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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EMMA C., by and through her Guardian Ad Litem, et al., each one individually and on behalf of all other similarly situated children, Plaintiffs, v. DELAINE EASTIN, individually and in her official capacity as Superintendent of Public Instructions for the State of California, et al., Defendants.	Case No.: C-96-4179 (TEH) **PLAINTIFFS' OPPOSITION TO STATE DEFENDANTS' MOTION OBJECTING TO, AND SEEKING TO SET ASIDE, MONITOR'S JANUARY 9, 2014 REPORT RE STATE LEVEL MONITORING SYSTEM** Date: June 23, 2014 Time: 10:00 a.m. Courtroom: Courtroom 2, 17th Floor Judge: Hon. Thelton E. Henderson

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Plaintiffs submit this Memorandum of Points and Authorities in opposition to the "State Defendants' Notice of Motion and Motion Objecting To, And Seeking To Set Aside, Monitor's January 9, 2014 Report Re State Level Monitoring System" ("Motion"), ECF No. 1911, filed by the California Department of Education ("CDE"), the State Board of Education ("SBE"), and the Superintendent of Public Instruction ("SPI") (collectively, "the State").

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State has failed to meaningfully address and analyze the determinations made by this Court's Monitor. The State provides not one shred of evidence to contest any single one of the detailed factual findings nor does it offer any proposed corrective actions to address the deficiencies identified by the Court Monitor, who, for nearly fifteen years, has overseen and evaluated the State's and the Ravenswood City School District's (the "District" or "Ravenswood") compliance with the Consent Decree in this matter. For that reason alone, the Court should deny the State's Motion and accept the Monitor's recommendation that the Court "direct the Monitor to develop [a corrective action plan] with the assistance of outside consultants." Ct. Monitor's Determinations Regarding Pls.' State Monitoring Design and SESR Implementation Objections ("Ct. Monitor's Dets.") at 87, ECF No. 1890.

Rather than addressing the Court Monitor's determinations, the State largely ignores the determinations and disregards the standards and dispute resolution process to which it stipulated and the Court ordered. Then it resurrects arguments that this Court has already rejected regarding the Court's authority to interpret and enforce Section 13.0 of its own First Amended Consent Decree ("FACD"). The Court should not countenance either of these strategies.

Recognizing that, under Section 13.0 of the FACD, the Court would eventually need to decide whether the CDE's monitoring system "is capable of ensuring continued compliance with the law and the provision of [a free appropriate public education ("FAPE")] to children with disabilities in Ravenswood," the Court directed the parties in its July 25, 2011 Order to "address the relevance of [Section 13.0], how [CDE's] compliance with this requirement should be measured, and when such measurement should begin." Order Re: Additional Status Conference Agenda Item ("July 25, 2011 Order") at 1, ECF No.

1640. Although the parties were unable to negotiate a standard for measuring compliance with Section 13.0, the parties did stipulate to and the Court approved a process for determining compliance with Section 13.0. The process provided that Plaintiffs would object to any aspect of the design and implementation of the CDE's monitoring system, the State would respond to those objections, and the Monitor would resolve any dispute over those objections with the Parties reserving the right to appeal the Monitor's determinations to this Court. Despite that Court-ordered stipulation, and in complete disregard of the Monitor's determinations, the State now argues that the Plaintiffs should have rubber-stamped the CDE's system during the failed meet-and-confer process. The State further argues, without analyzing any single component of its own system, that the system passes muster under Section 13.0 because it is "based upon" the Individuals with Disabilities Education Act ("IDEA") and some unsupported and unarticulated "standard of practice." Mot. at i, 5-8, ECF No. 1911. This effort to avoid the dispute resolution process to which the State agreed should be rejected and, equally important, does not demonstrate the State's compliance with Section 13.0.

The State's arguments fail under Section 13.0 because (1) both the Court Monitor's analysis and the analysis of Dr. Sam Howarth demonstrate that the specifics of the CDE's monitoring system cannot ensure FAPE and continued compliance with the law, while the State has failed to address the Monitor's determinations in any meaningful way; (2) this Court has already rejected the CDE's argument that the U.S. Department of Education's ("USDOE") Office of Special Education Programs' ("OSEP") supposed approval or continued funding of the CDE's monitoring system in any way constrains the Court's authority under Section 13.0; (3) the Monitor's findings that certain aspects of the CDE's monitoring system are not compliant with the IDEA are well-grounded; (4) the Court has already established its authority under the FACD and its equitable powers to ensure that the CDE's monitoring system is efficacious for Plaintiff children; and (5) this Court should reject the State's argument that some 16 years after the Plaintiff Class was certified it should now be decertified. For all of these reasons, the State's Motion should be denied and an expert consultant should be appointed by the Monitor to assist in developing a corrective action plan to fix the CDE's dysfunctional and ineffective monitoring system.

II.

BACKGROUND FACTS

A. The Consent Decree

Against the backdrop of the Ravenswood City School District's systemic failure to provide children with disabilities with a FAPE in the least restrictive environment ("LRE") and the CDE's failure to adequately monitor the District, address, resolve, and enforce compliance complaints in the District, and ensure the District's compliance with state and federal laws, the Court approved the original Consent Decree in this matter on January 18, 2000. That original Consent Decree provided, among other things, that (1) the District shall implement and the CDE shall ensure the implementation of a comprehensive corrective action plan, (2) the Court shall appoint a neutral, qualified individual to monitor the District's and the CDE's performance of their respective obligations under the Consent Decree and the corrective action plan, and (3) the District shall pay for the compensatory education and related services provided to individual Class Members. Order Re Final Approval of Consent Decree and Supplements Thereto, Ex. A., *passim*, Jan. 18, 2000. Significantly, the original Consent Decree provided a mechanism for the Court to decide when and how the litigation should be concluded: the Court shall dismiss the action upon finding that the corrective action plan has been implemented and the expected results have been achieved, that there exists in the District a system capable of providing a FAPE to children with disabilities, and that the CDE has a state-level system in place that is capable of ensuring future compliance with the law and of ensuring the provision of a FAPE to children with disabilities at the District. *Id.*, Ex. A., Section A, ¶8.0, at 13-15.

Unfortunately, the District failed to implement large portions of the corrective action plan and the Court consequently found the District in contempt of court on October 4, 2001. Order Re: Contempt at 23-29, Oct. 4, 2001. Facing the possible remedy of state receivership, the District, along with the State, entered the First Amended Consent Decree, which provided a significantly revamped corrective action plan (titled the Ravenswood Self Improvement Plan ("RSIP")), as well as the continued judicial monitoring and compensatory education terms of the original Consent Decree. Order Re: Final Approval of First Amended Consent Decree, Apr. 3, 2003. The FACD specifically identified the goal of ensuring that the CDE develop and implement an effective statewide monitoring system:

> CDE is responsible under federal and state law to ensure that children with disabilities who reside in Ravenswood have a free appropriate public education provided to them in the least restrictive environment. As part of this responsibility, CDE shall implement an effective monitoring system . . . . CDE shall ensure Ravenswood's performance of all of its obligations under this Decree.

FACD § 4.1 at 9.

Most important, Section 13.0 of the FACD adopted the original Consent Decree's standard for determining whether the State should be released from Court supervision:

> If, after considering the motion(s) of Defendants and any opposition thereto, and after conducting an Evidentiary Hearing, if necessary, the Court determines that . . . (2) the state-level system in place is capable of ensuring continued compliance with the law and the provision of FAPE to children with disabilities in Ravenswood, there shall be a rebuttable presumption that there exists in . . . CDE a system to adequately monitor, supervise and ensure FAPE to Class Members.

FACD § 13.0 at 20. Notably, this standard makes no mention of whether the USDOE or OSEP in any way "approves" or continues funding the state system nor does this standard suggest any deference to CDE or OSEP nor does this standard specifically cite any portion of the IDEA or its implementing regulations. Rather, the Parties left the interpretation of Section 13.0 to this Court.

B. Implementation Of The Ravenswood Self Improvement Plan

Since the 2003 approval of the FACD and RSIP, the District's compliance has proceeded in fits and starts, but has generally trended upward according to the Court Monitor's reports. *See* RSIP Compliance Trends Report, 2003-2013, and 2012-13 Benchmark Report, Oct. 31, 2013, ECF No. 1872. Plaintiffs acknowledge the District's accomplishments in complying with many of the aspects of the RSIP and further acknowledge the extraordinary commitment of CDE in assisting the District toward compliance. But that's just the point. CDE's assistance in implementing the RSIP was and is "extraordinary" in the true sense of the word. The on-site staff and supervision by the CDE is "extraordinary"; it is outside of the CDE's statewide special education monitoring system. Thus, the State cannot claim—as it attempts to claim—that any of those resources and supervision demonstrates that the "state-level system in place" is capable of ensuring FAPE. Indeed, the State's need to commit additional resources in Ravenswood to ensure compliance demonstrates the inefficacy of its "in place" monitoring system.

More telling, the state only committed most of those resources after the Court ordered it to do so. As early as 2003, compliance with the RSIP began to decline and during the 2006-07 school year, the District suffered a severe staffing shortage in special education, many children were denied services required by their individualized education plans, and compliance with the RSIP further plummeted. Order Re: Directives and CDE Technical Assistance, Oversight, and Monitoring Regarding Ravenswood's Delivery of Services and Related Issues ("Dec. 20, 2007 Order") at 4, ECF No. 1151 ("Evidence of the District's repeated failure to comply with the RSIP requirements and provide adequate services is incontrovertible."). As a result, on December 20, 2007, the Court issued an order providing, *inter alia*, (1) that the CDE conduct a staffing analysis for the District by January 28, 2007; (2) that the CDE determine the extent of service deprivations to children; (3) that the CDE ensure provision of compensatory education services to those children; (4) that the CDE place three staff/contractors in the District to serve as IEP coordinators; (5) that Defendants develop methods of oversight to ensure full staffing; (6) that the CDE appoint an individual to provide technical assistance and oversight to the District's human resources office; and (7) that the CDE assist Ravenswood in applying for any available discretionary funding for special education and/or at-risk children. *Id. passim*. That the District's failure to deliver appropriate services to its children and corresponding free-fall in RSIP compliance happened on the watch of CDE's monitoring system demonstrates the failure of CDE's monitoring system and its failure to ensure Ravenswood's delivery of FAPE as required by the FACD and the IDEA.

The State also raises the straw man argument that because the Plaintiffs did not object to the CDE's implementation of the verification review ("VR") portion of its system in 2006-07, Plaintiffs have either tacitly approved of the system or somehow waived their right to challenge the CDE's monitoring system under Section 13.0. Mot. at 3, ECF No. 1911. This argument must be rejected because Plaintiffs were under no obligation to raise objections to that VR process in 2006-07 and there was no mechanism or process in this litigation that would have permitted Plaintiffs to raise any such objections. Nonetheless, the efficacy of CDE's VR process must be questioned when such monitoring was simultaneously occurring with the widespread denial of services to children in the District.

C. Court's July 25, 2011 Order And The Meet-And-Confer Process

Prior to the December 7, 2011 status conference in this matter, the Court issued an order stating:

> Compliance with the RSIP is but one important step toward compliance with the First Amended Consent Decree ("FACD"). Under FACD section 13.0, the Court must also eventually determine whether the state-level system in place is capable of ensuring continued compliance with the law and provision of a free, appropriate public education ("FAPE") to children with disabilities in Ravenswood. In their status conference statements and at the status conference, the parties shall address the relevance of this requirement, how compliance with this requirement should be measured, and when such measurement should begin.

July 25, 2011 Order at 1, ECF No. 1640.

At the December 7, 2011 status conference, the Parties disagreed regarding the continued relevance of Section 13.0 and the standard the Court should employ to determine compliance with Section 13.0. Order to Meet and Confer on Issue of State Monitoring, Dec. 12, 2011, ECF No. 1674. As a result, the Court ordered the Parties to meet and confer over the matters raised in the Court's July 25, 2011 Order. What ensued was an arduous meet-and-confer process in which the Parties were unable to reach agreement on a standard for evaluating compliance with Section 13.0. Koski Decl. ¶¶ 3-5.

The State, for its part, provided the Parties with a presentation and documents that it claimed demonstrated the efficacy of the CDE's monitoring system. *Id.* ¶ 4. The Plaintiffs, meanwhile, sought to reach consensus on objective, external standards to evaluate the CDE's system under Section 13.0. *Id.* Both Parties participated in some "ten lengthy teleconferences." Tillman Decl. ¶ 4, ECF No. 1912. Plaintiffs "believe that all Parties participated in good faith." Koski Decl. ¶ 5.

But the negotiations failed. The Parties were unable to establish, as the Court requested, a standard for "how compliance with [Section 13.0] should be measured." July 25, 2011 Order, ECF No. 1640. The State makes much ado about the volume of paper that it provided to Plaintiffs and the amount of time it spent in meet-and-confer with the Plaintiffs. But the amount of paper produced, the length of the discussions in which both Parties participated, and the reasons for the breakdown of negotiations are in no way relevant to the Court's review of the Monitor's determinations because the Parties agreed upon and the Court ordered a procedural approach to evaluating compliance with Section 13.0.

D. The Fifth Joint Statement, The "General Standard," And The Dispute Resolution Process

Although the Parties were unable to reach agreement on how to measure compliance with Section 13.0, the Court approved and adopted the Court Monitor's "General Standard" to assist the Monitor and Court in determining whether the design and implementation of the CDE's monitoring system is compliant with Section 13.0: "CDE's statewide monitoring system, as applied to Ravenswood, [must be] implemented adequately; [identify] both compliance and noncompliance appropriately based on adequate evidence and reasoning; and [result] in appropriate corrective actions, the implementation of required corrective actions, and the timely correction of identified noncompliance." Order Den. Mots. Objecting to the Monitor's July 16, 2012 Determinations ("Nov. 26, 2012 Order") at 7-9, ECF No. 1793.

Further, as set forth in the Court Monitor's determinations,

> [t]he standards used in these determinations are those that govern state monitoring and enforcement systems in the Individuals with Disabilities Education Act (IDEA). Specific standards set forth in the IDEA will be drawn upon as needed in these determinations. In addition, standards are set by the First Amended Consent Decree (Consent Decree) and the Court's 11/26/12 *Order Denying Motions Objecting to the Monitor's July 16, 2012 Determinations* (*Order*).

Ct. Monitor's Dets. at 1, ECF No. 1890.

The Parties also established a process for determining compliance with Section 13.0:

> D. Should the meet-and-confer not resolve the dispute [over the adequacy and efficacy of the design of the state-level system], the parties are to inform the Monitor of the dispute and the basis of their respective positions within a week of the expiration of the meet-and-confer period.
>
> E. The Monitor shall then make determinations regarding any objections to the proposed changes.
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> F. Any party aggrieved by the Monitor's determinations may seek relief from the Court through filing a motion within fourteen days of the Monitor's determinations.
>
> G. Failure to timely object in accordance with the above procedures constitutes a waiver of any objection.
>
> H. As stated in the parties October 24, 2012 stipulation:

> (1) If the CDE meets its initial burden of proof, pursuant to the framework outlined in the Fourth Joint Statement, then there will be a rebuttable presumption that the CDE has a system to adequately monitor, supervise and ensure FAPE to class members. At that point, the burden will shift to the Plaintiffs to affirmatively rebut that presumption, if they so choose. If Plaintiffs do not challenge the presumption or bring a challenge and do not prevail, then the Court may find that the CDE has fully satisfied the terms of Section 13.0 of the FACD.
>
> (2) Alternatively, if the CDE does not meet its initial burden of proof, pursuant to the framework outlined in the Fourth Joint Statement, then a rebuttable presumption never arises and the parties anticipate the matter will be resolved in an alternate fashion by the Court and the parties, such as an evidentiary hearing at CDE's request.

Fifth Joint Statement and [Proposed] Order Re: CDE Monitoring of the Provision of FAPE in Ravenswood City School District ("Fifth Joint Statement") at 10, ECF No. 1799. The Fifth Joint Statement became an order of this Court on January 2, 2013. Order, ECF No. 1803.

In addition to that procedure, this Court approved and adopted the Court Monitor's "General Standard" to assist the Monitor and Court in determining whether the design and implementation of the CDE's monitoring system is compliant with Section 13.0. That General Standard is as follows: the "CDE's statewide monitoring system, as applied to Ravenswood, [must be] implemented adequately; [identify] both compliance and noncompliance appropriately based on adequate evidence and reasoning; and [result] in appropriate corrective actions, the implementation of required corrective actions, and the timely correction of identified noncompliance." Fifth Joint Statement at 6, ECF No. 1799 (citing Ct. Monitor's Determinations on Issues Related to State Monitoring at 6, July 16, 2012, ECF No. 1734).

Consistent with the foregoing standards and process for determining the State's compliance with Section 13.0, the Plaintiffs submitted objections to the design of the CDE's monitoring system and the special education self-review ("SESR") component of that system on May 10, 2013. Koski Decl. ¶ 8. The State responded to those objections on May 31, 2013 and August 26, 2013. Tillman Decl. Exs. 7-8, ECF No. 1912. And on January 9, 2014, the Monitor issued his extensive, comprehensive, and reasoned determinations regarding the Plaintiffs' objections to the design of the system and implementation of the SESR. Ct. Monitor's Dets., ECF No. 1890. Under the stipulation it signed and this Court ordered, the State's only recourse should it feel "aggrieved" by those determinations was to "seek relief from the Court through filing a motion." Fifth Joint Statement at 10, ECF No. 1799.

III.

ARGUMENT

A. The State Has Disregarded The Parties' Stipulation And This Court's Order Regarding The Process For Resolving Disputes Over The Design And Implementation Of The CDE's Monitoring System And Has Failed To Meaningfully Address Any Of The Monitor's Determinations.

The State has failed to meaningfully challenge any of the Court Monitor's individual determinations and instead rehashes rejected arguments in an effort to have the Court "set aside" the Court Monitor's determinations in whole. This transparent effort to end-run the stipulated and Court-ordered Fifth Joint Statement should be rejected and the determinations should stand.[1]

B. The State Has Failed To Demonstrate That CDE's Monitoring System Ensures Continued Compliance With The Law And FAPE In Ravenswood.

The Court Monitor's January 9, 2014 Report presents a careful and thorough analysis of Plaintiffs' challenge to the CDE's statewide monitoring system and CDE's response. As discussed below and in the analysis and report of Dr. Sam Howarth (filed with this Opposition), the Monitor's findings and corrective actions are firmly grounded in the IDEA, experience, the facts, and logic. Rather than addressing the Monitor's well-reasoned findings, however, the State offers its own standard of compliance with Section 13.0, but fails to provide any scientific, empirical, or meaningful support for that so-called "community standard." Nor does the State even apply its standard to any of the Monitor's specific determinations. Accordingly, the State has failed to demonstrate compliance with Section 13.0.

1. The Court Monitor Is Well-Qualified And Uniquely Situated To Make Determinations About The Efficacy Of CDE's Special Education Monitoring System

Mr. Mlawer has spent nearly fifteen years overseeing and evaluating the District's and CDE's compliance with the FACD. His extensive experience as the Monitor in this case makes him well-qualified to carry out his designated role in this dispute. In the November 2, 1999 Order appointing Mr.

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[1] It should also be noted that the State over-reaches with its request for a finding that "CDE has met the requirements of Section 13.0 [and that] Section 13.0 . . . is satisfied," Mot. at 13-14, ECF No. 1911, because the Fifth Joint Statement only allows the State to request that its initial burden to demonstrate that it has a Section 13.0-compliant system has been met. Fifth Joint Statement at 10, ECF No. 1799. Plaintiffs would still be able to rebut that presumption. *Id.*

Mlawer as Court Monitor, this Court highlighted Mr. Mlawer's "extensive and varied experience in the field of special education," as well as "his experience assisting in the remedial phases of other special education class action cases." Order Re: Preliminary Approval of Consent Decree, Notice Plan, and Appointment of Monitor at 4, Nov. 2, 1999. In the instant matter, Mr. Mlawer was given responsibilities to "monitor the CDE's performance of its obligations to ensure the provision of FAPE in the LRE to children with disabilities in Ravenswood," FACD § 6.1.1 at 11, and "plenary authority to monitor Ravenswood's compliance with [the FACD]," *id.* § 6.2 at 15. He is also authorized to select qualified consultants to assist him in these responsibilities. *Id.* § 6.1.5 at 13. As the FACD provides, "The Monitor shall at all times retain sole discretion to reach his or her own independent judgments regarding Ravenswood's compliance with each of the Requirements." *Id.* § 6.1.2 at 11. Despite the FACD's clear language and the respect due to Mr. Mlawer, the State now virtually ignores the Monitor's determinations.

In litigation as protracted and detail-laden as this one, courts often adopt a Monitor's findings. *See, e.g.*, *Evans v. Fenty*, 714 F. Supp. 2d 116, 133 (D.D.C. 2010); *Snyder v. Dep't of Def.*, No. C-03-4992 VRW, 2007 WL 951293, at *5-6 (N.D. Cal. Mar. 27, 2007). For instance, in a class action brought against the District of Columbia by residents of an institution for persons with developmental disabilities, court-appointed Special Masters spent over thirty years monitoring the city's compliance with the court's remedial orders. *Evans*, 714 F. Supp. 2d at 119. In response to the defendants' objections to the Masters' findings, the court wholly rejected those objections because "the Court ha[d] insufficient reason to question the reliability and accuracy of the Special Masters' conclusions." *Id.* at 133. Indeed, this Court has itself recognized a Monitor's unique ability to make determinations about the system he oversees. *See Madrid v. Woodford*, No. C90-3094 TEH, 2004 WL 2623924, at *6 (N.D. Cal. Nov. 17, 2004) ("The Court is amply satisfied that a neutral appraisal of the full record demonstrates that the Special Master's credibility determinations and factual findings are fair, persuasive, and well-supported by the record . . . ."). Similarly, there is no basis here for the State's blatant disregard for the Monitor's findings.

Mr. Mlawer's expertise and familiarity with the matter at hand both counsel in favor of respect toward his determinations.[2]

2. Dr. Sam Howarth's Analysis Demonstrates The Accuracy Of The Court Monitor's Determinations

The Monitor's determinations have also garnered support from Dr. Sam Howarth, Plaintiffs' independent expert. Dr. Howarth has spent over fifteen years examining and developing education policy. Howarth Decl. Ex. A, at 4. Among his many qualifications, Dr. Howarth served as State Director of Special Education in New Mexico from 2001 until 2004. *Id.* at 6. In this role, he "designed and implemented a 'focused monitoring' system" and was responsible for "monitor[ing] districts for compliance with applicable federal and state regulations." *Id.* at 7. Moreover, he has "assist[ed] OSEP to evolve their monitoring system and the compliance monitoring conducted by state education agencies," *id.* at 2, and has served as an expert witness in *P.B. v. John White*, No. 2:10-cv-04049 (E.D. La. Apr. 12, 2013), analyzing the Louisiana Department of Education's compliance monitoring system, *id.* at 4.

In his approximately 100-page analysis, Dr. Howarth summarizes the Monitor's analysis of Plaintiffs' and CDE's arguments regarding each aspect of the CDE's monitoring system, explains the Monitor's determinations, and discusses whether the determinations are founded and the recommended corrective actions are appropriately designed. Ultimately, Dr. Howarth believes "there is no question that the CDE's . . . system needs significant attention," and he "strongly support[s]" the appointment of outside consultants to develop a CAP. *Id.* at 90-91. Dr. Howarth's extensive expert analysis, therefore, adds credibility to the Monitor's Report.

3. The Determinations Reflect Careful Application Of The IDEA And Its Regulations Governing State Monitoring Systems

Effective July 1, 2005, the IDEA established new "focused monitoring" requirements for statewide special education monitoring systems, including monitoring priorities that:

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[2] The State also argues that "the Monitor went beyond the objections raised by plaintiffs to raise new objections . . . ." Mot. at 20, ECF No. 1911. The State is mistaken. The Monitor does not go beyond the Plaintiffs' objections. In a few instances, he merely adopted a slightly different rationale to address the objections that Plaintiffs made to certain aspects of the CDE's system. Nothing in the Fifth Joint Statement or anywhere else precludes the Monitor from doing so. Moreover, the burden remains on the State to demonstrate that the CDE's system complies with Section 13.0. As the Monitor found, the CDE did not meet its burden.

> require each State to monitor the local educational agencies located in the State (except the State exercise of general supervisory responsibility), using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in the following priority areas:
>
> (A) Provision of a free appropriate public education in the least restrictive environment.
>
> (B) State exercise of general supervisory authority, including child find, effective monitoring, the use of resolution sessions, mediation, voluntary binding arbitration, and a system of transition services as defined in sections 1401(34) and 1437(a)(9) of this title.
>
> (C) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification.

20 U.S.C. § 1416(a)(3) (2012).

Effective October 13, 2006, the IDEA regulations refined those state monitoring obligations, to include, among other things: "The State must have in effect *policies and procedures* to ensure that it complies with the monitoring and enforcement requirements in §§ 300.600 through 300.602 and §§ 300.606 through 300.608." 34 C.F.R. § 300.149(b) (2013) (emphasis added). Effective December 31, 2008, IDEA regulations at 34 C.F.R. § 300.600 et seq. require numerous specific actions by states to monitor local educational agency compliance with the IDEA.

The Court Monitor employed the IDEA standards in his review of CDE's system as follows: "Specific standards set forth in the IDEA will be drawn upon as needed in these determinations." Ct. Monitor's Dets. at 1, ECF No. 1890. Numerous determinations considered the requirements of the IDEA monitoring and enforcement regulations. *See, e.g.*, *id.* at 2-4 (policies and procedures that comply with specific monitoring and enforcement requirements), 5-9 (collection of data adequate to measure performance in the required priority areas for monitoring, specifically child find), 11-13 (identification and correction of noncompliance), 13-16, 27-29, 44-51 (process for making compliance determinations and taking enforcement actions), 19-20 (correction of identified noncompliance within one year), 21-24 (adequate quantitative and qualitative indicators to measure performance in required priority areas as part of the Special Education Self-Review process), 29-43 (same, as part of the Verification Review process). In several of his determinations, the Monitor cited to the IDEA and noted that the CDE had fallen short of IDEA and Section 13.0 compliance—for example: (1) too limited data collection in the VR process, *id.* at 42 ("[E]nsuring compliance with the IDEA's substantive FAPE, LRE and child find requirements are not set forth in the VR manuals among the questions the VR seeks to answer, and improving student results and outcomes is not listed as part of the purpose of the VR process."), (2) too limited data verification in the VR process, *id.* at 49 ("CDE has not demonstrated that . . . its standard for compliance comports fully with the IDEA."), and (3) scope of relief, *id.* at 85 ("As to CDE's argument that its monitoring system complies with the IDEA, in the specific respects set forth in the relevant determinations above that is not the case.").

The State does not refute any of the Monitor's specific determinations that the CDE's system does not comply with the IDEA and Section 13.0. Thus, the Monitor's determinations must stand.

4. The State's Reliance On The "White Paper" Is Misplaced

The State repeatedly mentions that "[t]he [CDE's] state-level system was developed in the wake of the *White Paper*," Mot. at 14, ECF No. 1911, and CDE official Chris Drouin notes that "[t]he same focused monitoring advocated by the *White Paper* has been advocated by OSEP, and so adopted by CDE," Drouin Decl. ¶ 10, ECF No. 1913. Because the *White Paper* comprehensively lists the components of effective monitoring systems, the State believes the CDE's system complies with federal law.

Although the *White Paper* was historically important for providing a foundation for statewide focused monitoring systems, it is not particularly relevant to the issue before this Court. First, the *White Paper* was written more than ten years ago. Ct. Monitor's Dets. at 2 n.1. The IDEA has since changed and the Monitor, who played an instrumental role in formulating the *White Paper*, notes that it "may not be current." *Id.* More importantly, the *White Paper* "has not been adopted by this Court as a set of standards to be applied in the *Emma C.* case." *Id.* The *White Paper* sets forth only very broad propositions about the components of focused monitoring systems, which are not useful in evaluating whether the CDE's system as applied to Ravenswood is capable of ensuring compliance with the law and the provision of FAPE. For instance, it states that "an effective compliance monitoring system [would be] (b) impartial and independent to enable compelling compliance with the law and . . . (c) designed for compliance and systemic improvement." Drouin Decl. ¶ 7, ECF No. 1913. From 36,000 feet, these principles seem unobjectionable, but, in this dispute over a ground-level monitoring system that is in place, the abstract principles of the *White Paper* are nearly irrelevant. As such, this Court should reject the State's arguments.

5. The State Fails To Provide Any Scientific, Empirical, Or Meaningful Support For The Vague "Community Standard" It Creates From Whole Cloth.

The State claims that the CDE has satisfied Section 13.0 of the FACD because its "monitoring system abides by the requirements of . . . [the] *prevailing community standard* for state monitoring systems." Mot. at 13-14, ECF No. 1911 (emphasis added). Sara Doutre, the State's independent expert, explains that

> [t]he community standard for a state-level general supervision system for monitoring the provision of FAPE by its local educational agencies (LEAs) requires states to have multiple integrated components including: a State Performance Plan and Annual Performance Reports; policies and procedures; a system for collecting and analyzing data; targeted technical assistance and professional development based on data collected; a system for dispute resolution; integrated monitoring activities including self-assessments and evaluations completed by LEAs; a system of incentives and sanctions; and incorporation of fiscal management into the supervision process.

Doutre Decl. ¶ 10, ECF No. 1915.

Like the *White Paper*, this community standard is far too vague to be workable on the ground and to analyze the specific components of the CDE's system. The State has not demonstrated how this standard is operationalized in the monitoring systems of other states nor has the State demonstrated how the CDE's system meets the standard. Rather than analyzing each of the Monitor's determinations against the standard, much less the standards that govern this case, the State asks this Court to set the determinations aside while simultaneously acknowledging the sufficiency of the CDE's system to ensure compliance with the law and the provision of FAPE. The community standard cannot provide for an adequate evaluation of the CDE's monitoring system as it applies to Ravenswood nor should it be used for this purpose.

6. The State's Expert Testimony Is Conclusory And Should Be Accorded Little Weight

This Court should ascribe little weight to the testimony of the State's expert witness, Sara Doutre, as her conclusions regarding the adequacy of the CDE's special education monitoring system rely on improper and poorly articulated standards and are founded on insufficient analysis.

Admissible expert opinion must be (1) "based on sufficient facts [and] data," (2) "the product of reliable principles and methods," and (3) the result of the application of those principles and methods reliably to the facts of the case. Fed. R. Evid. 702; *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-91 (1993). The trier of fact determines the weight to be accorded to admissible expert testimony. *See Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230-31 (9th Cir. 1998). In particular, an expert's "faults in his use of a particular methodology, or lack of textual authority for his opinion" may diminish the weight accorded to his testimony. *Id.* at 1231 (internal quotations and citations omitted).

Ms. Doutre fails to use the appropriate court-approved standards for assessing CDE's monitoring system. Rather than analyzing the CDE's system under the General Standard and Section 13.0 of the FACD, Ms. Doutre focuses almost exclusively on the *White Paper* and the vague "community standard." *See* Doutre Decl. ¶¶ 14, 15, ECF No. 1915 (criticizing the Monitor for not applying standards from the *White Paper* and analyzing CDE compliance under the "community standard"). Moreover, Ms. Doutre misreads the standards the Monitor applied in this case, further diminishing any weight her opinion should be accorded. *See Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002) (explaining that inadequacies and flaws in the underlying survey undermine the weight given to expert testimony). Indeed, Ms. Doutre mistakenly accuses the Monitor of using OSEP's Results Driven Accountability ("RDA") system in making his determinations. Doutre Decl. ¶¶ 17-19, ECF No. 1915. The Monitor recognized that the RDA system is not yet in effect, but referenced the impending change to RDA as evidence that OSEP "acknowledges the conflicts between the statutory requirements and its former approach to determinations, and is shifting in a more defensible direction." Ct. Monitor's Dets. at 15, ECF No. 1890.

Trial courts properly exercise their discretion by giving no weight to an expert's conclusory declarations. *See Broussard v. Univ. of Cal., at Berkeley*, 192 F.3d 1252, 1258-59 (9th Cir. 1999); *see also Sitrick v. Dreamworks, LLC*, No. CV 03-4265-SVW (AJWx), 2006 WL 6116641, at *29 (C.D. Cal. July 20, 2006), *aff'd*, 516 F.3d 993 (Fed. Cir. 2008) ("[C]onclusory statements by an expert witness are not helpful to the Court."). Here, Ms. Doutre fails to conduct any meaningful analysis regarding the reliability of the Monitor's determinations. She attempts to discredit the Monitor's report by simply stating that his determinations

> appear[] to devise requirements that CDE must meet that are more comprehensive than and not based on existing federal or state law, OSEP's current guidance, or the community standard among SEA monitoring systems. This is true, in particular, with regard to Determinations 3, 7, 9-14, 18, 22-26, 28-38, 40, and 41.

Doutre Decl. ¶ 16, ECF No. 1915. She fails, however, to provide any analysis of how the Monitor's determinations exceed the Court-ordered standards set forth above, other than to offer her mistaken belief that he applied the RDA. *See id.* ¶¶ 17-19. For example, in Determination 3, the Court Monitor found that "CDE has not demonstrated that it collects data adequate to measure performance in the priority areas for monitoring" as required by 34 C.F.R. § 300.600(c) and (d). Ct. Monitor's Dets. at 9, ECF No. 1890. In particular, the Court Monitor focused on the inadequacy of CDE's use of Indicator 11[3] as the sole measure of compliance in the monitoring priority area of child find, and even quoted § 300.600(c) and (d) in their entirety to further explain his reasoning. *Id.* at 6-7. Despite these legal bases for the Court Monitor's determinations, Ms. Doutre offers no reasoning in support of her sweepingly contradictory and conclusory opinion.[4]

Furthermore, Ms. Doutre proffers a conclusory opinion regarding the adequacy and efficacy of CDE's monitoring system by bluntly stating that based only on her review of the materials, her experience, her professional background, and the standards set forth in the *White Paper*, "CDE has demonstrated it has the capacity to identify noncompliance and enforce the requirement that its LEAs correct the noncompliance." Doutre Decl. ¶ 15, ECF No. 1915. The Court should disregard Ms. Doutre's finding, as it constitutes impermissible expert testimony regarding an ultimate legal conclusion.[5]

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[3] Indicator 11 measures the percent of children who were evaluated within 60 days of receiving parental consent for initial evaluation or, if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe.

[4] To the contrary, Ms. Doutre actually acknowledges the basis of the Court Monitor's determination, noting that "states are permitted to use additional indicators for determinations." Doutre Decl. ¶ 17, ECF No. 1915.

[5] CDE's Declaration of Chris Drouin is similarly flawed. Drouin Decl., ECF No. 1913. Paragraphs 10, 12, and 24 discuss how state monitoring systems have "evolved with the passage of the 2004 IDEA," *id.* ¶ 10, but Mr. Drouin offers no evidence of CDE's compliance with corresponding legal mandates. Instead, Mr. Drouin, like Ms. Doutre, provides improper opinion on an ultimate legal issue: "In my

See Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1016-17 (9th Cir. 2004) (explaining that no witness—expert or non-expert—should opine on the ultimate legal conclusion, which is the province of the court).

Ms. Doutre's expert declaration is a blatant attempt by the State to challenge the Court-approved standards in the wake of the Monitor's report. As such, this Court should accord it little weight.

C. As This Court Has Already Held, The USDOE's Evaluation Of The CDE's Monitoring System And Continued Funding For Special Education In California Does Not Constrain The Court's Jurisdiction And Ability To Determine Whether CDE Has Met Its Obligations Under Federal Law And The FACD.

The State argues that "[t]he CDE is entitled to deference in its administration of the state and federal IDEA laws for monitoring the provision of FAPE by local educational agencies" and that "OSEP's acceptance of the CDE's state plan, and OSEP's guidance, are entitled to deference." Mot. at 18-19, ECF No. 1911. According to the State, deference is warranted because the "CDE has presented its state-level system to the federal OSEP for review and consistently received approval, and federal funds, even as recently as July 2013." *Id.* at 14. The State, however, improperly relies on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Chevron holds that, when Congress delegates authority to a federal agency to interpret a statute, the "regulations [promulgated] are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 843-44. *Chevron*, however, only applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [] the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27. If *Chevron* does not apply, an agency may be entitled to lesser *Skidmore* deference under which agency interpretations, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance." 323 U.S. at 140.

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opinion, the design of the CDE's state-level monitoring system, and its implementation, enable the continued provision of FAPE to the children with disabilities within Ravenswood City School District." *Id.* ¶ 12.

These cases do not support deference to the CDE. First, the CDE is not a federal agency to which Congress has delegated any authority. The State has not pointed to any cases calling for deference to state agencies. Second, *Chevron*, *Mead*, and *Skidmore* all address deference in the context of legislative rulemaking, which has no place here given that this case concerns the judicial evaluation of the CDE's monitoring system on a consent decree. Third, despite the "CDE's relative expertise in IDEA law," Mot. at 18, ECF No. 1911, the CDE's interpretation of the IDEA is not at issue here. At issue is Section 13.0 of the FACD, which provides the standard for evaluating the CDE's monitoring system.

This Court has also already rejected the argument that OSEP is entitled to deference. As this Court noted in its November 26, 2012 Order, the

> CDE has not presented any evidence that OSEP has issued a ruling on the question presented in this case – whether CDE's monitoring system is 'capable of ensuring continued compliance with the law and the provision of FAPE to children with disabilities in Ravenswood.' FACD § 13.0. And even if OSEP had ruled on that precise question, *Douglas* [*v. Independent Living Center of Southern California, Inc*., 132 S. Ct. 1204 (2012)] at most suggests that OSEP's decision would be entitled to some level of deference – it in no way implies that the Court should decline to exercise its jurisdiction. *See id.* at 1210 ('All parties agree that the agency's approval . . . does not make these cases moot.').

Nov. 26, 2012 Order at 5-6, ECF No. 1793.

D. The Monitor's Determinations And Corrective Actions, And The Scope Of Those Corrective Actions, Fall Within This Court's Authority Under The FACD And Its Equitable Powers To Enforce Its Own Orders.

The State argues that "the [Monitor's] determinations should be set aside as . . . outside the scope of this Court's equitable jurisdiction." Mot. at 3-4, ECF No. 1911. This Court, however, has already recognized that it both had the authority to approve the making of the determinations and has the power to compel the CDE to implement the Monitor's corrective actions.

First, this Court's December 20, 2007 Order makes clear that "the Court has inherent authority to enforce its own orders." Dec. 20, 2007 Order at 3, ECF No. 1151 (citing *Vaughn G. v. Mayor of Balt.*, No. MJG-84-1911, 2005 WL 1949688, at *8 (D. Md. Aug. 12, 2005)). More specifically, "[t]he Court has broad powers to issue remedial measures design[ed] to effect compliance with its Orders." *Vaughn G.*, 2005 WL 1949688, at *8 (citing *Thompson v. U.S. Dep't of Hous. and Urban Dev.*, 404 F.3d 821, 830 (4th Cir. 2005)). The FACD and RSIP are to "be enforced as an order entered by this Court." FACD

§ 15.0 at 21. It is, therefore, within this Court's right to enforce the Decree as it sees fit. The Monitor's determinations and corrective actions are the means by which this Court has chosen to enforce the Decree. The determinations evaluate whether the CDE's monitoring system "is capable of ensuring continued compliance with the law and the provision of FAPE to children with disabilities in Ravenswood," *id.* § 13.0 at 20, and the corrective actions serve as a remedial measure to guarantee the CDE's compliance with the Decree.

Beyond the Court's equitable powers, the language of the FACD itself provides this Court with ample authority that encompasses the Monitor's determinations and corrective actions. According to the Decree, "Ravenswood . . . must assure that corrective actions are implemented and services are provided in a manner designed to improve educational results for Class Members." *Id.* § 3.1 at 7. The CDE is then required to "implement an effective monitoring system and complaint resolution procedure" to ensure Ravenswood's compliance with the Decree. *Id.* § 4.1 at 9. Additionally, "[t]he Monitor shall monitor Ravenswood's progress in implementing the Requirements in the Revised RCAP and its obligations under this First Amended Consent Decree. The Monitor shall also monitor the CDE's performance of its obligations to ensure the provision of FAPE in the LRE to children with disabilities in Ravenswood." *Id.* § 6.1.1 at 10-11. Given that this Court "retain[s] jurisdiction to ensure implementation of the Decree," *id.* § 15.0 at 21, and "ha[s] continuing jurisdiction of this action to ensure compliance with this Decree," *id.* § 7.1 at 16, the determinations and corrective actions need not and should not be set aside.

E. Principles Of Comity Do Not Limit The Court's Authority To Enforce Section 13.0 Of The FACD.

The State argues that the principle of comity requires this Court to limit "the scope of this pending action and consent decree." Mot. at 24, ECF No. 1911. The State misunderstands the comity doctrine. "[T]he comity doctrine . . . requires that when two *identical* actions are filed in courts of concurrent jurisdiction, the one which first acquired jurisdiction should be the one to try the lawsuit." *Great N. Ry. Co. v. Nat'l R.R. Adjustment Bd., First Div.*, 422 F.2d 1187, 1193 (7th Cir. 1970) (emphasis added). When, however, "the two pending suits involve different parties, different causes of action, and different issues," the comity doctrine does not apply. *Id.* Even if the comity doctrine does apply, courts have discretion in deciding whether to hear a case. *See Church of Scientology of Cal. v. U.S. Dep't of Army*, 611 F.2d 738, 749 (9th Cir. 1979) (recognizing that the comity doctrine is "a discretionary doctrine").

Despite the fact that both this case and *Morgan Hill Concerned Parents Ass'n v. California Department of Education*, No. 2:11-cv-3471-KJM-AC, 2013 WL 1326301 (E.D. Cal. Mar. 29, 2013), concern the CDE's special education monitoring system, they involve different parties and different causes of action. The cases are particularly distinguishable because this dispute is about the design and implementation of the CDE's monitoring system in Ravenswood, while the dispute in *Morgan Hill* is focused on the deficiencies in the CDE's monitoring system as it applies to the Morgan Hill Unified School District. The two cases are, therefore, not identical. As such, the comity doctrine does not apply here and does not in any way limit this Court's authority to enforce Section 13.0 of the FACD.

F. The State's Cursory Argument About Class Certification Should Be Ignored.

The *Emma C.* plaintiff class is comprised of past, present, and future children with disabilities residing in the Ravenswood City School District. The State argues that "class certification is no longer appropriate and should be revisited." Mot. at 21, ECF No. 1911. Additionally, the State claims that, because the Monitor's determinations do not address harm to the class and his suggested corrective actions lack specificity, changes made to the CDE's monitoring system may not benefit the class. *Id.* at 21-23. The State's arguments are misguided.

First, the State's class decertification argument lacks grounding as this case is distinguishable from *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012). Although the *Wal-Mart* decision explains that class commonality requires more than "merely . . . suffer[ing] a violation of the same provision of law," it also makes clear that commonality is important insofar as it allows for a "classwide resolution." 131 S. Ct. at 2551. The Supreme Court could not certify the class in *Wal-Mart* because "it [was] impossible to say that examination of all the class members' claims for relief [would] produce a common answer . . . ." *Id.* at 2552. Likewise, the Seventh Circuit in *Jamie S.* held that class certification was inappropriate because, due to a lack of commonality, "final injunctive or corresponding declaratory relief [could not] be ordered on a class-wide basis." 668 F.3d at 493.

Unlike in *Wal-Mart* and *Jamie S.*, a final remedy has already been implemented in this case. In 2003, this Court approved of the RSIP and FACD governing the District's delivery of special education services and the CDE's monitoring of the District's compliance with the law and the provision of FAPE. The State points to no cases where the parties have stipulated to a consent decree, the court has ordered the decree to remedy class violations, and thereafter the class has been decertified. It is, therefore, almost beyond comprehension that, near the close of this case, the State raises the class certification issue for the very first time.

Second, the Monitor's determinations and recommended corrective actions will provide relief to class members. The determinations, which highlight the deficiencies in the CDE's monitoring system, are specific to monitoring Ravenswood and are well-grounded in evidence provided by the CDE. The corrective actions are meant to address and remedy these deficiencies. Given that the *Emma C.* class includes future children with disabilities in Ravenswood, changes implemented to enhance the efficacy of the CDE's system as it applies to the District will allow the system to ensure the District's provision of FAPE going forward as is required by Section 13.0 of the FACD. Most important, an effective state monitoring system will ensure that Ravenswood does not backslide after implementation of the RSIP is complete.

G. The Court Should Direct The Monitor To Appoint A Consultant(s) To Develop Those Corrective Actions.

It is within the scope of this Court's authority to direct the Monitor to appoint a consultant to develop the Corrective Action Plan. As this Court noted in its December 20, 2007 Order, it has the "inherent authority to enforce its own orders." Dec. 20, 2007 Order at 3, ECF No. 1151 (citing *Vaughn G.*, 2005 WL 1949688, at *8). Given that the FACD and RSIP are to "be enforced as an order entered by this Court," FACD § 15.0 at 21, this Court may take any steps it deems necessary to ensure that the requirements of the FACD and RSIP are fulfilled. Appointing an independent consultant is merely an exercise of this Court's equitable powers.

The appointment of an independent consultant is not only within the Court's power, but is also warranted for the following two reasons. First, the complexity of the CDE's statewide monitoring system requires the involvement of an expert consultant. As the CDE has previously noted, its monitoring system "includes at least 100 discrete compliance tests and compliance standards." Fifth Joint Statement at 7, ECF No. 1799.

Second, it is common to separate remedial decisionmaking from the monitoring and evaluation of corrective actions. Doing so allows for greater efficiency and provides an additional check to ensure that there is both a robust set of corrective actions and compliance with those actions. The State previously approved of such a division of labor when it agreed to the RSIP, which required the District to "contract with Wayne Saylor [sic] and another inclusion expert . . . to provide technical assistance and to develop a comprehensive least restrictive environment plan for the District." RSIP § 10.3.1 at 51-52.

The State, however, argues that Rule 706 of the Federal Rules of Evidence[6] requires the Court to reject the Monitor's recommendation. Mot. at 25, ECF No. 1911. This argument should be disregarded as Rule 706 does not govern the appointment of outside consultants for the purpose of remedial decisionmaking; rather, it governs court-appointed expert witnesses. *See* Fed. R. Evid. 706. For this reason, Rule 706 has not been invoked in this case and does not apply. Nevertheless, the State relies on *Monolithic Power Systems, Inc. v. O2 Micro International Ltd.*, 558 F.3d 1341 (Fed. Cir. 2009),[7] and *Gorton v. Todd*, 793 F. Supp. 2d 1171 (E.D. Cal. 2011),[8] both of which examine decisions to appoint or deny appointment of an expert witness under Rule 706, to support its argument that appointment of an outside consultant is neither necessary nor justified here. These cases are irrelevant. Even if the two cases were applicable, *Gorton* notes that "[t]he decision of whether to appoint an expert witness under Rule 706 is discretionary." 793 F. Supp. 2d at 1178. Moreover, *Monolithic* explains that "under Ninth Circuit law, district courts enjoy wide latitude to make these appointments." 558 F.3d at 1348.

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[6] The State refers to "Rule 706 of the Federal Rules of Civil Procedure" instead of Rule 706 of the Federal Rules of Evidence. The State made this same mistake in September 24, 2012. *See* Def. CDE's Opp'n to Pl.'s Mot. for Appointment of an Expert at 4, Sept. 24, 2012, ECF No. 1764.

[7] The State's intended citation is to *Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd.*, 558 F.3d 1341, 1346 (Fed. Cir. 2009), not *Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd.*, 558 F.3d 1341 (9th Cir. 2009).

[8] The State's intended citation is to *Gorton v. Todd*, 793 F. Supp. 2d 1171, 1185 (E.D. Cal. 2011), not *Gorton v. Todd*, 739 F. Supp. 2d 1171, 1185 (2011).

IV.

CONCLUSION

For all of the above reasons, this Court should deny the State's Motion and direct the Monitor to appoint an outside consultant to assist in developing a corrective action plan.

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Respectfully submitted,

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