

IN THE UNITED STATES DISTRICT COURTS  
FOR THE EASTERN DISTRICT OF CALIFORNIA  
AND THE NORTHERN DISTRICT OF CALIFORNIA  
UNITED STATES DISTRICT COURT COMPOSED OF THREE JUDGES  
PURSUANT TO SECTION 2284, TITLE 28 UNITED STATES CODE

RALPH COLEMAN, et al.,

Plaintiffs,

V.

ARNOLD SCHWARZENEGGER,  
et al.,

## Defendants.

NO. CIV S-90-0520 LKK JFM P  
**THREE-JUDGE COURT**

MARCIANO PLATA, et al.,

Plaintiffs,

V.

ARNOLD SCHWARZENEGGER,  
et al.,

## Defendants.

NO. C01-1351 TEH

**THREE-JUDGE COURT**

**ORDER DENYING**  
**DEFENDANTS' MOTION FOR**  
**RECONSIDERATION OF THE**  
**MAGISTRATE JUDGE'S**  
**SEPTEMBER 10, 2008 ORDER**

23 On September 10, 2008, the magistrate judge granted “plaintiffs’ September 5, 2008  
24 motion to reopen the deposition of [California Department of Corrections and Rehabilitation  
25 Secretary] Matthew Cate and to require Mr. Cate to respond to questions about  
26 communications with the Governor and the Governor’s aides.” Sept. 10, 2008 Order at 8.  
27 The magistrate judge further ordered that Mr. Cate’s deposition be conducted on  
28 September 12, 2008, at 10:00 AM. *Id.*

1 Defendants move for reconsideration and request a stay of the magistrate judge's  
2 order. The Court now DENIES Defendants' motion for the reasons discussed below.  
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4 **I. Legal Standard**

5 Federal Rule of Civil Procedure 72(a) provides that non-dispositive pretrial matters  
6 may be decided by a magistrate judge, subject to reconsideration by the district judge. The  
7 district judge shall, upon reconsideration, modify or set aside any part of the magistrate  
8 judge's order which is "found to be clearly erroneous or contrary to law." Fed. R. Civ. P.  
9 72(a); *see also* 28 U.S.C. § 636 (b)(1)(A).

10 Discovery motions regarding depositions are non-dispositive pretrial motions within  
11 the scope of Rule 72(a) and 28 U.S.C. § 636(b)(1)(A), and thus subject to the "clearly  
12 erroneous or contrary to law" standard of review. *Rockwell Int'l, Inc. v. Pos-A-Traction*  
13 *Indus., Inc.*, 712 F.2d 1324, 1325 (9th Cir. 1983). "A finding is 'clearly erroneous' when  
14 although there is evidence to support it, the reviewing court on the entire evidence is left with  
15 the definite and firm conviction that a mistake has been committed." *United States v. U. S.*  
16 *Gypsum Co.*, 333 U.S. 364, 395 (1948).

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18 **II. Analysis**

19 Having carefully reviewed the record in this case, the Court concludes that the  
20 magistrate judge did not clearly err in ruling that:

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The record fails to support Secretary Cate's sweeping assertion of  
the deliberative process privilege at the start of his deposition.  
Specifically, there is no suggestion in the record that his assertion  
of the privilege was limited to 'predecisional' and 'deliberative'  
communications about governmental decisions or policies, which  
are the only type of communications to which the privilege may  
apply. Nor is there evidence of whether the confidentiality of  
those communications has been maintained.

26 Sept. 10, 2008 Order at 5.

27 Additionally, Defendants erroneously rely on *Franklin Savings Association v. Ryan*,  
28 922 F.2d 209 (4th Cir. 1991), for the proposition that Plaintiffs must make a "strong showing

1 of bad faith or improper behavior" before they are permitted to inquire as to Mr. Cate's  
2 "mental processes." *Franklin*, 922 F.2d at 212 (quoting *Feller v. Bd. of Educ.*, 583 F. Supp.  
3 1526, 1528 (D. Conn. 1984)) (emphasis in *Franklin*). In *Franklin*, the plaintiffs sought to  
4 challenge the decision of an administrative agency by impugning the process that led to that  
5 decision. Here, we face a far different circumstance. Plaintiffs seek not to challenge the  
6 manner in which an administrative agency reached its decision, but to discover what  
7 positions Defendants will take at trial and what support they may offer for those positions. In  
8 this circumstance, no showing of bad faith or improper behavior is required.

9 Consequently, the magistrate judge's conclusion that Defendants failed to support  
10 their blanket assertion of the deliberative process privilege during the deposition of Mr. Cate  
11 is not clearly erroneous. While it remains possible that the deliberative process privilege  
12 may be properly invoked in response to certain questions, the record does not contain any  
13 basis for Defendants' blanket assertion.

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### 15 III. Conclusion

16 In light of the above discussion, IT IS HEREBY ORDERED that Defendants' motion  
17 for reconsideration of the magistrate judge's September 10, 2008 order regarding the  
18 deposition of Matthew Cate is DENIED. The deposition shall proceed as ordered on  
19 September 12, 2008, at 10:00 AM.

20 Defendants shall not be permitted to invoke the deliberative process privilege to  
21 refuse to answer all questions concerning Mr. Cate's communications with the Governor or  
22 the Governor's aides. If Defendants seek to assert the deliberative process privilege as to any  
23 particular question, they must lay a specific foundation on the record. If necessary, the  
24 parties may then seek the further assistance of the magistrate judge, who will then have a  
25 more adequate basis for considering whether the deliberative process privilege applies to  
26 particular questions, including whether Plaintiffs' "need for the [information] and the need  
27 for accurate fact-finding override the government's interest in non-disclosure." *F.T.C. v.*  
28 //

1      *Warner Commc'ns. Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). The magistrate judge shall  
2      resolve any further disputes as early as practicable.

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4 **IT IS SO ORDERED.**

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6      Dated: 09/11/08

/s/

7      STEPHEN REINHARDT  
8      UNITED STATES CIRCUIT JUDGE  
9      NINTH CIRCUIT COURT OF APPEALS

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11     STEPHEN REINHARDT  
12     UNITED STATES CIRCUIT JUDGE  
13     NINTH CIRCUIT COURT OF APPEALS

10      Dated: 09/11/08

11     LAWRENCE K. KARLTON  
12     SENIOR UNITED STATES DISTRICT JUDGE  
13     EASTERN DISTRICT OF CALIFORNIA

14     

15     LAWRENCE K. KARLTON  
16     SENIOR UNITED STATES DISTRICT JUDGE  
17     EASTERN DISTRICT OF CALIFORNIA

14      Dated: 09/11/08

13     THELTON E. HENDERSON  
14     SENIOR UNITED STATES DISTRICT JUDGE  
15     NORTHERN DISTRICT OF CALIFORNIA

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