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FILED

APR 16 2007

2007 APR 16

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

MARCIANO PLATA, et al.,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER,
et al.,
Defendants.

NO. C01-1351 TEH

CLASS ACTION

ORDER DENYING MOTION
TO SHORTEN TIME

On April 3, 2007, Medical Development International (“MDI”), a non-party in this action, filed (1) a Motion to Intervene pursuant to Fed. R. Civ. P. 24(b), (2) a Motion for “Instructions,”¹ and (3) a Motion for Order Shortening Time to hear the above motions on a highly expedited schedule. Indeed, it makes the extraordinary request that the Court grant its Motion for Leave to Intervene in this action at the same time it grants MDI’s request to shorten time to hear MDI’s Motion for Instructions on April 9 or April 16, 2007. See MDI’s Ex Parte Motion to Shorten Time at 9; MDI’s [Proposed] Order Shortening Time. Such a request effectively asks the Court to grant MDI intervenor party status immediately.

The Court has carefully reviewed MDI’s Motion for Order Shortening Time, the Receiver’s Opposition thereto, and the record herein. The Court concludes, for the reasons set forth below, that there is no present emergency justifying the expedited schedule sought

¹ This motion asks the Court to “instruct” MDI and the Receiver regarding the legality of MDI’s operations in two California prisons, and MDI’s obligations to continue providing such services.

1 and that the matters raised by MDI can be adequately addressed pursuant to the rules
2 normally governing such motions in this Court.

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4 BACKGROUND

5 MDI is a Florida-based company that specializes in providing public and private
6 correctional facilities with access to physician and hospital services outside of the facility.
7 Willich Dec. ¶ 3. In March of 2006, MDI entered into negotiations with the California
8 Department of Corrections and Rehabilitation (“CDCR”) to provide such services at two
9 prisons in Southern California, California State Prison, Los Angeles County (“LAC”), and
10 California Correctional Institution in Tehachapi (“CCI”). Willich Decl. ¶¶ 2, 11. In April
11 2006, a Receiver appointed by this Court on February 14, 2006, assumed management of the
12 CDCR’s medical health care delivery system.

13 In the Fall of 2006, MDI began providing services to LAC and CCI although no
14 contract had been finalized. According to MDI, a former Assistant Secretary at CDCR in the
15 Office of Health Care Policy (Darc Keller) told MDI that it could begin providing the
16 services because it was a “common practice within CDCR for its contractors and providers to
17 start work before the final contractual form is provided by the Department of General
18 Services.” *Id.* at ¶ 13. No contract, however, was ever finalized.

19 At some point during the Fall of 2006, certain employees within the CDCR, who were
20 now reporting to the Office of the Receiver, informed the Receiver for the first time that
21 senior CDCR officials were attempting to enter into a \$26 million multi-year contract with
22 MDI to provide specialty medical services at LAC and CCI without following the State’s
23 competitive bid process. Hagar Dec. ¶ 3. The Receiver’s Chief of Staff, John Hagar,
24 thereafter looked into the matter and states that he learned the following:

25 (1) CDCR officials had in fact permitted MDI to commence a program to provide
26 specialty outside medical services at LAC and CCI without engaging in any competitive
27 bidding process and without a valid contract, and that senior CDCR officials were pressuring
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1 CDCR contract personnel to approve the contract based on an inapplicable order issued by
2 the undersigned judge on March 30, 2006;

3 (2) MDI is not licensed to practice medicine in California and CDCR and other
4 attorneys for the State had concluded that MDI's scope of work therefore violated
5 California's prohibition on the corporate practice of medicine²;

6 (3) Health care personnel were reporting that MDI had effectively monopolized access
7 to outside specialty care services in one of the prisons, thereby precluding use of more
8 efficient and less expensive alternatives such as telemedicine in certain instances; and

9 (4) The existence of potential billing irregularities including (a) billing rates that
10 appeared excessive for the services provided and (b) demands for Medicare reimbursement
11 based on rates utilized in Santa Clara County although the services were being provided in
12 Kern County. Hagar Dec. ¶¶ 4-5. CDCR contract experts informed the Chief of Staff that
13 they had never before seen such a proposed arrangement. *Id.* at ¶ 5(f).

14 In light of these concerns, and the apparent irregular manner in which the arrangement
15 had begun, the Chief of Staff requested that the California Office of Inspector General
16 undertake an investigation (currently pending) and recommended to the Receiver that he
17 suspend payments to MDI pending resolution of the legality of the arrangement. MDI was
18 also informed in December 2006 or early January 2007 by former senior CDCR official Dr.
19 Peter Farber-Szekrenyi that it was possible that "CDCR would conclude that MDI needs a
20 medical license." Willich Dec. at ¶ 17. The Receiver subsequently suspended payments to
21 MDI pending resolution of the legality of the contract. The last payment MDI received was
22 January 12, 2007. Willich Dec. ¶ 9.

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27 ² California's prohibition on the corporate practice of medicine is designed to avoid
28 the conflict between the professional standards and obligations of the medical profession and
the profit motive of corporations. *See Conrad v. Medical Board of California*, 48
Cal.App.4th 1038, 1042 and n.2 (1996).

1 In February 2007, MDI met with the Receiver (and members of his staff) who
2 expressed their “very strong concerns” that MDI’s services violated California’s restrictions
3 on the corporate practice of medicine. Also discussed were two related but independent
4 issues: (1) the rates being charged by MDI for its services which seemed exorbitant, and (2)
5 the lack of information regarding the rates that MDI was paying physicians under contract
6 with MDI. Hagar Dec. ¶ 7; *see also* Dodd Dec. ¶¶ 3-4.

7 MDI states that in the course of this meeting, it told the Receiver that MDI might
8 decide to stop providing services given the suspension of payments, and that the Receiver
9 responded by threatening MDI that it would never work in California again if it withdrew
10 from providing services. Willich Dec. ¶ 19; Heffernan Dec. ¶ 2. While the meeting
11 undoubtedly grew heated at times, the Receiver’s Chief of Staff disputes MDI’s
12 characterization of this exchange. According to Mr. Hagar:

13 During meeting, MDI’s response to the concerns of the Receivership ranged
14 from threatening legal action, to threatening to discontinue services
15 immediately at CCI and LAC, to alleging that it was the innocent victim of
16 misconduct by the CDCR and that it wanted nothing more than to enter into a
17 formal and legally binding agreement with the State. At the conclusion of the
18 meeting, MDI conceded that it was faced with a serious business decision:
19 either to cease doing business at LAC and CCI or to convince the Receiver that
20 its contracted activities did not violate California law. The Receiver
21 emphasized that his primary concern was protecting patient care. The Receiver
22 urged MDI to prove what it claimed, that its business practices were legal;
23 however, *he emphasized to MDI that if MDI made the decision to cease patient
24 services at LAC and CCI they should do so in a manner that provided for
25 continuity of care. The Receiver stated at the meeting that if MDI suddenly
26 dumped both contracts in a manner that jeopardized patient care, as MDI had
27 threatened to do, he would not utilize MDI’s services any where else in
28 California’s prison system.*

Hagar Dec. ¶ 8 (emphasis added).

23 Subsequent to the meeting MDI contacted Mr. Hagar and stated that MDI had decided
24 to continue providing services, notwithstanding the suspension of payment, and to
25 demonstrate to the Receiver that its services conformed to California law. Hagar Dec. ¶ 9.
26 MDI’s actions are consistent with this understanding – it continued providing services and on
27 March 7, 2007 provided the Receiver with a legal analysis of its operation.

1 MDI did not, however, take this opportunity to obtain an opinion or analysis from
2 either of the administrative entities with expertise in this area: the California Medical Board
3 and the California Department of Consumer Affairs.³ Instead, on March 7, 2007, MDI
4 provided the Receiver with a legal opinion from MDI's retained counsel, James Walsh, who
5 argued that MDI's services were lawful, and provided a revised proposed scope of work and
6 a new rate structure. *See* Willich Dec., Ex. E; Dodd Dec. ¶ 5. On request from the Receiver,
7 MDI also provided sample agreements between MDI and physicians and hospitals. Dodd
8 Dec. ¶ 7.

9 In response, the Receiver provided these materials to the legal staff at the California
10 Department of Consumer Affairs who advised the Receiver that they generally agreed that
11 the MDI's original versions of their described scope of work "appeared to violate the
12 prohibition on the corporate practice of medicine." Dodd Dec. at ¶ 8. They also "agreed that
13 the . . . most recent, proposed scope of work. . . did not fully address the issues or resolve the
14 concerns . . . about the legality of the services." *Id.* They also indicated "that the sample
15 agreements themselves raised additional questions, did not fully describe or disclose the
16 actual relationship between MDI and the providers, did not adequately discuss or describe the
17 rates those providers charged and, in the end, did not provide sufficient information for them
18 to make a definitive determination regarding the lawfulness of MDI's activities." *Id.* at ¶ 8.

19 Given the above, the Receiver declined to accept MDI's own legal analysis as
20 persuasive. Rather, in a letter to MDI dated March 26, 2007, he detailed his continuing
21 concerns regarding (a) the legality of MDI's operation at LAC and CCI, and (b) MDI's
22 failure to disclose the details of MDI's relationship with providers. *See* Willich Dec., Ex. F.
23 The Receiver invited MDI to obtain an opinion from the appropriate State agency attesting to
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27 ³ The California Medical Board is responsible for enforcing the prohibition on the
28 corporate practice of medicine. The California Department of Consumer Affairs is the
parent agency for the California Medical Board.

1 the legality of its operating model “as it actually exists at the two prisons at which MDI is
2 providing services.” *Id.*

3 Somewhere around this time, MDI began discontinuing some of its services in light of
4 the suspension of payments. Willich Dec. ¶ 24. Specifically, MDI began “cancelling [sic] all
5 high-dollar procedures & on-site specialties at this time due to non-payment of services.” *Id.*
6 Although MDI did not directly notify the Receiver of this development, the Receiver’s Chief
7 of Staff confirmed that, as of week of April 2, 2007, there was a substantial backlog of
8 patients waiting for specialty care and that MDI was cancelling all outside consultations
9 exceeding \$5,000 *regardless of the seriousness of the health care problem.* Hagar Dec. ¶ 12
10 (a), (e).(emphasis added).

11 The Receiver had previously developed an alternative back-up program to provide
12 specialty medical services at LAC and CCI given (1) the questionable legality of MDI’s
13 services, (2) the uncertainty over MDI’s continued performance given the disputes between
14 MDI and the Receiver, and (3) anecdotal information that Mr. Hagar was receiving that
15 access to specialty care at CCI and LAC remained problematic despite MDI’s representations
16 to the contrary. Hagar Dec. ¶¶ 11-12; Willich Dec. ¶ 4-5 (setting forth MDI’s view of
17 progress made). Accordingly, once the Receiver learned that MDI was withdrawing its
18 services, and doing so in a manner that appeared to jeopardize the medical interests of the
19 Plaintiff class, the Receiver implemented his alternative program effective Friday, April 6,
20 2007, and instructed CCI and LAC to discontinue utilizing MDI for specialty services as of
21 this date. *Id.* at ¶ 13.

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23 II. LACK OF EXIGENT CIRCUMSTANCES

24 Having reviewed the record herein, it is clear that no current exigent circumstance
25 requires the Court to abandon normal procedures and take action on the extraordinary
26 emergency schedule sought by MDI.

1 MDI first argues that an emergency schedule is necessary to avoid injury to the inmate
2 class because MDI cannot continue to provide services without payment and the Receiver
3 can not provide adequate services if MDI ceases to operate at LAC and CCI. As described
4 above however, the Receiver has already implemented a plan to provide speciality care
5 services at LAC and CCI, and MDI is no longer providing those services. As such, there is
6 no basis for concluding that emergency action on MDI's motions is necessary to protect the
7 medical health needs of the inmate class at LAC and CCI.

8 Second, MDI contends that an emergency schedule is necessary because MDI can not
9 continue sustaining the \$700,000 per month burden of providing services at LAC and CCI
10 without payment. MDI's Mot. To Shorten Time at 2. This circumstance is no longer an
11 issue, however, as MDI is no longer providing services at either LAC or CCI. Nor, as the
12 record has clarified, is MDI under any threat with respect to conducting business generally in
13 California. While an issue remains as to MDI's entitlement to reimbursement for the value
14 of services it provided over the last couple of months while payments were suspended, there
15 is no basis in the record for concluding that resolution of this issue requires urgent action.
16 Nor is it clear that this Court would be the appropriate forum for addressing this issue.

17
18 CONCLUSION

19 As the record before the Court reflects, MDI recently began providing medical related
20 services at LAC and CCI without a finalized contract and without the knowledge of the
21 Receiver. Upon learning of the contract, the Receiver discovered numerous and significant
22 potential irregularities and legitimate questions regarding the legality of MDI's scope of
23 work. The Receiver gave MDI an opportunity to demonstrate the legality of its operation
24 and to address other concerns as well. Understandably, the Receiver was not satisfied by an
25 opinion of MDI's own counsel given the countervailing assessment provided by the relevant
26 state agency.

1 While MDI's subsequent strategy of filing motions seeking emergency relief may
2 have been effective in attracting attention to this matter, the record does not demonstrate the
3 need for proceeding on an emergency basis.. MDI began discontinuing its services and the
4 Receiver has substituted an alternative plan for providing speciality care at LAC and CCI.
5 Accordingly, MDI's request that the Court immediately grant it status as an intervenor party
6 and schedule its "Motion for Instructions" on shortened time is denied.

7 MDI may, of course, proceed with its Motion for Leave to Intervene by filing a Notice
8 of Motion pursuant to the rules that normally govern such motions. *See* Local Rule 7. In the
9 event that the motion is granted and MDI obtains the status of a party in this matter, MDI
10 may then notice its Motion for Instructions.

11 **IT IS SO ORDERED.**

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13 Dated: 4/12/07

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16 THELTON E. HENDERSON
17 UNITED STATES DISTRICT JUDGE
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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

PLATA et al,

Plaintiff,

v.

SCHWARZENEGGER, et al,

Defendant.

Case Number: CV01-01351 TEH

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 16, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Alton G. Burkhalter
Burkhalter Michaels Kessler & George LLP
2020 Main Street, Suite 600
Irvine, CA 92614

Caroline N. Mitchell
Jones Day
555 California Street
26th Floor
San Francisco, CA 94104

Charles J. Antonen
California Department of Justice
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Donald Howard Specter
Prison Law Office
General Delivery
San Quentin, CA 94964

Jerrold C. Schaefer
Hanson Bridgett Marcus Vlahos & Rudy LLP
425 Market Street, 26th Floor
San Francisco, CA 94105-2173

John Hagar
Judge's Reading Room
450 Golden Gate Ave
18th Floor
Law Library
San Francisco, CA 94102

Martin H. Dodd
Futterman & Dupree LLP
160 Sansome Street, 17th Floor
San Francisco, CA 94104

Paul B. Mello
Hanson Bridgett Marcus Vlahos & Rudy LLP
425 Market Street, 26th Floor
San Francisco, CA 94105


Robert Sillen
California Prison Receivership
1731 Technology Drive, Suite 700
San Jose, CA 95110

Samantha D. Tama
California State Attorney General 's Office
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Steven Fama
Prison Law Office
General Delivery
San Quentin, CA 94964

Warren E. George
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4066

Dated: April 16, 2007


Richard W. Wieking, Clerk
By: R.B. Espinosa, Deputy Clerk