D068901

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

JOHN DOE,
Plaintiff and Respondent,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO,
Defendant and Appellant.

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY
HON. JOEL M. PRESSMAN, JUDGE, SUP. CT. NO. 37-2015-00010549-DU-WM-CTL

RESPONDENT'S BRIEF

HABERKORN & ASSOCIATES
Matthew H. Haberkorn, SBN 152424
P. O. Box 7474
Menlo Park, California 94025
Telephone: (650) 268-8378

ESNER, CHANG & BOYER
*Andrew N. Chang, SBN 84544
Joseph S. Persoff, SBN 307986
234 East Colorado Boulevard, Suite 975
Pasadena, California 91101
Telephone: (626) 535-9860

Attorneys for Plaintiff and Respondent

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Fourth APPELLATE DISTRICT, DIVISION One	Court of Appeal Case Number: D068901
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Andrew N. Chang, SBN 84544 — Esner, Chang & Boyer 234 E. Colorado Boulevard, Suite 975 Pasadena, CA 91101 TELEPHONE NO.: 626-535-9860 FAX NO. (Optional): 626-535-9859 E-MAIL ADDRESS (Optional): achang@ecbappeal.com ATTORNEY FOR (Name): John Doe	Superior Court Case Number: 37-2015-00010549 FOR COURT USE ONLY
APPELLANT/PETITIONER: John Doe RESPONDENT/REAL PARTY IN INTEREST: Regents of the University of California,	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): John Doe

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

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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: June 13, 2016

Andrew N. Chang
(TYPE OR PRINT NAME)

▶ Andrew N. Chang
(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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INTRODUCTION

This appeal arises from the Superior Court's grant of a Petition for Writ of Mandamus ordering the University of California, San Diego (the "University" or "UCSD") to set aside its suspension of an undergraduate student because the suspension was the result of an unfair process, unsupported by substantial evidence, and an abuse of discretion.

Reducing sexual assault on campuses and providing appropriate discipline for offenders is indisputably a goal all academic institutions should strive for. However, that goal must be achieved by proper substantive and procedural rules that best balance the complex issues involved in addressing sexual misconduct in our colleges and universities. The goal must be to fully address sexual harassment while at the same time protecting students against unfair and inappropriate discipline, honoring individual relationship autonomy, and maintaining the values of academic freedom.

John Doe was a sophomore Management Science major and Accounting minor at the University of California, San Diego when he met Jane Roe, a fellow UCSD student. Mr. Doe was then working at the District Attorney's office and planned to go to law school. In January 2014, Mr. Doe and Ms. Doe began a sexual relationship that lasted about a month. In June, Ms. Roe filed a complaint against Mr. Doe months after their final sexual encounter. The university initiated proceedings against Mr. Doe to determine whether he violated university policy. These proceedings were a sham attempt at a fair

process. Indeed, the proceedings were a pretense created to achieve a predetermined goal without affording Mr. Doe any meaningful opportunity of defending himself. The university then retaliated against Mr. Doe for appealing its findings by increasing Mr. Doe's sanctions at each stage of appeal. The final sanctions against Mr. Doe were a de facto expulsion from the university and a permanent mark that would likely prevent him from ever being accepted into a law school and would limit his employment opportunities. The trial court properly set aside the university's findings and sanctions against Mr. Doe after concluding the university did not provide him with sufficient process; its findings were not supported by the record; and its sanctions against him were an abuse of discretion.

Here, as the trial court found, the university substantially impaired, if not eliminated, Mr. Doe's right to a fair and impartial process.

This court should affirm the trial court's ruling for the following reasons.

First, the university did not provide Mr. Doe with any meaningful opportunity to defend himself. At the university's hearing, Mr. Doe was not entitled to be represented by counsel. While Mr. Doe's attorney was present at the hearing, he was not allowed to participate. Next, Mr. Doe was not provided with the right to cross-examine Ms. Roe. Although he was permitted to submit questions prior to the hearing, the panel chair determined which questions would be asked and how to ask them. Further, this process did not provide Mr. Doe with the opportunity to question Ms. Roe about anything she testified to at the hearing. Additionally, the panel improperly penalized Mr. Doe for

invoking his Fifth Amendment Privilege against self-incrimination. Finally, the university also did not provide Mr. Doe with the statements made to a university representative by numerous witnesses and Ms. Roe. These statements served as a basis for conclusions made in an investigative report that the panel relied upon in reaching its findings and imposing its sanctions. Recent case law from this District holds that withholding of evidence by a university against a student accused of sexual misconduct is alone sufficient to render the proceedings unfair.

Second, the university's finding that Mr. Doe violated university policy is not supported by evidence. The university found that Mr. Doe violated university policy by digitally penetrating her when it was unreasonable for him to believe she had consented to the activity. The university made this conclusion not based on any evidence presented to the panel at the hearing, but based on a finding made in the investigative report that was not mentioned at the hearing – the same investigative report whose conclusions were supported by witness statements the university refused to provide to Mr. Doe.

Third, the university's sanctions against Mr. Doe were an abuse of discretion. After the panel concluded Mr. Doe violated university policy, it recommended Mr. Doe be suspended for one quarter along with several other punishments. When Mr. Doe appealed the panel's findings and sanctions to the Dean, the Dean not only upheld all of the panel's sanctions, but increased Mr. Doe's suspension to one year and forced him to attend an ethics workshop for which he would have to pay the university to attend. When a student is suspended for two or more quarters, the student must apply for readmission.

In significantly increasing Mr. Doe's suspension, the Dean provided no reasoning for her action. In response to Mr. Doe pointing out there was no evidence supporting that Mr. Doe actually digitally penetrated Ms. Roe, the Dean responded by admitting Mr. Doe was right but stated she "expected" that Ms. Roe told the university representative drafting the investigative report that was what happened. Mr. Doe responded by appealing the Dean's decision to the Council of Provosts. The Council responded to Mr. Doe by tacking on another quarter to his suspension, increasing the suspension a full year from the initial single quarter suspension recommended by the Hearing Panel. Just like the Dean, the Council provided no justification for its actions.

For all these reasons, this Court should affirm the superior court's decision that the university's manifestly unfair actions against Mr. Doe should not stand.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

A. Two Students at the University of California, San Diego Develop a Sexual Relationship.

In January 2014, John Doe, a sophomore Management Science major and Accounting minor at the University of California, San Diego ("UCSD"), began a relationship with Jane Roe, a fellow undergraduate at UCSD. (1 AA 11, 107.) Ms. Roe was of the Mormon faith and, prior to entering college, abstained from drinking alcohol

and intended on abstaining from sexual intercourse until she was married or was in a committed relationship. (1 AA 107.) Mr. Doe and Ms. Roe met when their respective fraternity and sorority began organizing social activities together. (1 AA 107.)

Soon after meeting, Mr. Doe and Ms. Roe's relationship became amorous. (1 AA 107.) While the relationship was initially limited to kissing, within days Ms. Roe began performing oral sex on Mr. Doe and then requested he reciprocate. (1 AA 76, 107.) A week after their relationship began, Mr. Doe's fraternity hosted a social event with Ms. Roe's sorority. (1 AA 109.) Mr. Doe invited Ms. Roe and some of her friends to his apartment so they could begin drinking prior to the event. (1 AA 109.) Although Ms. Roe did not intend on having sexual intercourse with Mr. Doe that night, she brought a change of clothes to his apartment in case she decided to stay the night. (1 AA 109.)

Mr. Doe and Ms. Roe drank while at the event and returned to Mr. Doe's apartment afterward. (1 AA 109.) Upon returning to Mr. Doe's apartment, he and Ms. Roe talked with Mr. Doe's roommate before going into Mr. Doe's bedroom. (1 AA 111-112.) Throughout the night, Mr. Doe's other roommate heard Mr. Doe and Ms. Roe talking and laughing. (1 AA 111-112.) Mr. Doe and Ms. Roe eventually engaged in sexual intercourse. (1 AA 111-112.)

After their night of drinking, neither Mr. Doe nor Ms. Roe felt well the next morning. (1 AA 112-113.) Mr. Doe eventually drove Ms. Roe home, intending to meet her later for Ms. Roe's sorority formal. (1 AA 113.)

That afternoon, Mr. Doe and Ms. Roe conversed via text message and joked about how other members of their fraternity and sorority were entering into similar sexual relationships. (1 AA 206-210.) Mr. Doe and Ms. Roe then attended Ms. Roe's sorority formal together. (1 AA 113.) After the formal, Mr. Doe and Ms. Roe engaged in sexual intercourse once again. (1 AA 113.)

B. Mr. Doe and Ms. Roe Maintain a Cordial Relationship; Months Later, Ms. Roe Files a Complaint Against Mr. Doe.

While Mr. Doe and Ms. Roe's relationship was no longer amorous, they maintained a cordial relationship. As of April 2014, Mr. Doe and Ms. Roe continued to socialize together. (1 AA 84-85.) Ms. Roe also asked Mr. Doe for homework help in a class they had together. (1 AA 86.)

In late March, Ms. Roe was arrested for drunkenness, taken to the San Diego Detox Center, and cited for underage drinking. (2 AR 624.) A few weeks later, Ms. Roe's parents received a copy of the ticket in the mail. (2 AR 624.) Around the same time, Ms. Roe's cousin told her parents about Ms. Roe's sexual relationship with Mr. Doe. (2 AR 624.) Her parents responded by requiring Ms. Roe to come home every weekend. (2 AR 624.)

In May, Mr. Doe and Ms. Roe had a falling out after Mr. Doe was invited to Ms. Roe's sorority formal by another member of the sorority. (2 AA 537.) The next month,

Ms. Roe filed a complaint with the university alleging that Mr. Doe engaged in sexual misconduct with her the night of January 31 and the morning of February 1, and that he retaliated against her in May with his verbal behavior toward her at a party they attended. (1 AA 92-94, 109-116.) Specifically, Ms. Roe alleged that Mr. Doe engaged in sexual intercourse with her when she was incapacitated and unable to provide effective consent; that Mr. Doe retaliated against her at a party; and, the morning after they engaged in sexual intercourse the first time, that Mr. Roe "kept trying to remove [her] underwear and touch her but [she] kept telling him that it hurt really badly and asked him to stop." (1 AA 93, 100.)

C. The University Conducts an Investigation and Then Holds a Hearing.

The University conducted an investigation, interviewing Ms. Roe, 14 witnesses, and reviewing various text messages. (1 AA 106.) Mr. Doe, pursuant to his Fifth Amendment right against self-incrimination, declined to be interviewed but submitted two offers of proof. (1 AA 106, 154.) The investigator concluded the evidence was insufficient to support the sexual intercourse and retaliation complaint but it was sufficient to support the attempted digital penetration complaint. (1 AA 118-120.) The investigator then referred the matter to the university's Director of the Office of Student Conduct. (1 AA 186.)

The University held a hearing on December 12, 2014. (1 AR 280.) The hearing was limited to the accusation that Mr. Doe violated UCSD policy by allegedly "digitally penetrat[ing] [Ms. Roe's] vagina after she repeatedly stated that she did not want to engage in sexual activity with him." (1 AR 288.)

Prior to the hearing, Mr. Doe submitted pre-hearing submissions and other information in support of his defense (1 AR 90-108), as well as 32 questions to be asked of Ms. Roe at the hearing (1 AR 256-267). UCSD refused to provide Mr. Doe with Ms. Roe's statements in her initial complaint to the university, refused to provide Mr. Doe with Ms. Roe's statements from her interviews with the university, and refused to provide Mr. Doe with statements made by any of the 14 witnesses the university interviewed. (1 AA 58-59.)

The hearing was presided over by the chair of the hearing panel. (1 AR 282.) The hearing chair was Rebecca Otten, Director of Strategic Partnerships/Housing Allocations; the other two hearing officers were Jeff Hill, Assistant Director of Residence Life and Kris Nelson, Representative of the Graduate Student Association. (2 AR 334.) The chair notified Mr. Doe of his rights during the review: (1) the right to be notified of the alleged violations which occurred; (2) the right to a proper and fair review; (3) the right to a record of the review; and (4) the right to appeal the decision and/or sanctions. (1 AR 282-283.) Mr. Doe's attorney, while present, was not allowed to participate in the hearing. (1 AR 284.) The charges against Mr. Doe were presented by the university's representative, Anthony Jakubisin. (2 AA 321-322.)

Ms. Roe, while behind a screen shielded from the panel's view, testified at the hearing under direct questioning from Mr. Jakubisin that, on the morning of February 1, Mr. Doe "kept trying to touch [her], and [she] kept pushing his hand away and telling him that it hurt. And he kept saying, 'Okay, sorry,' and he would take his hands away, and then like two minutes later he would go and try again." (1 AA 51; 1 AR 290.)

When Mr. Jakubisin finished questioning Ms. Roe, the chair reviewed the questions submitted by Mr. Doe. (1 AR 303.) Of the 32 questions Mr. Doe submitted, the chair refused to ask Ms. Roe 23 of them. (1 AR 303-311.) Mr. Doe then asserted his Fifth Amendment right and did not testify, but he did answer some questions from the panel. (1 AR 311.) In response to a question, Mr. Doe stated that, on the morning of February 1, he and Ms. Roe "had not been amorous . . . whatsoever. . . . There was no touching." (1 AR 313.)

After the hearing ended, Mr. Doe submitted supplemental submissions and other information in support of his defense. (1 AR 327.) In these submissions, Mr. Doe raised objections to the process he was given in the hearing. Specifically, Mr. Doe stated that his questions submitted to be asked to Ms. Roe were "unreasonably and indiscriminately limited to such an extent that [Mr. Doe] was subjected to an unfair hearing and denial of his due process rights." (1 AR 328.)

D. The Hearing Panel Concludes Mr. Doe Violated UCSD Policy, Recommending a One Quarter Suspension; Mr. Doe Appeals; His Suspension Is Increased to One Year and after Another Appeal Increased Again to One Year and One Quarter.

The hearing panel found that, "[b]ased on the information presented at the Review, including the incident report, the investigative reports, the Respondent's pre-hearing submissions, the witnesses' statements, and the Respondent's supplemental submissions, we find it more likely than not that the Respondent, John Doe, violated [the UCSD code of conduct prohibiting 'sexual misconduct[1]].'" (2 AR 335.) The hearing panel recommended suspension for one quarter; a permanent no contact order; two hour sex offense/sexual harassment training; and counseling assessment. (2 AR 335.)

Per UCSD procedure, the panel's recommendations were sent to the Dean of Student Affairs. (2 AR 365-366.) While the dean had the recommendations under consideration, Mr. Doe wrote a letter to the dean. (2 AR 339-342.) In the letter, Mr. Doe once again denied the accusation, questioned the fairness of the proceeding, and raised concern over how the decision would prevent him from being accepted into law school and would cause him to lose his job at the District Attorney's office. (2 AR 339-342.)

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[1] UCSD defines "sexual misconduct" as "non-consensual sexual activity engaged in without the intent to harm another, such as when a person believes unreasonably that effective consent was given when, in fact, it was not." (2 AR 335.)

Upon reviewing the recommendations of the hearing panel, the dean suspended Mr. Doe for one year, and concluded that, while "[Ms. Roe] does not specifically reference digital penetration [in her testimony], . . . I expect that is what happened in this instance." (2 AR 344; 2 AA 391.) Per UCSD policy, students suspended for two quarters or more must reapply for admission to the university after their suspension. (2 AR 344.) The dean also instituted other sanctions against Mr. Doe, including non-academic probation for the duration of his tenure at UCSD, as well as requiring Mr. Doe to attend a "Practical Decision Making Workshop" for which he would have to pay a $50 fee to the university. (2 AR 344.)

Mr. Doe appealed the decision to the UCSD Council of Provosts. (2 AR 370.) The Council of Provosts affirmed the dean's decision, concluding the decision was supported by the findings, that there was not unfairness in the proceedings that prejudiced the result, and that the sanctions assigned were not grossly disproportionate to the violation committed. (2 AR 649.) Additionally, the Council of Provosts increased Mr. Doe's suspension to one year and one quarter. (2 AR 649.)

E. Mr. Doe Petitions the Superior Court for a Writ of Administrative Mandate; the Court Grants the Petition, Concluding UCSD's Proceedings Against Mr. Doe Were Unfair, the Evidence Did Not Support its Findings, and it Abused its Discretion by Increasing Mr. Doe's Sanctions Without Explanation.

Shortly after the Council of Provosts rendered its decision, Mr. Doe filed an ex parte application with the Superior Court of San Diego County seeking a stay of the administrative findings and sanctions pending the court's review. (1 AA 1.) The court granted a temporary restraining order granting the stay pending a hearing on the matter. (1 AA 22-23.)

Mr. Doe then filed a Petition for Writ of Administrative Mandate under Code of Civ. Proc. § 1094.5, or alternatively, under Code of Civ. Proc. § 1085, requesting the court direct UCSD to set aside its findings and sanctions. (1 AA 33-44.) Mr. Doe argued such action was justified due to UCSD's failure to grant Mr. Doe a fair hearing; UCSD's commission of a prejudicial abuse of discretion, in that UCSD failed to proceed in the manner required by law; UCSD's decision not being supported by the findings; and UCSD's findings not being supported by the evidence. (1 AA 41.)

The Regents of the University of California ("The Regents") filed an opposition to Mr. Doe's motion for stay. (2 AA 433.) The Regents argued a stay was not warranted because it would violate the principle of judicial deference to administrative decisions, because Mr. Doe could not demonstrate a likelihood of success on the merits, because it

would be against the public interest in preserving the educational purposes of student disciplinary process and sanctions, because Mr. Doe had not and could not demonstrate irreparable harm, and because a stay was not authorized by Code of Civ. Proc. § 1094.5. (2 AA 433-444.)

Mr. Doe filed a reply to The Regents' opposition, arguing that the principle of nonintervention by the court applies to academic affairs, not to Title IX sexual misconduct matters; that Mr. Doe met his burden of showing "some possibility" of prevailing; that The Regents failed to show the stay is against the public interest, and that Mr. Doe has demonstrated irreparable harm will result if no stay was granted. (2 AA 495-507.)

The court held a hearing and granted the stay in part. (2 AA 513.) The court granted the stay in respect to Mr. Doe's suspension by the university but kept the "stay away" order in effect. (2 AA 513.) The court granted the stay of Mr. Doe's suspension pending its review of Mr. Doe's Writ Petition. (2 AA 514-515.)

Mr. Doe then filed his opening brief in support of his Petition for Writ of Mandamus. (2 AA 534.) Mr. Doe argued UCSD's findings were not supported by the evidence because Mr. Doe denied he digitally penetrated Ms. Roe the morning of February 1 and Ms. Roe did not testify that digital penetration actually occurred. (2 AA 542.) Next, Mr. Doe argued UCSD's decision was not supported by the findings because the findings were inconsistent and were not conclusive as to whether non-consensual digital vaginal penetration occurred. (2 AA 543-545.) Mr. Doe also argued the

proceedings were unfair for numerous reasons, including (1) that UCSD refused to provide Mr. Doe with Ms. Roe's statements made in her initial complaint or her subsequent interviews; (2) that UCSD improperly redacted portions of Ms. Roe's statement in support of her Request for Formal Complaint (2 AA 577-579); (3) that UCSD refused to provide Mr. Doe with statements made by the 14 witnesses UCSD interviewed for its investigation; (4) that UCSD improperly refused to pose 23 out of the 32 questions Mr. Doe had submitted to be asked to Ms. Roe at the hearing–and the ones UCSD did ask were improperly altered; and (5) that UCSD's representative at the hearing, Mr. Jakubisin improperly referenced Mr. Doe's "prior sexual misconduct" to attack his credibility, even though the alleged February 1 event was the only event at issue and UCSD's investigation into Ms. Roe's other allegations concluded they had insufficient evidentiary support. (2 AA 545-549.) Last, Mr. Doe argued UCSD's sanctions are grossly disproportionate because they served as an effectual expulsion of Mr. Doe from the university. (2 AA 549.)

The Regents opposed Mr. Doe's Petition for Writ of Mandamus. (3 AA 582.) First, The Regents argued substantial evidence supported the findings against Mr. Doe because UCSD's factual determinations should be granted deference. (3 AA 592-594.) Next, The Regents argued the panel's decision was supported by the findings because Ms. Roe explained any inconsistencies in her statements. (3 AA 594-595.) The Regents then argued that Mr. Doe received a fair hearing because due process is flexible and a student's rights in disciplinary hearings are not co-extensive with the rights of litigants in

a civil or criminal trial. (3 AA 595-599.) The Regents also argued the sanctions against Mr. Doe are proportionate because he was merely "suspended for one year and one quarter and can return to UCSD upon completion of his suspension"; further, UCSD was "free to depart" from the hearing panel's recommendation. (3 AA 599-600.) The Regents last argued the UCSD Provosts were not proper parties to the proceeding. (3 AA 600-601.)

Mr. Doe filed a reply to The Regents' opposition. (3 AA 639.) Mr. Doe first responded to The Regents' argument that the panel's findings were supported by substantial evidence by arguing that the hearing panel improperly found that Mr. Doe digitally penetrated Ms. Roe when Mr. Doe denied it happened and Ms. Roe's testimony was inconsistent about whether it happened. (3 AA 642-646.) In response to The Regents' argument that the panel's decision was supported by the findings, Mr. Doe argued that the decisions were based on faulty findings, that the distinction between Ms. Roe's inconsistent testimony whether Mr. Doe actually digitally penetrated her or attempted to digitally penetrate her is significant because it undermines her credibility, and that the panel improperly prejudiced Mr. Doe for invoking his Fifth Amendment right as evidenced by the panel's reference in its findings to Mr. Doe's decision not to testify. (3 AA 646-647.) In regard to The Regents' argument that Mr. Doe was not deprived of a fair hearing, Mr. Doe argued that UCSD failed to provide him with fair notice of the charges and evidence against him, that UCSD failed to provide him a fair opportunity to present his defense, and that UCSD's investigation was rife with unfairness. (3 AA 647-

650.) In response to The Regents' argument the sanctions were proportionate, Mr. Doe responded that his suspension is a de facto expulsion because students suspended for two or more quarters must reapply to the university for admission. (3 AA 650-651.) Lastly, Mr. Doe argued the UCSD Provosts were properly named because they are being sued in their official capacity rather than their individual capacity. (3 AA 651.)

The court held a hearing and granted Mr. Doe's Petition for Writ of Administrative Mandate. (3 AA 715.) The court concluded UCSD's hearing was unfair, the evidence did not support the panel's findings, and that UCSD abused its discretion by increasing sanctions against Mr. Doe without explanation, making it appear the punishment was increased to punish Mr. Doe for appealing the Hearing Panel's decision. (3 AA 716.)

The court concluded the hearing was unfair because UCSD unfairly limited Mr. Doe's right to cross-examine Ms. Roe by asking only nine of the 32 questions Mr. Doe submitted, and that the questions were reviewed by the Panel Chair alone to determine whether or not the question would be asked. (3 AA 718-719.) The court also expressed concern over the fact that Ms. Roe was behind a barrier during the hearing and may not have been visible to the panel and was not visible to Mr. Doe despite there being no indication of hostility from Mr. Doe toward Ms. Roe. (3 AA 719.)

Next, the court found it unfair that UCSD's initial investigative report was hardly mentioned during the hearing but was relied upon heavily by the panel in its findings. (3 AA 719.) The court concluded it was improper that the panel relied on a report that was not part of the hearing, thereby preventing Mr. Doe from being able to refute the report.

(3 AA 719.) The court found that this also improperly delegated the panel's duty to an outside party. (3 AA 719.) The court also concluded Mr. Doe's right of confrontation was violated because he was not given any of the interviews by the 14 witnesses or by Ms. Roe. (3 AA 719.) Last, the court ruled the panel gave improper weight to Mr. Doe's exercise of his 5th Amendment right against self-incrimination because in one of its findings the panel stated, "While John stated during the hearing that he did not digitally penetrate Jane's vagina, he abstained from providing additional information regarding the incident and what occurred around the time of the incident *and the panel would have liked to hear more information from him*." (3 AA 720 [original emphasis].)

The court also found that substantial evidence did not support the panel's findings. (3 AA 720-721.) The court reached this conclusion because several of the panel's findings were based on UCSD's investigative report, which was not presented at the hearing. (3 AA 721.) The court also cited the fact that Mr. Doe clearly testified that Ms. Roe's allegation that he digitally penetrated her was not true and that Ms. Roe testified that Mr. Doe was trying to digitally penetrate but did not testify that he actually penetrated her. (3 AA 721.) The court also referenced that Ms. Roe voluntarily engaged in sexual intercourse with Mr. Doe later that same day. (3 AA 721.)

Last, the court found UCSD's sanctions against Mr. Doe to be fundamentally unfair. (3 AA 721-722.) The court concluded UCSD abused its discretion by increasing his punishment at each stage of appeal without any explanation. (3 AA 721-722.)

The court thereby granted the Petition for Writ of Mandamus and ordered UCSD to set aside its findings and sanctions issued against John Doe. (3 AA 722.)

The court entered judgment for Mr. Doe on October 1, 2015 and The Regents timely appealed. (3 AA 751-752, 754-755.)

ARGUMENT

I. THE UNIVERSITY FAILED TO PROVIDE JOHN DOE WITH ANY MEANINGFUL OPPORTUNITY TO DEFEND HIMSELF.

The Regents first argue that Mr. Doe was afforded a fair hearing because student disciplinary hearings do not require the same standard of process as criminal trial proceedings. (AOB, pp. 22-46.) This argument fails because the process afforded Mr. Doe by the university was so wanting that it does not even come close to meeting the lower standard of process allowed for student disciplinary proceedings.

As found by the trial court, the numerous deficiencies in the process UCSD provided to Mr. Doe rendered the hearing fundamentally unfair. Prior to the hearing, UCSD provided Mr. Doe with a redacted version of Ms. Roe's initial complaint against him and a copy of an investigative report on the matter. (2 AA 547-548.) What UCSD did not provide Mr. Doe with, however, were the statements made to the investigator by 14 witnesses that served as a basis for her conclusions. (1 AA 64; 2 AA 548.) UCSD

also refused to provide Mr. Doe with the interview statements made by Ms. Roe in her two interviews with the investigator, which the investigator relied on to make her conclusions. (1 AA 58; 2 AA 547.) Further, the hearing was conducted by a Panel Chair who was a UCSD employee. (2 AA 555.) The other two members of the panel consisted of two other UCSD employees. (2 AA 555.) While Ms. Roe was represented by an advocate provided by UCSD, Mr. Doe's attorney was not allowed to participate in the matter. (2 AA 322, 345.) Even more egregiously, the "university advocate," a colleague of the panel members, acted as a prosecutor rather than a neutral party, thereby providing Ms. Roe with two advocates but Mr. Doe with none. (2 AA 322.)

UCSD did not allow Mr. Doe to question Ms. Roe during the hearing, but instead allowed him to prepare questions prior to the hearing which would be funneled through the Panel Chair. (2 AA 548.) This procedure did not, however, allow Mr. Doe to question Ms. Roe in response to her testimony at the hearing. This procedure also prevented Mr. Doe from discovering facts such as that, months after the alleged incident, Ms. Roe was arrested for underage drinking, and she filed her complaint against Mr. Doe shortly after her parents found out about the arrest and her relationship with Mr. Doe. (2 AR 624; see also 2 AA 426-428 [fully redacted version provided to Mr. Doe].) This procedure also prevented Mr. Doe from questioning Ms. Roe about text messages showing them joking about their sexual activities later the same day of the alleged incident, and that Ms. Roe and Mr. Doe remained cordial for months after the alleged incident, including Ms. Roe asking Mr. Doe for homework help almost three months

later. (2 AA 311-318.) In a situation such as here where credibility is of utmost importance in resolving the issue, Mr. Doe's inability to discover these facts or question Ms. Roe's credibility prevented him from mounting any meaningful defense against UCSD's charges.

The trial court concluded UCSD subjected Mr. Doe to an unfair hearing. The trial court's conclusion was supported by several findings. First, the trial court concluded Mr. Doe was deprived of his right to cross-examine Ms. Roe, an adverse witness. (3 AA 718.) The trial court concluded the right of cross-examination was especially important here because the panel's findings were based on Ms. Roe's testimony. (3 AA 718.) The trial court also expressed concern with the fact that, of the 32 questions Mr. Doe submitted to be asked to Ms. Roe, the Panel Chair asked only nine, and, of the questions the Panel Chair did ask, the Panel Chair paraphrased them. (3 AA 718.) The trial court also noted that Ms. Roe was behind a barrier during proceedings, despite the fact there was no indication Mr. Doe was hostile toward Ms. Roe. (3 AA 719.)

Next, the trial court found Mr. Doe's right of confrontation was unfairly limited because evidence relied upon for the Panel's decision was not included in the hearing. (3 AA 719.) Specifically, the trial court noted that the OPHD report, which the Panel relied upon in its decision, was not mentioned at all in the hearing. (3 AA 719.) The trial court was also troubled by the fact that the author of the OPHD report did not testify and therefore her conclusions were not subject to any challenge. (3 AA 719.) Additionally, Mr. Doe was not provided with interview statements from any of the 14 witnesses

interviewed by the author of the report. (3 AA 719.) Lastly, the trial court concluded the Panel improperly deferred to the OPHD report in making its findings. (3 AA 719.)

Another concern the trial court had with UCSD's procedure was that his questions were carefully scrutinized by the Panel Chair, but the university representative's questions did not appear to be scrutinized by the Panel Chair at all, and when Mr. Doe attempted to raise an objection, he was denied by the Panel Chair. (3 AA 720.) The final basis for the trial court's conclusion that UCSD denied Mr. Doe a fair hearing is that the panel gave improper weight to Mr. Doe's exercise of his Fifth Amendment privilege against self-incrimination. (3 AA 720.)

Fair procedure generally requires "notice reasonably calculated to apprise interested parties of the pendency of the action . . . and an opportunity to present their objections." (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 240 ("*USC*"); *Bergeron v. Department of Health Services* (1999) 71 Cal.App.4th 17, 24; see also *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1445 ["Notice of the charges sufficient to provide a reasonable opportunity to respond is basic to the constitutional right to due process and the common law right to a fair procedure."].) In regard to student discipline, "[t]he student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. . . . Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded

against if that may be done without prohibitive cost or interference with the educational process." (*Goss v. Lopez* (1975) 419 U.S. 565, 579–580; *USC, supra,* 246 Cal.App.4th at p. 240.) "The hearing need not be formal, but 'in being given an opportunity to explain his version of the facts at this discussion, the student [must] first be told what he is accused of doing and what the basis of the accusation is.'" (*USC, supra,* 246 Cal.App.4th at p. 240, quoting *Goss, supra,* 419 U.S. at p. 582.)

Here, Mr. Doe was provided a hearing in name only. UCSD restricted Mr. Doe's ability to defend himself in several ways: first, UCSD did not allow Mr. Doe's attorney to participate in the hearing; second, UCSD did not allow Mr. Doe to cross-examine Ms. Roe at the hearing; third, UCSD withheld the evidence supporting the panel's decision from Mr. Doe; and fourth, UCSD penalized Mr. Doe for invoking his Fifth Amendment right against self-incrimination. The Regents' response to each of these unfair restrictions is that UCSD was not required to provide Mr. Doe with a "full dress" hearing. As now detailed, The Regents' response should be rejected.

A. No Right To An Attorney At The Hearing.

First, UCSD did not allow Mr. Doe's attorney to participate in the hearing. (2 AA 345 ["You don't have the right to participate in this."].) This restriction subjected Mr. Doe to the dangers of self-representation, such as the potential for the Hearing Panel's lack of credibility afforded to Mr. Doe as the accused to influence its decision. (*Faretta*

v. California (1975) 422 U.S. 806, 835; *People v. Burgener* (2009) 46 Cal.4th 231, 241-242; see also *People v. Lancaster* (2007) 41 Cal.4th 50, 68 ["[Y]ou'd be a fool to represent yourself because you're emotionally involved in the issues."].) This restraint on Mr. Doe also forced him to walk a fine line of attempting to represent himself as stridently as possible while at the same time maintaining his Fifth Amendment privilege against self-incrimination.

Further, this restriction on Mr. Doe's ability to be represented by counsel at the hearing was exacerbated by the fact that UCSD's representative at the hearing, Mr. Jakubisin, acted as Ms. Roe's advocate, despite the fact UCSD's representative is a presumptively neutral position – both Mr. Doe and Ms. Roe were UCSD students after all – and that Ms. Roe was already represented at the hearing by an advocate. (2 AA 322.) Additionally, as Mr. Jakubisin and two of the members of the panel were UCSD employees, Mr. Jakubisin was effectively attempting to persuade two of his colleagues to rule in his favor.[2] (2 AA 555.) This is akin to members of a jury being fellow district

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[2] The Panel Chair, Rebecca Otten, was Director of Strategic Partnerships/Housing Allocations; another panel member, Jeffrey Hill, was an Assistant Director of Residence Life. (2 AA 555.) According to the UCSD website, Mr. Jakubisin is currently also an Assistant Director of Residence Life. (https://sixth.ucsd.edu/residential-life/staff/tjakubisin.html.) While the third panel member, Kris Nelson, was a representative of the Graduate Student Association, he teaches at UCSD and is effectively an employee as well. (2 AA 555; http://acsweb.ucsd.edu/~k8nelson/.)

This concern was validated by the trial court who noted disparate treatment from the panel toward Mr. Doe: "When [Mr. Doe] wanted to object or remove a statement made by Ms. Roe, he was denied by the Panel Chair. [citation] Additionally, Mr. Jakubisin's questions to Ms. Roe did not appear to be reviewed by the Panel Chair at any

attorneys.[3] While administrative proceedings do not require the same due process standards as a criminal proceedings, this is far from characteristic of a fair hearing.

B. No Right To Cross-Examination.

Second, UCSD denied Mr. Doe the right to cross-examine Ms. Roe. While cross-examination is not always required in a disciplinary proceeding against a student, it is "essential" where findings against a party are based on an adverse witness's testimony. (*Manufactured Home Communities, Inc. v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 711-712 [cross-examination was "essential" where rent review board found testimony to be credible and concluded it was "never rebutted" but prevented cross-

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time during the hearing, unlike Petitioner's questions. Both of these actions are prejudicial to [Mr. Doe] by limiting his ability to participate in the hearing while allowing full participation by the university representative." (3 AA 720.)

[3] The trial court also noted the panel's disparate treatment toward Mr. Doe versus Mr. Jakubisin as evidence of the curtailment of Mr. Doe's right to confrontation. (3 AA 720.) The Regents attempt to frame the trial court's concern as critical of UCSD for not requiring Mr. Jakubisin to submit his questions to the panel. (AOB, pp. 42-43.) The trial court was not concluding Mr. Jakubisin was required to submit his questions to the panel beforehand, but merely that Mr. Jakubisin's favorable treatment increased the unfairness to Mr. Doe.

The Regents also argue this disparate treatment did not result in any prejudice to Mr. Doe, but, as discussed below, that conclusion ignores the fact that Mr. Jakubisin was not required to ask prepared questions like Mr. Doe was and that Ms. Roe responded to Mr. Jakubisin's questions in narrative form but selectively chose to respond to Mr. Doe's questions.

examination]; see also *Doe v. Brandeis University* (D. Mass. Mar. 31, 2016) __ F.Supp.3d __, 2016 WL 1274533 at * 35.)[4] Here, the panel's decision was completely dependent upon weighing Mr. Doe's credibility against Ms. Roe's. Had Mr. Doe had the ability to cross-examine Ms. Roe, perhaps the inconsistency between her testimony and the investigation report could have been resolved; or the inconsistencies could have been more prominently emphasized and the panel may not have credited Ms. Roe's testimony or the investigative report's conclusions so significantly. Further, Ms. Roe was behind a barrier during the hearing which made it even more difficult to judge her credibility. (3 AA 719.)

While Mr. Doe did have the opportunity to prepare questions to ask Ms. Roe at the hearing, the Panel Chair, through her own discretion, asked only nine of the 32 questions; and of the nine she asked, she paraphrased two of them. (2 AA 343-351.) Further, when Ms. Roe answered Mr. Jakubisin's questions, she responded with long narratives; but when she responded to Mr. Doe's questions, she responded with short answers, if she chose to respond at all. (2 AA 328-351 ["There's nothing else that I feel I need to add."].) Additionally, Mr. Doe had to prepare the 32 questions before the hearing; therefore, Mr. Doe was unable to present any questions in response to what Ms. Roe testified to at the hearing. (2 AA 296-307.) Ms. Roe could have completely fabricated her story at the hearing and Mr. Doe would have been unable to challenge the testimony

[4]Decisions of lower federal courts, while not binding, are treated as "persuasive and entitled to great weight." (*Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320-321.)

at all.

There is certainly an interest in protecting the accuser from a situation that may be traumatic or intimidating, but "the elimination of such a basic protection for the rights of the accused raises profound concerns." (*Brandeis, supra,* 2016 WL 1274533 at *34.) Further, there were certainly less restrictive means of preventing Ms. Roe from being questioned by Mr. Roe than eliminating Mr. Doe's right of cross-examination altogether. For example, Ms. Roe could have testified via video feed from a separate room. (*USC, supra,* 246 Cal.App.4th at p. 245, fn. 12.) Additionally, Ms. Roe was behind a screen which courts have found limits the potential for trauma or harm to the accuser. (*Ibid*.) Most obviously, had Mr. Doe's counsel been able to participate in the hearing, Ms. Roe would not have been subject to questioning from Mr. Doe but from his attorney. Instead of utilizing these less restrictive means, UCSD completely eliminated Mr. Doe's significant right. The nature of this situation rendered that restriction particularly prejudicial to Mr. Doe:

> Here, there were essentially no third-party witnesses to any of the events in question, and there does not appear to have been any contemporary corroborating evidence. The entire investigation thus turned on the credibility of the accuser and the accused. Under the circumstances, the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding.

(*Brandeis, supra,* 2106 WL 1274533 at * 35.)

The Regents argue that UCSD did not violate Mr. Doe's right to a fair hearing because Mr. Doe was not entitled to a "full dress hearing" and UCSD provided Mr. Doe

with the opportunity to cross-examine Ms. Roe by allowing him to submit questions to the panel. These arguments do not refute the trial court's conclusion that UCSD did not provide Mr. Doe with a fair hearing. First, while it is true that Mr. Doe was not entitled to a "full dress hearing," that does not mean that UCSD was permitted to provide him with as little process as it desired. As discussed above, the ability to cross-examine was vital in a case such as this where credibility of the witness is such a material issue. Further, as discussed below, UCSD's failure to provide Mr. Doe with the interview statements from the 14 witnesses and Ms. Roe was sufficient by itself to render the hearing unfair. Additionally, The Regents fail to acknowledge the difference between hearing standards for student discipline and academic purposes: "The hearing standards required for student discipline are not necessarily the same as those required for academic purposes. '[T]here are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter.'" (*USC, supra,* 246 Cal.App.4th at p. 245, fn. 13, quoting *Board of Curators of University of Missouri v. Horowitz* (1978) 435 U.S. 78, 87.)

Next, UCSD did not provide Mr. Doe with the right of cross-examination merely by allowing him to prepare questions for Ms. Roe that would be filtered through and edited by the Panel Chair. Mr. Doe was unable to develop any questions for Ms. Roe as a result of her testimony at the hearing. That is not cross-examination. Cross-examination provides an opponent the "ability to *immediately* test and dissect adverse testimony."

(*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1358, quoting *Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501, 1514, italics in original.) Wigmore explains how the efficacy of a proceeding is weakened by failing to allow cross-examination:

> The remaining and qualifying circumstances of the subject of testimony will probably remain suppressed or undisclosed, not merely because the witness frequently is a partisan, but also and chiefly because his testimony is commonly given only by way of answers to specific interrogatories ... and the counsel producing him will usually ask for nothing but the facts favorable to his party. If nothing more were done to unveil all the facts known to this witness, his testimony (for all that we could surmise) might present half-truths only. Someone must probe for the possible (and usual) remainder. The best person to do this is the one most vitally interested, namely, the opponent. Cross-examination, then, i.e. further examination by the opponent, has for its first utility the extraction of the remaining qualifying circumstances, if any, known to the witness, but hitherto undisclosed by him.

(*Ogden Entertainment Services v. Workers' Compensation Appeals Board* (2014) 233 Cal.App.4th 970, 983, fn. 12, quoting Wigmore, vol. V, [3d ed.] § 1368, page 33.)

Further, even if he was able to develop questions in response to Ms. Roe's testimony at the hearing, without access to her previous interview statements, he had no ability to impeach her for inconsistent testimony or ask her about any other potentially relevant events, such as the proximity in time between her drunkenness arrest, her parents finding out about their relationship, and her filing of the complaint. Without access to the relevant evidence, any cross-examination would be cross-examination in name only but with no substance.

The Regents also argue that Mr. Doe cannot now raise issue with the Hearing Panel's reliance on Ms. Dalcourt's report because he did not request her as a witness and

because he did not raise the issue in his administrative appeal. (AOB, p. 40.) This argument fails because first, Mr. Doe had no reason to believe the panel would render its decision based on Ms. Dalcourt's report. Mr. Doe reasonably believed the panel would come to its conclusions independently and not defer to Ms. Dalcourt. Second, Mr. Doe did raise issue with the panel's use of and reliance on Ms. Dalcourt's report. (See 1 AA 58-59.) Regardless, the trial court's reference to Ms. Dalcourt's failure to testify was part of its overall analysis that UCSD's restriction of Mr. Doe's right to confrontation prevented him from receiving a fair hearing, which was raised. (3 AA 719.) Further, the authority The Regents rely on does not support their argument. The Regents cite *Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765 for the proposition that Mr. Doe's failure to make this specific argument in the administrative appeal resulted in waiver. (AOB, p. 40.) In that case, however, the court deemed the petitioner's due process argument waived because the petitioner made no due process argument in the administrative proceeding whatsoever. (*Joseph, supra,* 161 Cal.App.4th at p. 787.) Here, in contrast, Mr. Doe raised due process concerns at every stage of the proceedings.

C. Withholding Of Evidence.

The third and perhaps most significant deprivation of Mr. Doe's right to a fair hearing was UCSD's restriction of Mr. Doe's ability to review the evidence supporting the panel's conclusion. In making its conclusion that Mr. Doe violated UCSD policy, the

panel relied upon the investigative report's conclusion that "I find it more likely than not that on February 1, Mr. Doe ignored Ms. Roe's objections to sexual activity in violation of the Student Sex Offense Policy." (2 AA 375.) As part of the investigation, Elena Dalcourt interviewed 14 witnesses as well as Ms. Roe. (1 AA 172.) UCSD refused to provide Mr. Doe with statements made by these witnesses or by the two interviews of Ms. Roe. (1 AA 90, 98, 104.) UCSD also refused to provide Mr. Doe with a copy of Ms. Roe's written report containing her statement of allegations against Mr. Doe. (1 AA 88.)

When a student is facing disciplinary sanctions, "the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies." (*USC, supra,* 246 Cal.App.4th at p. 246, quoting *Dixon v. Alabama State Bd. of Ed.* (5th Cir. 1961) 294 F.2d 150, 159.) The Court of Appeal recently held that simply requiring a student "to request access to the evidence against him does not comply with the requirements of a fair hearing." (*USC, supra,* 246 Cal.App.4th at p. 246; see also *Andersen v. Regents of University of California* (1972) 22 Cal.App.3d 763, 771 ["the student is entitled to . . . the names of the witnesses and a statement of the gist of their proposed testimony"]; *Goldberg v. Regents of University of California* (1967) 248 Cal.App.2d 867, 882 [students should be "given ample opportunity to hear and observe the witnesses against them"].)

The common law requirements of a fair hearing do not allow an administrative board to rely on evidence that has never been revealed to the accused. (*USC, supra,* 246 Cal.App.4th at p. 247.] That is exactly what happened here. The Hearing Panel

referenced the investigative report twice in its findings, and even specifically referenced Ms. Roe's interview with the investigator. (2 AA 374-375 ["Jane stated to Ms. Elena Dalcourt at the UCSD office for the Prevention of Harassment & Discrimination (OPHD) that John entered Jane's vagina with his fingers a total of three times."].) The investigator, in turn, relied on the interviews to support her conclusions. (1 AA 172-186 ["I first met with Ms. Roe on June 12, 2014; and conducted a follow-up interview on July 29, 2014."]; ["I find Ms. Roe credible in her assertion that she objected to physical activity during the morning in a clear and unambiguous manner."]; ["In interviews, I found Ms. Roe to have been genuinely traumatized by the events in connection with Mr. Doe."].) "The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a fair hearing. . . . A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced." (*English v. City of Long Beach* (1950) 35 Cal.2d 155, 158-159.)

The prejudice to Mr. Doe is clear. Mr. Doe was charged with "digitally penetrat[ing] [Ms. Roe's] vagina after she repeatedly stated that she did not want to engage in sexual activity with him." (2 AA 328.) At the hearing, however, Ms. Roe never testified that Mr. Doe penetrated her, but merely that he was "trying" to do so. (2 AA 329-330 ["[H]e kept trying to put his hands down my pants." "And he kept trying to

touch me."].) This testimony comports with Ms. Roe's initial summary of the incident. (1 AA 151 ["He then kept trying to move my underwear and touch me."].) The Hearing Panel ignored this inconsistency and relied on the report's conclusion instead: "Jane stated to Ms. Elena Dalcourt at the UCSD Office for the Prevention of Harassment & Discrimination (OPHD) that John entered Jane's vagina with his fingers a total of three times." (2 AA 375.) Had Mr. Doe been provided with the interview statements, he may have had an opportunity to challenge the report's conclusion. Perhaps he could have pointed out that Ms. Dalcourt misinterpreted Ms. Roe's statement, or perhaps he could have uncovered that Ms. Dalcourt fabricated Ms. Roe's statement to ensure a particular conclusion. Not having access to Ms. Roe's interview statements also harmed Mr. Doe when he appealed the panel's decision to Sherry Mallory, the Dean of Student Affairs; in response to Mr. Doe pointing out the inconsistency between Ms. Roe's testimony and Ms. Dalcourt's conclusion, Dean Mallory responded, "Students often expand on the statements included in their initial complaints during follow-up conversations . . .; I expect that is what happened in this instance." (2 AA 391.) The panel's findings and punishment therefore were not only sustained but increased due to an assumption that Mr. Doe was unable to refute because UCSD deprived him of the opportunity to do so. Without access to the interview statements he was completely unable to defend himself.

The prejudice to Mr. Doe is further aggravated by the fact that Ms. Dalcourt did not testify at the hearing. Therefore, Mr. Doe had no way of questioning her about her methods or how she reached her conclusions. The Hearing Panel took Ms. Dalcourt's

conclusions as fact, despite the fact they amounted to double hearsay and that it was the panel's job to make the conclusions, not Ms. Dalcourt's. This is particularly problematic because "[t]he dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious." (*Brandeis*, *supra*, 2016 WL 1274533 at *36.)

The Regents argue Mr. Doe was not entitled to interview notes. (AOB, pp. 41-42.) To support this conclusion, The Regents continue its mantra that Mr. Doe was not entitled to a "full dress hearing." This argument ignores the clear law discussed above that UCSD was required to provide him with the witness notes in order to provide him with a fair hearing.

D. UCSD Penalized Mr. Doe For Invoking His Fifth Amendment Rights.

A fact finder may not infer guilt from the accused's exercise of his Fifth Amendment privilege against self-incrimination. (*People v. Mincey* (1992) 2 Cal.4th 408; Evid. Code § 913; Assem. Com. on Judiciary, com., West's Ann. Evid. Code § 913 ["[I]n civil cases as well as criminal cases, inferences may be drawn only from the evidence in the case, not from the claim of privilege."].) UCSD policy also prohibits inferences from being made as a result of the accused's silence. (3 AA 620.) Statements in the Hearing Panel's conclusion show that the panel improperly relied upon Mr. Doe's invocation of his Fifth Amendment rights.

The Hearing Panel concluded that, "[w]hile John stated during the hearing that he did not digitally penetrate Jane's vagina, he abstained from providing additional information regarding the incident and what occurred around the time of the incident and the panel would have liked to hear more information from him." (2 AA 375.) The Hearing Panel next stated that "[t]he hearing panel found Jane credible in her assertion that John tried to digitally penetrate Jane's vagina and he ignored her objections." These statements imply that the Hearing Panel determined Ms. Roe's testimony credible due to the mere fact that Mr. Doe did not testify about the incident as much as Ms. Roe did. This was an improper violation of Mr. Doe's constitutional rights.

The Regents argued the Hearing Panel did not improperly infer Mr. Doe's guilt because he "selectively invoked" the privilege, thereby eroding his credibility with the panel. (AOB, pp. 44-45.) This argument amounts to an acknowledgment the panel improperly considered his invocation of his Fifth Amendment privilege when deciding whose story to believe. The result of a defendant selectively invoking his or her Fifth Amendment privilege is not that the finder of fact is then able to use the invocation of the privilege against the defendant, but merely that the defendant is then subject to cross-examination: "The illogic of allowing a witness to offer only self-selected testimony should be obvious even to the witness, so there is no unfairness in allowing cross-examination when testimony is given without invoking the privilege." (*Mitchell v. U.S.* (1999) 526 U.S. 314, 322.) Regardless, Mr. Doe did not selectively invoke the privilege, all he did was deny the accusations against him. This is akin to a defendant

pleading "not guilty" or denying allegations in a complaint; no distortion of facts resulted.

Therefore, because UCSD completely deprived Mr. Doe of any meaningful way to defend himself, the trial court's decision setting aside UCSD's decision should be affirmed.

E. The Trial Court Properly Ordered UCSD To Set Aside Its Findings And Sanctions Against Mr. Doe.

The Regents last argue the trial court erred "by failing to remand the case back to the University for a new hearing." (AOB, pp. 45-46.) This argument ignores the plain language of the relevant statute and recent Supreme Court law.

Code of Civil Procedure § 1094.5, subd. (f) states "[t]he court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ." There is no further requirement. Whether or not the court wants the agency to take further action is within the court's discretion: "The court can deny the writ or grant it and set aside the decision. If it sets aside the decision, the court can order the agency to take further action." (*County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 933.)

This conclusion is further supported by the Court of Appeal's recent decision in *USC, supra*. In that case, the petitioner sought a writ of mandate setting aside the university's disciplinary action against him, alleging that the investigation and hearing

process were unfair. (*USC, supra,* 246 Cal.App.4th at p. 237.) The trial court denied the writ in part, concluding the investigation and hearing were fair, but that substantial evidence did not support some of the university's findings. (*Id*. at p. 238.) The Court of Appeal affirmed the trial court's conclusion that substantial evidence did not support some of the university's findings but reversed the trial court's conclusion the proceedings were fair. (*Id*. at p. 253.) The Court of Appeal therefore affirmed the judgment to the extent it set aside the university's conclusion unsupported by substantial evidence and reversed the judgment in respect to the fair hearing issue, remanding to the trial court with directions to grant the petitioner's petition for writ of mandate setting aside the university's decision. (*Ibid*.)

II. NO EVIDENCE AT THE HEARING SUPPORTED THE PANEL'S FINDING.

UCSD charged Mr. Doe with digitally penetrating Ms. Roe without her consent, in violation of UCSD policy. (1 AA 100, 2 AA 328.) The Hearing Panel concluded Mr. Doe violated UCSD's policy against sexual misconduct. (2 AA 375.) UCSD defines "sexual misconduct" as "non-consensual activity [] engaged in without the intent to harm another, such as when a person believes unreasonably that effective consent was given when, in fact, it was not." (1 AA 67.) UCSD policy also states that "[c]onsent is not indefinite and may be withdrawn at any time. At that time, all sexual activity must cease

unless and until additional effective consent is given." (1 AA 67.)

The trial court concluded UCSD's findings were not supported by substantial evidence. (3 AA 720-721.) The court reached its conclusion by emphasizing the fact that Ms. Roe testified that Mr. Doe *tried* to digitally penetrate her but did not testify that he actually penetrated her. (3 AA 721.) The court also concluded the Hearing Panel improperly relied on Ms. Dalcourt's investigative report; the findings of which were not presented at the hearing. (3 AA 721.) Lastly, the trial court concluded the "entire narrative" of the events on February 1 "do not demonstrate non-consensual behavior." (3 AA 721.)

A reviewing court reviews a university's disciplinary actions for whether the actions were supported by "substantial evidence." (*USC, supra,* 246 Cal.App.4th at p. 248-249.) "Substantial evidence is defined as evidence of ponderable legal significance reasonable in nature, credible, and of solid value[, and] relevant evidence that a reasonable mind might accept as adequate to support a conclusion." (*Young v. Gannon* (2002) 97 Cal.App.4th 209, 225, international quotation marks omitted.) Substantial evidence "cannot be deemed synonymous with 'any' evidence. . . . inferences that are the result of mere speculation or conjecture cannot support a finding." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633, internal citations omitted.)

Here there was no substantial evidence supporting UCSD's conclusion that, by a preponderance of the evidence, Mr. Doe digitally penetrated Ms. Roe on the morning of February 1. Both Mr. Doe and Ms. Roe's testimony supports that Mr. Doe did not

digitally penetrate Ms. Roe. Mr. Doe denied that any amorous contact occurred that morning. (2 AA 353.) Ms. Roe testified that she "woke up in John's apartment in his bed, and [she] was hung over and feeling kind of out of it and tired. And John, he kept trying to put his hands down [her] pants, and [she] kept telling him that it hurt . . . . And he kept trying to touch [her], and [she] kept pushing his hand away and telling him that it hurt. And he kept saying, 'Okay, sorry,' and he would take his hands away, and then like two minutes later he would go and try again." [5] (2 AA 329-330.) The only reasonable conclusion from Ms. Roe's testimony is that Mr. Doe attempted to digitally penetrate Ms. Roe, but when she expressed to him that she did not want him to, he stopped his attempt. While Ms. Roe's testimony supports the conclusion that he tried again minutes later, the testimony does not support the conclusion that any digital penetration actually occurred. This is consistent with Ms. Roe's initial complaint: "He then kept trying to move my underwear and touch me but I kept telling him that it hurt badly and asked him to stop." (1 AA 93.)

The only support for the panel's conclusion is Ms. Dalcourt's report. That conclusion relied on statements purportedly made to Ms. Dalcourt by Ms. Roe. (1 AA 178.) But because UCSD failed to present Mr. Doe with the actual statements Ms. Roe made, there was no way for Mr. Doe to substantiate Ms. Dalcourt's conclusion. Further, Ms. Dalcourt's conclusion constitutes double hearsay, and under the substantial evidence

[5] Ms. Roe testified that "it hurt" "because [Mr. Doe] had had sex with me . . . the night before, and I had never had sex prior, so I was very sore." (2 AA 330.)

test the quality of the evidence is important. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 631, 651.) Therefore, "[h]earsay evidence that contradicts all firsthand accounts of what occurred is not substantial evidence." (*USC, supra,* 246 Cal.App.4th at p. 253.)

In their opening brief, The Regents attempt to portray the trial court's conclusion as an improper weighing of credibility. (AOB, pp. 14-19.) This argument ignores the trial court's reasoning. The trial court took Ms. Roe's testimony at her word. Ms. Roe testified that Mr. Doe attempted to digitally penetrate her and never testified that he actually digitally penetrated her. (2 AA 329-330; 3 AA 721.) If anything, The Regents' argument proves the court did not weigh evidence; rather, it credited Ms. Roe's testimony at the hearing in full.

The Regents also fail to point to any of Ms. Roe's testimony supporting the conclusion that Mr. Doe digitally penetrated her. The Regents argued that "Roe consistently stated that she told Doe that his attempts to digitally penetrate her were painful and to stop doing so." (AOB, p. 14.) Ms. Roe's testimony was not that she was in pain from any attempt to digital penetrate her, however, but from sexual intercourse the night before. (2 AA 329-330 ["I had never had sex prior, so I was very sore."].) Notably, every time The Regents claims Ms. Roe testified that Mr. Doe digitally penetrated her, it failed to provide any citation to her testimony. (See AOB, p. 14 ["[T]he trial court necessarily discredited Roe's testimony about what happened the morning of February 1, 2014, when she stated that Doe continued to digitally penetrate her over her objections";

AOB, p. 15 ["As such, it could not possibly contradict Roe's testimony that on that morning Doe repeatedly digitally penetrated her over objections."]; AOB, p. 18 ["The only testimony by Roe regarding the morning of February 1, 2014 – the morning in question – is that she repeatedly told Doe to stop trying to digitally penetrate her vagina and that he ignored her objections."].) Even Dean Mallory admitted Ms. Roe's testimony does not reference any digital penetration. (2 AA 391 ["[S]he does not specifically reference digital penetration."].)

On the contrary, the only possible conclusion from Ms. Roe's testimony is that when Mr. Roe attempted to digitally penetrate her she told him to stop because she was sore, and his response was to say, "okay, sorry" and pull his hand away. (2 AA 330 ["And he kept saying, 'Okay, sorry,' and he would take his hands away, and then like two minutes later he would go and try again."].) Ms. Roe testified that Mr. Doe attempted again after waiting a few minutes, but she never testified that he digitally penetrated her after she told him not to. (2 AA 330.)

Further showing there was no substantial evidence supporting UCSD's finding against Mr. Doe is Dean Mallory's statement justifying the finding:

> As requested, I have re-reviewed the complainants' statement of facts submitted on June 16. While she does not specifically reference digital penetration, she does mention touching and a request to stop. Students often expand on the statements included in their complaints during follow-up conversations (with OPHD, the Office of Student Conduct, or the Student Conduct Officer hearing the case); I expect that is what happened in this instance.

(2 AA 391.) Dean Mallory's conclusion evidences there is not substantial evidence,

however, because "inferences that are the result of mere speculation or conjecture cannot support a finding." (*Kuhn, supra,* 22 Cal.App.4th at p. 1633.)

In sum, UCSD enacted a punishment against Mr. Doe that would serve as a de facto expulsion from the university, would lead to him losing his job at the District Attorney's office, prevent him from being accepted to law school, and force him to lose his financial aid. (2 AR 340.) Mr. Doe would suffer all of these consequences because Dean Mallory made an assumption as to what happened and the Hearing Panel ignored the testimony of both Mr. Doe and Ms. Roe, instead relying on a conclusion made by a UCSD employee who was not subject to cross-examination and the factual basis of her conclusion was kept secret from Mr. Doe and any reviewing body. There was no substantial evidence supporting the conclusion that it was more likely than not that Mr. Doe digitally penetrated Ms. Roe the morning of February 1, 2014 in violation of UCSD policy; rather, only that when Ms. Roe asked Mr. Doe to stop his attempt to digitally penetrate her he responded, "okay, sorry" and pulled his hand away. Therefore, the trial court's decision setting aside UCSD's punishment for Mr. Doe should be affirmed.

III. NO REASONABLE PERSON COULD CONCLUDE UCSD'S INCREASES OF MR. DOE'S PUNISHMENTS EACH TIME HE APPEALED WERE FAIR OR REASONABLE.

After the Hearing Panel concluded Mr. Doe violated UCSD policy against sexual misconduct, it recommended several sanctions against him: (1) suspension for one quarter; (2) a permanent no contact order with Ms. Roe; (3) a two hour sex offense/sexual harassment training with the university; and (4) counseling assessment. (2 AA 375.) Per UCSD policy, Mr. Doe appealed the panel's finding to Dean Mallory. On appeal, Dean Mallory imposed the following sanctions: (1) an increase of Mr. Doe's suspension to one year; (2) imposition of non-academic probation for the duration of Mr. Doe's tenure as an undergraduate at UCSD; (3) required attendance of a counseling assessment; (4) a required meeting with a member of the UCSD Office for the Prevention of Harassment and Discrimination; (5) required attendance at a "Practical Decision Making Workship" (for which Mr. Doe had to pay $50 via check made payable to "UC Regents"); and (6) a permanent no contact order with Ms. Roe. (2 AA 384-385.) Mr. Doe then appealed Dean Mallory's decision to UCSD's Council of Provosts. In response, the Council of Provosts modified Dean Mallory's decision in one aspect: the Council of Provosts increased Mr. Doe's suspension to one year and one quarter. (2 AA 432.) The Council of Provosts kept the other sanctions intact. (2 AA 432.)

The trial court found these sanctions constituted an abuse of discretion because the university increased the sanctions each time Mr. Doe appealed and provided no justification for the increases: "Given the lack of rationale by both Dean Mallory and the Council of Provosts for the increased sanctions, it appears the increased sanctions are punitive towards Petitioner for appealing the decision of the Panel." (3 AA 721-722.)

A court may overturn a penalty imposed by an administrative body if the administrative body abused its discretion. (*Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 218.) While a reviewing court may not substitute its discretion for that of the agency, the agency abused its discretion if reasonable minds cannot differ as to the propriety of the penalty imposed. (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal.2d 589, 594.)

Here, no reasonable mind could conclude UCSD's increase of sanctions against Mr. Doe at every step of his appeals was justified. When Dean Mallory significantly increased his suspension she provided no justification; the email notifying Mr. Doe of the new sanctions merely stated that she made the decision after "careful and deliberate review." (2 AA 387.) A justification was particularly necessary since the increase in Mr. Doe's suspension required him to reapply for admission to the university after his suspension. (2 AA 387.) Dean Mallory did email Mr. Doe and his attorney prior to increasing his sanctions, but she did not provide any justification there either. (2 AA 391-392.) The sanctions letter from the Council of Provosts increasing Mr. Doe's suspension was even more terse. The letter merely stated that the Council of Provosts made its

determination following "a careful review of [Mr. Doe's] appeal." (2 AA 432.)

The Hearing Panel, which witnessed Ms. Roe's testimony, recommended a one quarter suspension for Mr. Doe. Dean Mallory's and the Council of Provosts' suspensions of Mr. Doe not only were substantial increases in the length of the suspension, but they were significant in the fact that they required Mr. Doe to reapply to the university, a de facto expulsion. Without providing any justification for these significant decisions, the increased punishments on their face seem to be, as the trial court concluded, punishments imposed on Mr. Doe for having the gall to appeal the Hearing Panel's findings. (See 3 AA 722.) Or perhaps the increased sanctions against Mr. Doe were an attempt to punish Mr. Doe for the other charges Ms. Roe levied against him, for which Ms. Dalcourt concluded there was insufficient evidence. Or maybe this was an attempt by UCSD to sacrifice the rights of Mr. Doe and avoid putting its federal funding at risk. (*Brandeis, supra,* __ F.Supp.3d __, 2016 WL 1274533 at *5.) This concern is particularly acute because the appeals were ruled on by high ranking employees of UCSD who are likely very aware of funding issues and there were no students involved in the ruling on appeal. An increase in punishment as significant as this requires a justification. Without any justification for the significant increases in Mr. Doe's suspension, the only reasonable conclusion is that Dean Mallory and the Council of Provosts had no legitimate justification for the increase.

The Regents argue in their opening brief that Dean Mallory and the Council of Provosts were not required to provide a justification for their increase of Mr. Doe's

suspension, and therefore they did not abuse their discretion. (AOB, pp. 20-22.) To support this argument, The Regents cite *Berman v. Regents of University of California* (2014) 229 Cal.App.4th 1265. The Regents argue that, because the court in that case "did not fault the Dean for withholding more details about the reasoning behind her sanction," the Dean and the Council of Provosts were not required to do so here, seemingly arguing that a justification for an administrative body's punishment is never required as a matter of law, ignoring the particular facts of the case. (AOB, p. 21.) This argument fails, however, because *Berman* is inapposite. In *Berman* the issue was whether the Dean had authority to impose a suspension on the student, not whether the Dean's suspension was an abuse of discretion. (*Berman, supra,* 229 Cal.App.4th at p. 1274.) The petitioner in *Berman* did not argue his suspension was an abuse of discretion and the court did not rule on whether the suspension was an abuse of discretion. Therefore, *Berman* provides The Regents no support for their form over substance argument. (See also Civ. Code § 3528 ["The law respects form less than substance."]; see also *People v. Seumanu* (2015) 61 Cal.4th 1293, 1366 ["cases are not authority for propositions not considered"].)

The Regents also argue the increased suspensions were justified because Dean Mallory and the Council of Provosts were able to take Mr. Doe's overall record of violations into account and Mr. Doe had previously been cited for consumption for alcohol while under the age of 21. (AOB, p. 22.) This argument only supports the conclusion that the substantial increase in Mr. Doe's suspension was manifestly unreasonable. No reasonable person would conclude that a student's suspension should

be increased by one full year because he was previously cited for underage drinking. Ms. Roe was arrested for underage drinking; no reasonable person would believe she should be suspended by the university for one year as a result. Regardless, The Regents's argument is purely academic because neither Dean Mallory nor the Council of Provosts cited this as a reason for their actions.

The Regents last argue Dean Mallory and the Council of Provosts acted within their discretion because UCSD sanctioning guidelines recommend a minimum one year suspension for sexual misconduct violations. (AOB, p. 22.) This conclusion belies reason. Ms. Roe testified that when she asked Mr. Doe to stop his attempts to digitally penetrate her he took his hands away and said, "Okay, sorry." (2 AA 330 ["And he kept saying, 'Okay, sorry,' and he would take his hands away."].) No reasonable mind could conclude that a student deserves to be expelled for stopping an attempted sexual activity when asked. As a result of these sanctions, Mr. Doe is "marked for life as a sexual predator" that will follow him through his future academic and professional endeavors. (*Brandeis, supra,* __ F.Supp.3d __, 2016 WL 1274533 at *6.)

Therefore, because Dean Mallory and the Council of Provosts substantially increased Mr. Doe's suspension to a length that will have significantly detrimental effects on him and his future, and did so for apparently no reason, the increased suspensions were an abuse of discretion and the trial court properly concluded they were unfair.

CONCLUSION

In conclusion, because UCSD's procedure was rife with unfairness and provided Mr. Doe with no meaningful opportunity to defend himself, because UCSD's findings were not supported by the evidence, and because UCSD's punishment of Mr. Doe was an abuse of discretion, the trial court's decision setting aside Mr. Doe's punishment was proper and should be affirmed.

Dated: June 13, 2016

HABERKORN & ASSOCIATES

ESNER, CHANG & BOYER

By: /s/ Andrew N. Chang

Attorneys for Plaintiff and Respondent

CERTIFICATE OF WORD COUNT

This Respondent's Brief contains 12,227 words per a computer generated word count.

/s/ Andrew N. Chang

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. My business address is 234 East Colorado Boulevard, Suite 975, Pasadena, California 91101.

I am readily familiar with the practice of Esner, Chang & Boyer for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. I served the document(s) listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, addressed as follows:

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

/s/ Carol Miyake

SERVICE LIST

Grant A. Davis-Denny, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
E: Grant.Davis-Denny@mto.com

(Attorneys for Defendant and Appellant Regents of the University of California, San Diego)

Charles Furlonge Robinson, Esq.
Karen J. Petrulakis, Esq.
Margaret L. Wu, Esq.
Elisabeth C. Yap, Esq.
University of California,
Office of the General Counsel
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200
E: karen.petrulakis@ucop.edu
margaret.wu@ucop.edu
elisabeth.yap@ucop.edu

(Attorneys for Defendant and Appellant Regents of the University of California, San Diego)

Hon. Joel M. Pressman
San Diego County Superior Court
330 W. Broadway
Hall of Justice, Dept. 66
San Diego, CA 92101

(Trial Judge - Via U.S. Mail)

Clerk's Office
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-7303

(Electronic submission)

Matthew H. Haberkorn, Esq.
Haberkorn & Associates
P. O. Box 7474
Menlo Park, CA 94025
E: matthewhaberkorn@mac.com

(Attorneys for Plaintiff and Respondent John Doe)

Mark M. Hathaway, Esq.
Werksman Jackson Hathaway & Quinn, LLP
888 West 6th Street, Fourth Floor
Los Angeles, CA 90017-2432
E: mhathaway@werksmanjackson.com

(Attorneys for Plaintiff John Doe)