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 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
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 14 **ELIZABETH MIRABELLI, an**  
**individual, and LORI ANN WEST,**  
 15 **an individual,**  
 16 Plaintiffs,  
 17 v.  
 18 **MARK OLSON, in his official**  
**capacity as President of the EUSD**  
 19 **Board of Education, et al.,**  
 20 Defendants.  
 21

3:23-cv-0768-BEN-VET

**REPLY TO PLAINTIFFS’  
 OPPOSITION TO *EX PARTE*  
 APPLICATION FOR A STAY OF  
 DISCOVERY PENDING RULING  
 ON MOTIONS TO DISMISS**

Courtroom: Courtroom 14B  
 Mag. Judge: The Honorable Valerie E.  
 Torres

Action Filed: April 27, 2023

22  
23 **INTRODUCTION**

24 In their opposition, Plaintiffs raise various arguments, but fail to adequately  
 25 address the two most critical considerations that this Court must assess. First,  
 26 though Plaintiffs believe jurisdiction against Defendants Newsom and Bonta is  
 27 appropriate, a “preliminary peek” at the pending motions to dismiss evidences at  
 28

1 least a “clear possibility” that one or both motions may be granted, which would  
2 dispositively eliminate one or both of these Defendants from the case.

3 Second, a brief stay of discovery, though capable of minimally lengthening the  
4 broader proceedings, does not prejudice Plaintiffs in any way because the  
5 preliminary injunction now in effect affords them the same relief they could expect  
6 to receive permanently following trial. On the other hand, a pause in discovery  
7 against Defendants Newsom and Bonta safeguards the Court and the parties from  
8 potentially unnecessary and wasteful expenditures associated with the discovery  
9 process. This Court should grant a brief discovery stay.

## 10 ARGUMENT

### 11 **I. THIS COURT HAS NOT PREVIOUSLY LITIGATED OR DECIDED THE** 12 **MERITS OF A STAY OF DISCOVERY PENDING DETERMINATION OF THE** 13 **PENDING MOTIONS TO DISMISS**

14 Plaintiffs initially contend that the instant application constitutes a request for  
15 reconsideration of a prior order of the Court. ECF No. 104 at 2. Specifically, they  
16 argue that this Court previously rejected the relief now sought when, in responding  
17 to the parties’ joint motion to continue a scheduled ENE conference, the Court set a  
18 new date for the conference (April 12, 2024) rather than continuing the conference  
19 indefinitely until after answers are filed by Defendants Newsom and Bonta. *Id.*; *see*  
20 ECF No. 92 at 5.

21 It should go without saying, however, that this Court has not considered or  
22 decided any of the arguments at issued in this stay application. Indeed, at the time  
23 the parties filed their joint motion to continue the ENE conference, the pending  
24 motions to dismiss that form the basis for Defendants Newsom and Bonta seeking a  
25 stay of discovery had not yet been filed. *See* ECF No. 92 at 3. The parties’ joint  
26 motion was based on the need for additional time for the newly added Defendants  
27 to file responsive pleadings and to formulate their broader litigating position so as  
28 to facilitate a more productive ENE conference. *Id.* Accordingly, this Court has

1 not and could not have previously considered the legal arguments now presented in  
2 support of a brief discovery stay pending determination of the motions to dismiss.<sup>1</sup>

3 **II. A LIMITED STAY OF DISCOVERY IS WARRANTED IN THE PRESENT**  
4 **CIRCUMSTANCES**

5 On the merits, Plaintiffs' arguments against a stay are unavailing. They first  
6 argue that Judge Benitez, in ordering them to amend their complaint to add the  
7 California Attorney General and State of California as defendants, essentially  
8 conducted the type of "preliminary peek" review that is now required and  
9 concluded that jurisdiction against these parties was proper. ECF No. 104 at 9-10.  
10 But that is nonsensical. Where a stay of discovery in light of a potentially  
11 dispositive motion is sought, the "preliminary peek" analysis is premised on *the*  
12 *existence of an actual pending motion*. *GTE Wireless, Inc. v. Qualcomm, Inc.*, 192  
13 F.R.D. 284, 286 (S.D. Cal. 2000); *Pacific Surf Designs, Inc. v. Whitewater West*  
14 *Industries, Ltd.*, No. 20-CV-1464-BEN-BLM, 2021 WL 3080061, at \*2 (S.D. Cal.,  
15 July 21, 2021). The Court must "take a preliminary peek at the merits of the  
16 allegedly dispositive motion to see if on its face there appears to be an immediate  
17 and clearly possibility that it will be granted." *GTE Wireless, Inc.*, 192 F.R.D. at  
18 286 (internal citation, quotation marks, and emphasis omitted).

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20 \_\_\_\_\_  
21 <sup>1</sup> Plaintiffs additionally submit that Defendants Newsom and Bonta's request  
22 for a stay of discovery should not have been submitted via *ex parte* application, but  
23 rather via a joint motion, which presumably would have noted Plaintiffs'  
24 opposition. ECF No. 104 at 2 (citing Hon. Valerie E. Torres, U.S. Magistrate  
25 Judge, Civil Chambers Rules, § XI (Feb. 20, 2024)). Given the urgent need for the  
26 requested relief in light of impending discovery-response deadlines, as well as the  
27 need for a separate memorandum of points and authorities in support of the stay  
28 application, Defendants Newsom and Bonta believed that an *ex parte* application  
was appropriate. To the extent a joint motion would have been more appropriate  
under the local rules, Defendants Newsom and Bonta submit that the *ex parte*  
application should nevertheless be considered and granted because it contains the  
same arguments and seeks the same relief as a joint motion would have. Moreover,  
despite Plaintiffs' formalistic objections, proceeding via *ex parte* application has  
not prejudiced Plaintiffs in any way. Not only did the *ex parte* application  
expressly acknowledge their opposition, but they were able to elaborate on their  
position through their formal opposition in response to the application. See ECF  
No. 103 at 3; 103-2 at ¶ 15; ECF No. 104<sub>3</sub>

1 Here, contrary to Plaintiffs’ arguments, the fact that Judge Benitez ordered the  
2 addition of the State of California and Attorney General as defendants in this case  
3 has absolutely no legal bearing on this Court’s “preliminary peek” review. Indeed,  
4 at the time of the district court’s order, Defendants Newsom and Bonta were not  
5 parties to the case and, of course, had not yet put before the Court the specific  
6 jurisdictional arguments raised in their motions to dismiss. That Judge Benitez may  
7 have initially believed (without briefing and argument by the relevant parties) that  
8 amendment of the complaint was worthwhile and that jurisdiction against these  
9 state-level defendants might be proper does not substitute for the type of  
10 substantive review of the actual arguments in the pending motions that is required.  
11 This Court must independently assess the pending motions to dismiss and  
12 determine whether there is a fifty percent chance or greater that one or both will be  
13 granted. *GTE Wireless, Inc.* 192 F.R.D. at 287 (a “clear possibility” means that a  
14 defendant’s motion is “nearly below but does not necessarily exceed a ‘fifty percent  
15 chance’ of success.”).<sup>2</sup>

16 In addition to the “clear possibility” that one or both of the motions to dismiss  
17 will be granted, the balancing of harms for granting or denying this application  
18 clearly weigh in favor of a stay. Plaintiffs argue that the burden of a stay would be  
19 “severe,” explaining that this case has been “lingering for a full year” and that the  
20 ongoing litigation has resulted in specific personal distress. ECF No. 104 at 11.  
21 But this is their lawsuit. Because Plaintiffs elected to bring their alleged

22 <sup>2</sup> It bears additional emphasis that Judge Benitez’s order explicitly required  
23 Plaintiffs to add the State of California, not Governor Newsom as a defendant.  
24 ECF No. 72. In electing instead to add Governor Newsom, Plaintiffs apparently  
25 recognized the obvious jurisdictional problems with suing California in federal  
26 court and sought to side-step those problems by naming Governor Newsom  
27 pursuant to the immunity exception articulated in *Ex parte Young*, 209 U.S. 123,  
28 155-57 (1908). As explained in the Governor’s motion to dismiss, Plaintiffs fail to  
substantiate an *Ex parte Young* exception, but for present purposes, the district  
court’s specific enumeration of the State of California, notwithstanding the  
indisputable jurisdictional problems with such an amendment, further illustrates  
that the Court’s order cannot be understood to have anticipated and rejected the  
jurisdictional arguments now raised in the pending motions to dismiss.

1 constitutional grievances to court, the necessary and ordinary byproducts of that  
2 voluntary choice cannot rate as substantial burdens. More importantly, as  
3 articulated in the application, and unaddressed by Plaintiffs, the preliminary  
4 injunction fully insulates Plaintiffs from experiencing the alleged injuries to their  
5 constitutional rights that form the basis for this lawsuit. Simply put, the  
6 preliminary injunction currently provides to Plaintiffs what they could expect to  
7 receive on a permanent basis if they were successful in an expedited trial. A short  
8 delay on discovery proceedings thus puts them in no worse place.

9 Yet a discovery stay will provide great benefit to the parties (including  
10 Plaintiffs) and the Court by forestalling the expenditure of resources on producing  
11 discovery and litigating discovery disputes where one or both Defendants Newsom  
12 and Bonta may be dismissed from the case. Plaintiffs make no attempt to address  
13 the burden on Defendants Newsom and Bonta that comes from producing discovery  
14 that may ultimately be rendered unnecessary. Instead, they simply point to the fact  
15 that the original Defendants to this lawsuit are in the process of engaging with them  
16 on discovery. ECF No. 104 at 11. But these original Defendants are not related,  
17 for discovery purposes, to Defendants Newsom and Bonta. Each may have  
18 different written discovery responses or different documents in their possession.  
19 Though Plaintiffs would prefer as a matter of “expense and efficiency” to procure  
20 all the discovery they seek from all Defendants at one time, ECF No. 104 at 11, the  
21 fact that each Defendant is an independent actor, with different roles in the public  
22 education system, undermines the argument that simultaneous discovery is  
23 necessarily more efficient. And, as stated, to the extent there is a “clear possibility”  
24 that one or both of the pending motions to dismiss will be granted, commencing  
25 with discovery against Defendants Newsom and Bonta at this premature stage is the  
26 opposite of efficient and cost-effective.

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**CONCLUSION**

For the foregoing reasons, the Defendants Newsom and Bonta respectfully request that the Court enter an order staying discovery as to them until after the Court decides the pending motions to dismiss.

Dated: April 4, 2024

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Case Name: Mirabelli et al. v. Olson, et al. No. 3:23-cv-0768-BEN-VET

I hereby certify that on April 4, 2024, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**REPLY TO PLAINTIFFS' OPPOSITION TO *EX PARTE* APPLICATION FOR A STAY OF DISCOVERY PENDING RULING ON MOTIONS TO DISMISS**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on April 4, 2024, at Sacramento, California.

Kevin L. Quade

Declarant

*/s/ Kevin L. Quade*

Signature