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and Austin Beutner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

KESHARA SHAW; ALMA ROSA FARIAS DE SOLANO; JOSUE RICARDO GASTELUM-CAMPISTA; 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,

Defendants, and,

UNITED TEACHERS LOS ANGELES,

Relief Defendant.

Case No. 20STCV36489

[Assigned to Judge Yvette M. Palazuelos, Department 9]

SEPARATE STATEMENT OF LOS ANGELES UNIFIED SCHOOL DISTRICT IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRELIMINARY INJUNCTION

[LOS ANGELES UNIFIED SCHOOL DISTRICT'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRELIMINARY INJUNCTION DISCOVERY AND REQUEST FOR JUDICIAL NOTICE FILED CONCURRENTLY HEREWITH]

Date : March 19, 2021
Time : 10:00 a.m.
Dept. : 9
Judge : Yvette M. Palazuelos

Trial: None set

Complaint Filed: September 24, 2020
FAC Filed: October 7, 2020

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

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Defendants Los Angeles Unified School District and Austin Beutner (collectively referred to as "District" or "LAUSD") hereby submits this separate statement in support of its opposition to 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")' Motion to Compel Preliminary Injunction Discovery ("Motion").

I. DISCOVERY REQUESTS AND RESPONSES SUBJECT TO THIS MOTION

A. REQUEST FOR PRODUCTION NO. 1:

All DOCUMENTS and COMMUNICATIONS RELATING to the drafting of, negotiation of terms of, implementation of, or extension of any side letter or sideletter agreement entered into with UTLA that is in effect during the FALL SEMESTER or SPRING SEMESTER, including but not limited to the AUGUST SIDE LETTER and the OCTOBER SIDE LETTERS.

B. RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

The District incorporates its preliminary response and general objections as if fully set forth herein. The District objects to this request to the extent that it seeks information protected from disclosure under the Brown Act (Gov. Code, §§ 54950, *et seq*.), the legislative process privilege, the official information privilege, and/or the deliberative process privilege. The District objects that this request is vague, ambiguous, and compound with regard to the terms "drafting of, negotiation of, terms of, implementation of, or extension of" and "side letter or sideletter." The District further objects that this request is overbroad and unduly burdensome and further seeks information that is neither relevant to Plaintiffs' claims nor reasonably calculated to lead to the discovery of admissible evidence. The District objects to the extent this request seeks information protected by the attorney client privilege and/or attorney work product doctrine. The District objects to the extent this request seeks confidential information relating to the development and/or presentation of the District's positions with respect to employer-employee relations, confidential information that is used to contribute significantly to the development of the District's positions with respect to employer-employee relations, confidential information regarding internal collective bargaining strategies or tactics, and/or confidential discussions with the Board of Education regarding the District's position

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regarding any matter within the scope of representation and instructing its designated representatives regarding same. (Gov. Code, §§ 3540.1(c), 54957.6, 54936, 3549.1; see, e.g., *Colton Joint Unified School District/Rialto Unified School District/San Bernardino City Unified School District* (1981) PERB Order No. Ad-113; *Berbiglia, Inc.* (1977) 233 NLRB 1476, 1495; *Burlingame Elementary School District* (2006) PERB Dec. No. 1847.)

The District further objects to this request to the extent it violates the right to confidentiality of its employees, students and/or their parents under the California Constitution and common law, and also violates the obligation to keep student records and information confidential under state and federal law. (See Cal. Const. art. I, § 1; 20 U.S.C. §§ 1232g *et seq.*; Ed. Code, §§ 49073 *et seq.*)

The District objects to the extent this request seeks discovery of voluminous email or electronically stored information, which would be subject to a motion for protective order under Code of Civil Procedure section 2031.060, subdivision (f), which provides in part relevant here: "The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exist: (1) It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive. (2) The discovery sought is unreasonably cumulative or duplicative. . . . (4) The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues."

Pursuant to Code of Civil Procedure section 2031.280, subdivision (c), the District objects to Plaintiffs' instruction number five, which appears to be a boilerplate instruction. The District further objects that this request seeks broad merits discovery at the outset of this putative class action, in violation of the Judicial Council's guidance that, "[i]n complex litigation . . . the issues may not be well defined when the case is first filed and may become better defined only after some initial discovery has occurred. This means there is a risk, particularly early in the life of a complex case, that discovery can become unfocused and out of control." (California Deskbook on Complex Civil Litigation Management, § 3.30.) As a result, "in some cases when it is appropriate for certain issues to precede other issues, such as questions of statute of limitations, jurisdiction, or standing, discovery

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should be staged so that these issues can be determined before other discovery proceeds." (*Id.* at § 3.31.)

Subject to and without waiving these objections, the District responds as follows: Responsive, non-privileged and non-confidential documents in the custody, possession or control of the District, will be produced. The District's investigation and discovery are continuing and the District reserves its right to supplement this response.

C. REQUEST FOR PRODUCTION NO. 4:

All DOCUMENTS and COMMUNICATIONS discussing the impact of DISTANCE LEARNING on LAUSD students during the FALL SEMESTER or SPRING SEMESTER.

D. RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

The District incorporates its preliminary response and general objections as if fully set forth herein. The District objects to this request to the extent that it seeks information protected from disclosure under the Brown Act (Gov. Code, §§ 54950, *et seq.*), the legislative process privilege, the official information privilege, and/or the deliberative process privilege. The District objects that this request is vague, ambiguous, and compound with regard to the terms "discussing," "impact of," and "FALL SEMESTER or SPRING SEMESTER." The District further objects that this request is overbroad and unduly burdensome and further seeks information that is neither relevant to Plaintiffs' claims nor reasonably calculated to lead to the discovery of admissible evidence. The District objects to the extent this request seeks information protected by the attorney client privilege and/or attorney work product doctrine. The District objects to the extent this request seeks confidential information relating to the development and/or presentation of the District's positions with respect to employer-employee relations, confidential information that is used to contribute significantly to the development of the District's positions with respect to employer-employee relations, confidential information regarding internal collective bargaining strategies or tactics, and/or confidential discussions with the Board of Education regarding the District's position regarding any matter within the scope of representation and instructing its designated representatives regarding same. (Gov. Code, §§ 3540.1(c), 54957.6, 54936, 3549.1; see, e.g., *Colton Joint Unified School District/Rialto Unified School District/San Bernardino City Unified School District* (1981) PERB Order No. Ad-113;

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Berbiglia, Inc. (1977) 233 NLRB 1476, 1495; *Burlingame Elementary School District* (2006) PERB Dec. No. 1847.) The District further objects to this request to the extent it violates the right to confidentiality of its employees, students and/or their parents under the California Constitution and common law, and also violates the obligation to keep student records and information confidential under state and federal law. (See Cal. Const. art. I, § 1; 20 U.S.C. §§ 1232g *et seq.*; Ed. Code, §§ 49073 *et seq.*)

The District objects to the extent this request seeks discovery of voluminous email or electronically stored information, which would be subject to a motion for protective order under Code of Civil Procedure section 2031.060, subdivision (f), which provides in part relevant here: "The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exist: (1) It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive. (2) The discovery sought is unreasonably cumulative or duplicative. . . . (4) The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues."

Pursuant to Code of Civil Procedure section 2031.280, subdivision (c), the District objects to Plaintiffs' instruction number five, which appears to be a boilerplate instruction. The District further objects that this request seeks broad merits discovery at the outset of this putative class action, in violation of the Judicial Council's guidance that, "[i]n complex litigation . . . the issues may not be well defined when the case is first filed and may become better defined only after some initial discovery has occurred.

This means there is a risk, particularly early in the life of a complex case, that discovery can become unfocused and out of control." (California Deskbook on Complex Civil Litigation Management, § 3.30.) As a result, "in some cases when it is appropriate for certain issues to precede other issues, such as questions of statute of limitations, jurisdiction, or standing, discovery should be staged so that these issues can be determined before other discovery proceeds." (*Id.* at § 3.31.)

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Subject to and without waiving these objections, the District responds as follows: Responsive, non-privileged and non-confidential documents in the custody, possession or control of the District, will be produced. The District's investigation and discovery are continuing and the District reserves its right to supplement this response.

II. OTHER DISCOVERY REQUESTS AND RESPONSES:

A. REQUEST FOR ADMISSION NO. 1:

Admit that the AUGUST SIDE LETTER reduces the number of hours that UTLA teachers must work from eight hours per school day to five and a quarter hours per school day.

B. LAUSD'S RESPONSE TO REQUEST FOR ADMISSION NO. 1:

The District incorporates its preliminary response and general objections as if fully set forth herein. The District objects to this request on the grounds that it is improper in form and is not full and complete in and of itself because it incorporates and requires reference to other materials in violation of Code of Civil Procedure section 2033.060, subdivision (d). The District objects that this request is vague and ambiguous with regard to the phrase "must work." The District objects that this request seeks information that is neither relevant to Plaintiffs' claims nor reasonably calculated to lead to the discovery of admissible evidence. The District objects to the extent this request seeks information protected by the attorney client privilege and/or attorney work product doctrine. The District objects to the extent this request seeks confidential information relating to the development and/or presentation of the District's positions with respect to employer-employee relations, confidential information that is used to contribute significantly to the development of the District's positions with respect to employer-employee relations, confidential information regarding internal collective bargaining strategies or tactics, and/or confidential discussions with the Board of Education regarding the District's position regarding any matter within the scope of representation and instructing its designated representatives regarding same. (Gov. Code, §§ 3540.1(c), 54957.6, 54936, 3549.1; see, e.g., *Colton Joint Unified School District/Rialto Unified School District/San Bernardino City Unified School District* (1981) PERB Order No. Ad-113; *Berbiglia, Inc.* (1977) 233 NLRB 1476, 1495; *Burlingame Elementary School District* (2006) PERB Dec. No. 1847.)

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The District further objects that this request seeks broad merits discovery at the outset of this putative class action, in violation of the Judicial Council's guidance that, "[i]n complex litigation . . . the issues may not be well defined when the case is first filed and may become better defined only after some initial discovery has occurred. This means there is a risk, particularly early in the life of a complex case, that discovery can become unfocused and out of control." (California Deskbook on Complex Civil Litigation Management, § 3.30.) As a result, "in some cases when it is appropriate for certain issues to precede other issues, such as questions of statute of limitations, jurisdiction, or standing, discovery should be staged so that these issues can be determined before other discovery proceeds." (*Id.* at § 3.31.)

Subject to and without waiving these objections, the District responds as follows: Deny.

C. REQUEST FOR ADMISSION NO. 2:

Admit that the AUGUST SIDE LETTER prohibits school principals from requiring UTLA teachers to participate in more than one hour of professional development meetings per week.

D. LAUSD'S RESPONSE TO REQUEST FOR ADMISSION NO. 2:

The District incorporates its preliminary response and general objections as if fully set forth herein. The District objects to this request on the grounds that it is improper in form and is not full and complete in and of itself because it incorporates and requires reference to other materials in violation of Code of Civil Procedure section 2033.060, subdivision (d). The District objects that this request is vague and ambiguous with regard to the terms "prohibits," "requiring," and "professional development meetings." The District objects that this request seeks information that is neither relevant to Plaintiffs' claims nor reasonably calculated to lead to the discovery of admissible evidence. The District objects to the extent this request seeks information protected by the attorney client privilege and/or attorney work product doctrine. The District objects to the extent this request seeks confidential information relating to the development and/or presentation of the District's positions with respect to employer-employee relations, confidential information that is used to contribute significantly to the development of the District's positions with respect to employer-employee relations, confidential information regarding internal collective bargaining strategies or tactics, and/or

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confidential discussions with the Board of Education regarding the District's position regarding any matter within the scope of representation and instructing its designated representatives regarding same. (Gov. Code, §§ 3540.1(c), 54957.6, 54936, 3549.1; see, e.g., *Colton Joint Unified School District/Rialto Unified School District/San Bernardino City Unified School District* (1981) PERB Order No. Ad-113; *Berbiglia, Inc.* (1977) 233 NLRB 1476, 1495; *Burlingame Elementary School District* (2006) PERB Dec. No. 1847.)

The District further objects that this request seeks broad merits discovery at the outset of this putative class action, in violation of the Judicial Council's guidance that, "[i]n complex litigation . . . the issues may not be well defined when the case is first filed and may become better defined only after some initial discovery has occurred. This means there is a risk, particularly early in the life of a complex case, that discovery can become unfocused and out of control." (California Deskbook on Complex Civil Litigation Management, § 3.30.) As a result, "in some cases when it is appropriate for certain issues to precede other issues, such as questions of statute of limitations, jurisdiction, or standing, discovery should be staged so that these issues can be determined before other discovery proceeds." (*Id.* at § 3.31.)

Subject to and without waiving these objections, the District responds as follows: Deny.

E. REQUEST FOR ADMISSION NO. 3:

Admit that the AUGUST SIDE LETTER does not require YOU to evaluate, oversee, or monitor the in-class performance of UTLA teachers.

F. LAUSD'S RESPONSE TO REQUEST FOR ADMISSION NO. 3:

The District incorporates its preliminary response and general objections as if fully set forth herein. The District objects to this request on the grounds that it is improper in form and is not full and complete in and of itself because it incorporates and requires reference to other materials in violation of Code of Civil Procedure section 2033.060, subdivision (d). The District objects that this request is compound in violation of Code of Civil Procedure section 2033.060, subdivision (f). The District objects that this request is vague and ambiguous with regard to the terms "evaluate, oversee, or monitor" and "in-class performance." The District objects that this request seeks information that is

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neither relevant to Plaintiffs' claims nor reasonably calculated to lead to the discovery of admissible evidence. The District objects to the extent this request seeks information protected by the attorney client privilege and/or attorney work product doctrine. The District objects to the extent this request seeks confidential information relating to the development and/or presentation of the District's positions with respect to employer-employee relations, confidential information that is used to contribute significantly to the development of the District's positions with respect to employer-employee relations, confidential information regarding internal collective bargaining strategies or tactics, and/or confidential discussions with the Board of Education regarding the District's position regarding any matter within the scope of representation and instructing its designated representatives regarding same. (Gov. Code, §§ 3540.1(c), 54957.6, 54936, 3549.1; see, e.g., *Colton Joint Unified School District/Rialto Unified School District/San Bernardino City Unified School District* (1981) PERB Order No. Ad-113; *Berbiglia, Inc.* (1977) 233 NLRB 1476, 1495; *Burlingame Elementary School District* (2006) PERB Dec. No. 1847.)

The District further objects that this request seeks broad merits discovery at the outset of this putative class action, in violation of the Judicial Council's guidance that, "[i]n complex litigation . . . the issues may not be well defined when the case is first filed and may become better defined only after some initial discovery has occurred. This means there is a risk, particularly early in the life of a complex case, that discovery can become unfocused and out of control." (California Deskbook on Complex Civil Litigation Management, § 3.30.) As a result, "in some cases when it is appropriate for certain issues to precede other issues, such as questions of statute of limitations, jurisdiction, or standing, discovery should be staged so that these issues can be determined before other discovery proceeds." (*Id.* at § 3.31.)

Subject to and without waiving these objections, the District responds as follows: Deny.

III. PLAINTIFFS' ARGUMENT IN SUPPORT OF MOTION TO COMPEL FURTHER PRODUCTION IN RESPONSE TO REQUEST FOR PRODUCTION NOS. 1 & 4:

The LAUSD repeatedly has refused to produce any internal, confidential communications concerning the side letters or the impact of distance learning on students. *See* Hillenbrand Decl. Ex. 1

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(RFP No. 1, 4); *see also* Exs. 32, 35, 36. It has also redacted portions of the side letter negotiation meeting notes it produced that reflect internal caucus discussions. *See, e.g., id.* Exs. 3–13, 19–23. It claims these communications are irrelevant and nonetheless protected by the Brown Act, the deliberative process, legislative, and official information privileges, and an administrative law policy opposed to the discovery of internal collective bargaining communications during an ongoing negotiation. *Id.* Exs. 23 (RFP Nos 1– 5), 27. These blanket relevance, confidentiality, and privilege objections categorically do not apply. The Court should order the LAUSD to produce these documents, and remove the applied redactions, or at minimum require the LAUSD to submit them for *in camera* review to determine if they are discoverable.

Relevance Objections: These communications are highly relevant, as made clear by the side letter negotiation meeting notes produced by the LAUSD. Those meeting notes show that the terms the LAUSD believed would comply with SB 98 were very different from the terms it agreed to. For example, during the August Side Letter negotiations, the LAUSD initially asked for a requirement that teachers work a "***regular 8 hour day as defined in the CBA***." *See, e.g.*, Hillenbrand Decl. Ex. 4 at LAUSD001250 (emphasis added); *see also id.* at LAUSD001249 ("We see a need for live video, need a defined school day, and would like to see the work day mirror or parallel a regular work day. Cant short change the students."). That request was met with significant resistance from UTLA:

- During a July 24, 2020 negotiation, a UTLA representative encouraged everyone to "stop talking about a full day's worth of work for teachers. When people push back about March, April the best approach from the District is to say our teachers were heroic, and they were trying to triage." *Id.* Ex. 7 at LAUSD001109.
- During a July 31, 2020 negotiation, a UTLA representative accused the district of "capitulating to political pressure" while admitting that one of his son's teachers "mailed it in" during the spring semester. *Id.* Ex. 11 at LAUSD001324.
- During an August 1, 2020 negotiation, a UTLA representative said that teachers cannot "be expected to sit in front of [a] computer screen for 8 or 9 hours a day, even though [a] loss for students" because "[e]veryone suffers from [the] pandemic." *Id.* Ex. 13 at LAUSD001336.

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Eventually, the LAUSD agreed that teachers only had to work ***5.25 hours*** and were "expected" to work ***6 hours***. *Id.* Ex. 9; *see also* Exs. 14–18. Notably, the December Side Letter does not require that teachers work full school days either. *Id.* Ex. 41 ¶ 5. And during those negotiations, UTLA representatives accused the LAUSD of responding to "media pressure" and trying to "punish" UTLA members, and called the district's proposals "borderline criminal." Ex. 19 at LAUSD001137–40. Therefore, and given the hotly-contested nature of these negotiations, Plaintiffs are entitled to know what internal discussions the LAUSD had about the terms it believed were SB 98 compliant, the terms proposed by UTLA, and the reasons for agreeing to the terms set forth in the executed side letters.

Relevance in this case is not merely limited to the four corners of the side letters. For example, Plaintiffs' Disparate Racial Discrimination claim—*see* FAC ¶¶ 153–165 (Oct. 7, 2020)—requires a showing (1) that LAUSD's distance learning policy has a disparate impact on minority children, (2) causing de facto segregation and an appreciable impact on the district's educational quality, and (3) that "***no action is taken to correct that policy when its impacts are identified***." *Collins v. Thurmond*, (2019) 41 Cal. App. 5th 879, 896-97 (emphasis added). Plaintiffs therefore are entitled to obtain discovery about the LAUSD's knowledge of the likely and actual impact of the policies it negotiated, and what (if any) actions the LAUSD implemented in response to that information. Whether the LAUSD discussed the impact of distance learning on students, reviewed and considered what distance learning policies other districts adopted, or drew conclusions from studies, surveys, and reports related to distance learning is plainly relevant to Plaintiffs' constitutional claims. *See, e.g.*, *Butt v. California*, (1992) 4 Cal. 4th 668, 674 (finding "***an unjustified discrimination against District students compared to those elsewhere in California***") (emphasis added); *Collins*, 41 Cal. App. 5th at 847 (citing *Butt*).

Even still, the LAUSD has called into question the plain meaning of the side letters' terms. For example, despite the express terms of the August Side Letter that teachers were only required to work between 9:00 a.m. and 2:15 p.m. during the fall semester, the LAUSD denied that teachers were only required to work 5.25 hours per school day. *See* Hillenbrand Decl. Ex. 26 (RFA No. 1). The LAUSD denied other requests for admission concerning the plain language of the August Side Letter

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as well. *Id*. (RFA Nos. 2–3). Accordingly, the Plaintiffs are entitled to investigate the LAUSD's understanding of the meaning of the side letter terms. *See Glenfed Dev. Corp. v. Superior Court*, (1997) 53 Cal. App. 4th 1113, 1118 (permitting discovery of extrinsic evidence to determine how an insurer interpreted language in an insurance policy); *Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, (1968) 69 Cal. 2d 33, 40 (extrinsic evidence is admissible when the interpretation of contractual terms is in dispute).

Confidentiality Objections: The LAUSD cannot withhold documents merely because they contain confidential information. "Simply put, confidentiality does not equate with privilege." *Los Angeles Unified Sch. Dist. v. Trustees of S. California IBEW-NECA Pension Plan*, (2010) 187 Cal. App. 4th 621, 631 n.7. Nonetheless, the LAUSD has cited various administrative decisions to claim that the Court should recognize a policy opposed to the discovery of internal collective bargaining communications. *See* Hillenbrand Decl. Ex. 1 (citing *Berbiglia, Inc.*, (1977) 233 NLRB 1476, 1495; *Burlingame Elementary Sch. District*, PERB Dec. No. 1847 (2006); *Colton Joint Unified Sch. District*, 1981 Cal. PERB LEXIS 218 (1981)).[1]

As an initial matter, administrative decisions are not binding on California courts. *See, e.g.*, *Elliott v. Indus. Acc. Comm'n*, (1942) 21 Cal. 2d 281, 284 ("The decisions of the [Industrial Accident Commission] are not binding on this court."); *Sara M. v. Superior Court*, (2005) 36 Cal. 4th 998, 1011 ("Ultimately, the interpretation of a statute is a legal question for the courts to decide, and an administrative agency's interpretation is not binding."). But even if the Court were to find these decisions persuasive, the California Court of Appeal already determined that there is no privilege that protects communications related to the collective bargaining process because "[p]rivileges contained in the Evidence Code are exclusive" and "courts are not free to create new privileges as a matter of

[1] These administrative law decisions all concern an ongoing negotiation that could prejudice one negotiating party and advantage another. *See, e.g., Berbiglia, Inc.*, 233 NLRB at 1495 (denying employer's subpoenas of union communications during a labor dispute because the subpoenas requested "crucial material regarding ***pending union negotiations***" (emphasis added)). Plaintiffs here were not parties to the negotiations, which have since ended and resulted in fully executed agreements. Therefore, any threat of prejudice stemming from disclosure is minimal and distinguishable from those decisions.

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judicial policy." *See Montebello Rose* 119 Cal. App. 3d at 33–37 (finding *Berbiglia* unpersuasive); *see also* Evidence Code section 911. *Montebello* clearly established that there is no collective bargaining process privilege under California law, and the California Legislature has not acted in the ***40 years*** since to create one.

Therefore, no such confidential internal labor deliberation privilege exists and confidentiality is not a proper basis for withholding relevant documents, especially when the Court already has entered a protective order that governs the parties' exchange of confidential materials.

Privilege Objections: The LAUSD's assertions of the Brown Act as well as the deliberative process, legislative, and official information privileges are misplaced and cannot overcome Plaintiffs' need for this highly relevant information. ***First***, Plaintiffs have made clear that they are not seeking any materials from the LAUSD Board's closed sessions (and tabled their initial request to depose the LAUSD Board after realizing that they did not participate in the side letter agreement negotiations). Therefore, the Brown Act does not apply.

Second, the "deliberative process" privilege is codified within the California Public Records Act. *See* Code of Civil Procedure section 6254 (codifying the deliberative process privilege). It is not an evidentiary or discovery privilege, and only applies to public records requests. *See Marylander*, 81 Cal. App. 4th at 1126–27; *see also* Government Code section 6260 ("[t]he provisions of [the Public Records Act] shall not be deemed in any manner to affect . . . the rights of litigants"). Therefore, the deliberative process privilege does not apply to civil discovery between litigants unless the action concerns a request made under the Public Records Act. Indeed, all of the cases the LAUSD has cited as alleged support concern Public Records Act requests. *See City of San Jose v. Superior Court*, (2017) 2 Cal. 5th 608; *Regents of Univ. of California v. Superior Court*, (1999) 20 Cal. 4th 509; *Times Mirror Co. v. Superior Court*, (1991) 53 Cal. 3d 1325. Because this case does not concern any request made under the Public Records Act, the deliberative process privilege is not a valid privilege objection.

Third, the "legislative process" privilege protects from disclosure the motives and mental processes of individual "legislators" when enacting "legislation." *Cty. of Los Angeles*, 13 Cal. 3d at 727; *see also People ex rel. Harris v. Rizzo*,(2013) 214 Cal. App. 4th 921, 944 (creation of

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memorandum was not a "legislative act"). Superintendent Beutner and other LAUSD employees, including those who negotiated the August Side Letter and December Side Letter, are not "legislators," and their communications about the side letters or the impact of distance learning do not concern "legislative acts." Indeed, the negotiation and execution of a labor ***contract***—a bilateral agreement between a government entity and its employees—is ***administrative*** in nature; whereas a municipal employee salary ***ordinance***— a unilateral legislative act enacted by a board of supervisors—is ***legislative*** in nature. *Cty. of Los Angeles*, 13 Cal. 3d at 723. The LAUSD, in over two months, has not cited a single case that says otherwise.[2]

The LAUSD more recently has suggested that any internal side letter communications are protected under the legislative privilege because the LAUSD Board eventually approved the August Side Letter after it was executed. But this premise falsely assumes that the Board's after-the-fact approval of a negotiated labor contract somehow converts an administrative act into a legislative one. It does not. Moreover, there is no evidence that any Board members directly participated in the August Side Letter negotiations—which were conducted by the LAUSD's labor relations team and other employees—and Plaintiffs are not seeking any discovery about why the Board approved the August Side Letter. Notably, the Board ***has never approved the December Side Letter***, which has been operative since December 18, 2020, or the April Side Letter from last spring. Clearly, the Board's approval is not needed for the side letters to be operative. And whatever tangential role the LAUSD Board played in approving the August Side Letter does not somehow convert a labor contract into a legislative act, or justify withholding every internal or confidential communication LAUSD employees had about the August Side Letter or the negotiation thereof.

The LAUSD also has recently argued that the side letters are legislative in nature because they reflect "policy considerations." If the Court were to adopt such an expansive view of the legislative

[2] The LAUSD has cited three inapposite cases that concern the awarding of government contracts to private parties during a competitive bidding process. *See SN Sands Corp. v. City and Cty. of San Francisco*, (2008) 167 Cal. App. 4th 185, 19; *Marshall v. Pasadena Unified Sch. Dist.*, (2004) 119 Cal. App. 4th 1241, 1253; *Mike Moore's 24-Hour Towing v. City of San Diego*, (1996) 45 Cal. App. 4th 1294, 1303. None of these cases support, let alone establish, that a labor negotiation between the LAUSD and UTLA is "legislative in character."

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privilege—which, again, is intended to protect only the mental processes and motives of "legislators" in enacting "legislation"—then every decision made by the LAUSD, and any internal communications about that decision, would be protected from disclosure. Clearly, that is not the intended purpose of the legislative privilege. The Court should reject the LAUSD's improper, blanket use of it.[3]

Finally, the official information privilege only protects "information acquired in confidence" from disclosure. Evidence Code section 1040(a). The purpose of Evidence Code section 1040 is to afford a "privilege against disclosure of official information communicated by informants." *People v. Garcia*, (1967) 67 Cal. 2d 830, 842 n.11. Thus, cases upholding the privilege generally protect information that agencies acquired in confidence from informants and other private parties. *See, e.g.*, *Los Angeles Unified Sch. Dist.*, 187 Cal. App. 4th at 624 (contractors' payroll records in the possession of the school district). On the other hand, information that is "never transmitted" to an agency "has not been acquired in confidence by a public employee." *Union Bank of California, N.A. v. Superior Court*, (2005) 130 Cal. App. 4th 378, 389 n.6; *see also People ex rel. Dep't Pub. Wks. v. McNamara Corp.*, (1972) 28 Cal. App. 3d 641, 650–51 (noting that the "statutory language [of § 1040] suggests a narrow application of the official information privilege in contentious matters"). Therefore, the requested internal communications are not protected by the official information privilege unless and until the LAUSD can establish that they contain "information acquired in confidence."[4] The LAUSD has not done so, nor has it established that disclosure is forbidden by

[3] Nevertheless, the legislative privilege is not an absolute prohibition and does not preclude Plaintiffs, at minimum, from requesting documents that reflect the LAUSD employees' "knowledge of objective facts and circumstances" at the time they negotiated the side letters. *See City of King v. Cmty. Bank of Centl. California*, (2005) 131 Cal. App. 4th 913, 931 n.12 (citing cases).

[4] The three cases cited by the LAUSD concern requests for criminal and regulatory investigative *Admin. Hearings*, (2004) 123 Cal. App. 4th 1191 (2004) (Department of Real Estate audit and enforcement deputy manuals "contain confidential investigative training materials"); *Cty. of Orange v. Superior Court*, (2000) 79 Cal. App. 4th 759 (finding criminal investigative file to be "acquired in confidence"); *Kleitman v. Superior Court*, (1999) 74 Cal.App.4th 324 (analyzing confidentiality of closed board sessions).

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statute, which means that the LAUSD must prove its need for confidentiality outweighs the public interest. *See* Evidence Code section 1040(b)(1)–(2).

Qualified Privileges: Even if the official information privilege, the deliberative process privilege, or some other qualified privilege applies to one or more of these communications, the Court would still need to balance the LAUSD's interest in keeping the information secret against Plaintiffs' need for the information to prove their case. *See* Evidence Code section 1040(b)(2); *see also Gove*rnment Code section 6255. To evaluate the need for information, courts consider (1) the importance of the information to the lawsuit, (2) the availability of these materials by other means, and (3) the reasonableness of those other means. *See Marylander*, 81 Cal. App. 4th at 1129 (citing *Shepherd v. Superior Court*, (1976) 17 Cal. 3d 107, 126); *see also* Evidence Code section 1040(b)(2) ("the interest of the public entity as a party in the outcome of the proceeding ***may not be considered***") (emphasis added)

For the reasons stated above, these communications are highly relevant to Plaintiffs' claims and the fair resolution of this lawsuit. They directly concern LAUSD students' fundamental, constitutional right to a "basic educational equality," which is the crux of this case. *Butt*, (1992) 4 Cal. 4th at 685; *see also Collins*, 41 Cal. App. 5th at 898. There are no other means for Plaintiffs to obtain these internal communications. Conversely, the LAUSD's interest in keeping this information secret is minimal now that the negotiations are over and there is a protective order in effect that governs the exchange of confidential materials. *See Los Angeles Unified Sch. Dist.*, 187 Cal. App. 4th at 632 n.8 (the existence of a protective order weighs in favor of discoverability). Therefore, any qualified privilege the LAUSD could claim should not apply but, at the very least, the Court should review these communications *in camera* to determine whether they are discoverable. *See Marylander*, 81 Cal.App.4th at 1130 (*in camera* review is appropriate where "the communications are alleged to be relevant" and the court cannot weigh the need for the information "without knowing the contents").

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IV. DISTRICT'S RESPONSE AND OPPOSITION TO PLAINTIFFS' ARGUMENT IN SUPPORT OF MOTION TO COMPEL FURTHER PRODUCTION IN RESPONSE TO REQUEST FOR PRODUCTION NOS. 1 & 4:

> [T]he United States Supreme Court stated the rule "with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or [inferable] from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile."

(*City of Santa Cruz, supra*, (1885) 40 Cal.App.4th at 1151, citing *Soon Hing v. Crowley* (1885) 113 U.S. 703 ("*Soon Hing*").) This rationale has been adopted by the California Supreme Court and precludes inquiry into the motivations, reasons, criteria or factors underlying a legislative act, including approval of labor agreements. (*Id*., at 1152-56; see also, *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 721-29 ("*County of LA*") [local legislators' approval of salary increase was legislative act]; *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 912-13 ("*City and County of SF*") [school district resolution approving labor agreement to end strike is legislative act that cannot be nullified where, "in the opinion of the court, it was or might have been the result of improper considerations"– the legislative act "must be measured by the terms of the legislation itself…"].)

A. Labor Negotiations Under the EERA

The purpose of the EERA is set forth in section 3540: "to promote the improvement of personnel management and employer-employee relations within the public school systems in ... California … for recognizing the right of public school employees to join organizations of their own choice [and] to be represented by such organizations in their professional and employment relationships with public school employers …" Enacted in 1975, the EERA establishes a system of collective bargaining for employees of public school districts educating students in grades kindergarten through 14. (Gov. Code, §§ 3540–3549.3). The EERA requires the school district employer to meet and negotiate in good faith with the duly selected exclusive representative of its employees as to subjects within the statutorily defined scope of representation. (Gov. Code, §§ 3543.3, 3543.5.)

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Here, the employer is the LAUSD Board and the exclusive representative of the certificated teachers is real party, UTLA. As set forth in section 3540.1(h), LAUSD and UTLA may enter into binding agreements including the arbitration of disputes involving interpretation, application or violation of the agreement. (§§ 3548. 5, 3548.6, 3548.7.) The final decision as to the terms of the negotiated agreement, including those matters within the scope of representation, is reserved to the employer – the LAUSD Board. (§ 3549.) Labor negotiations, mediations, other statutory procedures culminate in labor agreements brought before a school board for approval. But approval is far from the only role of, or communication with, the Board. (*Id.*, § 3540, et seq.) In the confidential closed session setting, the Board provides input and direction regarding negotiations to those charged with undertaking the negotiations. (Gov. Code, § 54957.6.)

The EERA also provides for confidentiality of the underlying internal information regarding negotiations and broadly defines a "confidential employee," for purposes of such communications, as "[a]ny employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information that is used to contribute significantly to the development of management positions." (§3540.1(c); see also, *Colton Joint Unified School District et al.* (1981) PERB Order No. Ad-113 (RJN Ex. 5); *Berbiglia, Inc.* (1977) 233 NLRB 1476, 1495 (RJN Ex. 6); *Berbiglia, Inc. v. N.L.R.B.* (1979) 602 F.2d 839; *Burlingame Elementary School District, supra,* PERB Dec. No. 1847 (RJN Ex. 7); *Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 911-912 ("*Boling*") [courts properly defer to PERB's construction of labor law provisions within its jurisdiction].)

B. Approval of Labor Agreements Is a Legislative Act

Contract approvals, including labor agreements, constitute legislative acts by a public entity. "A public entity's 'award of a contract, and all of the acts leading up to the award, are legislative in character'" because they "necessarily requires an exercise of discretion guided by consideration of the public welfare." (*Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303 [citations omitted].) This, of course, extends to labor agreements. (See, e.g., *County of LA, supra*, 13 Cal.3d 721, 728 [local legislators' approval of salary increase was "legislative act" subject to legislative privilege]; *City and County of SF, supra*, 13 Cal.3d 898, 912-13 [resolution approving labor agreement to

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end strike is legislative act].)

C. LAUSD Internal Communications Regarding Negotiations Are Privileged

If the public's "right to know" compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness. (*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1968) 263 Cal. App. 2d 41, 46.) This is not to suggest that our labor partners are District adversaries; however, there is no doubt that were the District required to lay bare the thoughts, intentions, considerations, strategies, tactics, potential or ultimate positions that go into the negotiations process, its efforts to reach equitable terms would be frustrated. (*Burlingame Elementary School District* (2006) PERB Dec. No. 1847 [maintaining the confidentiality related to negotiations is critical because if made public, it would jeopardize the employer's ability to negotiate from an equivalent position]; see also, *Boling, supra*, 5 Cal.5th at 911-912 [courts properly defer to PERB's construction of labor law provisions].)

Here, Plaintiffs seek discovery of all LAUSD's internal communications regarding negotiation of the Side Letters. (Mot., p. 1, 5-6.) Though relevance does not overcome the privilege, Plaintiff asserts these communications are "highly relevant." Yet, the reasons they state are precisely the bases rejected by the courts. Plaintiffs rely upon the meeting notes reflecting discussions between the District and UTLA (produced by the District and UTLA) to argue that "given the hotly-contested nature of these negotiations, Plaintiffs are entitled to know what internal discussions the LAUSD had about the terms it believed were SB 98 compliant, the terms proposed by UTLA, and the reasons for agreeing to the terms set forth in the executed side letters." (Mot. P. 7.) As explained in detail below, Plaintiffs reasoning is in direct contravention of controlling authority – discovery directed to the Board or staff related to what terms and/or why any provisions or the agreements as a whole were considered is strictly precluded. The cases consistently hold that Plaintiffs' efforts to invalidate the agreements cannot be based upon any underlying reasoning of the Board for its legislative decision *or* its staff. "…the validity of the legislative act does not depend upon the subjective motivation of its draftsmen but rests instead on the objective effect of the legislative terms." (*County of LA, supra*, 13 Cal. 3d at 727.) In other words, the validity of the Side Letters rests on the objective effect of the terms set forth in the final Side Letters.

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1. The Discovery Is Barred by the Legislative and Deliberative Process Privileges

The legislative and deliberative process privileges are independent grounds to withhold information. However, there is significant overlap, particularly with regard to the policies supporting these privileges. The District relies primarily upon the legislative process privilege in this discovery dispute and addresses this privilege first.

Legislative Process Privilege: The legislative privilege provides an absolute privilege prohibiting inquiry into a legislator's thought processes related to a particular decision. Whether through inquiry to the legislator *or from other sources*, such as nonlegislators – any inquiry designed to reach the same information is precluded. (*County of LA, supra*, 13 Cal. 3d at 726; *Board of Supervisors v. Superior Court* (1995) 32 Cal.App.4th 1616, 1626 ("*Board of Supervisors*"); *City and County of SF, supra*, 13 Cal.3d at 913; *City of Santa Cruz v. Superior Court* (1995) 40 Cal.App.4th 1146, 1151-1156 ("*City of Santa Cruz*").) "The basis for this rule is obvious. Courts would grossly overstep their constitutional bounds if they assumed a general power to invalidate facially unobjectionable legislation based upon what they found to be impermissible motives or other flaws in the mental processes of legislators." (*City of King City v. Community Bank of Central California* (2005) 131 Cal.App.4th 913, 943.)

The California Supreme Court has long recognized that the underlying reasoning for a given legislative act is not subject to discovery. (*County of LA, supra*, 13 Cal. 3d at 726.) In *County of LA*, plaintiff challenged the validity of a county salary ordinance, adopted by the board of supervisors. Plaintiffs argued that the vote to approve the salary ordinance was based upon, or in response to, a threatened strike by the unions and, for this reason, was an invalid approval. Plaintiffs sought discovery related to whether the vote was motivated by a strike or threat of strike and the trial court issued an order compelling county officials to answer related questions, including discussions held in closed sessions. (*Id*., at 723-24.) Defendant County objected, asserting privilege under both Evidence Code section 1040 and the Brown Act, section 54967.6. The Supreme Court issued its peremptory writ of prohibition restraining enforcement of the discovery order relying upon the legislative process privilege:

> In our view, however, we need not resolve these [parties'] conflicting claims as to the proper application of section 1040, for we believe that the discovery order in the instant case implicates a more fundamental, historically enshrined legal principle that precludes any judicially authorized inquiry into the subjective motives or mental processes of legislators.

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* * *

> "[T]he rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducement for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile."
>
> Moreover, the authorities, both in California and more generally, make clear that the rule barring judicial probing of lawmakers' motivations applies to local legislators as well as to members of the state Legislature or of Congress. (*Id*., at 726-727 citing *Soon v. Hing, supra*, 113 US 703, 710-711.)
> In *Board of Supervisors*, the court followed and expounded upon the decision in *County of LA*.

(*Board of Supervisors, supra,* 32 Cal.App.4th 1616.) A judges' association challenged the board of supervisors' decision to select the sheriff, over the marshal, as the agency to provide bailiff services to courts. (*Id.*, at 1622.) The trial court did not permit the depositions of the board members, but did compel depositions of the sheriff and other representatives to answer questions as to whether the board had decided to select the sheriff over the marshal, before the required hearing was held. (*Ibid*.) The court issued a writ precluding the discovery:

> We also affirm that respondents may not seek to circumvent the prohibition against discovery of Board members' thought processes by deposing others—such as Sheriff Block—about communications with Board members. Plaintiffs in *County of Los Angeles*, for example, assumed that an ordinance resulting from the threat of an illegal strike invalidated the legislation. *County of Los Angeles* questioned this theory, but stated: "even assuming that the ulterior purpose behind the enactment is relevant to the ordinance's validity, the taxpayer still may not prove such ulterior purpose by requiring legislators to testify about their reasoning process or by questioning others about the factors which may have led to the legislators' votes." (*Board of Supervisors, supra*, 32 Cal.App.4th at 1622, citing *County of LA, supra*, 13 Cal.3d at 729.)

The court in *City of Santa Cruz*, followed in 1995 and further explained the application of the legislative privilege as applied to discovery. (*Id*., *supra,* 40 Cal.App.4th 1146, 1155-57.) There, a developer challenged the city council's adoption of a general plan and sought depositions of the city's planning director and commissioners to find out if there was an agreement among the council and commissioners to refuse to consider zoning options, *i.e.*, was the general plan decision predetermined. (*Id*., at 1150- 51, 1155-57.) Citing the US Supreme Court in *Soon Hing* and the California Supreme Court in *County of Los Angeles*, the court held that there could be no questioning regarding the motivations of the legislators, or the basis for the legislative act, regardless of the position held by the deponent. (*Id*., at 1155-56.) *City of Santa Cruz* further rejected the argument that the discovery was sought only to test

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whether the board had complied with requisite procedures. "In reality, the 'procedural' irregularity about which [plaintiff] complains does not go to procedure at all; rather it relates to the substance of the legislators' decision, which was to reserve the greenbelt properties for agricultural purposes only, and to when the legislators arrived at their decision." (*Id*., at 1156; see also, *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768 [Supreme Court issued writ of prohibition to prohibit discovery related to what evidence councilmen relied on or what reasoning they employed in voting against the permit].)

> "It is simply unthinkable ... that members of legislative majorities should from time to time be subject to cross-examination in various courts over the country regarding their state of mind when they voted. That is no more representative government than it would be judicial process for judges to be subject to cross-examination by legislative committees about their state of mind in deciding cases. It seems almost anticlimactic to add that legislatures whose members were subject to call for testimony in this fashion would be hard put to find the time to legislate." (*City of Santa Cruz, supra*, at 1152 citing *County of LA*, *supra*, 13 Cal.3d at 731-732, quoting Bickel, The Least Dangerous Branch (1962) p. 215.)

Just as in each of the cited cases, Plaintiffs seek discovery of LAUSD's internal communications regarding negotiation of the Side Letters. Plaintiffs assert the need to know the "why" behind the Side Letters though they do not articulate why that it is necessary. It is not as only the terms of the Side Letters themselves, are relevant. Moreover, the courts are infinitely clear that the separation of powers doctrine bars the courts from judging the wisdom or the "why" of any particular legislative action. Such communications are protected from disclosure by the legislative process privilege.

The Deliberative Process Privilege: The discovery is further barred by the deliberative process privilege that establishes qualified privilege for any pre-decisional information reflecting upon various policy choices. As the United States Supreme Court just held,

> This case concerns the deliberative process privilege, which is a form of executive privilege. To protect agencies from being "forced to operate in a fishbowl," (citations omitted), the deliberative process privilege shields from disclosure "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," (citations omitted). The privilege is rooted in "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." …. To encourage candor, which improves agency decisionmaking, the privilege blunts the chilling effect that accompanies the prospect of disclosure." (*US Fish & Wildlife* (2021) 592 U.S. ----, p. 6-7, 2021 WL 816352 (RJN Ex. 4), citing *Department of Interior v. Klamath Water Users Protective Assn.*, 532 U. S. 1, 8-9 (2001).)

Though the deliberative process privilege is qualified, it does provide that, "senior officials of all three branches of government enjoy a qualified, limited privilege not to disclose or be examined concerning not only the mental processes by which a given decision was reached, but the substance of conversations,

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discussions, debates, deliberations … reflecting advice, opinions and recommendations by which government policy is processed and formulated." (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 305 (internal quotes omitted).) So in general it is qualified, it expressly prohibits the discovery Plaintiffs seek.[5]

It is noted that while Plaintiffs rely on *Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119 ("*Marylander*"), to argue that the deliberative process privilege only applies with regard to public records requests, this is not accurate. What the case states is that the courts have recognized privilege where either set forth in statute *or* where "compelled by constitutional considerations even where not specifically provided by statute." (*Id*., at 1126.) Both the legislative and deliberative process privileges are based in constitutional separation of powers principles which supersede any statutory limitations. (See, *Sutter's Place Inc. v. Superior Court* (2008) 161 Cal.App.4th 1370, 1375-78.) *Marylander* is in agreement citing *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 [courts may not add to the statutory privileges "except as required by state or federal constitutional law"]. The US Supreme Court did just that in *US Fish & Wildlife*, holding that FOIA "incorporates the privileges available to Government agencies in civil litigation, such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege." (*US v. Fish & Wildlife, supra*, 592 U.S. --- (2021).) And, as explained above, Plaintiffs have offered no legitimate basis for the information it seeks. Plaintiffs use terms "critical need" and "highly relevant" but simply do not support this contention with a showing of how it supports any claim. Absent a compelling need, which Plaintiffs cannot show as a matter of law as the validity of the Side Letters is determined objectively by their terms, the deliberative process privilege further prohibits the requested discovery. (*County of LA, supra*, 13 Cal.3d at 727 ["…the validity of a legislative act…rests on the objective effect of the legislative terms."]

[5] Plaintiffs incorrectly argue the privileges are limited to California Public Records Act (CPRA) or Freedom of Information Act (FOIA) case. But the US Supreme Court recognizes that, FOIA "incorporates the privileges available to Government agencies in civil litigation, such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege." (*US v. Fish & Wildlife, supra*, 592 U.S. --- (2021).) See also, CPRA, Gov. Code, § 6254(k) ["Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, *including, but not limited to,* provisions of the Evidence Code relating to privilege."; emphasis added].)

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2. The Communications Are Protected by the Brown Act Privilege

Whether referred to a privilege or otherwise, the Brown Act expressly provides that discussions related to negotiations are subject to the confidentiality requirements of closed session. Government Code section 54957.6(a), states:

> Notwithstanding any other provision of law, a legislative body of a local agency may hold closed sessions with the local agency's designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees, and, for represented employees, any other matter within the statutorily provided scope of representation.

Section 54957.1(a)(6) further provides that the legislative act of approving a labor agreement is to be reported out of closed session where "the agreement is final and has been accepted or ratified by the other party." (*Ibid.*) Reporting out does not include any information related to discussions, thoughts, intentions, or the reasons for a decision to approve the labor agreement. (*Ibid.*; see, Board of Education Report re Distance Learning Side Letter for 2020-21, RJN, Ex. 3.) As discussed in Section II.B.1., *supra*, even where a defendant county argued the requested discovery was barred by section 54957.6 of the Brown Act, the Supreme Court found it did not need to rely upon that provision, instead holding that discussions and information related to the legislative act were absolutely privileged under the legislative process privilege. (*County of LA, supra*, 13 Cal.3d at 726.) The same holds true here. Both the Brown Act and the case law interpreting its provisions provide that *all* closed session communications *shall* be confidential and not subject to disclosure. (See, Gov. Code, §54963(a) ["A person may not disclose confidential information that has been acquired by being present in a closed session."].) "Confidential" is defined as "a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session under this chapter." (§54963(b).) For purposes of this discovery dispute, this includes communications regarding negotiations discussed in closed session under section 54957.6. Disclosure of closed session information is subject to penalties. (§54963(c)-(d).) That these closed session discussions regularly occur is reflected in the LAUSD Board Meeting Agendas under the heading: "Conference with Labor Negotiators (Government Code Section 54957.6)" (See RJN, Ex. 1 for Board Agendas, June 2020 to present.)

In *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 332-335 ("*Kleitman*"), the appellate court held the trial court abused its discretion when it compelled defendants to answer interrogatories

regarding their personal recollections of the closed session.

> A trial court cannot compel disclosure of personal recollections of city council members with respect to a closed session, without improperly reading into the act a discovery procedure that would violate the confidentiality of closed sessions, which is inherent in the act. While the act is silent as to the circumstances, if any, under which members of local legislative bodies may be compelled to individually disclose their personal recollections of closed sessions that were not recorded in a minute book or tape recording, disclosure of closed session proceedings by the members of a legislative body necessarily destroys the closed session confidentiality that is inherent in the act.

Thus, regardless of whether it is called a privilege, the information is mandated to be protected from disclosure. (*Ibid*.) The court in *Los Angeles Unified School Dist. v. Trustees of Southern California IBEW–NECA Pension Plan* (2010) 187 Cal.App.4th 621, 630 ("*LAUSD v. Trustees*"), expounded on the *Kleitman* decision: "The court held that, because the Legislature had specifically described the limited instances in which closed session discussions could be disclosed in litigation, the statute impliedly barred disclosure in any other circumstance." (*Id.*, *supra*, 187 Cal.App.4th at 630, citing *Kleitman, supra*, 74 Cal.App.4th at 334–336, fn. 9.) Notably, this privilege is not so limited as to only preclude discovery of the information disclosed while in closed session, as Plaintiffs appear to argue. Instead, any closed session subject matter shall remain protected, including the requested communications, as they reflect the discussions undertaken in closed session. (Gov. Code, § 54963.)

3. The Communications are Privileged Under Evidence Code section 1040

As previously explained, under the Supreme Court authority, the discovery is barred by the legislative process and does not require application of the Official Information Privilege set forth in Evidence Code section 1040. (*County of LA, supra,* 13 Cal.3d 721, 725-26.) Nonetheless, the District asserts section 1040. Section 1040 applies where, as here, the information is acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made. (§ 1040(a).) The District as public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing, if:

> (1) Disclosure is forbidden by an act of Congress of the United States or a statute of this state; or (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice. (§1040(b).)

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The public entity further has the privilege to refuse to disclose official information, and to prevent another from disclosing official information, if disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interests of justice. (Evid. Code, § 1040(b)(2); *County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 834.) This qualified provision is not applicable here. Instead, the privilege is absolute—the trial judge must sustain the claim and preclude admissibility of the evidence, regardless of the effect on the outcome of the action. (*Marylander, supra*, 81 Cal.App.4th at 1124; *Rittenhouse v. Superior Court* (1991) 235 Cal.App.3d 1584, 1590.)

Application of 1040 is supported by several statutes: Government Code sections 54957.6 [provides for closed session regarding negotiations] and 54963 [expressly prohibits disclosure of confidential closes session discussions or information obtained by participating in a closed session]. The EERA further precludes the disclosure of information that is used to contribute to the development of the District's positions with respect to employer-employee relations, information regarding internal collective bargaining strategies or tactics, and/or confidential discussions with the Board regarding discussion of matters related to the District's position pertaining to any matter within the scope of representation, including discussions with the Board staff. (Gov. Code, §§ 3540.1(c), 3549.1; see, e.g., *Colton Joint Unified School District et al, supra,* PERB Order No. Ad-113; *Berbiglia, Inc.* (1977) 233 NLRB 1476, 1495; *Burlingame Elementary School District, supra,* PERB Dec. No. 1847; see also, *Boling, supra*, 5 Cal.5th at 911-912 [courts properly defer to PERB's construction of labor law provisions within its jurisdiction].)

Plaintiffs argue that *internal* discussions and drafts are not subject to the privilege because they are not acquired in confidence. But that is incorrect for all the reasons stated. Moreover, the §1040 privilege has been applied in numerous instances where the information originates internally. (See, e.g., *Suarez v. Office of Administrative Hearings* (2004) 123 Cal.App.4th 1191, 1193 [upholding privileged to internally prepared audit manual]; *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759, 768 [privilege potentially applicable to investigative files prepared and maintained by police]; *Kleitman, supra,* 74 Cal.App.4th at, 332-335 [applying privilege to closed session city council lease negotiations].) Because Plaintiffs' request for disclosure under RFPD No. 1 is barred by the legislative, deliberative

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process, Brown Act and official information privileges, the motion to compel is properly denied.

D. Plaintiffs' RFPD No. 4 Is Overbroad and Burdensome

Plaintiffs' RFPD no. 4 is severely overbroad while also being vague—an impossibly unworkable combination. Plaintiffs seek all documents and communications addressing the impact of distance learning on LAUSD students for the 2020-21 school year. (Wu Decl., ¶18, Ex. B.) And with some limited exceptions, LAUSD's entire educational program from the start of the 2020-21 school year is regarded as "distance learning." (*Id.*) The majority of documents and communications created this school year are to a varying degree responsive to Plaintiffs' demand as framed. LAUSD is the second largest school district in the country with more than 75,000 employees serving more than 650,000 students. (*Id.*) Correspondingly, it is not hyperbole to estimate that this request seeks millions of records as framed. (*Id.*) For instance, in attempting to locate responsive communications, the District conducted a search of District emails referencing the term "side letter," a search that itself yielded over 800,000 emails. (Wu Decl., ¶19.) And, as discussed, the Side Letters are merely a supplement to the existing CBA and do not encompass the District's entire distance learning program so the universe of responsive communications (let alone documents) is necessarily even greater. (*Id.*) The Court reviews an objection for undue burden for good cause. (*Mead Reinsurance Co. v. Superior Court* (1986) 188 Cal.App.3d 313, 320–321.) In *West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, the Court denied a motion to compel a document production that would have required a search of 78 branch offices. (*Id.* at 417.) Here, LAUSD has over 1,400 schools, not including numerous additional administrative facilities. (Wu Decl., ¶18.) The *Mead* court found undue burden and vacated a trial court's order granting a motion to compel that would have required the review of 13,000 claim files. (*Id.* at 315, 321.) Here, Plaintiffs are demanding unspecified records regarding the unspecified impacts of distance learning on more than 650,000 students.

Despite this overbreadth, the District has diligently endeavored to help Plaintiffs focus and narrow their request and has produced those records which appear most directly relevant and responsive to Plaintiffs' request and has invited Plaintiffs' to propose additional records for production. For instance, the District has produced District-wide aggregate student data relating to attendance, engagement, assessments and performance, records relating specifically to Plaintiffs' children, as well as a report on the impact of distance learning prepared by the District's Independent Analysis Unit ("IAU") in January 2021,

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along with all the foundational data that the IAU relied upon. (Wu Decl., ¶20.) The District has twice invited Plaintiffs to propose addition records responsive to this request for production and similarly invited Plaintiffs to propose suggest ESI search terms. (Wu Decl., Ex. I.) Plaintiffs only accepted the District's invitation on March 3rd, a week after filing this motion. (*Id.*)

RFPD No. 4 is oppressively overbroad and Plaintiffs have not reasonably worked with LAUSD to narrow the request to seek a manageable set of identifiable records.

DATED: March 8, 2021

DANNIS WOLIVER KELLEY
SUE ANN SALMON EVANS
ELLEN C. WU
KEITH A. YEOMANS
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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: 444 W. Ocean Blvd., Suite 1070, Long Beach, CA 90802.

On the date set forth below I served the foregoing document described as **DISTRICT'S SEPARATE STATEMENT IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRELIMINARY INJUNCTION DISCOVERY** 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 March 8, 2021 at Redondo Beach, California.

Shanti D. Friend

Shanti D. Friend

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