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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

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MARCIANO PLATA, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

Case No. C01-1351 TEH

**RECEIVER AND STATE PERSONNEL
BOARD'S FURTHER JOINT STATUS
REPORT RE PHYSICIAN CLINICAL
COMPETENCY DETERMINATION
POLICIES AND PROCEDURES**

1 The Receiver and the State Personnel Board (“SPB”) submit this Further Joint Status
 2 Report re Physician Clinical Competency Policies and Procedures pursuant to this Court’s Order,
 3 dated September 26, 2008 (Docket #1516).

4 **I. Receiver’s Information and Position¹**

5 **A. Funding and Additional Staff**

6 On September 19, 2008, the SPB informed the Court that it was submitting a budget
 7 change proposal (“BCP”) to the Department of Finance so that it could collect reimbursements
 8 from the Receiver of up to \$715,000 “which would include funding for up to one Administrative
 9 Law Judge position, one legal secretary position and a .6 analyst position.” (Docket # 1503, ¶ 2)
 10 SPB further advised the Court that “[b]ecause these positions are reimbursable rather than
 11 general funded, SPB needs to ensure actual workload materializes and will be permanent . . .
 12 before hiring permanent, full-time employees.” (Id.)

13 The Receiver’s staff recently received a copy of the BCP (a copy of which is attached as
 14 Exhibit A to the Buzzini Decl.), prepared by the SBP and submitted on or about August 15,
 15 2008, *i.e.*, prior to the filing of the Joint Status Report and related documents on September 19,
 16 2008. Despite the SBP’s statements in connection with the Joint Status Report, in the BCP the
 17 Board requests “approval for \$715,000 in reimbursement authority and to *permanently* hire 1.0
 18 ALJ II, 1.0 Legal Secretary and .6 Staff Services Analysts.” (Emphasis added.)

19 On September 19, 2008, in the Joint Status Report, the SPB informed the Court that it
 20 had recently determined that the 20% overhead rate it was proposing to charge the Receiver was
 21 a number of years old and that calculations used to arrive at that rate may no longer apply. The
 22 Board further advised the Court that the Receiver and the SPB had consequently agreed to a
 23 7.5% overhead reimbursement rate instead. (Docket # 1504, ¶ 19.)

24 On or about October 15, 2008, the Department of Finance (DOF) contacted the
 25 Receiver’s staff to determine if the Receiver was going to reimburse SPB consistent with the
 26 authority sought by SPB in the BCP. While it is difficult to determine, due to a lack of detail in
 27 the BCP, it appears that the BCP includes a 20% overhead rate. The BCP clearly seeks approval

28 ¹ The Receiver’s statements are based on the Declaration of Linda Buzzini (“Buzzini Decl.”), filed herewith.

1 to hire permanent full-time staff and the workload projections to support the number of positions
2 requested are significantly overestimated.

3 On October 21, 2008, Lori Gillihan, the SPB's Chief of the Administrative Services
4 Division, asked the Receiver's staff to notify DOF that the Receiver will absorb from his existing
5 funds the amount SPB that seeks in reimbursement. On Saturday, October 25, 2008, Paul
6 Ramsey sent Ms. Buzzini an email seeking to discuss a contract between the Receiver's Office
7 and SPB regarding clinical competency determination hearings.

8 On October 27, 2008, Ms. Buzzini spoke with Mr. Ramsey.² They discussed four issues:
9 (1) whether an agreement concerning reimbursement for SPB's expenses would be between the
10 Board and CDCR or the Board and the Receiver; (2) whether the salary and benefit rates
11 proposed by SPB were reasonable; (3) the BCP and its request for budget augmentation via
12 reimbursement from the Receiver; and, (4) the indemnification being insisted upon by the
13 California Medical Association, Institute for Medical Quality ("IMQ") which is discussed below.

14 During that conversation, Ms. Buzzini advised Mr. Ramsey that the proposed 7.5%
15 overhead rate was likely to be acceptable. Mr. Ramsey advised that DOF was seeking
16 confirmation that the Receiver would reimburse the Board. Ms. Buzzini reiterated that the
17 Receiver would reimburse SPB for reasonable, necessary and actual costs. A discussion ensued
18 regarding the amount of reimbursement authority contained in the BCP, but that the issues to be
19 addressed were the details of the BCP itself. They discussed the fact that the BCP assumes that
20 the Board will receive 30 appeals requiring some amount of attention by the Board and that, of
21 those, approximately six would culminate in an actual hearing. These estimates were not
22 consistent with the Receiver's projections. The Receiver's staff estimates that approximately 30
23 cases will be submitted for peer review annually, that no more than 10-12 will reach the appeal
24 phase and, of those, only six of those will make it as far as an evidentiary hearing (except during
25 the first year when a few more may go to hearing). In other words, the Receiver estimates that
26 the Board will be involved in some fashion in only about a dozen cases per year. The SPB may

27 ² For some reason, the SPB asserts below and in its supporting documents filed herewith that the Receiver's staff did
28 not communicate with SPB staff regarding the outstanding issues between August and November of this year. This
is simply not accurate, as the text of this report and Ms. Buzzini's Declaration reflect.

1 legitimately have misunderstood this distinction, but even after it was explained, Mr. Ramsey did
2 not address the Receiver's concerns about staffing levels in the BCP.

3 On November 3, 2008, Ms. Buzzini appeared before the five-member SPB regarding
4 matters unrelated to the physician clinical competency determination process. SPB President
5 Sean Harrigan spontaneously observed that the Receiver was refusing to reimburse SPB for
6 clinical competency determination hearings. Ms. Buzzini corrected the Board's
7 misapprehension, stressing that the Receiver had advised SPB staff and had stated in the Joint
8 Status Report that he would reimburse SPB for all necessary, actual and reasonable costs
9 associated with SPB administration of the hearings. The outstanding issues involved other
10 details in the BCP. For example, the SPB has not offset or deducted from its BCP the
11 reimbursement authority it already possesses to conduct physician adverse action hearings that
12 will now be replaced by the new process.

13 On November 10, 2008, the Receiver's Chief of Staff, John Hagar, sent a letter to the
14 SPB Executive Officer and DOF Director, a copy of which is attached as Exhibit B to the
15 Buzzini Decl. In the letter, Mr. Hagar stated that the Receiver could not support the Board's
16 BCP because it "grossly over-estimated the staffing and funding necessary for Clinical
17 Competency determinations" and failed to consider the "significant workload reduction" that the
18 PPEC process will bring to SPB and because DOF has taken the position that the Receiver must
19 reimburse SPB using his existing budget "while disregarding the fact that the State failed for
20 years to establish an adequate peer review process."

21 **B. Indemnification of IMQ**

22 Originally, the Board sought to have the Receiver (*i.e.*, effectively, this Court) indemnify
23 IMQ on the Board's behalf. More recently, the Board has sought to have the Receiver instruct
24 CDCR to provide indemnification on behalf of the Board. On October 9, 2008, Ms. Buzzini
25 advised Mr. Ramsey that the Receivership does not have the authority to instruct CDCR to
26 indemnify SPB and that whether CDCR stands behind SPB for purposes of indemnifying IMQ is
27 an issue for the State to decide on its own. Ms. Buzzini further advised Mr. Ramsey that the
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1 Receiver's Chief of Staff was available to meet with SPB's Executive Officer if the Board
2 wanted to discuss this matter further. The SPB Executive Officer has not contacted Mr. Hagar.

3 On October 27, 2008, during his conversation with Ms. Buzzini, Mr. Ramsey, on behalf
4 of SPB, continued to insist that the Receiver "order" CDCR to indemnify IMQ on behalf of the
5 Board. Mr. Ramsey noted that CDCR is currently indemnifying IMQ at the Receiver's request,
6 and he questioned why Receiver would not order CDCR to indemnify IMQ on behalf of the
7 Board. Ms. Buzzini explained that CDCR currently has an agreement with IMQ which includes
8 an indemnification clause because, at the present time, CDCR employees are administering those
9 aspects of the hearing process. When these responsibilities transfer to the Board there will be no
10 reason for CDCR involvement. In short, there is no basis for the Receiver to order CDCR to
11 indemnify IMQ.

12 **II. SPB's Position And Information**

13 **A. Funding and Additional Staff**

14 The SPB and the Receiver continue to disagree as to the funding and additional staff
15 needed by SPB to implement the physician disciplinary review process ordered by this court. As
16 set forth below, the Receiver has prevented the SPB from obtaining the funding necessary to
17 implement the court's order.

18 The court's May 23, 2008 Order Granting in Part and Denying in Part Receiver's Motion
19 for Waiver of State Law Regarding Physician Clinical Competency (Document 1205) requires
20 the SPB to implement an entirely new and separate process for physician discipline cases on an
21 expedited basis. SPB has completed training its administrative law judges (ALJs) and has
22 developed internal procedures to ensure timely processing of physician medical quality/discipline
23 cases in the manner set forth in the procedures ordered by the court. *See* Declaration of Paul
24 Ramsey in Support of Receiver's Supplemental Report re Physician Clinical Competency
25 Determination Policies and Procedures, para. 3, Document 1504, filed September 19, 2008
26 ("Ramsey Declaration"). SPB has also had extensive discussions with the Institute for Medical
27 Quality (IMQ) over the terms of a contract under which IMQ would provide qualified physicians
28 to conduct medical quality hearings as required by the court's order. *Id.* at paras. 3-4.

1 In order to complete implementation of the court's order, however, SPB will need to hire
2 additional staff to ensure timely processing of physician medical quality cases without disrupting
3 the more than 200 other evidentiary appeals filed with SPB each month. Without such staff, SPB
4 would be forced to vacate previously calendared hearings so that medical review panels could be
5 established and voir dired and hearings initiated within the 60-day time period required by the
6 process directed by the court. *Id.* at para. 12. Additional staff will also be required to ensure
7 timely preparation of decisions by both the medical review panel and the ALJ for consideration
8 by the Board within 45 days of submission of the case, as required by the court's order. *Id.*
9 Although the number of anticipated cases subject to these procedures may be relatively small,
10 SPB needs to ensure that it will have the ability to comply with the court-ordered, expedited time
11 frames, while still performing its existing functions in a timely manner.

12 In August 2008, SPB Executive Officer Suzanne Ambrose discussed with Receiver Clark
13 Kelso funding for the physician discipline process (PPEC) ordered by this court. During that
14 meeting, Ms. Ambrose indicated to Receiver Kelso that SPB would be submitting a Budget
15 Change Proposal (BCP) requesting authority to collect reimbursements from the Receiver for up
16 to \$715,000. That request would include funding for up to one Administrative Law Judge
17 position, one legal secretary position and a 0.6 analyst position, in addition to the costs associated
18 with retaining physicians to sit on the medical review panels. *See* Declaration of Suzanne
19 Ambrose in Support of Second Supplemental Report re Physician Clinical Competency
20 Determination Policies and Procedures filed herewith ("Ambrose Declaration No. 2") at para. 2;
21 *see also* Declaration of Suzanne Ambrose in Support of Supplemental Report re Physician
22 Clinical Competency Determination Policies and Procedures, paragraph 2, Document 1503, filed
23 September 19, 2008 ("Ambrose Declaration No. 1") at para. 2; Ramsey Declaration at para. 12.

24 As Ms. Ambrose explained to Receiver Kelso, the SPB intends only to bill the Receiver's
25 Office for the actual and reasonable costs associated with implementing the physician
26 disciplinary review process. The "reimbursement authority" sought by SPB through the BCP
27 process is the authorization to receive funds up to a maximum of \$715,000; it is not actual
28 funding. Moreover, as Ms. Ambrose made very clear to Receiver Kelso, SPB intends to utilize

1 part-time or retired annuitant staff on an as-needed basis, depending upon the volume of the
2 workload, and will only hire permanent, full-time civil servants if sufficient workload
3 materializes to warrant such hiring. If the projected workload does not materialize, the Receiver
4 will not be billed for the maximum amount and the SPB will not receive reimbursements for the
5 maximum amount. Ambrose Declaration No. 2 at para. 2; Ramsey Declaration at para. 12.

6 In her discussion with Receiver Kelso, Ms. Ambrose sought to obtain a commitment from
7 Receiver Kelso that his office would support SPB's BCP when questioned by the Department of
8 Finance and the Legislature. Ambrose Declaration No. 2 at para. 2. Ms. Ambrose informed
9 Receiver Kelso that if he would not support the BCP, SPB would not submit it since approval
10 was contingent upon his support. *Id.* Receiver Kelso indicated that he would agree to reimburse
11 the SPB for reasonable and actual costs of the program, but that the Receiver and SPB needed to
12 agree on what constituted "reasonable" costs. *Id.* Ms. Ambrose promised to provide an
13 itemized breakdown of SPB's projections. *Id.*

14 Ms. Ambrose subsequently had a conversation with the Receiver's counsel, Linda
15 Buzzini, in which she reiterated her conversation with the Receiver and told Ms. Buzzini that
16 SPB staff would work with her to reach agreement on the reasonable costs for the program.
17 Ambrose Declaration No. 2, paragraph 3.

18 In August 2008, SPB provided the Receiver's staff with an itemized breakdown of the
19 projected costs, and agreed to modify the overhead fee from 20% to 7.5%, as requested by the
20 Receiver. Ambrose Declaration No. 2 at para. 5; Ramsey Declaration at paras. 13, 19. SPB
21 further agreed to charge the Receiver for the cost of the services of SPB ALJs at the rate of \$122
22 per hour, which was less than the \$187 per hour charged by ALJs employed by the California
23 Office of Administrative Hearings (OAH). Ambrose Declaration No. 2 at para. 5; Ramsey
24 Declaration at para. 12.

25 On August 14, 2008, SPB forwarded the Receiver's office details regarding the proposed
26 billing rates, as requested by the Receiver's office. Ramsey Declaration at para. 13. The
27 Receiver's office, however, failed to respond to further attempts of SPB's Chief Administrative
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1 Law Judge to resolve the remaining issues regarding cost and indemnification prior to November
2 3, 2008. Ambrose Declaration No. 2 at para. 6.

3 Based on the Receiver's commitment to reimburse SPB for the reasonable and actual
4 costs of the physician discipline program, SPB submitted a BCP to the Department of Finance, in
5 order to meet the deadline for 2009/2010 BCPs. Ambrose Declaration No. 2 at para. 4. The
6 amount of the BCP could be modified downward if the parties subsequently agreed on a lower
7 amount. *Id.* At the request of the Department of Finance, SPB staff repeatedly requested that
8 CDCR and/or the Receiver provide verification to the Department of Finance that SPB would be
9 reimbursed for its services in connection with the medical quality hearings. *Id.*

10 On November 3, 2008, the SPB held a board meeting in Sacramento, California. The
11 Receiver's counsel, Linda Buzzini, was present during the open session of that meeting.
12 Ambrose Declaration No. 2 at para. 7. During the meeting, SPB President Sean Harrigan asked
13 Ms. Buzzini about the status of the PPEC process. Ms. Buzzini indicated that the parties had still
14 not agreed on the projected costs of the program. *Id.* Following the open session of the meeting,
15 Ms. Buzzini suggested that she and Ms. Ambrose meet to resolve the outstanding cost issue. *Id.*
16 at para. 8. Ms. Ambrose agreed, and scheduled a meeting with Ms. Buzzini for November 13,
17 2008. *Id.* at para. 19.

18 Despite the agreement by the Receiver's counsel to meet on November 13, 2008, to
19 resolve the outstanding cost issues, on November 10, 2008, the Receiver's office informed the
20 Department of Finance that the Receiver would not support SPB's BCP to fund the clinical
21 competency hearings requested by the Receiver and approved by this court. Ambrose
22 Declaration No. 2 at para. 10 and Attachment 1 thereto. Based upon the Receiver's refusal to
23 support SPB's BCP, the Department of Finance denied the BCP. Ambrose Declaration No. 2 at
24 para. 11.

25 The Receiver's refusal to support SPB's BCP request has prevented the SPB from
26 implementing the physician disciplinary review process ordered by the court. SPB cannot fund
27 the process without reimbursement from the Receiver. Without an approved BCP, SPB has no
28 authority to collect reimbursements from the Receiver in the projected amount for the program.

1 Without funding, SPB is unable to implement the court-ordered disciplinary review process.
2 Ambrose Declaration No. 2 at para. 12. Given that the Receiver will be billed only for the actual
3 cost of conducting hearings in these cases at a rate lower than that charged by the Office of
4 Administrative Hearings, the Receiver's decision to oppose SPB's request for reimbursement
5 authority necessary to implement the court's order is incomprehensible and serves only to
6 prevent implementation of the process ordered by the court.

7 **B. Indemnification**

8 As set forth in the documents filed on September 19, 2008, SPB has requested that
9 indemnification be provided to IMQ by CDCR in the same manner that CDCR, at the direction
10 of the Receiver, has agreed to provide indemnification for medical quality hearings currently
11 conducted by OAH. The Receiver has not responded to this request. Ambrose Declaration No. 2
12 at para. 6; Ramsey Declaration at paras. 8, 14, 15, 19.

13
14 Dated: November 21, 2008

FUTTERMAN & DUPREE LLP

15
16 /s/ Martin H. Dodd

Martin H. Dodd

17 Attorneys for Receiver J. Clark Kelso

18 Dated: November 21, 2008

BRUCE MONFROSS

19
20 /s/ Bruce Monfross

Bruce Monfross

21 Acting Chief Counsel
22 California State Personnel Board
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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman & Dupree LLP, 160 Sansome Street, 17th Floor, San Francisco, CA 94104. I am over the age of 18 and not a party to the within action.

I am readily familiar with the business practice of Futterman & Dupree, LLP for the collection and processing of correspondence.

On November 21, 2008, I served a copy of the following document(s):

RECEIVER AND STATE PERSONNEL BOARD'S FURTHER JOINT STATUS REPORT RE PHYSICIAN CLINICAL COMPETENCY DETERMINATION POLICIES AND PROCEDURES

by placing true copies thereof enclosed in sealed envelopes, for collection and service pursuant to the ordinary business practice of this office in the manner and/or manners described below to each of the parties herein and addressed as follows:

 BY FACSIMILE: I caused said document(s) to be transmitted to the telephone number(s) of the addressee(s) designated.

 X BY MAIL: I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated below. I am readily familiar with Futterman & Dupree's practice for collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.

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18
19 I declare that I am employed in the offices of a member of the State Bar of this Court at
20 whose direction the service was made. I declare under penalty of perjury, under the laws of the
united State of America, that the above is true and correct.

21 Executed on November 21, 2008 at San Francisco, California.

22
23 _____
Lori Dotson