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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MORGAN HILL CONCERNED  
PARENTS ASSOCIATION, et al.,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
EDUCATION, et al.,

Defendants.

No. 2:11-cv-3471 KJM AC

ORDER

On November 3, 2015, the parties were ordered to propose an order under Fed. R. Civ. P. 502(d) for review and approval by the undersigned. See ECF No. 127. The parties failed to arrive at a joint proposed order. The undersigned having considered the parties’ separate proposed orders (ECF Nos. 135, 136), IT IS HEREBY ORDERED that:

(a) No Waiver by Disclosure.

This Order is entered pursuant to Rule 502(d) of the Federal Rules of Evidence. Subject to the provisions of this Order, if a party (the “Disclosing Party”) discloses information in connection with the pending litigation that the Disclosing Party thereafter claims to be protected by the attorney-client privilege or work product protected material (“Protected Information”), the disclosure of that Protected Information will not constitute or be deemed a waiver or forfeiture – in this or any other action – of any claim of privilege or work product protection that the

1 Disclosing Party would otherwise be entitled to assert with respect to the Protected Information  
2 and its subject matter. This Order applies to all discovery, including Electronically Stored  
3 Information (“ESI”).

4 If a Disclosing Party discloses Protected Information but fails to comply with the  
5 procedures set forth in this Order, it waives the privilege or protection otherwise available for that  
6 information, and Fed. R. Civ. P. 502(d) will not apply to that information.

7 (b) Notification Requirements.

8 (1) Disclosing Party Notification. Upon discovering the disclosure of Protected  
9 Information, the Disclosing Party must promptly notify the party receiving the Protected  
10 Information (“the Receiving Party”), in writing, that it has disclosed that Protected Information  
11 without intending a waiver by the disclosure. The notice shall be accompanied, or followed  
12 within 10 days, by a Privilege Log of the privileged or protected materials; and the Privilege Log  
13 shall comply with Fed. R. Civ. P. 26(b)(5)(A)(ii). Upon receiving such notification, the  
14 Receiving Party must promptly return, sequester, or destroy the identified documents and any  
15 copies it has, as provided by Fed. R. Civ. P. 26(b)(5)(B), and promptly notify the Disclosing Party  
16 that it has done so. The Receiving Party shall not use the documents until the status of the  
17 documents has been resolved.

18 (2) Receiving Party Notification. If a Receiving Party discovers potentially  
19 Protected Information that the Disclosing Party has produced, the Receiving Party must promptly  
20 notify the Disclosing Party of the discovery. Such notification shall not waive the Receiving  
21 Party's ability to subsequently challenge any assertion of privilege with respect to the identified  
22 document. Upon receiving the notice from the Receiving Party, the Disclosing Party has ten (10)  
23 business days to commence the “Disclosing Party Notification” process, above.

24 (c) Contesting Claims of Privilege or Work Product Protection.

25 If the Receiving Party contests the Disclosing Party’s claim of attorney-client privilege or  
26 work product protection as to any document itemized in the Disclosing Party’s privilege log, the  
27 Receiving Party shall – after having sequestered, destroyed or returned the documents as provided  
28 for above – provide notice to the Disclosing Party of its challenge to the protected status of the

1 document within ten (10) business days of receiving the Privilege Log. The Disclosing Party  
2 must, within ten (10) business days of receiving the Receiving Party's challenge to the claim of  
3 the protected status of a document contained in the Privilege Log, move the Court for a Protective  
4 Order excusing it from producing the challenged document, or compelling the Receiving Party to  
5 destroy or return it ("Motion for Protective Order"). Any such motion shall be made in  
6 accordance with the provisions of E.D. Cal. R. 251, except as modified herein.

7 Any such motion must be filed under seal. The opposition to the Motion for Protective  
8 Order may not rely on the fact or circumstance of the disclosure. Unless otherwise ordered by  
9 this Court, pending resolution of such Motion, the Receiving Party must not use the challenged  
10 information in any way or disclose it to any person other than those required by law to be served  
11 with a copy of the sealed Motion.

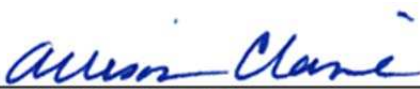
12 (d) Stipulated Time Periods. The parties may stipulate to extend the time periods set forth  
13 in paragraphs (b) and (c).

14 (e) Rule 502(b)(2). The provisions of Federal Rule of Evidence 502(b)(2) are inapplicable  
15 to the production of Protected Information under this Order.

16 (f) Burden of Proving Privilege or Work Product Protection. The Disclosing Party retains  
17 the burden upon challenge pursuant to paragraph (c) of establishing the privileged or protected  
18 nature of the Protected Information.

19 IT IS SO ORDERED.

20 DATED: December 17, 2015

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22 ALLISON CLAIRE  
23 UNITED STATES MAGISTRATE JUDGE  
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