Civil Case No. B231787
Los Angeles Superior Court Case No. BC454656

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 7

ARI MARKEN,
Plaintiff and Appellant,

vs.

SANTA MONICA-MALIBU UNIFIED SCHOOL DISTRICT,
Defendant and Respondent.

Appeal from the Superior Court of the State of California
For the County of Los Angeles

Honorable Ruth Ann Kwan, Judge Presiding

OPPOSITION TO APPELLANT'S OPENING BRIEF

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, 2nd APPELLATE DISTRICT, DIVISION SEVEN	Court of Appeal Case Number: B231787
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APPELLANT/PETITIONER: ARI MARKEN RESPONDENT/REAL PARTY IN INTEREST: SANTA MONICA-MALIBU UNIFIED S.D.	FOR COURT USE ONLY

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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1. This form is being submitted on behalf of the following party (*name*): Santa Monica-Malibu Unified School District

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. ☒ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) Santa Monica-Malibu Unified School District	Defendant and Respondent
(2) Ari Marken	Plaintiff and Appellant
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: September 29, 2011

Elizabeth Zamora-Mejia ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

PROOF OF SERVICE
[FRCP 5(B)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 12800 Center Court Drive, Suite 300, Cerritos, CA 90703-9364.

On September 30, 2011, I served the following document(s) described as **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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☒ **BY MAIL:** I deposited such envelope in the mail at Cerritos, California. The envelope(s) was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on September 30, 2011, at Cerritos, California.

MARIA T. WILSON

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I. INTRODUCTION

The District is required to permit access to its records to the public pursuant to the California Public Records Act, Government Code section 6250, et. seq., and failure to permit such access could result in court-mandated disclosure and the imposition of court costs and attorney's fees. (Govt. Code § 6259.) The District received a request pursuant to the Public Records Act for access to records regarding complaints against Plaintiff, an employee of the District. The District identified documents responsive to this request, including the November 25, 2008 Investigative Report and November 26, 2008 Memorandum to Plaintiff, which are the subject of Plaintiff's request for preliminary/permanent injunction.

There is no dispute that Plaintiff, like all public agency employees, has a legally-protected privacy interest in his personnel file. *BRV v. Superior Court* (2006) 143 Cal.App.4th 742, 756. For that reason, employee personnel records are generally exempted from disclosure under the Public Records Act. Specifically, Government Code section 6254(c) provides that the following records are exempt from disclosure:

> *Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.* (emphasis added)

Despite this exemption, there are occasions when an employee's right to privacy in his personnel files is outweighed by the public's right to obtain records under the Public Records Act. Specifically, records regarding well-founded complaints against a public employee that are substantial in nature are not exempted from disclosure.

In this case, the District determined the complaints made against Plaintiff were substantial in nature, as they involved conduct that constitutes sexual harassment pursuant to the District's Sexual Harassment Policy. Additionally, as set forth in the Investigative Report and the Memorandum to Plaintiff, many of the allegations were determined to have merit, and therefore, Plaintiff was found to have engaged in conduct that constituted sexual harassment.

The District is mindful of the fact that the underlying public records request implicates Plaintiff's personnel information. Moreover, the District has carefully weighed the competing interests of Plaintiff's privacy rights with the public's right of access to disclosable public records. However, based on a careful review and interpretation of applicable law, it is the District's position that where an investigation has concluded and disciplinary action is taken against the employee, as in Plaintiff's case, both the investigative findings (redacted of personal data about other individuals) *and* the record of the disciplinary action become disclosable public records.

Since the District does not believe it has a legal right to withhold the documents sought in the Public Records request, the District respectfully requests that Plaintiff's request for preliminary/permanent injunction be denied.

II. THE DISTRICT IS REQUIRED TO PROVIDE THE REQUESTED RECORDS BECAUSE THEY ARE NOT EXEMPT FROM DISCLOSURE UNDER THE PUBLIC RECORDS ACT

Although personnel records can be exempt from disclosure under the Public Records Act (Govt. Code § 6254(c)), courts have held that the public's interest in the operation of a public agency can outweigh the right to privacy in personnel records. (*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 757). In particular, records of complaints against employees may be disclosable depending on the outcome of the agency's investigation of the complaint:

> [W]here complaints of a public employee's wrongdoing and resulting disciplinary investigation reveal allegations of a substantial nature, as distinct from baseless or trivial, and there is reasonable cause to believe the complaint is well-founded, public employee privacy must give way to the public's right to know. (*Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041, 1046, citing *American Federation of State, County and Municipal Emp.*

(AFSCME), Local 1650 v. Regents of University of California (1978) 80 Cal.App.3d 913, 918.)

In the earliest case to address this issue, a state university imposed or attempted to impose discipline on an employee. The employee then reported acts of alleged financial irregularity by two of her superiors, the chancellor ordered an "audit investigation" of the charges, and a voluminous "audit report" was furnished to him. (*AFSCME, supra,* 80 Cal.App.3d 913.) The employee and her union sought a copy of the audit report. The court held the public's right of access to the report depended on whether the recorded complaint was "of a substantial nature" and whether there was reasonable cause to believe the complaint to be "well-founded." (*Id.* at p. 918.) Through in-camera examination, the court found the report had concluded that many accusations were unsupported by evidence; however, because there were exceptions, disclosure should have been allowed with respect to those exceptions. (*Id.* at p. 919.)

Later cases have followed the reasoning in *AFSCME* in the context of personnel records involving complaints against public employees. In *Bakersfield City School District, supra,* a newspaper petitioned for disclosure of complaints and disciplinary records of a school district employee. The trial court prevented disclosure of records of complaints it concluded were not "substantial in nature and for which there was no

reasonable cause to believe the complaints were "well-founded." The court granted the petition except as to complaints regarding one incident described as sexual-type conduct, threats of violence, and violence, finding those complaints were substantial in nature and there was reasonable cause to believe they were well-founded. (*Bakersfield, supra*, 118 Cal.App.4th at pp. 1043-1044.) The Court of Appeal affirmed:

> In evaluating whether a complaint against an employee is well-founded within the context of section 6250 et seq., both trial and appellate courts, working with little or nothing more than written records, are ill-equipped to determine the veracity of the complaint. The courts instead, both originally and upon review, are required to examine the documents presented to determine whether they reveal sufficient indicia of reliability to support a reasonable conclusion that the complaint was well-founded. The courts must consider such indicia of reliability in performing their ultimate task of balancing the competing concerns of a public employee's right to privacy and the public interest served by disclosure. (*Id.* at p. 1047.)

The court expressly rejected the contention that discipline must be imposed or complaints must be "found to be true" as a prerequisite to release of the complaints to the public. (*Id.* at p. 1046.)

In *BRV, supra,* 143 Cal.App.4th 742, a school district's board of education hired an investigator to prepare a report analyzing allegations of misconduct by the district's superintendent. The board then directed a private investigator to interview the individuals who complained, prepare written summaries of the interviews, and provide conclusions regarding whether the evidence supported the complaints. Portions of the report were released to a newspaper by persons the investigator had interviewed. After receiving the full report in confidence, the board of education entered into an agreement with the superintendent accepting his resignation in exchange for terms of payment and a promise to keep the report confidential. (*Id.* at p. 747.) Specifically, the district agreed to "seal and place in a sealed envelope in [his] personnel file any and all documents relating to the investigation," and not to release any information on the investigation "to any third party except as required by law or in accordance with any court order or subpoena." (*Id.* at pp. 748-749.)

BRV, publisher of a local newspaper, filed a request with the district under the Public Records Act to obtain copies of the report, documentation relating to retention of the investigator, and the superintendent's letter of resignation. The district provided BRV with everything it requested except the investigative report. (*Id.* at p. 749.) BRV filed a petition for writ of mandate seeking disclosure of the report. The trial court determined the

report was exempt from disclosure under the personnel-record exception. (*Ibid.*) The Court of Appeal reversed.

The court rejected the argument that the former superintendent's right to privacy precluded public release of the report:

> [A] public official of the position of Morris who, under the [*New York Times v.*] *Sullivan* standard, had a significantly reduced expectation of privacy in the matters of his public employment. The potential injury here is to his reputation, but as a public official, he knew his performance could be the subject of public, "vehement, caustic, and sometimes unpleasantly sharp attacks." . . .
>
> Members of the public were greatly concerned about the behavior of the city's only high school superintendent and his governing elected board in responding to their complaints. Indeed, from the public's viewpoint, the District appeared to have entered into a "sweetheart deal" to buy out the superintendent from his employment without having to respond to the public accusations of misconduct. The public's interest in judging how the elected board treated this situation far outweighed the Board's or Morris's interest in keeping the matter quiet. Because of Morris's position of authority as a

> public official and the public nature of the allegations, the public's interest in disclosure outweighed Morris's interest in preventing disclosure of the Davis report. (*Id.* at pp. 758-759, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 264, 270.)

Because of Morris's status as a public official, the court "applied a lesser standard of reliability than we otherwise would for a nonpublic official under the rule of *Bakersfield [City School District]*." (*Id.* at p. 759.) The court stated:

> Although the investigator determined most of the allegations were not reliable, the court "could not conclude the allegations were so unreliable the accusations could not be anything but false." The report exonerated Morris of all serious allegations of misconduct except those relating to outbursts of anger. In this circumstance, the public's interest in understanding why Morris was exonerated and how the District treated the accusations outweighs Morris's interest in keeping the allegations confidential. (*Ibid.*)

Under the *Bakersfield* standard, the October 2008 allegations made against Plaintiff were substantial in nature and well-founded. Although Plaintiff attempts to minimize the nature of the allegations, the District

cannot characterize them as trivial in nature. Rather, the allegations involved sexual harassment by a teacher against a District student. Here, there were 10 factual findings that Plaintiff engaged in specific conduct, which the District determined had "the purpose or effect of having a negative impact on the student's academic performance, or of creating an intimidating, hostile or offensive educational environment," in violation of the District's Sexual Harassment Policy. (See Exhibit 1 to Plaintiff's Supplemental Memorandum of Points and Authorities.) As a result of Plaintiff's acts, the District made the determination that Plaintiff engaged in sexual harassment of a District student. Such conduct was well-founded and violated the District's sexual harassment policy.

As the District determined that Plaintiff engaged in sexual harassment of a District student, it cannot characterize the allegations against Plaintiff as trivial or unfounded. Based on a careful reading and application of the holding in the *Bakersfield* case, the District believes that it does not legally have the discretion to refuse to produce the records sought in the December 14, 2010, public records request: (1) the November 25, 2008 Investigative Report and (2) the November 26, 2008 Letter of Reprimand. In the absence of such discretion, and unless this court determines otherwise, the District has determined that it is required by law to produce the requested records in response to the Public Records Act

request.

III. CONCLUSION

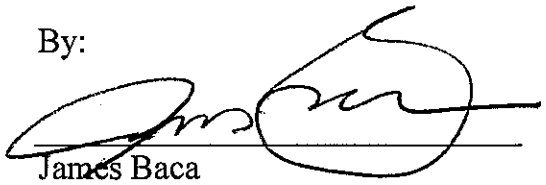
The District acknowledges that, as Mr. Marken points out in his opening brief, the trial judge did characterize the allegations of sexual harassment at issue in this matter as "probably on the lowest end of the spectrum." The District is also mindful of the fact that there is no case law that provides further clarification on the difference between "substantial" and "not substantial" and "well-founded" and "not well-founded." In the absence of such legal guidance, and based on the holding in the *Bakersfield* case, the District believes that it does not legally have the discretion to refuse to produce the records that were the subject of the preliminary injunction.

Dated: October 21, 2011

Respectfully submitted,

Atkinson, Andelson, Loya, Ruud & Romo

By:



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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c))

The text of this brief consists of 2,653 words as counted by the Microsoft® Word 2002 word-processing program used to generate the brief.

Dated: October 21, 2011

James Baca

PROOF OF SERVICE
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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 12800 Center Court Drive, Suite 300, Cerritos, CA 90703-9364.

On October 21, 2011, I served the following document(s) described as **OPPOSITION TO APPELLANT'S OPENING BRIEF** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on October 21, 2011, at Cerritos, California.

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