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7 **UNITED STATES DISTRICT COURT**
8 **FOR THE EASTERN DISTRICT OF CALIFORNIA,**
9 **SACRAMENTO DIVISION**

10 **RONALD S. CALDERON,**

11 **Plaintiff/Petitioner**

12 **v.**

13 **UNITED STATES,**

14 **Defendant/ Respondent**

CASE NO.:

**NOTICE OF MOTION AND MOTION
FOR ORDER TO SHOW CAUSE WHY
GOVERNMENT SHOULD NOT BE
HELD IN CONTEMPT FOR
VIOLATION OF MAGISTRATE
JUDGE'S ORDER SEALING FBI
AFFADAVIT; MEMORANDUM OF
POINTS AND AUTHORITIES;
REQUEST FOR SANCTIONS**

15 **IN RE: CRIMINAL VIOLATION OF**
16 **COURT ORDER SEALING AFFIDAVIT**

**TO BE FILED PUBLICLY - NOT TO
BE PLACED UNDER SEAL**

INITIATING DOCUMENT

Trial Date: TBD
Hearing Date: TBD
Time: TBD
Place: TBD

27 **NOTICE OF MOTION AND MOTION FOR ORDER TO SHOW CAUSE WHY GOVERNMENT**
28 **SHOULD NOT BE HELD IN CONTEMPT FOR VIOLATION MAGISTRATE JUDGE'S ORDER**
SEALING FBI AFFADAVIT; MEMORANDUM OF POINTS AND AUTHORITIES; REQUEST FOR
SANCTIONS

GERAGOS & GERAGOS, APC
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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:


PLEASE TAKE NOTICE that on a date and time to be determined by the above-captioned Court, located at 501 I Street, Sacramento, California 95814, moving party Senator Ronald S. Calderon will, and hereby does, move this Court for an Order to Show Cause as to why the United States Government, and its agents, should not be held in contempt for illegally leaking an affidavit, sealed pursuant to the orders of the Federal Magistrate Judge of this Honorable Court, to the media in an effort to defame and retaliate against Senator Calderon for not cooperating in its “sting” operation against Senator Darrell Steinberg and Senator Kevin de Leon.

PLEASE TAKE FURTHER NOTICE that Senator Ronald S. Calderon will, and hereby does, seek all appropriate sanctions against the United States Government, and its agents, for irreparably tainting future grand jury proceedings and causing irreparable harm to Senator Calderon’s reputation.

This motion is based on this Notice, the accompanying Memorandum of Points and Authorities, the attached exhibits, and such other argument and evidence as may be presented at the hearing on this Motion.

DATED: November 13, 2013

GERAGOS & GERAGOS, APC

By: 
MARK J. GERAGOS
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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3 Senator Ronald S. Calderon was approached on six separate occasions by high level
4 agents of the Federal Bureau of Investigation and on two occasions by the Assistant United
5 States Attorney for the Central District of California Doug Miller demanding that Senator
6 Calderon participate in a sting operation against Senate President pro Tem Darrel Steinberg.
7 The FBI agents requested that Senator Calderon wear a wire and secretly record his
8 conversations with Senator Steinberg and Senator Kevin de Leon. The FBI was specifically
9 interested in Senator Steinberg’s financial activities with Michael Drobot, the former Chief
10 Executive Officer of Pacific Hospital of Long Beach. Senator Calderon refused to continue
11 participating in the FBI’s sting operation, and rejected their demands to secretly record
12 conversations with Senator Steinberg and Senator de Leon. Senator Calderon, through the
13 law office of Geragos & Geragos, APC, returned the wire equipment supplied by the FBI to
14 the agents working for United States Attorney’s Office for the Central District of California.
15 Attached hereto as Exhibit “A” is a true and correct copy of the “Acknowledgement of
16 Receipt” signed by the FBI for the wireless transmitter-serial number P235, returned by
17 Senator Calderon.

18 Further, on June 4, 2013—shortly after Senator Calderon refused the FBI’s request to
19 participate in its sting operation—the FBI conducted a raid on Senator Calderon’s office.
20 The media was alerted to the raid, as it was taking place, by sources at the FBI working for
21 Assistant United States Attorney-Central District of California (AUSA-CDC). The FBI raid
22 of Senator Calderon’s office became a media spectacle with camera crews present for the
23 entire ordeal. The FBI raid was conducted after the FBI presented an affidavit which
24 included numerous false and defamatory allegations about Senator Calderon. The FBI
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1 affidavit omitted facts that just days before the affidavit was prepared, the FBI was
2 attempting to use Senator Calderon as an informant against Senators Steinberg and de Leon.
3 The FBI affidavit was ordered sealed by the Magistrate Judge of this Honorable Court.

4 On October 30, 2013, the news outlet "Al Jazeera America" published an article
5 which included the FBI's affidavit relating to the search warrant of Senator Calderon's
6 office. The article included other confidential details concerning the FBI's investigation.
7 Attached hereto as Exhibit "B" and "C" are true and correct copies of the Al Jazeera Article
8 and FBI affidavit attached to the article. The source of the leaked affidavit could only have
9 come from the FBI and/or the AUSA-CDC which was directing the FBI operation. The
10 details of the FBI's investigation, the strategy and direction of the investigation, the potential
11 charges being considered by the government, and the contents of the FBI's affidavit are all
12 information that could be known only to those within the U.S. Attorney's office.

13 The AUSA-CDC has a history of having confidential and sealed documents under the
14 office's control leaked to the press. Specifically, the pattern of illegal leaks coming from the
15 office of AUSA Doug Miller is troubling, with the media sensationalism created by those
16 leaks bearing no relation to the ultimate facts and law. Here, it is clear that the FBI and/or
17 AUSA-CDC engaged in a campaign to smear the reputation of Senator Calderon and convict
18 him in the press and public before a grand jury was assembled and while it was hearing
19 evidence. Short of that, they seek to have him removed from office. The egregious
20 constitutional violations committed in this case were not motivated by the ends of justice, but
21 were instead efforts by the AUSA-CDC to retaliate against Senator Calderon for derailing
22 the FBI/AUSA sting operation on the California State Senate by refusing to participate as
23 their informant.

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II. FACTUAL BACKGROUND

A. The Leak

On October 30, 2013, Al Jazeera America published an article written by Trevor Aaronson and Josh Bernstein which describes the allegations contained in the FBI's sealed affidavit. The article contains a downloadable copy of the FBI affidavit. The affidavit was ordered to be sealed and kept confidential by the Magistrate Judge for the United States District Court, Eastern District of California. Leaking the sealed affidavit to the press is expressly prohibited and illegal.

The October 30, 2013 Al Jazeera article claims that the FBI's affidavit was provided to Al Jazeera America's Investigative Unit. The article contains descriptions of names of numerous potential witnesses, the nature of the purported allegations against Senator Calderon, the details of the investigation conducted by the FBI, purported conversations with Senator Calderon, and other blatant hearsay. All of this information was under seal. The article admits that the affidavit is "still under seal." The article continues by using completely false and fabricated information taken from the affidavit to smear Senator Calderon and his family. Al Jazeera claims that its attorneys redacted portions of the affidavit to protect the identities of *the FBI agents* involved in the raid. We have evidence that Al Jazeera reporters were in prior contact with FBI Public Information Officer Samora Ivera.

Following the publication of the October 30 Al Jazeera article, the FBI announced an investigation into the unauthorized leak of the sealed affidavit¹. On November 7, 2013 the

¹ *FBI seeks investigation of source of leaked affidavit*, The Sacramento Bee (November 1, 2013), at <http://blogs.sacbee.com/capitolalert/latest/2013/10/fbi-seeks-investigation-of-source-of-leaked-affidavit.html>.

1 FBI released another statement refusing to comment on the pending investigation and
2 confirming that the investigation into the source of the leak was referred to the Department
3 of Justice.² However, the FBI's "investigation" into the illegal leak is little more than the fox
4 guarding the proverbial henhouse since the likely source of the illegal leak is inside the
5 Department of Justice where the so-called investigation has now been referred.

6 **B. Retaliation by the FBI and/or the AUSA-CDC**

7 The leaker in this case deliberately released the FBI's sealed affidavit to publicly
8 disgrace Senator Calderon. The false information contained in the FBI affidavit, the illegal
9 raid on Senator Calderon's office, and the most recent leak of the under seal affidavit were
10 part of a calculated effort by the FBI and/or the AUSA-CDC to retaliate against Senator
11 Calderon.

12 Shortly before the FBI raid took place, Senator Calderon refused to participate in the
13 sting operation planned by the FBI and AUSA Miller against Senator Steinberg. Senator
14 Calderon was given a wire to wear and was asked to record his communications with Senator
15 Steinberg and Senator de Leon. High level FBI agents met with Senator Calderon on six
16 occasions and AUSA Miller met with Senator Calderon on two separate occasions to try and
17 convince the Senator to participate in the sting operation targeting the financial dealings
18 between Senator Steinberg and Michael Drobot and other donors to the Senate pro Tem's
19 political action committees. Senator Calderon refused to participate in the sting operation
20 and returned the wire equipment to the FBI. In response, the FBI and AUSA Miller pursued
21 frivolous and fabricated allegations against Senator Calderon and permitted such allegations
22

23 ² Randy Economy & Brian Hews, *BREAKING: FBI Issues Statement on Al Jazeera America Expose on The*
24 *Calderons*. Los Cerritos Community Newspaper (November 7, 2013), at
25 <http://www.loscerritosnews.net/2013/10/31/breaking-fbi-issues-statement-on-al-jazeera-america-expose-on-the-calderons/>.

1 to leak to the press in violation of Court order.

2 The AUSA-CDC has attempted to convict Senator Calderon in the press through an
3 illegal disinformation campaign. While false information concerning Senator Calderon has
4 been illegally leaked to the press, critical facts regarding the AUSA-CDC's activities have
5 been omitted or misrepresented. For example, the Los Angeles Times reported that AUSA
6 Miller subpoenaed Senator de Leon in connection with the investigation of Senator Calderon
7 but "indicat[ed] that de Leon is not target of the investigation."³ However, this statement, in
8 a letter to Senator de Leon's attorney signed by AUSA Miller, is demonstrably false since
9 Senator Steinberg and Senator de Leon were the main targets of the investigation, for which
10 Senator Calderon was requested to be the FBI's informant.

11
12 **C. Similar Leaks Have Plagued the Government's Investigations into Other**
13 **Cases Handled by the AUSA-CDC**

14 The illegal leak of under seal records in this case is apparently the modus operandi for
15 how high profile and sensitive cases are handled by AUSA Miller's office. AUSA Miller
16 has been the common thread in a string of illegal leaks over the years. For example, AUSA
17 Miller was involved in the investigation into steroid use in major league baseball in 2003-
18 2004. In June 2009, the New York Times published an article disclosing a name of a player
19 who purportedly appeared on the "positive results" lists in an under seal filing. The New
20 York Times Article quoted "an anonymous source" who did not want to be identified as
21 discussing matter because it was sealed with the court. *See In re: GRAND JURY LEAKS,*
22 *2011 WL 2766956 (C.D. Cal 2011).* Additionally, in 2011 AUSA Miller headed the

23
24 ³ See *Federal prosecutor probing Calderon is used to high-profile cases*, Los Angeles Times (November 1,
25 2013), at [http://www.latimes.com/local/political/la-me-pc-ron-calderon-investigation-prosecutor-
26 20131101.0.3060451.story#axzz2kTDG9vSN](http://www.latimes.com/local/political/la-me-pc-ron-calderon-investigation-prosecutor-20131101.0.3060451.story#axzz2kTDG9vSN)

1 government's investigation of professional athlete Lance Armstrong. In that case, multiple
2 instances of sealed and confidential information being leaked to the press were identified.
3 Mr. Armstrong's attorneys filed a sanctions motion against the government, and its agents,
4 for the illegal leaks that tainted the grand jury procedures. *See Id.*

5 The pattern of illegal leaks in cases handled by the AUSA-CDC has grown more
6 brazen over the years culminating in the most flagrant and prejudicial violations yet with
7 respect to Senator Calderon. There is a systematic and systemic pattern of contempt for
8 secrecy rules in AUSA Miller's cases resulting in the complete corruption of the legal
9 process and character assassination of his targets. This conduct is deeply disturbing given
10 that AUSA Miller purports to represent the "public corruption" division within the AUSA's
11 office.

12 **D. Irreparable Harm to Senator Calderon**

13 The inviolable secrecy of pre-indictment documents is derived from constitutional
14 norms to preserve the presumptions of innocence. Although the government routinely holds
15 press conferences and issues press releases to saturate the public with their version of events,
16 in mostly all cases that conduct occurs after an indictment is issued and an individual is
17 charged with a crime. Here, the prejudice caused to Senator Calderon is compounded
18 because not only has Senator Calderon not been charged with a crime, but the illegal leaks
19 have occurred while the Grand Jury is hearing evidence. The leaks of sealed records in this
20 case are calculated to fast track and strong-arm a meritless case against Senator Calderon
21 through the grand jury process and then apparently shame Senator Calderon into accepting a
22 plea agreement. The release of the sealed records has prejudiced any future grand jury
23 proceeding and irreparably tainted any future court proceedings involving Senator Calderon.

24 The illegal leaks have also served to discredit and defame Senator Calderon in the
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1 public before any proceedings have been held. Senator Steinberg, who was the target of the
2 government's investigation *for his conduct*, has stripped Senator Calderon from his
3 committee positions and, on November 12, 2013 proclaimed he "will be damned" if Senator
4 Calderon harms the reputation of the California State Senate⁴. Assemblymember Christina
5 Garcia and numerous news outlets have publicly called on Senator Calderon to resign.⁵

6 Despite the fact that no charges against Senator Calderon have been filed, Senator
7 Calderon's reputation has been irreparably damaged by the selective and illegal leak of the
8 fabricated FBI affidavit which was ordered sealed. The presumption of innocence has been
9 turned on its head.

10 III. ARGUMENT

11 A. Leaking Sealed Records Is Illegal

12 The Ninth Circuit has consistently recognized that "warrant materials during the pre-
13 indictment phase of an investigation . . . warrant the highest protection." *Kamakana v. City*
14 *and County of Honolulu*, 447 F.3d 1172, 1185, fn. 23 (9th Cir. 2006). Public access to
15 records, "while important, had to be tempered by the rule of secrecy because of the well-
16 recognized policies behind that rule." *Times Mirror Co. v. U.S.*, 873 F.2d 1210, 1219 (9th
17 Cir. 1989). These public policy considerations include preserving the presumption of
18 innocence of an individual who is targeted, but not yet charged, by the government and
19 avoiding taint in future grand jury proceedings or in the event charges are filed. *Id.*
20

21
22 ⁴ Steinberg: "I'll Be Damned" If Scandal Taints Senate (November 10, 2013),
23 <http://www.nbclosangeles.com/news/local/Darrell-steinberg-senate-pro-tem-news-conference-calderon-231326421.html>

24 ⁵ *State Sen. Ron Calderon must resign, right now: Editorial*, Long Beach Press Telegram (November
25 5, 2013), <http://www.presstelegram.com/opinion/20131105/state-sen-ron-calderon-must-resign-right-now-editorial>.

1 Tampering with pre-indictment procedures, including leaking sealed documents,
2 raises other concerns rising to the level of serious criminal violations. Specifically, 18
3 U.S.C.A. § 1509—Obstruction of Court Orders states:

4 Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes
5 with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due
6 exercise of rights or the performance of duties under any order, judgment, or decree of
7 a court of the United States, shall be fined under this title or imprisoned not more than
8 one year, or both.

9 Additionally, the Unites States Code criminalizes acts of retaliation against witnesses
10 or informants during pre-indictment procedures. 18 U.S.C.A. § 1513—Retaliating against a
11 witness [or] an informant, provides:

12 (e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any
13 person, including interference with the lawful employment or livelihood of any
14 person, for providing to a law enforcement officer any truthful information relating to
15 the commission or possible commission of any Federal offense, shall be fined under
16 this title or imprisoned not more than 10 years, or both.

17 (f) Whoever conspires to commit any offense under this section shall be subject to the
18 same penalties as those prescribed for the offense the commission of which was the
19 object of the conspiracy.

20 (g) A prosecution under this section may be brought in the district in which the
21 official proceeding (whether pending, about to be instituted, or completed) was
22 intended to be affected, or in which the conduct constituting the alleged offense
23 occurred.

24 Here, the conduct of leaking sealed records to retaliate against Senator Calderon for
25 his activity as a witness and informant against Senator Steinberg invokes both 18 U.S.C.A. §
26 1509—Obstruction of Court Orders and U.S.C.A. § 1513—Retaliating against a witness [or]
27 an informant.

28 Individuals responsible for leaking confidential pre-indictment documents and
information have received severe punishments by Courts. For example, in *U.S. v. Hall*

1 2011 WL 6291957 (D.Vt. 2011) a paralegal working for the U.S. Attorney’s Office was
2 caught leaking sealed documents to her boyfriend who was under investigation. The
3 defendant in that case was charged with obstruction of justice. The defendant accepted a
4 plea deal for three years of probation. At the sentencing of the defendant, the federal court
5 explained, “This is an extremely serious offense . . . I’ve never seen anything like it before in
6 my 16 years on the bench. . . You understand that what you did goes to the heart of what the
7 criminal justice systems is about?”⁶

8 Leaks of confidential pre-indictment material also violate the Department of Justice’s
9 own rules. The United States Attorney's Manual (“USAM”) expressly recognizes the need
10 for confidentiality and prohibits prosecutors from making public comments regarding the
11 nature and progress of ongoing investigations; any statements made by a target or the failure
12 of a target or subject to make a statement; and the identities of prospective targets, subjects,
13 or witnesses. See USAM §§ 1-7.111, 1-7.500, 1-7.530. The USAM also makes clear that
14 “[a]t no time shall any component or personnel of the Department of Justice furnish any
15 statement or information that he or she knows or reasonably should know will have a
16 substantial likelihood of materially prejudicing an adjudicative proceeding.” USAM § 1-
17 7.500.

18 Leaking sealed pre-indictment records and affidavits also violates Federal Rules of
19 Criminal Procedure 49.1 and Local Rule 141. Both of these rules protect sealed documents
20 from public disclosure. At a minimum, violating the Court’s sealing orders subjects the
21 violating party to contempt proceedings and sanctions. *See In Matter of Respondent X*, 1997
22 WL 90832 (Cal.Bar Ct., 1997) (acknowledging that attorney may be found in criminal
23 contempt for violating a court’s sealing order and imposing discipline on the violating
24 attorney).

24 ⁶ Ex-paralegal sentenced for Burlington grand jury leak (May 15, 2012)
25 <http://www.burlingtonfreepress.com/article/20120515/NEWS02/120514026/>

1 The violations committed here are thus criminal, contemptible, procedural, and a
2 violation of the Department of Justice's own rules.

3 **B. The Government Should be Held in Contempt for Violating the Magistrate**
4 **Judge's Order to Seal the FBI's Affidavit**

5 In a contempt proceeding, the "moving party has the burden of showing by clear and
6 convincing evidence that the contemnor violated a specific and definite order of the court."
7 *F.T.C. v. Affordable Media*, 179 F.3d1228, 1239 (9th Cir. 1999), (*quoting Stone v. City and*
8 *County of San Francisco*, 968 F.2d 850, 856 n.9 (9th Cir. 1992)); *see also In re Crystal*
9 *Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987) ("If a person disobeys a
10 specific and definite court order, he may be properly adjudged in contempt.") *citing Shuffler*
11 *v. Heritage Bank*, 720 F.2d 1141, 1146 (9th Cir. 1983). If the moving party meets its burden,
12 the burden is then on the violator to demonstrate why he has not complied with the order.
13 *See Affordable Media*, 179 F.3d at 1239.

14 Here, the Magistrate's Order to seal the FBI affidavit followed the historical and
15 sacrosanct judicial and constitutional precedent of maintaining strict confidentiality of pre-
16 indictment documents and records. The FBI affidavit was only possessed by the FBI and the
17 AUSA-CDC. The FBI investigation was conducted under the auspices of the AUSA-CDC.
18 Other than referring the investigation over its own misconduct to itself, the government has
19 provided no explanation why the affidavit was furnished to Al Jazeera America. The leak in
20 this case follows a history of leaks in high profile cases handled by AUSA Miller.

21 The fact that the affidavit was leaked, when only the government had access to the
22 document, inherently implicates the government as the source of the leak and shifts the
23 burden to the government to answer for its conduct. The Fifth Circuit Court of Appeal's
24 analysis regarding leaks is instructive. The Court has held that an inference is made that the
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1 government was the source of the leak when some variation of the following information is
2 published:

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4 (i) the name of “a specific witness...to be called,” and “a specific question which the
5 witness will be asked;” (ii) “specific types of criminal conduct which the grand jury
6 was focusing upon;” (iii) “the contents of documents presented to the grand jury;” (iv)
7 “information learned by the grand jury;” and (v) particular entities “whose activities
8 were being investigated.

9
10 *In re: Grand Jury Investigation (Lance)*, 610 F.2d 202, 218 n. 12. (5th Cir. 1980). *See also*
11 *U.S. v. Flemmi*, 233 F.Supp.2d 113, 117-18 (D.Mass 2000) (ordering government to submit
12 affidavits proving it was not the source of the leak where a single news article, citing
13 “sources familiar with the investigation,” was “susceptible to the interpretation that it reports
14 on evidence that is not part of the public record, but which was presented to the grand jury or
15 was provided to investigators acting as the grand jury’s agents.”)

16 Here, the information released in the Al Jazeera article is precisely the type of
17 information only the government had access to. Indeed, the leak in this case exceeds the
18 mere inference that the government leaked the records since the actual affidavit was
19 delivered to the press.

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21
22 **C. Since The Government Is The Source Of The Leak, The Court Should
23 Impose Sanctions.**

24 This Court has the inherent power to enforce compliance with its lawful orders
25 through contempt. *Shillitani v. United States*, 384 U.S. 364, 370 (1966); *See also* 18 U.S.C. §
26 401 (1982); *Young v. United States*, 481 U.S. 787, 793 (1987); *In re Crystal Palace*, 817
27 F.2d at 1364; *see also* Fed R. Civ. P. 70. The court’s powers in contempt proceedings are
28 broad, *Spallone v. United States*, 493 U.S. 265, 276 (1990), and include the authority to
impose sanctions to coerce compliance with a court order, *Int’l Union, United Mine Workers*

1 of *America v. Bagwell*, 512 U.S. 821, 829 (1994), and to compensate affected persons and
2 entities for losses caused by the contemnor's actions. *Transact Technologies, Inc. v. Isource*
3 *Worldsite*, 406 F.3d 851, 855 (7th Cir. 2005). Sanctions may be imposed to coerce
4 defendants into compliance with the court's order, or to compensate the party pursuing the
5 contempt action for losses sustained as a result of the contemptuous behavior, or both.
6 *United States v. United Min Workers*, 330 U.S. 258, 303-304 (1947); *United States v. Bright*,
7 596 F.3d 683, 696-697 (9th Cir. 2010)

8 The government has demonstrated contempt for the Court's Order to seal the FBI's
9 affidavit. Based on the clear and convincing evidence presented in this motion, Senator
10 Calderon respectfully requests the Court order the government to show cause why it should
11 not be held in contempt and subject to all appropriate sanctions.

12 IV. CONCLUSION.

13 Based on the foregoing, California State Senator Ronald S. Calderon respectfully
14 requests that the Court issue an Order to Show Cause why the United States, and its agents,
15 such not be held in contempt for leaking sealed and confidential records and irreparably
16 prejudicing Senator Calderon.
17

18
19 DATED: November 13, 2013

GERAGOS & GERAGOS, APC

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22 By: 

MARK J. GERAGOS
Attorneys for Defendant
RONALD CALDERON

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27 NOTICE OF MOTION AND MOTION FOR ORDER TO SHOW CAUSE WHY GOVERNMENT
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