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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

11 RALPH COLEMAN,
12 Plaintiff,
13 v.
14 GAVIN NEWSOM, et al.,
15 Defendants.

No. 2:90-cv-0520 KJM DB P

ORDER

18 Defendants have filed a motion for a protective order protecting them from
19 producing to the court's neutral expert documents they claim are subject to the attorney-client
20 privilege and work product doctrine. ECF No. 6086. The motion is noticed for hearing before
21 the undersigned on March 22, 2019. *Id.* For the reasons explained in the order, the motion is
22 denied without hearing.

23 | I. BACKGROUND

24 Defendants' motion for protective order is the latest in a series of motions and
25 court proceedings that have followed the court's receipt in October 2018 of a whistleblower
26 report by defendant California Department of Corrections and Rehabilitation's Statewide Chief
27 Psychiatrist, Dr. Michael Golding. The Golding Report was brought to the court's attention by
28 separate October 5, 2018 filings by plaintiffs and defendants, the former seeking a status

1 conference and the latter requesting a stay of proceedings. ECF Nos. 5936, 5938. The court had
2 five hearings between October 10, 2018 and December 14, 2018 as part of considering options for
3 addressing the allegations of the Golding Report. *See* ECF Nos. 5944, 5964, 5980, 5995, 6035.
4 Ultimately the court also gave the parties opportunities to show cause why the court should not
5 appoint an independent investigator,¹ ECF No. 6002, to file their views on the court's planned
6 appointment of Charles J. Stevens, Esq. of Gibson, Dunn & Crutcher LLP, ECF No. 6018, and to
7 comment on the proposed content of appointment orders. ECF Nos. 6002-1, 6018-1.

8 Defendants filed two responses to the court's November 13, 2018 order to show
9 cause, ECF No. 6002. ECF Nos. 6009, 6012. In the first set of objections, which were timely
10 filed, defendants asserted, *inter alia*, that the court's proposed order would authorize the
11 independent investigator to invade attorney-client and work product protections. ECF No. 6009
12 at 13-14. The second response, ECF No. 6012, was filed after the deadline set in the November
13, 2018 order, and accompanied by a request for an extension of time to file the response. ECF
14 No. 6013. In that response, defendants asserted they had "confirmed that no fraud on this Court
15 has occurred." ECF No. 6012 at 4.² While the court granted the extension of time and permitted
16 the late filing, the court also held that it would "disregard the objections at this time as filed in
17 derogation of a prior court ruling denying without prejudice defendants' request to submit a
18 substantive response to the allegations of the Golding Report prior to completion of an
19 independent investigation." ECF No. 6018 at 1-2 (citing ECF No. 5998 at 20:4-23).

20 On November 29, 2018, after considering the parties' responses to the November
21 13, 2018 order to show cause, the court issued an order confirming its intention "to appoint an
22 expert under Federal Rule of Evidence 706 to investigate and prepare a report for the court and
23 the parties on whether there is evidence sufficient to warrant an evidentiary hearing into whether

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25 ¹ Over the course of this process, the expert has been referred to variously in court orders
as an independent investigator, an independent expert, and a neutral expert.
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27 ² References to page numbers in documents filed in the Court's Electronic Case Filing
28 (ECF) system are to page numbers assigned by the ECF system and located in the upper right
hand corner of the page.

1 defendants have intentionally presented false or misleading information to the court in one or
2 more of the areas addressed in the Golding Report.” ECF No. 6018 at 2. The court again invited
3 responses from the parties, this time to the court’s proposal to appoint Mr. Stevens of Gibson,
4 Dunn & Crutcher LLP as the court’s independent expert. *Id.* at 12.

5 In their December 6, 2018 response, defendants again reiterated their objection to
6 the appointment of a neutral expert before the court assessed the accuracy of allegations in the
7 Golding Report, ECF No. 6022 at 4-5, and their objections concerning potential invasion of the
8 attorney-client privilege. *Id.* at 10-11. On December 13, 2018, after reviewing the parties’
9 responses to the November 29, 2018 order, the court issued an order confirming its intention to
10 appoint Mr. Stevens and his firm “as its neutral expert to conduct an independent investigation
11 into certain allegations in the Golding Report,” “subject to his confirmation of his consent.” ECF
12 No 6032 at 1, 10.

13 On December 14, 2018, the court conducted a status conference. Mr. Stevens and
14 his partner Benjamin Wagner, Esq., participated in the status conference by telephone.
15 Defendants again raised their attorney-client privilege objection, arguing the court had not
16 responded to their objection. ECF No. 6054 at 16:2-7. The court stated its response was “in a
17 single line in the order issued yesterday, and that is I’m not going to put any artificial limits on the
18 investigation. The information will lead where it will.” *Id.* at 16:8-11. Subsequently, the
19 following exchange took place between Mr. Stevens and the court:

20
21 MR. STEVENS: First, and perhaps this relates to Mr. Gibson's
22 comment about attorney-client privilege, I think it is clear to
23 us from the court's orders that the court contemplates that we
24 will at various times have access to information that is
appropriately deemed to be privileged information pursuant to
attorney-client privilege.

25 In our view, and this is our interpretation of the
26 orders, if a party provides access to attorney-client
27 privileged information, that would not effectuate a waiver of
the attorney-client privilege because we are acting as an arm
of the court. And thus, the disclosure of privileged
28 information to us would be the functional equivalent of

1 submitting privileged information to the court, under seal, for
2 in camera review.

3 Consistent with that, assuming that interpretation is
4 right, I would confirm on the record that our intention would
5 be, to the extent that we do have attorney-client information
6 from any party, that we would not publicly disclose that, nor
7 disclose it to the other side. And any such information that
is flagged by the parties as privileged information would only
be submitted to the court, under seal, for in camera review.
And only the court would be free to decide the validity of any
privilege claim and disclose that information.

8 We are very respectful of parties' privileges and will
9 do everything in our power to avoid any intentional or
10 inadvertent disclosure of privileged material.

11 I would just like to confirm that is a correct
12 interpretation of the court's order.

13 THE COURT: The court would confirm that is a correct
14 interpretation, that any access provided will not operate as a
waiver and there will be no public disclosure.

15 To the extent Mr. Stevens provides any information
16 covered by a privileged claim, it will be not publicly
provided. It will be provided under seal to the court, and the
court would ultimately, after adversarial proceedings, make any
determination about unsealing that information if it thought it
17 was required to do so.

18 *Id.* at 25:18-27:4.

19 On December 14, 2018, the court issued an order appointing Mr. Stevens and his
20 firm as the court's neutral expert under Federal Rule of Evidence 706. ECF No. 6033. The court
21 issued an amended appointment order on January 8, 2019. ECF No. 6064. Defendants have
22 appealed the appointment orders, although their grounds for appeal are not clear. *See* ECF Nos.
23 6058, 6078. They have neither sought nor received a stay of the court's orders covered by any
24 appeal.

25 II. ANALYSIS

26 Though styled as a motion for protective order, defendants' motion is properly
27 construed as a motion for reconsideration of this court's prior orders concerning the scope of the
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1 neutral expert's access to information for which attorney-client privilege and/or work product
2 protections might be asserted and the process to be followed for production and consideration of
3 such materials. Local Rule 230(j) sets out the requirements for seeking reconsideration of a court
4 order:

5 (j) Applications for Reconsideration. Whenever any motion has been
6 granted or denied in whole or in part, and a subsequent motion for
7 reconsideration is made upon the same or any alleged different set of
8 facts, counsel shall present to the Judge or Magistrate Judge to whom
such subsequent motion is made an affidavit or brief, as appropriate,
setting forth the material facts and circumstances surrounding each
motion for which reconsideration is sought, including:

9 (1) when and to what Judge or Magistrate Judge the prior motion was
10 made;

11 (2) what ruling, decision, or order was made thereon;

12 (3) what new or different facts or circumstances are claimed to exist
13 which did not exist or were not shown upon such prior motion, or
what other grounds exist for the motion; and

14 (4) why the facts or circumstances were not shown at the time of the
prior motion.

15 Local Rule 230(j) (E.D. Cal.). Defendants have not satisfied the requirements of this rule. In
16 particular, misleadingly, while defendants quote part of Mr. Stevens' comments from the
17 December 14, 2018 hearing, they do not set forth the entire exchange between the court and Mr.
18 Stevens, nor do they acknowledge that the court specifically confirmed in open court, in a bench
19 order, the procedure that would be followed. *See* ECF No. 6086 at 5. In this way, they have
20 failed to meet the requirement of Local Rule 230(j)(2); similarly, they have not met the
21 requirements of Local Rule 230(j)(3) or (4).

22 Moreover, defendants' request that the court conduct an advance review of
23 allegedly privileged material *in camera* to determine whether the crime-fraud exception to the
24 attorney-client privilege applies seeks an end-run around the court's prior ruling that it would not
25 consider "a substantive response to the allegations of the Golding Report prior to completion of
26 an independent investigation." ECF No. 6018 at 2 (citing ECF No. 5998 at 20:4-23). Such a
27 review would require the court now to consider the question of whether there is evidence of fraud
28 on the court, in advance of the report it is awaiting from its neutral expert. The defendants have it

1 backwards: Completion of the neutral expert's work is a prerequisite to the court's proper
2 consideration and resolution of the issues raised by the Golding Report.

3 As the court has explained and confirmed in prior orders, the process it has put in
4 place does not delegate the court's factfinding or decision-making authority to the neutral expert.
5 Rather, the sole function of the neutral expert is

6 to assist the court and the parties in determining "whether there is a
7 sufficient factual foundation to require this court to hold an
8 adversarial, evidentiary hearing to determine whether defendants
9 have intentionally presented false or misleading evidence to the court
10 or the Special Master." ECF No. 6018 at 10. At the conclusion of
11 the investigation, he will report to the court and the parties on the
12 results of the investigation, providing his views on what documents
13 and which witnesses, if any, support the court's holding of an
14 evidentiary hearing. *See id.* at 10. He will not "have any 'dispute
15 resolution authority,' will not conduct any hearings, and will not
16 make any recommendations to the court concerning adjudication of
17 any facts." *Id.*

18 ECF No. 6032 at 6. As the court has also explained, the Golding Report requires the court to
19 "fulfill its duty to ensure that the record before it is free from fraud or intentional
20 misrepresentation," and in doing so the court "must ultimately consider all the evidence relevant
21 to those questions as they are raised by the Golding Report." *Id.* at 4-5. To perform its function
fairly,

22 [t]he court simply cannot itself conduct the initial factual
23 investigation into allegations it may adjudicate in subsequent
24 adversarial proceedings. The importance in this context of a neutral
25 investigation led by someone who understands what qualifies as
26 actual fraud and what does not, and who also understands the way
27 large and complex governmental organizations operate, cannot be
28 overstated.

29 *Id.* at 5. To ensure that the neutral investigation is carried out efficiently and fairly, as discussed
30 above, the court already has addressed defendants' concerns regarding materials for which they
31 may claim attorney-client privilege or work product protection, by providing that those claims are
32 not waived and potentially privileged material be disclosed only to the court's neutral expert
33 during the investigation and then to the court, subject to the claim of privilege. In light of the
34 court's prior orders, there is no basis for the protective order defendants now seek.

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1 For the foregoing reasons, defendants' motion for protective order will be denied.
2 Given counsel's selective quoting of the December 14, 2018 hearing transcript, and apparent
3 disregard of the court's prior orders regarding the procedures to be followed and the treatment of
4 potentially privileged information during the independent investigation, counsel is reminded of
5 the obligations imposed by Federal Rule of Civil Procedure 11.

6 In accordance with the above, IT IS HEREBY ORDERED that defendants'
7 February 14, 2019 motion for protective order, ECF No. 6086, is DENIED. The hearing set for
8 March 22, 2019 is VACATED.

9 DATED: February 19, 2019.

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11 UNITED STATES DISTRICT JUDGE
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