

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 <u>ORDER</u>
--	--

This matter came before the Court on Monday, January 22, 2007, on the motion of Public Health Services Bureau (PHSB) to Notify the Court of Legal Issues Raised by Recent RFP and to Set Aside the Receiver's Award of the Contract for the Improvement and Management of the California Department of Corrections and Rehabilitation Adult Prison Pharmacy System Awarded to Maxor National Pharmacy Services Corporation. Having carefully considered the written and oral arguments presented by PHSB and the Receiver, and the record herein the Court finds that PHSB lacks standing to bring this motion. The

Court, however, has informally reviewed and responded to the specific complaints raised by PHSB's motion by way of a separate letter.

I. BACKGROUND

On February 17, 2006, this Court appointed a Receiver to take control of the grossly unconstitutional medical health care system in California's state prisons. As one of his first actions, the Receiver commissioned an updated audit of the pharmacy system by Maxor National Pharmacy Services Corporation ("Maxor"), a company with extensive experience in providing pharmacy management services in prisons. Maxor found severe deficiencies¹, and in June 2006 submitted its findings along with a general "Road Map" for addressing them. It also presented its findings to the Court on July 26, 2006. The Receiver subsequently proposed that, given the seriousness of the situation, he hire an outside contractor to assist with overhauling the management of the pharmacy system (or lack thereof) on an expedited basis. Defendants concurred in this proposal. *See* July 26, 2006 R.T. at 43 ("Recognizing the urgency of the situation . . . the defendants are supportive. And DGS [Department of General Services] and CDCR [California Department of Corrections and Rehabilitation] are committed to assisting the receiver as much as possible in an expedited award process."). The Court directed the Receiver to proceed as he proposed. *Id.* at 56.

¹ *See e.g.*, Goldman Dec., Ex. 1 at 5 (finding a "serious lack of pharmacy management," and high potential for "drug diversion" leading to an operation that is "unsafe" as well as costly and inefficient).

Shortly thereafter, the Receiver developed a Request for Proposal (RFP) for the purpose of obtaining proposals for implementing the Road Map developed by Maxor. He then sought to identify all potential vendors with significant experience managing pharmacy services in a correctional context. *See* Goldman Decl. at ¶ 5. All such vendors identified (seven in total) were sent the RFP on August 18, 2006. Several other companies, that had little or no experience managing pharmacy services in prisons, including Public Health Services Bureau (PHSB) requested and received copies of the RFP. PHSB, along with two other vendors, McKesson Medication Management (McKesson) and Maxor, submitted responses to the RFP by the September 18, 2006 deadline.

All three vendors were interviewed by a panel convened by the Receiver consisting of (1) Dr. Peter Farber-Szekrenyi, Director of Correctional Health Care Services for the CDCR, (2) Narinder Singh, Director of Pharmacy for the Santa Clara County Health and Hospital System, and (3) Jared Goldman, an attorney for the Receiver overseeing the RFP process with experience in public sector health care delivery systems. Following the interviews, each panelist independently submitted a recommendation to the Receiver. The panelists unanimously recommended Maxor, which was subsequently awarded the contract.

PHSB subsequently filed the instant Motion [by Real Party in Interest/Third Party Intervener] to Notify the Court of Legal Issues Raised by Recent RFP and to Set Aside the Receiver's Award of the Contract for the Improvement and Management of the CDCR Adult Prison Pharmacy System Which was Awarded to Maxor National Pharmacy Services Corporation. PHSB contends that the Receiver's process for selecting Maxor was fundamentally unfair. It asks the Court to set aside the Receiver's contract with Maxor and

direct him to re-issue the RFP in a manner consistent with "fundamental notions of fairness." See PHSB's Reply at 9. Specifically, it asks the Court to require the Receiver to (1) provide "proper notice of the RFP" by publishing it in a major newspaper and the California State Contracts Register, (2) provide an additional "reasonable" time to respond, (3) provide responses to all bidders' written inquiries regarding the RFP, and (4) "demonstrate to the Court the absence of bias for or against any qualified bidder." See PHSB's Reply at 9 and Proposed Order at 2. The Receiver has opposed PHSB's motion.

II. STANDING

Notwithstanding the caption of its motion, PHSB is not a third-party intervener; nor has it ever moved to intervene in this matter. Indeed, it disavows any interest in intervening. It asserts, however, that it has standing to file a formal motion in this action and obtain relief pursuant thereto, by virtue of the fact that "PHSB's interest in *Plata v. Schwarzenegger* is extremely limited and focused on a discrete, albeit important, issue. Thus, this case fits into the "rare" circumstance acknowledge by *Spangler* [*v. United States*, 415 F.2d 1242 (9th Cir. 1969)] where intervention is not required for standing." See PHSB's Reply at 3.

The Court is not aware of any authority which permits a non-party to file a motion in a case and obtain relief thereto "without obtaining intervenor status" simply because it has an interest in a "limited" but "important" issue. As the Ninth Circuit in *Spangler* emphasized it is "rarely, if ever" appropriate for a district court to grant relief in the favor of a non-party to an action:

If a court has for some reason permitted persons who are not parties to a suit to participate in some stage of the proceedings, this will rarely, if ever, suffice to eliminate the necessity of formal intervention to become parties in their own right. Thus, it was error for the court to conduct proceedings at the moving parents' request and to grant relief in their favor.

Spangler, 552 F.2d 1326 (9th Cir. 1977).

PHSB nonetheless contends that it has standing to make a formal motion and obtain relief thereto under *Securities Exchange Commission v. Lincoln Thrift Association*, 577 F.2d 600, 602-03 (9th Cir. 1978). In that case the Court held that in certain circumstances a non-party may be allowed to appeal an order of the district court. In *Lincoln Thrift*, the circumstances were as follows: Lincoln Thrift, a failed savings and loan association, was placed in Receivership. The Receiver notified all creditors, including those who were not named as parties by the SEC in the complaint, that it had decided to liquidate the association and that they should assert all claims. The appellant, Fred Thender, on behalf of himself and 805 other creditors, responded and was permitted to participate at the hearing. *Id.* at 605. They requested, *inter alia*, that the case be transferred to the bankruptcy court. The district court denied this relief and the liquidation proceeded. The creditors appealed. Although no party objected to the non-party creditors' standing on appeal, the Court addressed the issue *sua sponte*, and concluded that the appeal could proceed. The Court indicated that the non-party creditors could have met the standard for intervention and that proceeding as intervenors would have been the better course. *Id.* at 603 (The creditors here more properly might have moved to intervene and then appealed from the denial of that motion). It nonetheless permitted the appeal so that the Court could with finality adjudicate the

authority of the receiver to act under the supervision of the district court.ö *Lincoln Thrift*, 577 F.2d at 603. Indeed, the Court appeared to welcome the opportunity presented by the appeal to ðconfront the complex problem of the extent to which the district court may supervise a Securities & Exchange Commission initiated receivership.ö *Id.* at 605.

The Court is not persuaded that *Lincoln Thrift* is applicable here. In *Lincoln Thrift*, the creditors were ðentitledö to present their claims in the proceedings in the district court. *Id.* at 603. The Court further emphasized that intervention would have been the proper course and implied that the requirements for such would have been satisfied. Here, PHSB makes no effort to argue that it qualifies for intervenor status. *Lincoln Thrift* also involved an appeal of an order from the district court. PHSB cites no authority, and this Court has found none, that has approved of a district court bypassing intervention rules and simply granting standing to a non-party because of an interest in a limited issue in the case. In sum, the Court is not persuaded that *Lincoln Thrift* confers upon PHSB the right to short-cut normal intervention procedures and obtain standing in this action as a ðnon-party.ö

Nonetheless, the Court agrees with PHSB that the Court exercises general oversight of the Receiver, given that he is an appointee of the Court. As such, if PHSB had brought its concerns to the Court in an informal manner ó *e.g.* by way of a letter ó the Court would have considered its concerns and provided a response. Indeed, PHSB appears to anticipate this potential alternative treatment of its motion by indicating in its caption that it seeks to ðNotify Court of Legal Issues Raised by Recent RFP.ö Accordingly, the Court, consistent with its oversight responsibility, will carefully consider PHSB's concerns and respond to them in detail by separate letter, filed simultaneously herewith.

III. CONCLUSION

Good cause appearing, and in light of the above, the Court denies PHSB's motion for lack of standing given that PHSB is not a named party to this action. Nor has it obtained the status of a party by way of a motion for intervention.² For the reasons discussed above, however, the Court shall informally address PHSB's complaints by separate letter.

IT IS SO ORDERED.

Dated:

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

² Even assuming *arguendo* that PHSB had established standing to bring this motion, the Court would deny the relief sought on the merits for the reasons set forth in the letter filed simultaneously herewith.