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

11 MARCIANO PLATA, et al.,
12 *Plaintiffs,*
13 v.
14 ARNOLD SCHWARZENEGGER, et al.,
15 *Defendants.*

Case No. C01-1351 TEH

**RECEIVER’S OPPOSITION TO
DEFENDANTS’ ADMINISTRATIVE
MOTION TO LIFT CONFIDENTIALITY
DESIGNATION ON THE RECEIVER’S
FACILITY PROGRAM STATEMENT,
SECOND DRAFT**

16
17 Receiver J. Clark Kelso (“Receiver”) submits this Opposition to Defendants’
18 Administrative Motion To Remove Confidentiality Designation From Receiver’s Facility
19 Program Statement, Second Draft (“Administrative Motion”).

20 **INTRODUCTION**

21 The Court should deny the Administrative Motion for at least four related reasons. (1)
22 This Court ruled on September 18, 2008 that the Receiver’s draft Facilities Program Statement
23 should remain confidential as agreed by the parties. Defendants have not met the test under the
24 Civil Local Rules for reconsideration of this Court’s order and nothing has changed in the last
25 week that would justify this Court reversing itself. (2) Making the document public would be
26 inconsistent with the terms and conditions upon which the document was provided to attorneys
27 for the parties in the three-judge panel proceeding. (3) Defendants’ Administrative Motion
28 should also have been, but was not, brought before Judge Karlton in *Coleman* since the

1 document was expressly made subject to the protective orders in both this case and *Coleman* in
 2 connection with the three-judge court proceeding. (4) The draft Facilities Program Statement is
 3 not relevant to any issue on the contempt motion presently pending before this Court. As a
 4 result, there is no compelling reason why the parties' agreement to maintain confidentiality
 5 should be overridden.

6 ARGUMENT

7 A. Defendants' Motion Is A Thinly Disguised, And Improper, Motion 8 For Reconsideration Of This Court's September 18, 2008 Order.

9 Defendants submitted portions of the draft Facility Program Statement for filing under
 10 seal in connection with their opposition to the Receiver's pending contempt motion. They
 11 included an explanation from the Receiver's counsel as to how and why the document had
 12 attained confidential status under the protective orders in *Coleman* and *Plata*. Defendants also
 13 expressed their view at the time that they did not believe the document should be filed under seal.
 14 Docket ## 1495, 1495-2. On September 18, 2008, this Court ruled that "[w]hile the final version
 15 of the Receiver's facilities plan will be made public, the drafts produced for discussion have been
 16 designated as confidential under existing protective orders." Docket # 1500. As a result, the
 17 documents submitted by Defendants were filed under seal.¹

18 Defendants have now reiterated their contention that the portions of the draft Facility
 19 Program Statement they submitted should not be deemed confidential and ask that the entire draft
 20 Program Statement be made a part of the record. This is nothing more than a motion for
 21 reconsideration of the September 18 Order, but Defendants have not complied with the
 22 requirements of Civil L.R. 7-9. They have not requested leave to file a motion for
 23 reconsideration (Civil L.R. 7-9(a)) and could not meet the standards for reconsideration set forth
 24 in Civil L.R. 7-9(b) in any event. No new facts or law have arisen in the last eight days that
 25 would justify this Court changing its ruling. In fact, Defendants have actually violated Civil L.R.

26 ¹ The purpose for maintaining the confidentiality of the Facility Program Statement is that it is in draft at this point.
 27 Since it remains subject to revision, perhaps even significant revision, making it public now threatens the possibility
 28 of confusion and misunderstanding as to what the Receiver ultimately plans to do. The Receiver currently
 anticipates having a further draft by in or about late November and hopes to publish the final version by the early
 part of 2009. The public will be apprised of the final plans soon enough.

1 7-9(c) because, although their Administrative Motion is somewhat lengthier than the previous
 2 filing, they have essentially repeated their previous arguments for why they believe the document
 3 should be public. Compare Docket # 1495 with Docket # 1517. The Court should deny the
 4 Administrative Motion.

5 **B. Making The Facility Program Statement Public Would Violate The**
 6 **Terms Under Which It Was Provided To Counsel For The Parties To**
 7 **The Three-Judge Panel Proceeding.**

8 The Receiver has set forth elsewhere the circumstances pursuant to which the draft
 9 Facility Program Statement was provided to counsel for the parties in the three-judge panel
 10 proceeding. *See* Docket # 1509, ¶¶ 8-13 and Exhs. G, H thereto; Docket # 1507, ¶ 10. Without
 11 repeating everything in those previous pleadings, the salient points are these: the draft Facility
 12 Program Statement was given to counsel for the parties on the express condition that it would be
 13 deemed subject to the protective orders in *Coleman* and *Plata*, would be maintained as
 14 confidential and would not be made public. The parties were permitted to utilize the draft
 15 Program Statement in connection with the *three-judge panel proceeding* so long as those
 16 conditions were met.

17 Significantly, Defendants do not dispute that the document would not have been given to
 18 counsel had they not agreed to the conditions imposed on its use. In fact, it was counsel's
 19 agreement to the terms by which they obtained the document that makes this situation different
 20 from the typical circumstance involving a protective order. The document was not produced in
 21 discovery and then designated as confidential under the protective orders by the responding party.
 22 This document was provided to the parties voluntarily by the Receiver solely because counsel for
 23 the parties agreed to maintain its confidentiality.² Making it public now – in a different
 24 proceeding – would be completely inconsistent with the agreements reached. Thus, Defendants'
 25 claim that the attorneys who were given the document were merely extending a "professional
 26 courtesy" to the Receiver (Docket # 1517, p. 4 of 5) is an unsubstantiated effort to rewrite history

27 ² In view of the three-judge court's orders limiting discovery against the Receiver, it is by no means certain that the
 28 parties could have had access to the document otherwise. But there is no question that the Receiver would have
 declined to provide the draft Facility Program Statement voluntarily without the agreement of the parties to maintain
 its confidentiality.

1 that is refuted completely by the evidence before the Court. Docket ## 1509 and 1507. Notably,
2 Defendants have not submitted any declarations from the attorneys who actually requested and
3 received the draft Facility Program Statement and who agreed to the terms of its use. This
4 glaring absence in Defendants' papers speaks volumes. Attorneys in the Office of Attorney
5 General made an agreement in the three-judge panel proceeding; the Court should require them
6 to stick to it.³ The Court can deny the Administrative Motion on this ground alone.

7 **C. This Motion Should Also Have Been Brought Before Judge Karlton**
8 **In Coleman.**

9 Defendants acknowledge that the draft Facility Program Statement was provided to
10 counsel on the condition that it be deemed subject to the protective orders in this case *and* in
11 *Coleman*. Thus, even if this Court lifted confidentiality, Defendants still could not make the
12 document public without violating their agreement that it be subject to the protective order in
13 *Coleman*. Implicitly recognizing this fatal flaw in their motion, Defendants argue that because
14 the Receiver is not a "party" to *Coleman*, only the protective order in this case is relevant. Not so
15 fast. Once again, Defendants just do not – or perhaps, refuse to – understand.

16 Technically, the Receiver is a not a "party" in this case; and he is not a "party" to the
17 three-judge panel proceeding. The Receiver, instead, is an officer of the Court who has a role in
18 this case and in *Coleman*. This Court appointed the Receiver to develop a remedial plan, and the
19 *Coleman* court authorized the Receiver to take a lead role in the construction plans in that case.
20 The draft Facility Program Statement was made confidential in this case, not because the
21 Receiver is a "party," but because counsel agreed that it would be subject to the protective order
22 and its confidentiality thereby maintained. Counsel likewise agreed that it would be subject to
23 the protective order in *Coleman*. Thus, unless the confidentiality is lifted in both cases, the
24 document cannot be made public. The Court should deny the Administrative Motion on this
25 ground as well.

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28 ³ It is indeed disturbing that the Attorney General apparently does not treat an agreement by one lawyer in his office
to be binding on the others.

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 September 29, 2008, I served a copy of the following document(s):

RECEIVER'S OPPOSITION TO DEFENDANTS' ADMINISTRATIVE MOTION TO LIFT CONFIDENTIALITY DESIGNATION ON THE RECEIVER'S FACILITY PROGRAM STATEMENT, SECOND DRAFT

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

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

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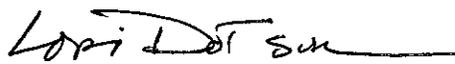
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19 I declare that I am employed in the offices of a member of the State Bar of this Court at
20 whose direction the service was made. I declare under penalty of perjury, under the laws of the
21 united State of America, that the above is true and correct.

Executed on September 29, 2008 at San Francisco, California.

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Lori Dotson

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