SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

REUTERS AMERICA LLC Plaintiff, vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA Defendants.	RG12-613664 ORDER (1) GRANTING IN PART PETITION FOR WRIT OF MANDATE ON FIRST REQUEST; (2) GRANTING IN PART PETITION FOR WRIT OF MANDATE ON SECOND REQUEST; (3) DENYING MOTION TO STRIKE; (4) GRANTING IN PART FOUR MOTIONS TO SEAL.

The Petition of Reuters America LLC ("Reuters") for a Writ of Mandate under the California Public Records Act ("CPRA") regarding the September 20, 2011, request, the Petition of Reuters for a Writ of Mandate regarding the March 14, 2012, request, the motion of Reuters to strike a reply brief, and four motions of the Regents of the University of California (the "Regents") to seal court records under C.R.C. 2.500 et seq. came on regularly for hearing on October 19, 2012, and again on December 7, 2012, in

Department 31 of this Court, Judge Evelio Grillo presiding. Petitioner appeared by counsel Karl Olson. Respondent appeared by counsel Michael Goldstein.[1]

The Court having considered the pleadings and arguments submitted in support of and in opposition to the motion, and good cause appearing, it is hereby ORDERED: (1) the Petition of Reuters for a Writ of Mandate regarding the September 20, 2011, request is GRANTED IN PART, (2) the Petition of Reuters for a Writ of Mandate regarding the March 14, 2012, request is GRANTED IN PART, (3) the motion of Reuters to strike a reply brief is DENIED, and (4), (5), (6), and (7) four motions of the Regents to seal court records are GRANTED IN PART.

EVIDENCE.

On a petition for a writ of mandate under the CPRA, the court makes factual findings based on its evaluation of the evidence. (*San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, 1409.) Where the evidence is in dispute or could support alternative factual findings, the court has weighed the evidence and made factual findings. The court has considered all the evidence and OVERRULES all evidentiary objections.

OVERVIEW.

The Regents[2], acting through the University of California, manages an investment portfolio of approximately $70 billion for its retirement plan. (Berggren Dec. ¶ 1.)

[1] Sequoia Capital and Kleiner Perkins Caufield & Byers were notified of this case on April 26, 2012, and again on October 15, 2012. Neither has filed a motion to intervene or otherwise indicated any intent to participate in the case.

Among its many investments, the Regents has historically invested approximately 2% of the retirement plan's money in private equity such as alternative investment vehicles that are offered by venture capital entities. (Berggren Dec., Exh A.) The venture capital entities obtain long term investment commitments to the alternative investment vehicles and only then do the managers of the alternative investment vehicles identify and invest in start up companies. (Lehmann Dec., ¶ 16-21.) Because alternative investment vehicles typically make early stage investments in privately held companies, it is frequently many years before an investment is profitable and during those years it is difficult to place a market value on the privately held companies and thus on the investment vehicles. (Lehmann Dec., ¶ 16-21; Berggren Dec., ¶ 33.) Venture capital entities typically consider information about their investment vehicles to be confidential. (Lehmann Dec., ¶ 16-21.)

In 2003, this court issued an order in a CPRA case directing the Regents to disclose information regarding the performance of alternative investment vehicles. (*Coalition of University Employees v. Regents, Alameda Superior Court*, Case No. RG03-089302, ("*CUE*").) The Regents sought relief at the Court of Appeal, which denied the petition on September 23, 2003, and sought review in the California Supreme Court, which denied review on September 30, 2003.

Following the *CUE* decision, Sequoia Capital ("Sequoia") and Kleiner Perkins Caufield & Byers ("Kleiner Perkins") threatened to expel the Regents from existing alternative investment vehicles and to exclude the Regents from investing in future

[2] The Regents of the University of California is a 26-member board established under Article IX, Section 9 of the California Constitution to organize and govern the university. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 889.)

vehicles if the Regents complied with the law and disclosed information about its investments. (Russ Dec., ¶ 3-4.) The Regents was motivated to negotiate because it considered Sequoia and Kleiner Perkins to be "top tier" venture capital entities.[3] The Regents ultimately entered into arrangements with Sequoia and Kleiner Perkins that permitted the Regents to maintain its investments in existing alternative investment vehicles but limited the information that the venture capital entities disclosed to the Regents. (Russ Dec., ¶ 4, 8-31.) Sequoia and Kleiner Perkins did, however, exclude the Regents from investing in any of their new investment vehicles. (Russ Dec., ¶ 5.)

In spring and summer of 2005, following both the order in *CUE* and the Regents' readjustment of its relationships with Sequoia and Kleiner Perkins, the Regents lobbied the legislature to enact a statute that would clarify what type of information public investment funds would need to disclose regarding their investments in alternative investment vehicles. (Olson Dec. ¶¶ 2-4.) The legislature enacted Gov't Code § 6254.26 in 2005 and it was effective January 1, 2006. The legislative findings included:

> (b) Public pension and retirement systems and public endowments and foundations have a fiduciary duty to invest the assets of these funds with care, skill, prudence, and diligence. ... Investment in high performing alternative investments is a component of diversifying the pension assets and maximizing the rate of return.
>
> (c) At the same time, a certain narrow class of public investments, alternative investments, involves some information that historically has been kept confidential because confidentiality is essential to their success.

[3] The Regents has in fact realized spectacular returns on some of its investments with Sequoia and Kleiner Perkins, such as those made in 1992, 1994, 1996, and 1998. (Berggren Dec., Exh. A; Lehmann Dec., Exh A, Appendix 1.) The Regents has also realized negative returns on other investments with those entities, such as those made in 1999 and 2000. (Berggren Dec., Exh. A.)

> The disclosure of certain information pertaining to alternative investments could be harmful to generating sustainable and profitable rates of return for the investments of the pension or retirement system and of the public endowment or foundation. ...
>
> (d) Following recent litigation seeking to require public pension funds and retirement systems and public endowments or foundations to disclose certain information about alternative investments, the funds risk being excluded from participation in certain alternative investments. Exclusion from investing pension or retirement system assets in alternative investments may impose substantial costs on state public pension funds and the public employees who are their beneficiaries.
>
> (e) It is the intent of this legislation to balance the public's right of access to information and the ability of public pension funds to continue to invest in alternative investment funds. It is also the intent of this legislation to allow the public to monitor the performance of public investments; for public bodies to avoid payment of excessive fees to private individuals or companies; and for the public to be able to know the principals involved in management of alternative investment funds in which public investment funds have invested so that conflicts of interest on the part of public officials can be avoided. ....
>
> (f) ... It is ... the intent of this legislation to establish predictability about what should and should not be disclosed regarding private equity funds so that public pension funds will be able to continue to invest in private equity funds.

(Section 1 of Stats.2005, c. 258 (S.B.439).)

Sequoia and Kleiner Perkins have not provided the Regents with individual fund level performance information since 2004. (Recker Dec., ¶ 4; Berggren Dec., ¶ 2.) The Regents did come into possession of some individual fund level information from Sequoia, but that was by mistake. (Recker Dec., ¶ 8; Berggren Dec., ¶ 25.) The Regents

obtains information about the Sequoia and Kleiner Perkins investment vehicles from Cambridge Associates, which has access to individual fund level performance information and aggregates it on a fund-year basis for use by the Regents in calculating bonuses. (Recker Dec., ¶ 32-35; Berggren Dec., ¶ 6, 8, 18.)

The First Amended Petition filed on March 26, 2012, seeks two categories of information from the Regents. First, the Petition concerns the September 20, 2011, CPRA request, in which Reuters sought "UC Commitment," "cash in," "current NAV," "cash out," the "aggregate, time weighted return" (the "Fund Level Information") for individual alternative investment vehicles that the Regents has with Sequoia, Kleiner Perkins, and Accel. (Petition, ¶ 8, Exh A). The Regents produced some Fund Level Information for Sequoia and Kleiner Perkins, and produced all the requested information for Accel.

Second, the Petition concerns the subsequent March 14, 2012, request in which Reuters sought information related to the the relationships between the Regents and either Sequoia or Kleiner Perkins. (Petition, ¶ 11-12, Exh C). By stipulation and order filed June 25, 2012, at para 1(e) and (f) the parties agreed that Reuters could receive and review documents responsive to the March 14, 2012, request and then seek disclosure of those documents under the CPRA. The court reviews this motion under the CPRA even though it is captioned as a motion to de-designate documents produced in discovery as "confidential."[4]

[4] If Reuters had obtained the documents in discovery and were seeking permission to disclose the documents, then the motion would be under C.C.P. §§ 2025.420(b)(13) and 2031.060(b)(5), and the court would consider only private concerns unless the discovery at issue implicated public health and safety. (*Westinghouse Electric Corp. v. Newman & Holtzinger* (1995) 39 Cal.App.4th 1194, 1208; *Marriage of Candiotti* (1995) 34 Cal. App. 4th 718, 722-723; *Clayworth v. Pfizer, Inc*. (Cal. Super. 2005) 2005 WL 4890291.)

The Regents filed three motions to seal documents in court files under CRC 2.550.

PETITION OF REUTERS FOR A WRIT OF MANDATE (I).

MERITS – PRELIMINARY ISSUES.

Fiduciary Duty to Mange Public Funds. Reuters is not asserting claims that the Regents breached any statutory or fiduciary duty to manage public funds when it decided to continue to invest public funds with Sequoia and Kleiner Perkins and agreed to receive aggregate rather than vehicle specific information about its investments. It is not material to the CPRA petition whether reasonable investors would want more information than the Regents currently receives from Sequoia and Kleiner Perkins. (Boslet Dec. ¶ 8; Schwartz Dec. ¶ 8.) The court evaluates whether the CPRA applies to the Fund Level Information on the facts as they exist, not on facts that could have existed if the Regents had made different decisions.

Lobbying for a New Statute. The Regents made certain representations to the legislature related to the enactment of Gov't Code § 6254.26. (Olson 8/31/12 Dec., Exh. A, B, and C.) The Regents' lobbying efforts are of limited relevance to statutory construction because persuasive legislative history concerns what the legislature intended rather than what interested parties urged on the legislature. (*American Tobacco Co. v. Superior Court* (1989) 208 Cal.App.3d 480, 488 ("the statement of a representative of a special interest group ... is ordinarily an unreliable indication of the purpose of legislation affecting the interests of that group"). See generally *Statutes and Statutory Construction*, Singer & Singer, 7th Ed. (2010), Section 13:18 ("Courts do not consider lobbying activity a useful source of information on which to base interpretations of general legislation.").)

The Regents is not contractually bound or estopped by any representations that it made to the California legislature in its lobbying. Legislation is not an agreement between the government and the persons who advocated for or against any specific piece of legislation. Gov. Code § 6254.26 applies equally to all "public investment funds" and does not apply differently to the Regents because the Regents lobbied for its enactment.

Further, the court does not give the Regents' lobbying efforts a special or different effect because it is a public entity. Executive branch departments, counties, cities, and other government entities lobby the legislature, and their lobbying efforts have the same legal effect as the lobbying efforts of business, consumer, environmental, or other interests. The court does give "great weight" to the administrative construction of a statute by the agency responsible for enforcing the statute (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1565), but deference to the post-enactment administrative construction of a statute as enacted is different from deference to pre-enactment lobbying communications regarding what an agency wants the legislature to enact.

Adapting to a New Statute. Following the *CUE* decision in 2003 the Regents entered into new arrangements with Sequoia and Kleiner Perkins that limited the information that Sequoia and Kleiner Perkins disclosed to the Regents. An entity is permitted to change its actions in response to new legislation or new case law. By analogy, persons are permitted to structure transactions to take lawful advantage of how the tax code is written. (*Ferguson v. C.I.R.* (9th Cir. 1999) 174 F.3d 997, 1006 ("there is a distinction between tax evasion (i.e., choosing an impermissible path) and tax avoidance (i.e., choosing the least costly permissible path)"); *In re Schlesinger* (Bkrtcy. E.D.Pa., 2002) 290 B.R. 529, 539 (similar).

MERITS - RES JUDICATA.

The 2003 decision in *CUE* has no res judicata or collateral estoppel effect. As a matter of law, "collateral estoppel will not be applied "to foreclose the relitigation of an issue of law covering a public agency's ongoing obligation to administer a statute enacted for the public benefit and affecting members of the public not before the court."" (*Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440, 452.) In addition, the *CUE* decision concerned whether the Regents had an obligation to disclose information based on the facts as they existed in 2003 whereas the current petition concerns a very different factual situation in 2012.

MERITS - INTERPRETING "PUBLIC RECORDS" UNDER GOVERNMENT CODE SECTION 6252(e).

The central legal issue presented is the definition of "public records" in Gov. Code § 6252(e), which states: ""Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." The Regents contends that "public records" includes only those writings that are *directly and actually* prepared, owned, used, or retained by government agencies. Reuters contends that "public records" also extends to writings that a government agencies can obtain or could have obtained to further the conduct of the public's business. The court's goal is "to ascertain and effectuate legislative intent" and does so using the text of the statute, and, if necessary, extrinsic aids to statutory construction. (*In re Lucas* (2012) 53 Cal.4th 839, 849.)

Gov't. Code § 6252(e) states that public records are documents "relating to the conduct of the public's business prepared, owned, used, or retained by" government entities. The use of the broad term "the public's business" and the four separate overlapping broad descriptors suggest that the legislature intended the definition of "public records" be read expansively. (*California State University v. Superior Court* (2001) 90 Cal.App.4th 810, 824-825.) The California Constitution also suggests an expansive reading. Cal. Const., Article I, section 3(b)(2) states, "A statute, court rule, or other authority, … shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."

Regarding legislative history, *Commission On Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal.4th 278, 288 fn 3, ("*CPOST*") states that the legislature intended a broad reading of "public records," quoting the following: ""This definition [of "public records"] is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed. Only purely personal information unrelated to 'the conduct of the public's business' could be considered exempt from this definition...." (Assem. Statewide Information Policy Com., Final Rep. (Mar.1970) 1 Assem. J. (1970 Reg. Sess.) appen. p. 9.)" The legislative history contains no indication that the legislature intended intended special meanings to the words prepared, owned, used, and retained. (Scannel Dec.)[5]

Gov't Code § 6253(c) states that public agencies have an obligation to produce "public records in the possession of the agency." *Consolidated Irr. Dist. v. Superior*

[5] The court gives no weight to the recollections of individuals regarding what they thought the legislature intended when it enacted the CPRA. (Bagley Dec.; Fazio Dec.)

Court (2012) 205 Cal.App.4th 697, 710, holds that "possession" means both actual and constructive possession. The court stated that "[f]or purposes of the Public Records Act, we conclude an agency has constructive possession of records if it has the right to control the records, either directly or through another person." The Court of Appeal reviewed a contract between the City and the contractor and found that the trial court's decision that the City was not in constructive possession of the subcontractor's documents was supported by substantial evidence.

Gov't Code § 6254.26 concerns the disclosure of "records regarding alternative investments in which public investment funds invest." The court finds no support for the proposition that if the Regents invests in alternative investment vehicles then for each such vehicle the information identified in section 6254.26(b) is "public records" as a matter of law. The statutory text and legislative intent do, however, support the proposition that if the Regents invests in alternative investment vehicles then the Regents has the obligation to obtain and disclose the information identified in section 6254.26(b).

Gov't Code § 6253.3 states, "A state or local agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter." That statute is directed to the situation where information is in "public records" and a third party seeks to limit disclosure. (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 775.) Section 6253.3 does not address the whether information is "public records" in the first instance.

Addressing the different, but related, issue of when a nongovernmental entity can fall within the definition of "public agency" in Gov't Code § 6252(d), *California State University v. Superior Court* (2001) 90 Cal.App.4th 810, 825-830, held that a University-

affiliated, nonprofit auxiliary corporation that collected private donations and planned to operate a $103 million multipurpose arena on a campus was not a "state agency." The court relied on the plain language of the statute and concluded that "a nongovernmental auxiliary organization is not a "state agency" for purposes of the CPRA." (*Id.*, 90 Cal.App.4th at 829.)[6]

The court can consider how the courts of other states have interpreted similar language in similar statutes. (*Martinez v. Enterprise Rent-A Car Co.* (2004) 119 Cal.App.4th 46, 55; *Aliberti v. Allstate Inc. Co.* (1999) 74 Cal.App.4th 138, 147.) The analysis of the courts of other states is useful in considering how the term "public record" is to be applied when government agencies contract with private entities to perform or provide services that are governmental in nature. (*News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser* (Fla. 1992) 596 So.2d 1029; *Hackworth v. Board of Educ. for City of Atlanta* (Ga.App. 1994) 447 S.E.2d 78; *Henry v. Taylor* (Idaho 2012) 152 Idaho 155; *Idaho Conservation League, Inc. v. Idaho State Dept. of Agriculture* (Idaho, 2006) 143 Idaho 366; *Gannon v. Board of Regents* (Iowa 2005) 692 N.W.2d 31; *State ex rel. Guste v. Nicholls College Foundation* (La. 1990) 564 So.2d 682; *Pathmanathan v. St. Cloud State University* (Minn.App.,1990) 461 N.W.2d 726; *Evertson v. City of Kimball* (Neb. 2009) 767 N.W.2d 751; *Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y.* (N.Y. 1995) 87 N.Y.2d 410; *State ex rel. Cincinnati Enquirer v. Krings* (Ohio 2001) 758 N.E.2d 1135; *Clarke v. Tri-Cities Animal Care & Control Shelter* (Wash. App. Div. 3, 2008) 181 P.3d 881.) The California Constitution and Public

[6] In *California State University*, both the University and the private entity were in possession of the information, so the court compelled the University to produce the information and held that the private entity was not required to produce the information. (*Id.*, 90 Cal.App.4th at 836.)

Records Act suggest that the California legislature would share many of the same concerns articulated by the courts of other states.

Considering the text of Gov. Code § 6252(e) and the tools of legislative interpretation identified above, the court holds that "public records" includes both (1) writings relating to the conduct of the people's business that are directly prepared, owned, used, or retained by government agencies and (2) writings relating to the conduct of the people's business over which government agencies have actual or constructive possession.

The court reads "prepared, owned, used, or retained" as meaning that the government agency at issue must have directly prepared, owned, used, or retained the documents in question. This reading gives effect to the common meaning of those words. (Civil Code § 1644; *California State University*, 90 Cal.App.4th at 829.)

A public agency also has an obligation under Gov't Code § 6253(c) to produce public records in its constructive possession. (*Consolidated Irr. Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, 710.) This extension of the scope of what information must be produced is appropriate both because it is in the statute and also because if a state agency outsources "the conduct of then people's business," then private entities become the functional equivalent of public agencies. This is consistent with the law that the definition of "public records" is intended to cover every conceivable kind of record that is involved in the governmental process, that exemptions are to be construed narrowly, and that it does not matter where a document is kept. (*CPOST*, 42 Cal.4th 278, 288 fn 3 and 291.) This definition also yields practical results comparable to those in most of the out-of-state cases.

MERITS – IS THE INFORMATION WITHIN THE DEFINITION OF "PUBLIC RECORDS"?

The court divides the documents at issue into three categories: (1) Fund Level Information: (2) Forms K-1; and (3) the Regents' internal trade tickets.

Fund Level Information. The Regents has demonstrated that it did not directly "prepare" and does not directly "own" or "retain" post-2003 Fund Level Information concerning investments with Sequoia and Kleiner Perkins. Sequoia and Kleiner Perkins have not provided the Regents with individual fund level performance information since 2003. (Recker Dec., ¶ 4; Berggren Dec., ¶ 2.) The Regents did come into direct possession of some individual fund level information from Sequoia, but the Regents has demonstrated that this was a mistake. (Recker Dec., ¶ 8; Berggren Dec., ¶ 24-25; Goldstein Dec., ¶ 15.)

The Regents has demonstrated that it has not "used" Fund Level Information directly. The Regents has received aggregated information from Cambridge Associates, which has access to individual fund level performance information and aggregates it on a fund-year basis for use by the Regents in calculating bonuses. (Recker Dec., ¶ 32-35; Berggren Dec., ¶ 6, 8, 18.) This derivative use of Fund Level Information is not the direct "use" envisioned by the statute.

The Regents has not, however, demonstrated that the Fund Level Information does not relate to the conduct of the people's business or that it does not have constructive possession of that information.

The "public's business" includes the monitoring of the performance of public investments, monitoring the fees paid to private individuals or companies, and knowing who is involved in management of alternative investment funds. This definition of the public's business in this context is driven by the legislature's statement in the enactment of Gov't Code § 6254.26. The legislature stated:

> It is ... the intent of this legislation to allow the public to monitor the performance of public investments; for public bodies to avoid payment of excessive fees to private individuals or companies; and for the public to be able to know the principals involved in management of alternative investment funds in which public investment funds have invested so that conflicts of interest on the part of public officials can be avoided.

(Section 1 of Stats.2005, c. 258 (S.B.439), ¶ (e).)

The "public's business" is the Regents's decision to place the public's money in specific investments and its monitoring of those investments. The court does not hold or intend to imply that "public's business" extends to how an investment in turn manages its business. On the facts of this case, the court does not hold that Sequoia and Kleiner Perkins are engaged in the "public's business" when they determine how alternative investment vehicles will allocate their money among individual companies and then provide advice and counsel to those individual companies. If the Regents were to invest in the stock of a publically traded corporation (Intel, Bank of America, Nike, etc.), it is unlikely that the company would be conducting the public's business even though the company's board of directors would be managing the company to increase the investment return for the Regents and all other shareholders. The Regents would, however, be

conducting the public's business when it reviewed prospectuses (SEC Forms S-1), made investment decisions, and monitored performance (SEC Forms 10-Q and 10-K) .

The Regents might have constructive possession of the Fund Level Information. The Regents has contractual rights to obtain Fund Level Information under the Limited Partnership Agreements. (E.g. Sequoia 2010, section 6.1 (a), (b) and (c) (UCRT 711); Kleiner Perkins VI, sections 4.8, 4.9, and 4.10 (UCRT 15).)[7] (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 775 ("under the express terms of the contract" the City "retained the power and duty to monitor the Disposal Company's performance of its delegated duties").) The Regents' contractual rights might be restricted elsewhere in the Limited Partnership Agreements (E.g. Sequoia 2010, section 6.12(f) (UCRT 715)) or in Side Agreements, but on the face of the Limited Partnership Agreements the Regents has a colorable right to information. In addition, the Regents might have rights to information under pertinent statutes. (E.g., Cal. Corp. Code § 15634; 5 Del. Code § 17-305; Cay. Is. Exempted Limited Partnership Law § 12(a).)

Forms K-1. The Regents owns, retains, and uses Forms K-1 relating to the Regents' investments with Sequoia and Kleiner Perkins. (Regents Brief at 7:16-18; Recker Dec. ¶ 36-43.)

The Regents' internal trade tickets. The Regents owns, retains, and uses the trade tickets that it prepared regarding its investments with Sequoia and Kleiner Perkins. (Recker Dec. ¶ 45.)

[7] On October 19, 2012, Reuters and the Regents filed record citations identifying relevant contract provisions.

MERITS – MUST THE REGENTS PRODUCE THE INFORMATION THAT IS "PUBLIC RECORDS."

Fund Level Information. Assuming that the Regents can obtain the Fund Level Information, it is not exempt from disclosure. If the Regents has constructive possession of any Fund Level Information then the Regents must obtain that information and disclose it to the public. (Gov't Code § 6254.26(b).)

The text of Gov't Code § 6254.26 and the statement of legislative intent (Section 1 of Stats.2005, c. 258 (S.B.439) strongly suggest that if a public pension fund invests in an alternative investment vehicle then the public pension fund is required to obtain and disclose the information identified in Gov't Code § 6254.26(b). The legislature can constitutionally condition the ability of the Regents to invest public money on making public disclosures related to those investments. Although the Regents is granted substantial autonomy under Article IX, section 9 of the California Constitution (*San Francisco Labor Council v. Regents of the University of California* (1980) 26 Cal.3d 785, 788-789), section 9(a) states that the Regents is "subject [] to such legislative control as may be necessary to insure the security of its funds ... and purchasing of materials, goods, and services."

Forms K-1. The September 20, 2011, request seeks types of information rather than documents, so the question is whether the Forms K-1 contain any of the requested information. The Forms K-1 are tax schedules, and tax accounting and reporting is different in purpose and character from financial reporting. (*General Mills v. Franchise Tax Bd.* (2009) 172 Cal.App.4th 1535, 1547 ("Financial and tax accounting have 'vastly different objectives.'").) The Regents has met its burden of demonstrating that the Forms

K-1 do not include any of the information requested in the September 20, 2011, request. (Recker Dec. ¶ 36-43; Kerridge Dec.)

The March 14, 2012, request, however, makes requests for documents that are broad enough to include the Forms K-1. The forms K-1 are exempt from disclosure under Gov't Code § 6255(a) because they are equivalent to 1040 forms and therefore protected under the balancing test as informed by statutes and case law on the privacy of tax returns. (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 719-720; Fam. Code § 3552(c).)

The Regents' internal trade tickets. The September 20, 2011, request seeks types of information rather than documents, so the question is whether the trade tickets contain any of the requested information. The trade tickets "are internally-generated documents that the Treasurer's Office maintains for each fund." (Recker Dec. ¶ 45.) The Regents creates the trade tickets for internal accounting purposes and, because it has only blended aggregate information from Sequoia and Kleiner Perkins, the Regents assigns data to its internal trade tickets for individual funds "in a somewhat random, and therefore artificial manner." The Regents does this because its computers cannot generate reports unless there is data in the data fields and the Regents therefore assigns the trade ticket numbers "only as "place holders'" so it can generate reports. The Regents then aggregates the "artificial" individual fund data to produce blended aggregate firm-wide information about Sequoia and Kleiner Perkins and uses that aggregate information to evaluate the venture capital firms. (Recker Dec. ¶ 45.) The Regents has demonstrated that the trade tickets are interim internal accounting entries, and has therefore met its burden of demonstrating that the trade tickets do not include any of the requested information.

The March 14, 2012, request, however, makes requests for documents that are broad enough to include the trade tickets. The trade tickets are not exempt from disclosure under Gov't Code § 6255(a), which requires the Regents to demonstrate that "the public interest served by not disclosing the records and other information withheld clearly outweighs the public interest served by disclosure" of those materials. (*American Civil Liberties Union of Northern Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 68.) The legislature has determined that the public has a strong interest in the information listed in section 6254.26(b), and internal inaccurate accounting entries are not on the list. In addition, as a general matter "The public interest is not served by disclosing potentially inaccurate information." (*Coronado Police Officers Ass'n v. Carroll* (2003) 106 Cal.App.4th 1001, 1014.) There is, however, an equally weak interest in withholding the information. The trade tickets do not directly reflect confidential information provided by Sequoia or Kleiner Perkins and the information is known to be inaccurate. Weighing the equally weak interests, the court finds that the Regents has not met the "clearly outweighs" standard and therefore the trade tickets are not exempt.

MERITS – CONCLUSION

The Petition for a writ of mandate directing the Regents to produce information responsive to the September 20, 2011, request is GRANTED IN PART.

The court will direct the clerk to issue a writ that directs the Regents to make an objectively reasonable effort to obtain Fund Level Information responsive to the September 20, 2011, request. The court notes that in this context, "objectively reasonable effort" might be based on what the legislature would consider to be a reasonable effort rather than on what an institutional investor or "reasonable person" would consider to be

reasonable. The court will not direct the Regents' exercise if its discretion, but will evaluate the objective reasonableness of its efforts in the context of the return on the writ. After the Regents has demonstrated an objectively reasonable effort to obtain the information (and may have additional information in its possession), the court anticipates directing the clerk to issue a writ that directs the Regents to make public production of the Fund Level Information responsive to the September 20, 2011, request.

The court cannot direct the clerk to issue a writ that requires Sequoia and Kleiner Perkins to provide information to the Regents or to disclose information under the CRPA. Sequoia and Kleiner Perkins are not parties to this action and, in addition, are not "public agencies" subject to the CPRA. (*California State University v. Superior Court* (2001) 90 Cal.App.4th 810, 825-830.)

The court will direct the clerk to issue a writ that the Regents must produce its internal trade tickets on or before March 11, 2013.

PETITION OF REUTERS FOR A WRIT OF MANDATE (II).

MERITS – IS THE INFORMATION "PUBLIC RECORDS"?

Reuters seeks the disclosure of certain of the documents that the Regents produced in response to March 14, 2012, request. The Regents has produced these documents and acknowledges that they are "public records."

MERITS – FRAMEWORK FOR REVIEWING THE INFORMATION.

Application of Gov't Code § 6254.26 to Documents Created Before January 1, 2006. Gov't Code § 6254.26 applies to all information that existed as of and was created after January 1, 2006, and not just to information that was created on or after January 1,

2006. The court starts with the general presumption that "statutes operate prospectively only" and "that legislation must be considered as addressed to the future, not to the past." (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840.) Section 6254.26 applies prospectively in that it determines public access to government records in any CPRA request made after January 1, 2006.[8] The court has not located any authority on the subject, but is fairly confident that when the CPRA was enacted in 1968 it applied prospectively to all records requests made after enactment and applied to all previously created government records as of the date of enactment.

> Regarding retroactivity, the bill enacting Gov't Code § 6254.26 states:
>
> (f) It is not the intent of this legislation to overrule or invalidate any court orders in or stipulated resolutions of prior litigation relating to any public entity's obligation to disclose information about its alternative investments to narrow the information disclosed as a result of those decisions, or in any other way to apply retroactively. It is, rather, the intent of this legislation to establish predictability about what should and should not be disclosed regarding private equity funds so that public pension funds will be able to continue to invest in private equity funds.

(Section 1 of Stats.2005, c. 258 (S.B.439), ¶ (f).) The first sentence states that the legislation will not supersede any existing court order or agreement to disclose information. The court reads the phrase "or in any other way to apply retroactively" in the context of the first sentence and limits it to public agency obligations to disclose documents that existed as of December 31, 2005. (*California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 189.) The second

[8] On the facts of this case the court does not need to address whether section 6254.26 applies to *requests* made after January 1, 2006, or to *responses* due after January 1, 2006.

sentence states that the legislature is seeking "to establish predictability," and it furthers predictability to have section 6254.26 apply equally to all documents subject to CPRA requests made on or after January 1, 2006..

Interpretation of Gov't Code § 6254.26. Gov't Code § 6254.26 facially identifies two categories of information: (1) fund specific information identified in section 6254.26(a) that is exempt from disclosure and (2) fund specific information identified in section 6254.26(b) that must be disclosed. This case raises the legal issue of whether public records relating to public investments in alternative investments not expressly identified in either section 6254.26(a) or (b) are subject to the CPRA generally or are implicitly within the exemptions in section 6254.26(a). There is no case law applying or interpreting Gov't Code § 6254.26.

The court could give effect only to the listed exceptions in section 6254.26(a) and construe those exceptions narrowly. This would give effect to the statute's text, which limits the exemptions to "the following records" rather than to all records that refer or elated to alternative investments. This would also be consistent with the statutory construction doctrine of *expressio unius est exclusio alterius,* "'the expression of certain things in a statute necessarily involves exclusion of other things not expressed.'" (*Blue v. City of Los Angeles* (2006) 137 Cal.App.4th 1131, 1142), and that CPRA exceptions to be read narrowly (Cal. Const., Article I, section 3(b)(2); *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1261.) Under this approach, public records relating to public investments in alternative investments not expressly identified in either section 6254.26(a) or (b) would be subject to the CPRA generally.

In the alternative, the court could read the exceptions in section 6254.26(a) broadly. This would give effect to section 6254.26's structure, which identifies two categories: (a) records not subject to disclosure and (b) information to be disclosed. The two category structure of the statute suggests that information regarding public investments in alternative investments must be in one category or the other. A broad reading of the exemptions would give effect to the legislature's indication that disclosure of the information listed in section 6254.26(b) is sufficient to permit the public to monitor the investments while permitting public funds to continue to invest in alternative investments. (Sections 1(e) and (f) of Stats.2005, c. 258 (S.B.439).) To the extent the legislature's intent in enacting section 6254.26 is inconsistent with the pro-disclosure purpose of the CPRA as a whole, the court could follow the principle that where a general statute and a more specific statute are in conflict the court should give effect to the more specific statute. (*Schelb v. Stein* (2010) 190 Cal.App.4th 1440, 1448.) Finally, the legislature's inclusion of only the six express exceptions in section 6254.26(a) is not dispositive because "[t]he maxim *expressio unius est exclusio alterius*, "while helpful in appropriate cases, 'is no magical incantation, nor does it refer to an immutable rule. Like all such guidelines, it has many exceptions.... More in point here, however, is the principle that such rules shall always " 'be subordinated to the primary rule that the intent shall prevail over the letter.' " '" (*In re P.A.* (2012) 211 Cal.App.4th 23, 36 fn10.)

The court will limit section 6254.26(a) to the identified exceptions and will read those exceptions narrowly. This reading is consistent with the California Constitution (Cal. Const., Article I, section 3(b)(2). (*Singh v. Superior Court* (2006) 140 Cal.App.4th 387, 393 ("wherever possible, 'we will interpret a statute as consistent with applicable

constitutional provisions, seeking to harmonize Constitution and statute.'").) This reading is also consistent with the text of the statute, which is the primary source of legislative intent. If the legislature had determined that excluding all records regarding public investments in alternative investments from the CPRA (except the section 6254.26(b) information) was the price to pay for continued public investments in in alternative investments, then it could have stated so expressly and identified the six listed categories in section 6254.26(a) as examples.

Gov't Code § 6254.26 therefore identifies three categories of information: (1) fund specific information identified in section 6254.26(a) that is exempt from disclosure; (2) fund specific information identified in section 6254.26(b) that must be disclosed; and (3) information not identified in either section 6254.26(a) or (b) that is subject to the CPRA generally. Each document is in one of these three categories.

Scope of Gov't Code § 6254.26(a)(1), (2), and (6). The court construes the exceptions narrowly, giving effect to section 6254.26(a)'s identification of six discrete categories of documents.

Gov't Code § 6254.26(a)(1) states that "Due diligence materials that are proprietary to the public investment fund or the alternative investment vehicle" shall not be subject to disclosure. The court holds that this includes prospectuses and other offering materials prepared by the keeper of the information similar to Form S-1 filings with the S.E.C. This does not include the derivative evaluation and analysis of government agencies, although that deliberation might be otherwise exempt.

Gov't Code § 6254.26(a)(2) states that "Quarterly and annual financial statements of alternative investment vehicles" shall not be subject to disclosure. The court holds that this includes financial statements prepared by the keepers of the information, any re-publication of specific financial information, and any derivative evaluation and analysis of government agencies that reveals specific financial information.

Gov't Code § 6254.26(a)(6) states that "Alternative investment agreements and all related documents" shall not be subject to disclosure. The court holds that "Alternative investment agreements" refers to limited partnership agreements and similar agreements, but does not refer to any agreement entered into with a private equity fund, venture fund, or similar fund. Section 6254.26(a)(6) includes executed agreements, drafts of agreements, and correspondence and other documents that reveal the specific content of the agreements. 6254.26(a)(6) does not include correspondence concerning enforcement of an agreement unless it reveals the agreement's terms with specificity, and even then the specific terms could be redacted and the remainder of the document produced.

Application of Gov't Code § 6255(a). If information cannot be placed into a Gov't Code § 6254.26(a) or (b) category, then the Regents asserts that the information is exempt from disclosure under Gov. Code § 6255(a). This section states that a government agency may justify withholding any record by demonstrating "that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Because disclosure is favored, all exemptions are narrowly construed, and "[t]he agency opposing disclosure

bears the burden of proving that an exemption applies." (*American Civil Liberties Union of Northern Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 67.)

Application of Gov't Code § 6255(a) to communications between Regents and Sequoia or Kleiner Perkins – Protecting the Relationships. The Regents seeks to maintain the confidentiality of its communications with Sequoia and Kleiner Perkins. The Regents has not asserted that there is a direct public interest in the confidentiality of the information. Rather, the Regents asserts that Sequoia and Kleiner Perkins consider the information as confidential, that the Regents values its relationships with Sequoia and Kleiner Perkins, and that as a result there is a public interest in preserving the confidentiality of the information.[9] The Regents has not demonstrated that the public interest in permitting the Regents the opportunity to make investments with Sequoia and Kleiner Perkins "clearly outweighs" the public interest in public review of communications between public pension funds and investment vehicles. Documents reflecting communications between the Regents and either Sequoia and Kleiner Perkins are presumptively public.

The court's balancing is based on the stated intent of Gov't Code § 6254.26. Public disclosure of the public's business is a significant public goal, and section 6254.26 is designed to allow the public to monitor the performance of public investments, to monitor fees, and to monitor potential conflicts. Making a good return on pension fund investments is also a significant public goal. The stated legislative weighing and the

[9] Neither Sequoia nor Kleiner Perkins has appeared or provided any support for the Regents' derivative assertion of their implied claim that the Fund Level Information includes trade secrets and is exempt from disclosure under Gov't Code § 6254(k) incorporating Evidence Code § 1060. At the court's direction, Reuters notified Sequoia and Kleiner Perkins of this case on April 26, 2012, and again on October 15, 2012.

resulting disclosure obligations in Gov't Code § 6254.26 demonstrate that the legislature values the certainty of public oversight over the less certain potential for higher investment returns from opaque investment vehicles.[10]

This balancing of the public interest is contrary to the Regents' strenuous argument that it is in the public interest that it be permitted to communicate in confidence with Sequoia and Kleiner Perkins and thereby be permitted by those entities to invest in their alternative investment vehicles. (Berggren Dec., ¶ 22.) The Regents bases its argument on two propositions. First, the Regents has realized spectacular returns on some of its investments with Sequoia and Kleiner Perkins and plausibly would have realized significant returns on investments with Sequoia and Kleiner Perkins from 2004 to the present if it had not been excluded from their new investment vehicles. Second, the Regents asserts that the successful venture capital firms of the past decades will likely be the successful venture capital firms for future decades. (Yasuda Dec.) This is plausible, as venture capital firms appear to be similar to universities in that a combination of talented and creative individuals tends to attract more talented and creative individuals and perpetuate a successful entity.[11]

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[10] The legislature might be risk averse regarding the investment of public funds in opaque entities. Although Sequoia and Kleiner Perkins may appear today to be top tier investment firms that are likely to generate above average returns, the private investment firms of Bernard L. Madoff Investment Securities LLC and Stanford Financial Group also generated superior returns for their investors before they collapsed. (*In re Enron Corp. Securities Litigation* (S.D.Tex. 2002) 206 F.R.D. 427, 454 (noting that "the Regents purchased more than two million shares of Enron common stock and lost more than $144 million").

[11] It is also true that venture capital firms are comprised of individuals who can leave and start their own firms (Cal. Bus & Prof. Code § 16600) and that venture capital entities are

The legislature was, however, presumably aware of these two propositions when it enacted section 6254.26. Addressing those two propositions indirectly, the statement of legislative intent states "Investment in high performing alternative investments is a component of diversifying the pension assets and maximizing the rate of return." (Section 1 of Stats.2005, c. 258 (S.B.439).) Nevertheless, the legislature did not direct public pension funds to make only the required section 6254.26(b) disclosures and permit them to keep all other information regarding alternative investments from public view.

Application of Gov't Code § 6255(a) to communications between Regents and Sequoia or Kleiner Perkins – Confidential Information. Confidential business or investment information is protected generally by section 6255(a) and specifically by section 6254(k) incorporating Evid. Code § 1060. (*Uribe v. Howie* (1971) 19 Cal.App.3d 194, 206-207.) In determining whether a public record contains confidential information, the court will consider whether the information was protected by "efforts that are reasonable under the circumstances to maintain its secrecy." (Civil Code 3426.1(d)(2).) The court will consider factors such as identifying documents as "confidential," limiting access to the documents on "need to know basis," controlling distribution of documents, and the use of confidentiality agreements. (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 306-308; *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1454.) The confidentiality warning that is affixed to the conclusion of many e-mails does not, without more, suggest a contemporaneous concern with the confidentiality of a specific communication. (*Thiesing v. Dentsply Intern., Inc.* (E.D. Wis. 2011) 2011 WL

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not immune from the creative forces of competition. "Past performance is no guarantee of future results." (*Hamilton v. Lanning* (2010) 130 S.Ct. 2464, 2480.)

4017968 at *10; *Mattel, Inc. v. MGA Entertainment, Inc.* (C.D. Cal. 2010) 2010 WL 3705902 at *4.)

Application of Gov't Code § 6255(a) to the Regents' Internal Deliberative Process. The courts have applied section 6255(a) to exclude from public review materials the disclosure of which "would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1342.) "[F]or materials to be exempt from disclosure under the deliberative process privilege, the agency must show that its decision is both (1) predecisional and (2) deliberative." (*American Civil Liberties Union of Northern Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 76.) "Not every disclosure which hampers the deliberative process implicates the deliberative process privilege. Only if the public interest in nondisclosure clearly outweighs the public interest in disclosure does the deliberative process privilege spring into existence." (*Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1128.) The public disclosure of predecisional deliberative information could chill the deliberative process inside the Regents. Documents reflecting internal deliberations are arguably, but not presumptively, confidential.

Application of Gov't Code § 6255(a) to Older Information. When balancing the public interests under section 6255(a), the court considers the length of time between the creation date of the material to be disclosed and the date of the proposed disclosure. There is a public interest in the prompt disclosure of information that might affect current public discourse. (Gov't Code § 6258 (CPRA claims are to be resolved "at the earliest possible time.").) In addition, where there is a public interest in maintaining the

confidentiality of information, the strength of that interest decreases over time because the threat of disrupting sensitive deliberations or disclosing information of commercial value decreases as the information becomes dated and stale. (*Koch v. Greenberg* (S.D.N.Y. April 13, 2012) 2012 WL 1449186 at *4 ("where commercially sensitive information is stale, this can undermine the party's (or non-party's) claim that disclosure will create a competitive disadvantage."); *Clark v. Prudential Ins. Co. of America* (D.N.J. May 13, 2011) 2011 WL 1833355 at *3, 4 ("As a general rule, business information that is substantially out of date is unlikely to merit protection").)

The court will presume, absent specific evidence to the contrary, that information more than seven years old is stale and no longer has significant commercial or other value. (Penal Code § 832.5(b) and Evid. Code § 1045(b)(1) (requiring retention of complaints and limiting discovery of complaints about police to five years before incident); 15 USCA § 1681c(a)(4) (credit reports precluded from reporting charge offs more than seven years old).) The court's selection of seven years for presumptive staleness is case specific. (Compare *Avtel Services, Inc. v. United States* (Fed. Cl. 2006) 70 Fed.Cl. 173, 191 (FOIA case finding information stale at five years, and collecting cases where courts found information stale at one, three, five, and three to eight years).

The most material specific evidence regarding the confidentiality of information is the terms of the Limited Partnership Agreement (UCRT 00001-1386 and 1745-1785.) These agreements concern confidentiality among contracting parties, but a government entity in its role as a contracting party cannot limit its disclosure obligations as a public entity under the CPRA. (Gov't Code § 6253.3; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 775.) The generalized evidence presented by the Regents

regarding how venture capital entities operate generally and that they generally consider information to be confidential is not "specific evidence," as it is not specific either to the concerns of Sequoia and Kleiner Perkins and it does not differentiate among the many types of information that are at issue.

The Regents argues that information over seven years old is currently confidential because Sequoia and Kleiner Perkins consider the old information to be confidential. The Regents does not argue that the information has any independent current commercial value. The Regents' only current interest in the non-disclosure of the information is that disclosure might lead to the termination of the Regents' investment relationship with Sequoia and Kleiner Perkins. The Regents has not demonstrated that the public interest in eliminating a risk to the Regents's investment relationships with Sequoia and Kleiner Perkins "clearly outweighs" the public interest in public review of seven year old documents reflecting communications between the Regents and those entities.

The public interests may vary for different types of information. For example, the public interest in prompt disclosure may be stronger where information would tend to disclose management fees or conflicts of interest whereas the public interest in delayed disclosure may be stronger where information concerns internal deliberations. The court has considered these factors in applying the judicial presumption that the information at issue in this case loses its confidential status after seven years.

MERITS – CONCLUSION.

At the hearing on October 19, 2012, the court ordered the parties to meet and confer and to apply the above framework to the information at issue and the parties made

supplemental submissions on November 30, 2012. By agreeing to how the framework applies to specific documents the Regents did not waive any of its overall or document specific arguments. All arguments are preserved for any potential appeal.

The court has reviewed in detail all the disputed documents that are the subject of the Petition. The court ORDERS that documents are public or exempt under the CPRA as stated in the attached Exhibit A. The court will direct the clerk to issue a writ that the Regents must produce documents and information consistent with Exhibit A no later than March 11, 2013.

MOTION TO STRIKE

The motion of Reuters to Strike the reply brief of the Regents is DENIED.

MOTIONS TO SEAL.

The Regents filed four motions to seal: (1) Motion filed September 10, 2012 (Res. # R-1325129); (2) Motion filed September 14, 2012 (Res. # R-1326102); (3) Motion filed October 12, 2012 (Res. # R-1334333); and (4) Motion filed December 3, 2012 (Res. # R-1349892).

LEGAL STANDARD.

A motion to seal under C.R.C. 2.550 is different from most motions because the "opposition" is not really the opposing party but the people of the State of California and their interest in an open and transparent judicial system. The Court has an obligation to review the motion and seal only those documents where the court can make the factual findings listed in C.R.C. 2.550(d).

The party seeking to seal a document in a Court file has the burden of presenting facts sufficient to justify the sealing. (C.R.C. 2.551(b)(1).) The court must weigh the

evidence and does not defer to an agreement among parties that documents are confidential. Although C.R.C. 2.550 and *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178, 1181, both require that the trial court find that the party moving to seal satisfies each of the five factors, the trial court exercises its discretion in determining whether those criteria have been met. (*In re Providian Credit Card Cases* (2002) 96 Cal. App. 4th 292, 299-300.) This suggests that the trial court can use a sliding scale or balancing approach where a strong showing on one factor can compensate for a weak showing on another factor.

An "overriding interest" in C.R.C. 2.550 may include a party's interest in protecting trade secrets, but it may also be a party's interest in protecting business information that does not rise to the level of a trade secret, a party or third party's interest in privacy, the government's interest in law enforcement, or some other interest. (*NBC Subsidiary*, 20 Cal.4th at 1222, fn 46; *People v. Jackson* (2005) 128 Cal. App. 4th 1009, 1024.)

The court gives no weight to the public importance of the claims in a case when deciding whether to seal portions of the record. The criteria are set forth in C.R.C. 2.550 and do not include the public importance of the claims in the case. The Court considers the consistent public interest that all judicial proceedings should be open to the public. (*In re Marriage of Burkle* (2006) 135 Cal.App.4th 1045, 1054-1060 (refusing to differentiate between the public right of access to divorce cases and to other civil cases).)

MERITS - FRAMEWORK FOR REVIEWING THE INFORMATION.

The court applies the CPRA framework for when deciding whether to seal filed documents under C.R.C.2.550 without regard to whether the documents or information are the subject of the CPRA claims.

MERITS – SPECIFIC ORDERS

At the hearing on October 19, 2012, the court ordered the parties to meet and confer and to apply the above framework to the information at issue and the parties made supplemental submissions on November 30, 2012. By agreeing to how the framework applies to specific documents the Regents did not waive any of its overall or document specific arguments. All arguments are preserved for any potential appeal.

The court has reviewed in detail all the disputed documents that are the subject of the Regents's four motions to seal. The court ORDERS that documents are public or sealed under CRC 2.550 as stated in the attached Exhibit B. The Regents must file public versions of all documents now conditionally under seal with exclusions or redactions only as permitted by Exhibit B on or before March 11, 2013.

THE ORDER AND JUDGMENT ARE DESIGNED TO PERMIT APPELLATE REVIEW.

The court's order does not require the Regents to produce to Reuters or to make public filings of documents it asserts are confidential until March 11, 2013. This is to permit Reuters and/or the Regents to petition the appellate court for the issuance of an extraordinary writ and seek temporary relief from the Court of Appeal. (Gov. Code § 6259(c).)

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Reuters is to submit a proposed final judgment and proposed writs consistent with this order on or before February 13, 2013. (C.R.C. 3.1312.)

DATED: February __, 2013 _____

Evelio Grillo
Judge of the Superior Court