

1 Mark C. Holscher (SBN 139582)
mark.holscher@kirkland.com
2 KIRKLAND & ELLIS LLP
555 South Flower Street
3 Los Angeles, CA 90071
Telephone: (213) 680-8400
4 Facsimile: (213) 680-8500

5 Sierra Elizabeth (SBN 268133)
sierra.elizabeth@kirkland.com
6 Kathryn E. Panish (SBN 324047)
kathryn.panish@kirkland.com
7 KIRKLAND & ELLIS LLP
2049 Century Park East
8 Los Angeles, CA 90067
Telephone: (310) 552-4200
9 Facsimile: (310) 552-5900

10 Laura Elizabeth Kelley (SBN 330678)
laura.uhlenhuth@kirkland.com
11 KIRKLAND & ELLIS LLP
555 California Street
12 San Francisco, CA 94104
Telephone: (415) 439-1498
13 Facsimile: (415) 439-1500

14 *Attorneys for Plaintiffs*

RECEIVED
NOV 30 2020
SPRING STREET
DEPT. 9
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

17 KESHARA SHAW; ALMA ROSA FARIAS DE
SOLANO; JOSUE RICARDO GASTELUM-
18 CAMPISTA; MARITZA GONZALEZ; RONNIE
HEARD, JR.; DEYANIRA HOOPER; JUDITH
19 LARSON; VICENTA MARTINEZ; AND
AKELA WROTEN, JR.,

20 Plaintiffs,

21 v.

22 LOS ANGELES UNIFIED SCHOOL
23 DISTRICT; AUSTIN BEUTNER, Los Angeles
Unified School District Superintendent; and
24 DOES 1-25, inclusive,

25 Defendants,

26 UNITED TEACHERS LOS ANGELES,

27 Relief Defendant.
28

Case No. 20STCV36489

Honorable Yvette M. Palazuelos
Dept. 9

**PLAINTIFFS' EX PARTE APPLICATION
FOR EXPEDITED PRELIMINARY
INJUNCTION DISCOVERY SCHEDULE**

Date: December 1, 2020
Time: 8:30 a.m.
Dept.: 9

Complaint Filed: 09/24/2020
First Am. Complaint Filed: 10/07/2020

COPY

1 **TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on December 1, 2020, at 8:30 a.m., in Department 9 of the Los
3 Angeles County Superior Court, located at 312 North Spring Street, Los Angeles, CA 90012, Plaintiffs
4 will, and hereby do, move the Court by *ex parte* application for an order partially lifting the complex
5 litigation stay to permit expedited preliminary injunction discovery according to the following schedule:

6

Proposed Expedited PI Discovery Schedule	
Event	Due Date
Written Discovery Requests (5 RFPs, 5 Interrogatories, 5 RFAs per party)	Monday, December 7, 2020
Written Discovery Responses and Document Productions	Monday, January 4, 2021
Start of Deposition Period	Monday, January 11, 2021
End of Deposition Period	Friday, March 12, 2021

7
8
9
10
11
12

13 Defendants were provided with notice of this application as required by California Rule of Court
14 3.1203 through their respective counsel, Sue Ann Salmon Evans at Dannis Woliver Kelley, 115 Pine
15 Avenue, Suite 500, Long Beach, CA 90802, sevans@dwkesq.com, (562) 366-8500, and Ira Gottlieb, 801
16 North Brand Boulevard, Suite 950, Glendale, CA 91203, igottlieb@bushgottlieb.com, (818) 973-3219.
17 This application will be filed by 10:00 a.m. the Court day before the hearing. Defendants will also be
18 electronically served with a copy of the application by 10:00 a.m. the Court day before the hearing.
19 Defendants have indicated that they intend to oppose this *ex parte* application.

20 Plaintiffs make this application pursuant to California Rules of Court 3.1150 and 3.1200 *et seq.*
21 This application is based upon the attached Memorandum of Points and Authorities, the Court's file, the
22 declaration of Kathryn Panish and exhibits thereto, the declarations of Plaintiffs Judith Larson, Keshara
23 Shaw, Akela Wroten, Jr., Deyanira Hooper, Maritza Carolina Gonzalez Tomasino, Vicenta Martinez,
24 Ronnie Heard, Jr., Alma Rosa Farias De Solano, and Josue Ricardo Gastelum-Campista, and such other
25 and further oral and documentary evidence as may be presented at the hearing. There has been one
26 previous *ex parte* application for similar relief, which was denied without prejudice by the Honorable
27 Kenneth R. Freeman on October 19, 2020.

1 DATED: November 30, 2020

KIRKLAND & ELLIS LLP



2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Mark Holscher (SBN 139582)
mark.holscher@kirkland.com
Edward Hillenbrand (SBN 310872)
edward.hillenbrand@kirkland.com
KIRKLAND & ELLIS LLP
555 South Flower Street
Los Angeles, CA 90071
Telephone: (213) 680-8400
Facsimile: (213) 680-8500

Sierra Elizabeth (SBN 268133)
sierra.elizabeth@kirkland.com
Kathryn E. Panish (SBN 324047)
kathryn.panish@kirkland.com
KIRKLAND & ELLIS LLP
2049 Century Park East
Los Angeles, CA 90067
Telephone: (310) 552-4200
Facsimile: (310) 552-5900

Laura Elizabeth Kelley (SBN 330678)
laura.uhlenhuth@kirkland.com
Kirkland & Ellis LLP
555 California Street
San Francisco, CA 94104
Telephone: (415) 439-1498
Facsimile: (415) 439-1500

Attorneys for Plaintiffs

1 Mark C. Holscher (SBN 139582)
mark.holscher@kirkland.com
2 KIRKLAND & ELLIS LLP
555 South Flower Street
3 Los Angeles, CA 90071
Telephone: (213) 680-8400
4 Facsimile: (213) 680-8500

5 Sierra Elizabeth (SBN 268133)
sierra.elizabeth@kirkland.com
6 Kathryn E. Panish (SBN 324047)
kathryn.panish@kirkland.com
7 KIRKLAND & ELLIS LLP
2049 Century Park East
8 Los Angeles, CA 90067
Telephone: (310) 552-4200
9 Facsimile: (310) 552-5900

10 Laura Elizabeth Kelley (SBN 330678)
laura.uhlenhuth@kirkland.com
11 Kirkland & Ellis LLP
555 California Street
12 San Francisco, CA 94104
Telephone: (415) 439-1498
13

14 *Attorneys for Plaintiffs*

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **COUNTY OF LOS ANGELES**

17 KESHARA SHAW; ALMA ROSA FARIAS DE
18 SOLANO; JOSUE RICARDO GASTELUM-
19 CAMPISTA; MARITZA GONZALEZ; RONNIE
HEARD, JR.; DEYANIRA HOOPER; JUDITH
LARSON; VICENTA MARTINEZ; AND AKELA
WROTEN, JR.,

20 Plaintiffs,

21 v.

22 LOS ANGELES UNIFIED SCHOOL DISTRICT;
23 AUSTIN BEUTNER, Los Angeles Unified School
District Superintendent; and DOES 1-25, inclusive,

24 Defendants,

25 UNITED TEACHERS LOS ANGELES,

26 Relief Defendant.
27
28

Case No. 20STCV36489

Honorable Yvette M. Palazuelos

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' *EX PARTE*
APPLICATION FOR EXPEDITED
PRELIMINARY INJUNCTION
DISCOVERY SCHEDULE**

Complaint Filed: 09/24/2020
FAC Filed: 10/07/2020
Dept.: 9

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction.....	1
II. Background.....	3
A. The Policies Adopted by LAUSD Last Spring In Response to the COVID-19 Pandemic Exacerbated an Ongoing and Discriminatory Educational Crisis.....	3
B. Despite Plaintiffs’ Demand Letters Imploring the Adoption of Adequate Distance Learning Policies, LAUSD and UTLA Entered Into the Defective August Side Letter.....	4
C. The August Side Letter’s Deficient Distance Learning Policies Have Irreparably Harmed Plaintiffs Children and Other LAUSD Students.....	5
D. Plaintiffs Filed This Lawsuit and, Days Later, Sought to File a PI Motion to Address the Ongoing Irreparable Harm Caused by the August Side Letter.....	6
E. In October, Plaintiffs Efforts to Set a PI Schedule Were Frustrated Due to Judge Freeman’s Recusal and UTLA’s Peremptory Strike of Judge Highberger.....	7
F. The Court Has Stayed Proceedings Until the January 22, 2021 Initial Status Conference, and Defendants Have Refused to Begin PI Discovery Before Then.....	7
G. As a Result, the August Side Letter’s Inadequate Distance Learning Policies Will Continue to Irreparably Harm Plaintiffs’ Children and Other LAUSD Students Well into the Spring Semester.....	8
III. Argument	9
IV. Conclusion	11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Indian Model Sch. v. Oakland Unified Sch. Dist.,
227 Cal. App. 4th 258 (2014) 3, 10

Butt v. State of California,
4 Cal. 4th 668 (1992) 2, 9

Handyspot Co. of N. Cal. v. Buegeleisen,
128 Cal. App. 2d 191 (1954) 11

Statutes

Cal. Civ. Proc. Code § 2030.020 10

Cal. Civ. Proc. Code § 2031.020 10

Cal. Civ. Proc. Code § 2033.020 10

Cal. Educ. Code § 43503 1, 4

Rules

Cal. R. Ct. 3.1202..... 10

Cal. R. Ct. 3.1203..... 6

Other Authorities

F.Ex Parte Applications, Cal. Prac. Guide Civ. Pro. Before Trial Ch. 9(I)-F (June 2020
Update)..... 10

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Plaintiffs request that the Court set a preliminary injunction (“PI”) discovery schedule because (1)
4 their attempts to obtain urgently needed relief have been stymied by the complex court’s automatic stay
5 since the original complaint was filed on September 24, 2020, and (2) Defendants refuse to agree to a PI
6 discovery schedule despite receiving Plaintiffs’ draft motion papers and supporting evidence several
7 weeks ago.

8 Plaintiffs are nine concerned parents and guardians of children who attend Los Angeles Unified
9 District (“LAUSD”) public schools. They filed this civil rights class action on September 24, 2020—over
10 two months ago—because LAUSD’s distance learning policies violate the state’s distance learning statute
11 (Cal. Educ. Code § 43503), and compound LAUSD’s cumulative failure to provide its students with a
12 basic education guaranteed by the California Constitution. *See* First Am. Compl. (“FAC”) ¶¶ 142–185
13 (Oct. 7, 2020). Even before the COVID-19 pandemic, **three out of four** Latino students and **four out of**
14 **five** Black students enrolled in LAUSD’s public schools were not performing at grade level in math and
15 English. *Id.* ¶ 3. Now, LAUSD’s own 10-week interim assessments show that D and F grades are surging,
16 particularly in low-income communities, and 23% of surveyed UTLA members are either “not that
17 confident” or “not confident at all” that they can provide “effective instruction services” under the current
18 distance learning model. *See* Kathryn Panish Decl. Exs. 24 at 2, 25 at 3, 26 at 3 (Nov. 29, 2020). Many of
19 Plaintiffs’ children, and even those who were honor students before the pandemic, are at risk of failing
20 this year because of the lack of adequate instruction they have received. *See, e.g.,* Judith Larson Decl. ¶¶
21 24–25 (Nov. 24, 2020). Therefore, unless and until LAUSD’s deficient distance learning policies are
22 addressed, Plaintiffs’ children and the hundreds of thousands of other LAUSD students will continue to
23 suffer irreparable harm that jeopardizes their academic trajectory and long-term wellbeing and livelihood.

24 On September 29th, in order to address this ongoing irreparable harm during the pendency of the
25 lawsuit, Plaintiffs sought to file for a PI to enjoin LAUSD from adhering to inadequate distance learning
26 policies, and to require LAUSD to adopt policies consistent with the California Constitution and Education
27 Code. To do so, Plaintiffs requested via *ex parte* application a lift of the complex court’s automatic stay
28 to set a PI discovery, briefing, and hearing schedule. The day before, on September 28th, Plaintiffs

1 provided advanced courtesy copies of their draft PI motion and supporting evidence. This included
2 declarations from each of the nine Plaintiffs, as well as declarations from seven experts stating that
3 LAUSD’s distance learning policies fail to provide adequate instruction, teacher training and oversight,
4 attendance intervention or truancy measures, and assistance for special needs and English learning
5 students. When LAUSD demanded discovery from Plaintiffs and their experts to oppose the PI motion,
6 Plaintiffs offered to work with LAUSD to reach a mutually-agreeable schedule, and Plaintiffs agreed that
7 LAUSD could take limited depositions of the Plaintiffs and their seven experts. When LAUSD claimed
8 that United Teachers Los Angeles (“UTLA) was a necessary party, Plaintiffs quickly amended their
9 complaint to add UTLA as a Relief Defendant, and soon after provided to UTLA courtesy copies of their
10 PI motion and supporting evidence. LAUSD now has had Plaintiffs’ draft PI motion and supporting
11 evidence for **62 days**; UTLA has had them for **42 days**.

12 Despite the urgent and compelling need for a PI in this case, Plaintiffs have encountered multiple
13 procedural hurdles that have frustrated their attempts to lift the complex court’s automatic stay and, as a
14 result, prevented them from filing for a PI and obtaining a discovery schedule. These hurdles include (1)
15 a judge’s recusal on his own motion one month into the case after setting an initial status conference and
16 denying Plaintiffs’ *ex parte* application without prejudice, (2) a peremptory challenge by UTLA that
17 resulted in a second case reassignment before the automatic stay could be lifted or an initial status
18 conference could be scheduled, and (3) most recently, the Court’s November 17, 2020 order staying all
19 proceedings until an initial status conference set for **January 22, 2021**. Meanwhile, Defendants are gaming
20 the automatic stay to obstruct Plaintiffs’ efforts to file their PI motion, and refusing to agree to any
21 stipulation on a PI discovery schedule despite demanding discovery from Plaintiffs and their experts
22 before filing any opposition.

23 If the Court’s latest scheduling order is not amended, Plaintiffs will not be able to file their PI
24 motion and the parties cannot even begin related discovery until four months after this lawsuit was filed
25 and well into the spring semester. That will result in many more hours of lost instruction time, and even
26 more irreparable harm to Plaintiffs’ children and other LAUSD students as they inevitably fall further
27 behind their peers and below grade level, even if Plaintiffs were to prevail on their PI motion. Courts
28 historically have moved more quickly to address a PI motion in educational civil rights cases. *See Butt v.*

1 *State of California*, 4 Cal. 4th 668, 674–75 (1992) (granting a preliminary injunction **12 days** after class
2 action was filed); *Am. Indian Model Sch. v. Oakland Unified Sch. Dist.*, 227 Cal. App. 4th 258, 271 (2014)
3 (granting preliminary injunctive relief **57 days** after lawsuit was filed.)

4 Time is of the essence to rectify the deficiencies of LAUSD’s distance learning policies. Therefore,
5 Plaintiffs submit this *ex parte* application to request that the Court set a PI discovery schedule, consistent
6 with the proposal set forth herein. Alternatively, Plaintiffs request that the Court set an initial status
7 conference for as soon as possible to set the PI discovery, briefing, and hearing schedule.

8 **II. BACKGROUND**

9 **A. The Policies Adopted by LAUSD Last Spring In Response to the COVID-19 10 Pandemic Exacerbated an Ongoing and Discriminatory Educational Crisis.**

11 Even before the COVID-19 pandemic hit, LAUSD’s education policies were failing. These
12 shortcomings were especially felt by LAUSD’s most vulnerable—low-income, minority, English
13 learning, homeless, and special needs—students. *See* FAC ¶ 3. For example, only 32.09% of Black
14 students and 38.7% of Latino students met English Language Arts standards, and only 20.18% of Black
15 students and 27.47% of Latino students met Math standards. *Id.* Thus, even under normal conditions, there
16 was an ongoing and discriminatory educational crisis in LAUSD’s public schools.

17 On April 8, 2020, after schools closed due to the COVID-19 pandemic, LAUSD and UTLA
18 negotiated a side letter agreement (the “April Side Letter”) that modified the existing terms of their
19 Collective Bargaining Agreement. *Id.* ¶ 51. The April Side Letter inexplicably required (1) no live video
20 instruction or online instruction, (2) no assessment of student learning, (3) only one hour per week for
21 planning, collaborating, or attending professional development meetings, (4) no teacher evaluations, and
22 (5) only a **four-hour workday**—or half the previously negotiated workday. *Id.* ¶ 52.

23 The results were horrific for students. Approximately 40% of LAUSD students participated
24 minimally or not at all during the eight weeks of remote learning last spring. *Id.* ¶ 55. Black and Latino
25 students participated in remote education at a rate 10–20% lower than their peers. *Id.* ¶ 55. English learners
26 and students with disabilities participated even less, with participation rates 20% lower than their peers.
27 *Id.* ¶ 55. All of Plaintiffs’ children suffered significant learning losses or setbacks, leaving them ill
28 equipped to begin the next grade this fall. *Id.* ¶ 67; *see also* Larson Decl. ¶¶ 4–13; Keshara Shaw Decl. ¶¶

1 4–15 (Nov. 24, 2020); Akela Wroten, Jr. Decl. ¶¶ 9–22 (Nov. 24, 2020); Deyanira Hooper Decl. ¶¶ 5–21
2 (Nov. 24, 2020); Maritza Carolina Gonzalez Tomasino Decl. ¶¶ 7–12 (Nov. 24, 2020); Vicenta Martinez
3 Decl. ¶¶ 4–10 (Nov. 24, 2020); Ronnie Heard, Jr. Decl. ¶¶ 9–16 (Nov. 24, 2020); Alma Rosa Farias De
4 Solano Decl. ¶¶ 6–13 (Nov. 24, 2020); Josue Ricardo Gastelum-Campista Decl. ¶¶ 5–14 (Nov. 24, 2020).

5 The April Side Letter’s remote education policies, as implemented, appropriately received intense
6 public condemnation and backlash. *See* FAC ¶ 68. On June 29th, in response to the shortcomings and
7 confusion of the spring semester, Governor Gavin Newsom signed Senate Bill 98 (“SB 98”), codified as
8 California Education Code section 43500 *et seq.*, to ensure that California public school students receive
9 adequate remote education “at a level of quality and intellectual challenge substantially equivalent to in-
10 person instruction.” Cal. Educ. Code § 43503(b)(2); *see also* FAC ¶ 6.

11 **B. Despite Plaintiffs’ Demand Letters Imploring the Adoption of Adequate Distance**
12 **Learning Policies, LAUSD and UTLA Entered Into the Defective August Side Letter.**

13 By the end of July, LAUSD had not announced a new side letter agreement that complied with SB
14 98. *See* FAC ¶ 75. Fearing that LAUSD and UTLA would continue to adhere to the April Side Letter’s
15 distance learning policies during the fall semester, Plaintiffs sent a demand letter to LAUSD on July 29th.
16 *Id.* ¶ 79. It outlined the April Side Letter’s deficiencies and requested a new agreement that adopted
17 policies consistent with students’ constitutional and statutory rights. *Id.* LAUSD never responded. *Id.*

18 When a tentative side letter agreement between LAUSD and UTLA was announced on August
19 3rd, Plaintiffs discovered that it contained only minor improvements to the April Side Letter and did not
20 rectify LAUSD’s failure to provide an equal and adequate education to students. *Id.* ¶ 80. Instead of
21 resuming pre-pandemic eight-hour teaching days, the August Side Letter requires teachers to work only
22 *six hours per day*. *Id.* ¶ 98. It mandates minimal teacher training, relies heavily on untrained substitute
23 teachers, and removes any meaningful ability to oversee actual instruction that teachers are providing. *Id.*
24 ¶¶ 11–12, 111, 114–15. It fails to provide services required for students with special needs and English
25 language instruction critical for English learners. *Id.* ¶¶ 108–109. And it lacks an attendance and truancy
26 enforcement policy to provide critical, time-sensitive intervention to prevent drop out and learning loss.
27 *Id.* ¶¶ 119–121.

1 After reviewing the tentative side letter agreement, Plaintiffs sent another demand letter that same
2 day, on August 3rd, noting its inadequacies and demanding that they be remedied. *Id.* ¶ 81. LAUSD failed
3 to respond. *Id.* On August 11th, LAUSD Superintendent Austin Beutner brought the tentative agreement
4 to the LAUSD Board of Education for a vote. *Id.* Plaintiffs again contacted LAUSD and implored it to
5 adopt adequate distance learning policies in advance of the fall semester. *Id.* But the August Side Letter
6 ultimately received sufficient support from the Board and went into effect on August 14th. *Id.*

7 **C. The August Side Letter’s Deficient Distance Learning Policies Have Irreparably**
8 **Harmed Plaintiffs Children and Other LAUSD Students.**

9 Due to the August Side Letters deficient distance learning policies, Plaintiffs’ children have
10 continued to struggle this fall. Many of their school days and classes end early or cover old material. *See*
11 Larson Decl. ¶¶ 16–17, 21; Shaw Decl. ¶¶ 17–18; Hooper Decl. ¶ 22; Farias De Solano Decl. ¶¶ 14, 17;
12 Gonzalez Decl. ¶ 14; Heard Decl. ¶¶ 22–25; Martinez Decl. ¶¶ 14, 17; Gastelum-Campista Decl. ¶ 17; *see*
13 *also* FAC ¶¶ 92, 93. Most of them have experienced difficulties attending virtual classes and accessing
14 school materials. *See* Shaw Decl. ¶ 16; Hooper Decl. ¶ 28; Heard Decl. ¶¶ 17–20; Martinez Decl. ¶¶ 11–
15 12; Gastelum-Campista Decl. ¶ 19; *see also* FAC ¶¶ 132–136. And while several of them received extra
16 help or additional support before the pandemic, many of those services are no longer offered. *See* Hooper
17 Decl. ¶ 30, 33, 36; Farias De Solano Decl. ¶¶ 16–17, 20, 23, 25; Gonzalez Decl. ¶ 15; Heard Decl. ¶ 27;
18 *see also* FAC ¶ 108. Several of Plaintiffs’ children have seen a significant decline in their grades because
19 they are not receiving the live instruction, resources, or support they require. *See* Larson Decl. ¶ 24 (“In
20 mid-November, [my daughter] received a progress report indicating that she had a D in science. [My
21 daughter] has been an honors student with good grades throughout her life, so this was a shock to us.”);
22 Shaw Decl. ¶ 23; Farias De Solano Decl. ¶ 24; Gonzalez Decl. ¶ 17; Hooper Decl. ¶¶ 15, 35; Heard Decl.
23 ¶ 26; *see also* FAC ¶ 67.

24 Their struggles are not unique though. LAUSD’s interim 10-week assessments shows a rapid
25 increase in the number of D and F grades, and a precipitous drop in attendance, among middle school and
26 high school students this fall. *See* Panish Decl. Exs. 24 at 2, 25 at 3. The effects of the August Side Letter’s
27 deficient distance learning policies were especially felt by low-income communities. *Id.* Therefore, not
28 only has LAUSD failed its students by refusing to adopt adequate distance learning policies, but it is now

1 literally *failing them* as a result of its own shortcomings—not theirs. As Plaintiffs’ experts will testify,
2 LAUSD’s abject failure to adopt adequate distance learning policies has exacerbated the terrible
3 deficiencies and inequalities that existed even when LAUSD had teachers working full time and teaching
4 in person.

5 **D. Plaintiffs Filed This Lawsuit and, Days Later, Sought to File a PI Motion to Address**
6 **the Ongoing Irreparable Harm Caused by the August Side Letter.**

7 On September 24, 2020, Plaintiffs filed this civil rights class action in complex court on behalf of
8 “parents and guardians with children who were enrolled in the LAUSD’s public schools during remote
9 learning due to the COVID-19 pandemic and continue to be enrolled in the LAUSD’s schools for the
10 2020-2021 academic year.” *See* Panish Decl. ¶ 1.

11 On September 28th, in compliance with California Rule of Court 3.1203, Plaintiffs notified
12 LAUSD of their intention to file an *ex parte* application to lift the complex court’s automatic stay and set
13 an expedited PI discovery, briefing, and hearing schedule. *See* Panish Decl. Ex. 1. Plaintiffs also provided
14 LAUSD with an advanced courtesy copy of their draft PI motion, which sought to enjoin LAUSD from
15 operating under the August Side Letter and compel LAUSD to adopt adequate distance learning policies.
16 *Id.* Plaintiffs further offered to discuss their proposed PI schedule with LAUSD in hopes that a stipulation
17 could be reached. *Id.*

18 On September 29th, Plaintiffs filed their *ex parte* application. *Id.* ¶ 3, Ex. 2. Hours after Plaintiffs
19 filed their *ex parte* application, LAUSD filed a fulsome 10-page opposition that (1) rejected Plaintiffs’
20 expedited PI motion schedule, (2) made detailed legal and factual challenges the merits of their lawsuit
21 and PI motion, and (3) declared UTLA an indispensable party to the action. *Id.* Ex. 3. LAUSD further
22 indicated during meet and confer discussions that it would seek to depose each of the nine Plaintiffs and
23 each of Plaintiffs’ seven expert witnesses before responding to Plaintiffs’ PI motion. *Id.* ¶ 8. Plaintiffs
24 agreed to allow LAUSD to take these depositions on an expedited basis. A review of LAUSD’s thorough
25 September 29th *ex parte* opposition, which addressed the merits of Plaintiffs’ claims, leaves little doubt
26 that it is fully able and prepared to litigate this matter on an expedited schedule. Given that LAUSD
27 received multiple letters last summer summarizing many of the claims in this lawsuit, its fulsome response
28 was not surprising.

1 On September 30th, Plaintiffs filed a one-page reply to clarify the record regarding their efforts to
2 reach a mutually-agreeable PI schedule, and to express their continued willingness to do so. *Id.* Ex. 4
3 (“Plaintiffs are amenable to a more extended briefing schedule that would provide Defendants with
4 additional time to respond to Plaintiffs’ [PI motion] and provide discovery, as well as setting the hearing
5 for a later date.”). Plaintiffs also provided LAUSD with courtesy copies of the exhibits they intended to
6 file with the PI motion, which included nine Plaintiff declarations and seven expert witness declarations.
7 *Id.* Ex. 5. In response to LAUSD’s claim that UTLA was an indispensable party, Plaintiffs amended their
8 complaint on October 7th to add UTLA as a Relief Defendant, and provided courtesy copies of their draft
9 PI motion and supporting evidence to UTLA. *Id.* ¶ 6, Ex. 6; *see also* FAC ¶ 30.

10 **E. In October, Plaintiffs Efforts to Set a PI Schedule Were Frustrated Due to Judge**
11 **Freeman’s Recusal and UTLA’s Peremptory Strike of Judge Highberger.**

12 On October 9, 2020, the Honorable Kenneth R. Freeman issued an order that continued the *ex*
13 *parte* application until after an initial status conference set for October 19th. *See* Panish Decl. Ex. 7. Per
14 the court’s order, the parties submitted a Joint Status Conference Report on October 14th, which addressed
15 among other things Plaintiffs’ proposal for an expedited PI motion schedule. *Id.* Ex. 8.

16 Counsel for Plaintiffs, LAUSD, and UTLA attended the initial status conference, during which
17 Judge Freeman disclosed a potential conflict due to the fact that his wife was a UTLA member and teacher,
18 and might still be a non-dues paying UTLA member. *Id.* ¶ 9. After the conference, the Court issued a
19 minute order that denied the *ex parte* application without prejudice, set a second initial status conference
20 for November 6th, stayed proceedings until then, and requested that the parties address the issues set forth
21 in the Initial Status Conference Order by October 28th. *Id.* Ex. 9. However, on October 20th, Judge
22 Freeman recused himself under California Civil Procedure Code section 170.1(a)(6)(A)(iii). *Id.* Ex. 10.

23 The case was reassigned to the Honorable William F. Highberger the next day. *Id.* Ex. 11. But on
24 October 26th, while the automatic stay was in effect and before Judge Highberger issued any orders,
25 UTLA appeared in the case and filed a peremptory challenge. *Id.* Ex. 12.

26 **F. The Court Has Stayed Proceedings Until the January 22, 2021 Initial Status**
27 **Conference, and Defendants Have Refused to Begin PI Discovery Before Then.**

28 One week later, on November 2, 2020, the case was reassigned to this Court. *Id.* Ex. 13. On
November 17th, without full knowledge of Plaintiffs’ efforts to file a PI motion or engage in PI discovery,

1 the Court issued a scheduling order that stayed proceedings until an initial status conference set for January
2 22, 2021. *Id.* Ex. 14. In response to the Court’s order, and in recognition of the ongoing irreparable harm
3 caused by the August Side Letter’s distance learning policies, Plaintiffs requested a meet and confer with
4 Defendants to discuss beginning the PI discovery phase in advance of the January 22, 2021 initial
5 scheduling conference. *Id.* Ex. 15.

6 When the parties met and conferred on November 23rd, LAUSD and UTLA declined to agree to
7 a PI discovery schedule that began in advance of the initial status conference. *Id.* ¶ 14. Rather than address
8 Plaintiffs’ grounds for seeking to commence PI discovery before then, Defendants raised arguments
9 concerning the merits of the case or alleged grounds for demurrer. *Id.* Due to the parties inability to reach
10 an agreement, Plaintiffs provided formal notice of their *ex parte* application on November 25, 2020. *See*
11 *id.* ¶ 15, Ex. 16. Both LAUSD and UTLA indicated that they would oppose the application. *Id.*

12 **G. As a Result, the August Side Letter’s Inadequate Distance Learning Policies Will**
13 **Continue to Irreparably Harm Plaintiffs’ Children and Other LAUSD Students Well**
14 **into the Spring Semester.**

15 The August Side Letter states that it will expire “on December 31, 2020, or when LAUSD students
16 physically return to LAUSD schools for regular instruction, whichever occurs first,” but “may be extended
17 by mutual agreement of the parties.” *Id.* Ex. 17 at 6. There has been no indication that LAUSD students
18 will return for regular in-person instruction in January 2021, or that LAUSD and UTLA will not extend
19 the August Side Letter to cover the spring semester. Indeed, Defendants were unwilling to represent during
20 the November 23rd meet and confer that the August Side Letter would expire at the end of the year, or
21 that it would be replaced with a new side letter agreement.¹ *Id.* ¶ 14.

22 Although there have been recent reports of LAUSD and UTLA reaching an agreement on a hybrid
23 learning model to employ during the spring semester, no date has been set for when that model will be
24 implemented, nothing suggests that the current inadequate distance learning policies will change under
25 that hybrid model, and providing in-person instruction still will be left to the discretion of the teacher and
26 students. *See id.* Ex. 21. According to LAUSD’s Superintendent, due to the rising COVID-19 case

27 ¹ Supplemental side letter agreements issued in October provide for in-person assessments and tutoring, but strictly
28 on a voluntary basis and at the discretion of the teacher. *See id.* Exs. 18, 19. There is no evidence that these services
have been offered on a widespread basis. *See id.* Ex. 20 (indicating that only 2,000 students out of 460,000 students
have received in-person tutoring services). None of Plaintiffs’ children have received them.

1 numbers in Los Angeles County, this proposed hybrid model will not take effect any time soon. *See id.*
2 Ex. 22 at (“Without significant changes in priorities and a greater focus on public education, it’s unlikely
3 that schools in Los Angeles will reopen for in-person instruction any time soon.”); *see also id.* Ex. 23.
4 Moreover, even if given the option of in-person instruction, many UTLA members have indicated that
5 they will choose to continue distance learning until a vaccine is widely available. *Id.* Ex. 26 at 12, 13, 19
6 (31% do not want to return to campus until there is a vaccine or herd immunity, 65% are “unlikely” or
7 “very unlikely” to send their children for in-person instruction, and 88% would choose to continue distance
8 learning if they knew an outbreak was likely to occur again upon reopening).

9 Thus, the August Side Letter’s inadequate distance learning policies will continue to irreparably
10 harm Plaintiffs’ children and other LAUSD students, by failing to provide adequate instruction, teacher
11 training and oversight, attendance intervention or truancy measures, and assistance for special needs and
12 English learning students, well into the spring semester.

13 **III. ARGUMENT**

14 Plaintiffs’ efforts to set a PI discovery, briefing, and hearing schedule have been frustrated by the
15 complex court’s automatic stay for two months already. *See* Panish Decl. ¶¶ 3–12. Further, despite having
16 Plaintiffs’ draft PI motion and supporting evidence for many weeks, and demanding to depose Plaintiffs
17 and their experts before filing any opposition, Defendants still refuse to agree to any PI discovery schedule.
18 *See id.* ¶¶ 2, 6, 8, 14, Ex. 1, Ex. 6. Meanwhile, the August Side Letter’s distance learning policies have
19 continued to deprive Plaintiffs’ children and other LAUSD students of an equal and adequate education,
20 in violation of their constitutional and statutory rights. As a result, Plaintiffs’ children and other LAUSD
21 students unnecessarily have fallen further behind their peers and below grade level, thereby jeopardizing
22 their academic trajectory and future wellbeing and livelihood.

23 The Court’s most recent order, which continued the automatic stay until at least January 22, 2021,
24 does not take into account Plaintiffs’ position that there is a compelling and urgent need to rectify the
25 August Side Letter’s deficient distance learning policies. If that order stands, Plaintiffs’ cannot move for
26 a PI and the parties cannot even engage in any related discovery until at least **120 days** after Plaintiffs filed
27 this lawsuit. That is an exceptionally long time to wait, especially when students’ rights and the quality of
28 their education hang in the balance. *See Butt*, 4 Cal. 4th at 674–75 (granting a preliminary injunction **12**

1 *days* after parents of schoolchildren filed a class action to prevent a school district from shortening the
2 school year by six weeks in response to a budget crisis); *Am. Indian Model Sch.*, 227 Cal. App. 4th at 271
3 (granting preliminary injunctive relief *57 days* after a school operator filed a lawsuit challenging a school
4 district’s decision to revoke its charters). Had Plaintiffs not filed in complex court, they could have
5 propounded discovery requests as early as 10 days after service of the complaint. *See* Cal. Civ. Proc. Code
6 § 2030.020 (interrogatories); *id.* § 2031.020 (documents); *id.* § 2033.020 (admissions).

7 Plaintiffs have made the requisite affirmative factual showing with declaration testimony,
8 publicly-available information, and Defendants’ own statements that their children and other LAUSD
9 students will suffer irreparable harm if the Court does not at least allow PI discovery to begin in advance
10 of the initial status conference. *See* Cal. R. Ct. 3.1202(c) (*ex parte* relief should be granted if the applicants
11 present “competent testimony based on personal knowledge of irreparable harm, immediate danger, or
12 any other statutory basis for granting relief”); *see also supra* §§ II.C, II.G. Moreover, the California
13 Practice Guide expressly recognizes that authorizing discovery during a procedural hold or stay is a
14 common and proper basis for granting *ex parte* relief. *See* F.Ex Parte Applications, Cal. Prac. Guide Civ.
15 Pro. Before Trial Ch. 9(I)-F, at 9:347 (June 2020 Update) (seeking “to authorize discovery by plaintiff
16 during the ‘hold’ on discovery at the outset of the case” is one of the “most common situations in which
17 *ex parte* orders may be obtained”). Therefore, the Court should grant Plaintiffs’ *ex parte* application and
18 set the following expedited PI discovery schedule:

19

Proposed Expedited PI Discovery Schedule	
Event	Due Date
Written Discovery Requests (5 RFPs, 5 Interrogatories, 5 RFAs per party)	Monday, December 7, 2020
Written Discovery Responses and Document Productions	Monday, January 4, 2021
Start of Deposition Period	Monday, January 11, 2021
End of Deposition Period	Friday, March 12, 2021

20
21
22
23
24
25

26 Plaintiffs intend to request narrowly-tailored written discovery and to take a limited number of
27 depositions, of shortened length, to supplement the compelling evidence already in their possession.
28 Plaintiffs understand from Defendants that they will require short depositions of each of the Plaintiffs and

1 their expert witnesses as well. This proposed schedule provides ample time to complete all of the parties’
2 desired discovery before the PI motion is filed. LAUSD previously projected that *75 days* would be
3 sufficient to “adequately review and oppose Plaintiffs’ fact-intensive motion” and participate in expert
4 depositions. *Id.* Ex. 8 at 5. Plaintiffs’ proposed schedule spans *95 days* for discovery alone.

5 Defendants claim they cannot properly respond to Plaintiffs’ PI motion without first deposing
6 Plaintiffs and their expert witnesses, yet they refuse to reach any agreement on a PI discovery schedule
7 before an initial status conference is held. *See* Panish Decl. ¶¶ 8, 14. Rather than address the actual issue
8 at hand—whether the Court should set a PI discovery schedule that begins before the initial status
9 conference—they instead have raised merits-based arguments best suited for an opposition to the PI
10 motion. *Id.* ¶ 14. Judge Freeman acknowledged this fact in his October 9, 2020 ruling. *See* Panish Decl.
11 Ex. 7 at 7 (Defendants’ argument that administrative remedies have not been exhausted “*would be more*
12 *appropriately directed to ultimately opposing the preliminary injunction itself*” (emphasis added)). Even
13 if Defendants intended to raise these arguments by demurrer, “[t]he rule is well settled in California that
14 a court may grant a preliminary injunction based on a complaint which may be subject to a general or
15 special demurrer.” *Handyspot Co. of N. Cal. v. Buegeleisen*, 128 Cal. App. 2d 191, 194 (1954).

16 Nonetheless, Plaintiffs are *not* seeking a ruling on the merits of their PI motion or the viability of
17 their claims; they only are seeking for the Court to set a PI discovery schedule that begins now rather than
18 wait another two months to do so. Plaintiffs will address Defendants’ merit-based arguments, all of which
19 are unfounded, at the appropriate time. However, Defendants should not be permitted to distract from the
20 issue before the Court, or further game the automatic stay and obstruct Plaintiffs’ reasonable requests to
21 initiate PI discovery.

22 **IV. CONCLUSION**

23 In light of the urgent nature of Plaintiffs’ claims and the irreparable harm their children and the
24 hundreds of thousands of other LAUSD students continue to face as a result of LAUSD’s deficient
25 distance learning policies, Plaintiffs request that the Court set a PI discovery schedule, consistent with the
26 proposal set forth herein. Alternatively, Plaintiffs request that the Court set an initial status conference for
27 as soon as possible to set the PI discovery, briefing, and hearing schedule.

1
2 DATED: November 30, 2020

KIRKLAND & ELLIS LLP

3
4 

5 Mark C. Holscher (SBN 139582)
6 mark.holscher@kirkland.com
7 KIRKLAND & ELLIS LLP
8 555 South Flower Street
9 Los Angeles, CA 90071
10 Telephone: (213) 680-8400
11 Facsimile: (213) 680-8500

12 Sierra Elizabeth (SBN 268133)
13 sierra.elizabeth@kirkland.com
14 Kathryn E. Panish (SBN 324047)
15 kathryn.panish@kirkland.com
16 KIRKLAND & ELLIS LLP
17 2049 Century Park East
18 Los Angeles, CA 90067
19 Telephone: (310) 552-4200
20 Facsimile: (310) 552-5900

21 Laura Elizabeth Kelley (SBN 330678)
22 Laura.uhlenhuth@kirkland.com
23 Kirkland & Ellis LLP
24 555 California Street
25 San Francisco, CA 94104
26 Telephone: (415) 439-1498
27 Facsimile: (415) 439-1500

28 *Attorneys for Plaintiffs*

1 **PROOF OF SERVICE**

2 I, LaTonya Fountain, am employed in the County of Los Angeles, State of California. I am over
3 the age of 18 and not a party to the within action. My business address is 555 South Flower Street, Suite
4 3700, Los Angeles, California 90071.

5 On November 30, 2020, a copy of the foregoing document was served on the interested parties in
6 this action as follows:

7 **By Personal Service**

8 By causing a copy of the document to be personally served by hand to the recipients at the
9 addresses set forth below.

10 **By Electronic Mail -- CCP § 1010.6(a)(4)(A)**

11 The parties have agreed to accept service by e-mail or electronic transmission. I caused the
12 foregoing document to be served to the persons at the e-mail addresses listed below. I did
13 not receive, within a reasonable time after the transmission, any electronic message or other
14 indication that the transmission was unsuccessful. Also, an FTP folder was provided to
15 Counsel for access to the folder of documents.

14 Sue Ann Salmon Evans (SBN 151562)

15 sevans@DWKesq.com

16 Ellen C. Wu (SBN 258515)

17 ewu@DWKesq.com

18 Keith A. Yeomans (SBN 245600)

19 kyeomans@DWKesq.com

20 Luke L. Punnakanta (SBN 293488)

21 lpunnakanta@DWKesq.com

22 **DANNIS WOLIVER KELLEY**

23 115 Pine Avenue, Suite 500

24 Long Beach, CA 90802

25 Telephone: (562) 366-8500

Ira L. Gottlieb (SBN 103236)

igottlieb@bushgottlieb.com

Lisa C. Demidovich (SBN 245836)

ldemidovich@bushgottlieb.com

Dexter Rappleye (SBN 302182)

drappleye@bushgottlieb.com

BUSH GOTTLIEB

A Law Corporation

801 North Brand Boulevard, Suite 950

Glendale, California 91203-1260

Telephone: (818) 973-3200

Counsel For

United Teachers Los Angeles

Relief Defendant

26 *Attorneys Specially Appearing for Defendants*

27 *Los Angeles Unified School District and Austin*

28 *Beutner*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 30, 2020, at Los Angeles, California.


LaTonya Fountain