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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MARCIANO PLATA, et al., Plaintiffs, **v.** **ARNOLD SCHWARZENEGGER, et al.,** Defendants.	3:01-cv-01351-TEH **ADMINISTRATIVE MOTION TO REMOVE CONFIDENTIAL MATERIAL DESIGNATION FROM RECEIVER'S FACILITY PROGRAM STATEMENT, SECOND DRAFT** Judge: The Honorable Thelton E. Henderson

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, pursuant to Local Rule 7-11, and the Protective Order entered by this Court on March 3, 2003, defendants hereby move the above-entitled Court for an order removing the confidential material designation from the Receiver's Facility Program Statement, Second Draft ("Program Statement"), lodged with this Court under seal. This motion is based upon this Notice of Motion and Motion, Memorandum of Points and Authorities, the

concurrently filed Notice of Lodging Sealed of Documents for *In Camera* Review and accompanying exhibits, and all the pleadings and papers on file in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

Through this Motion, the State Defendants seek to make public the basis for the Receiver's unprecedented $8 billion demand on the State Treasury for his construction project. Although the Receiver has until now resisted efforts to make his Facility Program Statement public, it remains the most current description of his plan that forms the basis for the Receiver's request that this Court authorize the seizure $8 billion from the State Treasury. While the Receiver may wish to prevent public disclosure of his $8 billion plan until it is "final," he did not wait until it was final to request $8 billion to put his plans into action. Having asked for this enormous sum, Californians now have a right to know how their hard-earned tax dollars would be spent. So important is the principle that the government is accountable to the people and that it should operate in public that the California Constitution grants a right of access to the information concerning the conduct of the people's business. The expenditure of $8 billion is certainly the people's business. As the Supreme Court has recognized, "informed public opinion is the most potent of all restraints upon misgovernment," which is why, as Justice Brandeis so famously said, "Sunlight is said to be the best of disinfectants." *Buckley v. Valeo*, 424 U.S. 1, 67 & n. 79 (1976). For this reason, the State Defendants move to release the vast majority of the Receiver's Program Statement to the public.

Although the Receiver has consistently maintained that his Program Statement is subject to the protective orders entered in *Plata* and *Coleman*, it is not subject to those protective orders and should be made publicly available. As the Receiver is not a party in the *Coleman* action, only the protective order issued by this Court is potentially applicable. The *Plata* protective order defines confidential material as "'Department of Corrections' ('CDC') records that identify any inmate or parolee ('personal information') or that are designated by defendants as threatening prison safety and/or security if disclosed without protective conditions ('security information'), and which are produced by defendants in informal and/or formal discovery in this action." The vast majority of the Receiver's Program Statement does not fall within this

definition of confidential material. Most importantly, the Program Statement is not a record of CDCR. Defendants recognize that the Receiver is, for some purposes, considered to stand in the shoes of the Secretary of CDCR. However, even if the Receiver's Program Statement was considered to be a CDCR record, most of its contents do not meet the definition of confidential material. The Program Statement contains no personal information. There is, however, some information that constitutes security information and that should be kept confidential. (See Exhibit A to the Declaration of Michael Beaber lodged concurrently herewith ("CDCR Designated Material").) The vast majority of the Program Statement, however, does not constitute information that, if released publicly, could be a threat to the security or safety of the prison system. Aside from CDCR Designated Material, the Receiver's Program Statement contains general information regarding the generic layout, design, and amenities of the seven prison healthcare facilities sought to be built by the Receiver. None of that information is remotely specific enough to be considered a security risk. Certainly, the Receiver has not offered any justification for concluding that his Program Statement as a whole constitutes security information.

Moreover, even if the Receiver were somehow subject to the protective order in *Coleman*, that order similarly does not apply to his Program Statement. The only provision of that protective order that could potentially apply is a provision added by Magistrate Judge Moulds in an order dated June 20, 2008. The amended protective order in *Coleman* protects documents "reflecting architectural specifications, renderings, blueprints, infrastructure layout, building footprints, points of access and construction design details . . ." Most of the information in the Receiver's Program Statement is of insufficient detail to fall within this category, which was added in response to CDCR's concerns that such details could pose a security risk. (Plaintiff's Opposition to Defendant's Motion for a Protective Order at 5–6 (deferring to CDCR's security concerns and proposing the modification to the protective order approved by Judge Moulds).) Aside from the CDCR Designated Material, the generic description of the Receiver's prison healthcare facilities construction plans does not pose a security risk. Accordingly, as the *Coleman* protective order is inapplicable to the Receiver, who is not a party to that action, and in

any event the bulk of his Program Statement is not confidential material for purposes of that protective order, the portions of the Program Statement not included in the CDCR Designated Material should be made public.

The Receiver makes much of the fact that the Program Statement was provided to our Office pursuant to an agreement that we treat it as confidential. (See Supplemental Declaration of Martin H. Dodd ¶¶ 8–13, and Exhibits G–H.) As a professional courtesy, we acknowledged that the Receiver had deemed the Program Statement confidential under the *Coleman* and *Plata* protective orders and agreed not to disclose it publicly.[1/] We did not, however, agree to never challenge that designation pursuant to the procedures called for by the very protective orders the Receiver invoked to protect the confidentiality of the Program Statement. It is not at all inconsistent to agree to a request to treat the Program Statement as confidential and not disclose it publicly while subsequently seeking a court determination as to whether the document is properly subject to the protective orders. As called for by the protective orders, counsel has and will continue to keep such document confidential until such time as a court orders otherwise; nothing in the protective orders or any prior communication with the Receiver requires more.

The public's interest in learning the details of the Receiver's construction plan also warrants its release. There "is a strong presumption in favor of access to court records." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). That presumption can be overcome only by a showing of a "sufficiently important countervailing interest." *San Jose Mercury News, Inc. v. U.S. District Court, Northern District (San Jose)*, 187 F.3d 1096, 1102 (9th Cir. 1999). "This presumption of access may be overcome only 'on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture.'" *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). The factors to be considered in making this determination include the "public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets." *EEOC v. Erection Co., Inc.*, 900 F.2d 168, 170

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1. As indicated above, defendants do not believe the *Coleman* protective order is even applicable to the Receiver.

(9th Cir.1990).

These factors strongly weigh in favor of public access to the Receiver's Program Statement that does not constitute security information. The Program Statement contains no trade secrets, nor does it involve any personal information that could be misused. Moreover, as the document reflects the most detailed justification for the Receiver's request to seize $8 billion from the State Treasury, there is a compelling reason for it to be disclosed to the public. Californians deserve to know how the Receiver intends to spend such an enormous sum of money, particularly given the State's precarious financial situation. The fact that the Receiver is acting under the authority granted by this Court is yet another reason why his actions should be subjected to public scrutiny.

As the vast majority of Receiver's Program Statement is not properly subject to the protective order in this case, and as the public interest in its disclosure clearly outweighs any potential harm in the release of his Program Statement, defendants respectfully request that this Court remove the confidential material designation from those parts of the Receiver's Program Statement not designated by CDCR as constituting security information. Moreover, if the Court grants defendants' Motion, defendants request that the Court unseal those portions of its Opposition and Exhibit A to the Declaration of Christopher Lief filed in response to the Receiver's Contempt Motion, none of which is CDCR Designated Material.

Dated: September 25, 2008

Respectfully submitted,

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