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

11 MARCIANO PLATA, et al.,
12 *Plaintiffs,*
13 v.
14 ARNOLD SCHWARZENEGGER, et al.,
15 *Defendants.*

Case No. C01-1351 TEH

**RECEIVER'S OPPOSITION TO
MOTION OF NON-PARTY PUBLIC
MEDICAL DEVELOPMENT
INTERNATIONAL FOR ORDER
SHORTENING TIME FOR MOTION
FOR LEAVE TO INTERVENE AND
MOTION FOR INSTRUCTIONS**

19 Receiver Robert Sillen submits this opposition to the motion of non-party Medical
20 Development International ("MDI") for an order shortening time for the Court to hear MDI's
21 proposed motions to intervene and for "instructions."

22 **INTRODUCTION**

23 MDI has jumbled together facts and events in an effort to create a false sense of urgency,
24 for the apparent purpose of restricting the Court's ability to give adequate scrutiny to MDI's
25 various motions. The motion for an order shortening time is procedurally defective and there is
26 no need for such an order in any event. It should be denied.

27 For the better part of 60 days, the Receiver and his attorneys have been in discussion with
28 MDI and its attorneys with respect to the Receiver's concern that MDI's business model and

1 services violate California's prohibition on the corporate practice of medicine and, thus, are
2 simply unlawful. During those discussions, MDI warned the Receiver that it would cease
3 performance if the Receiver refused to enter into a contract with MDI. Faced with that
4 eventuality, the Receiver made provision for substitute medical services at the two affected
5 prisons.

6 In late March, MDI – rather than address the Receiver's legitimate concerns about the
7 legality of its services – began instead to shut down its operations and decline service to inmate.
8 The Receiver has since instructed the prisons not to use MDI's services for any reason and has
9 begun implementing his backup plan to ensure that the inmates in both prisons receive
10 appropriate medical specialty care. Accordingly, no exigent circumstances exist that would
11 justify an order shortening time. To the contrary, all that is really going on is that MDI is
12 unhappy that its potentially lucrative, and likely illegal, deal with the State has come to an end.

13 If MDI believes that it has a claim that should be determined in this litigation or wishes
14 this Court to render an advisory opinion on an issue of State law – an issue, by the way, as to
15 which MDI could have requested, but did not request, guidance from appropriate State regulatory
16 agencies – then MDI should bring an properly noticed motion to intervene, provide a legal basis
17 for intervention, attach a proposed complaint in intervention that states a justiciable claim and
18 provide the Receiver and parties a full opportunity to respond. *If* the Court permits such
19 intervention, then *after* the Receiver and the parties have had an opportunity to respond to the
20 allegations of the complaint and to conduct discovery, MDI can bring whatever motion it
21 believes is appropriate.

22 Put simply, the parties and the Receiver should be given an adequate opportunity to
23 respond to MDI's motions, based upon an adequate record. The motion for an order shortening
24 time should be denied.

25 **FACTS**

26 In the latter part of 2006, MDI was selected by senior officials at CDCR – without
27 competitive bidding and without the knowledge of the Receiver – to undertake a project at the
28 California State Prison, Los Angeles County ("LAC") and the California Correctional Institute in

1 Tehachapi ("CCI") to provide specialty medical services to inmates in those prisons. The
2 proposed contract had a total value of more than \$26 million. Declaration of John Hagar, filed
3 herewith, ¶¶ 3, 4;

4 CDCR employees raised red flags about the description of MDI's services in the scope of
5 work because those services appeared to violate the very strong prohibition in California on the
6 "corporate practice of medicine," *i.e.*, the provision of medical services by business entities that
7 have not been licensed to practice medicine. *See* California Business & Professions ("B&P")
8 Code § 2400. Despite these expressed concerns, *and even though no contract between CDCR*
9 *and MDI had been (or ever has been) executed*, the CDCR officials had permitted MDI to begin
10 performing services at CCI and LAC. *Id.*; Declaration of Martin H. Dodd, filed herewith, ¶ 2.

11 In December 2006, apparently in response to the questions raised about the legality of its
12 services, MDI proposed a revised scope of work that modified the description of services to some
13 extent. This revised scope of work was not incorporated into any executed agreement. Dodd
14 Decl., ¶ 2.

15 At about this same time, CDCR employees, who now report to the Receiver's office,
16 notified John Hagar, the Receiver's Chief of Staff, about both the existence of the proposed
17 contract and that questions had been raised about the legality of MDI's services. In response to
18 this information, Mr. Hagar conducted an investigation into the unusual circumstances
19 surrounding MDI and its services. In addition to the continuing questions about the legality of
20 those services under California law, Mr. Hagar questioned the apparently exorbitant and unusual
21 rates being charged by MDI, discovered troubling billing irregularities in invoices submitted by
22 MDI, and learned of apparent "monopolization" of specialty services by MDI in at least one of
23 the institutions. *See* Hagar Decl., ¶¶ 5. In light of these very disturbing facts, Mr. Hagar notified
24 the Office of Inspector General, which has commenced an investigation into the MDI
25 arrangement, and recommended that the Receiver halt payment of invoices submitted by MDI,
26 pending a determination of the lawfulness of the services MDI was providing. *Id.*, ¶ 6.

27 In early February 2006, the Receiver and his staff met with MDI and its attorneys. The
28 Receiver expressed concerns about the legality of MDI's services, as well as concerns about two

1 related, but independent issues: the rates being charged by MDI for its services seemed exorbitant
2 and, furthermore, the Receiver had no way of determining the underlying rates that physicians
3 under contract with MDI were charging. MDI threatened legal action and threatened to cease
4 performing services if it was not paid. The Receiver let MDI know that he could not authorize
5 payment for potentially illegal activity. He also asked MDI to provide notice if, and when it
6 intended to shut down operations, warning MDI that failure to provide such notice could have
7 negative consequences if it wished to do business with the Receiver in the future. MDI told the
8 Receiver that it would continue providing services, at least in the near term, understood that it
9 would not be paid pending the Receiver's determination, and asserted that it would establish to
10 the Receiver's satisfaction that its services were lawful. *Id.*, ¶¶ 7,8.

11 Meanwhile, the Receiver and his counsel undertook their own analysis of the legality of
12 the services being provided by MDI. That analysis confirmed that the services described in both
13 the original and revised versions of the scope of work likely violated the law. In late February
14 2006, MDI's California counsel, James Walsh, sent the Receiver's counsel a letter in which Mr.
15 Walsh made an argument that the services MDI had been providing were lawful. Nevertheless,
16 Mr. Walsh included in the letter a *third* proposed scope of work that modified the description of
17 services still further and proposed an entirely different rate structure than the one MDI had been
18 using. MDI still refused to provide the Receiver with information pertaining to rates being
19 charged by the doctors it had under contract, contending that those rates were "proprietary."
20 Dodd Decl., ¶¶ 3-5.

21 MDI's counsel repeated several times during this period that MDI would cease
22 performing services if the Receiver did not express a willingness to enter into a contract. *Id.*, ¶ 5.
23 In the face of those threats, and to avoid potential loss of services to the inmates, the Receiver
24 developed a comprehensive plan for the provision of substitute medical specialty services at CCI
25 and LAC in the event that MDI stopped performing. *See Hagar Decl.*, ¶ 11. At the same time,
26 Mr. Hagar investigated to determine whether MDI was providing quality services commensurate
27 with the unusually high rates it was charging. He discovered that specialty services at both
28 institutions continued to be unacceptable, significant scheduling backlogs remained and troubling

1 systemic problems in the provision of specialty services at both institutions were continuing.
2 Hagar Decl., ¶ 12.¹

3 Nor had MDI demonstrated that its services were lawful. The letter brief to the
4 Receiver's counsel from Mr. Walsh did not answer all the Receiver's questions. Indeed, the
5 letter raised additional questions about MDI's actual relationship to the physicians it had under
6 contract, whether and to what extent MDI was exercising "medical" judgment as that term has
7 been construed and understood in California, what rates the physicians were charging and what
8 control MDI had exercised over the setting of those rates. Counsel for the Receiver contacted
9 employees at the California Department of Consumer Affairs ("DCA") – the agency responsible
10 for enforcing the prohibition on the corporate practice of medicine – to get their guidance on
11 whether MDI's services, as described in each of the three versions of the scope of work, were
12 lawful. Dodd Decl., ¶¶ 6,7.

13 The DCA staff generally agreed that the first and second versions of the scope of work, as
14 drafted, described services that appeared clearly to violate the prohibition on the corporate
15 practice of medicine and that MDI's third, and most recent, proposed scope of work did not fully
16 address the issues or resolve the concerns about the lawfulness of the services. Accordingly, on
17 March 26, 2006, the Receiver's counsel forwarded a letter to MDI's counsel indicating that the
18 Receiver could not, in good conscience, undertake an agreement with MDI if there was a chance
19 that the contract would violate State law. The Receiver offered the possibility of a contract if
20 MDI provided the Receiver with all the information he had requested, as well as some indication
21 from the DCA (or other appropriate State agency) that MDI's business model was lawful. *Id.*, ¶¶
22 8, 9 and Exh. 1 thereto.²

23 Rather than seek any guidance from the State as to the legality of its services, and without
24 notice to the Receiver, in the latter part of March 2007, MDI began discontinuing on-site

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26 ¹ To the extent improvements have been made at CCI, they have more to do with existing CDCR staff than with
MDI. Hagar Decl., ¶12(c).

27 ² MDI has asserted that it has no reason to believe that the California Medical Board provides such opinions. *See*
28 Declaration of Timothy Heffernan, filed on or about April 3, 2007. This is a surprising statement since MDI's
motion actually includes just such an opinion. *See* August 2, 1991 letter attached to Exhibit E to the Declaration of
Theodore Willich, filed on April 3, 2007.

1 specialty services at LAC and CCI and began refusing to schedule certain patients for off-site
2 specialty services. Hagar Decl., ¶¶ 12(e),(f). Both prisons have since been instructed to
3 discontinue using MDI's services for any reason, effective April 6, 2007. The Receiver has
4 begun implementing his backup plan to provide substitute medical services to the inmates at both
5 institutions. Id., ¶ 13.

6 ARGUMENT

7 THE MOTION TO SHORTEN TIME IS PROCEDURALLY DEFECTIVE AND 8 SHOULD BE DENIED ON THAT GROUND ALONE.

9 Civil Local Rule 6-3(a) sets forth the requirements for a motion for an order shortening
10 time. The motion (a) may not be longer than five (5) pages, and (b) must be accompanied by a
11 declaration that (c) “[d]escribes the efforts the party has made to obtain a stipulation to the time
12 change” and (d) “[i]dentifies the substantial harm or prejudice that would occur if the Court did
13 change the time.” The motion fails in every one of these respects.

14 MDI's motion – which is nearly 10 pages long – is not supported by any declaration
15 setting forth facts justifying an order shortening time. Nowhere in its motion has MDI indicated
16 that it made an effort to seek a stipulation for such an order; in fact, MDI made no such effort.
17 Dodd Decl., ¶ 10. The first time that the Receiver and his counsel learned of the motions was
18 when they showed up in counsel's office. Id. Finally, although the declarations submitted in
19 connection with the underlying motions purport to describe some kind of urgency, nowhere do
20 they actually establish that anyone will be prejudiced if the motions are not heard in the normal
21 course. Indeed, as discussed below, no harm will come to anyone if the motions are heard
22 pursuant to the standard procedures for motions.

23 THE RECEIVER MADE PROVISION FOR MDI'S DECISION 24 TO CEASE PERFORMING SERVICES AND, AS A RESULT, 25 NO INMATES ARE BEING DENIED MEDICAL CARE.

26 MDI seeks to create the false impression that it is currently being required to perform
27 services without payment and that inmates at CCI and LAC in need of medical care will suffer if
28 the motions are not heard on an emergency basis. In fact,

- the Receiver has never required MDI to perform services at either prison;

- 1 • MDI began declining service to inmates at LAC and CCI in late March 2007 and
- 2 is now out of both institutions;
- 3 • MDI threatened for weeks that it would cease performing services if the Receiver
- 4 declined to enter into a contract with MDI; and, therefore,
- 5 • the Receiver made provision for substitute medical services in the event MDI
- 6 carried out its threat and is currently providing those substitute medical services to
- 7 the inmates.

8 In short, neither of the “exigent circumstances” that MDI hints at has actually occurred.
9 Instead, all that this dispute is about at this point is whether MDI is entitled to receive payment
10 for past services that may well have been illegal. That is hardly an emergency and surely is not
11 the sort of “substantial harm or prejudice” that would justify fast-tracking MDI’s motions.

12 **MDI’S MOTIONS SHOULD NOT BE HEARD UNTIL THE RECEIVER AND PARTIES**
13 **HAVE HAD ADEQUATE TIME TO RESPOND AND TO UNDERTAKE NECESSARY**
DISCOVERY INTO THE RELEVANT FACTS.

14 MDI requests not only that its motions for leave to intervene and for “instructions” be
15 heard on shortened time, but that the motions be heard simultaneously. Not so fast. Each of
16 these motions raises substantial questions that will require thorough analysis and as to which the
17 Receiver and the parties should be permitted sufficient time to respond.

18 It is by no means clear, for example, that MDI is entitled to or should be permitted to
19 intervene under FRCP 24. If MDI believes it has a claim against the State for reimbursement for
20 past services, for example, this litigation is not the proper forum to assert such a claim. And if,
21 as it appears, MDI seeks intervention so this Court – rather than the appropriate State agencies –
22 can render an advisory opinion about the legality of MDI’s services, then MDI should be required
23 both to explain why it is appropriate for this Court to render such an opinion, and then to allege a
24 justiciable claim by way of a complaint in intervention. *See* FRCP 24(c).

25 And, even if this Court were inclined to render the advisory opinion requested, the legal
26 issue, *i.e.*, whether MDI’s past services violated California law, cannot be decided without
27 inquiry into at least the following factual matters:

- 28 • the actual relationship between MDI and the physicians in its network;

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- the actual services MDI has been providing at LAC and CCI, including how decisions are made about inmate referrals to particular physicians;
- the rates that the physicians in MDI's network have been charging;
- how the rates the physicians are charging were set; and,
- whether the various charges and proposed charges by MDI are reasonable and appropriate for the services allegedly rendered.

See generally B&P Code §§ 2400, 2418; *People v. Pacific Health Corp.*, 12 Cal.2d 156, 160 (1938); *Conrad v. Medical Board of California*, 48 Cal.App.4th 1038, 1042-1043 (1996); *Marik v. Superior Court*, 191 Cal.App.3d 1136, 1139 (1987); 83 Cal. Op. Atty. Gen. 170 (2000).

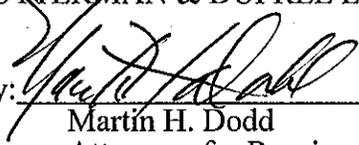
Rushing to judgment on MDI's proposed motions is thus unnecessary and inappropriate. The Receiver and the other parties should be afforded a full and fair opportunity to delve into the foregoing issues before the Court is asked to decide the sort of fact-intensive legal question posed by MDI. And MDI should be required to file its motions under the normal notice periods and in the proper order: first, the motion to intervene; and then, if that motion is granted, the parties may move on to addressing the underlying legal and factual issues.

CONCLUSION

For all the foregoing reasons, the motion for order shortening time should be denied.

Dated: April 6, 2007

FUTTERMAN & DUPREE LLP

By: 
 Martin H. Dodd
 Attorneys for Receiver Robert Sillen