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Fee Exempt – Gov. Code § 6103

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Attorneys for Respondent
THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

IRVIN MUCHNICK,

Petitioner,

v.

UNIVERSITY OF CALIFORNIA,
BOARD OF REGENTS,

Respondent.

Hayward Hall of Justice

CASE NO. RG17857115

RESERVATION NUMBER 1972714

OPPOSITION BY RESPONDENT THE
REGENTS OF THE UNIVERSITY OF
CALIFORNIA TO MOTION BY PETITIONER
RE PRIVACY RIGHTS AND SEEKING
DISCLOSURE OF ALL AGU DOCUMENTS,
OTHER DOCUMENTS NOT PROPERLY
WITHHELD UNDER PRIVACY PRINCIPLES,
DISCLOSURE OF THE 141-PAGE CAMPUS
POLICE REPORT AND ALL DOCUMENTS
RELATED TO THE AGU SETTLEMENT
AGREEMENT; DECLARATION BY
MICHAEL R. GOLDSTEIN

Hearing Date: August 1, 2018
Time: 9:00 a.m.
Judge: Hon. Jeffrey Brand
Dep't: 507
Petition Filed: April 18, 2017

1 In this motion, which Petitioner served on June 11, 2018, Petitioner prematurely seeks an:
2 “Order that FERPA does not bar disclosure of documents related to a deceased
3 student, that Ted Agu has no FERPA rights, that the Agu family has no FERPA
4 rights, that the Agu family has no privacy rights implicated by this Petition, that the
5 Agu family has no standing to assert privacy rights or FERPA rights on behalf of Ted
6 Agu, that the disclosure of a UC campus police report does not violate FERPA, that
7 the Regents must disclose the 141-page campus police report within ten days of the
8 Court’s Order, that the Respondent must disclose within ten days all documents
9 related to the Agu Settlement Agreement unless otherwise privileged along with a
10 privilege log as to all documents it contends are privileged, and must provide
11 meaningful substantive statements that will clarify those lettered issues raised in
12 Exhibit 1 (Issues Index) within ten days of the Court’s Order if substantive responses
13 were not provided with Respondent’s Response to Petitioner’s Motion.” (Notice of
14 Motion [dated June 11, 2018].)

15 *The motion is premature.* On June 11, 2018, the same day Petitioner served this motion,
16 the Court issued its final ruling on the motion by The Regents Regarding the Suitability of a
17 Vaughn Index, which was heard on May 17, 2018. In the June 11 Order, two paragraphs before
18 the heading "NOTICE TO THIRD PARTIES" (which is at the end of the Order), the Court states:

19 “After the Regents produces the response on a category by category basis [which
20 the Order states is due “[o]n or before 8/1/18”], then petitioner can file a motion
21 regarding any categories that remain in dispute. The court can then address
22 whether the categories describe public records that are exempt under the CPRA’s
23 exemptions *or* the CPRA exemption including FERPA by reference.” (Order
24 dated June 11, 2018.) (Emphasis on “or” added.)

25 By its plain language, the Order does not anticipate Petitioner’s filing *any* motion – as to
26 either the FERPA exemption or any other exemption – until after The Regents has produced its
27 category by category response (due August 1, 2018).

28 Petitioner is basing the current motion on language which was in the Court’s Tentative

1 Ruling (issued in advance of the May 17, 2018, hearing) *but which was stricken* by the Court in
2 its final June 11, 2018, Order. The May 17, 2018, Tentative Ruling contained language which
3 permitted the parties to file a motion such as the one Petitioner served on June 11 (the same date
4 as the Court’s final order) and has calendared for August 1. The Tentative Ruling stated:

5 “Petitioner and/or the Regents could also file a preliminary motion on the legal
6 issues of whether FERPA and the student’s right of privacy survives a student’s
7 death and the related issues of whether the surviving parents have rights under
8 FERPA, whether, they can asserts [sic] their child’s privacy interest and whether
9 they have their own privacy interests. (Stmt filed 5/11/18 at 6:26.) It is unclear
10 why these are issues given that the Regents obtained a waiver from the family of
11 Ted Agu and subsequently released public records concerning him to petitioner.
12 (Goldstein Dec filed 3/27/18, para 9; Gordet Dec. filed 4/9/18, para 8.)”
13 (Tentative Ruling for May 17, 2018, Hearing.)

14 And Petitioner expressly based this motion, which he served on June 11, on the Court’s
15 language in the Tentative Ruling:

16 “[t]he purpose of this instant Motion is based on the Court’s invitation to either
17 party to ‘file a preliminary motion on the legal issues of whether FERPA and the
18 student’s right to privacy survives a student’s death and the related issues of
19 whether the surviving parents have rights under FERPA, whether they can assert
20 their child’s privacy interests and whether they have their own privacy interests.’
21 ” (Memo. at p. 5, lines 1-6)

22 But the Court did not include any of that language in its June 11 Order. It was stricken
23 from the Court’s final order dated June 11, 2018.

24 Moreover, as the Court expressly noted in that Tentative Ruling, “[i]t is unclear why these
25 are issues given that the Regents obtained a waiver from the family of Ted Agu and subsequently
26 released public records concerning him to petitioner.” (Tentative Ruling.) *The Regents agrees.*
27 The Agu documents were withheld on FERPA grounds, as well as privacy. The Agu family
28 waived its rights and consented to The Regents’ release of the Agu records, and The Regents

1 released them, as the Court noted in its Tentative Ruling. *Petitioner now has all of those records.*

2 Apart from the Agu “privacy” documents, the Motion refers to a 141-page police report.
3 The Regents will be addressing that request in its category-by-category response the Court has
4 ordered The Regents to provide by August 1. As to this issue as well, Petitioner’s Motion is
5 premature.

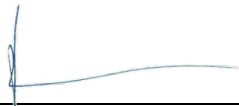
6 As explained in the attached Declaration of Michael R. Goldstein, and as documented in
7 Exhibit 1 to that Declaration, The Regents explained all of this to Petitioner upon receiving the
8 Court’s June 11, 2018, Order, including the fact that, by virtue of that Order, Petitioner’s Motion
9 was, and is, premature. The Regents asked Petitioner to take the Motion off calendar and not to
10 renew it until after Petitioner had received The Regents’ August 1 report. Petitioner declined.

11 Petitioner’s refusal was based, in part, on his belief that “the case should move forward
12 without further delay.” (Goldstein Declaration, Exh. 1, p. 1 of 7, top email.) Petitioner made
13 similar claims about “delay” in his CM-110 form filed on February 16, 2018, and, based on the
14 excerpted statement in Exhibit 1, The Regents suspects he will raise them again in his Reply
15 Brief. If he does so, then The Regents respectfully directs the Court’s attention to The Regents’
16 full and detailed responses to those claims of “delay” in its Opening Brief Re: Suitability of
17 Vaughn Index (filed March 27, 2018), especially at pages 1-8, as well as the supporting
18 declarations by Liane Ko, Carrie Schmidt, and Michael Goldstein attached to that Opening Brief.

19 For the foregoing reasons, The Regents respectfully requests that the Court deny the
20 Motion.

21 Dated: July 19, 2018

UNIVERSITY OF CALIFORNIA
OFFICE OF THE GENERAL COUNSEL

22
23
24 By:  _____
 Michael R. Goldstein

25
26 Attorneys for Respondent
 THE REGENTS OF THE UNIVERSITY
 OF CALIFORNIA

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DECLARATION OF MICHAEL R. GOLDSTEIN

I, MICHAEL R. GOLDSTEIN, declare:

1. I am an attorney in the Office of the General Counsel to The Regents of the University of California and responsible for the above-captioned litigation. Unless indicated otherwise, I have personal knowledge of the following facts, and if called as a witness I could and would testify competently to those facts.

2. On June 11, 2018, Roy Gordet, counsel for Petitioner, email served me Petitioner’s Motion re Privacy and all supporting documents. On June 21, 2018, I replied and told Mr. Gordet I thought the Motion was premature because it was calendared for August 1 but the Court gave The Regents until August 1 to provide Petitioner with its category-by-category response. I was out of the office when I sent that email on June 21 and unaware that the June 11 Order was received by my office that very day (June 21).


3. On June 25, when I returned to the office, I saw, for the first time, that our office received (on June 21) a copy of the Order dated June 11. Until I read the Order on June 25, I was unaware that the Court had issued it and it was my first opportunity to review it.

4. That same day, June 25, after I had an opportunity to examine the Court’s June 11 Order, and to compare it with the Tentative Ruling for the May 17, 2018, hearing, I emailed Mr. Gordet and tried to persuade Petitioner to drop the motion for the reasons explained in the Opposition attached to this Declaration. Mr. Gordet replied by email that he was unwilling to drop the motion.

5. Attached as Exhibit 1 is a true and correct copy of the email correspondence described above.

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

Executed on July 19, 2018, at Oakland, California.


Michael R. Goldstein

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PROOF OF SERVICE BY E-MAIL

(Code Civ. Proc., § 1013(g))

I, the undersigned, say: I am over 18 years of age, employed in Alameda County, California, and not a party to the subject cause. My business address is Office of the General Counsel, 1111 Franklin Street, 8th Floor, Oakland, California 94607-5200.

On July 19, 2018, I served the attached:

OPPOSITION TO MOTION RE PRIVACY RIGHTS AND SEEKING DISCLOSURE OF ALL AGU DOCUMENTS, OTHER DOCUMENTS NOT PROPERLY WITHHELD UNDER PRIVACY PRINCIPLES, DISCLOSURE OF THE 141-PAGE CAMPUS POLICE REPORT AND ALL DOCUMENTS RELATED TO THE AGU SETTLEMENT AGREEMENT; DECLARATION BY MICHAEL R. GOLDSTEIN

on the interested parties in this action by placing a true copy thereof and addressed as follows:

Roy S. Gordet, Esq.
The Law Office of Roy S. Gordet
235 Westlake Center, No. 452
Daly City, California 94015
Email: roy@copyrightdirection.com

Jonathan Hinnant
Fabiano Hale

NOTICE TO THIRD PARTIES

The court ORDERS the Regents to serve a copy of this order and copies of all future court filings by any party on J.D. Hinnant, Fabiano Hale, and Joe Mahalic or their legal representatives at their last known addresses. These third parties appear to be the real parties in interest regarding the privacy interests that the Regents is asserting. On the facts of this case it is therefore appropriate that they receive notice so that they have the opportunity to participate, to assert their privacy interest, or to waive their privacy interests.

(By **E-MAIL OR ELECTRONIC TRANSMISSION**) I caused the document to be sent to the person at the e-mail address listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on July 19, 2018, at Oakland, California.

Lissa Ly

EXHIBIT 1

From: Roy S. Gordet
To: [Michael Goldstein](#)
Cc: [Lissa Ly](#)
Subject: Requested Postponement of Aug 1 Hearing Date
Date: Friday, July 6, 2018 10:21:11 AM

Good Morning Michael,

Your newest arguments are unpersuasive and you have not come close to rebutting the various points raised in my last message explaining why a postponement is not appropriate and why Petitioner's motion is not premature. The issues related to privacy must be addressed and I do not understand why the Regents refuse to address them, except for the most obvious reasons. The Regents also contended that the Petition itself was premature so your claim on this ground lacks some credibility. The Court has made it clear that the case should move forward without further delay.

Dropping an express reference to a previously issued invitation that did not need to be a part of the final order is a far cry from a "revocation" of the Court's unequivocal statement that it wanted to know more from the parties on the privacy issues. As importantly, Petitioner does not require an invitation from the Court or from anyone else in order to file a motion.

Petitioner paid his money and Petitioner is entitled to a hearing on his motion on August 1.

Regards,
Roy

From: Michael Goldstein <Michael.Goldstein@ucop.edu>
Sent: Thursday, July 5, 2018 10:29 AM
To: Roy S. Gordet <roy@copyrightdirection.com>
Cc: Lissa Ly <Lissa.Ly@ucop.edu>; Michael Goldstein <Michael.Goldstein@ucop.edu>
Subject: RE: Requested Postponement of Aug 1 Hearing Date RE: Service of Notice of Motion re Privacy and Motion

Hi Roy-

I just reviewed the court's final order (dated June 11, 2018). I assume you saw it when you emailed me below on June 25, while my email to you, toward the bottom of this string, on June 21, was sent while I was out of the office and I was basing it on the tentative ruling, not the final order.

Now that I have read the final order, and re-read your papers, I can confirm that I believe your motion is premature and I ask that you re-notice it once we complete our production in accordance with the Court's August 1 deadline, should any remaining issues require such a motion.

THE ORDER EXPRESSLY DEFERS MOTION PRACTICE UNTIL AFTER AUGUST 1, 2018 AND EXPRESSLY REVOKED THE EARLIER TENTATIVE INVITATION TO FILE A "PRELIMINARY MOTION"

In the June 11 Order, two paragraphs before the heading "NOTICE TO THIRD PARTIES," the Court

states: "After the Regents produces the response on a category by category basis [which the Order states is due "[o]n or before 8/1/18"], then petitioner can file a motion regarding any categories that remain in dispute. The court can then address whether the categories describe public records that are exempt under the CPRA's exemptions *or* the CPRA exemption including FERPA by reference." (Emphasis on "or" added.) By its plain language, the Order does not anticipate Petitioner's filing any motion – as to either the FERPA exemption or any other exemption – until after The Regents has produced its category by category response (which may be up to the deadline of August 1, 2018).

The tentative ruling did contain language which permitted the parties to file a motion such as the one Petitioner served on June 11 (the same date as the Court's final order) and has calendared for August 1. The tentative ruling stated: "Petitioner and/or the Regents could also file a preliminary motion on the legal issues of whether FERPA and the student's right of privacy survives a student's death and the related issues of whether the surviving parents have rights under FERPA, whether, they can asserts [sic] their child's privacy interest and whether they have their own privacy interests. (Stmt filed 5/11/18 at 6:26.) It is unclear why these are issues given that the Regents obtained a waiver from the family of Ted Agu and subsequently released public records concerning him to petitioner. (Goldstein Dec filed 3/27/18, para 9; Gordet Dec. filed 4/9/18, para 8.)"

And Petitioner expressly based the motion he served on June 11 on the Court's language in the tentative ruling:

"[t]he purpose of this instant Motion is based on the Court's invitation to either party to 'file a preliminary motion on the legal issues of whether FERPA and the student's right to privacy survives a student's death and the related issues of whether the surviving parents have rights under FERPA, whether they can assert their child's privacy interests and whether they have their own privacy interests.'" (Memo. at p. 5, lines 1-6)

But the Court did not include any of that language in its June 11 Order.

Moreover, as the Court expressly noted in that tentative ruling, "[i]t is unclear why these are issues given that the Regents obtained a waiver from the family of Ted Agu and subsequently released public records concerning him to petitioner." The Regents agrees. The Agu documents were withheld on FERPA grounds, as well as privacy. When the Agu family waived FERPA rights, it consented to The Regents' release of the Agu records to Petitioner and we released them. You now have them all.

Roy, two questions: why, as the Court noted in its tentative ruling, is this still an issue given the fact that Petitioner now has all of the records The Regents withheld until the Agu family provided a waiver; and, equally importantly, why file this motion (or why not now take it off calendar) on the basis of an invitation the Court expressly revoked when it dropped the invitation "to either party to 'file a preliminary motion' " from the final ruling, dated June 11, which I assume you had it in your hand by the time you received my June 21 email and certainly by now?

Apart from the Agu "privacy" documents, you refer to a 141-page police report. I have seen the document I believe you are referring to. It is exempt under section 6254(f) and The Regents will log

it on any Vaughn Index the Court orders The Regents to provide.

Thanks,
Michael

Michael R. Goldstein
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receptionist (510) 987-9800
fax (510) 987-9757
<http://www.ucop.edu/general-counsel/>

-----Original Message-----

From: Michael Goldstein
Sent: Thursday, June 28, 2018 8:23 AM
To: Roy S. Gordet <roy@copyrightdirection.com>
Cc: Lissa Ly <Lissa.Ly@ucop.edu>; Michael Goldstein <Michael.Goldstein@ucop.edu>
Subject: RE: Requested Postponement of Aug 1 Hearing Date RE: Service of Notice of Motion re Privacy and Motion

Hi Roy-

Thanks for your response. I have been on travel all week and just got into my office and saw the court's final ruling from the May 17 hearing. The date stamp for my office shows it got to us on June 21 and for some reason it wasn't in my in-box by June 22, the last day I was in the office before today.

Anyway, it looks like there are a number of differences from the tentative ruling. I'm going to digest it after I finish a big filing due in another case tomorrow. I may have some further thoughts for you in response to your email immediately below after I've done that. Among other things, I see the new reference to notice to Mr. Mahalic and we'll be tracking down his whereabouts so we can serve him. Does Mr. Muchnick by any chance have any contact information for him? That could speed things up for us.

Thanks,
Michael

Michael R. Goldstein
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Office of the General Counsel
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direct dial (510) 987-9895

assistant (Lissa Ly) (510) 987-9935
receptionist (510) 987-9800
fax (510) 987-9757
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-----Original Message-----

From: Roy S. Gordet <roy@copyrightdirection.com>
Sent: Monday, June 25, 2018 12:33 PM
To: Michael Goldstein <Michael.Goldstein@ucop.edu>
Cc: Lissa Ly <Lissa.Ly@ucop.edu>
Subject: Requested Postponement of Aug 1 Hearing Date RE: Service of Notice of Motion re Privacy and Motion

Hi Michael,

Your request to postpone the hearing date schedule is not well-taken. I earnestly request that we keep the August 1 hearing date. There are various reasons that lead to this conclusion.

1. I re-read the pending Privacy Motion, line by line. I do not see how the completeness of the new search (based on the algorithm) would come into play as part of your response. The stated purpose in the brief is to address the privacy issues that the Court requested more guidance on, which is what I attempted to do. Hypothetically, if the Regents come up with any new documents based on the latest search, the privacy issues will be the same as what are raised in the pending motion, and everything will fall into place, one way or the other. Not to obscure the most important point: this pending Motion is not about the search terms, the new categories, or the completeness of what will be produced in your newest search, but it is intended to address the significant privacy issues. In the unlikely event there is some unanticipated spill-over, and you believe that you cannot in good faith respond to certain issues raised in the pending Motion because your disclosures are not yet completed, then those issues will be for another day. I am not foreseeing any such issues and if any there are, they will be very circumscribed.

2. This "problem", if it was ever a problem or ever existed before I filed the pending Privacy Motion, existed at the time the Court set the hearing date for August 1 to coincide with Respondent's deadline for producing the results of the newest search. Furthermore, if there are new issues for the Regents related to the search that overlap with this pending Motion, then the Regents would have been required to bring them before the Court at the Case Management hearing, which was apparently what the Court anticipated when it set the production date the same as the hearing date. I assume that you and I will need to prepare another Joint Statement in advance of the Case Management hearing, which I believe everyone knew at the time that we all, including the Court, set the August 1 hearing date to coincide with the production deadline. That is why I say that this problem existed at the time the Court set the hearing date to coincide with the document production deadline. I for one did not think that you were going to disclose an avalanche of documents within the week prior to August 1 – presumably responsive and disclosable documents will have come to light during the weeks-long search procedure and, as agreed by everyone at the last hearing, those documents will be produced on a "rolling basis". So, in actuality, to the extent that any new documents are discovered after the time that your response brief is due, it will probably be a small set of documents, assuming there are any documents at all that are newly discovered and must be disclosed.

3. I could have set the hearing on the Privacy Motion for much earlier than August 1 but was already seeking to maximize efficiency from a logistics standpoint and also not wanting to waste time attempting to coordinate everyone's schedule, including the Judge's. I knew everyone was available on this date. Because of this approach, you already have a whole lot of time to respond.

4. Of course, the Court's Tentative Ruling expressly anticipated a motion to address the privacy issues that would take place as soon as you or I filed such a motion. Apparently the Court believed that these privacy issues deserved airing without further delay and in any case also believed they are not inextricably tied to the categories issues or to the disclosure of any new documents coming out of your upcoming new search. As seen in the pending Motion, and I understand you have not yet sunk your teeth into it, we are very interested in answers to specific questions about why certain documents were or were not disclosed vis-à-vis privacy issues, and we are especially interested in the disclosure of a specific document that you still have not acknowledged exists despite evidence to the contrary, no less actually produced as part of the rolling production. It is unacceptable that the Regents refuses to disclose the campus police report if the Regents has it, and Petitioner is entitled to know why without any further delay. This non-disclosure of the campus police report has nothing to do with the results of the newest search based on the algorithm. Nor do you need the algorithm to locate this document, assuming the Regents has it.

5. Needless to say, this August 1 date is later than what Petitioner wanted, but based on your representations about staffing, I immediately, albeit begrudgingly, agreed to this late date. For the reasons stated above and below, this already agreed-upon later date should not be further pushed back.

6. In reliance on everyone's agreeing to the August 1 date, weeks after the date was set and actually after filing the pending Privacy Motion but before receiving your latest request, I purchased a ticket to Sydney, Australia leaving on August 4. I do not return until August 26. Thus, if the hearing date of August 1 were to be moved, the earliest possible date that could work would need to permit me to file our reply brief at least three court days after August 26, and the hearing date would be set in September, subject to the Judge's availability. It is not fair.

7. In light of all that is written above, if you still think that it will be in the interest of court and attorney efficiency to have everything, including any presently unknown issues, if any, related to the new disclosures or to the newest search, then I would suggest that what makes the most sense is for the Regents do what it deems necessary to complete the new search sufficiently in advance of August 1 if you believe there are any issues related to the search that need to be addressed in your response brief or in our joint statements. Let me hasten to add that within the four corners of the pending Privacy Motion I cannot foresee any such issues, so this entire discussion is out of bounds. Hopefully you will drop this request and proceed with what we all need to do in order to comply with the Aug 1 hearing on the Motion and the Case Management conference.

Best regards,

Roy

-----Original Message-----

From: Michael Goldstein <Michael.Goldstein@ucop.edu>

Sent: Thursday, June 21, 2018 12:09 PM
To: roy (roy@copyrightdirection.com) <roy@copyrightdirection.com>
Cc: Michael Goldstein <Michael.Goldstein@ucop.edu>
Subject: FW: Service of Notice of Motion re Privacy and Motion

Hi Roy-

I haven't started preparing our opposition to this but, at first glance, I wanted to let you know asap that I think it is premature and ask that you consider noticing it for a later date. Here's why: the Court gave us until August 1 to report to you. I understand that we were to release records to you on a rolling basis but the actual due date to be finished is August 1. Until we get to that date, we will not know (1) whether there are responsive documents (responsive to the 20 categories minus the 3 you withdrew), (2) whether any of them is exempt, and (3) whether any of the non-exempt has already been released to Mr. Muchnick. I may end up filing an opposition that says as much (viz., it's premature) and that will be a poor use of everyone's (including the Court's) time. If, instead, you notice this for a date that permits me a reasonable amount of time after our August 1 deadline to prepare an opposition that deals with the reality on points (1)-(3) above, then I think that will be a much better use of everyone's time.

Thanks,
Michael

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From: Roy S. Gordet <roy@copyrightdirection.com>
Sent: Monday, June 11, 2018 6:23 PM
To: Michael Goldstein <Michael.Goldstein@ucop.edu>
Cc: Lissa Ly <Lissa.Ly@ucop.edu>
Subject: Service of Notice of Motion re Privacy and Motion

Hi Michael,
I am by this email message and the next email message to be sent immediately following, serving the Regents with the following attachments:
Notice of Motion
Memorandum of Points & Authorities

To hopefully avoid server overload issues, I will send with the second message, the following

documents:

Declaration of Roy S. Gordet

Index of Exhibits

Exhibits 1 -4

Proof of Service

As you can see, I noticed the hearing date to coincide with the Case Management Hearing date, namely August 1. Seemed convenient for everyone and hopefully will avoid calendar conflicts. Seems as though you will have adequate time for your response.

We will also need to meet and confer in advance as part of the Case Management process and in preparing the Joint Case Management Statement, so perhaps we can discuss some of the issues raised in the Motion being filed today.

We anticipate receiving additional responsive documents from you before August 1, 2018.

In any case, if you have any questions, please do not hesitate to contact me.

Thanks.

Regards,

Roy

[\[cid:1AF77AEB-BD37-4863-A8E0-8B794A7C13EC@hsd1.ca.comcast.net.\]](mailto:roy@copyrightdirection.com)

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