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2
3 **IN THE UNITED STATES DISTRICT COURT**
4 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

5 MARCIANO PLATA , et al.,)

6 Plaintiffs)

7
8 v.)

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10 ARNOLD SCHWARZENEGGER,)
11 et al.,)

12 Defendants,)
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NO. C01-1351-T.E.H.

**RECEIVER'S MOTION FOR A
WAIVER OF STATE LAW**

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1 I

2 INTRODUCTION

3 On February 14, 2006, the Court ordered the appointment of Robert Sillen as the
4 Receiver to take control over the delivery of medical services for California prisoners confined
5 by the California Department of Corrections and Rehabilitation (“CDCR”). That order vested
6 the Receiver with the duty to control, oversee, supervise, and direct all administrative, personnel,
7 financial, accounting, contractual, legal and other operational functions of the medical delivery
8 component of the CDCR. Pursuant to that order the Receiver must make all reasonable efforts
9 to exercise his powers in a manner consistent with California state laws, regulations and labor
10 contracts. In the event, however:

11 that the Receiver finds that a state law, regulation, contract, or state action or
12 inaction is clearly preventing the Receiver from developing or implementing a
13 constitutionally adequate medical health care system, or otherwise preventing the
14 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.

15 Order at p 5, paragraph II.D., lines 1-11.

16 The crisis with clinical staffing within California’s prisons, previously reported by the
17 Court and the Court’s Correctional Expert, continues to disrupt medical care operations. To a
18 large degree the crisis has been created by the long-term and grossly inadequate salaries offered
19 by the State of California to clinical personnel who seek employment in its prisons.
20 Nevertheless, the State is either unable or unwilling to correct this situation. As explained
21 below, the Receiver cannot begin the implementation of a constitutionally adequate medical care
22 system within California’s prisons without the appropriate number and quality of clinical
23 personnel including, for example, physicians, mid-level practitioners, nurses, and pharmacists.

24 Accordingly, the Receiver motions the Court for a waiver of state laws and regulations in
25 order to provide salary incentives necessary to achieve the purpose of the Receivership. The
26 waiver sought by the Receiver has been narrowly crafted, as discussed in detail below.

27 Furthermore, both plaintiffs and defendants, as well as the affected labor organizations, indicate

1 that they do not oppose this waiver.

2 **II**

3 **BACKGROUND**

4 The serious and negative impact that chronic shortages of clinical personnel has had on
5 inmate/patient care in California's prisons is not in dispute. See, e.g. *Findings of Fact and*
6 *Conclusions of Law Re Appointment of Receiver* filed October 3, 2005 16:22-24 [RT 579:11-
7 13]). Nor is it disputed that, despite testimony concerning crisis levels of staffing shortages in
8 May and June of 2005, by November 2005 the staffing crisis in California's prisons actually
9 worsened. See *Correctional Expert's Report re Clinical Staff* filed November 14, 2005.

10 Chief among the expert's findings was that CDCR's failure to hire and retain adequate
11 health care providers was *inter alia* due to inaction by the Department of Personnel
12 Administration ("DPA") and Department of Finance ("DOF"), and cumbersome, bureaucratic
13 hiring processes. For example, the Correctional Expert found registered nurse and physician
14 salaries were inadequate for purposes of recruitment and retention. He also concluded that salary
15 compaction between clinicians, clinical supervisors and clinical managers created a vacuum in
16 clinical leadership.¹

17 As emphasized by the Court at the November 28, 2005 hearing, the Correctional Expert's
18 Report powerfully underscored the depth of the CDCR medical care crisis. Instead of voicing an
19 aggressive commitment to the reforms recommended by the Correctional Expert, however,
20 defendants (including the Governor, CDCR correctional officials, and CDCR health care
21 officials) were content to invoke bureaucratic red tape and 'business as usual' procedures as
22 roadblocks.² To prevent Defendants from "twiddl[ing] their collective thumbs" until the
23 Receiver was appointed, the Court determined that it was necessary to adopt measures
24 recommended by the Correctional Expert to avoid a further deterioration of services. The Court,

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¹ *Correctional Expert's Report re Clinical Staffing, supra*, pp. 12-13.

26 ² *Order re Interim Remedies Relating to Clinical Staffing* filed December 1, 2005, pp. 1-2.

1 therefore, ordered interim salary differentials for physicians, registered nurses, mid-level
2 practitioners and certain supervisory personnel. When doing so the Court noted these pay
3 differentials were only intended to address the then-current crisis and once appointed, the
4 Receiver would have the option of modifying the differentials in response to future
5 circumstances or making other structural changes with regard to salaries as may be appropriate.³

6 III

7 **FACTS SUPPORTING THE NEED FOR SALARY INCREASES**

8 A. Introduction.

9 The Receiver and his staff have, over a period of several months, engaged in an
10 exhaustive survey concerning the adequacy of clinical staffing within California's prison medical
11 system, both inside the prisons and within the CDCR Central Office in Sacramento. The Office
12 of the Receiver also carefully reviewed the sufficiency of the compensation provided to clinical
13 personnel essential to the adequate delivery of medical services in CDCR institutions. This
14 review included an evaluation of salary surveys and comparisons to other large California health
15 care providers. Based on this evaluation, the Receiver makes the following findings:

16 1. Staffing levels in CDCR institutions are so inadequate that the remedial
17 programs necessary to bring prison medical care up to constitutional levels clearly
18 cannot begin to be implemented without significant increases in clinical
19 personnel.

20 2. The programs and services needed to provide constitutionally adequate
21 care to prisoner/patients with chronic diseases, health problems that involve both
22 medical and mental health issues, and long-term and aging issues clearly cannot
23 begin to be implemented until California prisons stop relying upon short-term
24 registry personnel and commence the hiring of adequate numbers of permanent
25 full time State employees.

26 3. The salaries offered by the State to applicants for clinical positions in

27 ³ *Order re Interim Remedies Relating to Clinical Staffing*, supra, p. 6, fn. 1.

1 its prisons are so low that the prison system is unable to hire and retain an
2 adequate number of qualified clinical personnel at all clinical levels, including
3 physicians, mid-level practitioners, registered nurses, licensed vocational nurses,
4 pharmacists and other necessary professions. To remedy this problem, salary
5 increases are necessary as an initial step to begin to correct the health care delivery
6 crisis in California's prisons.

7 B. The Crisis Level of Shortages of Clinical Personnel Continues.

8 1. *Physician/Mid-Level Practitioner Primary Care Providers.*

9 In response to the Correctional Expert's Report re Clinical Staffing, defendants took the
10 position that institutions with physician vacancy rates above 20% are in crisis.⁴ As of July 31,
11 2006, CDCR reports that 20% of the primary care positions statewide were vacant. At six (6)
12 prisons that rate climbs to more than 30%. At two (2) prisons it is more than 50%. At one prison
13 the vacancy rate is 90%. See CDCR report entitled "Primary Care Providers: Vacancy Rate by
14 Institution," attached as Exhibit 1.

15 To some degree these statistics paint a picture of care that is more positive on paper than
16 in reality. For example, the CDCR further reports that the vacancy rate during fiscal year
17 2005/2006 prompted the use of registry personnel for 128,216 hours of primary care at a cost of
18 more than \$17 million. See CDCR report entitled "Registry by Speciality for Impacted
19 Classifications" attached as Exhibit 2. However, as explained below, the use of short term
20 registry personnel does not provide an adequate system to address the need for carefully planned
21 and coordinated care concerning the complicated, long-term health care needs for a significant
22 percentage of prisoner/patients

23 2. *Nurses.*

24 In November 2005, the Correctional Expert's Report re Clinical Staffing found the
25 vacancy rate for registered nurses was 39%. By March 2006, CDCR reports that the vacancy rate

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27 ⁴ *Correctional Expert's Report*, supra, 9: 4-5.

1 dropped to 15% in response to the December 2005 Order (which increased nurse salaries by
2 approximately 18%). However, since March 2006 there has been no decline in the vacancy rate,
3 suggesting the need for further increases. See CDCR report entitled "Summary of Clinical
4 Hiring Result" attached as Exhibit 3. This is particularly so for the Bay area prisons⁵ where
5 CDCR reports the registered nurse vacancy rate was 51% as recently as July 21, 2006. Also
6 noteworthy is the fact that on July 1, 2006 CDCR reports indicate that there were 167 vacant
7 registered nurse positions. By the end of the month, that number rose to 182 vacancies⁶.

8 3. *Pharmacists.*

9 As detailed in the Maxor Report (attached as an exhibit to the Receiver's *First Bi-*
10 *Monthly Report*), the California prison pharmacy system is in crisis, providing inadequate patient
11 care while at the same time wasting millions of dollars of taxpayer resources each year. One of
12 the reasons for the pharmacy melt-down is a system wide staffing shortage. For example, CDCR
13 informs the Receiver that thirty-nine (39%) percent of the Pharmacy Technician positions were
14 vacant on July 21, 2006. Forty-two (42%) of the Pharmacist II positions were vacant as of that
15 date, as well as forty-two (42%) percent of the Pharmacist I positions.

16 4. *Other Critical Positions.*

17 CDCR reports indicate that 26% of the medical transcriber positions, 26% of the medical
18 records technician positions, 44% of the Radiological Technician positions, and 63% of the
19 Clinical Dietician positions remain vacant.

20 C. Constitutionally Adequate Medical Care in California's Prisons Cannot be 21 Delivered Without Continuity of Care.

22 Continuity of care is a fundamental element of a constitutionally adequate prison medical
23 delivery system particularly given California's prisoner/patient demographics. California's
24 prisons confine tens of thousands of "Lifers," aged prisoners, prisoners with long-term and

25 ⁵ Throughout this Request for Waiver, the term "Bay area" refers to San Quentin State Prison,
26 Salinas Valley State Prison, and the Correctional Training Facility at Soledad.

27 ⁶ Some of the increase was due to resignations and some due to establishing new positions.

1 chronic diseases, and prisoners with inter-related medical and mental health problems.
2 Correctional health care in the California system cannot be as safely or effectively provided by
3 those who do not have an on-going relationship with their patients and colleagues. A continuous
4 provider-patient relationship must be the cornerstone of health care, for without it
5 communication suffers, information is lost, trust is lessened, expertise is squandered and
6 outcomes are deficient. To provide the requisite continuity the prisons must be staffed with
7 permanent State clinicians rather than short term registry personnel. See the Declarations of Dr.
8 Terry Hill and R.N. Jayne Robinson, attached as Exhibits 4 and 5.

9 D. Salary Increases Are Necessary.

10 Neither party disputes the fact that salaries presently offered by the State to prison
11 physicians, mid-level practitioners, registered nurses, and licensed vocational nurses are not
12 adequate enough to attract the number and quality of clinicians needed to bring the health care in
13 California's correctional institutions up to constitutional standards. Testimony concerning salary
14 inadequacies concerning these clinical positions was presented to the Court during the hearings
15 of 2005, and additional evidence, including salary surveys which documented the low level of
16 clinical pay offered by the CDCR, was submitted in the *Correctional Expert's Report re Clinical*
17 *Staff* filed November 14, 2005.

18 These salary inadequacies continue, and as a result tens of millions of dollars are spent by
19 the CDCR each year for private registries to bring into the prisons clinical personnel who are
20 paid at hourly rates far above the rates provided to State employees. For example, during fiscal
21 year 2005/06 CDCR reports having acquired almost 406,000 hours of work from registry nurses
22 at a cost of approximately \$27 million. The CDCR paid approximately \$67 per hour for the
23 contract nurses (Exhibit 2) while paying about \$38⁷ per hour to its civil service nurses.

24 While the evidence at the hearings did not focus on all positions for which the Receiver
25 seeks salary increases, the Receiver has found that the same salary inadequacies which prevent the

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27 ⁷ With benefits this amount increases to approximately \$49 per hour

1 California prison system from hiring doctors and nurses also negatively impacts on the hiring of
2 other crucial professions. For example:

3 1. *Pharmacists.*

4 The State set the *maximum* salary for Pharmacist I at \$5,748 even though its own salary
5 survey reveals the statewide *median* salary for pharmacists in the public sector is 43% higher,
6 and *median* public sector salary in the Bay Area is 54% higher. Despite the vacancies and
7 despite the crisis, the collective bargaining agreement negotiated by the Department of Personnel
8 Administration (DPA) on behalf of the Governor only increases the Pharmacist I salaries by 3.5%
9 effective July 1, 2006.

10 2. *Clinical Dieticians.*

11 In similar fashion, the American Dietetic Association's 2005 compensation survey
12 indicates the California-statewide hourly rate at the 50th percentile is \$28.50 while the State only
13 pays a *maximum* of \$22.28 per hour. Annualized this means working for CDCR results in a loss
14 of more than \$12, 937 every year. The State's newly negotiated labor agreement only raises the
15 Clinical Dieticians' maximum annual salary by \$1,620 effective July 1, 2006.

16 E. The Salary Increases Proposed by the Receiver Are Reasonable and Necessary to
17 Begin the Process of Bringing the Health Care in California's Prisons Up to
18 Constitutional Standards.

19 The proposed salary ranges recommended by the Receiver are set forth in Exhibit 6. The
20 increases are essentially based on the salary ranges offered by the State through the University of
21 California health care system, with limited geographical adjustments to address the present
22 difficulties hiring in the Bay Area and for the more remote Southern institutions. These increases
23 represent a reasonable and necessary first step toward bringing the health care in California's
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1 prisons up to constitutional standards.^{8 9}

2 As explained below, prior to filing this motion the Receiver and his staff provided
3 documentation of the proposed increases to the State's control agencies and the Office of the
4 Governor for review, as well as to counsel and involved labor organizations. No party has
5 objected to the specifics of the proposed recommended increases.

6 It should be noted that filling clinical vacancies with full time permanent State employees
7 will offset the need for temporary employees acquired by contract through private registries. This
8 is beneficial for at least three reasons.

9 First, CDCR reports the total cost for contract and registry personnel during fiscal year
10 2005/06 was approximately \$90 million. Replacing contract personnel with full time State
11 employees should reduce this figure considerably.

12 Second, lessening the need for temporary employees will minimize or eliminate the
13 friction between permanent and temporary employees due to the difference in salaries. For
14 example, CDCR reports paying approximately \$49 per hour for contract dieticians and \$22.28 to
15 its permanent employees. CDCR reports paying an *average* of \$170 per hour for contract
16 primary care providers at the same time its permanent physicians make approximately \$80 per
17 hour.

18 Third, replacing temporary employees with a permanent staff results in improved
19 continuity of care, which, as explained above, is a fundamental element of a constitutionally
20 adequate prison medical delivery system.

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24 ⁸ The salary ranges proposed by the Receiver have also been designed to eliminate the
25 cumbersome, confusing, and at times inconsistent recruitment and retention differentials currently
26 provided for certain clinical positions and for certain prisons. Thus, on the effective date of the new
salaries, existing differentials will cease.

27 ⁹ With one exception, the Receiver intends the salary modifications to have an effective date of
28 September 1, 2006.

1 IV.

2 THE RECEIVER HAS MADE ALL REASONABLE EFFORTS TO
3 EXCISE HIS POWER CONSISTENT WITH STATE LAW
4 CONCERNING THIS MOTION FOR WAIVER

5 A. Introduction.

6 Before filing this motion, the Receiver and his staff engaged in several weeks of
7 negotiations and numerous unsuccessful attempts to effectuate salary increases and structural
8 change through Defendants.

9 B. The Office of the Receiver's Communications with DPA.

10 Salary setting by the Governor and Legislature is generally delegated by law to the DPA.
11 This California control agency is vested with authority to establish and adjust salary ranges
12 subject to certain restrictions and considerations.¹⁰ DPA may establish more than one salary
13 range, rate or method of compensation for a classification given unusual working conditions and
14 prevailing rates for comparable services in the public and private sector.¹¹ To the extent that these
15 measures impact rank-and-file employees they must be bargained¹² unless as observed by DPA
16 there is an emergency or the unions waive their right to bargain.

17 Therefore, on August 8, 2006, the Receiver's attorneys Jared Goldman and Linda Buzzini
18 met with DPA Director David Gilb. Director Gilb was provided with a copy of salaries
19 determined necessary by the Receiver, effective September 1, 2006. At the meeting DPA was
20 asked whether it would effectuate the salary adjustments deemed necessary by the Receiver. In
21 addition, DPA was asked to determine whether the State had the authority to raise salaries, and if
22 so, whether the State would exercise that authority. These issues were again discussed by DPA
23 representatives on August 14, 2006, at which time the Governor's representative, Louis Mauro,

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25 ¹⁰ Gov. Code section 19826, 19829.

26 ¹¹ Gov. Code section 19829.

27 ¹² Gov. Code section 3512 et seq.

1 was also present.

2 The DPA responded in writing concerning the Receiver's request. See Paul M. Starkey's
3 letter of August 15, 2006 attached as Exhibit 7. DPA concluded that a court order was
4 "appropriate and necessary to remove statutory barriers that prevent DPA from implementing the
5 proposed salary increases" for the following reasons:

6 1. DPA is required to bargain salary increases with the unions, unless their right to
7 bargain is waived or there is an emergency, citing California Gov. Code § 19816; 3512 et seq.

8 2. The State's classification system requires that all positions with similar characteristics
9 be assigned to the same classification. DPA emphasizes that when assigning positions to a
10 particular classification it must do so where the same schedule of compensation can be made to
11 apply with equity to each similarly classified position, citing California Gov. Code § 19818.

12 3. DPA is required to administer a statewide pay plan based on the principle that like
13 salaries shall be paid for comparable duties and responsibilities, citing California Government
14 Code section 19826, subdivision (a).¹³

15 C. The Office of the Receiver's Communications with the Office of the Governor.

16 On August 20, 2006, the Receiver's Chief of Staff, John Hagar, sent a letter to the
17 Governor's Office attempting to determine whether it concurs with DPA's analysis and
18 conclusions (Exhibit 8). The Governor's Legal Affairs Secretary, Andrea Hoch replied on
19 August 25, 2006 (Exhibit 9). In the reply, the Office of the Governor concluded as follows:

20 1. Absent a statutory waiver by the Federal court, DPA is legally obligated to meet and
21 confer [bargain] with the unions.

22 2. The Receiver correctly observes that DPA may establish more than one salary range or
23 rate or method of compensation within a classification given unusual working conditions, hours
24 of work and where necessary to meet provisions of State law, or prevailing rates for comparable

25 ¹³ DPA also provided the Receiver with a list of additional statutes it believes are implicated by
26 the Receiver's request. The Office of the Receiver finds, however, that virtually all of the statutes
27 cited are irrelevant to this motion. For example, DPA cites all laws pertaining to itself irrespective
28 of the fact that most of them do not pertain to salary setting.

1 services in public and private business. *See* Government Code section 19829, subdivision (a).

2 3. While case law has permitted some flexibility, the principle of like pay for like work
3 as set forth in Government Code section 19826 cannot be ignored in the absence of a statutory
4 waiver by the Court.

5 The Governor's Secretary for Legal Affairs concludes that while it appears as if the State
6 has the authority to implement the salary increases, she cannot say for certain that it would
7 implement the proposed increases for represented employees because doing so is dependent on
8 variables such as successful negotiations and a possible need for Legislative ratification of any
9 agreement reached with the unions which exceeds \$250,000. *See* Government Code section
10 3517.63.¹⁴

11 **V.**

12 **STATE LAW OR INACTION BY DEFENDANTS IS CLEARLY PREVENTING THE**
13 **RECEIVER FROM CARRYING OUT HIS DUTIES**

14 **A. Introduction.**

15 Defendants' response to the Receiver's request that they implement the salary increases
16 necessary to begin to implement the programs necessary to bring the medical care in California's
17 prisons up to constitutional standards supports a finding that either:

18 (1) California law prevents the State from implementing salary increases and structural
19 change in the salary program in order to carry out the purpose of the Receivership (as suggested
20 by State officials) or;

21 (2) Defendants' inaction is clearly preventing the Receiver from developing a
22 constitutionally adequate medical care system by their failure to provide adequate salaries for
23 prison clinical personnel.

24 The Order Appointing Receiver establishes either as grounds for seeking judicial

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26 ¹⁴ The Governor's Office did not comment about the Receiver's proposed increases for
27 supervisors and managers who are not afforded the right to collectively bargain agreements with the
28 State.

1 intervention. It also provides for waiving State requirements causing the impediment, and it
2 provides for contempt proceedings regarding Defendant and all persons in concert and
3 participation with Defendant who fail to fully cooperate with the Receiver in the discharge of his
4 duties.¹⁵

5 B. The Receiver Questions Whether it is State Law or State Inaction Which Prevents the
6 Necessary Salary Increases.

7 As discussed above, both the Office of the Governor and the DPA take the position that
8 in the absence of a Court ordered waiver of the law, California's statutory scheme requires DPA
9 to bargain salary increases and submit any of them which exceed \$250,000 to the Legislature for
10 potential ratification. The Receiver, however, remains skeptical about whether it is State law
11 rather than inaction on the part of the State which is preventing him from carrying out his duties.
12 The Receiver's uncertainty stems from the following.

13 First, Government Code section 3517.63 requires DPA to submit labor agreements for
14 \$250,000 or more to the Legislature if the funds are not already contained in the Budget Act.

15 The Receiver questions the relevance of this section for two reasons:

- 16 1. The Order Appointing Receiver states the Receiver shall determine the annual CDCR
17 medical health care budget.¹⁶
- 18 2. The Receiver has been allocated \$100 million in budgeted funds which the Receiver
19 intends to use for the salary increases.

20 Second, Government Code section 3516.5 relieves DPA of the duty to bargain before
21 making a change when there is an emergency. In the Order re Interim Remedies Relating to
22 Clinical Staffing, the Court determined there was a staffing crisis that supported the need for pay
23 differentials. The State has not provided any evidence which suggests that the crisis has abated;
24 to the contrary, the State appears to agree that the crisis is continuing. On the other hand, the
25 shortage of clinicians in the prisons and the resulting failure to deliver adequate medical care in

26 ¹⁵ *Order Appointing Receiver* at pages 5 and 8.

27 ¹⁶ *Order Appointing Receiver*, p. 3.

1 the CDCR, while a crisis, may not be, from the State's perspective, the type of emergency which
2 activates the relief provision of section 3516.5.

3 Third, even though the unions may waive their right to bargain, DPA has not asked
4 whether they are willing to do so. DPA's failure is significant because the Service Employees
5 International Union which represents various medical classifications (including nurses) has
6 agreed to a one time waiver of statutory, regulatory or contractual requirements relied upon by
7 DPA to block the Receiver's efforts to implement the agreed upon salary increases (*see* Exhibit
8 10), the American Federation of State, County and Municipal Employees which represents
9 pharmacy staff and dieticians supports the salary increases sought by the Receiver (Exhibit 11),
10 as does the Union of American Physicians and Dentists which represent physicians (Exhibit 12),
11 the California Correctional Supervisors Organization which represents supervising nurses
12 (Exhibit 13), and the Association of California State Supervisors (Exhibit 14).

13 For all of these reasons the Receiver questions whether California law is an actual
14 impediment requiring waiver, as Defendants suggest, or whether the defendants choose not to
15 exercise their authority under the law to increase salaries as requested by the Receiver.

16 In raising this uncertainty, however, the Receiver emphasizes that he does not interpret
17 defendants' reluctance to implement the salary increases as a demonstration of bad faith
18 cooperation or interference which calls for the sanctions described in the Order Appointing
19 Receiver at page 8, paragraph VI. Concerning this issue defendants have responded in a timely
20 manner to Office of the Receiver inquiries, they made diligent efforts to assure coordinated
21 responses from California's control agencies, and most important, they have indicated in their
22 correspondence and at the meetings that they do not oppose the overall increases, nor the
23 specifics of the Receiver's proposal. For example, see Cabinet Secretary Fred Aguiar's letter of
24 August 30, 2006 stating, "[i]f such an order were to be drafted and issued by the Court, the
25 administration stands ready to offer its assistance, technical and otherwise, to successfully
26 implement the order" (Exhibit 15 at page 1). In essence, defendants appear to seek protections
27 that may be afforded them by a Federal Court remedial order. Therefore, in an abundance of
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1 caution, the Receiver has decided to work with defendants and pursue a waiver of the law.

2 **VI.**

3 **REQUEST FOR WAIVER**

4 A. Introduction.

5 The Receiver requests a narrowly drawn waiver of California law and a corresponding
6 order. The waiver is not intended to relieve the State of its duties and responsibilities under
7 California law, including the obligation to collectively bargain regarding salaries. Rather, the
8 waiver is intended to make way for the Receiver to direct the implementation, adjustment and
9 administration of the proposed salaries and structural changes to the pay system. To emphasize,
10 the waiver only applies to actions and determinations made by the Receiver and not to any other
11 party.

12 B. Request for Waiver.

13 Based on the facts set forth above, the Receiver requests the following:

14 1. That the Court order defendants to cooperate fully with the Receiver concerning the
15 implementation, administration, and adjustments of the salary ranges established by the Receiver
16 in Exhibit 6.¹⁷

17 2. That the Court waive the following statutes and regulations to the extent necessary for
18 the Receiver to direct the implementation, administration, and adjustment of the salary ranges
19 established by Exhibit 6.

20 A. Government Code section 19816 (which vests DPA with duties, purposes,
21 responsibilities and jurisdiction with respect to the administration of salaries for civil service and
22 exempt employees).

23 B. Government Code section 19826 (which designates DPA as the agency responsible
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26 ¹⁷ Consistent with prior Court orders, and with the previous salary recommendations of the
27 Court's Correctional Expert, the Receiver recommends that the waiver and salary increases apply
28 to Pelican Bay State Prison.

1 for establishing and adjusting salary ranges for civil service classifications).¹⁸

2 C. Government Code section 19829 (which requires DPA to provide for intermediate
3 steps with salary ranges which govern the extent of the salary adjustment an employee may
4 receive at any one time, and providing for DPA to establish more than one salary range or rate or
5 method of compensation within a classification).

6 D. Government Code section 19832 (which authorizes DPA to set standards of efficiency
7 applied for purposes of granting employees annual merit salary adjustments, as implemented
8 through California Code of Regulations, title 2, section 599.683).¹⁹

9 E. Government Code section 19836 (which vests DPA with authority to approve
10 payment of salaries at any step above the minimum of the salary range for recruitment purposes;
11 to obtain persons with extra ordinary qualifications or as credit for prior State service).

12 F. Government Code section 3516.5 (which requires DPA to provide written notice to
13 employee unions, and provide them an opportunity to meet and confer (bargain) when there is a
14 change that falls within the scope of representation (e.g., wages)).²⁰

15 G. Government Code section 3517 (which requires the Governor or his representative
16 (DPA) to bargain in good faith regarding wages, hours and other terms and conditions of
17 employment prior to arriving at a determination of policy or course of action).²¹

18 ¹⁸ In making the request the Receiver emphasizes that he does not intend to abrogate in any
19 manner the salary setting principles set forth in section 19826.

20 ¹⁹ The purpose of the waiver of Government Code sections 19829 and 19832 is to provide the
21 Receiver with authority to control the salary ranges for a limited number of health care positions
22 (e.g., Director of Division of Correctional Health Care Services, Physicians and Surgeons) after
23 taking into consideration performance, extraordinary qualifications, recruitment and retention issues,
24 prevailing rates in the public and private sector, patient needs and the position of applicable labor
25 organizations.

26 ²⁰ In making this request, it is the Receiver's intent that the State's independent duty to bargain
27 concerning the salary modifications established by the Receiver (as set forth in Exhibit 6) remains
28 unaltered.

²¹ In making this request, it is the Receiver's intent that the State's independent duty to bargain
concerning the salary modifications established by the Receiver (as set forth in Exhibit 6) remains
unaltered.

1 H. California Code of Regulations, Title 2, section 599.681 (which sets forth the
2 methodology for determining salaries when employees move between ranges in the same
3 classification).

4 3. That the Court order the waivers set forth above be ongoing in the event that the
5 Receiver determines additional salary modifications are necessary to effectuate the purposes of
6 the Receivership, subject to the following procedure:

7 A. No less than forty-five (45) days prior to establishing additional salary modifications
8 the Receiver shall provide written notice to the Office of the Governor, DPA, counsel, and the
9 affected labor organizations concerning his proposed salary modifications.

10 B. The Receiver or delegated staff from the Office of the Receiver shall thereafter
11 contact, and if necessary confer with the Office of the Governor, DPA, counsel, and the affected
12 labor organizations concerning the proposed salary modifications.

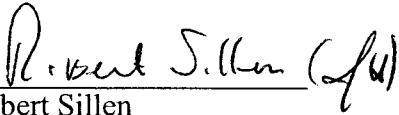
13 C. In the event that the Office of the Governor, DPA, counsel, or affected labor
14 organizations believe that the additional salary modifications proposed by the Receiver are
15 prohibited by law, regulation or contract (other than the laws and regulation waived by this
16 motion), they shall submit to the Receiver a written explanation of their concerns not more than
17 twenty (20) days following their receipt of the Receiver's proposed salary modifications.

18 D. In the event that written objections from the Office of the Governor, DPA, counsel, or
19 the affected labor organizations are submitted to the Receiver, the Receiver or delegated staff
20 from the Office of the Receiver shall confer with the objecting party to determine if the objection
21 can be resolved. In the event the objections cannot be resolved, the Receiver shall request the
22 Court to waive the law, regulation or contract at issue.

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1 E. In the event that no written objections are submitted to the Receiver, or in the event
2 that written objections are resolved as set forth in paragraph D above, the Receiver shall direct
3 and implement the proposed additional salary modifications forty-five (45) days after providing
4 the Office of the Governor, DPA, counsel, and the affected labor organizations with written
5 notice of his intention to establish additional salary modifications.

6
7 Dated: September 12, 2006

8
9 
10 Robert Sillen
11 Receiver

1 **PROOF OF SERVICE BY MAIL**

2 I, Kristina Hector, declare:

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

5 On September 12, 2006 I arranged for the service of a copy of the attached documents
6 described as RECEIVER'S MOTION FOR WAIVER OF STATE LAW on the parties of record
7 in said cause by sending a true and correct copy thereof by pdf and by United States Mail and
addressed as follows:

8 ANDREA LYNN HOCH
9 Legal Affairs Secretary
10 Office of the Governor
11 Capitol Building
12 Sacramento, CA 95814

13 PETER FARBER-SZEKRENYI, DR., P.H.
14 Director
15 Division of Correctional Health Care Services
16 CDCR
17 P.O. Box 942883
18 Sacramento, CA 94283-0001

19 J. MICHAEL KEATING, JR.
20 285 Terrace Avenue
21 Riverside, Rhode Island 02915

22 JONATHAN L. WOLFF
23 Deputy Attorney General
24 455 Golden Gate Ave., Suite 11000
25 San Francisco, CA 94102

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

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

BRUCE SLAVIN
General Counsel
CDCR-Office of the Secretary
P.O. Box 942883
Sacramento, CA 94283-0001

28

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Legal Affairs Division
2 California Department of Corrections
P.O. Box 942883
3 Sacramento, CA 94283

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JOHN CHEN
5 State Controller
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6 Sacramento, CA 95814

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Chief Counsel, Department of Finance
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11 707 Third Street, 7th floor, Suite 7-330
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Office of the Inspector General
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20 Department of Personnel Administration
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22 GARY ROBINSON
23 Executive Director
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24 1330 Broadway Blvd., Suite 730
Oakland, CA 94612

25
26
27
28

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

6 PAM MANWILLER
7 Director of State Programs
8 AFSME
9 555 Capitol Mall, Suite 1225
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11 RICHARD TATUM
12 CSSO State President
13 CSSO
14 1461 Ullrey Avenue
15 Escalon, CA95320

16 TIM BEHRENS
17 President
18 Association of California State Supervisors
19 1108 O Street
20 Sacramento, CA95814

21 I declare under penalty of perjury under the laws of the State of California that the foregoing
22 is true and correct. Executed on September 12, 2006 at San Francisco, California.

23 
24 Kristina Hector

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