

ORIGINAL  
FILED  
FEB 17 2011  
COURT REPORTER  
RICHARD W. ...  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

1  
2  
3  
4  
5  
6 MARCIANO PLATA , et al., )  
7 Plaintiffs )  
8 v. )  
9 )  
10 ARNOLD SCHWARZENEGGER, )  
11 et al., )  
12 Defendants, )

NO. C01-1351-T.E.H.

**RECEIVER'S MOTION FOR ONE TIME  
LIMITED WAIVER OF CALIFORNIA  
GOVERNMENT CODE SECTION 19080.3**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 I

2 INTRODUCTION

3 In Fall 2004, the California Department of Corrections and Rehabilitation (“CDCR”)  
4 submitted a Budget Change Proposal (“BCP”) to fund 53.5 two-year “limited term” Pharmacy  
5 Technician positions. The positions were requested by CDCR to augment the inadequate staffing  
6 which existed in CDCR prison pharmacies. When submitting the proposal the CDCR indicated  
7 that it would conduct a statewide study during the two-year period to determine and justify the  
8 CDCR’s need for permanent positions. The request was approved by the Department of Finance  
9 and Legislature, and funding for 53.5 limited-term positions took effective January 1, 2005  
10 through December 31, 2006. *See* the Declaration of Yulanda Mynhier, attached to this motion as  
11 Exhibit 1.

12 The CDCR failed to even begin the statewide pharmacist study which it had promised to  
13 conduct. Indeed, rather than engaging in an appropriate study as promised, the CDCR requested  
14 \$200,000 for fiscal year 2007 to contract for a workload study to determine appropriate pharmacy  
15 staffing levels. In addition, the CDCR submitted a subsequent BCP to continue the funding for  
16 the 53.5 limited-term positions previously approved by Finance and the Legislature.

17 Funding for the study was included in the 2006/07 budget, and 53.5 Pharmacy Technician  
18 positions were again approved on a two-year limited-term basis ending June 30, 2008. Thus, the  
19 necessary additional Pharmacy Technician positions themselves have been approved. However,  
20 pursuant to California Government Code section 19080.3, the current incumbents who were  
21 hired into these positions must be terminated after two years of “limited term” service, regardless  
22 of whether funding for the position continues. For example, twenty-two of the current “limited-  
23 term” incumbents are scheduled to be automatically terminated beginning as soon as March 20,  
24 2007. *See* attachment to Exhibit 1.

25 Therefore, though State funding has been approved and is available, and even though the  
26 necessary pharmacy positions have been authorized, California law operates to prematurely  
27 terminate the incumbents. To avoid a worsening of the prison pharmacy crisis, Receiver Robert  
28

1 Sillen moves to waive the application of Government Code section 19080.3 on a one-time basis  
2 concerning these “limited term” positions only.

3 **II**

4 **STANDARD FOR WAIVING STATE LAW**

5 Pursuant to the Order Appointing Receiver (“Order”) filed February 14, 2006, the  
6 Receiver must make all reasonable efforts to exercise his powers in a manner consistent with  
7 California state laws, regulations and labor contracts. In the event, however:

8 that the Receiver finds that a state law, regulation, contract, or state action or  
9 inaction is clearly preventing the Receiver from developing or implementing a  
10 constitutionally adequate medical care system, or otherwise preventing the  
11 Receiver from carrying out his duties as set forth in this Order, and that other  
alternatives are inadequate, the Receiver shall request the Court to waive the state  
law or contractual requirement that is causing the impediment.

12 Order at 5:1-11.

13 **III.**

14 **FACTS SUPPORTING LIMITED WAIVER OF STATE LAW**

15 **A. CDCR Pharmacies Function In An Abject State of Disrepair.**

16 The Receiver assigned pharmacy reform as an important initial priority for two reasons:

17 First, pharmacy services are an integral part of the health care system where it is an  
18 “uncontested fact [is] that, on average, an inmate in one of California’s prisons needlessly dies  
19 every six to seven days due to constitutional deficiencies in the CDCR’s medical delivery  
20 system.” *See Findings of Fact and Conclusions of Law Re Appointment of Receiver*, filed  
21 October 3, 2005 at 1. Without adequate pharmacy services, it is impossible to address  
22 prisoner/patient medication needs, and therefore impossible to manage a constitutionally  
23 adequate chronic disease program.

24 Second, during the past five years, the CDCR pharmacy services have been audited by the  
25 State Auditor, Office of the Inspector General, Fox Systems, Inc., and by the Senate Advisory  
26  
27

1 Commission on Cost Control in State Government.<sup>1</sup> In every instance the auditing agency found  
2 serious problems with the management and control with dire fiscal consequences. CDCR,  
3 however, failed to address these problem and prison pharmacy services to class members  
4 continues to be constitutionally inadequate and California's taxpayers pay from \$40 - \$80 million  
5 for cost overruns, even after adjusting for pricing and population. See Reporters Transcript of  
6 Proceedings filed August 4, 2006 at 55:19-25; 56:1-11,; see also the Maxor National Pharmacy  
7 Services Corporation ("Maxor") June 2006 report entitled: "*An Analysis of the Crisis in the*  
8 *California Prison Pharmacy.*"

9 B. Staff Shortages Contribute To Current Pharmacy Shortfalls.

10 No one seriously disputes the fact that the CDCR pharmacy program is in a state of abject  
11 disrepair. Among the many deficiencies detailed in prior audits and confirmed by the 2006  
12 Maxor audit is the lack of human resources needed to support an effective program. This  
13 deficiency and others outlined in its analysis caused Maxor to conclude the CDCR pharmacy  
14 system does not meet minimal standards of patient care, provide inventory controls or ensure  
15 standardization. See Maxor's "*An Analysis of the Crisis in the California Prison Pharmacy*"  
16 June 2006 at 4-5 and 7. See also, Goal D at 41.

17 In response, the Receiver commenced an aggressive program toward pharmacy reform,  
18 including the following:

19 1. On September 12, 2006 the Receiver moved to waive State law to establish  
20 appropriate clinician salaries. In so doing the Receiver pointed out that according to CDCR,  
21 there exists a vacancy rate of 39% for Pharmacy Technicians. See *Receiver's Motion for a*  
22 *Waiver of State Law* at 5:9-14. The Receiver's motion was granted on October 17, 2006, and  
23

---

24 <sup>1</sup> See the California Department of Corrections Health Care Services Division Pharmacy Services  
25 Alternatives for Improvement, FOX, 2001; Containment of Drug Costs and Management of  
26 Medications for Adult Inmates Continue to Require Significant Improvements; Bureau of State  
27 Audits, 2002; Survey of California Department of Corrections Pharmaceutical Expenditures; Office  
28 of the Inspector General, 2003; 2006 Accountability Audit Pharmaceutical Expenditures, OIG, 2006;  
and Controlling the Costs of California's Prison Pharmacy Operations, California State Senate, 2002.

1 retroactive salary increases ranging from seven to seventeen percent took effect for Pharmacy  
2 Technicians.

3 2. The Receiver contracted with Maxor to implement its roadmap objectives which  
4 include maximizing the utilization of Pharmacy Technicians so that pharmacists are freed to  
5 perform much needed clinical functions. *See* "December 14, 2006 Agreement Between the  
6 California Prison Health Care Receivership Corporation and Maxor National Pharmacy Services  
7 Corporations for Pharmacy management Consulting Services."

8 Having taken two significant steps forward, however, the Receiver now faces the prospect  
9 of being forced backward due to a State law which mandates the termination of necessary and  
10 experienced State-employed Pharmacy Technicians.

11 C. Pharmacy Technicians Provide Services Necessary for Constitutionally  
12 Adequate Medical Care.

13 Pharmacy Technicians are essential in the routine processing and delivery of  
14 pharmaceuticals at each of the thirty-three CDCR prison facilities. Their normal duties include  
15 indispensable pharmacy services such as: stocking, ordering, counting and preparing  
16 prescriptions under the supervision of pharmacists. Without the services of the limited-term  
17 Pharmacy Technicians normal, daily services provided by the pharmacist would be  
18 correspondingly and severely impacted. Ultimately, prisoner/patient access to medications  
19 would be delayed due to decreased efficiencies in pharmacy operations, filling of prescriptions  
20 and routine materials management within the pharmacy itself. Until process and centralization of  
21 pharmaceutical services occurs, the loss of the temporary pharmacy technicians would create a  
22 void in pharmacy services that cannot be immediately overcome. *See* Declaration of Glenn G.  
23 Johnson, M.D. attached as Exhibit 2.

24 D. Existing Vacancies Combined with a Finite Candidate Group Virtually  
25 Guarantee the Limited-Term Positions At Issue in This Motion Will Remain  
26 Vacant If Incumbents Are Terminated.

27 Pursuant to the class specification adopted by the State Personnel Board pursuant to its  
28

1 authority prescribed by California Constitution, article VII, section 3(a) appointments are  
2 generally limited to individuals who possess a valid certificate of registration as a Pharmacy  
3 Technician issued by the State Board of Pharmacy set forth in Section 4115 and 4202 of the  
4 Business and Professions Code. *See* Declaration of Kathy Stigall attached as Exhibit 3.

5 California law generally requires that Pharmacy Technicians hired into civil service must  
6 first compete in a competitive examination and then be appointed from a list of successful  
7 competitors. Individuals on lists must indicate the conditions of employment they are willing to  
8 accept upon becoming a civil servant. Those conditions narrow the list available to hiring  
9 managers. These conditions include such things as: the geographic location where a candidate is  
10 willing to accept employment and whether a candidate is willing to accept temporary (limited  
11 term) employment. Exhibit 3.

12 There are a total of 139 authorized Pharmacy Technician positions and 13.4% are vacant.  
13 The Pharmacy Technician vacancy rate is due to a variety of factors such as the remote  
14 geographic locations of the institutions; the high cost of living in certain geographic areas; and,  
15 the fact that a majority of these positions only afford temporary, limited-term employment. In  
16 addition, there are only fifteen schools in the State of California that graduate Pharmacy  
17 Technicians which significantly limits the applicant pool. Attracting Pharmacy Technicians to  
18 work in a correctional institution is difficult given the competition from employers like Rite  
19 Aide, Sutter Health, and Kaiser. The working conditions in CDCR institutions also play a  
20 significant role in being able to effectively recruit Pharmacy Technicians. *See* Declaration of  
21 Katrina Hagan attached as Exhibit 4. Thus, finding qualified candidates willing to forego  
22 “permanent” positions with other employers in exchange for “limited-term” jobs in California’s  
23 adult institutions is exceedingly difficult and unlikely without an intervening gap in Pharmacy  
24 Technician services that are vital for prisoner/patient access to medication.

1 IV.

2 WAIVER IS APPROPRIATE

3 A. The Application of the Mandates of Government Code Section 19080.3  
4 Concerning the Existing Limited Term Pharmacy Tech Positions Will Clearly  
5 Prevent the Receiver From Implementing a Constitutional Adequate Pharmacy  
6 System.

7 Government Code section 19080.3 only authorizes limited-term for up to one (1) year  
8 unless extended by the State Personnel Board (“Board”) for an additional year. CDCR therefore  
9 faces the loss of thirty-one limited-term Pharmacy Technicians upon the 24-month mark  
10 commanding termination from these positions. Twenty-two must be terminated before funding  
11 for their position expires on June 30, 2008. Exhibit 1.

12 B. There Are No Other Adequate Alternatives.

13 Terminating the existing experienced limited-term Pharmacy Technicians is not an  
14 alternative at present time, it will merely serve to shift the performance of critical services to  
15 more costly registry employees or pharmacists who must remain free to perform higher level  
16 services (assuming contract staff are available for temporary employment at the prisons which  
17 currently employ limited-term pharmacy personnel).

18 Converting temporary Pharmacy Technicians to permanent employees is not a prudent  
19 alternative for three reasons. First, funding for these positions is limited-term. Second, the  
20 Receiver is on a path to automate and centralize the pharmacy system to gain advantages of scale  
21 related to efficient purchasing, inventory control, volume production, drug distribution,  
22 workforce utilization and increased safety. Third, it is expensive and time consuming to  
23 geographically relocate permanent employees or engage in layoffs should automation or  
24 centralization change the number of Pharmacy Technicians needed where the limited-term  
25 individuals are presently working.

26 C. The Receiver Seeks the Narrowest Possible Waiver.

27 The Receiver requests a waiver of Government Code section 19080.3 only insofar is it  
28

1 affects the existing pharmacy incumbents with appointments set to expire on June 30, 2008. This  
2 waiver will do no more than allow these limited-term employees to remain limited-term  
3 employees until the funding approved by the Legislature for their positions expires on June 30,  
4 2008.

5 D. State Officials Do Not Contest This Limited Waiver.

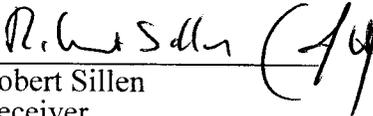
6 State officials have been consulted and have expressed no opposition to this limited  
7 waiver. See Declaration of Linda Buzzini attached as Exhibit 5.

8 V.

9 CONCLUSION

10 Based on the forgoing, the Receiver respectfully requests the Court grant this limited  
11 waiver of Government Code section 19080.3 to permit limited-term Pharmacy Technicians with  
12 appointments that are funded until June 30, 2008 to continue as limited-term employees until that  
13 date.

14  
15 Dated: April 5, 2007.

16  
17   
18 Robert Sillen  
19 Receiver

1 **PROOF OF SERVICE**

2 I, KRISTINA HECTOR, declare:

3 I am a resident of the County of Alameda, California; that I am over the age of eighteen  
4 (18) years of age and not a party to the within titled cause of action; that I am employed as the  
5 Inmate Patient Relations Manager in *Plata v. Schwarzenegger*.

6 On April 6, 2007 I served a copy of the attached document described as  
7 RECEIVER'S MOTION FOR ONE TIME LIMITED WAIVER OF CALIFORNIA  
8 GOVERNMENT CODE SECTION 19080.3 on the parties of record in said cause by sending a  
9 true and correct copy thereof by pdf and by United States Mail and addressed as follows:

10 BRIGID HANSON  
11 Director (A)  
12 Division of Correctional Health Care Services  
13 CDCR  
14 P.O. Box 942883  
15 Sacramento, CA 94102

16 CHARLES J. ANTONEN  
17 SAMANTHA D. TAMA  
18 ROCHELLE EAST  
19 Deputy Attorney General  
20 455 Golden Gate Ave., Suite 11000  
21 San Francisco, CA 94102

22 STEVEN FAMA  
23 DON SPECTER  
24 ALISON HARDY  
25 Prison Law Office  
26 General Delivery  
27 San Quentin, CA 94964-0001

28 PAUL MELLO  
JERROLD SCHAEFER  
Hanson Bridgett  
425 Market Street, 26th Floor  
San Francisco, CA 94105

MICHAEL BIEN  
Rosen, Bien & Galvan  
155 Montgomery Street, 8th Floor  
San Francisco, CA 94104

ANDREA LYNN HOCH  
Legal Affairs Secretary  
Office of the Governor  
Capitol Building  
Sacramento, CA 95814

ELISE ROSE  
Counsel  
State Personnel Board  
801 Capitol Mall  
Sacramento, CA 95814

1 J. MICHAEL KEATING, JR.  
285 Terrace Avenue  
2 Riverside, RI 02915

3 BRUCE SLAVIN  
General Counsel  
4 CDCR – Office of the Secretary  
P.O. Box 942883  
5 Sacramento, CA 94283

6 KATHLEEN KEESHEN  
Legal Affairs Division  
7 CDCR  
P.O. Box 942883  
8 Sacramento, CA 94283

9 RICHARD J. CHIVARO  
JOHN CHEN  
10 State Controller's Office  
300 Capitol Mall, Suite 518  
11 Sacramento, CA 95814

12 MOLLY ARNOLD  
Chief Counsel  
13 Department of Finance  
State Capitol, Room 1145  
14 Sacramento, CA 95814

15 LAURIE GIBERSON  
Staff Counsel  
16 Department of General Services  
707 Third Street, 7<sup>th</sup> Floor, Suite 7-330  
17 West Sacramento, CA 95605

18 MATTHEW CATE  
Inspector General  
19 Office of the Inspector General  
P.O. Box 348780  
20 Sacramento, CA 95834-8780

21 DONNA NEVILLE  
Senior Staff Counsel  
22 Bureau of State Audits  
555 Capitol Mall, Suite 300  
23 Sacramento, CA 95814

24 WARREN C. (CURT) STRACENER  
PAUL M. STARKEY  
25 Labor Relations Counsel  
Department of Personnel Administration  
26 Legal Division  
1515 "S" Street, North Building, Suite 400  
27 Sacramento, CA 95814-7243

28

1 GARY ROBINSON  
Executive Director  
2 UAPD  
1330 Broadway Street, Suite 730  
3 Oakland, CA 94612

4 YVONNE WALKER  
Vice President for Bargaining  
5 CSEA  
1108 "O" Street  
6 Sacramento, CA 95814

7 PAM MANWILLER  
Director of State Programs  
8 AFSME  
555 Capitol Mall, Suite 1225  
9 Sacramento, CA 95814

10 RICHARD TATUM  
CSSO State President  
11 CSSO  
1461 Ullrey Avenue  
12 Escalon, CA 95320

13 TIM BEHRENS  
President  
14 Association of California State Supervisors  
1108 "O" Street  
15 Sacramento, CA 95814

16 STUART DROWN  
Executive Director  
17 Little Hoover Commission  
925 "L" Street, Suite 805  
18 Sacramento, CA 95814

19 I declare under penalty of perjury under the laws of the State of California that the  
20 foregoing is true and correct. Executed on April 6, 2007 at San Francisco, California.

21   
22 \_\_\_\_\_  
23 Kristina Hector

24  
25  
26  
27  
28