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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

	)	Civil No. 10-CV-940-CAB(WVG)
TARLA MAKAEFF <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	ORDER ON DISCOVERY ISSUES
	)	
v.	)	
	)	
TRUMP UNIVERSITY, LLC <i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

Rather than comply with the Court's Chambers Rules on the informal dispute resolution process or the Civil Local Rules on Applications for Reconsideration, the parties sent e-mail communications directly to the Court's research attorney without advance notice. After some admonishments below, the Court rules on the issues presented in the e-mails.

**I. BACKGROUND**

On January 6, 2012, without first contacting the Court by telephone as required by Chambers Rules, Defendants submitted a 13-page letter-brief on various written discovery disputes. This violated the Court's Chambers Rules in more than one way. However, given the nature and number of disputes, the Court elected to

1 overlook Defendants' transgression and accepted the brief.  
2 Plaintiffs' response brief included additional disputes that were  
3 not included in Defendants' brief. An Order on these disputes  
4 issued on February 13, 2012. (Doc. No. 93.)

5 On February 22, 2012, counsel for Defendants sent an e-mail  
6 directly to the Court's research attorney and asked for an extension  
7 of time to comply with a portion of the February 13, 2012, Order.  
8 Although improper and violative of the Court's Chambers Rules'  
9 provision on communicating with chambers, the Court again elected to  
10 overlook the transgression because the e-mail contained no legal  
11 arguments and was essentially a written version of information  
12 counsel would have conveyed via telephone.

13 That same day, Plaintiffs' counsel sent a response e-mail to  
14 the Court's research attorney. In addition to responding to  
15 Defendants' e-mail, Plaintiffs sought reconsideration of portions of  
16 the February 13, 2012, Order, made arguments, and cited legal  
17 authorities to that end. This violated both the Court's Chambers  
18 Rules and Civil Local Rules. Two additional e-mails followed before  
19 the Court had a chance to respond and ask the parties to cease.

## 20 **II. RULINGS**

21 In the interest of efficiency, the Court again elects to  
22 overlook the failure to comply with the rules and the violations of  
23 protocol. However, should the parties again fail to comply, the  
24 Court will summarily reject all future briefing, which may result in  
25 the dispute not being heard if the time for bringing the dispute to  
26 the Court's attention has passed.

27 Furthermore, through its recent dealings with the parties,  
28 the Court has noticed a tendency to take liberties with presenting

1 case law and facts in a manner that favors them, but which may not  
2 be a faithful reading of the case, does not recognize distinctions  
3 that set cases apart from theirs, or ignores the outcome of the case  
4 or other contrary reasoning in a court's opinion. As a general  
5 matter, not accurately characterizing a case, overstating the  
6 congruity of a case with yours, and citing a select passage but  
7 failing to recognize that the remaining discussion or the outcome  
8 militate against one's argument are generally considered improper or  
9 poor advocacy. Indeed, as one jurist advised long ago:

10 "Nothing, perhaps so detracts from the force and persuasive-  
11 ness of an argument as for the lawyer to claim more than he  
12 is reasonably entitled to claim. Do not 'stretch' cases  
13 cited and relied upon too far, making them appear to cover  
something to your benefit they do not cover. Do not try to  
dodge or minimize unduly the facts which are against  
you. . . ."

14 Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of  
15 Persuading Judges 13 (2008) (quoting Hon. Wiley B. Rutledge). The  
16 Court is dismayed that the parties appear to advocate polarized  
17 positions based on skewed, inaccurate, or incomplete interpretations  
18 and representations. The Court cautions the attorneys and their  
19 clients to take better care in the future when they interpret case  
20 law and advocate their position in a manner that is faithful to the  
21 authority cited. Rule 11 sanctions always remain an option for the  
22 Court if this behavior continues. With these admonitions, the Court  
23 now continues to the disputes at issue.

24 **A. Request For Extension of Time to Respond to RFP No. 11**

25 By stipulation between the parties, Defendants' request for  
26 extension of time to respond to Plaintiff's RFP No. 11 is granted.  
27 Defendants shall respond no later than March 13, 2012.

28

1 **C. Financial Privacy and Defendants' Redaction of Contracts**

2 Defendants provided a list of putative class members,  
3 identified the course each took, and provided a separate price list  
4 for each course. Plaintiffs object only that Defendants redacted  
5 the course costs on the individual contracts they produced.  
6 Defendants shall submit additional briefing on the propriety of the  
7 redaction of the purchase amounts in the contracts, especially in  
8 light of the fact that it appears each redacted purchase amount can  
9 be ascertained by cross-referencing the two lists that together  
10 identify each student, the course he or she purchased, and the price  
11 of each course.

12 Keeping in mind the admonitions above, if Defendants choose  
13 to continue to defend the redaction of the contracts on the basis of  
14 a privacy right, the redacted information very well better be the  
15 kind of information the privacy doctrine protects and that they do  
16 not assert it simply because the redacted information simply  
17 contains numbers and a dollar sign (unless of course, a good faith  
18 reading of the doctrine actually protects numbers and dollar signs  
19 alone).

20 Other than the above, the Court is satisfied that Defendants  
21 have produced sufficient information to allow Plaintiffs to  
22 calculate damages.

23 **D. Communications With Putative Class Members**

24 Plaintiffs seek the Court's reconsideration of its ruling on  
25 Plaintiffs' response to Defendants' RFP No. 15. Specifically,  
26 rather than being compelled to produce all of Plaintiffs' counsel's  
27 communications with putative class members for *in camera* review,  
28 Plaintiffs seek to produce either a privilege log or declaration.

1           The Court is persuaded by some of Plaintiffs' cases. Rather  
2 than produce documents for *in camera* review, Plaintiffs shall  
3 produce a privilege log and declaration(s) to meet their burden to  
4 establish "facts necessary to support a prima facie claim of  
5 privilege . . . ." Costco Wholesale Corp. v. Superior Court, 219  
6 P.3d 736, 741 (Cal. 2009). When doing so, Plaintiffs should be  
7 mindful to fully discuss the dominant purpose of the subject  
8 communication(s) as well the participants' contemplated relation-  
9 ship. See generally Taylor v. Waddell & Reed, Inc., 2011 U.S. Dist.  
10 LEXIS 54109 (S.D. Cal. May 20, 2011). In other words, Plaintiffs  
11 need show more than the mere fact that counsel simply sent general  
12 letters or e-mails to a putative class member because, as in Taylor,  
13 the pivotal question is the nature of the relationship as well as  
14 what counsel and the putative class members contemplated at the time  
15 of the communication.

16           Defendants' citation to In re McKesson HBOC, Inc. Secs.  
17 Litig., 126 F. Supp. 2d 1239 (N.D. Cal. 2000), is unhelpful. The  
18 issue before that court was whether opposing counsel was barred by  
19 ethics rules from communicating with putative class members. The  
20 court's conclusion that putative class member were not "represented"  
21 was in the context of a professional ethics rule that prohibited  
22 communication with "represented" parties. Id. at 1245. In other  
23 words, the court analyzed a very specific word used in a specific  
24 ethics rule. Id. (citing Atari, Inc. v. Superior Court, 212 Cal.  
25 Rptr. 773, 776 (Cal. Ct. App. 1985) (citing former California Rule  
26 of Professional Conduct 7-103)). The Court declines to extend the  
27 reasoning or conclusion in McKesson to the attorney-client privilege  
28 context at issue here. Defendants certainly have not provided the

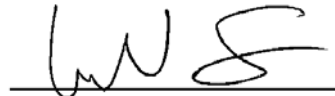
1 Court any reason why McKesson and its conclusion apply in this  
2 context.

3 **III. CONCLUSION**

4 The parties shall proceed in accordance with this Order.

5 IT IS SO ORDERED.

6 DATED: March 2, 2012

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8  
9 Hon. William V. Gallo  
U.S. Magistrate Judge

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