Law Offices of
TOSDAL, SMITH, STEINER & WAX
401 West A Street, Suite 320
San Diego, CA 92101
website: tosdalsmith.com

Thomas L. Tosdal
Ann M. Smith
Fern M. Steiner
Michael K. Wax
Jon Y. Vanderpool
James M. Stern*
Angela M. Jae
Kathryn A. Schultz
Jon Cadieux

*Certified Specialist Workers' Compensation Law
State Bar of California Board of Legal Specialization

Telephone: (619) 239-7200
Facsimile: (619) 239-6048
Email: asmith@tosdalsmith.com

April 24, 2012

Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

Re: *San Diego Municipal Employees Association (MEA) v. The Superior Court*
[PERB and City of San Diego, Real Parties In Interest]
Court of Appeal Case No. D061724
San Diego Superior Court Case No. 37-2012-00092205-CU-MC-CTL
Petitioner MEA's *Preliminary* Response to Ballot Proponents' Request to Join Action as Real Parties in Interest And/Or File a Preliminary Opposition As An Interested Party

Dear Justices:

Petitioner MEA was served this morning with a two-page letter accompanying a bound "Opposition of Interested Parties, Catherine A. Boling, T.J. Zane and Stephen B. Williams to Petition for Writ of Mandate." MEA offers this *preliminary* response while reserving its right to file a more comprehensive brief in response if this Court is inclined to accept and consider this Opposition on its merits.

Boling et al. have cited California Rules of Court, Rule 8.385 for the proposition that this rule entitles them to be heard in opposition to MEA's Writ Petition as "an interested person." But Rule 8.385 applies to *Petitions for Writs of Habeas Corpus* and not to the petition for writ of mandate which MEA filed under CRC Rule 8.485. In fact, even the inapplicable Rule 8.385, subdivision (b)(1) contemplates a *request* from the appellate court to "an interested person" inviting an informal written response. There is no similar provision under the rules applicable to MEA's civil petition for a writ of mandate.

In MEA's Certificate of Interested Entities or Persons which accompanied its Writ Petition, MEA identified *Boling et al.* as interested persons – noting the pendency of their motion to intervene in the civil injunctive relief proceedings below between PERB and the City of San Diego in which MEA, as charging party in the underlying unfair practice matter, is the real party in interest. The *Boling* motion to intervene had been set before Judge Dato for April 20, 2012; however, as outlined in detail in MEA's Writ Petition, counsel for the *Boling* ballot proponents – by his own admission

to Judge Taylor on March 15, 2012 – was frustrated and impatient with the schedule Judge Dato set for determination of this motion and thus filed a new action for damages (*inter alia*) against the individual PERB Board members and PERB's General Counsel. When Judge Taylor transferred this new action to Judge Dato to "avoid the appearance of forum shopping," the ballot proponents filed a peremptory challenge directed to Judge Dato which led to the transfer of both related cases to Judge Vargas where the *Boling* motion to intervene remains to be heard and decided.

Thus, *Boling et al.* are not real parties in interest in the matter before this Court on MEA's Writ Petition because they are *not* parties to the civil proceeding below between PERB and the City – and, more to the point, even if their motion to intervene is subsequently granted, they are not and will not become parties to the administrative proceedings before PERB between Charging Party MEA, as a recognized employee organization under the Meyers-Milias-Brown Act ("MMBA"), and Respondent City of San Diego as the public entity employer whose conduct under the MMBA is at issue in the pending unfair practice charge.

Although the Order staying PERB's administrative proceedings directly and adversely affects MEA's rights, it has no effect on *Boling et al.* because the Comprehensive Pension Reform ballot initiative will proceed to the ballot on June 5, 2012. As MEA noted in its Writ Petition, Judge Dato denied PERB's request for a temporary restraining order or preliminary injunction – and MEA is not challenging this determination in its Writ Petition – such that there will be no pre-election remedy even if the MMBA has been violated as alleged.

Moreover, by reference to the rules applicable to a miscellaneous writ seeking review of an order or decision of the Public Employment Relations Board (PERB), CRC Rule 8.498, subdivision (a)(2) defines a "real party in interest" as "a party of record to the proceeding." While this rule does not pertain expressly to MEA's writ petition, it serves to underscore the fact that *Boling et al.* are not "real parties in interest" for purposes of the administrative proceedings before PERB between MEA and the City. And it is MEA's interest in a timely, affordable administrative hearing on its unfair practice charge which has been undermined and harmed by the Superior Court's Order at issue in MEA's writ petition. Therefore, the request of *Boling et al.* for this Court to treat them as real parties in interest with respect to MEA's Writ Petition should be denied as they are *not* real parties in interest with respect to the Order staying PERB's administrative proceedings on MEA's unfair practice charge.

Even if this Court feels it is appropriate to consider the *Boling* Opposition over MEA's objections, this Opposition provides no merits-based rationale for denying MEA the writ relief it seeks. Instead, it is full of accusatory rhetoric about PERB's alleged "illegal expenditure of public funds," as well as inadmissible, speculative "beliefs" and "opinions" about MEA's and PERB's "real motives." In the midst of these provocative accusations, *Boling et al.* describes the Superior Court's Order as a benign and proper exercise of the trial court's discretion to "control its calendar." Just as the City itself did in its informal response, *Boling et al.* ignore the MMBA statutory scheme and PERB's proper role and responsibility when presented with unfair practice charges and requests for injunctive relief; they ignore the statutory law establishing – and the case law honoring – PERB's exclusive initial jurisdiction over this matter as an expert state agency.

Instead, *Boling et al.* attempt to put both MEA and PERB "on trial" – MEA for fulfilling its duty as an exclusive bargaining representative by filing an unfair practice charge in the first place based on the compelling evidence gathered in support, and PERB for performing its statutory duties. Indeed, *Boling et al.* have sued PERB Board members and PERB's General Counsel in their individual capacities for damages. They offer the implausible arguments in their Opposition that PERB "is actively participating in the campaign" (p. 8); that, by issuance of subpoenas duces tecum under PERB Regulation section 32150, PERB "has allowed MEA to delve into the *private lives* of elected officials" (p. 8); that the "threat of disclosure of private conversations during a political campaign chills their free speech rights" (p. 9); and that the "real purpose of the administrative proceedings is to investigate the conduct of the Proponents (*Boling et al.*) and their political allies rather than to achieve some lawful, governmental purpose." (p. 9)

Yet, as this Court knows, the written communications from and to elected officials are subject to disclosure under the Public Records Act and there can be no expectation of privacy regarding these communications by either party. Campaign finance laws required the Mayor to disclose – and he did disclose – the names of all those who provided monetary or in-kind contributions to the fund he established to support a pension reform initiative. Notably, the subpoenas which Judge Vargas improperly quashed by the Order at issue in MEA's Writ Petition were already the subject of City's Motion to Revoke which was pending before Administrative Law Judge Donn Ginoza at the time Judge Vargas heard the City's *ex parte* application on March 23, 2012. Indeed, the City had just filed this Motion to Revoke on March 21, 2012, and ALJ Ginoza directed MEA to respond to it on or before March 26, 2012. The City's Motion challenged all nine (9) subpoenas under California Cal. Code of Regulations, tit. 8, part III, section 32150, subd. (d), on the grounds that (1) the evidence requested is not relevant to any matter under consideration in the proceeding, or (2) the subpoena is otherwise invalid. MEA filed a timely opposition to the City's Motion but this matter was put into abeyance due to the Superior Court's Stay Order. The subpoenas at issue seek documents related to the activities of the Mayor and other elected officials while on City-paid time using City-paid resources; they are not directed at their "private" lives as *Boling et al.* erroneously assert.

Moreover, Mayor Sanders announced his intentions with regard to this pension reform initiative during the State of the City Public Address in January 2011, when he publicly declared: **"Councilman Kevin Faulconer, the city attorney and I will soon bring to voters an initiative** to enact a 401(k)-style plan that is similar to the private section's and reflects the reality of our times." (PE 9, 02419; see also PE 9, 02411 and PE 9, 02407 – Mayor's Press Releases.) Multiple media accounts thereafter document the Mayor's activities in connection with what he called "*his* legacy initiative." (PE 9, 02366-02405; see also PE 9, 02433, 02438-02439, 02459.) And Mayor Sanders openly explained to a *San Diego CityBeat* reporter that he *chose to go the citizen-initiative route in order to avoid negotiating with the unions that represent city employees*:

> "You do that so that you can get the ballot initiative on that you actually want. Otherwise, we'd have gone through meet-and-confer [negotiations], and you don't know what's gonna go on at that point through the meet-and-confer process." (PE 9, 02370-02371, *San Diego CityBeat*, 12/7/11)

Nor do *Boling et al.* offer any persuasive argument explaining how *their* First Amendment rights are allegedly threatened by PERB's administrative proceedings such that PERB's jurisdiction to proceed on MEA's unfair practice charge may lawfully be terminated. *Boling et al.* voluntarily communicated with elected officials, made campaign contributions, and participated in press conferences and other media events with the Mayor for the purpose of generating support for the Mayor's initiative. A "private citizen" has no expectation of privacy or confidentiality when communicating with an elected public official whose communications are generally subject to disclosure under the Public Records Act. Nor can such person's participation in meetings with elected officials be kept secret in a democracy. Any person who communicated with Mayor Sanders or his staff or any other City employee about the pension reform Charter amendments at issue in this case undoubtedly did so with the knowledge and expectation that those communications and/or meetings would or could be disclosed to other interested persons upon request.

Moreover, numerous media accounts related to the Mayor's activities over this ballot initiative identify private citizens who were involved in the effort with him; many of these private citizens appeared at press conferences where they were filmed for broadcast news coverage or photographed for the print media. *Boling et al.* themselves stood with Mayor Sanders on the City Concourse during work hours in early April last year to support the Mayor's announcement (as multiple media broadcast videoclips confirm) that "we" are taking the next step to reform the City's pension system and "it's a big one" which "transforms it into a national model." Mayor Sanders described the "compromise" *he* reached with Councilmember DeMaio to "craft one initiative." In turn, Councilmember DeMaio praised Mayor Sanders for his leadership in getting this CPR Initiative ready for the ballot. The Mayor was surrounded at the podium by these Councilmembers, by City Attorney Jan Goldsmith, and *by the three other citizens who became the "official" ballot proponents*. (PE 9, 02302) These "official" proponents are self-described professional political activists who are in leadership positions with the activist Lincoln Club. As vocal supporters of the pension reforms contained in the Mayor's Initiative, these citizens hitched their "Charter reform" wagon to the Mayor's bright star. In so doing, they took advantage of the power, prestige and extensive visibility and resources associated with his elected office in order to give this CPR Initiative the credibility and free media attention it would not likely have gotten without him – and would certainly not have gotten if this initiative had been crafted and promoted by three regular "John" or "Jane Doe" San Diego residents who wanted to change the City's Charter.

Thus, it does not matter how often or how loudly *Boling et al.* (or the City) assert that, in their judgment there was no violation of the MMBA here because, as a matter of law, there was no duty for the City to meet and confer over this "citizens' initiative." This is a *conclusion*. MEA will respond as often and as loudly – yes, there was – and MEA has the evidence and law to prove it at the administrative hearing where the *legislature* directed MEA to take its case for an initial determination.

This is the principal point driving MEA's writ petition: PERB must hear and decide the issues raised by MEA's unfair practice charge in accordance with its statutory mandate and the relevant case law. MEA has a right to proceed with this hearing in order to develop a full evidentiary record for this important issue to be decided in accordance with the statutory MMBA scheme.

Whether and how *Seal Beach* applies to the facts adduced in such a hearing will be PERB's determination to make in the first instance. Whether and how *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165 – addressing in part the assumptions voters make about an initiative they believe a *city* has sponsored versus one they believe *voters* or *citizens* have sponsored – applies to the circumstances here will be PERB's determination to make in the first instance. In its Writ Petition, MEA has addressed and explained PERB's recognized authority to make these determinations even when other statutory schemes or constitutional rights must be reconciled with the MMBA.

Administrative Law Judge Donn Ginoza will permit the parties (the City and MEA) to develop a full factual record based on admissible evidence; he will make credibility determinations based on the testimony of witnesses presented at the hearing and then issue a written proposed decision for either party (MEA or the City) to appeal to the PERB Board and, thereafter, to the Court of Appeal on a miscellaneous writ of review under CRC Rule 8.498 as noted above. This is the statutory scheme which applies to this case and there was no exception written into the statute or PERB's Regulations for the City of San Diego.

No lawful basis has been offered by the City or *Boling et al.* (if this Court even considers their Opposition to MEA's Writ) to support the correctness of the Superior Court's Order staying PERB's administrative proceedings on MEA's unfair practice charge and thereby disrupting the statutory scheme and PERB's proper role in that scheme – to the *detriment* of MEA and the employees it represents. Consistent with its statutory authority, PERB directed that the hearing on MEA's unfair practice charge be *expedited.* This directive was issued on February 10, 2012 – *before* the hearing on PERB's injunction relief on February 21, 2012, and *before* Judge Dato's decision to deny the pre-election remedy being sought. (PE 11, 108.) PERB's decision to expedite the administrative hearing in this case was *not* a reaction to this denial. In fact, if PERB had never sought injunctive relief, this expedited hearing would have already occurred as scheduled on April 2, 2012. The Order at issue here represents a form of gratuitous and unauthorized harm to MEA's legitimate rights when the Superior Court's jurisdiction was sought in the first place *only* for the limited purpose of getting interim *help* in light of the compelling evidence that the MMBA was being violated and that PERB's ability to provide an adequate remedy *after* an administrative hearing had taken place was being compromised.

The Superior Court has acted in excess of its lawful jurisdiction and the harmful consequences of its Order may only be reversed and remedied by this Court whose intervention is sorely needed as emphasized in MEA's Writ Petition filed on April 11, 2012, and re-emphasized in its Reply to the City's Informal Response filed this morning.

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MEA respectfully urges this Court to grant the relief requested in its Writ Petition.

Sincerely,

Ann M. Smith
TOSDAL, SMITH, STEINER & WAX
Attorneys for Petitioner San Diego Municipal Employees Association

Re: San Diego Municipal Employees Association v. Superior Court of the State of California, County of San Diego
Court of Appeal Case No.: D061724

PROOF OF SERVICE

I, the undersigned, hereby declare and state:

I am over the age of eighteen years, employed in the city of San Diego, California, and not a party to the within action. My business address is 401 West "A" Street, Suite 320, San Diego, California, 92101.

On April 24, 2012, I served the within document described as:

PETITIONER MEA'S PRELIMINARY RESPONSE TO *BOLING ET AL.'S* REQUEST TO JOIN ACTION AS REAL PARTIES IN INTEREST AND/OR FILE A PRELIMINARY OPPOSITION AS AN INTERESTED PARTY

via the method indicated:

Party	Method of Service
Hon. Luis R. Vargas San Diego Superior Court Department C-63 330 West Broadway San Diego, CA 92101 Telephone: (619) 450-7063	First Class Mail
Donald Worley, Esq. Office of the City Attorney 1200 Third Avenue, Suite 1620 San Diego, CA 92101-4178 Telephone: 619-236-6220 Fax: 619-236-7215 (Attorneys for City of San Diego)	First Class Mail

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M. Suzanne Murphy, Esq. — First Class Mail
Wendi Ross, Esq.
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4174
Telephone: 916-322-3198
Fax: 916-327-6377
(Attorneys for State of California,
Public Employment Relations Board)

James P. Lough, Esq. — First Class Mail
Lounsbery Ferguson Altona & Peak
960 Canterbury Place, Suite 300
Escondido, CA 92025-3870
Telephone: 760-743-1201
Fax: 760-743-9926
(Attorneys for Boling, et al.)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 24, 2012, at San Diego, California.

Elizabeth Diaz