entity to
4 conduct such monitoring, given that it has hired (or will hire) physicians and nurses to
5 take part in monitoring medical care at individual prisons.

6 **CONCLUSION**

7 For the reasons stated above, the Court should deny the motion without prejudice,
8 directing the Receiver to provide a revised policy and procedure incorporating any
9 modifications he has actually made, or, if the motion is granted, provide for monitoring of
10 the physician peer review and clinical competency determination processes

11 January 22, 2008

12 Respectfully submitted ,

13
14 /s/ *Steven Fama*

15 _____
16 Steven Fama
Attorney for Plaintiffs