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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE EASTERN DISTRICT OF CALIFORNIA
13 SACRAMENTO DIVISION

14 **KEVIN JACKSON, an individual; individually and**
15 **on behalf of all others similarly situated,**

16 Plaintiffs,

17 v.

18 **ROBIN DEZEMBER, et al.,**

19 Defendants.
20

No. 08-1954 MCE-JFM

**DEFENDANT DEZEMBER'S
RESPONSE TO ORDER TO
SHOW CAUSE**

Judge: The Honorable Morrison
C. England

21 **I. Introduction.**

22 Defendant Dezember submits this response to the Court's September 4, 2008 minute order
23 to the parties to show cause why this case should not be transferred to the Northern District of
24 California to be joined with the class action case of *Plata v. Schwarzenegger*, No. C-01-1351
25 TEH (N.D. Cal.). As discussed below, this case should not be joined with *Plata*. Instead, the
26 case must be dismissed because the suit should not have been filed given that there is a certified
27 pending class action before the United States District Court for the Northern District of
28 California involving the same defendant and subject matter.

II. Background.

Plaintiff is an inmate currently incarcerated at the California State Prison at Solano. (Am. Compl. 1.) He alleges in this putative class action that state prisoners diagnosed with chronic hepatitis C, genotype 1, should be offered a liver biopsy every five years to determine whether further treatment with antiviral drugs is warranted. (Am. Compl. 4.) Plaintiff further alleges that: (1) he was diagnosed with chronic hepatitis C in 2000, (2) his liver biopsy in 2007 revealed Stage II of the disease, and (3) his requests for treatment in accordance with medical recommendations have been refused. (Am. Compl. 5-6.) Plaintiff also alleges that Defendant Dezimmer, Director of the Division of Correctional Health Care Services of the California Department of Corrections and Rehabilitation, maintains a policy and practice of denying treatment for chronic hepatitis C until an inmate's disease is advanced beyond Stage II in violation of his and others' rights under the Eighth and Fourteenth Amendments to the United States Constitution. (Am. Compl. 7-8.)

Plaintiff initially filed his complaint in the United States District Court for the Central District of California, on July 8, 2008. The complaint was personally served on Defendant Dezimmer on August 6, 2008. On August 19, 2008, this matter was transferred to the Eastern District of California, Sacramento Division. Plaintiff filed his amended complaint on August 3, 2008.

III. Legal Arguments

A. Joinder of this Matter with *Plata* Is Unwarranted Because the Court's Screening of this Matter Will Determine that Defendant Dezimmer Is Not in Charge of the Health-Care System and the Recent Addition of the Receiver as a Defendant Is Improper Because

Preliminarily, Defendant Dezimmer renews his request to this Court to screen and dismiss Plaintiff's complaint in accordance with 28 U.S.C. § 1915A. As explained in his moving papers, the Court adjudicating the *Plata* class action ordered a receivership to take control of the delivery of medical services to all inmates under the custody of the California Department of Corrections and Rehabilitation (CDCR) with the exception of those incarcerated at Pelican Bay State Prison. (Def.'s Req. Judicial Not, Ex. B: Order Appointing Receiver at 1.) In its Order Appointing

1 Receiver, the Court declared that the Receiver shall:

2 exercise all powers vested by the Secretary of the CDCR as they relate to the
3 administration, control, management, operation, and financing of the
4 California [Department of Corrections and Rehabilitation's] medical health
care system. The Secretary's exercise of the above powers is suspended for
the duration of the Receivership (*Id.* at 4.)

5 Because Plaintiff belongs to a health-care system that is controlled by the federal receiver
6 appointed in *Plata*, rather than Defendant Dezember, this action should be screened and
7 dismissed.

8 Plaintiff's recent amendment adding the federal receiver^{1/} as a defendant does not save his
9 suit. The federal statute granting leave to sue federal receivers in some circumstances without
10 leave of the appointing court, 28 U.S.C. s 959(a), does not apply here and Plaintiff has not
11 obtained the leave of this Court to sue the receiver.

12 **B. Rather than Joining this Suit with *Plata*, this Court Should Dismiss It, as Other**
13 **Courts Have Done in Similar Circumstances, Because the Suit Should Not Have**
Been Brought.

14 Suits for equitable relief from alleged unconstitutional prison conditions cannot be brought
15 where there is an existing class action within the same subject matter. *McNiel v. Guthrie*, 945
16 F.2d 1163, 1165 (10th Cir. 1991); *see also Green v. McKaskle*, 770 F.2d 445, 446-47 (5th Cir.
17 1985) ("[T]he individual class member should be barred from pursuing his own individual
18 lawsuit that seeks equitable relief within the subject matter of the class-action."); *Muhammed v.*
19 *Schwarzenegger*, No. 06-0739 MHP (PR), 2006 WL 1883347, at *1 (N.D. Cal. July 7, 2006);
20 *Coyle v. Cambra*, No. 02-1810 SBA (PR), 2005 WL 2397517, at *13 (N.D. Cal. Sept. 27, 2005)
21 ("[An] action for equitable relief from alleged unconstitutional prison conditions cannot be
22 maintained where there is a pending class-action suit involving the same subject matter.");
23 *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1209 (C.D. Cal. 2004) (holding that a
24 district court may dismiss an individual plaintiff's action where the plaintiff is a member of a
25 pending class action involving the same claims); *Acuna v. Cambra*, No. 95-2150 VRW, 1995
26 WL 607543, at *2 (N.D. Cal. Oct. 6, 1995) ("Individual lawsuits for injunctive and declaratory
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28 1. The Attorney General does not represent the federal receiver and, to his knowledge, the
federal receiver has not been served.

1 relief may not be brought if there is a class action pending involving the same subject matter.”).
 2 The same principle applies to new class actions when one already exists concerning the same
 3 subject matter. *Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982) (“[A] class member should not
 4 be able to prosecute a separate equitable action once his or her class has been certified.”).

5 This is because “to allow individual suits would interfere with the orderly administration of
 6 the class-action and risk inconsistent judgments.” *Gilispie v. Crawford*, 858 F.2d 1101, 1103
 7 (5th Cir. 1998); *see also Goff*, 672 F.2d at 704 (“Two of the primary purposes of Fed. R. Civ. P.
 8 23 are avoidance of both duplicative litigation and inconsistent judgments Both of these
 9 policies are undermined when two suits challenging the same prison conditions are allowed to
 10 proceed.”) Accordingly, a plaintiff who is a class member may assert any equitable or
 11 declaratory claims he has, but must do so by either “urging further action through the class
 12 representative . . . or by intervention into the class-action.” *Gilispe*, 858 F.2d at 1103; *McNiel*,
 13 945 F. 2d at 1166; *Muhammed*, 2006 WL 1883347, at *1; *Coyle*, 2005 WL 2397517 at *13;
 14 *Acuna*, 1995 WL 607543 at *2.

15 In this matter, Plaintiff alleges in his amended complaint that his 2007 liver biopsy revealed
 16 Stage II of chronic hepatitis C and his requests for treatment in accordance with certain medical
 17 recommendations have been refused. (Am. Compl. 5.) Plaintiff further alleges that Defendants
 18 maintain a policy and practice of denying treatment for chronic hepatitis C until an inmate’s
 19 disease is advanced beyond Stage II in violation of his and others’ rights under the Eighth and
 20 Fourteenth Amendments to the United States Constitution. (Am. Compl. 7.) Plaintiff seeks only
 21 injunctive relief ordering Defendants to cease subjecting Plaintiff and similarly situated
 22 individuals to the alleged policies and conditions described in his complaint. (Am. Compl. 9.)

23 These allegations and prayer for relief fall squarely within *Plata v. Schwarzenegger*, No. C-
 24 01-1351 THE (N.D. Cal.), a certified class action pending before the United State District Court
 25 for the Northern District of California, San Francisco Division, which concerns medical care for
 26 all inmates in California and is now in the remedial phase of litigation. In their Stipulation for
 27 Injunctive Relief, the parties in *Plata* stipulated that the *Plata* class “consists of *all prisoners in*
 28 *the custody of the CDC[R] with serious medical needs*, except those incarcerated at Pelican Bay

1 State Prison.” (Def.’s Req. Judicial Not., Ex. A: Stipulation Inj. Relief at 5, emphasis added.)
 2 Through the injunction and order appointing a receiver, the Northern District of California is
 3 overseeing the overhaul of the entire prison medical system. Because Plaintiff is a prisoner
 4 incarcerated at the California State Prison at Solano and is seeking injunctive relief on behalf of
 5 himself and others with respect to his alleged serious medical condition, his claims fall squarely
 6 within the ambit of the *Plata* class action.

7 Joining this action with *Plata* while *Plata* is in the delicate remedial phase would not
 8 accomplish anything positive and, instead, would likely hinder the receiver’s present efforts to
 9 reform an expansive medical care system. Plaintiff is already a member of the plaintiff-class in
 10 *Plata* and can easily make his concerns known to the receiver for inclusion into the receiver’s
 11 reform efforts.

12 Facing circumstances similar to those here, the courts in *Pride v. Correa*, No. 07-CV-1382-
 13 BEN (S.D. Cal.), and *Gary v. Hawthron, et al.*, No. 06-cv-1528-WHQ (S.D. Cal.), dismissed
 14 plaintiffs’ class complaints. Similarly, this Court should dismiss Plaintiff’s complaint.

15 **IV. Conclusion**

16 Joinder of this matter with *Plata* would be inappropriate because the issue and relief sought
 17 is already encompassed by *Plata*. Therefore, Defendant respectfully requests that this Court

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1 dismiss this case in its entirety.

2 Dated: September 17, 2008

3 Respectfully submitted,

4 EDMUND G. BROWN JR.
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **K. Jackson v. R. Dezember, et al.**

No.: **08-1954 MCE-JFM**

I declare:

On **September 19, 2008**, I electronically filed the following document(s):

DEFENDANT DEZEMBER'S RESPONSE TO ORDER TO SHOW CAUSE

Electronic Mail Notice List

I have caused the above-mentioned document(s) to be electronically served on the following person(s), who are currently on the list to receive e-mail notices for this case:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **September 19, 2008**, at Oakland, California.

M.M. Argarin

Declarant



Signature