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8 Attorneys for Non-parties Julie Albertson and Mary Hendow

9 UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 (SAN JOSE)

12 In re APOLLO GROUP, INC.
13 SECURITIES LITIGATION

Case No.: 06-80270 MISC PVT

(U.S. District Court, District of Arizona,
CV 04-2147-PHX-JAT)

14
15 This Document relates to:

DECLARATION OF NANCY G. KROP IN
SUPPORT OF EXHIBITS FILED BY APOLLO
GROUP REMAINING UNDER SEAL

16 ALL ACTIONS.
17

18 Date: October 12, 2006
19 Courtroom: Five
20 Judge: Honorable Patricia V. Trumball
United States Magistrate Judge
(General Duty Judge for August)
21 Location: United States Courthouse
22 280 S. 1st Street, Ste 2112
San Jose, CA 95113-3008
23 Tel 408 535 5363 and 5364
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DECLARATION OF NANCY G. KROP
IN SUPPORT OF DOCUMENTS REMAINING UNDER SEAL

I, Nancy G. Krop, hereby declare the following to be true, to be of my own personal knowledge, and to be facts about which I am willing and competent to testify if called upon to do so.

1. Co-counsel Daniel Robert Bartley and I represent non-party witnesses Julie Albertson and Mary Hendow in these proceedings and also in Ms. Albertson's and Ms. Hendow's False Claims Act *qui tam* whistleblower case titled *United States ex rel. Hendow v. University of Phoenix*, ___ F. 3d ___ (9th Cir., September 5, 2006) (FRCP 12(b)(6) dismissal by ED Cal reversed and case remanded). In such *qui tam* case, a request for rehearing is pending, which request we anticipate the Ninth Circuits imminently will deny. We both are duly admitted to practice before this Court.

2. I file this declaration in response to the Court's order dated October 6, 2006, requesting any party wanting Exhibits T, X, Y and Z to the Diulio Declaration (counsel for Apollo Group) to remain under seal in the records of this Court to file a declaration no later than October 12, 2006, showing cause for those exhibits to remain under seal.

The Disclosure Statement and Exhibits: Exhibit T

3. Exhibit T to the Declaration of Kristopher P. Diulio in Support of Defendant Apollo Group Inc's Opposition to Julie Albertson's and Mary Hendow's Motion to Quash Subpoenas ("Diulio Declaration") is a confidential privileged Disclosure Statement and exhibits that non-party witnesses Ms. Albertson and Ms. Hendow (hereinafter Relators) provided to the United States Department of Justice as required by the False Claims Act ("FCA"), 31 U.S.C. §3730(b). Request is hereby made that this Court maintain Exhibit T under seal.

4. As set forth below, non-parties provided Exhibit T in complete confidentiality to the United States Government. Upon learning that Apollo Group has Exhibit T in its possession, the United States Government promptly demanded that Apollo Group return the original and all copies of the Disclosure Statement and Exhibits to the United States Government on the

1 grounds that such was inadvertently released to Apollo Group. The return of the documents to
2 the Government, whether voluntarily by Apollo Group or through a court order, will be
3 meaningless if the documents are accessible to the public in this Court's files.

4 5. We provided the Disclosure Statement and Exhibits to the Government as a
5 necessary step to Relators initiating the *qui tam* FCA lawsuit against defendant University of
6 Phoenix. The False Claims Act ("FCA"), 31 U.S.C. §3729 *et seq*, authorizes a person (the
7 "relator") to file a fraud civil action alleging a violation of Section 3729 on behalf of the person
8 and the Government. *See* 31 U.S.C. § 3730(b)(1). The FCA, however, requires that the person
9 serve on the Government a "written disclosure of substantially all material evidence and
10 information the person possesses," along with a copy of the complaint. 31 U.S.C. §3730(b)(2).
11 The purpose of the written disclosure requirement is to provide the United States with enough
12 information on the alleged fraud to determine whether it wishes to intervene in the filed lawsuit
13 or allow the relator to prosecute the matter alone. 31 U.S.C. § 3730 (b).

14 6. The subject Disclosure Statement, prepared in anticipation of the FCA litigation,
15 reflects the opinion work product of co-counsel Daniel Robert Bartley and me. The Disclosure
16 Statement and Exhibits are the product of numerous meetings Mr. Bartley and I had with Julie
17 Albertson and Mary Hendow ("Relators"). From those meetings, we Relators' counsel selected
18 the facts, documents, and witnesses we deem material to proving University of Phoenix's
19 violations of the FCA.

20 7. Such Disclosure Statement, with its Exhibits, is a protected document containing
21 attorney work product and communications protected by the common interest privilege, the
22 work product privilege, and the attorney-client privilege. The Disclosure Statement, with its
23 Exhibits, sets forth our litigation strategy, reflects our attorney thought processes, reveals our
24 interpretation of applicable law (especially the incentive compensation ban contained in Title
25 IV of The Higher Education Act), lays out our theories on liability and damages, our analysis
26 and conclusions regarding our clients' status as original sources under the False Claims Act, and
27 otherwise presents a huge amount of our clients' case, much as if defense counsel had been
28 permitted to rummage through our clients' case file that we keep in our law offices.

1 8. The Disclosure Statement also reveals the identities, locations, contact
2 information (addresses and telephone numbers) and anticipated testimony of key witnesses
3 against University of Phoenix. Counsel for the Department of Education assured me that
4 witness information, including the identities and locations of participating witnesses would
5 remain confidential. I forwarded to potential witnesses this assurance that their privacy rights
6 would be protected.

7 9. Relators and counsel did not waive the opinion work product privilege by
8 sharing the Disclosure Statement and exhibits with the federal government. The Disclosure
9 Statement and Exhibits remained privileged under the common interest privilege. Compelling
10 disclosure because the document was shared with the government would

11 “virtually preclude the Government from engaging in meaningful,
12 communication with such co-litigants. No litigant will turn over information to
13 the Government if by so doing the information became subject to disclosure
14 pursuant to the Freedom of Information Act, to the public, which of course
15 includes the opposing parties in the pending litigation.”

16 *Miller, Anderson, Nash, Yerke & wiener v. United States Department of Energy*, 499 F.Supp.
17 767, 771 (D.C. Or. 1980).

18 10. As such, district court precedent within the Ninth Circuit concludes that the
19 disclosure statement and exhibits “are protected opinion work product.” *See, United States ex*
20 *rel Bagley v. TRW Inc.*, 212 F.R.D. 554, 566 (C.D.Cal 2003)(disclosure statement is protected
21 opinion work product not subject to discovery by the defendant; discovery of the disclosure
22 exhibits not at issue in that case because they were already produced to defendant); *see also*
23 authorities cited in Non-party Witnesses Julie Albertson's and Mary Hendow's Supporting
24 Memorandum of Points and Authorities re Motion to Quash Apollo Group, Inc. Deposition
25 Subpoenas Duces Tecum Directed to Them, And, in the Alternative, a Motion for Protective
26 Order Regarding Same; Supporting Declaration of Daniel Robert Bartley filed with this Court.

27 11. Apollo Group’s reliance on out-of-circuit cases for the proposition that the
28 Disclosure Statement and exhibits is subject to discovery by a defendant is disingenuous.

1 California federal precedent expressly rejects the holdings of those out-of-circuit cases cited by
2 Apollo Group.. See *Bagley*, 212 F.R.D. at 559-566.

3 12. Irreparable harm to the case is caused by the public release of the Disclosure
4 Statement. One cannot un-ring this bell once opposing counsel for defendant has seen Relators'
5 counsel confidential opinion work product on how to prosecute the defendant. As such, we
6 Relators' counsel are presently considering the filing of a motion to disqualify the law firm of
7 Gibson, Dunn & Crutcher from representing defendant University of Phoenix in the *qui tam*
8 litigation. Exhibit T needs to remain under seal so that subsequent counsel for University of
9 Phoenix may not access the Disclosure Statement and Exhibits in this court record.

10 13. The United States Government consistently asserts to me, Apollo Group
11 counsel, and this Court that the Disclosure Statement and exhibits are privileged and
12 confidential, both before and after learning that Apollo Group possessed the Disclosure
13 Statement and exhibits.

14 14. September 1, 2006, the United States Department of Justice filed a
15 memorandum with this Court contending that the Disclosure Statement and exhibits are
16 confidential, privileged materials, such that this Court should quash Apollo Group's subpoena
17 requesting those materials from the non-party witnesses Albertson and Hendow. Please see the
18 United States Memorandum in Support of Motion to Quash Defendants Subpoenas to
19 Albertson and Hendow filed September 1, 2006.

20 15. The evening of Tuesday, September 19, 2006, I informed the Government
21 (Department of Justice, Department of Education) that Apollo Group, Inc. earlier that day made
22 the Disclosure Statement and its Exhibits an exhibit to the deposition of Julie Albertson. I
23 informed the Government that Apollo Group, Inc. claimed it received the materials through a
24 FOIA request.

25 16. The United States Government immediately communicated to me that the
26 release of the Disclosure Statement and exhibits to Apollo Group must have been inadvertent.

27 17. September 20, 2006, at the deposition of Mary Hendow, I informed counsel for
28 Apollo Group that the government believed the release was inadvertent and still viewed the

1 Disclosure Statement and exhibits as confidential, privileged material.

2 18. By letter dated September 29, 2006, the United States Department of Education
3 confirmed to Apollo Group, Inc. that the Disclosure Statement and Exhibits are confidential,
4 privileged materials. In the letter, the Department demands that Apollo Group return all
5 electronic and hard document originals and copies of the confidential Disclosure Statement and
6 exhibits back to the federal government. The Department states, "This is a very serious matter.
7 Apollo and its counsel possess documents that they know the Department has identified as
8 privileged." Attached hereto as Exhibit A is a true and accurate copy of this September 29,
9 2006, letter.

10 19. Given the Government's demand to Apollo Group, Inc. for the return of the
11 inadvertently released documents, request is made that the documents remain under seal.
12 Otherwise, a court could direct Apollo Group to return the documents and yet the documents
13 would remain accessible to the public in this Court's files.

14 20. Any contention by counsel for Apollo Group that the United States' release of
15 the Disclosure Statement and its Exhibits to Apollo Group in response to Apollo Group FOIA
16 requests is anything other than inadvertent directly contradicts the consistent, repeated positions
17 of the federal government that these materials are highly confidential and illegitimately in the
18 possession of Apollo Group.

19 Albertson Deposition: Exhibit X

20 21. Exhibit X to the Diulio Declaration is the deposition of Julie Albertson. During
21 the deposition, I repeatedly instructed Ms. Albertson not to testify regarding any confidential or
22 privileged information, including the Disclosure Statement and exhibits. Ms. Albertson and
23 Ms. Hendow accordingly do not need this transcript to remain under seal.

24 Communications Among Counsel for Relators and the United States

25 Department of Education: Exhibits Y and Z

26 22. Exhibits Y and Z to the Diulio Declaration are confidential communications
27 among Dan Bartley, myself, and counsel for the United States Department of Education. Those
28 communications occurred while the Department of Education and counsel for Relators pursued

1 the common issue of whether the University of Phoenix was violating the Higher Education Act
2 incentive compensation ban. Dan Bartley and I viewed the communications as privileged work
3 product communications. One communication concerns a confidential document index;
4 another communication concerns a confidential meeting among counsel.

5 23. We request the Court to keep the communications under seal. Cooperation
6 among *qui tam* relators, counsel and the United States Government will be greatly curtailed if
7 the Court rules that communications among relators and the government may be open to public
8 inspection.

9 Jurisdiction

10 24. Via e-mail dated October 10, 2006, counsel for Apollo Group, Inc. contend this
11 Court does not have jurisdiction to decide whether documents in this Court's files may be
12 sealed. Please see Exhibit C to these non-parties' administrative motion to seal Exhibit U to
13 the Diulio Declaration, filed herewith.

14 25. An interesting argument, coming from the party that first invoked this Court's
15 jurisdiction to seal the documents. Apollo Group, Inc. first requested that the Court file these
16 Albertson deposition exhibits under seal in an administrative motion filed September 20, 2006.
17 At that time, Apollo Group did not contend that the Court lacked jurisdiction to determine
18 whether it was appropriate to place the documents under seal. I am unaware of any authority
19 for the proposition that a court originally has jurisdiction to place documents under seal, but not
20 to continue the seal.

21 26. According to the Local Rules for the Northern District of California, this Court
22 has jurisdiction to determine whether documents in its files should remain under seal. The
23 Local Rules for the Northern District of California expressly provide this Court with the
24 procedures for keeping documents in this Court's own files under seal. ND Cal. Civil Rules 7-
25 11 and 79-5. Apollo Group expressly followed those rules in requesting this Court to accept
26 and place the deposition exhibits attached to the Diulio declaration now at issue under seal.

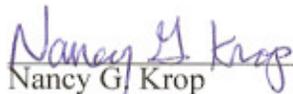
27 27. At the September 22, 2006, hearing on non-parties' motion to quash the
28 deposition subpoenas duces tecum Apollo Group served on the non-party witnesses, counsel for

1 Apollo Group, Inc. represented to this Court that it had jurisdiction over the deposition exhibits
2 (T, X, and Y) that the United States and Relators contend were inadvertently released to Apollo
3 Group.

4 28. At that same hearing, United States counsel and I also represented to the Court
5 that this Court has jurisdiction over the inadvertent release of the privileged documents that
6 Apollo Group, Inc. identified and made exhibits to the non-party witnesses San Francisco,
7 California, depositions occurring within this Court's jurisdiction.

8 29. Apollo Group, Inc. to date never disputed that controversies regarding depositions
9 of non-parties are decided in the Court issuing the subpoena (where the deposition is being
10 taken), unless the nonparty consents to determination elsewhere. Fed.R.Civ. Proc. Rule
11 37(a)(1); CAL PRAC GUIDE: FED CIV PROC BEFORE TRIAL 6 11.2289 (Rutter Group,
12 2006)(citations omitted).

13
14 EXECUTED under penalty of perjury under the laws of the State of California and the
15 United States, this 11th day of October, 2006, at San Mateo County, California.

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18 Nancy G. Krop
19 Attorney for Nonparty Witnesses
20 and Relators Julie Albertson
21 and Mary Hendow
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PROOF OF SERVICE

I declare I am employed in the county of Marin, State of California, by Daniel Robert Bartley Law Offices, P.O. Box 686, Novato, CA, 94948-0686. I am over the age of 18 and not a party to this action.

On today's date, I caused to be served, via e-mail, true and accurate copies of "DECLARATION OF NANCY G. KROP IN SUPPORT OF EXHIBITS FILED BY APOLLO GROUP REMAINING UNDER SEAL" upon the parties' counsel as follows:

BARRACK, RODOS & BACINE Stephen R. Basser, Esq. Samuel M. Ward, Esq. 402 West Broadway, Suite 850 San Diego, CA 94101 Telephone 619 230-0800 Fax 619 230-1874 E-mail sbasser@barrack.com and sward@barrack .com	GIBSON, DUNN & CRUTCHER Kristopher P. Diulio, Esq. Gibson, Dunn & Crutcher LLP 4 Park Plaza, Suite 1400 Irvine, CA 92614 Telephone 949 451 3907 Fax 949 475 4630 E-mail KDiulio@gibsondunn.com
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Sara Winslow, Asst. U.S. Attorney United States District Attorney's Office 450 Golden Gate Avenue Post Office Box 36055 San Francisco, CA 94102-3661 Telephone 415 436 6925 Fax 415 436 6748 E-mail Sara.winslow2@usdoj.gov	
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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this declaration was executed on this 12th day of October, 2006, at Novato, Marin County, California.


Daniel Robert Bartley

EXHIBIT A



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

ASSISTANT SECRETARY

September 29, 2006

Via Facsimile -- (949) 475-4627

Joseph P. Busch, III, Esq.
Gibson, Dunn and Crutcher LLP
Jamboree Center
4 Park Plaza
Irvine, California 92614-8557

Re: FOIA Request No. 05-00093-F,
In re: Apollo Securities Group, Inc., Securities Litigation
and Related Matters

Dear Mr. Busch:

The Department's Office of the General Counsel has referred to me for appropriate administrative action your September 27, 2006 letter to Assistant United States Attorney Sara Winslow.

Your letter to Ms. Winslow reveals that the Apollo Group, Inc. and its counsel (collectively, "Apollo") possess one or more documents identified as privileged by the U.S. Department of Education and that Apollo received those privileged documents in error pursuant to the above-referenced FOIA request. Examples of the documents identified as privileged and of concern to us include your reference to the Agency's witness interview notes and a March 7, 2003 draft disclosure statement. This letter constitutes a demand for Apollo to return to the Department all originals and any and all copies of the CDs released with the Department's April 8, 2005, May 3, 2005, and August 31, 2006 letters to Douglas R. Cox, Kristopher P. Diulio and Jared M. Toffer of your firm, as well as all printed hard copies of documents contained on those CDs. The Department is seeking a return of the documents and CDs to determine the extent of any disclosure of privileged documents. The Department also asks that Apollo certify that Apollo has accounted for and returned to the Department each of the foregoing materials.

This is a very serious matter. Apollo and its counsel possess documents that they know the Department has identified as privileged. I ask that you contact Joanna Dailey of the Office of the General Counsel at (202) 401-6000 by no later than October 4, 2006 to make arrangements for the return of the above-described records.

400 MARYLAND AVE., S.W., WASHINGTON, D.C. 20202-4500
www.ed.gov

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Letter to Mr. Busch
Page 2

The Department looks forward to your cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Mitchell Clark for".

Mitchell Clark
Assistant Secretary for Management
and Chief FOIA Officer

cc: **Douglas R. Cox, Esq.**
Gibson, Dunn and Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Via Facsimile -- (202) 530-9539

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