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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

KESHARA SHAW et al.,

Plaintiffs,

vs.

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

Defendant, and

UNITED TEACHERS LOS ANGELES,

Relief Defendant.

CASE NO. 20STCV36489

UTLA'S SEPARATE STATEMENT OF ITEMS IN DISPUTE

Filed Concurrently with Memorandum of Points and Authorities in Opposition to Motion to Compel, Declarations of Carlos Torres, Ira L. Gottlieb

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

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The following are the disputed Plaintiffs' Requests for Production of Documents made to United Teachers-Los Angeles ("UTLA" or "Union") and UTLA's responses, followed by reasons why this Court should not order any further responses or document production.

DOCUMENT REQUEST 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 the LAUSD 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.

RESPONSE TO DOCUMENT REQUEST NO. 1:

Objection. Compound request; seeks to evade the numerical limits of the requests imposed by the Court. The request unlawfully and improperly seeks confidential information, including but not limited to, drafts of proposals not proposed to the District, and internal union communications relating to union bargaining strategy, deliberations, priorities and tactics. *See, e.g.*, *Berbiglia* 233 NLRB 1476 (1977); *Harvey's Wagon Wheel, Inc. v. N.L.R.B.*, 550 F.2d 1139, 1143 (9th Cir. 1976); *Colton Joint Unified School District*, PERB Order No. Ad-11, 1981 Cal. PERB LEXIS 218 (1981); *County of Tulare*, PERB Decision No. 2697-M, 2020 Cal. PERB LEXIS 74, fn.9 (2020). In addition, this request seeks documents not reasonably calculated to lead to admissible evidence, in that documents other than the AUGUST SIDE LETTER (or any other collective bargaining agreement) itself do not provide insight into whether that agreement is lawful and constitutional. The language of the Sideletter speaks for itself. Internal union communications do not shed light on the meaning of a collective bargaining agreement. *Santisas v. Goodin*, 17 Cal.4th 599, 608 (1998); *Los Angeles Unified School Dist. v. Torres Construction Corp.*, 57 Cal. App. 5th 480, 495 (2020); *Silverado Modjeska Recreation & Park Dist. v. County of Orange*, 197 Cal. App. 4th 282, 313 (2011); Civ. Code § 1639.

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Plaintiffs have disavowed making any claim against UTLA in this lawsuit, and have not asserted that there is any ambiguity in the Sideletter that is at issue in this lawsuit. Moreover, this request is based on Plaintiffs' premise, which Defendants have explained to the Plaintiffs is erroneous, that the Sideletter, either alone or in combination with other CBAs, comprises the entirety of the District's educational program and policy. That is, the Sideletter's terms do not determine or tend to prove or disprove the legality or constitutionality of the District's operation during COVID-19. Finally, in light of the expiration of the August Sideletter and LAUSD's and UTLA's agreement to a new Sideletter effective January 1, 2021, this request is moot; with the expiration of the August Sideletter, it no longer can be the subject of a preliminary injunction, even if that relief would otherwise be warranted. Without waiving those objections, the Union responds as follows:

Relief Defendant will produce non-privileged responsive documents that are not drafts of proposals or internal communications.

REASONS WHY NO FURTHER PRODUCTION IS REQUIRED

Plaintiffs seek this Court's permission to intrude into the internal caucus deliberations of the Union, and those of the LAUSD as well. To do so would violate strong public policy established under labor law, risk immediate and long-term damage to a well-established collective bargaining relationship, and undermine a venerable bedrock principle of labor relations that, to the knowledge of UTLA, has never been breached by a California state court in a civil case. An order compelling UTLA to reveal its bargaining strategies, priorities and tactics would cause severe harm to it and to its relationship with the District, and offer no useful or relevant information or documents to Plaintiffs in this litigation.

A. **The Strong Labor Relations Policy Protecting Internal Bargaining Party Deliberations Applied by PERB Should be Heavily Weighed by this Court.**

1. The protection of internal caucus deliberations is unbroken and longstanding.

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It has long been a standard and accepted practice in collective bargaining that the internal deliberations of either collective bargaining team—that of management or labor—are kept confidential from its counterpart and third parties in general, in order to advance the purposes, candor and integrity of that process. In turn, in this state's public sector, and throughout the country in the private sector, such confidentiality has long been honored, as the citations above and in footnotes 1 and 2 exemplify (with more below), as a matter of public policy to ensure labor peace and constructive labor relations. There is ample authority recognizing that the internal, private notes and communications reflecting the strategies, priorities and deliberations of parties engaged in collective bargaining or a labor dispute are protected against unwarranted disclosure. This principle is well-established in the private sector and has been recognized and applied in numerous decisions of federal courts and the National Labor Relations Board in various contexts, including in addressing requests for enforcement of administrative discovery demands.[1] The principle has also

[1] *Mallick v. IBEW* (D.C. Cir. 1981) 749 F.2d 771, 785 (noting that internal records pertaining to union's "organizing strategy" or "negotiating plans" are union "secrets," analogous to trade secrets, for which a member could not establish "just cause" to demand inspection under Section 201(c) of the Labor Management Relations and Disclosure Act, 29 U.S.C. § 431(c)); *Harvey's Wagon Wheel v. NLRB* (9th Cir. 1976) 550 F.2d 1139 (observing that statements of union representatives obtained in the course of an NLRB investigation are "normally exempt from [Freedom of Information Act] disclosure as a matter of law" because "[o]therwise, the danger of their withholding relevant information for fear of exposing crucial material regarding pending union negotiations would be manifest"); *Berbiglia, Inc.* (1977) 233 NLRB 1476, 1495 (refusing to enforce subpoenas seeking disclosure by union officials of "crucial material regarding union negotiations," reasoning that "requiring the Union to open its files to Respondent would be inconsistent with and subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members," and that "[i]f collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure"); *Volume Servs., Inc. v. Unite Here* (N.D. Cal. Jan. 28, 2014) No. C-13-02318 YGR (DMR), 2014 U.S. Dist. LEXIS 10492, at *5 (substantially limiting the scope of discovery regarding admittedly relevant information concerning a union's bargaining strategy, reasoning as follows: "[T]he court recognizes the important concerns expressed in *Harvey* and the Board decisions: when an employer and a union are engaged in collective bargaining, discovery by the employer into its opponent's negotiation plans would severely prejudice the union's ability to bargain effectively. For this reason, when crafting the scope of relevant discovery under such circumstances, the court should

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been expressly recognized and incorporated under the corresponding state law governing collective bargaining between LAUSD and UTLA, the Educational Employment Relations Act ("EERA"), Government Code Section 3540 *et seq*., as well as in other states with similar laws.[2] These decisions establish that confidentiality is essential to effectuate and maintain the important public policy of encouraging public employee collective bargaining and association, and that disclosure of confidential bargaining-related information should not be ordered unless the paramount necessity of the requested information is conclusively shown.

This Court should honor and apply these fundamental labor law concepts in the context of the civil discovery dispute presented in this motion. The deference to those principles is not lessened because they emanate in part from quasi-judicial administrative

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exercise particular caution and care in balancing the competing concerns."); *Raymond v. Spirit Aerosystems Holdings, Inc*. (D. Kan. Dec. 21, 2017) No. 16-1282-JTM-GEB, 2017 U.S. Dist. LEXIS 209709, at *13-14 & n.13 (rejecting subpoena seeking internal union communications because of "the Court's concern about the confidentiality of communications between [the union] and the employees it represents—especially those not parties to this case[,]" relying on *Berbiglia*, 233 NLRB at 1495); *Winnett v. Caterpillar, Inc.* (M.D. Tenn. Feb. 6, 2008) No. 3:06-cv-00235, 2008 U.S. Dist. Lexis 9167, at *8-13 (denying in part employer's motion to compel discovery, holding that information relating to union's collective bargaining strategy constituted "an actual trade secret or other confidential business information" protected from disclosure under Fed. R. Civ. P. 26(c)).

[2] *County of Tulare* (2020) PERB Decision No. 2697-M, 2020 Cal. PERB LEXIS 74, p. 15 n.9 (2020) (discussing the "limited privilege" that protects unions against disclosure in administrative discovery of "internal discussions regarding strategy for collective bargaining"); *Colton Joint Unified School District*, PERB Order No. Ad-113, 1981 Cal. PERB LEXIS 218, pp. 5-6 (1981) (adopting rule applied by NLRB in *Berbiglia*, 233 NLRB at 1495, whereby union negotiating strategy is protected against disclosure in administrative discovery; holding that "[n]egotiating team members should generally not be compelled to disclose the content or substance of communications regarding planning of strategy and tactics for negotiations"); *see also Illinois Educational Labor Relations Board v. Homer Community Consolidated School District,* 547 N.E.2d 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.").

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agencies delegated by legislatures to adjudicate and regulate labor disputes and pervasive policy. Indeed, although *Sara M. v. Superior Court* (2005) 36 Cal. 4th 998, 1011, cited by Plaintiffs (Plaintiffs' Memorandum in Support of Motion to Compel Discovery ("Mem."), pp. 1-2) states that the interpretation of a statute is ultimately a legal question for the courts to decide, the Supreme Court qualified that observation two sentences later, noting that

> [W]e have also said that when a statute is susceptible of more than one interpretation, we will consider an administrative interpretation of the statute that is reasonably contemporaneous with its adoption. (*Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal. 4th 226, 234.) "'**Consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect, is entitled to great weight and will not be overturned unless clearly erroneous.**'"

Id. at 1011-1012 (emphasis added); *accord*, *People v. Harrison* (2013) 57 Cal.4th 1211, 1225 ("Consistent administrative construction of a statute, especially when it originates with an agency that is charged with putting the statutory machinery into effect, is accorded great weight.") (citing *Ste. Marie v. Riverside County Regional Park & Open-Space Dist*. (2009) 46 Cal.4th 282, 292)). PERB's rule against disclosing internal bargaining deliberations, first stated in 1981 in *Colton*, *supra*, PERB Order No. Ad-113, has stood the test of time, with a reiteration of that same rule by PERB just last year, in *Tulare*, *supra*, PERB Dec. No. 2697-M. That principle should be accorded great weight.

2. PERB's expert administrative rulings are entitled to deference

In the field of public sector labor relations in this state, PERB is the expert quasi-judicial agency created by the Legislature to administer "a coherent and harmonious system of public employment relations laws." *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd*. (2005) 35 Cal.4th 1072, 1084-85, 1090. As with the other public sector labor relations statutes under its jurisdiction, PERB has broad authority—similar to that of the National Labor Relations Board (NLRB) in private sector labor disputes—to interpret the Educational Employment Relations Act (EERA) in the interest of bringing "expertise and uniformity to the delicate task of stabilizing labor relations." *San Diego Teachers Assn. v. Super. Ct.* (1979) 24

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Cal.3d 1, 12.

Consistent with the Legislature's express delegation of "exclusive jurisdiction" to PERB over the "initial determination as to whether the charges of unfair practices are justified (§ 3541.5), "interpretation of a public employee labor relations statute falls squarely within PERB's legislatively designated field of expertise, dealing with public agency labor relations" *Regents of Univ. of Cal. v. Public Employment Relations Bd.* (2020) 51 Cal. App. 5th 159, 174, internal quotation marks omitted. PERB is uniquely suited, with its "'specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess,'" to adjudicate public sector labor disputes. *Boling v. Public Employment Relations Bd*. (2018) 5 Cal.5th 898, 911-912 ("PERB is 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, *whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect*.'")(emphasis added); *San Diego Teachers Assn.*, *supra*, 24 Cal.3d at 12 ["[A]s if exclusive initial jurisdiction were not amply implied by the comprehensiveness of the EERA scheme, section 3541.5 declares [adjudication of unfair practice charges] 'shall be a matter within the exclusive jurisdiction of the board'".). PERB's view of the importance and sanctity of the privacy of collective bargaining deliberations must be respected and carefully weighed by this Court, not discarded as Plaintiffs seek to do. As PERB recognized in *Colton Unified School District* (1981) PERB Order No. Ad-113, 1981 Cal. PERB LEXIS 218 ("*Colton*"),

> The establishment of goals for negotiations, and the process of communication involved in mapping out the strategy and tactics for the attainment of those goals, is activity which is of crucial importance to the entire scheme of employer-employee relations as established by the EERA. . . .Negotiating team members should generally not be compelled to disclose the content or substance of communications regarding planning of strategy and tactics for negotiations.

The Legislature routes adjudication of the merits of labor disputes exclusively through PERB. (§ 3541.5.) Review of PERB's final decisions on the merits is directly to

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the appellate courts. (§ 3542, subds. (b) & (c) [review of PERB's final decision or order is by petition for a writ of extraordinary relief from such decision or order].) In other words, the superior courts lack any jurisdiction whatsoever to reach the merits of a labor dispute. Thus, PERB stands as a substitute for the courts in the adjudication of California public sector labor matters, and has developed precepts of law to safeguard and govern the collective bargaining process, and the parties that engage in it. One such doctrine is the protected and confidential character of bargaining parties' internal caucus deliberations, as explicated above in *Colton*.

This concept has been validated by courts. In *Kerns v. Caterpillar, Inc*. (M.D. Tenn. February 7, 2008) No. 3:06-cv-1113, 2008 U.S. Dist. LEXIS 9301, a federal court recognized the danger of revealing such communications, denying a motion to compel production of materials reflecting a union's bargaining strategies. *Id.* at *9-15 (citing *Titan International, Inc. v. George Becker* (C.D. Ill. Nov. 26, 2002) No. 00-3257, Slip Op.). The *Kerns* court cited with approval the following reasoning from the *Titan* decision, affirming principles that apply in this case, including rejection of the argument Plaintiffs make here, that the expiration of a particular CBA permits disclosure of internal communications pertaining to that expired CBA:

> Plaintiffs and Defendants continue to deal with each other and anticipate negotiating future labor agreements. If the information sought is disclosed, future negotiations may be jeopardized. The Court agrees with Defendants that such information is confidential business information. Defendants' persuasive argument that future negotiations may be hampered is a legitimate reason to protect such information as confidential. Defendants have demonstrated to this Court's satisfaction that the documents comprising Defendants' collective bargaining negotiating strategies are confidential. **Plaintiffs' argument that information from this labor dispute is not privileged because the negotiations relevant to this case have ended, [sic] is not persuasive. As there is an ongoing relationship between the parties, it is important that the parties remain assured that negotiation history be kept confidential to protect the ability to discuss similar issues freely in the future**.

Id. at *11-12 (emphasis added); *see also Winnett*, *supra*, 2008 U.S. Dist. Lexis 9167 at *12 (rejecting argument that "collective bargaining strategy materials do not merit protection

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after the negotiation to which they were related have concluded," emphasizing that parties in an ongoing collective bargaining relationship "revisit and renegotiate the same issues again and again").

In *Berbiglia, Inc*. (1977) 233 N.L.R.B. 1476, the NLRB considered whether to revoke an employer's subpoena duces tecum for union documents, including communications between the union and its members and with other organizations, which might tend to show the union's reasons for a strike. The NLRB found that the employer was engaged in a "fishing expedition" and that forcing the union to open its files to the employer would be "subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members. **If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure. This necessity is so self-evident as apparently never to have been questioned**." *Id.* at 1495 (emphasis added).

Similarly, in *Boise Cascade Corp*. (1986) 279 N.L.R.B. 422, the NLRB considered whether an employer should be forced to disclose to the union the employer's study of ways to improve maintenance productivity. The study served as a basis for an overhaul of union workers' job duties. One section of the report contained statements regarding a negotiating strategy for implementing the study's proposals. The NLRB held that this portion of the report did not have to be disclosed to the union because "[a] proper bargaining relationship between the parties mandates that [the employer] be able to confidentially evaluate possible interpretations of the existing labor agreement and that it be able to plan in confidence a strategy for altering or changing its maintenance improvement program." *Id.* at 432.

The Supreme Court of Illinois has also upheld such restrictions on discovery of bargaining strategy. *See Illinois Educational Labor Relations Board v. Homer Community Consol. School Dist*. (1989) 132 Ill. 2d 29, 547 N.E.2d 182 ("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

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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.").

Plaintiffs assert that UTLA's interest in maintaining the confidentiality of its bargaining strategies is "not a proper objection." That is incorrect. Indeed, most of the authorities cited above holding that internal bargaining deliberations are protected involved a union's obligation to respond to discovery requests. The cases Plaintiffs cite for this point do not support Plaintiff's blanket assertion that "confidentiality is not a proper objection." Rather, they hold that certain information may not be totally shielded from discovery by a defined privilege under the Evidence Code. That principle is not dispositive of the question whether a party can be ordered to disclose specific information in a given case. *See Los Angeles Unif. Sch. Dist. v. Trustees of S. California IBEW-NECA Pension Plan* (2010) 187 Cal. App. 4th 621 (holding that the confidentiality protection for personal employee information under Lab. Code § 1776(e) did not establish an "absolute privilege" under Evid. Code § 1040, but acknowledging that the information is subject to a "conditional privilege" under which disclosure should only be ordered if the party's specific need for the information is found to outweigh the need for confidentiality); *Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal. App. 3d 1, 36-37 (holding that there is no specific privilege under the Evidence Code barring disclosure of bargaining-related communications between a union and its attorney).

While the state courts in California have never ruled on the propriety of requiring disclosure of internal union bargaining deliberations and strategies in discovery, they have recognized in numerous cases the need to carefully balance legitimate confidentiality concerns against a party's litigation-based interest in obtaining particular information when evaluating demands for production of private information. Courts have recognized the need to carefully consider claims that discovery requests infringe on protected confidentiality interests even in the absence of an absolute privilege, and to limit the scope

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of discovery where necessary to accommodate those interests. *See, e.g.*, *Alch v. Superior Court* (2008) 165 Cal. App. 4th 1412, 1422-26 (discussing the balancing of interests that courts must perform when evaluating discovery requests that implicate privacy rights); *Lantz v. Superior Court* (1994) 28 Cal. App. 4th 1839, 1853-57 (reversing trial court order requiring disclosure of patients' medical records where court failed to conduct balancing inquiry); *Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 713 ("When the interest of a private litigant in discovering relevant facts conflicts with the right of others to maintain reasonable privacy regarding their financial affairs, a court must indulge in a careful balancing before ordering disclosure."); *Britt v. Superior Court* (1978) 20 Cal.3d 844, 859-860 (refusing to compel disclosure of information regarding litigants' private associational activities because the relationship between the information sought and the defenses with respect to which the information was sought was "tenuous at best"); *Church of Hakeem, Inc. v. Superior Court*, 110 Cal. App. 3d 384 (1980)(Church affiliation cannot be compelled); *Aldapa v. Fowler Packing Co*., 2016 U.S. Dist. LEXIS 78791 (E.D. Cal. June 16, 2016)(Associational information questioning at deposition rejected); *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202 (N.D. Cal. 1983); *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656 (when evaluating claims of confidentiality in discovery, even where no absolute privilege applies, courts must consider "the purpose of the information sought, the effect that disclosure will have on the parties and on the trial, the nature of the objections urged by the party resisting disclosure, and ability of the court to make an alternative order which may grant partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens which appear just under the circumstances"). When the court determines that the need to obtain the information does not outweigh the confidentiality interest at stake, disclosure should not be ordered. *See Britt*, 20 Cal.3d at 865 (vacating discovery order); *see also Grafilo v. Wolfsohn* (2019) 33 Cal. App. 5th 1024, 1037 (reversing trial court order requiring disclosure of the medical records of defendant doctor's patients).

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In view of the important labor law non-disclosure principle recognized in the above cases, the Court should use a similar approach here, balancing UTLA's significant interest in maintaining confidentiality of its internal bargaining deliberations against Plaintiffs' specific need for those communications—which the below analysis shows is minimal.

B. **The Union's Interest in Confidentiality Far Outweighs the Value of the Information at Issue.**

It is of little import for the purposes of this motion whether the confidential information is protected under the rubric of privilege or a protective order denying disclosure arrived at through a balancing of the strong interests in maintaining confidentiality of the internal discussions by union negotiators against the trivial interest Plaintiffs can muster to reveal further bargaining-related discussions (much less non-bargaining related internal discussions). Whichever form the analysis takes, Plaintiffs are not entitled to the documents and information they demand because the information is *necessarily irrelevant* to proving the claims alleged in Plaintiffs' First Amended Complaint ("FAC").

1. Plaintiffs' Request for Information is Based on a Fatally Flawed Series of Incoherent Premises, and an Unwarranted Demand for Documents that Cannot Shed Light on the Meaning of the Sideletters Plaintiffs Attack.

To begin, Plaintiffs, albeit errantly, have launched a wholesale rhetorical attack in their FAC on the District's entire distance learning education policy, yet focus their litigation attacks only on the narrow terms of a series of collective bargaining agreements between UTLA and the District, which they falsely equate with the entire District policy (FAC, ¶11), and misinterpret to boot. (Mem., p. 6-7). This mismatch between Plaintiffs' boundless critique of the District's entire policy and myopic focus on CBAs is in derogation of controlling law in such profound cases, because their burden here is to demonstrate that "the actual quality of the district's program, **viewed as a whole**, falls fundamentally below prevailing statewide standards." *Butt v California* (1992) 4 Cal.4th 668, 685 (emphasis added); *see also Collins v. Thurmond*, 41 Cal. App. 5th 879, 898 (2019), request for depublication denied, review denied (Feb. 26, 2020) 2020 Cal. LEXIS

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1448 (equal protection claim requires proof that a particular policy "has a substantial disparate impact on the minority children of [the defendant's] schools, causing de facto segregation of the schools and an appreciable impact to a district's educational quality, and no action is taken to correct that policy when its impacts are identified"; this claim is subject to the *Butt* standard requiring evaluation of "the actual quality of the District's program, viewed as a whole"). Conversely, Plaintiffs' misplaced CBA target is circumscribed by the EERA, §3543.2(a)(1), which limits what parties can bargain over, leaving most of the District's educational policies which Plaintiffs purport to challenge – both enshrined in its Learning Continuity and Attendance Plan ("LCAP") and outside the bounds of any CBA.[3]

The Plaintiffs persist with their flawed approach, which is further exposed by examination of the FAC's commentary on the August Sideletter. The FAC repeatedly, albeit with varied passive vocabulary, speaks in terms of what the Side Letter omits or "fails to address", and/or does not articulate the connection between the Side Letter and any specific perceived shortcoming Plaintiffs' children have experienced. *See, e.g.*, FAC at ¶¶ 11, 12 (Sideletter "failed to address or remedy" lack of training), ¶ 55 (Sideletter "left many students" without access to education, does not explain how the CBA did so); ¶ 63 (Sideletter "offers no explanation" as to how it would meet standards); ¶ 64 (Sideletter "lacks. . instructional requirements"); ¶ 68 (Sideletter blamed for plaintiffs' inability to

[3] That section provides: "(1) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. 'Terms and conditions of employment' mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to former Section 22316 of the Education Code, as that section read on December 31, 1999, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code."

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access any classes); ¶ 80 (incorrectly stating that instructional hours were reduced, and Sideletter "does nothing to remedy" remote learning problems or intervene on behalf of students who were not engaging); ¶¶ 83-85 (Sideletter allows synchronous and asynchronous learning; neglecting to mention this is consistent with SB 98); ¶ 89 (Sideletter "does not mandate" teachers balance instructional methods); ¶ 90 (Sideletter "does not ensure" Plaintiffs' children will receive necessary instruction); ¶ 98 (incorrectly alleging limits on teachers' instructional day, failing to account for preparation time and other work outside school day); ¶ 111 (Sideletter "does nothing to ensure" adequate teacher training); ¶ 115 (Sideletter "fails to place limits" on amount of substitute instruction); ¶ 118 ("there is no mandate" in Side Letter to reach out to students or families); ¶ 119 (Sideletter prevents the LAUSD from intervening to fix student disengagement; no explanation of how); ¶ 122 (Sideletter makes home visits voluntary); ¶ 126 (Sideletter is "silent on the issue" of student assessments); ¶ 141 (Sideletter "failed to provide necessary educational requirements"); ¶ 150 (Sideletter "fails to provide pre-pandemic benefits").

The FAC is necessarily the broadest source of what may be relevant. While riddled with flaws and mounting an anemic attack by omission, the FAC is still focused exclusively on the Sideletters, and hence their meaning, not on any materials or information the bargaining parties did not share with each other. The materials Plaintiffs seek, after having received non-confidential bargaining materials in discovery, do not and cannot shed light on the meaning of the Sideletters. *California Teachers Assn. v. Governing Bd. of Hilmar Unified School Dist.*, 95 Cal. App. 4th 183, 189 fn.3 (2002) ("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."); *see also, e.g.*, *Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal. App. 4th 964, 980 ("California recognizes the objective theory of contracts, under which it is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of

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the parties, that controls interpretation."); *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc*. (2003) 109 Cal.App.4th 944, 955) ("The parties' undisclosed intent or understanding is irrelevant to contract interpretation.").

2. The Union's Internal Deliberations Are Irrelevant to the Issues.

Ironically, Plaintiffs rely on blatant misinterpretation of the parties' CBAs, and documents Defendants produced in discovery, and ignore the pronouncements of the documents *relevant to evaluation of District policy,* to fashion an argument that they need confidential information in addition to that which the parties have already produced.

One particularly egregious example is Plaintiffs' persistent misrepresentation about the length of the school work day. Article IX, Section 1.0 of the overall applicable collective bargaining agreement in effect from 2019-2022, which Plaintiffs have, states:

> It is agreed that the professional workday of a full-time regular employee requires no fewer than eight hours of on-site and off-site work, and that the varying nature of professional duties does not lend itself to a total maximum daily work time of definite or uniform length.

(Exhibit 1, p. 52). This provision has continued to be in full effect throughout the pandemic distance learning year, and has not been altered by the provisions of any Sideletter. UTLA counsel pointed this out to Plaintiffs' counsel via email on February 17 (Gottlieb Decl., ¶ 5, Exhibit 5), but they nevertheless persist with this offensive and baseless fabrication in this motion and elsewhere in this litigation. As reflected in the notes Plaintiffs cite, educators have indeed been heroic in this fraught and stressful period, and nothing in the notes Plaintiffs have selected indicate otherwise, let alone provide a justification for intrusion into the Union's private deliberations.

It is beyond belief that Plaintiffs and their experts are unaware that even in pre-pandemic times, no teacher was likely to spend her full eight-hour day in a school building. Nor were students. School sessions tend to be approximately six hours per day, and not all those hours are spent by teacher or student in instruction. It should not be startling to Plaintiffs that in pandemic times, with all involved facing unprecedented stress and challenges, there would still not be eight daily hours *of instruction*; and after all,

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Plaintiffs themselves in their FAC have complained not only of insufficient amounts of instruction, but also insufficient amount of time in other important non-instructional educator activity, such as outreach, preparation and evaluations. In fact, those activities are ongoing, albeit in a different manner and with more interruptions, obstacles, stress, management of new learning curves, and much more, faced by all involved in the education process.

Moreover, the District's LCAP, an Education Code-mandated document issued after the August Sideletter was finalized, reiterates the same point about the immutability of the eight hour day:

> Per the District's agreement with the United Teachers of Los Angeles (UTLA), *all teachers have a contractual 8-hour work day obligation comprised of both on-site and off-site work*. The side letter modifies the teacher 6-hour on-site portion of their workday to provide students virtual services (synchronous and asynchronous instruction) with the remaining minutes of work to be completed outside of the 9:00 AM to 2:15 PM school day (such as preparing lesson plans, grading of student work, feedback to students, conferences, maintaining appropriate records, communicating with parents, IEP meetings).

Gottlieb Dec. Exh. 4 (November LCAP), p. 20.

Plaintiffs have the LCAP, but continue to both ignore its content, and misrepresent and misinterpret the discovery they have received. Most significantly, Plaintiffs have not compared the terms of the Sideletters with that of the current state standard set by SB 98. Why? Because there is nothing in the Sideletters, read together with the still-applicable overall CBA, that is non-compliant. That is why they rely extensively on what is *not* found in the CBAs to try to make their case. Plaintiffs' exaggerations and unwarranted aspersions do not provide a justification for expansive and intrusive discovery.

If there are individual teachers who have not lived up to the daily eight-hour requirement, that would be *inconsistent with* the terms of the CBA and Sideletters. Teachers, too, are facing challenges during the pandemic, with their own households and families, and in adjusting to the new and dynamic reality. But Plaintiffs have shown no

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interest in that set of circumstances.[4] In short, Plaintiffs' recital of selected passages of notes relating to bargaining conversations that they find inappropriate – mostly through misinterpretation -- does not grant them license to listen in on internal caucus discussions.

3. Discovery Should be Limited to the Four Corners of the Agreements.

The only claims Plaintiffs make are against the District, not UTLA (FAC, ¶ 30). Flawed as their claims are, they depend on policies that are established by the *District*, not UTLA, which is not a government actor, and does not set, and is not authorized to set, education policy (found in the LCAP, a document unilaterally created by the District). The showing Plaintiffs say they have to make (Mem., p. 7) about discriminatory impact, segregation, and no action taken when discriminatory impacts are identified, are not advanced by finding out what the *Union* said in its own caucus that it did not share with the District. Nor for that matter, is what the Union said more broadly but still in confidence about distance learning outside the collective bargaining context at all responsive to the Plaintiffs' legitimate discovery interests. That material—which would take hundreds of hours to gather, analyze and produce (*See* Declaration of Carlos Torres)—is even more remote in subject matter than the communications related to collective bargaining, and neither can be legitimately compelled in this litigation.

The Court should also reject Plaintiffs' non-analytical attempt to simply assert the same relevance arguments against UTLA that it did against the District (Mem., pp. 12-13). Respectfully, the Union, as a non-policymaker non-government actor in this case, is not subject to the same attacks – flawed though they may be – and is not freighted with the same responsibility as is the District. The District is the party responsible for policy, it has unilaterally promulgated that policy in its LCAP Plaintiffs insist on ignoring, and it is the

[4] Plaintiffs even seem to find fault with the notion that a UTLA representative allegedly said that people cannot "be expected to sit in front of a computer screen for 8 or 9 hours a day." (Compel mem., p. 6, lines 22-23). This appears to have been an innocuous truism that all who have experienced the pandemic could relate to, except apparently for Plaintiffs.

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only party against whom Plaintiffs have made claims of wrongdoing and for relief. Whatever the Union may have been privately thinking about or discussing outside the bargaining context with reference to distance learning (that also was not shared with the District) cannot shed light on what the District's policies were and are.

Plaintiffs make a muted attempt to claim that the Union opened the door to its caucus room by denying a request for admission "concerning the plain meaning of the August Side Letter." (Mem., p. 13, lines 12-13). As noted above, however, Plaintiffs cannot leverage their own blatant and baseless misinterpretation of the Sideletter relating to the continuing applicability of the eight-hour work day to justify their desired intrusion. The main CBA's eight hour work day remains in effect, as reflected by that document (Exhibit 1, p. 52) and the LCAP (Exhibit 4, p. 20). Nor does Plaintiffs' characterization of the Union's bargaining stance as benefiting teachers justify surveillance by them. The Union would be violating its fiduciary duty to its members if it abandoned their interests in safety, in an acceptable, manageable level of stress, and in basic protection from the dangers of the pandemic. Plaintiffs do not explain how negotiating to protect educators' safety—all the while negotiating to ensure the best distance learning experience for students—is suspect, discriminatory, or somehow grants entrée into the Union's private deliberations. And again, insofar as anyone wants to question the true or actual meaning of the Side Letters, as Plaintiffs seem to want to do, that effort cannot be accomplished by delving into undisclosed intent. It is even more removed from Plaintiffs' stated claims to enable them to delve into the Union's confidential internal discussions occurring separate from collective bargaining.

The Plaintiffs' need to obtain the requested documents pertaining to UTLA's undisclosed intent and irrelevant private opinions about distance learning simply doesn't measure up to the need to maintain the integrity of collective bargaining. This Court should deny Plaintiffs' motion to compel.

DOCUMENT REQUEST NO. 3:

All DOCUMENTS and COMMUNICATIONS RELATING to DISTANCE

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LEARNING surveys of UTLA members, including but not limited to the OCTOBER 2020 UTLA MEMBER SURVEY.

RESPONSE TO DOCUMENT REQUEST NO. 3:

Objection. Compound request; seeks to evade the numerical limits of the requests imposed by the Court. The request unlawfully and improperly seeks confidential information, including but not limited to, internal union communications relating to union bargaining strategy, deliberations, priorities and tactics. *See, e.g.*, *Berbiglia* 233 NLRB 1476 (1977); *Harvey's Wagon Wheel, Inc. v. N.L.R.B*., 550 F.2d 1139, 1143 (9th Cir. 1976); *Colton Joint Unified School District*, PERB Order No. Ad-11, 1981 Cal. PERB LEXIS 218 (1981); *County of Tulare*, PERB Decision No. 2697-M, 2020 Cal. PERB LEXIS 74, fn.9 (2020). It also seeks information and documents that intrude on the associational and individual privacy and confidentiality of individual respondents to the survey, who were promised confidentiality and anonymity when surveyed. In addition, this compound request seeks documents not reasonably calculated to lead to admissible evidence, in that documents pertaining to the subjects enumerated in this request will not shed light on or tend to prove or disprove whether the District's educational program and policy are lawful and constitutional. Plaintiffs have disavowed making any claim against UTLA in this lawsuit. Plaintiffs already have the survey to which this request refers.

Without waiving those objections, the Union responds as follows:

Relief Defendant will produce non-privileged responsive documents that are not internal communications, do not include private or confidential information, and that are not already in Plaintiffs' possession.

REASONS WHY NO FURTHER PRODUCTION IS REQUIRED

UTLA has produced documents responsive to this request, but for the reasons explained in response to RFP #1, cannot be compelled to produce internal communications. Those reasons for internal confidentiality apply to this request as well. And, as explained above, internal Union communications that do not relate to collective bargaining are even more remote in terms of relevance than are the ones related to

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bargaining, given that Plaintiffs' claims are focused on CBAs. Indeed, if Plaintiffs were not errantly so focused, UTLA would not be a party to this litigation at all, because there would not be even a theoretical basis for questioning the Union's non-collective bargaining thought process about distance learning. As noted above, providing this information would entail hundreds of hours of gathering and examination of the gathered materials. *See* Torres Declaration. Thus, no less than their demands for bargaining-related internal communications, Plaintiffs' demand to compel production of any internal communications unrelated to bargaining must be rejected by this Court.

DOCUMENT REQUEST NO. 4:

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

RESPONSE TO DOCUMENT REQUEST NO. 4:

Objection. Compound request; seeks to evade the numerical limits of the requests imposed by the Court. The request unlawfully and improperly seeks confidential information, including but not limited to, internal union communications relating to union bargaining strategy, deliberations, priorities and tactics. *See, e.g.*, *Berbiglia* 233 NLRB 1476 (1977); *Harvey's Wagon Wheel, Inc. v. N.L.R.B.*, 550 F.2d 1139, 1143 (9th Cir. 1976); *Colton Joint Unified School District*, PERB Order No. Ad-11, 1981 Cal. PERB LEXIS 218 (1981); *County of Tulare*, PERB Decision No. 2697-M, 2020 Cal. PERB LEXIS 74, fn.9 (2020). In addition, this request seeks documents not reasonably calculated to lead to admissible evidence, in that documents pertaining to the subjects enumerated in this compound request will not shed light on or tend to prove or disprove whether the District's educational program and policy are lawful and constitutional. Plaintiffs have disavowed making any claim against UTLA in this lawsuit.

Without waiving those objections, the Union responds as follows:

Relief Defendant will produce non-privileged responsive documents that are not internal communications and not already in Plaintiffs' possession.

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REASONS WHY NO FURTHER PRODUCTION IS REQUIRED

This demand must be rejected by this Court for the same reasons as explained in response to RFPs numbered 1 and 3.

DATED: March 8, 2021

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