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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA, ex rel.
12 MARY HENDOW and JULIE ALBERTSON,

13 Plaintiff,

14 v.

15 UNIVERSITY OF PHOENIX,

16 Defendant.
17

CASE NO. CV-03-0457 GEB DAD

**DEFENDANT'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION TO
DISQUALIFY**

*[Notice of Motion and Motion to Disqualify,
Declaration of Christopher B. Campbell and
[Proposed] Order filed concurrently herewith]*

HEARING:

Date: May 18, 2009

Time: 9:00 a.m.

Place: Courtroom 10

Judge: Hon. Garland E. Burrell, Jr.
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I. INTRODUCTION

Defendant University of Phoenix ("University") brings this motion to disqualify to address a serious and systemic violation of the California Rules of Professional Conduct ("CRPC") by the lawyers and law firms representing Relators in this case.¹ Specifically, on numerous occasions, Relators' counsel have acted in blatant violation of California's prohibition on *ex parte* communications with a "party" represented by counsel without that counsel's consent.

CRPC Rule 2-100 provides that, "[w]hile representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." CRPC Rule 2-100(A). The term "party" is defined broadly to include "[a]n association member or *an employee* of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which *may be binding upon* or *imputed to* the organization for purposes of civil or criminal liability or whose statement *may constitute* an admission on the part of the organization." CRPC Rule 2-100(B)(2) (emphasis added).

Despite this prohibition, the University has obtained substantial evidence that Relators' counsel have improperly communicated with at least 16 individuals who at the time of the communications were current University employees. This includes two Directors of Enrollment, one Associate Director of Enrollment, one Director of Campus Financial Services, ten Enrollment Counselors, one Academic Counselor, and one Financial Counselor. As demonstrated in numerous emails University obtained from the Department of Education ("DOE"), Relators' counsel have been violating the rule against *ex parte* communications from the beginning of this litigation, and have even used their clients to engage in communications with University employees that Relators' counsel would be prohibited from having.

¹ Attorneys practicing in the Eastern District of California are required to comply with the California Rules of Professional Conduct. *See* Local Rule 83-180(e).

1 The University believes that these improper *ex parte* communications are just the tip of the
2 iceberg because most of the evidence that the University has gathered is based on information the
3 University gleaned from Relators' privilege log. But the University is aware of other improper
4 contacts that are not included on the privilege log, which suggest that Relators' counsel's conduct is
5 even more widespread. For example, one witness has testified that Relators' counsel first initiated
6 contact with her over the telephone, at a time when she was a current Enrollment Counselor. *See Ex.*
7 *A*² (Charlotte Gould, Dec. 9, 2008 Dep.) at 19:14-20:16. The total number and positions of the
8 University employees contacted by Relators counsel is unknown because in response to multiple
9 requests from the University, Relators have refused to provide a list of employees they communicated
10 with.

11 At issue are at least five classes of the University's employees: (i) Directors of Enrollment³;
12 (ii) Enrollment Managers⁴; (iii) Enrollment Counselors; (iv) Financial Counselors; and (v) Academic
13 Counselors. Recognizing the serious nature of this motion and the issues it presents, the University
14 tried to avoid the necessity for the motion by asking Relators' counsel to confirm that:

- 15 1. Relators would not take the position now, or in the future, that any act or
16 omission of the five classes of employees may be binding upon or imputed to
University.
- 17 2. Relators would not take the position now, or in the future, that a statement by the
18 five classes of employees may constitute an admission on the part of University.

19 If Relators had confirmed these requests, the University would not be bringing this motion.
20 But Relators refused to do so, because they want to be free to introduce testimony from these classes
21 of employees for the very purposes covered by the cited Rule, even though doing so means their
22

23 ² All exhibits are attached to the concurrently filed Declaration of Christopher B. Campbell
24 ("Campbell Decl.").

25 ³ This includes Directors of Enrollment and Associate Directors of Enrollment.

26 ⁴ Although there is no indication on Relators' privilege log that Relators' counsel contacted
27 employees who were Enrollment Managers at the time, Relators' counsel contacted current
28 employees who were previously Enrollment Managers, as well as employees above and below
Enrollment Managers, and it seems certain that Relators' counsel also contacted Enrollment
Managers.

1 contacts violated the Rules of Professional Conduct. Relators' intent in this regard is confirmed by a
2 number of their statements of position, including:

- 3 • Relators specifically allege in their Second Amended Complaint ("SAC") that the
4 "[m]anagerial employees of the Defendants, in doing the acts and things described in
5 this complaint, were acting within the course and scope of their respective agencies
6 and/or employment with the Defendants, and each of them, with the knowledge and
7 consent of the Defendants" SAC ¶¶ 11-13.
- 8 • Relators' SAC attributes numerous acts, omissions, and statements to University
9 Enrollment Managers and Directors of Enrollment, which Relators rely on in an effort
10 to establish University's liability. *See, e.g.*, SAC ¶¶ 47, 54-57.
- 11 • Relators recently argued that statements purportedly made by Enrollment Managers to
12 Enrollment Counselors relating to Enrollment Counselor performance constituted
13 separate violations of the incentive compensation rule. According to Relators,
14 "[e]xplaining to ECs that their income levels depend on the number of enrollments
15 violates the purpose of the incentive compensation ban because it creates an incentive
16 to enroll as many students as possible." Mar. 30, 2009 Joint Statement Re Discovery
17 Disagreement [Docket No. 215] at 12:4-6.

18 Given Relators' theory of the case and the admitted *ex parte* communications with current
19 University employees, they are stuck now between accepting one of two options: (1) admitting to
20 numerous violations of Rule 2-100, or (2) conceding that the acts, omissions, and statements of
21 Enrollment Counselors, Enrollment Managers, and Directors of Enrollment cannot be imputed to or
22 bind the University for purposes of liability. However, Relators' ploy has been to dodge the issue by
23 arguing that nothing compels them to disclose their position on their improper *ex parte* contacts, and
24 that the Court will later decide on the admissibility of the testimony they have and are eliciting from
25 the involved classes of employees. But that begs the question and leaves the University in an
26 untenable situation. When the trial arrives and there is a fight over the admissibility of testimony
27 from these three classes of employees, if the University loses and the Court agrees the testimony is
28 admissible and the employees' conduct may be imputed to the University or their statements
constitute admissions, what redress does the University then have? Would the Court entertain a
motion to disqualify counsel at that late date? Clearly, the time to resolve these issues is now.

1 **II. BACKGROUND**

2 **A. The University Obtained Evidence Of Relators' Counsel's Improper⁵ Communications**
3 **Only After Relators Objected To Providing The Required Information**

4 This action was initiated on March 7, 2003, when Relators filed their original complaint.
5 They subsequently filed a first amended complaint on August 26, 2003, and a second amended
6 complaint on March 3, 2004. There is no dispute that the University has been represented by counsel
7 in this matter. Despite this fact, throughout the course of this case Relators' counsel have engaged in
8 *ex parte* communications with current University employees without the consent of the University's
9 attorneys.

10 Much of the evidence that the University has been able to gather regarding these
11 communications comes from the privilege log produced by Relators. And while the University
12 believes that Relators' privilege log is, among other things, incomplete and lacking in required detail,
13 the University had to battle with Relators just to get the minimal information on the privilege log.
14 For instance, the first version of Relators' privilege log did not include the names of the individuals
15 with whom Relators' counsel had communicated. Since the identity of these individuals was not
16 protected by any privilege, the University pressed Relators to produce a revised privilege log that
17 included witnesses' names. After much resistance, Relators finally complied with this request.

18 When the revised privileged log was produced, and the University cross-checked the
19 witnesses' names with their dates of employment, it became clear why Relators did not want to
20 divulge this information. Indeed, the University found that a large number of the communications
21 listed were with current University employees potentially covered by Rule 2-100. As summarized in
22 the chart below, the privilege log shows that Relators' counsel had been involved in numerous written
23 communications with University employees, including two Directors of Enrollment, one Associate
24

25 _____
26 ⁵ In asserting that Relators' counsel's communications were improper, the University is in no way
27 conceding that the statements, acts, or omissions of the classes of employees that Relators' counsel
28 communicated with can be imputed to or bind the University. Rather, as explained in detail in this
motion, Relators' counsel's communications are improper because, *based on Relators' theory of this case*, the *ex parte* communications at issue come squarely within the prohibition of Rule 2-100.

1 Director of Enrollment, one Director of Campus Financial Services, ten Enrollment Counselors, one
 2 Financial Counselor, and one Academic Counselor.

Name	Position At Time of <i>Ex Parte</i> Communications	Date Hired	Last Day of Employment	Dates of <i>Ex Parte</i> Communications
Keisha Barnett	Enrollment Counselor	Dec. 27, 2004	Dec. 27, 2006	Oct. 12, 2006 (Relators' Priv. Log at 5)
Steve Brodale	Director of Campus Financial Services	Aug. 30, 2004	Jan. 14, 2008	Feb. 1, 9, 11, 14, 15, 25, 2007 Mar. 7, 2007 May 7, 2007 (Relators' Priv. Log at 14)
Maureen Cadigan	Enrollment Counselor	First Hired: July 25, 2005 Re-hired: July 9, 2007	Initially employed through: Aug. 8, 2006 After re-hire, employed through: Jan. 1, 2009	Oct. 17, 2007 (Relators' Priv. Log at 9)
Chris Connor	Temporary Enrollment Counselor	Approx. May 21, 2006	Approx. July 1, 2006	June 12, 2006 (Relators' Priv. Log at 3)
Tom Corbett	Director of Enrollment	Nov. 20, 2003	Dec. 17, 2007	Oct. 2, 11, 2007 (Relators' Priv. Log at 12-13)
Kathy Daftari	Academic Counselor	April 19, 2004	May 16, 2008	Oct. 26, 27, 28, 2006 Nov. 11, 12, 2006 May 1, 16, 19, 20, 21, 2007 July 6, 7, 2007 (Relators' Priv. Log at 6)
Brienne Dani	Enrollment Counselor	Dec. 1, 2006	June 6, 2008	May 9, 10, 14, 16, 29, 2007 June 5, 7, 9, 15, 18, 19, 20, 2007 July 3, 4, 5, 31, 2007 Aug. 22, 2007 Sept. 14, 2007 Oct. 8, 2007 (Relators' Priv. Log at 1, 2)
Thomas Dorsey	Enrollment Counselor	Feb. 1, 2006	Oct. 13, 2006	Sept. 27, 2006 (Relators' Priv. Log at 4)
Morsell Ector	Enrollment Counselor	Nov. 8, 2004	Jan. 27, 2006	June 5, 2005 (Relators' Priv. Log at 14)
Charlotte Gould	Enrollment Counselor	Feb. 3, 2003	Feb. 3, 2005	Sept. 2004 (Charlotte Gould, Dec. 9, 2008 Dep. at 19:14-20:16).
Nick Huff	Associate Director of Enrollment	Jan. 24, 2005	Aug. 20, 2007	Aug. 20, 2007 (Relators' Priv. Log at 9)
Sheryl Johnson	Enrollment Counselor	May 30, 2006	Current University employee	Aug. 20, 21, 2007 (Relators' Priv. Log at 12)
David King	Director of Enrollment	Sept. 30, 2002	July 18, 2006	July 18, 2006 (Relators' Priv. Log at 7-8)
Stephanie Roa	Enrollment Counselor	Nov. 21, 2005	Sept. 11, 2007	Aug. 8, 2007 (Relators' Priv. Log at 13)
William Schindler	Enrollment Counselor	Apr. 11, 2005	Mar. 6, 2007	Dec. 21, 22, 23, 28, 2006 Jan. 15, 22, 2007 Feb. 11, 12, 13, 15, 2007 (Relators' Priv.

Name	Position At Time of <i>Ex Parte</i> Communications	Date Hired	Last Day of Employment	Dates of <i>Ex Parte</i> Communications
				Log at 13)
Rochelle Votaw	Financial Counselor	June 1, 2005	Current University employee	Sept. 13, 14, 15, 18, 27, 28, 30, 2006 Oct. 1, 2, 3, 4, 8, 9, 25, 26, 27, 2006 Nov. 3, 2006 Feb. 11, 2007 Mar. 5, 8, 27, 2007 Apr. 11, 13, 2007 June 1, 2007 (Relators' Priv. Log at 10-12)

See Ex. B (Declaration of Matthew Mitchell ("Mitchell Decl.)) at ¶¶ 3-17; Ex. C (Relators' Privilege Log) at 1-14; Ex. D (Declaration of Chris Connor) at ¶ 1 (setting forth Mr. Connor's dates of employment).

B. The University Has Obtained Additional Evidence Of Other Improper Communications Not Reflected On Relators' Privilege Log And Which Relators Refuse To Address

The University believes that the communications on the privilege log represent just a small portion of the overall number of improper communications that have taken place. For instance, Charlotte Gould testified at her deposition that, when she was an Enrollment Counselor, Relators' counsel initiated contact with her in 2004 by telephone. See Ex. A (Charlotte Gould, Dec. 9, 2008 Dep.) at 19:14-20:16. They spoke for approximately 30 minutes. See *id.* at 20:13-19. Ms. Gould also testified that, while an active Enrollment Counselor, she sent a memorandum to Relators' counsel in December 2004 that "outlin[ed] the events of [Ms. Gould's] employment" at the University's San Jose campus. See *id.* at 16:12-17:5. She further stated that she has had approximately five conversations with Ms. Krop. See *id.* at 20:24-21:1. None of these communications appear on Relators' privilege log.⁶ At the time of these communications, this suit was pending and Relators' counsel well knew that the University was represented by counsel.

In addition, Tom Corbett testified that he communicated with Ms. Krop about the allegedly "unethical business practices" at the University. See Ex. E (Thomas Corbett, Oct. 6, 2008 Dep.) at

⁶ University was not able to obtain any other information as to the substance of Ms. Gould's communications with Relators' counsel at Ms. Gould's deposition because Relators' counsel asserted, incorrectly, that these conversations were protected by the attorney work product privilege and instructed her not to answer the questions. See Ex. A (Charlotte Gould, Dec. 9, 2008 Dep.) at 20:13-21:21.

1 33:20-36:14. And the University has reason to believe that these communications took place when
2 Mr. Corbett was a University employee. This is because the only entries on Relators' privilege log
3 showing communications between Relators' counsel and Mr. Corbett are during a time when Mr.
4 Corbett was a Director of Enrollment, and the entries on the log only show communications *from*
5 Relators' counsel to Mr. Corbett, even though Mr. Corbett testified that he was also communicating
6 with Relators' counsel. *See* Ex. C (Relators' Privilege Log) at 12-13. As with Ms. Gould, none of
7 Mr. Corbett's communications to Relators' counsel appear on the privilege log and they occurred at a
8 time when Relators' counsel knew the University was represented by counsel.

9 Based on these two depositions, it is clear that Relators are not providing full information
10 about all of their contacts with these individuals who were University employees at the time of the
11 communications. This is true even though both Ms. Gould and Mr. Corbett are included on Relators'
12 supplemental disclosures as individuals Relators may use to support their claims, and even though the
13 University has requested, on numerous occasions, the identification of current employees contacted
14 by Relators' counsel. *See* Ex. F (Relators' Supplemental Disclosures) at 3. The University has no
15 way to know how many other employees were contacted as Relators refuse to provide this
16 information.

17 **C. Relators' Counsel Has Ignored The Facts Establishing Its Unethical Conduct**

18 The University has raised the issue of Relators' counsel's improper communications on
19 numerous occasions, but Relators' counsel has either failed to respond, dodged the issue, or attempted
20 to justify its conduct by relying on irrelevant or inaccurate facts. On January 16, 2009, University's
21 counsel sent Relators' counsel a letter, voicing their concerns and objections to Relators' counsel's
22 practice of contacting current University employees. *See* Ex. G (Jan. 16, 2009 letter from K. Diulio).
23 The University asked Relators' counsel to either: (1) confirm that it is their position that (i) no act or
24 omission of any Enrollment Counselor or Enrollment Manager⁷ may be binding upon or imputed to
25 the University for purposes of liability in this action, and (ii) statements by Enrollment Counselors or
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27 ⁷ At this point, the University had not yet realized that Relators had also contacted Directors of
28 Enrollment, an even higher position. Later communications added this category.

1 Enrollment Managers do not constitute an admission on the part of the University, or; (2) if Relators'
2 counsel's position is to the contrary, to provide the University with a list of all the University
3 employees who have been contacted by Relators' counsel, or by Relators with the knowledge of
4 counsel, and why this violation of Rule 2-100 occurred. *See id.* at 2. Relators failed to respond.

5 On February 3, 2009, the University's counsel again contacted Relators' counsel, reiterating
6 the seriousness of this matter, and asking again that Relators' counsel answer the straightforward
7 questions posed in the University's January 16, 2009 letter. *See* Ex. H (Feb. 3, 2009 e-mail from K.
8 Diulio). Relators did not respond until 10 days later.

9 On February 13, 2009, almost one month after the University's counsel had raised the issue of
10 Relators' counsel's improper communications, Relators' counsel finally contacted the University's
11 counsel to discuss Relators' counsel's *ex parte* communications. During that conversation, Rachel
12 Geman, one of the attorneys representing Relators, indicated that she believed Relators' counsel's
13 communications were proper because none of the individuals involved were an officer, director or
14 managing agent of the University at the time of the communications. *See* Ex. I (Feb. 20, 2009 letter
15 from J. Toffer) at 2. The University's counsel pointed out during the call, however, that Ms. Geman's
16 response only addressed the first definition of a "party" under Rule 2-100(B)(1), and that the
17 University believes that Relators' counsel's communications may have been improper under the
18 second definition of a "party" set forth in Rule 2-100(B)(2). *See id.*

19 The University's counsel subsequently confirmed this discussion in a letter to Relators'
20 counsel dated February 20, 2009. *See id.* In that letter, the University's counsel once again asked
21 Relators' counsel to answer the questions the University's counsel had posed a month earlier, and
22 reserved its right to take further action, including seeking to disqualify Relators' counsel. *See id.* at
23 2-3.

24 Counsel for both parties had a conversation on February 25, 2009, in which they discussed the
25 issues raised in the University's February 20, 2009 letter. *See* Ex. J (Feb. 26, 2009 e-mail from J.
26 Toffer). It was not until March 11, 2009, however, that Relators' counsel finally responded in writing
27 to the University's concerns. *See* Ex. K (Mar. 11, 2009 letter from R. Nelson). In that response,
28 which followed a telephone conversation between counsel for the parties, Relators' counsel

1 seemingly admitted that at least some of their communications may have been improper, as *Relators'*
2 *counsel offered not to call Steve Brodale as a witness* at trial if the University would refrain from
3 further pursuing the issue of Relators' counsel's improper contacts.⁸ *See id.* at 2.

4 Relators' counsel otherwise attempted to downplay the seriousness of Relators' counsel's
5 communications with current University employees, and continued to dodge the questions posed by
6 the University's counsel. For instance, Relators' counsel argued that their communications with Mr.
7 Corbett, a then-current Director of Enrollment, were proper because Mr. Corbett was on
8 "administrative leave" at the time of the communications. *See id.* at 1. But Mr. Corbett has already
9 testified that, although he was on *paid* administrative leave, he was a University employee at the
10 time. *See Ex. E* (Thomas Corbett, Oct. 6, 2008 Dep.) at 181:5-7; 188:11-14; 264:17-20. Relators'
11 counsel also asserted that the first communications by Mr. Brodale, Mr. Corbett, Mr. Huff, and Mr.
12 King were initiated by these individuals, rather than by Relators' counsel. But even if this were the
13 case, it does not matter who initiates the contact for purposes of applying Rule 2-100's prohibitions
14 here.⁹ And Relators' counsel's position is not supported by the face of their privilege log. For
15 example, with respect to Mr. Brodale, Relators' privilege log indicates that the first communications
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19 ⁸ When this offer was first made, the University informed Relators' counsel that it would need to
20 review the communications that Relators' counsel had with Mr. Brodale in order to evaluate the
21 appropriateness of Relators' proposed resolution. *See Ex. J* (Feb. 26, 2009 e-mail from J. Toffer).
22 The University also told Relators that the University needed to know the dates of any other
23 communications, whether written or oral, that Relators' counsel had with Mr. Brodale while he was
employed. *See id.* Relators never responded to the University's request. Of course, the offer not to
call Mr. Brodale in exchange for the University dropping its inquiry about all other improper
communications would have left the broader issues unresolved.

24 ⁹ *See Comment 3, Model Rule 4.2* (which is similar to Rule 2-100) (stating that "[t]he Rule
25 [prohibiting *ex parte* communications] applies even though the represented person initiates or
26 consents to the communication"). Furthermore, even if it is true that some University employees
27 initiated contact with Relators' counsel, it would be unfair to allow that to excuse the communications
28 here. For instance, Mr. Corbett testified that he first contacted Ms. Krop after obtaining her
information from universityofphoenixsucks.com, a website that is devoted to unfairly disparaging the
University. *See Ex. E* (Thomas Corbett, Oct. 6, 2008 Dep.) at 33:20-34:21. If an attorney contacted
in this manner was then free to communicate *ex parte* with the current employee, it would permit an
improper end-run around Rule 2-100's prohibitions.

1 were initiated by Relators' counsel. *See* Ex. C (Relators' Privilege Log) at 14 (listing Feb. 1, 2007
2 emails from Mr. Bartley to Mr. Brodale).¹⁰

3 Following Relators' March 11, 2009 letter, a series of additional exchanges took place
4 between the parties where the University repeated its straightforward requests that Relators' counsel
5 set forth in writing their position regarding which categories of the University's employees Relators
6 contend can make statements or take actions that bind the University. Relators' counsel refused to do
7 so, and this motion to disqualify necessarily followed. *See* Ex. L (Mar. 13, 2009 e-mail from T.
8 Hatch); Ex. M (Mar. 17, 2009 letter from R. Nelson); Ex. N (Mar. 23, 2009 e-mail from T. Hatch).

9 **III. ARGUMENT**

10 **A. The University's Employees Are A Represented "Party" Under Rule 2-100(B)(2)**
11 **Because, Under Relators' Theory Of This Case, Their Acts And Omissions May Bind Or**
12 **Be Imputed To The University**

13 The California Rules of Professional Conduct restrict the extent to which opposing counsel
14 may communicate with a "party." *See* CRPC Rule 2-100(A). Rule 2-100(A) prohibits an attorney,
15 "[w]hile representing a client," from communicating "directly or indirectly about the subject of the
16 representation with a party the member knows to be represented by another lawyer in the matter,
17 unless the member has the consent of the other lawyer." Rule 2-100(B)(2) goes on to define a "party"
18 as including "an employee of a[] . . . corporation . . . if the subject of the communication is any act or
19 omission of such person in connection with the matter which may be binding upon or imputed to the
20 organization for purposes of civil or criminal liability or whose statement may constitute an
21 admission on the part of the organization." CRPC Rule 2-100(B)(2).

22 The express language of Rule 2-100(B)(2) makes clear that it applies to communications with
23 employees at all levels of a corporate defendant, not just those in certain high-ranking positions.¹¹

24 ¹⁰ If Relators' counsel is right that Mr. Brodale first initiated the contact, then this may be further
25 evidence of additional improper oral communications that Relators' counsel are aware of, but refuse
26 to disclose to University.

27 ¹¹ The witnesses involved in the communications here were all campus level employees. With
28 regards to enrollment personnel, the first level employees are Enrollment Counselors, then
Enrollment Managers, Associate Directors of Enrollment, and Directors of Enrollment. A similar
hierarchy applies with respect to finance and academic personnel, with Financial Counselors and

[Footnote continued on next page]

1 The court in *Triple A Machine Shop, Inc. v. State of California*, 213 Cal. App. 3d 131, 140 (1989)
2 confirmed this aspect of Rule 2-100(B)(2), stating that *ex parte* contacts with present employees of a
3 represented corporation are impermissible unless "the communication does not involve the
4 employee's act or failure to act in connection with the matter which *may* bind the corporation, be
5 imputed to it, or constitute an admission of the corporation for purposes of establishing liability."
6 (emphasis added); *see also* Paul W. Vapneck, et al., Cal. Prac. Guide Prof. Resp. Ch. 8-D, 8:348
7 ("[E]x parte contact with even middle and low-level employees is prohibited if it relates to *their own*
8 *acts or omissions* and their statements might be *damaging* to the corporation.") (emphasis added).

9 The purposes behind Rule 2-100 are straightforward: "The rule was designed to permit an
10 attorney to function adequately in his [or her] proper role and to prevent the opposing attorney from
11 impeding his [or her] performance in such role. If a party's counsel is present when an opposing
12 attorney communicates with a party, counsel can easily correct any element of error in the
13 communication or correct the effect of the communication by calling attention to counteracting
14 elements which may exist." *Mills Land and Water Co. v. Golden West Refining Co.*, 186 Cal. App.
15 3d 116, 130 (1986). With regards to a corporate defendant, there are numerous reasons that Rule
16 2-100's prohibitions apply to contact with certain of its employees, including that "(1) the employee
17 may be directly or indirectly prejudiced by the *ex parte* contact; (2) the corporation has an interest in
18 keeping information and knowledge garnered by an employee in the course of employment from
19 release to an opponent in litigation *without the protection and advice of counsel*; (3) the employee
20 might be induced to make admissions or statements binding upon the corporation; and (4) it is
21 difficult to ascertain who is a member of the control group." *Id.* at 129 (emphasis in original).

22 Here, based on Relators' theory of this case, the *ex parte* communications at issue come
23 squarely within the prohibition of Rule 2-100(B)(2). With regard to the communications with Mr.
24 Brodale, Mr. Corbett, Mr. Huff, and Mr. King – the four University employees ranking above the
25 levels of Enrollment Counselor, Financial Counselor, or Academic Counselor – it has clearly been
26

27 [Footnote continued from previous page]
28 Academic Counselors at the first level of their respective divisions, overseen by a director of that
division, such as Mr. Brodale with regards to the finance division.

1 Relators' position that the acts or omissions of such employees may bind or be imputed to the
2 University. Relators specifically allege in their Second Amended Complaint that the "[m]anagerial
3 employees of the Defendants, in doing the acts and things described in this complaint, were acting
4 within the course and scope of their respective agencies and/or employment with the Defendants, and
5 each of them, with the knowledge and consent of the Defendants" SAC ¶¶ 11-13. Similarly,
6 Relators' SAC attributes numerous acts, omissions, and statements to University Enrollment
7 Managers and Directors of Enrollment, in an attempt to establish the University's liability. *See, e.g.*,
8 SAC ¶¶ 47, 54-57.

9 And Relators recently argued that statements purportedly made by Enrollment Managers to
10 Enrollment Counselors relating to Enrollment Counselor performance constituted separate violations
11 of the incentive compensation rule. According to Relators, "[e]xplaining to ECs that their income
12 levels depend on the number of enrollments violates the purpose of the incentive compensation ban
13 because it creates an incentive to enroll as many students as possible." Mar. 30, 2009 Joint Statement
14 Re Discovery Disagreement [Docket No. 215] at 12:4-6.

15 Moreover, Relators' counsel's communications with Enrollment Counselors are also improper
16 under Rule 2-100(B)(2)'s prohibition on communications with employees whose acts or omissions
17 may bind or be imputed to the University. As part of their attempt to establish liability of the
18 University, Relators allege that Enrollment Counselors were pressured to enroll unqualified students,
19 and the SAC at least implies that Enrollment Counselors actually did so.¹² SAC ¶¶ 18, 53-57.

20 And while it is impossible for the University to know at this point what exactly was said
21 during the various *ex parte* communications in question because (as was seen with Ms. Gould's
22 deposition) Relators are claiming that such communications are protected under either the attorney-
23 client or attorney work product privileges, it is certainly reasonable to assume that, given Relators'

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26 ¹² Given Relators' allegations relating to the enrolling of unqualified students, Relators' counsel
27 conceivably may try to use statements, acts, or omissions of the Financial and Academic Counselors
28 with whom Relators' counsel improperly communicated to bind the University. These individuals
may have been involved in issues relating to student eligibility as it relates to financial aid and
various courses and degree programs, and they may have communicated with Relators' counsel
regarding their acts or omissions.

1 theory of this case, the communications involved the acts and/or omissions of the individuals with
2 whom they communicated. In fact, Mr. Corbett testified that he communicated with Ms. Krop about
3 the allegedly "unethical business practices" at the University, a subject area that could certainly have
4 involved discussions of Mr. Corbett's own acts or omissions.¹³ See Ex. E (Thomas Corbett, Oct. 6,
5 2008 Dep.) at 33:20-36:14.

6 The University believes that ultimately the acts and omissions of the individuals contacted by
7 Relators should not be imputed to or be binding on the University, for a variety of reasons. But the
8 relevant question for purposes of Rule 2-100 is whether they "may". Because Relators' counsel are
9 proceeding on a theory that the acts or omissions of the individuals with whom they communicated
10 here *will* indeed be binding on the company, it was incumbent upon them to avoid those
11 communications and, by not doing so, they violated their ethical responsibilities.

12 **B. The University's Employees Are a Represented "Party" Under Rule 2-100(B)(2)**
13 **Because, Under Relators' Theory Of This Case, Statements By The Employees May**
14 **Constitute Admissions Against University**

15 As noted above, Rule 2-100(B)(2) prohibits *ex parte* communications with current employees
16 "whose statement *may* constitute an admission on the part of the organization." CRPC Rule
17 2-100(B)(2) (emphasis added). Relators have stated that they "do not contend that enrollment
18 counselors can" "make statements that bind the company." Ex. M (Mar. 17, 2009 letter from R.
19 Nelson) at 1. However, they refuse to concede this point with regard to employees ranking above
20 Enrollment Counselors, such as Enrollment Managers, Directors of Enrollment, and Directors of
21 Campus Financial Services, which can only mean that Relators' counsel believe that statements by
22 these individuals "may" bind the company. And clearly Relators here are intending to use statements
23 made by these employees as admissions by the University, as evidenced by the reasons stated in the
24 preceding section of this motion. See *infra*, section III.A.

25 ¹³ The only entries on Relators' privilege log showing communications between Relators' counsel
26 and Mr. Corbett are during a time when Mr. Corbett was a Director of Enrollment and the entries on
27 the log only show communications *from* Relators' counsel to Mr. Corbett. See Ex. C (Relators'
28 Privilege Log) at 12-13. Mr. Corbett testified that he was also communicating with Relators' counsel
(see Ex. E (Thomas Corbett, Oct. 6, 2008 Dep.) at 33:20-36:14), and likely those communications
took place around the same time as the communications reflected on the privilege log.

1 It is clear that Relators plan to argue the statements are binding on the University. Relators
2 stated in their most recent correspondence that they anticipate this issue will be decided closer to or
3 during trial. *See* Ex. M (Mar. 17, 2009 letter from R. Nelson) at 1 ("Ultimately, the question of who
4 binds the company may be an issue that is decided in the context of jury instructions."). But this is
5 the kind of gamesmanship prohibited by the Rule's express language. Counsel cannot communicate
6 with employees and seek damaging testimony which counsel will later argue *is binding* on the
7 employer, but claim they have not violated the Rule because the Court has not yet ruled on whether
8 the statements are binding. Rule 2-100 does not require that a statement ultimately be deemed an
9 admission before its prohibitions are triggered. The plain language of the Rule is prospective, and its
10 prohibition applies if an individual's statement "may" constitute an admission. If Relators have their
11 way, these individuals' statements *will* constitute admissions against the University, a point Relators
12 do not deny. As a result, Relators' counsel's *ex parte* contacts were improper.

13 **C. Relators' Counsel Further Violated Rule 2-100 Because Their Clients Engaged In**
14 **Improper Communications On Their Behalf**

15 In addition to the numerous improper *ex parte* communications that are listed on Relators'
16 privilege log, the University has also obtained evidence that Relators' counsel, from very early on in
17 this case, have been using their clients to engage in the same sort of communications that Relators'
18 counsel would be prohibited from conducting. This is plainly improper.

19 Just as Relators' counsel may not themselves engage in improper *ex parte* contacts, it is also a
20 violation of their ethical obligations to direct another individual to violate Rule 2-100 on their behalf.
21 The text of Rule 2-100 makes this perfectly clear, as it prohibits direct, as well as "indirect," *ex parte*
22 communications. *See* Rule 2-100(A) (" . . . a member shall not communicate directly or *indirectly*
23 about the subject of the representation with a party . . .) (emphasis added); Hon. Ming W. Chin, et al.,
24 Cal. Prac. Guide Employment Litigation Ch. 2-G, 2:173 ("an attorney could not escape the rule's
25 prohibition by enlisting the assistance of a non-lawyer investigator or other person to initiate *ex parte*
26 communications with a represented party"). The case law also makes clear that an attorney is
27 prohibited from directing another individual to violate the rule against *ex parte* communications. *See*
28 *Lewis v. Tel. Employees Credit Union*, 87 F.3d 1537, 1557-59 (9th Cir. 1996) (police officer/expert's

1 *ex parte* contact with a defendant at the direction of plaintiff's attorney warranted evidentiary
2 sanctions).

3 Here, it appears that in August and September 2003 – after this lawsuit was filed – Ms. Krop
4 and Mr. Bartley, as well as the Relators, were contacting and communicating with current employees
5 to try to get them to talk to the Department of Education ("DOE") program review team. *See* Ex. O
6 (Aug. 20, 2003 e-mail from N. Krop); Ex. P (Aug. 21, 2003 e-mail from N. Krop); Ex. Q (Aug. 21,
7 2003 e-mail from M. Hendow); Ex. R (Aug. 27, 2003 e-mail from M. Hendow); Ex. S (Sept. 30,
8 2003 e-mail from R. Wolff). And these communications are particularly problematic because they
9 appear to result from an e-mail communication from DOE counsel in which counsel acknowledges
10 that they "[o]bviously" cannot and would not "directly solicit interviews with U of P employees."
11 Ex. T (Aug. 5, 2003 e-mail from R. Wolff). These documents establish that Ms. Krop, Mr. Bartley,
12 and the DOE, were improperly using Relators themselves to engage in the very types of
13 communications that Relators' counsel and the DOE are prohibited from having. This evidence
14 further demonstrates the pattern and practice that Relators' counsel had of violating their ethical
15 obligations over an extended period of time.

16 **D. Relators' Counsel's Improper *Ex Parte* Communications Constitutes Grounds For**
17 **Disqualification**

18 It is indisputable that this court "has authority to disqualify in any instance when, as here, the
19 court reasonably deems it necessary to control in furtherance of justice, the conduct of its ministerial
20 officers." *Chronometrics, Inc. v. Sysgen, Inc.*, 110 Cal. App. 3d 597, 605 (1980) (internal citations
21 omitted); *Lewis*, 87 F.3d 1537 at 1558 (noting district court's inherent powers to impose a sanction
22 upon violators of Rule 2-100). "If the status or misconduct which is urged as a ground for
23 disqualification will have a continuing effect on the judicial proceedings which are before the court, it
24 is justified in refusing to permit the lawyer to participate in such proceedings." *Chronometrics*, 110
25 Cal. App. 3d at 607. It is well-established that violation of the rule against *ex parte* communications
26 is grounds for disqualification. *See Mills*, 186 Cal. App. 3d at 133 (upholding the disqualification of
27 an attorney based on the attorney's improper *ex parte* communications) (decided under predecessor
28 rule).

1 Disqualification is warranted here. The facts are well-established that, *over a period of*
2 *several years*, Relators' counsel engaged in a systemic pattern and practice of improper
3 communications with at least 16 different University employees. This was not an isolated incident or
4 event. And while it is difficult for the University to determine at this point what information
5 Relators' counsel obtained from the individuals with whom they communicated (because Relators
6 have refused to produce the written communications at issue or provide information as to Relators'
7 counsel's oral communications with University employees), it is clear that this information was
8 obtained "without the protection and advice of counsel" and that Relators' counsel believes the
9 information gathered is prejudicial to the University as they insist on the right to introduce it at trial.
10 *See Mills*, 186 Cal. App. 3d at 129.

11 The University knows, for instance, that Mr. Corbett communicated with Ms. Krop about the
12 allegedly "unethical business practices" at the University. *See Ex. E* (Thomas Corbett, Oct. 6, 2008
13 Dep.) at 33:20-36:14. This is precisely the type of communication that the University's counsel
14 should have had an opportunity to be present for, to impose appropriate objections and correct any
15 factual inaccuracies, thereby protecting the University's interests. *See Mills*, 186 Cal. App. 3d at 129-
16 30. This is also precisely the type of information that Relators now seek to use against the
17 University. Indeed, Mr. Corbett is included on Relators' initial disclosures as a witness likely to have
18 information to support their claims. *See Ex. F* (Relators' Supplemental Disclosures) at 3.
19 Furthermore, the unfair advantage will have a continuing effect on the proceedings, as the
20 information improperly learned by Relators' counsel cannot be unlearned, and could be used by
21 Relators' counsel throughout discovery and trial. *See Chronometrics*, 110 Cal. App. 3d at 607-08
22 (attorney involved in improper communications obtained unfair advantage requiring disqualification
23 because he "would have the improperly obtained facts instantly available in his mind in questioning
24 witnesses, making and responding to objections and addressing the court and jury").

25 The University has been blocked in its efforts to obtain information about Relators' counsel's
26 contacts with the University's employees because counsel has refused to provide any information
27 about those contacts and has blocked all questioning of the involved employees by asserting attorney-
28 client privilege and work product protection, coupled with instructions to the witnesses not to answer

1 the questions.¹⁴ While the evidence of improper communications that the University has acquired to
2 date may appear most directly to implicate Ms. Krop and Mr. Bartley, thus requiring their
3 disqualification, this Court should also disqualify the other lawyers and law firms that represent
4 Relators in this case, including Lief Cabraser, Altshuler Berzon, and McGuinn, Hillsman &
5 Palefsky, because they have acquired the same unfair advantage as Ms. Krop and Mr. Bartley. *See*
6 *Shoney's, Inc. v. Lewis*, 875 S.W.2d 514, 517 (Ky. 1994) (attorney and law firm disqualified based on
7 attorney's improper *ex parte* contacts with current employees); Paul W. Vapneck, et al., Cal. Prac.
8 Guide Prof. Resp. Ch. 8-D, 8:417 ("Gag' orders to the offending counsel seem an unrealistic solution.
9 If unfair advantage has been taken by one member of the firm, his or her knowledge should be
10 imputed to other members of the firm, and the *entire firm disqualified.*") (emphasis in original).¹⁵

11 First, Lief Cabraser, Altshuler Berzon, and McGuinn, Hillsman & Palefsky are co-counsel to
12 Ms. Krop and Mr. Bartley in this case. As co-counsel, there is every reason to believe that Ms. Krop
13 and Mr. Bartley have shared any and all information they could about the case, including information
14 gleaned during the improper communications with the University employees. And none of these
15 firms has attempted to distance themselves from the communications at issue. Indeed, in
16 correspondence relating to the improper communications, Robert Nelson of Lief Cabraser refers to
17 the communications as "our communications," not the communications of Ms. Krop or Mr. Bartley.
18 *See* Ex. K (Mar. 11, 2009 letter from R. Nelson) at 1.

19
20 ¹⁴ Any effort by Relators' counsel to justify their conduct in response to this motion should be
21 disregarded in light of their deliberate stonewalling repeated requests for information about their
22 contacts.

23 ¹⁵ While the courts in *Chronometrics* and *Mills* upheld disqualifications of the individual attorneys
24 based on their improper contacts, but not the disqualifications of the law firms, the case for
25 disqualification of the lawyers and law firms is stronger here. In both of those cases, the disqualified
26 attorney was found to have been communicating improperly with a single individual. Here, Relators'
27 counsel have been involved in improper communications with at least 16 University employees, and
28 likely even more, over an extended period of time. And in the *Chronometrics* decision, in ruling that
disqualification of the law firm was not required, the court took into consideration the fact that, at the
time the court issued its ruling, the individual defendant/cross-defendant who was improperly
contacted was no longer a party to the lawsuit. *See Chronometrics*, 110 Cal. App. 3d at 608 n.3.
Presumably, the court viewed this as a factor that would tend to reduce the likelihood that the
improper communications would have a continuing effect on the litigation. Here, on the other hand,
the entity whose employees were wrongfully contacted remains a party, and thus will continue to be
prejudiced as a result of those improper communications.

1 Second, Relators' privilege log is made up entirely of email communications, and anyone who
2 viewed those emails would be privy to the facts contained therein to the same extent as an email
3 recipient or sender. And it certainly seems very likely that lawyers from the other firms reviewed
4 those emails (the privilege log was sent to the University by a Lieff Cabraser attorney).

5 Third, the privilege log indicates that lead lawyers from both Lieff Cabraser and Altshuler
6 Berzon were recipients of improper email communications sent by Ms. Krop. Relators' privilege log
7 shows that Robert Nelson and Robert DeMaria, a partner and investigator, respectively, at Lieff
8 Cabraser, and Michael Rubin, a partner at Altshuler Berzon, were included as recipients on two
9 separate emails sent by Ms. Krop to Sheryl Johnson on August 20, 2007. *See* Ex. C (Relators'
10 Privilege Log) at 12. Ms. Johnson was an Enrollment Counselor at that time, and is a current
11 University employee. *See* Ex. B (Mitchell Decl.) at ¶ 13. This evidence shows at a minimum that
12 these attorneys knew of this instance of misconduct. Moreover, the fact that Ms. Krop continued
13 these improper communications after this date (*see* Ex. C (Relators' Privilege Log) at 12-13 (listing
14 Oct. 2007 emails from Ms. Krop to Mr. Corbett), suggests that Ms. Krop's co-counsel were complicit
15 in her misconduct, as they knew she was contacting current employees but did nothing to stop her.

16 **E. The Witnesses Involved In, and Evidence Obtained During, The Improper**
17 **Communications Should Be Suppressed**

18 In addition to disqualification of the attorneys and law firms representing Relators, Relators
19 should also be prohibited from using as witnesses those individuals involved in, as well all
20 information and documents obtained during, the improper communications. Suppression or
21 exclusion of evidence is a common remedy approved for violation of the rule against *ex parte*
22 communications. *See Lewis*, 87 F.3d at 1559 (finding that, as sanction for violation of *ex parte*
23 communication rule, district court could prohibit use of information and evidence obtained during
24 improper communications); *Shoney's*, 875 S.W.2d at 516-17 (suppressing evidence obtained during
25 *ex parte* communications). And while the decision in *Mills* may suggest that information and
26 documents improperly obtained can only be suppressed until the information/documents are
27 discovered by independent means, the fact is that here the witnesses involved in the communications
28 were only identified by Relators' counsel as a result of the improper communications. They simply

1 could not be discovered "independently" now. At a minimum, the attorneys who are disqualified
2 should be prohibited from communicating regarding the information and documents obtained by
3 virtue of the improper communications. *See Mills*, 186 Cal. App. 3d at 136-37.¹⁶

4 If for any reason the Court is not persuaded to disqualify Relators' counsel, it should issue an
5 order ruling that at trial no testimony from any Enrollment Counselor, Enrollment Manager,
6 Associate Director of Enrollment, Director of Enrollment, Academic Counselor, Financial Counselor,
7 or Director of Campus Financial Services may be binding upon or imputed to the University or
8 deemed an admission by the University. Such an order is appropriate in the absence of
9 disqualification as it would be the only basis upon which Rule 2-100 would not have been violated.

10 IV. CONCLUSION

11 Based upon counsel's repeated violations of their ethical obligations by systemically
12 communicating with current University employees, this Court should order that the lawyers and law
13 firms representing Relators in this case are disqualified, and that the witnesses and evidence obtained
14 as a result of the improper communications be excluded.

15 Dated: April 10, 2009

16 By: /s/ Christopher B. Campbell

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25 ¹⁶ If the Court has any doubt as to the propriety of Relators' counsel's communications with
26 University employees, it should at least conduct an *in camera* review of those communications. *See*
27 *Zachair, Ltd. v. Driggs*, 965 F. Supp. 741, 746, 753 (D. Md. 1997) (conducting *in camera* review of
28 *ex parte* communications under Maryland Rule of Professional Conduct 4.2, which is similar to
CRPC 2-100). *In camera* review may reveal that other oral or written communications took place, of
which the University is currently unaware. It would also allow the Court to view the substance of the
communications, which would assist the Court in determining whether those communications would
be prohibited by Rule 2-100.

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2009, the attached document was electronically transmitted to the Clerk of the Court using the CM/ECF System which will send notification of such filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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