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July 29, 2013

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VIA E-MAIL TO: JANGOLDSMITH@SANDIEGO.GOV AND FIRST CLASS MAIL

Re: *Irene McCormack Jackson v. Bob Filner, et al.*
San Diego Superior Court Case No. 37-2013-00058613-CU-OE-CTL
Our File No. 5486

Dear Mr. Goldsmith:

As you know, Pope, Berger & Williams, LLP has been retained to defend Mayor Filner from employment claims brought against him. You are also aware of the lawsuit brought by Plaintiff Irene McCormack Jackson, as the City has already made an appearance in that action. By this letter, Mayor Filner requests that the City Council meet in closed session to consider this request to be defended by the City at the City's expense under Government Code sections 825 and 995.

I previously conveyed to Mr. Cordileone certain aspects of this case which place some responsibility and potential liability on the City of San Diego, which make it crystal clear that the City should be defending the Mayor in the pending lawsuit. I did not want to set forth those details in writing, out of fear that this letter may become public, and assist Plaintiff with her case, but I have been given clear instructions by your office to present this issue in writing to the City Council. Therefore, to protect Mayor Filner, we have no choice.

The City has a legal obligation to provide sexual harassment training to all management level employees, and to provide such training to new managers within six (6) months of hire. Government Code section 12950.1. The City ***failed*** to provide such training to Mayor Filner. In fact, it is my understanding that such training was scheduled, but that the trainer for the City unilaterally cancelled, and never re-scheduled such training for the Mayor (and others.) Therefore, if there is any liability at all, the City will almost certainly be liable for "failing to prevent harassment" under Government Code Section 12940(k).

While, to paraphrase Bob Dylan, many might argue that "you don't need a weatherperson to tell you which way the wind blows," and an adult male should not need sexual harassment training, I would point out that in his decades of public service for the people of San Diego as a U.S. Representative, Mayor Filner never received sexual harassment training. This is not an excuse for any inappropriate behavior which may have occurred, but having conducted sexual harassment training scores of times over the years, I have learned that many - if not most - people do not know what is and what is not illegal sexual harassment under California law. There is a very, very good reason for mandatory sexual harassment training; if nothing else, it makes people think about the subject, and how they interact with their fellow employees. Had the City provided mandatory sexual harassment training to Mayor Filner, Ms. McCormack Jackson may never have brought her lawsuit.

While there has been a frenzy of publicity in the last two (2) weeks, and Mayor Filner has been excoriated in the press, we would ask that you and the City Council try to set aside politics and publicity, and consider, this, Mayor Filner's request to be defended for the claims brought by Ms. McCormack Jackson, on an objective, fair and equitable basis. We are, of course, concerned that a majority of City Council members have already publicly called for the Mayor to step down, so we are unsure how such City Council members can view this matter objectively.

While we acknowledge that sexual harassment is not within the course and scope of employment, please understand that Mayor Filner ***denies*** the allegations brought by Ms. McCormack Jackson. He is being sued for his behavior while Mayor, and just like any other employee of the City, lawsuits are frequently brought that may, or may not, have merit. **Not all behavior which is offensive is necessarily sexual harassment under California law.** *Hughes v. Pair* (2009) 46 Cal.4th 1035. The City should defend Mayor Filner until and unless there is merit shown in this case. **This is not a request for the City to agree to pay any verdict; it is simply a request for defense against unverified claims being brought against the Mayor - *claims which are denied.***

Plaintiff McCormack Jackson has merely filed an *unverified* lawsuit; she had the opportunity to file a verified lawsuit, but chose to have her attorney sign the complaint, so the allegations made in the lawsuit could certainly change over time. I am not currently aware of any witnesses supporting the plaintiff's specific allegations.

Of course, the storm of controversy surrounding this matter has brought forth a number of statements by people who have alleged inappropriate acts and behavior by Mayor Filner. However, virtually all of these statements refer to alleged acts committed years ago, *not* while Mayor Filner was in his present role, and such claims would be barred by the statute of limitations. The City Council should not take such unverified and irrelevant public statements into account when making its decision whether or not to defend Mayor Filner. ***Indeed, it is highly unlikely that any of these witnesses will be allowed to testify to such remote and alleged incidents in this pending lawsuit.*** We also would point out that many of the alleged statements and behaviors are not even employment related, and therefore not *legally* sexual harassment.

Of course, under FEHA, the City will be strictly liable for any sexual harassment by a supervisor, even if it had no reason to know of it. So, of course, the City should have a strong interest in making certain that Mayor Filner has the resources to defend himself. Given the City's joint liability if Plaintiff prevails, both for failing to conduct training and taking steps to prevent harassment, and due to the strict liability aspects of this case, it would only make sense for the City to provide a defense to Mayor Filner. If it does not, it will be a political, not a rational decision.

Mayor Filner and the City should stand together and work cooperatively to minimize the exposure to either of them, and to ultimately reach a resolution which will be satisfactory to all concerned.

If you have any questions about this request, please call me. We await the City's response.

Very truly yours,

POPE, BERGER & WILLIAMS, LLP

Harvey C. Berger

HCB:bms:ldl
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Mary Jo Lanzafame, Assistant City Attorney (via e-mail)
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