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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
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12 MARCIANO PLATA, et al.,

13 *Plaintiffs,*

14 v.

15 ARNOLD SCHWARZENEGGER, et al.,

16 *Defendants.*
17

Case No. C01-1351 TEH

**RECEIVER’S APPLICATION FOR
LEAVE TO FILE RESPONSE TO SPB’S
OBJECTIONS TO PHYSICIAN
CLINICAL COMPETENCY POLICIES
AND PROCEDURES**

18 Receiver J. Clark Kelso (“Receiver”) requests leave to file, and asks the Court to
19 consider, the attached Response to SPB’s Objections to Physician Clinical Competency
20 Determinations Policies and Procedures.

21 In its Order, dated May 23, 2008, the Court permitted amici and the parties to file
22 objections on June 25, 2008 to the proposed policies and procedures the Receiver filed on
23 June 20, 2008. The Order did not provide, however, for any opportunity for the Receiver to
24 respond to such objections.

25 Only the SPB has filed objections to the policies and procedures. As discussed more
26 fully in the attached Response, the Receiver submits that the objections interposed by the SPB
27 are not well-taken and flow from a profoundly flawed view of the May 23 Order. It is the
28 Receiver’s position that if the Court were to agree with the SPB’s objections then the careful

1 balance this Court struck in the May 23 Order would be lost and peer review in the State prisons
2 would continue to be ineffectual. In view of the importance of a functioning and effective peer
3 review system in the prison medical care system, the Receiver believes that it is essential that he
4 be given the opportunity to respond briefly to the SPB's objections. The Court will then have
5 before it a complete record upon which decide whether to adopt the policies and procedures
6 submitted by the Receiver.

7 Accordingly, the Receiver requests leave to file the attached Response.

8 Dated: June 27, 2008

FUTTERMAN & DUPREE LLP

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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

12 MARCIANO PLATA, et al.,

13 *Plaintiffs,*

14 v.

15 ARNOLD SCHWARZENEGGER, et al.,

16 *Defendants.*

Case No. C01-1351 TEH

**RECEIVER'S RESPONSE TO STATE
PERSONNEL BOARD OBJECTIONS TO
RECEIVER'S REPORT RE PHYSICIAN
CLINICAL COMPETENCY
DETERMINATIONS POLICIES AND
PROCEDURES**

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18 Receiver J. Clark Kelso ("Receiver") submits this Response to the objections filed by the
19 State Personnel Board ("SPB") to the Receiver's Report Re Physician Clinical Competency
20 Determination Policies and Procedures, filed on June 20, 2008 (Docket ## 1262-1264).

21 **INTRODUCTION**

22 The Receiver had thought that the battle over the policies governing physician clinical
23 competency determinations had come to an end. Apparently not. Despite months of briefing and
24 this Court's carefully considered Order, dated May 23, 2008 ("May 23 Order"), the SPB
25 continues to assert the position it so adamantly asserted at every step along the way: *i.e.*, the SPB
26 contends that *it*, rather than clinicians, should decide whether doctors are qualified to treat
27 patients in the State prisons. There should be no mistake about it: the SPB objections reveal that
28 the SPB refuses to acknowledge, much less concede, that this Court's May 23 Order has rejected

1 the SPB's arguments. It is as if the SPB did not even read the May 23 Order – or worse yet, has
2 read only those parts to its liking. The Receiver is therefore compelled to submit this Response.

3 This Court put it succinctly: “peer review is just that: review by one’s peers.” May 23
4 Order, p. 13. Accordingly, the Court adopted the “majority of the procedural changes proposed
5 by the Receiver” with respect to *peer* review, subject to three specific modifications that the
6 Receiver had agreed to in previous court filings. *Id.*, p. 9. Reduced to their essence, the
7 procedural changes proposed by the Receiver and adopted by this Court would (1) create a
8 unitary peer review and employment hearing process; (2) make privileging a condition of
9 employment; (3) permit the peer review panel (the “JRC”) to make privileging, and
10 consequently, employment, decisions; and, (4) provide for review of such employment decisions
11 by the SPB. The modifications required by the Court will permit specially-trained SPB ALJs to
12 preside over the privileging and employment hearings; permit the SPB ALJs to decide certain
13 affirmative defenses; and, require the SPB to sustain the JRC decisions on privileging, and
14 consequently, employment, if supported by substantial evidence. The Receiver’s policies filed
15 on June 20, 2008 track these rulings by the Court.

16 The SPB, however, vehemently disagrees with the Court’s Order, but tries to hide that
17 disagreement behind meritless “objections” to the Receiver’s proposed policies. Those
18 objections (“SPB Obj.”) are based upon an intentional misreading – bordering on outright
19 disregard – of the May 23 Order. The SPB would have the Court believe that the Order amounts
20 to little more than an affirmation of what the SPB has argued all along: *i.e.*, that peer review
21 determinations regarding who may treat patients in the prisons should be at most advisory. It
22 need hardly be said that the May 23 Order was a firm rejection of the SPB’s contentions
23 regarding its “constitutional” authority and the nature of its review. The time has come for the
24 SPB’s obstinacy and arrogance to end. Its objections to the Receiver’s policies should be
25 rejected in their entirety and the Court should adopt those policies as its order.

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ARGUMENT

I. THE COURT ADOPTED THE “MAJORITY” OF THE RECEIVER’S POLICIES AND ORDERED MODIFICATIONS TO THOSE POLICIES IN ONLY THREE PARTICULARS BASED UPON CONCESSIONS THE RECEIVER MADE PUBLICLY IN COURT FILINGS.

Seizing upon one sentence in the May 23 Order that it quotes out of context, the SPB bases its objections upon informal suggestions made many months ago by a member of the predecessor Receiver’s staff in connection with discussions pertaining to a different proposed peer review framework. The SPB wrote:

In its Order, the Court declined to adopt the Receiver’s original proposal in full and instead narrowed its consideration to “a procedure that incorporates all of the modifications the Receiver was prepared to accept during his negotiations with SPB.”

SPB Obj., p. 4.

True, as far as it goes. But from this, the SPB makes the leap that anything the Receiver, his predecessor or their staff may have suggested at any time during the months of discussions with the SPB was now to be incorporated into the policies and procedures. The SPB is simply, flatly wrong.

What the SPB ignored in its selective quotation from the May 23 Order is that the Court’s statement followed, and clearly referred to, three specific concessions the Receiver had made publicly in court filings since January 2008. Those concessions were the following:

- The Receiver agreed that ALJs presiding over the unitary privileging and employment hearings ““will be available to adjudicate affirmative defenses by the physician’ under review, including contentions ‘that the referral to hearing by the peer review body was motivated by retaliation for whistle blowing, unlawful bias or discrimination or a conflict of interest.’” May 23 Order, p. 8.
- The Receiver agreed ““to permit SPB-employed ALJs to preside over privileging hearings in the manner otherwise provided in those procedures, as long as the SPB ALJs receive special training in privileging matters.”” Id.

- 1 • The “Receiver explained that he ‘informed the Board [SPB] he believes the right
2 compromise is for the Board to apply the “substantial evidence standard” when
3 reviewing medical judgments by physicians who are trained to make medical
4 judgments.’” Id. p. 9.

5 In requiring the above modifications, the Court was responding to a statement in the
6 Receiver’s April 14, 2008 Reply (Docket # 1161) that the Receiver sought a ruling on the
7 policies and procedures as originally proposed and that he was withdrawing the specific
8 modifications *proposed in court filings*. Docket # 1161, pp. 2-3. The Court required the
9 Receiver to accept *those* modifications, but otherwise adopted “the majority of the procedural
10 changes proposed by the Receiver” (May 23 Order, p. 9), because there were no objections to
11 those proposals.

12 The SPB, however, intentionally misreads the May 23 Order in an attempt to justify
13 placing before the Court suggestions made under the auspices of the *prior* Receiver *eight months*
14 ago at one point during more than a year of negotiations with the SPB. It goes without saying
15 that these suggestions are inadmissible for the purposes SPB has submitted them. FRE 408; Cal.
16 Evid. Code § 1152. Furthermore, and in any event, the prior Receiver’s suggestions from last
17 October were based upon a proposed peer review framework decidedly different from that which
18 the current Receiver – and this Court – ultimately decided to adopt. And, not only did the SPB
19 explicitly reject those suggestions at the time, it implicitly rejected them by continuing to
20 challenge the Receiver’s motion. It is disingenuous for the SPB to pull these proposals out of
21 context now and wave them about as if they had been made by the current Receiver.

22 But the real reason that the SPB is suddenly so interested in proposals it rejected many
23 months ago is this: those previous proposals presupposed a different peer review process and if
24 adopted out of context now they would render meaningless this Court’s ruling in the May 23
25 Order that privileges are a condition of employment. As discussed more fully in the next section,
26 undermining that ruling is one of the subtexts for the SPB’s objections. *See, e.g.*, SPB Obj.,
27 p. 11. The Court can and should reject the objections on this ground alone.

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1 **II. THE SPB'S "UNDERSTANDING" OF THE PROPOSED PEER REVIEW**
 2 **PROCESS ORDERED BY THE COURT IS PROFOUNDLY INCONSISTENT**
 3 **WITH THE MAY 23 ORDER.**

4 The SPB's professed "understanding" of the May 23 Order is so far removed from what
 5 the Order actually says that it is difficult to know where to begin. It boils down to this: the SPB
 6 has not changed its view one iota with respect to who should decide whether physicians will
 7 continue to treat patients in the prisons. Just as it did at the beginning, SPB continues to insist
 8 that it alone is the body which should decide that issue. Nothing, it seems, has changed or should
 9 change as far as the SPB is concerned.

10 The SPB feigns surprise at the Receiver's proposal that the JRC will make decisions
 11 regarding privileging and employment, *i.e.*, whether the physician will be permitted to continue
 12 to treat patients in the prisons. *E.g.*, SPB Obj., pp. 10-12. The SPB should not have been
 13 surprised since that has been the Receiver's position from the outset and it is precisely the point
 14 of having "staff privileges, as defined by California Business and Professions Code section
 15 805(a)(4), be made a condition of employment for physicians providing clinical care in the
 16 CDCR." May 23 Order, p. 14. Nevertheless, notwithstanding this Court's clear and unequivocal
 17 endorsement of the concept that privileging must be a condition of employment, the SPB
 18 professes not to understand the Court's ruling and requests that the Court "clarify" what it meant.
 19 SPB Obj., p. 11.¹

20 In fact, the SPB is being considerably less than forthright. It understands quite well what
 21 the Court's ruling means. Indeed, a careful reading of its objections demonstrates that the SPB
 22 believes privileging should *not* be a condition of employment and that the JRC's decision should
 23 be *advisory only* insofar as it applies to the question of whether the doctor will continue to treat
 24 patients: "[I]f SPB sustains the revocation of privileges to practice medicine at CDCR, such a
 25 determination *may also warrant the imposition of discipline such as suspension or termination.*"
 26 SPB Obj., p. 11 (emphasis added). Under the Receiver's policies, as endorsed by this Court, if

27 ¹ This Court found that the Receiver's request that privileges be made a condition of employment was "unopposed."
 28 May 23 Order, p. 14. The Receiver submits that the SPB's implicit and explicit challenges to the proposed policy
 providing that "Privileges are a condition of employment" (SPB Obj., p. 11) violates this Court's admonition that
 "no new objections that could have been made to the Receiver's original proposed policies will be considered . . ."
 May 23 Order, p. 17.

1 the SPB finds that substantial evidence supports revocation of privileges, the doctor will
2 automatically be precluded from treating patients in the prison. As this Court recognized, if the
3 employment and privileging decisions are not linked, then one of the key weaknesses in the
4 current system that the Receiver has sought to remedy, *i.e.*, that privileging is *not* a condition of
5 employment, will remain unchanged.

6 The SPB is not content with trying to undermine the Court's order regarding the link
7 between privileging and employment; it also endeavors to undermine the Court's ruling
8 regarding the scope of the SPB's review of privileging and employment decisions. Despite this
9 Court's rejection of the SPB's arguments about the scope of its "constitutional" authority (May
10 23 Order, pp. 10-14), the SPB continues to insist that it, and it alone, must decide who is
11 qualified to treat patients in the prisons. As the SPB stated:

12 . . . SPB understands the Court to contemplate a process whereby SPB retains its
13 constitutional authority and utilizes its expertise over state civil service
14 employment to conduct an adjudicatory hearing and make the final determination
15 as to what employment action should be taken against a physician accused of
16 substandard medical performance, subject to the requirement that the medical
findings and determinations of the peer review medical panel as to whether the
physician has met the applicable standard of care will be binding on the SPB and
its ALJs if they are supported by substantial evidence.

17 *Id.*, p. 8 (emphasis in original).

18 The SPB's "understanding" is, to say the least, erroneous. The Receiver never proposed,
19 and this Court did not conclude, that the JRC would be limited to the role of deciding only
20 whether the doctor had fallen below the standard of care, leaving it to the SPB to decide what
21 consequences should follow. To the contrary, the Receiver has always proposed that the JRC
22 will make the privileging decision. And, because the May 23 Order makes privileging a
23 condition of employment, the JRC will necessarily make the employment decision as well. *That*
24 *is* what is subject to substantial evidence review.²

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27 ² If the JRC was not intended to make employment decisions, then the Receiver's concession that ALJs may decide
28 affirmative defenses unrelated to whether the physician is qualified to treat patients would have been meaningless. If
the ALJs always were to have decision making authority over all employment matters, there would have been no
need for or point to the Receiver's concession.

1 In fact, because the SPB understands the significance of the relationship between
2 privileging and employment under the Court's order, the SPB has gone even farther in
3 challenging the May 23 Order and the Receiver's policies based on the Order. The SPB now
4 contends that even the decision as to whether privileges are revoked will be *its* decision alone:

5 Based on the medical findings of the JRC, the SPB would decide whether the final
6 action taken by the Governing Body *is just and proper under all the*
7 *circumstances, including deciding whether the medical determinations of the JRC*
warrant taking any action with respect to the physician's employment, such as the
revocation of privileges and/or suspension or termination from employment. . . .

8 SPB Obj., p. 8 (emphasis added).

9 In sum, under the SPB's flawed conception of the process approved by this Court, the
10 JRC will only make findings of fact as to whether the doctor has fallen below the standard of
11 care and only that determination will be subject to substantial evidence review. *Id.* According to
12 the SPB, whether the doctor's privileges will be revoked and/or whether the doctor will continue
13 to treat patients in the prisons will remain the sole and exclusive domain of the SPB. By its
14 objections, the SPB is plainly seeking to lay the groundwork for a case in which it would agree
15 that a doctor's conduct fell below the standard of care, but in which it would nevertheless be free
16 to conclude that privileges should not be revoked and that the doctor should continue to treat
17 patients in the prisons. This would leave "peer review" in precisely the same toothless and
18 ineffective status it occupies now. In the SPB's ideal world, therefore, peer "review" means the
19 SPB decides. That is not what the Receiver proposed and it is not what the Court ordered.

20 In the guise of "objections" to the Receiver's policies, the SPB seeks to reargue issues
21 that this Court has already decided and thereby to undermine this Court's May 23 Order. The
22 Receiver submits that the SPB's conception of the peer review process is profoundly inconsistent
23 with what the Receiver proposed from the beginning and equally inconsistent with what this
24 Court has ordered. The Court should reject the SPB's "objections" in their entirety.

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CONCLUSION

The Receiver requests that the Court adopt the Receiver's proposed policies and procedures as its order.

Dated: June 27, 2008

FUTTERMAN & DUPREE LLP

By: /s/ Martin H. Dodd
Martin H. Dodd
Attorneys for Receiver J. Clark Kelso

CERTIFICATE OF SERVICE

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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 June 27, 2008, I served a copy of the following document(s):

RECEIVER'S APPLICATION FOR LEAVE TO FILE RESPONSE TO SPB'S OBJECTIONS TO PHYSICIAN CLINICAL COMPETENCY POLICIES AND PROCEDURES

RECEIVER'S RESPONSE TO STATE PERSONNEL BOARD OBJECTIONS TO RECEIVER'S REPORT RE PHYSICIAN CLINICAL COMPETENCY DETERMINATIONS 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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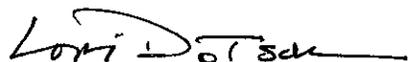
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23 I declare that I am employed in the offices of a member of the State Bar of this Court at
24 whose direction the service was made. I declare under penalty of perjury, under the laws of the
25 united State of America, that the above is true and correct.

Executed on June 27, 2008 at San Francisco, California.

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Lori Dotson