

1 FUTTERMAN & DUPREE LLP
MARTIN H. DODD (104363)
2 160 Sansome Street, 17th Floor
San Francisco, California 94104
3 Telephone: (415) 399-3840
Facsimile: (415) 399-3838
4 martin@dfdlaw.com

5 *Attorneys for Receiver*
Robert Sillen

6
7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10
11 MARCIANO PLATA, et al.,

12 *Plaintiffs,*

13 v.

14 ARNOLD SCHWARZENEGGER, et al.,

15 *Defendants.*

Case No. C01-1351 TEH

**RECEIVER'S REPLY TO RESPONSE OF
STATE PERSONNEL BOARD TO
MASTER APPLICATION FOR ORDER
WAIVING STATE CONTRACTING
STATUTES, REGULATIONS AND
PROCEDURES, ETC.**

16
17
18
19 Receiver Robert Sillen submits this reply to the response filed by the State Personnel
20 Board ("SPB") to his Master Application For Order Waiving State Contracting Statutes,
21 Regulations and Procedures, and Approving Receiver's Substitute Procedure For Bidding and
22 Award of Contracts ("Master Waiver Application").

23 **INTRODUCTION**

24 The parties to this action, both plaintiffs and the defendant State agencies, have submitted
25 no opposition to the Master Waiver Application. The SPB has filed a Response which, in tone
26 and content, is largely a primer on its role in State government. The Receiver discerns, however,
27 the following points in SPB's Response that he will address in this reply.

1 The SPB's operative premise seems to be that the Receiver's request for a waiver of
2 California Government Code § 19130 and California Public Contracts Code § 10337 is at once
3 too narrow and too broad. *Compare* SPB Response, pp. 2:22-24 and 7:9-14 *with* pp. 5:11-6:3.
4 From that premise, SPB suggests that the waiver should be made either narrower or broader still.

5 Thus, the SPB contends that the "least intrusive" means to achieve the Receiver's goals
6 would be to require the Receiver to comply with both Government Code § 19130 and Public
7 Contracts Code § 10337, and for this Court to adopt a procedure that expedites SPB review of
8 personal services contracts awarded by the Receiver if an employee organization should
9 challenge such contract. *Id.*, p. 6:7-11. Alternatively, the SPB suggests that the Court waive all
10 the statutes and regulations, as well as the applicable provisions of the California Constitution,
11 governing the SPB's role in reviewing personal services contracts. *Id.*, p. 7:9-14.

12 Finally, in either event, SPB asks this Court for an advisory opinion "as to the SPB's role
13 in the process" and as to "what will happen to contracts formed pursuant to any state-law waivers
14 at the termination of the receivership. Ideally, all unjustified contracts would be terminated or
15 transitioned at the end of the receivership and civil servants would be hired to continue the
16 functions performed by the contractors." *Id.*, p. 7:15-19.

17 Subject to the provisos indicated below, and based on the SPB's representation that its
18 jurisdiction is limited to adjudicating challenges to personal services contracts brought before it,
19 the Receiver will simply withdraw his request for a waiver of Government Code § 19130 and
20 Public Contracts Code § 10337.

21 ARGUMENT

22 A. The Concerns Expressed In SPB's Response Are Largely Hypothetical.

23 While it is somewhat puzzling that the SPB would simultaneously argue that it should
24 retain its jurisdiction completely or lose it altogether, the Receiver notes only that the SPB's
25 apparent jitters about its "role in the process" are, to a great extent, based on hypothetical
26 concerns. The SPB takes up review of personal services contracts only upon a request by an
27 employee organization. *See* Gov't Code §§ 19130-19132; Public Contracts Code § 10337; *In re*
28 *California State Employee Ass'n*, SPB Decision PSC No. 04-01 and 04-02 (June 8, 2004). The

1 SPB receives formal notice only of those personal services contracts that are “cost savings
2 contracts” within the meaning of Government Code § 19130(a) and the SPB, in turn, provides
3 notice thereof to affected employee organizations. Cal. Gov’t Code § 19131. However, the vast
4 majority of personal services contracts awarded by State agencies – at least 95% according to the
5 Department of General Services – are justified under one or more of the 10 criteria listed in
6 Section 19130(b). Declaration of John Hagar (“Hagar Decl.”), filed herewith, ¶ 4. These
7 contracts are awarded without any notice of any kind to the SPB. In practice, therefore, SPB
8 plays little “role in the process.” Furthermore, to the extent the SPB has had a “role in the
9 process” prior to the Receiver’s appointment, it has been to facilitate CDCR’s virtual campaign
10 to privatize the prison health care system through out-sourcing. *Id.*, ¶¶ 6-7. *See In re California*
11 *State Employees Ass’n*, SPB Decision PSC No. 03-02 (August 5, 2003) (attached as Exhibit 1 to
12 Hagar Decl.).

13 Significantly, no employee organization has complained that the Receiver is awarding
14 contracts for services that State employees could otherwise perform. This is not surprising since
15 one of the most significant failings in the prison health care system has been the extraordinarily
16 low salaries and extraordinarily high vacancy rates among the clinical staff; the Receiver – unlike
17 State agencies previously – has undertaken a substantial program to raise salaries and to hire
18 additional, competent staff in the prisons who are or will become permanent State civil service
19 employees. Hagar Decl., ¶ 8.¹ In any event, as the SPB acknowledges, it is probable that the
20 Receiver, like CDCR and other State agencies, could justify future personal services contracts
21 under Government Code § 10130(b), *i.e.*, without any notice to the SPB. Thus, the SPB is
22 concerned about issues that are largely theoretical.

23 Notably however, the Receiver will do substantially more in practice than the law
24 requires of State agencies. The Receiver will list all personal services contracts he has awarded
25 in his Quarterly Reports so that any employee organization that wishes to bring any such contract
26 to the attention of the SPB may do so.

27 ¹ It is, therefore, particularly ironic that the SPB expresses concern over the impact of the Receiver’s motion on the
28 law and procedure governing review of personal services contacts. It is the *Receiver* who has hired “hundreds of
additional full-time permanent” State nurses to staff the prisons. Hagar Decl., ¶ 8.

1 **B. The Receiver Is Willing To Withdraw His Request For A Waiver Of**
2 **Government Code § 19130 And Public Contracts Code § 10337 Provided He**
3 **Is Not Subject To Contract Pre-approval By The SPB.**

4 As the Receiver has endeavored to make clear, in seeking a waiver of the two statutes at
5 issue, he had no intention of preventing the SPB from reviewing personal services contracts upon
6 request by an employee organization. See Receiver's Opposition to Request by State Personnel
7 Board for Additional Time to Respond, filed herein on May 7, 2007, p. 3.² The Receiver's goal
8 is to avoid delay in the execution of contracts necessary to critical patient care by having to seek
9 SPB's pre-approval of such contracts.

10 The Receiver does not read Government Code §§ 19130-19132 or Public Contracts Code
11 § 10337 to require pre-execution approval by SPB and does not understand the SPB in its
12 Response to be asserting a right to such pre-execution approval. Instead, the Receiver
13 understands that the SPB's process is not to take any action with respect to a contract unless and
14 until an employee organization brings a claim before it. SPB Response, p. 2:14. With that
15 understanding, the Receiver is comfortable withdrawing his request for a waiver of Government
16 Code § 19130 and Public Contracts Code § 10337.³

17 **C. SPB's Request For An Advisory Opinion Is Moot And Inappropriate In Any**
18 **Event.**

19 The Receiver assumes that the withdrawal of his request for a waiver renders moot the
20 SPB's request that this Court issue an advisory opinion on "what will happen with contracts
21 formed pursuant to state-law waivers" that are slated to continue post-receivership. To the extent
22 that the SPB's request is *not* moot, however, the Court should deny the request. An advisory
23 opinion of the sort requested by SPB is inappropriate. *Calderon v. Ashmus*, 523 U.S. 740, 747
24 (1998). It is all the more inappropriate here because, as this Court is acutely aware, the

25
26 ² Nor, as the Receiver emphasizes in his Reply to the SPB's Response to the Receiver's Motion for a Waiver
27 regarding Receiver Career Executive Assignments, has he ever been opposed to working with the State personnel
28 agencies when seeking to develop appropriate job descriptions, salary ranges and the like for clinical staff to be hired
29 by the State.

30 ³ Conversely, to the extent that the SPB does assert that any of the statutes provide it the right to review and pre-
31 approve the Receiver's contracts, then the Receiver *is* seeking a waiver of such requirement.

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 May 25, 2007, I served a copy of the following document(s):

RECEIVER'S REPLY TO RESPONSE OF STATE PERSONNEL BOARD TO MASTER APPLICATION FOR ORDER WAIVING STATE CONTRACTING STATUTES, REGULATIONS AND PROCEDURES, ETC.

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 HAND DELIVERY: I caused such envelope(s) to be served by hand to the address(es) designated below.

X BY MAIL: I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated. 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.

___ BY OVERNIGHT COURIER SERVICE: I caused such envelope(s) to be delivered via overnight courier service to the addressee(s) designated.

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

Andrea Lynn Hoch
Legal Affairs Secretary
Office of the Governor
Capitol Building
Sacramento, CA 95814

Brigid Hanson
Director (A)
Division of Correctional
Health Care Services
CDCR
P.O. Box 942883
Sacramento, CA 94283-0001

Rochelle East
Deputy Attorney General
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004

J. Michael Keating, Jr.
285 Terrace Avenue
Riverside, RI 02915

- 1 Bruce Slavin
General Counsel
- 2 CDCR – Office of the Secretary
P.O. Box 942883
- 3 Sacramento, CA 94283-0001

- 4 Richard J. Chivaro
John Chen
- 5 State Controller
300 Capitol Mall, Suite 518
- 6 Sacramento, CA 95814

- 7 Laurie Giberson
Staff Counsel
- 8 Department of General Services
707 Third St., 7th Fl., Ste. 7-330
- 9 West Sacramento, CA 95605

- 10 Donna Neville
Senior Staff Counsel
- 11 Bureau of State Audits
555 Capitol Mall, Suite 300
- 12 Sacramento, CA 95814
- 13

- 14 Gary Robinson
Executive Director
- 15 UAPD
1330 Broadway Blvd., Ste. 730
- 16 Oakland, CA 94612

- 17 Pam Manwiller
Director of State Programs
- 18 AFSME
555 Capitol Mall, Suite 1225
- 19 Sacramento, CA 95814

- 20 Tim Behrens
President
- 21 Association of California State Supervisors
1108 "O" Street
- 22 Sacramento, CA 95814

- 23 Stuart Drown
Executive Director
- 24 Little Hoover Commission
925 L Street, Suite 805
- 25 Sacramento, CA 95814
- 26
- 27
- 28

- Kathleen Keeshen
Legal Affairs Division
California Department of Corrections
P.O. Box 942883
Sacramento, CA 94283

- Molly Arnold
Chief Counsel, Dept. of Finance
State Capitol, Room 1145
Sacramento, CA 95814

- Matthew Cate
Inspector General
Office of the Inspector General
P.O. Box 348780
Sacramento, CA 95834-8780

- Warren C. (Curt) Stracener
Paul M. Starkey
Labor Relations Counsel
Department of Personnel Administration
Legal Division
1515 "S" St., North Building, Ste. 400
Sacramento, CA 95814-7243

- Yvonne Walker
Vice President for Bargaining
SEIU
1108 "O" Street
Sacramento, CA 95814

- Richard Tatum
CSSO State President
CSSO
1461 Ullrey Avenue
Escalon, CA 95320

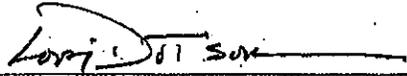
- Elise Rose
Chief Counsel
State Personnel Board
801 Capital Mall
Sacramento, CA 95814

- Michael Bien
Rosen, Bien & Asaro
155 Montgomery Street, 8th Floor
San Francisco, CA 94104

1 Miguel A. Neri
2 Deputy Attorney General
3 1515 Clay Street, Suite 2000
P.O. Box 70550
4 Oakland, CA 94612-0550

John Hagar
Judges Reading Room
Law Library
450 Golden Gate Ave., 18th Floor
San Francisco, CA 94102

5 Dated: May 25, 2007


6 Lori Dotson

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28