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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

KESHARA SHAW; ALMA ROSA FARIAS DE SOLANO; JOSUE RICARDO GASTELUMCAMPISTA; MARITZA GONZALEZ; RONNIE HEARD, JR.; DEYANIRA HOOPER; JUDITH LARSON; VICENTA MARTINEZ; AND AKELA WROTEN, JR.,

Plaintiff,

v.

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

Defendant.

Case No. 20STCV36489

LOS ANGELES UNIFIED SCHOOL DISTRICT'S NOTICE OF MOTION AND MOTION SUPPORTING OSC RE: STAY PENDING RELATED LITIGATION; DECLARATION OF SUE ANN SALMON EVANS

[REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF LOS ANGELES UNIFIED SCHOOL DISTRICT'S MOTION SUPPORTING OSC RE: STAY PENDING RELATED LITIGATION FILED CONCURRENTLY HEREWITH]

Date : February 25, 2021
Time : 10:00 am
Dept. : 9
Judge : Yvette M. Palazuelos

Trial: **None set**

Complaint Filed: **September 24, 2020**

Exempt from filing fees pursuant to Gov. Code, § 6103.

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD,

PLEASE TAKE NOTICE THAT on February 25, 2021, at 10:00 a.m., or as soon thereafter as the matter may be heard in Department 9 of the above-captioned Court located at 312 North Spring Street, Los Angeles, CA 90012, the Los Angeles Unified School District ("LAUSD") will move this Court for an order staying the above-captioned action filed by Plaintiffs Keshara Shaw, Alma Rosa, Farias De Solano; Josue Ricardo Gastelumcampista, Maritza Gonzalez, Ronnie Heard, Jr., Deyanira Hooper, Judith Larson, Cicenta Martinez, and Akela Wroten, Jr. (collectively, "Plaintiffs") pending resolution of the matters identified in the District's December 30, 2020, Notice of Related Cases, particularly: (1) *Cayla J. v. State of California, et al.*, Superior Court, County of Alameda, Case Number RG20084386, filed 11/30/2020 ("*Cayla J.*"); and (2) *Martinez, et al. v. Newsom, et al.*, Ninth Circuit Court of Appeal, Case No. 20-56404 ("*Martinez*").

This Motion is brought pursuant to the Court's January 20, 2021, Minute Order on the District's Notice of Related Cases setting "a hearing on an OSC re: whether a stay should issue pending resolution of one or more of these cases" on the above date and time, and deeming Defendants as "the moving party." Regarding *Cayla J.*, this Motion is premised on the grounds that the doctrine of primary jurisdiction warrants a stay of this matter pending resolution of a nearly-identical matter against LAUSD's administrative oversight agency, the California Department of Education, and any resulting agency action. Regarding *Martinez*, this Motion is brought under Code of Civil Procedure sections 410.30 and 418.10 on the ground that an earlier-filed pending federal action substantially overlaps with this matter, warranting a stay of this case pending the earlier-filed matter and on the grounds that pending litigation seeking statewide relief on the same/similar grounds as Plaintiffs' action is properly heard before piecemeal litigation. This Motion is further brought pursuant to California Rules of Court, rules 3.300 and 3.515.

This Motion is based upon this Notice of Motion and Motion; the Memorandum of Points and Authorities; Request for Judicial Notice; Declaration of Sue Ann Salmon Evans; the pleadings, records and files in this action; oral and documentary evidence that may be presented at the hearing; and such other evidence as the Court deems relevant.

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Further, LAUSD joins in the stay sought by UTLA in its Motion for Stay filed the same date as LAUSD's Motion.

DATED: January 28, 2021

DANNIS WOLIVER KELLEY
SUE ANN SALMON EVANS
ELLEN C. WU
KEITH A. YEOMANS
LUKE L. PUNNAKANTA

By: _____
Sue Ann Salmon Evans
Attorneys for Defendants Los Angeles Unified School District and Austin Beutner

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Exhibit A: First Amended Complaint in *Shaw, et al. v. LAUSD, et al.*, Superior Court, County of Los Angeles, Case No. 20STCV36489

Exhibit B: Complaint in *Cayla J. v. State of California, et al.*, Superior Court, County of Alameda, Case No. RG20084386

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Exhibit F: Ninth Circuit Docket in *Martinez, et al. v. Newsom, et al.*, United States District Court for the Central District of California, Case No. 20-cv-01796-DMG-KK (Ninth Circuit Case No. 20-56404)

Exhibit G: November 24, 2020, Order in *Martinez, et al. v. Newsom, et al.*, United States District Court for the Central District of California, Case No. 20-cv-01796-DMG-KK (Ninth Circuit Case No. 20-56404)

Exhibit to Declaration of Sue Ann Evans In Support of Motion

Exhibit H: January 8, 2021 email from Mr. Hildenbrand to Mr. Gottleib

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND BACKGROUND

As is common knowledge at this stage of the COVID-19 pandemic, many parents, students, and school districts, for that matter, would prefer for learning to take place in a classroom, were it safe to do so. Distance learning has presented a difficult shift for every school district in the State. Districts like Los Angeles Unified School District ("LAUSD") have adapted, purchasing thousands of electronic devices and internet hotspots, partnering with local internet providers to offer free internet access to students, serving tens-of-millions of free meals, and creating and implementing a Learning Continuity Plan that provides all required minutes and extensive resources for students and families with target supports for students in need. There has further been ever changing state and local statutes, regulations, and orders governing school districts, including LAUSD.[1] Indeed, as this Motion is prepared the Legislature is considering AB 10, an urgency statute amending, among other provisions, section 43503 (aka SB 98), which is the centerpiece of both the instant litigation ("*Shaw*") and related cases. It perhaps goes without saying that the shift to distance learning for the State's system of common schools has been difficult, and remote education during the pandemic has generated a flurry of lawsuits in both state and federal courts.

Shaw was not the first case filed regarding distance learning, or even the first filed against LAUSD. Plaintiff parents Keshara Shaw, Alma Rosa, Farias De Solano; Josue Ricardo Gastelumcampista, Maritza Gonzalez, Ronnie Heard, Jr., Deyanira Hooper, Judith Larson, Cicenta Martinez, and Akela Wroten, Jr. (collectively, "Plaintiffs") filed this case in September 2020, but other lawsuits preceded *Shaw*, others have followed it, and likely more will be filed as the pandemic, and the type of education necessitated by it, continues and as laws attempting to respond to the pandemic progress.

[1] Notably, the Plaintiffs bring the *Shaw* case alleging violation of Education Code section 43503 by virtue of the collectively negotiated agreement ("Side Letter") dated August 11, 2020. However, that Side Letter expired by its terms December 31, 2020, rendering the First Amended Complaint moot.

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California Rules of Court, rule 3.300(a), defines related cases as follows:

> A pending civil case is related to another pending civil case, or to a civil case that was dismissed with or without prejudice, or to a civil case that was disposed of by judgment, if the cases: (1) Involve the same parties and are based on the same or similar claims; (2) Arise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact; (3) Involve claims against, title to, possession of, or damages to the same property; or (4) Are likely for other reasons to require substantial duplication of judicial resources if heard by different judges.

As noted in the District's Notice of Related Cases, at least the following cases have been filed to date, many of them still pending:

- Cases in which LAUSD is a party (Rule 3.300(a)(1)):
  - *Alliance for Children's Rights v. Los Angeles Unified School District*, Supreme Court of California (seeking original jurisdiction), Case No. S266055 [writ denied];[2]
  - *J.T. v. de Blasio, et al.*, United States District Court for the Southern District of New York, Case No. 20-cv-05878-CM (Second Circuit Case No. 20-4128);
  - *Martinez, et al. v. Newsom, et al.*, United States District Court for the Central District of California, Case No. 20-cv-01796-DMG-KK (Ninth Circuit Case No. 20-56404) ("*Martinez*").
- Cases in which LAUSD is not a party, but involve school closures and distance learning, i.e., determination of the same or substantially identical questions of law or fact and/or require substantial duplication of judicial resources (Rule 3.300(a)(2) and (4)):
  - *Cayla J. v. State of California, et al.*, Superior Court, County of Alameda, Case No. RG20084386 [although LAUSD is not a party, it is named as a subject of the litigation];
  - *Orange County Board of Education v. Newsom*, Supreme Court of California (original proceedings), Case No. S264065;
  - *Matthew Brach, et al. v. Gavin Newsom, et. al.*, United States District Court, Central District of California, Case No. 2:20-cv-06472-SVW-AFM;
  - *E.E., et. al v. Norris School District*, United States District Court, Eastern District of California, Case No. 1:20-cv-01291.

California law is equipped to handle situations like this, where a multitude of cases proliferates from some common issue affecting a large portion of the State. In addition to

[2] *See* Plaintiffs' Notice of Decision in *Alliance for Children's Rights, et al. v. Los Angeles Unified School District, et al.*, filed January 27, 2021.

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consolidation and coordination of matters before one judge, which LAUSD may pursue alternatively, California law provides that Superior Courts may simply stay actions pending resolution of other proceedings on similar issues, including cases filed in other counties of the state or in the federal court. Here, LAUSD respectfully requests this Court stay the *Shaw* matter pending resolution of the two closest pending actions to this case, specifically, LAUSD requests this Court stay this case pending resolution of:

- *Cayla J.*, under the doctrine of primary jurisdiction (*see Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377); and
- *Martinez*, under the California equivalent of the federal *Colorado River* abstention doctrine (*see Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.* (1993) 15 Cal.App.4th 800; *see also Benitez v. Williams* (2013) 219 Cal.App.4th 270, 276 [noting *Caiafa* provides for a stay of state court cases pending federal matters, while *Colorado River Water Conservation Dist. v. U. S.* (1976) 424 U.S. 800 provides for a stay of federal cases pending state matters]).

II. ARGUMENT

With the multitude of cases against school districts and other public education entities resulting from school closures and related distance learning, several grounds for a stay exist. As set forth below, related cases properly include out-of-county and federal cases; the *Cayla J.* case against the State seeking statewide relief on the same legal grounds as presented by *Shaw* Plaintiffs, should proceed while the instant case is stayed to avoid a conflict between statewide orders and local district orders; and, the *Martinez* case, filed prior to *Shaw*, likewise seeks relief on behalf of the same group of students as in the *Shaw* case, such that the *Shaw* case is properly stayed pending resolution of the *Martinez* action.[3]

[3] The district court in the *Martinez* action, in which LAUSD is a party, has issued an order dismissing the claims against school districts on the grounds that exhaustion of administrative remedies is required before the federal court has jurisdiction. (RJN, Ex. G.) The ruling is currently on appeal to the Ninth Circuit.

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A. The District's Notice of Related Cases Properly Identified Out-of-County and Federal Cases

Initially, "California procedural law is infused with a solicitude, if not an altogether outright preference, for the economies of scale achieved by consolidating related cases into a single, centrally managed proceeding." (*Petersen v. Bank of America Corp.* (2014) 232 Cal.App.4th 238, 248.) Consistent with this preference, California Rules of Court, rule 3.300, subdivision (b), requires parties to identify related cases pending not only in the same Superior Court, but also "in *any* state or *federal* court in California[.]" (Emphasis added.)

Here, the Court's Order on the District's Notice of Related Cases stated, "[o]ut-of-County cases and federal cases are not related to the instant case." (January 20, 2021, Minute Order.) The District interprets the Court's Order merely to refer to other procedures for coordination of out-of-county cases, such as under Code of Civil Procedure section 404; however, out of an abundance of caution, and to the extent the inclusion of those cases in the District's Notice of Related Cases impacts the Court's decision on this Motion to Stay, the District notes that California Rules of Court, rule 3.300 required the District to identify out-of-county and federal cases in its Notice of Related Cases. The District further notes the Court's authority under California Rules of Court, rule 3.515, to stay an action on the Court's own Motion based upon the considerations presented by this Motion.

B. This Court Should Stay *Shaw* Pending Resolution of a Related Case Against the State, Which Has Primary Jurisdiction

It is first important to put the cases in context, recalling that California school districts are part of a statewide public school system. The California Constitution provides for the provision of public education through "a system of common schools." (Cal. Const., art. IX, § 5.) The State Legislature has plenary power over California's public education. (*Cal. Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 254 [the Legislature "'may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution'"]; *Marine Forests Society v. Cal. Coastal Com.* (2005) 36 Cal.4th 1, 31 [the Legislature wields "*plenary* legislative authority except as specifically limited by the California Constitution" [emph. original]].)

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The *Shaw* and the related case discussed below both rely upon SB 98, which enacted the current Education Code section 43503. As we file this Motion, the Legislature is considering AB 10 to enact Governor Newsom's "Safe Schools for All" plan. AB 10 amends section 43503 and is urgency legislation, to take effect immediately. Because the State holds the authority over action taken related to distance learning and the issues raised in *Shaw*, these issues should be first heard as to the State. *Cayla J.* is such a case.

Cayla J. is an action against the State regarding distance learning, focused on SB 98. The present *Shaw* matter is nearly identical to *Cayla J.*, which was filed in November 2020, and remains pending in Alameda County Superior Court as of the date of this filing. (RJN, Ex. C.) Both the *Shaw* First Amended Complaint and *Cayla J.* Complaint allege Constitutional wealth and race discrimination claims and violation of various other Constitutional provisions, Government Code section 11135, and SB 98 (the Legislature's response to distance learning), all stemming from purported inequities due to distance learning in the face of the COVID-19 pandemic. (*Compare* RJN, Ex. A at pp. 38-44 *with* Ex. B at pp. 51-61.) All of the Plaintiffs in *Shaw* are LAUSD parents seeking to represent all parents with students at LAUSD; whereas ten of the student plaintiffs in *Cayla J.* are LAUSD students seeking to speak for all parents and students in the State of California, including those in LAUSD. (RJN, Ex. A at pp. 5-6, Ex. B at pp. 11-19.)

The *Shaw* Plaintiffs and the *Cayla J.* plaintiffs all claim that LAUSD students suffered harm based on their experience at various LAUSD elementary, middle, and high schools during remote instruction. While *Shaw* is a putative class action and *Cayla J.* is largely a mandamus action, both are limited to declaratory and injunctive relief and seek the same orders to reform school district distance learning policies. (RJN, Ex. A at pp. 44-45 ["enjoining Defendants from further depriving of their constitutional rights"], RJN, Ex. B at pp. 61-62 ["Enjoining Defendants from further depriving Plaintiffs of their constitutional rights"].) The *Shaw* and *Cayla J.* Plaintiffs both seek the same relief to declare and enjoin the same Constitutional and statutory violations they purportedly have suffered as a result of remote instruction. The *Shaw* Plaintiffs sued LAUSD directly for its alleged violations, while the *Cayla J.* Plaintiffs sued the State, including the state administrative

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agency with oversight of LAUSD, the California Department of Education ("CDE"), for its alleged lack of oversight of school districts like LAUSD.[4] This distinction nevertheless and in fact warrants a stay of *Shaw* pending resolution of *Cayla J.,* and any resulting state actions including administrative proceedings under the doctrine of primary jurisdiction.

The doctrine of primary jurisdiction is "closely related" to the doctrine of exhaustion of administrative remedies. (*Farmers Ins., supra,* 2 Cal.4th at 390.) Exhaustion of administrative remedies applies "where a claim is cognizable in the first instance by an administrative agency alone[.]" (*Ibid*. [quoting *U.S. v. Western Pac. R. Co.* (1956) 352 U.S. 59, 63.) Primary jurisdiction, on the other hand, "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." (*Ibid*.) Thus, primary jurisdiction warrants a stay pending administrative action even where a claim is "'originally cognizable in the courts[.]'" (*Id*. at 391.)[5]

"No rigid formula exists for applying the primary jurisdiction doctrine." (*Ibid*.) Instead, courts weigh the extent to which the policies behind the doctrine would be furthered by a stay. (*Ibid*.) Those policies include: (1) "enhance[ment of] court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise"; (2) "assur[ance of] uniform application of regulatory laws"; (3) "the alleged 'inadequacy' of administrative remedies"; and (4) "other factors affecting litigants," including delay and expense. (*Id*. at 391, fn. 9.)

[4] *See* RJN, Ex. B at p 2. ("The State's lack of oversight has left teachers in many districts to fend for themselves, without adequate equipment, training, or support"); p. 31 ("Although the Legislature has passed sections 43500, *et seq*. of the Education Code setting standards for LEAs to follow during the pandemic, the State has exercised no oversight to ensure that LEAs are implementing them"); p. 32 ("This is a grave failure because community organizations have spent considerable time and effort troubleshooting remote learning difficulties and filling the educational gaps left by the State's lack of oversight"); p. 35 ("But the State has exercised no oversight over this requirement, with the result that families who have historically been left out of educational decision-making continue to be unheard.").

[5] LAUSD also intends to raise an exhaustion of administrative remedies defense in its initial responsive pleading and contends this matter is not "originally cognizable in the courts." LAUSD understands Plaintiffs oppose administrative exhaustion. The Court need not resolve this dispute to stay the matter pending resolution of *Cayla J*.

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Each of these policy goals are achieved by a stay in the instant matter. "Courts have frequently applied the primary jurisdiction doctrine and stayed actions where the issues raised in the trial court action were pending before an administrative agency." (*Wise v. Pacific Gas & Electric Co.* (1999) 77 Cal.App.4th 287, 296 [collecting cases].)

For example, in *Farmers Ins.*, the California Supreme Court held the doctrine of primary jurisdiction justified a stay of the State Attorney General's action against an insurer over its setting of insurance rates pending administrative action by the Department of Insurance. (*Farmers Ins., supra*, 2 Cal.4th at 381.) Contrasting the case against an earlier one that declined to exercise the doctrine because the relevant "agency had no special expertise that would warrant prior resort to its procedures[,] . . . questions involving insurance ratemaking pose issues for which specialized agency fact-finding and expertise is needed in order to both resolve complex factual questions and provide a record for subsequent judicial review." (*Id*. at 396-97.) The Court held the Insurance Commissioner could provide this administrative expertise through its "'pervasive and self-contained system of administrative procedure[.]'" (*Id*. at 396.) The Court noted, "even if . . . ultimate resort to the courts [is] inevitable [citation], the prior administrative proceeding will still promote judicial efficiency by unearthing the relevant evidence and by providing a record which the court may review." (*Id*. at 400 [quoting *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 476].)

Likewise, in *Wise*, *supra*, 77 Cal.App.4th 287, consumers brought suit against Pacific Gas & Electric, which allegedly had increased its rates in order to implement a gas regulator replacement program ("GRRP") before quickly terminating that program. The Court of Appeal held that a stay under the doctrine of primary jurisdiction was proper because an administrative proceeding before the Public Utilities Commission ("PUC") "indicate[d] that the PUC may be commencing the process of formulating a policy concerning the GRRP." (*Id*. at 298; *see also Pacific Bell v. Superior Court* (1986) 187 Cal.App.3d 137, 140 [court abused its discretion in denying stay under doctrine of primary jurisdiction because "when the regulatory proceeding is completed, the superior court will have the benefit of the agency's views on the issues[,]" a stay would "minimize the risk that the court's rulings will hinder or frustrate the agency's policies,

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orders, or decisions[,]" and "a stay will conserve judicial and other resources which would otherwise be consumed in litigation of some issues which will likely be resolved by administrative action."].)

So too here, primary jurisdiction warrants a stay of the *Shaw* matter pending resolution of the *Cayla J.* matter. While primary jurisdiction is typically invoked to stay litigation pending resolution of a related administrative proceeding, and *Cayla J.* is a court proceeding, *Cayla J.* seeks to compel the State and CDE—the District's administrative oversight agency—to undertake the exact type of administrative policymaking and oversight of school districts to which the doctrine applies. Again, "[n]o rigid formula exists for applying the primary jurisdiction doctrine." (*Farmers Ins., supra*, 2 Cal.4th at 391.) And logically, if a stay would issue under the primary jurisdiction doctrine to permit an agency to resolve an issue through oversight, a stay should also issue to permit another court to require an agency to resolve the issue through oversight.

Illustrating this, all of the factors relevant to primary jurisdiction weigh in favor of a stay here, each addressed in turn:[6]

Administrative Expertise: In Plaintiffs' telling of the case, resolution of the *Shaw* matter will require this Court to determine whether the District violated SB 98, codified at Education Code section 43503, which Plaintiffs allege the District violated by, among other things, "failing to provide Plaintiffs' children and those similarly situated who are not performing at grade level or need support with any support;" "failing to provide Plaintiffs' English learner children and those similarly situated with adequate integrated instruction in English language development;"

[6] Courts raise similar concerns over adjudication of claims regarding complex policy determinations under the similar but distinct doctrine of equitable abstention: "Abstention may also be appropriate if the lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency, or if granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress." (*Hambrick v. Healthcare Partners Medical Group, Inc.* (2015) 238 Cal.App.4th 124, 147-48 [citation and quotations omitted]; *see also Id.* at 150 ["In order to fashion an appropriate remedy for such a claim, be it injunctive or restitutionary, the trial court would have to determine the appropriate levels of capitation and oversight. Such an inquiry would pull the court deep into the thicket of the health care finance industry, an economic arena that courts are ill-equipped to meddle in" [citation and quotations omitted]].) Without waiver of its ability to do so later, LAUSD does not argue abstention here because leave of Court is required in this Complex Division to bring motions, and the Court has only permitted a motion for *stay*, while the remedy for equitable abstention is *dismissal*. (*See Id.* at 146.)

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and "failing to provide Plaintiffs' children and those similarly situated with adequate interaction with certificated teachers and their peers." (*See* RJN, Ex. A at p. 44.) In other words, the Court will need to decide what performance constitutes "grade level," what constitutes "*adequate* integrated instruction in English language development, " and what constitutes "*adequate* interaction with" teachers and peers. (Emphasis added.) These inquiries would improperly pull the Court into the thicket of educational policymaking, especially improper without the benefit of administrative expertise. (*See Campaign for Quality Education v. State of California* (2016) 246 Cal.App.4th 896, 903 ["the constitutional sections leave the difficult and policy-laden questions associated with educational adequacy and funding to the legislative branch"]; *see also Hoeft v. Tucson Unified School Dist*. (9th Cir. 1992) 967 F.2d 1298, 1305 ["Eligibility criteria and methodology are classic examples of the kind of technical questions of educational policy best resolved with the benefit of agency expertise and a fully developed administrative record."].)

Uniform Application of Regulatory Laws: As noted, the COVID-19 pandemic and school shutdowns have sparked a flurry of litigation against school districts *State-wide*, and against the CDE's oversight of the *entire State's* student population. In line with this broad challenge to distance learning as a whole through litigation, *Cayla J.* expressly seeks a writ of mandamus compelling CDE to ensure students across the State receive the distance learning requirements of SB 98. (RJN, Ex. B at pp. 58-59.) *Cayla J.* also seeks declarations that something about the distance learning programs adopted by California school districts fundamentally leads to race and wealth discrimination, which CDE has failed to correct. (*See Id*. at pp. 51-54.) These are State-wide concerns, and it would make little sense for this Court to require (or not require) LAUSD to implement Plaintiffs' requested distance learning program, only for CDE to ask LAUSD and every other school district in the State to implement some other distance learning program as a result of *Cayla J*. Indeed, inconsistent distance learning programs between LAUSD and other districts in the State could, depending on the circumstances, be unconstitutional. California's Equal Protection Clause requires "'the schooling furnished by the state . . . be made available to all on an equal basis . . .'" (*Butt v. State* (1992) 4 Cal.4th 668, 680.) Thus, in *Butt*, the Supreme Court held: "[w]hatever the requirements of the free school guaranty, the equal protection clause

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precludes the State from maintaining its common school system in a manner that denies the students of one district an education basically equivalent to that provided elsewhere throughout the State." (*Id*. at 685.) The constitutional requirement of equal education between districts illustrates why a stay of *Shaw* should issue in favor of *Cayla J.*, and not the other way around. Uniform application of State-wide educational policy weighs particularly heavily here in favor of a stay under the doctrine of primary jurisdiction.

Adequacy of the Administrative Forum: The *Cayla J.* litigation provides an equally adequate forum for Plaintiffs here—both cases seek nearly identical declaratory and injunctive relief: *Shaw* seeks LAUSD to implement the injunction locally based on the experience of Plaintiffs' children at LAUSD's elementary, middle, and high schools, while *Cayla J.* seeks CDE to implement the injunction State-wide (which, again, is arguably constitutionally necessary under *Butt*) based on the experience of ten LAUSD students in its elementary, middle, and high schools. Further, the administrative scheme provided by SB 98 itself provides adequate administrative relief on its own. SB 98 requires all local educational agencies to prepare and adopt a Learning Continuity and Attendance Plan ("Learning Continuity Plan" or "LCP") for the 2020-21 school year, which provides information for how student learning continuity will be addressed during the COVID-19 crisis in the 2020–21 school year. The provisions for the LCP are set forth in Education Code section 43509, which also requires the State to vet school districts' LCPs. Administrative vetting of a policy that may address the complaints of Plaintiffs in this case is the precise sort of procedure primary jurisdiction is intended to allow. (*See Wise*, *supra*, 77 Cal.App.4th at 298 [stay under primary jurisdiction doctrine was proper where administrative proceeding "indicate[d] that the PUC may be commencing the process of formulating a policy concerning the GRRP."].) In summary, both Courts in *Shaw* and *Cayla J.* will be making determinations as to whether underprivileged students at LAUSD have experienced harm as a result of remote instruction.

Other Factors Affecting Litigants: Finally, the absence of other factors affecting Plaintiffs like expense and delay weighs in favor of a stay. Plaintiffs' counsel represented in a January 8, 2021, email that they are handling this matter on a pro bono basis, so Plaintiffs should not have incurred any expenses at all. (Evans Decl., ¶11, Ex. H.) And regarding delay, *Farmers*

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Ins. held a stay was proper "even if . . . ultimate resort to the courts [is] inevitable" because "the prior administrative proceeding will still promote judicial efficiency by unearthing the relevant evidence and by providing a record which the court may review." (*Farmers Ins., supra*, 2 Cal.4th at 381 [quoting *Westlake Community Hosp., supra*, 17 Cal.3d at 476].)

This Court should permit CDE to weigh in on the parameters of a constitutionally-adequate distance learning program in the first instance, which would result if *Cayla J.* succeeds, rather than wading into the waters of educational policymaking and what constitutes an "adequate" education during the pandemic, based only on the guidance of Plaintiffs' counsel and whatever witnesses they produce. The factors of primary jurisdiction weigh in favor of a stay of this litigation.

C. This Court Should Stay *Shaw* Pending Resolution of a Related Federal Case

In addition to *Cayla J.*, the federal *Martinez* action warrants a stay pending resolution of that earlier-filed case challenging the distance learning program of LAUSD, the State, and other school districts as it relates to special education students under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. ("IDEA"). As here, the *Martinez* Complaint seeks, in part, the award of compensatory education services to make up for alleged regression based on allegations that school closures due to COVID-19 violated the rights of disabled students under the IDEA. (RJN, Ex. D at pp. 105-106.) LAUSD is a named defendant in *Martinez*, which as of this filing remains pending at the Ninth Circuit. (*Id*. at p. 14; RJN Exs. E and F.) As in *Shaw*, *Martinez* is a putative class action, and *Martinez*'s class definition of "students who are entitled to receive special education services from the District Defendants . . ." overlaps with *Shaw*'s class definition of "a class of parents and guardians with children who were enrolled in the LAUSD's public schools during remote learning due to the COVID-19 pandemic and continue to be enrolled in the LAUSD's schools for the 2020-2021 academic year." (*Compare* RJN, Ex. D at pp. 44-45 *with* RJN, Ex. A at ¶ 14.) The two cases are significantly related—in fact, *Shaw*'s claims are specifically premised on LAUSD's purported failures to serve special education students. (*Id*. at ¶¶ 63-64, 97.) Given the overlap of issues between the two matters and risk of unseemly

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conflict between state and federal courts, the Court may exercise its discretion here to stay *Shaw* pending resolution of *Martinez*.

"It is black letter law that, when a Federal action has been filed covering the same subject matter as is involved in a California action, the California court has the discretion but not the obligation to stay the state court action." (*Caiafa*, *supra*, 15 Cal.App.4th at 804 [citing *Farmland Irr. Co. v. Dopplmaier* (1957) 48 Cal.2d 208, 215].) "In exercising its discretion the court should consider the importance of discouraging multiple litigation designed solely to harass an adverse party, and of avoiding unseemly conflicts with the courts of other jurisdictions. It should also consider whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, or the stage to which the proceedings in the other court have already advanced." (*Farmland*, *supra*, 48 Cal.2d at 215.) Further, "[t]he California Supreme Court also has isolated another critical factor favoring a stay of the state court action in favor of the federal action, a factor which happens to be present in this case—the federal action is pending in California not some other state." (*Caiafa*, *supra*, 15 Cal.App.4th at 804.) "This factor is one which the Supreme Court found so important it accounted for the several earlier California decisions which appeared to make a stay of state court proceedings *a matter of right* not merely a matter of discretion. While reemphasizing a stay was a discretionary decision for the California trial courts not a right held by litigants who preferred the federal forum, our high court also recognized the significance of this factor in the trial court's exercise of its discretion." (*Id*. at 808 [emphasis added].)

Thus, under these factors, the *Caiafa* Court of Appeal held a law firm's state court action seeking to compel arbitration of unpaid legal fees from State Farm was properly stayed pending resolution of State Farm's Southern District of California action against that law firm and others alleging civil Racketeer Influenced and Corrupt Organizations Act ("RICO") claims over padded legal bills, which had been filed nearly nine months earlier. (*Id*. at 802-803.) The Court of Appeal's reasoning was based on several concerns equally applicable here.

First, the court reasoned that while "the federal court action which was pending at the time Caiafa filed the petition to compel arbitration in state court raised issues much broader than the"

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amount of fees, "resolution of those broader issues almost certainly would determine whether Caiafa was entitled to . . . fees at all and, if so, the proper amount of those fees." (*Id*. at 806.) In other words, and as in *Shaw* and *Martinez,* the Court of Appeal affirmed a stay of the later-filed state court action notwithstanding imperfect overlap between the two matters, because resolution of one case would provide resolution of issues in the other.

Second, the court reasoned that "the full-scale federal fraud trial is a better forum for deciding the full range of issues bearing on this subject matter than would a . . . hearing before a single arbitrator." (*Ibid*.) Here, while this Court is certainly as able as the Ninth Circuit to address the claims overlapping between *Shaw* and *Martinez*, this Court's ruling would of course not result in citable precedent (*see Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744), while a Ninth Circuit decision, even if unpublished, would be citable as, at minimum, persuasive authority in both state and federal courts. (*Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, 990, fn. 4; U.S.Ct. of App. 9th Cir. Rule 36-3, subd. (b).) With the multitude of pending school closure civil cases at this moment alone, and more likely to follow if the pandemic continues, persuasive and perhaps binding authority on these matters would benefit all parties. The stage of the *Martinez* case—on appeal with the prospect of a precedential published opinion—further weighs in favor of a stay here. (*See Farmland, supra,* 48 Cal.2d at 215 [courts should consider "the stage to which the proceedings in the other court have already advanced"].)

Third, and crucially as noted by the Supreme Court, the *Caiafa* Court relied on the fact that "the federal fraud action is pending in the Southern District of California, not in some other state. Thus, the federal court is of equal convenience to the parties and witnesses as is the state court and its arbitrator." (*Caiafa, supra,* 15 Cal.App.4th at 807.) Again, while a stay is discretionary to be sure, "[t]his factor is one which the Supreme Court found so important it accounted for the several earlier California decisions which appeared to make a stay of state court proceedings *a matter of right* not merely a matter of discretion." (*Id.* at 808 [emphasis added].) *Martinez* is pending in this State: it was filed in the Central District of California, is presently at the Ninth Circuit, and would be remanded to the Central District if reversed. (RJN, Exs. E and F.)

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For at least these reasons, this Court should stay the *Shaw* matter pending resolution of the earlier-filed *Martinez* case.

III. CONCLUSION

LAUSD respectfully requests a stay of this case pending resolution of the related matters.

DATED: January 28, 2021

DANNIS WOLIVER KELLEY
SUE ANN SALMON EVANS
ELLEN C. WU
KEITH A. YEOMANS
LUKE L. PUNNAKANTA

By: _____
Sue Ann Salmon Evans
Attorneys for Defendants Los Angeles Unified School District and Austin Beutner

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DECLARATION OF SUE ANN SALMON EVANS

I, Sue Ann Salmon Evans, declare as follows:

1. I am an attorney admitted to practice law before all courts of the State of California. I am general counsel and a shareholder in the law firm of Dannis Woliver Kelley ("DWK"), attorneys for defendants Los Angeles Unified School District ("LAUSD") and Austin Beutner (LAUSD and Mr. Beutner shall be collectively referred to as the "District"), in the matter of *Keshara Shaw, et al. v. Los Angeles Unified School District, et al.,* Los Angeles Superior Court Case No. 20STCV36489. I have personal knowledge of the facts set forth in this declaration, and if called upon to testify under oath concerning them, I could and would testify competently to such facts.

2. I make this declaration in support of the District's Motion Supporting OSC Re: Stay Pending Related Litigation.

3. As counsel of record for the District in this litigation, I am familiar with the pleadings, discovery, and correspondence in this litigation and am similarly familiar with DWK's policies, practices, and record-keeping procedures for receiving, reviewing, creating and maintaining all litigation related records.

4. Attached as **Exhibit A** to the Request For Judicial Notice filed concurrently herewith is a true and correct copy of First Amended Complaint in *Shaw, et al. v. LAUSD, et al.*, Superior Court, County of Los Angeles, Case No. 20STCV36489.

5. Attached as **Exhibit B** to the Request For Judicial Notice filed concurrently herewith is a true and correct copy of Complaint in *Cayla J. v. State of California, et al.*, Superior Court, County of Alameda, Case No. RG20084386.

6. Attached as **Exhibit C** to the Request For Judicial Notice filed concurrently herewith is a true and correct copy of Docket of *Cayla J. v. State of California, et al.*, Superior Court, County of Alameda, Case No. RG20084386.

7. Attached as **Exhibit D** to the Request For Judicial Notice filed concurrently herewith is a true and correct copy of Complaint in *Martinez, et al. v. Newsom, et al.*, United States District Court for the Central District of California, Case No. 20-cv-01796-DMG-KK (Ninth Circuit Case No. 20-56404).

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8. Attached as **Exhibit E** to the Request For Judicial filed concurrently herewith is a true and correct copy of District Court Docket in *Martinez, et al. v. Newsom, et al.*, United States District Court for the Central District of California, Case No. 20-cv-01796-DMG-KK (Ninth Circuit Case No. 20-56404).

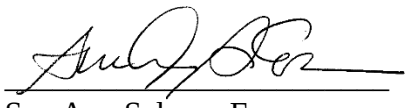
9. Attached as **Exhibit F** to the Request For Judicial Notice filed concurrently herewith is a true and correct copy of Ninth Circuit Docket in *Martinez, et al. v. Newsom, et al.*, United States District Court for the Central District of California, Case No. 20-cv-01796-DMG-KK (Ninth Circuit Case No. 20-56404).

10. Attached as **Exhibit G** to the Request For Judicial Notice filed concurrently herewith is a true and correct copy of November 24, 2020, Order in *Martinez, et al. v. Newsom, et al.*, United States District Court for the Central District of California, Case No. 20-cv-01796-DMG-KK (Ninth Circuit Case No. 20-56404).

11. Attached hereto and incorporated herein as **Exhibit H** is a true and correct copy of a January 8, 2021 email from Mr. Hildenbrand to Mr. Gottleib, with a copy to my office.

I have read the above declaration and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 28th day of January, 2021, in Los Angeles County, California.



Sue Ann Salmon Evans

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EXHIBIT “H”

From: Hillenbrand, Edward <edward.hillenbrand@kirkland.com>
Sent: Friday, January 08, 2021 4:01 PM
To: Ira L. Gottlieb; Sue Ann Salmon Evans; Ila Friend; Lisa C. Demidovich; Dexter Rappleye; LAUSD Shaw
Cc: Holscher, Mark C.; Elizabeth, Sierra; Panish, Kathryn E.; Uhlenhuth, Laura Kelley; Fountain, La Tonya D.
Subject: RE: Shaw v. LAUSD

Hi Ira,

Thank you for your response. We will review. Please provide UTLA's availability on Monday afternoon for a meet and confer call to discuss the topics below as well as the points raised in the Court's November 17, 2020 Initial Status Conference Order.

Regarding your accusation that there are one or more undisclosed "parties financing this litigation on behalf of Plaintiffs, financiers who may be antagonistic to the Union and its advocacy for public education and hence interested in this otherwise irrelevant and confidential improperly requested information," our firm is representing Plaintiffs on a pro bono basis. So I can assure that you no such financiers exist.

Regards,

Ned

Edward Hillenbrand

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From: Ira L. Gottlieb <buddyg@bushgottlieb.com>
Sent: Friday, January 8, 2021 3:10 PM
To: Hillenbrand, Edward <edward.hillenbrand@kirkland.com>; Sue Ann Salmon Evans <sevans@dwkesq.com>; Ila Friend <ifriend@dwkesq.com>; Lisa C. Demidovich <ldemidovich@bushgottlieb.com>; Dexter Rappleye <drappleye@bushgottlieb.com>; LAUSD Shaw <LAUSD_Shaw@dwkesq.com>
Cc: Holscher, Mark C. <mholscher@kirkland.com>; Elizabeth, Sierra <sierra.elizabeth@kirkland.com>; Panish, Kathryn E. <kathryn.panish@kirkland.com>; Uhlenhuth, Laura Kelley <laura.uhlenhuth@kirkland.com>; Fountain, La Tonya D. <lfountain@kirkland.com>
Subject: RE: Shaw v. LAUSD

Dear Ned and all:

Here are UTLA's responses to your assertions about inadequacy of the Union's responses to Plaintiffs' discovery requests.

1. The Union stands by all of the objections it has raised in those responses, and will not repeat them all here, but will highlight them for discussion purposes in this email.
2. The Union, as a "relief Defendant" that Plaintiffs have disavowed making any claim against, is essentially a "nominal" party such that its obligation to respond to discovery is diminished. E.g., where Plaintiffs can obtain discovery from other sources, or where the information or documents sought are not clearly relevant, discovery requests should be rejected.
3. Plaintiffs have errantly attacked the August Sideletter, alleging erroneously in the First Amended Complaint that it comprises the entirety of the District's educational operation and program, though Plaintiffs know or should know that is not the case (and hence, Plaintiffs misrepresented or feigned ignorance of that reality in their responses to both UTLA's and the District's discovery requests on that very point.) We expect, with the August Sideletter's expiration (mooting any threatened injunctive relief against that agreement), Plaintiffs will perhaps attack its successor agreement(s). That seriatim set of attacks would itself be off base, as further demonstrated by Plaintiffs' evasive and non-substantive responses to UTLA's and the District's discovery requests. Plaintiffs cannot both launch an attack on the UTLA-LAUSD CBAs, ask a court to erase or revise them, and simultaneously avoid having to explain precisely how they believe those documents violate the law and the California constitution. In sum, Plaintiffs focus on the wrong target, ignore and refuse to address the inevitable effects of COVID on learning loss in this litigation and in yet another evasive discovery response, refuse to reorient their claims to a more appropriate target (if any), and now seek information and documents even further removed from the District's policies and programs, that don't shed light on the meaning of any CBA, let alone the litigable issues in this case. *Tylo v. Superior Court*, 55 Cal. App. 4th 1379, 1387 (1997)("While the filing of the lawsuit by petitioner may be something like issuing a fishing license for discovery, as with a fishing license, the rules of discovery do not allow unrestricted access to all species of information.")
4. Based on #3, Plaintiffs' tangential challenge to the content and substance of any Sideletter at issue – merits aside -- must of necessity be based on the language of the agreement(s), and not on any materials not exchanged or shared between the Union and the District. As you are aware, in interpreting the meaning of a contract, what is relevant to the meaning and the ascertainment of the parties' contractual intent in addition to the contractual language itself (if ambiguous) are communications between the parties, not information or thoughts and considerations the parties did *not* share with each other. *Central States v. Hartlage Truck Serv., Inc*., 991 F.2d 1357, 1362 (9th Cir. 1991) ("The parties to a collective bargaining agreement are bound by the terms of their agreement, *regardless of their undisclosed intent*."), citing *Central States v. Independent Fruit & Produce Co*., 919 F.2d 1343, 1352 (8th Cir. 1990*); Northwest Adm'rs, Inc. v. Waste Mgmt. of Wash., Inc*., 2006 U.S. Dist. LEXIS 70925 (W.D. Wa. September 29, 2006); *Iqbal v. Ziadeh*, 10 Cal. App. 5th 1, 8-9 (2017) ("California recognizes the objective theory of contracts (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 948, under which '[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation' (*Titan Group, Inc. v. Sonoma Valley County Sanitation Dist*. (1985) 164 Cal.App.3d 1122, 1127). *The parties'*

undisclosed intent or understanding is irrelevant to contract interpretation. (*Winograd v. American Broadcasting Co*., 68 Cal.App.4th 624, 632 (1998); *Berman v. Bromberg, supra*, 56 Cal.App.4th at p. 948.)" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc*. (2003) 109 Cal.App.4th 944, 955–956."); *California Teachers Assn. v. Governing Bd. of Hilmar Unified School Dist*., 95 Cal. App. 4th 183, 189 fn.3 ("If the intent of the bargaining team as described by the HTA's president was not communicated to the District, then it is merely evidence of undisclosed subjective intent of a party and is irrelevant to determining the meaning of contractual language."); *Kistler v. Redwoods Community College Dist*., 15 Cal. App. 4th 1326, 1334 (1993); *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co*., 107 Cal. App. 4th 516, 525(2003); *Bunnett v. Regents of University of California*, 35 Cal. App. 4th 843, 854 (1995); *Clark v. Lesher*, 169 Cal. App. 2d 319, 329 (1959); *Albaugh v. Moss Constr. Co.*, 125 Cal. App. 2d 126, 130 (1954). Thus, as stated in the Union's objections to the requests, any metadata, or internal Union or internal District deliberations that were not conveyed to the other bargaining party, are not relevant to the interpretation of the agreements, let alone the questions of legality or constitutionality of the agreements, all distinct from the legality or constitutionality of the District's programs or policies. Nor are any of such requested information or documents relevant to the Plaintiffs' proposed motion for preliminary injunction.

5. With respect to metadata in particular, the parties have not agreed on any protocol, and did not agree to Plaintiffs' unilaterally proclaimed definitions and demands, which in any event do not override the objections UTLA has made. Plaintiffs have offered no particularized basis – as they must -- for seeking such information in a case where the negotiating parties exchanged proposals -- that have now been produced -- that were intended by both parties to be reviewed and negotiated without reference to whatever the underlying invisible editing process might have been. Collective bargaining, like most arm's length contract negotiations, as noted above, is a process controlled by communications and presentation of proposals, not secret undisclosed thoughts or deliberations harbored by one or the other party. There is thus no need or occasion to delve into metadata to understand the produced documents. There is no reason to question the veracity or authenticity of the produced documents; the negotiating parties themselves did not access any metadata as part of the bargaining process, and hence there is no need for metadata production. There is no hidden formula or logarithm, or pattern, embedded within metadata, that could conceivably have any bearing on this case. The parties simply negotiated and presented their proposals without consideration of anything other than the content visible on the pages, along with any other communications between the parties. Because the parties relied only on the visible content of the documents, that content is all that could possibly be relevant to the issues in this case, not the underlying data showing how the documents were created. Because the negotiating parties did not consider metadata, there is absolutely no reason to produce it to a third party to those negotiations in this case.

Plaintiffs' demand for such information underlying the straightforward exchange of proposals and other documents smacks of harassment and overreach. See, e.g., *United*

States ex rel. Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 245 (S.D. Cal. 2015)(Rejecting a party's request for metadata, reasoning that "Courts have required the requesting party to show '*a particularized need for the metadata,*"[emphasis added]); *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350, 354 (S.D.N.Y. 2008) ("Courts have commented that most system (and substantive) metadata lacks evidentiary value because it is not relevant."); *Mich. First Credit Union v. Cumis Ins. Soc'y, Inc*., 2007 U.S. Dist. LEXIS 84842 (E.D. Mich. September 16, 2007) ("In *Wyeth v. Impax Laboratories, Inc*., 2006 U.S. Dist. LEXIS 79761, 2006 WL 3091331, *2 (D.Del. 2006) (unpublished), the court stated that '[m]ost metadata is of limited evidentiary value, and reviewing it can waste litigation resources." (Citing *Williams v. Sprint*, 230 F.R.D. at 651). Likewise, the Eastern District of Kentucky stated in *Kentucky Speedway, LLC v. NASCAR, Inc*., 2006 U.S. Dist LEXIS 92028, *24 (E.D. Ky. 2006), 'In most cases and for most documents, metadata does not provide relevant information." In *Williams v. Sprint*, 230 F.R.D. 640, 651 (D. Kan 2005), the court noted that "[e]merging standards of electronic discovery appear to articulate a general presumption against the production of metadata[.]')" We have provided Plaintiffs with notes relating to discussions between the parties, albeit about a Sideletter Plaintiffs inquired about that is no longer in effect, which may or may not shed light on the meaning and application of the agreements; that is the appropriate, if not necessarily relevant source of secondary meaning, not information that may show how the document was created and who authored or edited it. (We have, however, identified those individuals who participated in the negotiations.) Plaintiffs have not, in any event, explained the relevance of internal party discussions or metadata to the issues in dispute in this litigation, or the proposed preliminary injunction motion, either in the email below or any other communication we've received from Plaintiffs since we first advised you of this basic objection.

6. Insofar as you believe you have illegible documents produced by UTLA, please state their Bates-stamped numbers and we will review and respond appropriately. The underlying survey documents produced by UTLA are legible if magnified. I am unaware of having produced any redlined documents, but if Plaintiffs do have some from UTLA and find them objectionable, please list the Bates numbers for those.
7. Do you have legal authority supporting the notion that compiling multiple documents into a single pdf is inappropriate? This request, too, appears to be more an effort to impose an undue burden on this responding party than a genuine good faith attempt to conduct discovery in an efficacious way intended to advance the progress of this litigation.
8. Your offhand dismissal of labor decisions from the National Labor Relations Board ("NLRB") and the California Public Employment Relations Board ("PERB") -- cited in UTLA's objections that I will not replicate in this email -- that protect the internal deliberations of parties in collective bargaining purportedly supported with a citation to a 1942 workers compensation case is not persuasive or helpful to this discussion. The law administered by PERB that effectuates a fundamental California labor relations policy, the EERA (see, e.g., Government Code Section 3540*; Redwoods Community College Dist. v. Public Employment Relations Bd*. 159 Cal. App. 3d 617 (1984)), protects the sanctity of collective bargaining. The need to protect that process is not overridden by a rote recital of the ostensible need for that irrelevant information. Confidentiality of each

party's internal bargaining deliberations is essential for the advancement and integrity of the collective bargaining process. Contrary to your suggestion and inapt citation to that *Elliott* workers compensation case, the California Supreme Court has recognized that precedent under the National Labor Relations Act and correlative provisions of the EERA are persuasive and applicable in this state, and PERB's interpretation of its statute is entitled to deference from the courts, especially when that interpretation falls within the agency's field of expertise, as protection of the bargaining process does. E.g., *Boling v. Public Employment Relations Bd*., 5 Cal. 5th 898, 917 (2018); *County of Los Angeles v. Los Angeles County Employee Relations Com*., 56 Cal. 4th 905 (2013); *Coachella Valley Mosquito & Vector Control Dist. v. PERB*, 35 Cal. 4th 1072, 1084-1085, 1090 (2005) (PERB is the expert quasi-judicial agency created by the Legislature to administer "a coherent and harmonious system of public employment relations laws"); *San Diego Teachers Ass'n v. Super. Ct.* , 24 Cal. 3d 1, 12 (PERB has broad authority, similar to that of the NLRB, to interpret the EERA in the interest of bringing "expertise and uniformity to the delicate task of stabilizing labor relations."); *Regents of University of California v. Public Employment Relations Bd*., 51 Cal. App. 5th 159, 174 (2020); *Brown v. Pro Football, Inc.*, 518 U.S. 231, 242 (1996) (labor laws give the NLRB, not the courts, primary responsibility for policing the bargaining process). Apart from the dispositive issue of relevance which you cannot overcome, you are flatly incorrect or at least misleading in misstating or suggesting that there is no "legislative process privilege" or "deliberative process" privilege cognizable in this case and in this state. There certainly are such privileges of longstanding applicability. That privilege or protection from disclosure is available, and there is in this case by the same token, a similar balancing analysis that the courts must undertake in determining whether the union's counterpart internal deliberations can be revealed. See, e.g., *Labor & Workforce Development Agency v. Superior Court*, 19 Cal. App. 5th 12 (2018); *Cook Pint & Varnish v. NLRB*, 648 F.2d 212, 222 (D.C. Cir. 1981); *Mallick v. IBEW*, 749 F.2d 771, 785 (D.C. Cir. 1981) (Noting that union organizing strategy and negotiating plans are types of union "secrets" entitled to be withheld); *Harvey's Wagon Wheel v. NLRB*, 550 F.2d 1139 (9th Cir. 1977); *Illinois Educational Labor Relations Board v. Homer Community Consolidated School District*, 547 N.E. 182, 185 (Ill. 1989)("[disclosure of these deliberations to a teachers' union with whom the school board is engaged in collective bargaining would seriously undermine the board's negotiating position. School board members would be reluctant to discuss bargaining strategy if they thought their discussion would be disclosed to the union. Similarly, union negotiating teams might be hampered in their planning sessions if a school board could subpoena information contained within such strategy meetings.")

The pursuit of such information by your law firm and/or the plaintiffs may give rise to unfair labor practice charges against it. See, *Veritas Health Servs v. NLRB*, 671 F.3d 1267 (D.C. Circ. 2012); *United Nurses Ass'ns of Cal v. NLRB*, 871 F.3d 767, 776 & 785-86 (9th Cir. 2017)(finding an unfair labor practice for the employer's outside counsel to serve subpoenas on the union that sought information about confidential union activity and communications between unit employees and the union); *Chino Valley Med. Ctr*., 362 NLRB No. 32 n.1 (2015); (ordering employer to cease and desist from "[s]erving

subpoenas on employees and unions that request information about employees' union activities"); *Guess?, Inc.* 339 N.L.R.B. 432 (2003); *National Telephone Directory Corp.*, 319 NLRB 420 (1995), and see *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), and California Government Code Section 6254(p). That misguided pursuit may also give rise to discovery requests and inquiries from the Union to Plaintiffs concerning the identity of the parties financing this litigation on behalf of plaintiffs, financiers who may be antagonistic to the Union and its advocacy for public education and hence interested in this otherwise irrelevant and confidential improperly requested information. See, e.g., *V5 Techs. v. Switch, Ltd*., 334 F.R.D. 306, 311-312 (D. Nv. 2019)(There is a split of authority as to the discoverability of litigation funding information); *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig*., 405 F. Supp. 3d 612, 615 (D.N.J. 2019) ("For example, discovery will be Ordered where there is a sufficient showing that a non-party is making ultimate litigation or settlement decisions, the interests of plaintiffs or the class are sacrificed or are not being protected, or conflicts of interest exist."); *Miller UK Ltd. v. Caterpillar, Inc*., 17 F. Supp. 3d 711, 739–42 (N.D. Ill. 2014) (discussing the court's in camera review of withheld litigation-funding documents); *Abrams v. First Tennessee Bank Nat. Ass'n*, 2007 U.S. Dist. LEXIS 6739, 2007 WL 320966, 1 (E.D.Tenn. 2007).

9. To be sure, most of the categories of allegedly "missing" documents you list – which you assume without evidence exist – are not within the possession, custody or control of UTLA. They include District internal deliberations, "student performance data", attendance data, Board meeting minutes, and surveys other than the materials UTLA did produce.
10. We have not completed our analysis of Plaintiffs' discovery production, though as noted above, Plaintiffs have attempted to evade their responsibility to precisely substantiate and explain their claims of illegality of any CBA, and fatuously refuse to even acknowledge the reality that the CBAs do not comprise the entirety of the District's educational program and policy.
11. UTLA will provide a Privilege/Objections log.

We look forward to a discussion of our respective positions at a mutually convenient time.

Ira L. Gottlieb
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From: Hillenbrand, Edward <edward.hillenbrand@kirkland.com>
Sent: Wednesday, January 6, 2021 11:59 AM
To: Ira L. Gottlieb <buddyg@bushgottlieb.com>; Sue Ann Salmon Evans <sevans@dwkesq.com>; Ila Friend <ifriend@dwkesq.com>; Lisa C. Demidovich <ldemidovich@bushgottlieb.com>; Dexter Rappleye <drappleye@bushgottlieb.com>; LAUSD Shaw <LAUSD_Shaw@dwkesq.com>
Cc: Holscher, Mark C. <mholscher@kirkland.com>; Elizabeth, Sierra <sierra.elizabeth@kirkland.com>; Panish, Kathryn E. <kathryn.panish@kirkland.com>; Uhlenhuth, Laura Kelley <laura.uhlenhuth@kirkland.com>; Fountain, La Tonya D. <lfountain@kirkland.com>
Subject: RE: Shaw v. LAUSD

Hi Sue Ann and Ira,

I'm writing to respond to your January 3rd and 4th emails, and to request a meet and confer call to discuss the topics below as well as the points raised in the Court's November 17, 2020 Initial Status Conference Order.

LAUSD Special Interrogatory No. 1
Plaintiffs stand by their position that LAUSD exceeded the number of permissible special interrogatories. The Court's order didn't contemplate the use of form interrogatories. We are not objecting to Form Interrogatory No. 17.1. We are objecting to LAUSD's attempted use of it to compel Plaintiffs to respond to more than five special interrogatories, in violation of the Court's order. Again, please refer to UTLA's special interrogatories for an example of what does conform to the Court's order.

Scheduling Depositions
LAUSD previously represented that it wants to depose all of the 16 declarants who supported Plaintiffs' draft PI motion. We agreed to make each of them available for a two-hour deposition. That results in a total of 32 hours on the record, which is why we proposed that each side receive 32 total hours. If LAUSD and UTLA won't accept Plaintiffs' proposal, please explain why and offer a counterproposal for consideration.

The list of deponents Plaintiffs provided on December 23rd is non-exhaustive. It isn't inconsistent with any prior statements made to LAUSD or the Court, all of which were made under the premise that each side would receive 32 hours on the record. Your January 3rd email is silent on why you think it is improper for Plaintiffs to depose Mr. Beutner and members of LAUSD's board. Mr. Beutner is a named defendant in the case and has percipient knowledge about the side letter agreements and the impact they've had on students. The LAUSD board approves the district's labor agreements, including the August Side Letter and presumably the December Side Letter (the April Side Letter was approved by Mr. Beutner and then board President Richard Vladovic under emergency powers granted by the board). Therefore, it's entirely proper to depose them about the policies set forth in those side letters, their reasons for agreeing to them, and the impact they've had on students.

Below is a chart setting forth Plaintiffs' availability for depositions in January and February (assuming sufficient notice is provided).

Plaintiff	Availability
Ricardo Gastelum-Campista	After 4:00pm on Tuesdays, Thursdays, and Fridays
Maritza Gonzalez	Sundays; Wednesdays from 8:00am to 11:00am
Ronnie Heard, Jr.	Tuesday, Thursday, and Friday evenings
Deyanira Hooper	Fridays from 12:00pm to 3:00pm
Judith Larson	Weekday mornings; Monday, Wednesday, and Friday evenings
Vicenta Martinez	Weekdays and Saturdays from 10:00am to 4:00pm
Keshara Shaw	Weekdays after 6:00pm; Saturdays before 2:00pm
Alma Solano	Tuesdays; Monday, Wednesday, Thursday, and Friday mornings
Akela Wroten, Jr.	Weekdays after 1pm

Defendants' Document Productions
We've reviewed LAUSD and UTLA's document productions. There are several deficiencies that need to be addressed.

First, neither LAUSD nor UTLA complied with the standard ESI protocols set forth in Plaintiffs' Instruction No. 5. The documents provided, some of which LAUSD and UTLA compiled into single PDFs, lack any metadata. Many of them are freestanding documents,

including undated drafts of side letters that were exchanged between the parties during negotiations. Yet the emails evidencing their exchange are absent from the production set. Please provide revised production sets that (1) include the standard ESI metadata fields, (2) don't compile multiple documents into a single PDF, and (3) provide complete document families (i.e., parent emails and their attachments).

Second, LAUSD and UTLA both produced redlined documents and excel spreadsheets in PDFs that are in many instances impossible to read and often missing key information. Please provide any redlined documents and Excel spreadsheets in their native formats.

Third, there are many categories of highly relevant documents missing from the production sets. These include:

- Emails exchanged between LAUSD and UTLA about the side letters or the impact they've had on students;
- LAUSD's internal emails about the side letters or the impact they've had on students;
- UTLA's internal emails about the side letters or the impact they've had on students;
- Any student performance data, including any assessment data (not even for Plaintiffs' children);
- Attendance data broken down by grade, school, ethnicity, socioeconomic class, special needs status, and English Learning status;
- Board meeting minutes and materials, including closed session meeting minutes and materials; and
- Surveys, reports, data compilations, or analysis related to distance learning during the fall semester.

Fourth, LAUSD and UTLA included in their written responses a number of reasons for withholding documents from production, among them citations to administrative law decisions, the Brown Act, and the "legislative process," "deliberative process," and "official information" privileges. Administrative law decisions are not binding on California courts. *See, e.g.*, *Elliott v. Indus. Acc. Comm'n*, 21 Cal. 2d 281, 284 (1942). Moreover, California law only recognizes privileges established by statute. *See Welfare Rights Org. v. Crisan*, 33 Cal. 3d 766, 769 (1983) (Evidence Code § 911 "abolish[ed] common law privileges and . . . keep[s] the courts from creating new nonstatutory privileges."). The California Evidence Code does not recognize the legislative process privilege or deliberative process privilege. *See* Cal. Evid. Code §§ 930-1063; *see also Marylander v. Superior Court*, 81 Cal. App. 4th 1119, 1126 (2000). And there is no absolute privilege under California law that protects confidential labor negotiation materials from disclosure in civil discovery (especially for labor negotiations that have ended). Despite Ira's claim that requesting internal communications related to the side letters could subject Plaintiffs to charges of unfair labor practices, Plaintiffs are well within their rights to request and obtain relevant, non-privileged materials through civil discovery. Confidentiality alone is not a basis to withhold relevant information. Indeed, the parties entered into a protective order that governs the exchange of confidential information in this case.

Fifth, per Plaintiffs' instruction No. 10, please provide a privilege log that addresses the redactions applied to produced documents as well as any responsive documents that LAUSD and UTLA have withheld from production in their entirety. Without this information, Plaintiffs cannot know the full extent of responsive information that has been withheld from production, or properly challenge defendants' grounds for withholding it.

Given the time sensitivity of these matters, please provide a response by close of business tomorrow. Please also provide times on Friday afternoon that you are available for a meet and confer call. We are free after 1:00pm.

Regards,

Ned

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Cc: Holscher, Mark C. <mholscher@kirkland.com>; Elizabeth, Sierra <sierra.elizabeth@kirkland.com>; Panish, Kathryn E.

<kathryn.panish@kirkland.com>; Uhlenhuth, Laura Kelley <laura.uhlenhuth@kirkland.com>; Fountain, La Tonya D. <lfountain@kirkland.com>
Subject: RE: Shaw v. LAUSD

Dear Counsel:

This is in response to Plaintiffs' proposals below on how to conduct discovery.

First, UTLA disagrees with your assumption that because we didn't contact you about your discovery requests, "there are no questions or issues to discuss." That may turn out to be true, but not because of lack of objections to your requests, which seek confidential and irrelevant documents and information, and are objectionable for other reasons as well. UTLA spent a substantial amount of time gathering responsive non-privileged non-confidential relevant documents and information, and will later today send you its responses. In terms of objections, however, for example, we made clear from the moment you reversed field and announced you wished to obtain discovery from UTLA -- even though your operative pleading disavows any claim against it -- that the union would object to producing documents and information about internal union deliberations, which are confidential, irrelevant, and might in fact be the basis for an unfair labor practice charge against the requesting party. (We understand that the District is also objecting to producing or revealing its own internal deliberations.) We have not yet received an adequate explanation or support for plaintiffs' requests for this kind of information; plaintiffs' ill-advised attacks on successive collective bargaining agreements between the District and UTLA – which again, do not comprise the District's program, operation or practices -- do not warrant intrusion into each negotiating party's private internal discussions. Moreover, as with the District, UTLA is objecting to some of the requests as compound and an attempt to evade the Court's numerical limits on discovery requests, but will respond as if those limits were not exceeded.

It would be unreasonable to conduct depositions on weekends and evenings, and UTLA is inclined to object to such an approach. The agreed amount of time for depositions you propose, in light of the magnitude of the matters at stake and the extraordinary relief Plaintiffs seek in a dynamic, changing environment, is inadequate. To this point, you have not named any UTLA representative as a possible deponent, which makes sense because Plaintiffs have put the District's policies and operation at issue. Of course I leave it to the District's able counsel to respond to plaintiffs' desire to depose District representatives.

We stand willing to discuss all of the above. Thank you for your attention.

Very truly yours,

Ira L. Gottlieb
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From: Hillenbrand, Edward <edward.hillenbrand@kirkland.com>
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Subject: RE: Shaw v. LAUSD

Hi Sue Ann and Ira,

I write as a follow-up to my email last week. Please confirm whether Defendants will agree to the deposition terms set forth below. We are still working on obtaining Plaintiffs' availability and will provide as soon as possible. Please let us know when we can expect to receive the same for Ms. Gonez, Ms. Goldberg, Mr. Melvoin, Mr. Schmerelson, Ms. Garcia, Mr. McKenna, and Mr. Beutner.

Today you will receive an initial production set of documents that we were able to process in advance of the January 4th deadline. We are providing documents to you as they become available to facilitate your review in advance of taking any depositions.

Based on our December 3rd meet and confer call, we understood that Defendants would request a follow-up call to address Plaintiff's document requests if there were any questions or issues to discuss. Because we have not received any such request, we assume there are no questions or issues to discuss. However, out of an abundance of caution, we want to make clear that Plaintiffs' RFP No. 1 to LAUSD covers closed session board meeting minutes and materials, and Plaintiffs' RFP No. 3 to LAUSD covers the following:

- Results for any completed assessments set forth in the 2020-2021 Comprehensive Assessment Program for Early Education, Elementary and Secondary Students (attached for your reference) broken down by grade, school, ethnicity, socioeconomic class, special needs status, and English Learning status;
- Data showing which students did and did not take those assessments broken down by the same criteria; and
- Class participation/absence data, including data pulled from Schoology and other online platforms, broken down by the same criteria.

Please confirm that the above materials will be included in LAUSD's document production. If you would like to discuss further by phone this week, we are happy to do so.

Thanks and Happy New Year,

Ned

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Cc: Holscher, Mark C. <mholscher@kirkland.com>; Elizabeth, Sierra <sierra.elizabeth@kirkland.com>; Panish, Kathryn E. <kathryn.panish@kirkland.com>; Uhlenhuth, Laura Kelley <laura.uhlenhuth@kirkland.com>; Fountain, La Tonya D. <lfountain@kirkland.com>
Subject: Shaw v. LAUSD

Hi Sue Ann and Ira,

I hope you and your families are doing well and staying safe. We wanted to touch base about an issue concerning LAUSD's interrogatories, and to start the conversation about scheduling depositions.

LAUSD's Special Interrogatory No. 1 Contains Several Interrogatories
Special Interrogatory No. 1 cites to and quotes Form Interrogatory No. 17.1. It asks Plaintiffs to address each of LAUSD's RFAs for which Plaintiffs have not provided an unqualified admission. Because Plaintiffs are not providing any unqualified admissions in response to LAUSD's five RFAs, Special Interrogatory No. 1 is really comprised of five separate interrogatories. LAUSD served four additional interrogatories for a total of nine. Therefore, Special Interrogatory Nos. 2-5 exceed the maximum number permitted by the Court's order. UTLA's use of its five interrogatories, each of which correlates to one of its five RFAs, is an example of what does conform to the Court's order.

We raise this issue now so that LAUSD has an opportunity to identify the five interrogatories they would like Plaintiffs to respond to before the January 4th deadline. Please let us know by 5:00 p.m. on Monday which five you would like us to address.

Scheduling Depositions
Plaintiffs previously agreed to make each of their declarants available for a 2-hour deposition, for a total of 32 hours on the record. Plaintiffs also proposed to take no more than 32 hours of deposition testimony so that both sides received an equal amount of time. Please let us know if LAUSD and UTLA will agree to these terms.

We are gathering Plaintiffs' availability in January, and will try to provide dates next week. Please note that many of the Plaintiffs have rigid work schedules, so some depositions may need to occur in the evening or on the weekend. While Plaintiffs do not yet have their full list of deponents, we do intend to depose LAUSD board members Kelly Gomez, Jackie Goldberg, Nick Melvoin, Scott Schmerelson, Monica Garcia, and George McKenna, as well as Superintendent Austin Beutner. Please provide their availability in January and February. We will work with you to reach mutually-agreeable dates.

If you would like to discuss further by phone next week, we are happy to do so.

Thanks and Happy Holidays,

Ned

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 115 Pine Avenue, Suite 500, Long Beach, CA 90802.

On the date set forth below I served the foregoing document described as **LOS ANGELES UNIFIED SCHOOL DISTRICT'S NOTICE OF MOTION AND MOTION SUPPORTING OSC RE: STAY PENDING RELATED LITIGATION** on interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

☐ (VIA U.S. MAIL) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses on the attached service list. I deposited such document with the U.S. Mail at Redondo Beach, California with postage thereon fully prepaid I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ (VIA U.S. MAIL/REGISTERED/CERTIFIED) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses on the attached service list. I deposited such document with the U.S. Mail at Redondo Beach, California with postage thereon fully prepaid to cover the cost of certified mailing, attaching a registration number for the certified mailing and a postcard complete with the addressee's name and address for a return receipt as requested. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ (VIA FACSIMILE) I caused such document to be transmitted via facsimile to the addressee from the facsimile machine of DANNIS WOLIVER KELLEY whose phone number is 855.933.2611. The transmission by facsimile was reported as complete and without error.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

☐ (VIA OVERNIGHT MAIL) I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses on the attached service list. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☒ (VIA CASE ANYWHERE ELECTRONIC SERVICE) A true and correct copy through DANNIS WOLIVER KELLEY's electronic mail system from sfriend@dwkesq.com was electronically served by transmission to CASE ANYWHERE. The transmission was reported as complete and without error.

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

Executed on January 28, 2021 at Redondo Beach, California.

Shanti D. Friend

Shanti Friend

DANNIS WOLIVER KELLEY
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