**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION ONE**

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| SAN DIEGO UNIFIED PORT DISTRICT,<br><br>Petitioner,<br><br>vs.<br><br>THE SUPERIOR COURT OF SAN DIEGO COUNTY,<br><br>Respondent,<br><br>ARTURO CASTANARES,<br><br>Real Party in Interest. | D087218<br><br>(San Diego County Superior Court, Case No. 37-2024-00010750-CU-MC-CTL) |

# APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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MAKUS LAW CORPORATION

## APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

The importance of upholding the attorney-client privilege to reports of confidential workplace investigations including exhibits counsel transmit to their clients cannot be overstated. Amici curiae believe they can assist the Court in resolving this important case by presenting the views of public agencies and groups specializing in workplace investigations and addressing the importance of securing uniformity in protecting privileged workplace investigation reports in their entirety from disclosure under California's Public Records Act. For these reasons, the following amici curiae request leave to file the accompanied brief:

*The Association of Workplace Investigators, Inc.* The Association of Workplace Investigations ("AWI") is a tax-exempt California non-profit corporation with over 2,600 members performing impartial workplace investigations worldwide, including more than 960 in California. AWI's mission is to promote and enhance the quality of impartial workplace investigations. AWI attorney members are frequently retained to conduct impartial workplace investigations for California cities, counties and other government agencies. The reports that are generated often include factual findings and exhibits, and the entire report is considered protected by the attorney-client privilege. AWI's substantial experience with respect to workplace investigations will assist the Court in identifying important policy considerations underlying the issues raised by the petition and analyzing the attorney-client privilege in the context of workplace investigations. Since its founding in 2009, AWI has amassed and disseminated a considerable body of knowledge regarding impartial workplace investigations. It has published 21 issues of its peer-reviewed professional journal, currently entitled the AWI Journal. It has held 17 annual conferences with approximately 450 individuals attending each

session in recent years, more than 30 week-long Training Institutes with attendance limited to 70 students and dozens of seminars, workshops, and webinars. AWI's week-long ANAB accredited Training Institute includes such topics as: discrimination and investigation law, investigation planning, ethics, bias, interviewing witnesses, credibility, a full day mock investigation, report writing, individual faculty evaluations of student reports, and defending the investigation in litigation. AWI is an approved MCLE provider by the State Bar of California. Most of AWI's programs qualify for MCLE credit, and its programs on legal ethics qualify for MCLE specialty credit in legal ethics. In conjunction with these activities, AWI has devoted considerable resources to analyzing the legal and ethical issues involved in conducting impartial workplace investigations and training members and students on how to perform workplace investigations impartially, ethically, and legally. Although AWI does not generally have an interest whether a particular investigation at issue satisfies the requirements of the attorney-client privilege, much is at stake for the practice of AWI's members and their clients because of the larger implications of this decision, and, accordingly, AWI respectfully requests that the Court consider this amici brief.

*California Special Districts Association.* The California Special Districts Association ("CSDA") is a nonprofit corporation with a membership of over 1,000 special districts throughout California that was formed to promote good governance and improve core local services through professional development, advocacy, and other services for all types of independent special districts. Independent special districts provide various public services to urban, suburban, and rural communities, including irrigation, water, recreation and parks, cemetery, fire protection, police protection, library, utilities, harbor, healthcare, community-service districts and more. CSDA is advised by its Legal Advisory Working Group,

which consists of attorneys from all regions of the state with an interest in legal issues related to special districts. CSDA monitors litigation of concern to special districts and identifies cases that are of statewide significance. This is one of those cases.

*The League of California Cities.* The League of California Cities ("Cal Cities") is an association of 472 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 27 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

*The California State Association of Counties.* The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

*Oppenheimer Investigations Group, LLP.* Oppenheimer Investigations Group ("OIG") launched in 2021 as a limited liability partnership growing out of the Law Offices of Amy Oppenheimer. OIG has more than 25 years of experience as a leading entity in the field of workplace investigations and employment law. OIG's attorneys provides employment law services, including conducting independent workplace investigations, to 60% of California counties, 20% of its cities, plus dozens

of school and special districts throughout the State. As retained attorneys, OIG's investigations for public as well as private entities, and the reports OIG generates, are protected by the attorney client privilege. OIG conducts investigations with the understanding that the attorney-client privilege covers not only the body of its investigation reports, but also documents (interview notes, witness summaries, etc.) attached to its report.

*PRISM.* PRISM is a JPA formed in 1979 to provide cost-effective risk management services for California counties. Its membership has expanded to presently include 95% of the State's counties, 70% of its cities, 10% of the school districts, and hundreds of special districts. Some of its members are school districts that provide education to minors and other non-schools members such as counties, cities and park districts providing foster care services, recreation programs, youth sports, and other child-centered programs. PRISM provides several coverages to its members, including general liability coverage that provide for pooled first-level coverage up to $5,000,000 per member, after which layers of excess reinsurance are provided. PRISM and its members receive many requests for records from the public and rely upon the protections of the Public Records Act as they pertain to excluding the production of attorney-client communications and attorney work product.

*Van Dermyden Makus Law Corporation (VMLC).* VMLC focuses exclusively on neutral services such as workplace investigations and Title IX adjudications. Founded in 2009, VMLC has conducted thousands of workplace investigations and issued reports for public entities across California. Its attorneys and shareholders are leading authorities in the industry. Two of its shareholders served as president of the Association of Workplace Investigators (AWI), a preeminent, international association devoted to enhancing and promoting the quality of impartial workplace investigations.

VMLC's investigators are licensed attorneys who practice as attorneys in conducting workplace investigations. Every VMLC engagement, whether with a public or private entity, is an attorney-client relationship. By conducting investigations and issuing reports under the attorney-client privilege, VMLC's clients are able to receive comprehensive, thorough information at the early stages of an employment dispute. This frequently allows clients to resolve employment disputes before they escalate into litigation.

The ability to conduct an investigation and report findings and analysis under privilege is an important incentive for employers to authorize thorough, unbiased investigations that enable employers to receive a comprehensive, unbiased assessment of workplace concerns, regardless of whether the assessment is favorable to the employer. In VMLC's experience, the vast majority of employers desire to have accurate, comprehensive information about the circumstances of an employment dispute so they can take necessary action to resolve the dispute. The confidential nature of privileged investigations also allows employees and other stakeholders to participate candidly in the investigation process. Knowing that information will be confidential allows employees to share information that may not be favorable to them or their employer. This transparency leads to more reliable fact-finding and supports the efficient resolution of workplace issues before they become formal claims in litigation.

For these reasons, VMLC has a strong interest in protecting the ability to conduct investigations and issue reports that often attach exhibits under the attorney-client privilege. Based on VMLC's extensive experience, we have repeatedly observed employers resolve employment disputes effectively and early with the benefit of thorough reports of independent workplace investigations.

No party or party's counsel authored this brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief. Other than the amici curiae, their members or their counsel, no person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

Dated: April 1, 2026 WOMBLE BOND DICKINSON (US) LLP

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TABLE OF CONTENTS

INTRODUCTION ..... 11

ISSUE PRESENTED ..... 13

STATEMENT OF FACTS ..... 14

LEGAL ARGUMENT ..... 16

A. The Confidential Summary Report Inclusive of Attachments is Protected by the Attorney-Client Privilege ..... 16

B. The Trial Court Erred in Requiring the Port to Establish that Attachments to the Confidential Summary Report were Independently Privileged ..... 18

C. The CPRA Does Not Require Disclosure of Public Records Attached as Exhibits to Privileged Attorney-Client Communications ..... 18

1. The Trial Court Erred in Requiring Disclosure of Witness Summaries Attached to the Confidential Summary Report ..... 20

2. The Trial Court Erred in Requiring Disclosure of Records Attached to The Confidential Summary Report ..... 20

D. The Orders Requiring the Port to Further Amend its Privilege Logs Violated the Statutory Prohibition Against Requiring Disclosure of Information Claimed to be Privileged ..... 21

E. The Confidential Memorandum and Confidential Summary are Protected From Disclosure As Attorney Work Product ..... 22

F. Real Party's Remaining Arguments Lack Merit ..... 24

G. Public Policy Weighs in Favor of Including Exhibits to Confidential Communications Under the Attorney-Client Privilege Exemption From Disclosure ..... 24

CONCLUSION ..... 25

TABLE OF AUTHORITIES

**Cases**

*CBS, Inc. v. Block*
(1986) 42 Cal. 3d 646 ..... 24
*City of Petaluma v. Superior Court*
(2016) 248 Cal. App. 4th 1023 ..... 17, 20, 23
*Clark v. Superior Court*
(2011) 196 Cal. App. 4th 37 ..... 17
*Coito v. Superior Court*
(2012) 54 Cal. 4th 480 ..... 23
*Costco Wholesale Corp. v. Superior Court*
(2009) 47 Cal. 4th 725 ..... 16, 18, 21, 22
*County of Los Angeles Board of Supervisors v. Superior Court*
(2017) 12 Cal. App. 5th 1264 ..... 19
*D.I. Chadbourne, Inc. vs Superior Court*
(1964) 60 Cal 2d 723 ..... 20
*In re Jordon*
(1974) 12 Cal. 3d 575 ..... 16
*Los Angeles County Board of Supervisors v. Superior Court*
(2016) 2 Cal. 5th 182 ..... 17, 19
*Mitchell v. Superior Court*
(1984) 37 Cal. 3d 591 ..... 16, 21, 22, 25
*Rico v. Mitsubishi Motors Corp.*
(2007) 42 Cal. 4th 807 ..... 23
*Roberts v. City of Palmdale*
(1993) 5 Cal. 4th 363 ..... 17, 18, 19
*St. Croix v. Superior Court*
(2014) 228 Cal. App. 4th 434 ..... 19

**Statutes**

§6255 ..... 25
§7922.000 ..... 25
Business and Professions Code §6068(e)(1) ..... 26
California Evidence Code §952 ..... 18
Code of Civil Procedure §2018.030(a) ..... 23, 24
Code of Civil Procedure §2030.030 ..... 24
Evidence Code §915 ..... 22, 23
Evidence Code §915(b) ..... 22
Evidence Code §917 ..... 19
Evidence Code §954 ..... 17
Evidence Code 917(a) ..... 22
Gov't Code §7927.705 ..... 18, 19, 20, 25
Government Code §54950 ..... 19

## BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

### INTRODUCTION

The issue presented by the petition goes to the heart of confidential workplace investigations conducted by outside attorneys for public and private employers that result in reports protected by the attorney-client privilege. As in this case, government agencies retain attorneys specializing in employment law to conduct thorough and impartial workplace investigations. At the conclusion of the investigation, the attorney typically prepares a detailed written investigation report and, in that report, the attorney chooses to reference facts, witness statements and other documents and attach selected exhibits relevant to the attorney's findings. Under settled law the attorney-investigator's report, including exhibits – which they prepare or select using their legal knowledge, skills, and judgment - are considered privileged. The trial court in this case erred in finding the privilege covered the attorney's report but somehow not the attachments transmitted with the report to the client as a confidential attorney-client communication. This result is not only incongruous and contradicts settled law but, if upheld, it would undermine public policy in protecting confidential communications between attorney and client in the course of their relationship regardless of the content and regardless of whether the communication includes information or documents that might be discoverable through some other means. Allowing courts to parse exhibits to attorney-client communications for privilege under Evidence Code §954 would be significantly detrimental for lawyers conducting confidential workplace investigations as well as for clients and the general public.

Independent investigations are conducted so the employer may prevent and respond to harassment, discrimination, retaliation and other misconduct and take steps to fix any problems uncovered. A proper investigation has the potential to unearth all manner of sensitive

information including information that may not be relevant to the complaint. Because attorney investigators cannot know in advance what information is relevant, they must be given wide berth to chase down various avenues of inquiry without concern as to where this may lead. The attorney-client privilege allows an employer to give attorneys broad authority to review documents and interview witnesses without concern that confidential communications are not subject to disclosure to third parties. This, in turn, allows for a greater possibility of conducting a thorough and independent investigation. The existence of the privilege also encourages witness candor. Many employees would otherwise be reluctant to provide candid and truthful information without the assurance that their identities will be kept confidential from the accuser and the accused, other witnesses, and persons who are outside the investigation process.

Attorneys conducting workplace investigations and generating reports protected by the attorney-client privilege operate under the belief that the attorney-client privilege covers not only the body of the investigation report, but also supporting documents (interview notes, witness summaries, etc.) attached to the report. It makes little sense to require attorneys to include the contents of relevant documents and witness statements in the body of the report rather than as supporting documents in order to maintain the privilege. Attaching supporting documents aids in the completeness and thoroughness of the report and is an effective means of conveying information and legal advice to the client.

The trial court in this case improperly concluded that plaintiff's need for 61 of the exhibits attached to outside counsel's Confidential Summary Report outweighed the critical importance of the exemption for disclosure of records protected by the attorney-client privilege under the California Public Records Act. The attorney-client privilege applies to the attorney's Confidential Memorandum and Confidential Summary Report under the

CPRA. Allowing courts to engage in a balancing of interests in ruling on exhibits attached to the report under the exemption for privilege would be contrary to the public policy behind the privilege and would be detrimental to public agencies, employees and the public. Government agencies rely on outside counsel trained in confidential workplace investigations to conduct impartial investigations and render candid analysis and advice in privileged reports that often include exhibits. The fact that certain exhibits transmitted to the client in a privileged communication might constitute public records does not change the fact that the privileged communication is exempt from disclosure. The public policy that protects against disclosure of attorney-client communications in the course of the professional relationship applies equally to government agencies as it does to clients in the private sector.

It is critical that the Court reach the proper conclusion in this case. Affirming the trial court's findings would negatively impact confidential workplace investigations that were conducted according to best practices prior to the decision in this case, as exhibits attorney investigators attached to privileged reports could become the subject of discovery. This would jeopardize myriad investigators' mental impressions, along with their clients' attorney-client privilege rights, even though these past investigations were conducted with an understanding of the attorney-client privilege based on settled jurisprudence.

Further, affirming the trial court's decision would radically alter the future approach to workplace investigations. Specifically, attorneys would likely be constrained to conduct privileged investigations and write privileged reports without attaching supporting evidence for fear of disclosing their mental impressions or otherwise non-discoverable material.

## ISSUE PRESENTED

Whether exhibits attached to an attorney's privileged investigative report consisting of summaries of witness interviews with employees and

other selected documents are protected from disclosure under the California Public Records Act as attorney-client privileged communications and/or attorney work product.

## STATEMENT OF FACTS

The material facts do not appear to be in dispute. In 2013, the San Diego Unified Port District retained Elizabeth Dunn, an experienced lawyer in labor and employment law, as special counsel to conduct an impartial and thorough factual investigation and legal analysis concerning employment matters involving former Port CEO Joe Stuyvesant. Under her agreement with the Port, Ms. Dunn was expected to use her employment law and workplace investigation experience in advising the Port as to the appropriate scope of the investigation, what witnesses to interview and in what order, and what corroborating evidence to consider. She was expected to review and provide analysis of documents, including the Port's policies and procedures, determine what information was pertinent, make credibility determinations, evaluate evidence under legal standards, make factual findings and render legal opinions for use by the Port including use by the Port in anticipation of litigation.

Ms. Dunn worked directly through the Port's authorized representative, Ellen Gross, a licensed attorney who the Port retained as special counsel. Ms. Dunn memorialized her findings and analysis in a Confidential Memorandum and a Confidential Summary Report. The Confidential Summary Report included summaries prepared by Ms. Dunn of interviews she conducted with Port employees using her legal experience and which she attached to explain and support her legal analysis and advice. The Confidential Summary Report also included documents selected by Ms. Dunn based on her mental impressions and legal analysis which she incorporated in her report as supporting evidence. The Memorandum and Summary Report, including the attachments, were

transmitted by Ms. Dunn to Ms. Gross, the Port's authorized representative, in confidence and in the course of her attorney-client relationship with the Port as required by her legal services agreement.

Plaintiff and real party in interest submitted a public records request under the CPRA in February, 2024 for "any and all investigations, inquiries, or other reports concerning or otherwise pertaining to the job performance of former CEO Joe Stuyvesant conducted since January 1, 2023." The Port identified the Confidential Memorandum and the Confidential Summary with exhibits as responsive to the request, but withheld the records based on several exemptions including the attorney-client privilege and the attorney work product doctrine. In March 2024, Plaintiff filed a complaint and petition for writ of mandate alleging the Port failed to produce responsive documents.

The trial court initially determined the Port had established that both the Confidential Memorandum and the Confidential Summary Report are protected from disclosure under the attorney-client privilege and the attorney work product doctrine. Subsequently, the court questioned whether Plaintiff's need for exhibits attached to the Confidential Summary Report outweighed the Port's claim of privilege and attorney work product and ordered the Port, over its objection, to provide a more detailed privilege log. The Port filed an amended privileged log and declarations by Ms. Dunn, Ms. Gross and the Port's Assistant General Counsel confirming the privilege status of both the Memorandum and the Summary Report. At a subsequent hearing, the court sustained Ms. Dunn's attorney-client relationship with the Port and her assertion of attorney work product, but indicated that a qualified work product privilege applied to the attachments and ordered the Port to file a further revised privilege log. Ultimately, the court ruled that the Port's amended privilege logs complied with its orders and that no waiver of the attorney-client privilege had occurred. On

November 5, 2025, the court entered its order directing the Port to disclose 61 attachments to the Confidential Summary Report.

LEGAL ARGUMENT

**A. The Confidential Summary Report Inclusive of Attachments is Protected by the Attorney-Client Privilege**

It is settled law that the attorney-client privilege attaches to confidential communications between attorney and client occurring in the course of the attorney-client relationship to further the purpose of the legal representation. *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal. 4th 725, 733-734. Evidence Code §954 confers a privilege on clients "to refuse to disclose, and to prevent another from disclosing a confidential communication between client and lawyer." The privilege attaches to opinion letters and other forms of communication in their entirety regardless of whether unprivileged material is included. *Costco*, supra, at 733-734 – lengthy opinion letter sent by outside counsel to corporate counsel containing both factual information and legal advice is protected by the attorney-client privilege.

"The privilege covers the transmission of documents which are available to the public, and not merely information in the sole possession of the attorney or client. In this regard, it is the actual fact of the transmission which merits protection since discovery of the transmission of public documents might very well reveal the transmitter's intended strategy." *Mitchell v. Superior Court* (1984) 37 Cal. 3d 591, 599-600; *In re Jordon* (1974) 12 Cal. 3d 575, 580 – attorney-client privilege attached to copies of cases and law review articles transmitted by attorney to attorney's client.

It follows that because the privilege protects the transmission of unprivileged information and documents in a privileged communication, the attachments to privilege communications do not become unprivileged because they could be discovered by some other means. For these reasons,

the identity of attachments to privileged communications should not be discoverable. Courts have recognized that where the dominant purpose of the relationship between attorney and client is the provision of legal advice and services communications made during the course of the relationship that include factual material are privileged even though the factual material might be discoverable by other means. See, e.g., *Clark v. Superior Court* (2011) 196 Cal. App. 4th 37, 51-52 – employee's attorneys were disqualified for their unauthorized receipt of an email with an attached memorandum transmitted to employer's legal counsel during an internal investigation of employee's claims.

The California Public Records Act affords public entities such as the Port the attorney-client privilege as to public records to the extent authorized by the Evidence Code. *Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal. 5th 182, 291 – invoices for legal services transmitted to government agency by outside counsel are not categorically protected by the attorney-client privilege; Gov't Code §7927.705; California Evidence Code §952; *Roberts v. City of Palmdale* (1993) 5 Cal. 4th 363, 371.

Confidential prelitigation workplace investigations reports conducted by retained attorney investigators are considered protected by the attorney-client privilege and the attorney work product doctrine. *City of Petaluma v. Superior Court* (2016) 248 Cal. App. 4th 1023, 1035-1036. The Confidential Memorandum and Confidential Summary Report with exhibits are unmistakenly confidential communications of legal advice and services transmitted by retained outside counsel to the Port's authorized representative in confidence and in the course of their professional relationship. Witness summaries and records that the government agency's outside counsel determined to be relevant to her analysis and advice are an integral part of the privileged communication transmitted to the client and

are properly within the scope of confidential communications protected by the privilege.

### B. The Trial Court Erred in Requiring the Port to Establish that Attachments to the Confidential Summary Report were Independently Privileged

The trial court determined that the Confidential Memorandum and the Confidential Summary Report fell within the definition of the attorney-client privilege and that the Port had satisfied its burden that the records were confidential communications between lawyer and client made in the course of their relationship. Once a party establishes the preliminary facts necessary to support the claim of privilege, the communications are presumed to be made in confidence and the other party has the burden of proof to establish the communications were not confidential or the privilege does not apply for some other reason. Evidence Code §917; *Costco*, supra, 47 Cal. 4th at 733. It was, therefore, error for the court to place the burden on the Port to establish that exhibits to the Confidential Summary Report were independently privileged under the CPRA.

### C. The CPRA Does Not Require Disclosure of Public Records Attached as Exhibits to Privileged Attorney-Client Communications

The attorney-client privilege is absolute and disclosure may not be ordered without regard to relevance or necessity under the CPRA or other statutory authority. The CPRA expressly exempts from mandated disclosure communications that are protected by the attorney-client privilege. Government Code §7927.705 (formerly§6254(k)); *Roberts v. City of Palmdale*, supra, 5 Cal. 4th at 370 - while the Brown Act (Government Code §54950 et. seq.) abrogates the attorney-client privilege for purposes of the open meeting requirements, written attorney-client communications remain protected by the privilege; *St. Croix v. Superior*

*Court* (2014) 228 Cal. App. 4th 434, 441-442 – trial court erred in ordering disclosure under CPRA of written communication between city commission and city attorney. The Supreme Court in *Roberts* rejected the argument that in the public agency context, the attorney-client privilege should be limited to situations involving pending litigation. 5 Cal. 4th at 379-380.

Public policy preserving confidentiality in the attorney-client relationship applies even when public records in the possession of government agencies may be required to be disclosed under the CPRA or other law. Courts have confirmed that attorney-client communications between attorney and client "made for the purpose of seeking or delivering legal advice or representation" are exempt from disclosure under the CPRA. *Los Angeles County Board of Supervisors vs. Superior Court*, supra, 2 Cal. 5th at 297 – Invoices for legal services in pending and active matters closely related to attorney-client communications implicate the "heartland" of the privilege; *County of Los Angeles Board of Supervisors v. Superior Court* (2017) 12 Cal. App. 5th 1264, 1274-1275.

The Confidential Memorandum and the Confidential Summary Report with the attached exhibits implicates the "heartland" of the Port's privilege as explained by the Supreme Court and undisputably fall within the exemption. The exhibits closely relate to the lawyer's work and are integral to the communication of the lawyer's analysis and advice such that disassociating them from the transmission of privileged communications with the client is unsupportable. A determination whether a particular communication is exempt from disclosure under Government Code §7927.705 requires an examination of the entire communication and not simply its attachments. No distinction can or should be made between privileged communications of legal advice and services exempt from

disclosure under the CPRA and attachments to the communications that closely relate to the lawyer's work.

### 1. The Trial Court Erred in Requiring Disclosure of Witness Summaries Attached to the Confidential Summary Report

Confidential workplace investigation reports commonly include interviews with the client's employees by the attorney investigator. The investigative report does not lose its privileged status by including summaries of witness interviews with the report. Confidential attorney investigative reports relating to employment matters and transmitted to employer-clients are protected by the attorney client privilege and the attorney work product doctrine. *City of Petaluma v. Superior Court*, supra 248 Cal. App.4th at 1035-1036. Attorney interviews of employees who have been witnesses to matters in connection with their employment are protected by the employer's attorney-client privilege where, as here, the employer directs the making of the report for confidential transmission to the employer. *D.I. Chadbourne, Inc. vs Superior Court* (1964) 60 Cal 2d 723, 736-737. In this case, the dominant purpose of the Port requesting the investigation, including the interview of Port employees, was for the confidential transmission of the attorney's findings and the attorney's analysis and advice. Accordingly, the summaries of the witness statements attached to the Confidential Summary Report are clearly privileged.

### 2. The Trial Court Erred in Requiring Disclosure of Records Attached to The Confidential Summary Report

Although records in the possession of a government agency are assumed to be public records, and the agency bears the burden of asserting and establishing an exemption under the CPRA, the agency satisfies its burden of establishing the exemption based on the attorney-client privilege

by demonstrating the preliminary facts necessary to support the exercise of the privilege under Evidence Code 917(a).

A confidential attorney-client communication that satisfied the statutory requirements does not lose its privileged character because it includes nonprivileged information or records in the possession of the government agency. The attorney-client privilege includes the transmission of documents which are available to the public. *Mitchell v. Superior Court*, supra, 37 Cal. 3d at 600.

**D. The Orders Requiring the Port to Further Amend its Privilege Logs Violated the Statutory Prohibition Against Requiring Disclosure of Information Claimed to be Privileged**

A court may not require disclosure of information claimed to be privileged in order to rule on the claim of privilege. Evidence Code §915; *Costco v. Superior Court* supra, 47 Cal. 4th at 736-737. While a court may require disclosure of information claimed to be attorney work product in chambers out of the presence of persons other than the person claiming work product protection of the documents (and other persons the person claiming work product protection consents to be present), the court should first determine if the information is subject to the attorney-client privilege. Only if the court determines the privilege does not apply, should the court consider whether the information is protected as attorney work product at an in camera hearing. *Costco*, supra, 737 and fn. 4; Evidence Code §915(b).

Notwithstanding the trial court's determination that the Confidential Memorandum and Confidential Summary Report were privileged communications exempt from disclosure under the CPRA, the court ordered the Port to disclose privileged information under the exemption in ruling 61 of the exhibits to the Confidential Summary were subject to disclosure as qualified attorney work product. While a litigant may have to disclose some information to permit the court to evaluate the claim of

privilege, the court is not free to ignore the prohibition of Evidence Code §915 in requiring disclosure of the allegedly privileged information itself. *Costco*, supra, at 737.

The fundamental purpose of the attorney-client privilege is the preservation of the confidential relationship between attorney and client so as to promote full and open discussion of the facts and strategy surrounding legal matters. *Mitchell v. Superior Court*, supra, 37 Cal. 3d at 599; *Costco v. Superior Court,* supra, 47 Cal. 4th at 732. Ordering the Port to provide the amended and augmented amended privilege logs was an unwarranted intrusion into the confidences of the professional relationship between Ms. Dunn and the Port. Because the privilege protected the transmission of the communications irrespective of their content, there was no justification for requiring greater specificity of the exhibits to the Confidential Summary in ruling on the claim of privilege.

**E. The Confidential Memorandum and Confidential Summary are Protected From Disclosure As Attorney Work Product**

Because the Confidential Memorandum and Confidential Summary Report fall within the exemption for privileged documents under the CPRA, there is no need to reach the issue whether the documents are also exempt under the attorney work product doctrine. Nevertheless, the attorney work product doctrine applies and absolutely protects from discovery writings that contain an attorney's impressions, conclusions, opinions, legal research and theories. Code of Civil Procedure §2018.030(a). According to the record, both the Confidential Memorandum and the Confidential Summary Report contain the attorney investigator's work product. Whether specific material is protected work product must be resolved on a case by case basis. If the communications at issue are not exempt from disclosure under the attorney-client privilege, the Port should

be entitled to an in camera review of whether the 61 exhibits ordered to be disclosed qualify as protected work product under §2018.030(a).

The court erred in concluding that witness summaries of interviews conducted by the attorney investigator were entitled to only qualified work product protection and under a balancing of interests were required to be disclosed as public records under the CPRA. Witness statements obtained as a result of interviews of client employees conducted by outside counsel retained to conduct independent workplace investigations at the behest of the client constitute work product protected by §2030.030; *Coito v. Superior Court* (2012) 54 Cal. 4th 480, 494; *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal. 4th 807, 814 – work product protections extend to an attorney's notes about a witness's statement; see also *City of Petaluma v. Superior Court,* supra, 248 Cal. App. 4th at 1035-1036 – findings by an attorney-investigator that pertain to legal advice constitute professional services supporting the application of the attorney-client privilege and the attorney work product doctrine to the investigative efforts.

As the Supreme Court noted in *Rico*, the very existence of the witness summaries is owed to the lawyer's thought process in gathering, analyzing and reporting evidence in her role in conducting a thorough workplace investigation. *Rico,* supra, 42 Cal. 4th at 814.The statements could well include sensitive matters that go beyond the complaint and which are obtained with an expectation of confidentiality and privilege on the part of both the employee and the attorney.

The record in this case reveals that Ms. Dunn made a foundational showing that the summaries would reveal her impressions, conclusions, evaluations and opinions. Based on this adequate showing, at minimum, the court erred in failing to make an in camera inspection to determine whether work product protection applied to the witness summaries. *Coito v. Superior Court*, supra, 54 Cal 4th at 499-500.

## F. Real Party's Remaining Arguments Lack Merit

Plaintiff claims that public records attached as exhibits to privileged communications between lawyer and client are discoverable unless the exhibit itself is privileged. The argument lacks merit or supporting authority. Plaintiff's argument would require an implied exception be read into the exemption for privilege under §7927.705, which does not exist. Courts may not imply unwritten exceptions to existing statutory privileges.

Plaintiff is also incorrect that the "catchall" exemption under §7922.000 (formerly §6255) applies and that the trial court properly engaged in a balancing of interests in ordering disclosure of certain attachments to the Confidential Summary Report. The exemption that applies in this case is based on privilege for which there is no balancing of interests. The language Plaintiff cites that public agencies are required to use the equivalent of a surgical scalpel to separate portions of a record subject to disclosure from privileged portions, citing *CBS, Inc. v. Block* (1986) 42 Cal. 3d 646, 652-653, refers to situations involving exemptions under former §6255 (currently §7922.000). *CBS, Inc.* involved a T.V. network's public records act request for applications to and licenses issued by the sheriff's office authorizing possession of concealed weapons. The statement plaintiff cites that factual parts of a requested document falling within the terms of an exemption does not justify withholding the entire document is in the context of applying §7922,000 and does not apply in this case. The scope of the exemption under the Act in this case is based the statutory attorney-client privilege.

## G. Public Policy Weighs in Favor of Including Exhibits to Confidential Communications Under the Attorney-Client Privilege Exemption From Disclosure

The attorney-client privilege has long been recognized as a means of ensuring that lawyers and clients communicate freely with one another

without fear that information shared between them will not be revealed. Cases and statutes articulating the attorney-client privilege do not distinguish between factual and legal information. Transmitting factual information in support of legal advice and services in confidential communications occurring during the course of the professional relationship advances the fundamental purpose behind the attorney-client privilege to safeguard the confidential relationship between clients and their lawyer and to promote full and open discussion of the facts and issues surrounding legal matters.

Compelling disclosure of attachments to privileged communications will result in revealing much of the attorney investigator's investigative effort, thought processes and strategy. The mere knowledge of such potential discovery would place an unnecessary burden on attorneys and clients in communicating effectively in the course of their professional relationship. Including attachments within the scope of the privilege is consistent with the principle that the privilege protects information transmitted between attorney and client regardless of its content because the fact of transmission "might well reveal the transmitter's intended strategy." *Mitchell v. Superior Court*, supra, 17 Cal. 3d at 600.

For decades, attorneys have included materials and attachments in conveying legal advice and analysis in privileged communications with their clients. To change that long standing practice would significantly and unjustifiably disrupt effective communications between lawyers and clients.

## CONCLUSION

Public policy strongly favors the attorney-client privilege, which applies to government agencies and is not constrained by the CPRA. The duty of lawyers to protect client confidences is not merely a rule of professional conduct but instead involves public policies of paramount importance. Business and Professions Code §6068(e)(1). The Port's

assertion of the privilege as to outside counsel's Confidential Memorandum and Confidential Summary Report with attachments was proper under the CPRA and should be upheld.

For the forgoing reasons, the amici respectfully requests that the Port's petition be granted.

Respectfully submitted this first day of April, 2026.

WOMBLE BOND DICKINSON (US) LLP

By: */s/ Mark L. Tuft*
Mak L. Tuft Esq

Attorney*s* for Amici Curiae
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## CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c), I certify that this brief contains 6468 words, including footnotes, as counted by the word-processing program used to prepare the brief.

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

Executed on April 1, 2026, at Walnut Creek, California.

By: *<u>/s/ Mark L. Tuft</u>*
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WBD (US) 4927-7982-9917v1

## PROOF OF SERVICE [#1]

At the time of service, I am over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 50 California Street, Suite 2750, San Francisco, CA 94111.

On April 1, 2026, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

☐ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Womble Bond Dickinson (US) LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at San Francisco, California.

☒ **ELECTRONIC SERVICE (TrueFiling):** I electronically served the document(s) listed above on all parties in this action by transmitting the document(s) through the Court of Appeal's authorized electronic filing and service provider, TrueFiling. Service was completed on all counsel of record who are registered for electronic service, as reflected on the electronic service list generated by TrueFiling.

☐ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address Mark.Brewster@wbd-us.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on April 1, 2026, at Walnut Creek, California.

*/s/ Mark J. Brewster*

Mark J. Brewster

## SERVICE LIST

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## PROOF OF SERVICE [#2]

At the time of service, I am over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 50 California Street, Suite 2750, San Francisco, CA 94111.

On April 1, 2026, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER** on the interested parties in this action as follows:

| | |
|---|---|
| Superior Court of California, County of San Diego<br>Central Courthouse<br>Clerk of the Court<br>1100 Union Street,<br>San Diego, CA 92101 | Respondent |

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

Executed on April 1, 2026, at Walnut Creek, California.

*/s/ Mark J. Brewster*

Mark J. Brewster

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