

**SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM**  
**M E M O R A N D U M**  
**LEGAL DIVISION**

**DATE:** October 9, 2006  
**TO:** The Board of Administration  
**FROM:** Roxanne Story Parks, Interim General Counsel  
**SUBJECT:** October Legal Services Report

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**I. ADMINISTRATIVE DISABILITY HEARINGS** (Unless otherwise noted, Sheila Jacobs represents the Board in administrative hearings.)

**Adjudicator Hearings:**

Max Camberos: Judge Stephen Hjelt's (OAH) decision is pending.

Harold Cox: Judge Raymond Zvetina (Ret.) (JAMS) has recommended that Mr. Cox's application for industrial disability be denied. He did not file an objection to the recommended decision. The matter will be presented to the Disability Retirement Committee in November 2006.

Constantino Delimitros, Judge Raymond Zvetina heard Mr. Delimitros case on October 5. Debra Kuttnauer represented the Board. A recommended decision is pending.

Heleodoro Lopez: Judge Alan Alvord (OAH) has recommended that the Board approve Mr. Lopez's application. Based on an error of law, the Board filed an objection to the recommended decision. Mr. Lopez's responded to that objection. Judge Alvord's final recommendation is pending.

**Adjudicator Hearings on Calendar:**

Francisco Torres, October 26, 2006 (JAMS)

Linda LaChusa, October 31, 2006 (JAMS)

Michael Wahl, December 7, 2006 (OAH)

Robert Neal, December 11, 2006 (OAH)

**Pre-Hearings on Calendar:**

Brad Ruff, October 27, 2006

**Pre-Hearing Completed, Adjudicator Hearing to be Calendared:**

Norma Diaz, Harvey Kitchel, Debra Mattie, Scott Naliboff, Peter Hepburn and Raul Padilla.

**Application Withdrawn:**

Felix Zavala: Mr. Zavala, who is currently in DROP, withdrew his application for industrial disability. The file has been closed.

**II. LITIGATION**

**Superior Court - Disability Cases**

Mark George v. San Diego City Employees' Retirement System Board of Retirement, San Diego Superior Court Case No. GIC860870. George's Petition for Writ of Mandate was filed February 3. SDCERS' filed its Answer March 24. After withdrawing his contributions from SDCERS, Mr. George dismissed his action, with prejudice, in September 2006. The file has been closed.

**Superior Court – Miscellaneous**

Michael Abramsky, et al. v. Alstom S.A. et al.: 03-CV-6595 (VM) United States District Court, Southern District of New York (Manhattan): SDCERS has been appointed co-lead plaintiff, along with 3 other public retirement funds in this securities fraud class action lawsuit against the French corporation, Alstom and a number of its affiliates. A second-amended Complaint was filed in March 2006. Motions to Dismiss were also filed to the Second Amended Complaint. In late September 2006, the court denied the motions to dismiss. The court's decision allows the lead plaintiffs, including SDCERS, to proceed with claims against the individual defendants relating to fraud at ATI, and to proceed with discovery on the securities fraud claims against other defendants. The New York City office of Bernstein, Litowitz, Berger and Grossman is representing SDCERS.

SDCERS v. City of San Diego & City Attorney, Michael Aguirre, San Diego Superior Court Case No. GIC841845. On January 27, 2005, the Board filed a lawsuit against the City of San Diego and its City Attorney, Michael Aguirre, seeking a judicial declaration that SDCERS is entitled to retain its own legal counsel and demanding return of SDCERS' privileged documents seized from certain SDCERS' Board members' City

offices. The case is assigned to Judge Jeffrey Barton. Seltzer Caplan McMahon & Vitek ("SCMV") represents SDCERS.

The City Attorney has filed a cross-complaint on behalf of the City seeking declaratory relief regarding the validity of Manager's Proposals I and II and certain retirement benefits. After various challenges, the cross-complaint is now in its sixth version. SDCERS has filed an answer to the Fifth Amended Cross-Complaint.

SDCERS' Motion for Summary Adjudication on its first cause of action for a declaration that SDCERS is empowered to employ legal counsel of its own choosing for all purposes, separate and independent from the City of San Diego and Office of the City Attorney of the City of San Diego was granted on March 6, 2006. The Petition for Writ of Mandate filed on April 3, 2006 by the City Attorney seeking to set aside Judge Barton's ruling was denied.

The City filed a Motion for Summary Judgment on its Fourth Amended Cross-complaint (notwithstanding it had been superseded by the Fifth Amended Cross-complaint), the SDCERS complaint in case No. GIC851286, and the various unions' complaints in intervention. The Court denied the City's Motion for Summary Judgment. The City filed a Petition for Writ of Mandate with the Fourth District Court of Appeal, which also was denied.

SCMV also filed a compulsory cross-complaint to the City's cross-complaint. SDCERS' cross-complaint seeks recovery of the all monies owed by the City to SDCERS but not paid because of Manager's Proposal I and II. The City answered SDCERS' compulsory cross-complaint on April 25, 2006.

The Court has divided the trial into phases. Trial on phases 1 and 2 is set to commence on October 25, 2006.

SDCERS v. City of San Diego, San Diego Superior Court Case No. GIC851286. On July 22, 2005, the Board voted unanimously (8-0) to file an action for declaratory relief seeking a judicial determination of the legality of paying contested retirement benefits to its members. The lawsuit was filed on July 26, 2005, and has since been consolidated with Case No. GIC841845 before Judge Jeffrey Barton.

SCMV filed a Motion for Summary Judgment on the GIC851286 complaint on Friday, July 7, 2006. The hearing on SDCERS' Motion was held on September 22, and September 28, 2006. The Court has not ruled, but instead has taken the matter under submission.

San Diego Police Officers' Association v. Michael Aguirre, et al., United States District Court Case No. 05CV1581. On August 9, 2005, the San Diego Police Officers' Association (POA) filed a complaint in federal court for Damages, Declaratory and Injunctive Relief against the City Attorney, City of San Diego, Retirement System, former Retirement Administrator Larry Grissom, past and present members of the City Council, certain former SDCERS Board Members, the former City Auditor and the past and present City Manager. This case appears to be primarily based upon what the POA alleges have been unfair labor negotiation tactics by the city (e.g., docking police DROP participants 3.2% to match the decrease in the City "pick up" of employee contributions by active employees). In addition, however, it asserts claims related to MP1, MP11 and health care benefits. After various pleading challenges, on April 17, 2006, SDCERS filed its Answer to the POA's Third Amended Complaint.

Mr. Aguirre, the City Council and the individual City Council Members and Employees appealed portions of the District Court's denial of their respective Motions to Dismiss with respect to the Qualified Immunity Doctrine. That matter is now pending before the 9th Circuit Court of Appeals. The District Court did not stay the proceedings upon notice of the appeals.

The Court and the parties participated in an Early Neutral Evaluation conference in which the parties discussed various issues including the status of pleadings, written discovery and depositions. Significantly, any claim for money damages on behalf of POA members has been eliminated, leaving only a theoretical monetary claim by the POA itself, and a claim for declaratory relief. SCMV will continue to discuss with POA's attorneys the issue of dismissing SDCERS completely.

In November of 2005, the court issued a scheduling order containing various dates and deadlines, including a discovery cutoff of September 8, 2006 and a trial date of November 14, 2006. On June 29, 2006, the POA persuaded the Court to extend all dates – ostensibly due to the POA's inability to search and read electronic data produced to it by the City. Trial has now been rescheduled for April 3, 2007.

During August and September of 2006, the POA's efforts were focused on derailing the impending class action certification and settlement in the McGuigan case. The POA has brought several motions before the Court seeking the Court's intervention in the McGuigan matter. The Court has declined each request to intervene. The POA also filed two motions for summary judgment in September. The first was a motion asking the Court to compel the City and SDCERS to hire independent auditors to perform a comprehensive accounting of the financial operations and status of both entities from

1996 to the present. SDCERS opposed that motion. The hearing is set for October 13, 2006. The second motion for summary judgment sought to establish that the benefits conferred on POA members in the 2003 Memorandum of Understanding between the POA and the City are vested benefits. Because this issue did not implicate SDCERS, no opposition was filed. That motion also is to be heard on October 13.

Aaron, et al. v. Aguirre, et al., Case No. '06CV1451. On July 18, 2006, the attorneys for the POA filed a class action lawsuit on behalf of the members of the POA in the Southern District of California naming SDCERS. The case was assigned to the Honorable James Miller, but it probably will be transferred to Judge Huff's court as a related matter. The lawsuit is essentially identical in substance to the POA's representative action, though some of the allegations have been reworded, and other allegations have been added in an attempt to satisfy the class action pleading requirements. The primary difference between the class action and the representative action is that class members are permitted to seek their individual alleged damages from defendants, which is an amount that far exceeds what the POA could seek as a representative body. SCMV is representing SDCERS.

The class representatives filed a motion to certify the class on August 25, 2006. That motion was set for hearing on September 22, 2006. While the motion was pending, the POA's attorneys filed a First Amended Complaint. When the Court heard the certification motion on September 22, it declined to formally rule on that motion due to the fact that the POA had filed an amended complaint. However, the Court did state why, even under the First Amended Complaint, class certification would have been denied. The Court suggested to the POA that it limit its class certification to only POA members. The POA is now seeking leave to file a Second Amended Complaint.

SDCERS v. City of San Diego, San Diego Superior Court Case No. GIC861125. On January 20, 2006, the Board voted to file an action for subrogation seeking the recovery of monies paid by SDCERS for attorneys fees incurred in the *Gleason* litigation and the various City investigations on behalf of various former board members. The complaint was filed on February 9, 2006. The case has been assigned to Judge Linda Quinn. Seltzer Caplan McMahon Vitek is representing SDCERS.

Discovery is ongoing. Upon request, the Court has moved the trial date from January 5, 2007 to February 9, 2007.

Newsome v. San Diego City Employees' Retirement System, San Diego Superior Court Case No. GIC856841. On November 14, 2005, William Newsome, a former employee of the City of San Diego, filed a complaint against SDCERS and the City of San Diego for Breach of Fiduciary Duty, Aiding and Abetting and Conspiracy. The case is

assigned to Judge William Nevitt. Seltzer Caplan McMahon Vitek is representing SDCERS. On January 25, 2006, SDCERS filed an answer to the complaint and filed a cross-complaint against the City of San Diego for declaratory relief. Plaintiff voluntarily dismissed the action without prejudice.

City of San Diego v. San Diego City Employees' Retirement System, San Diego Superior Court Case No. GIC865543. On May 5, 2006, the City Attorney, in the name of the City of San Diego, filed a new complaint against SDCERS seeking administrative mandate for an immediate stay of SDCERS administrative decisions and declaratory relief. The complaint alleges the SDCERS' Board improperly approved payment of criminal defense costs for Mr. Grissom, the former SDCERS' administrator, and Ms. Chapin, the former SDCERS' general counsel. The case was assigned to Judge Charles Hayes. Seltzer Caplan McMahon Vitek is representing SDCERS. On June 5, 2006, SDCERS filed a demurrer as to all causes of action in the complaint, and a motion to strike the complaint in its entirety, or in the alternative to strike several allegations therein. The City filed its Opposition papers on July 25, 2006, and SDCERS replied on July 28, 2006. Prior to the hearing on the demurrer, the City voluntarily dismissed the action without prejudice.

### **Court of Appeal**

On July 31, 2006, the City Attorney filed a Petition for Writ of Mandate in Case No. GIC 841845 regarding Judge Barton's denial of the City's Motion for Summary Judgment on the legality of the benefits granted in 1996 and 2002. The Court of Appeal denied the City Attorney's Petition.

Alcala v. SDCERS, San Diego Court of Appeal Case No. D048569: After the Board adopted an adjudicator recommendation to deny Mr. Alcala's application for industrial disability retirement, Mr. Alcala filed a Petition for Writ of Mandate in the Superior Court. The court denied the Petition, thus sustaining the Board's decision. Mr. Alcala filed his Notice of Appeal in the Appellate Court. Alcala's opening brief was due September 15. It was not filed timely. On September 19, the appellate court provided notice that it would dismiss the appeal on October in mid-September, but was not filed. The Appellate Court has indicated that it would dismiss his appeal on October 4. SDCERS has not yet received the dismissal.

### **Other Cases of Interest:**

City of San Diego v. Callan Associates, Inc., Gabriel Roeder Smith & Company, San Diego Superior Court Case number GIC852419. On August 16, 2005, the City of San Diego filed a Complaint for Damages against SDCERS investment consultant and

actuary for professional negligence, intentional fraud-affirmative misrepresentation and intentional fraud-concealment. The case has been assigned to Judge Kevin A. Enright. SDCERS is not a party to this case.

People of the State of California v. Cathy Lexin, et. al., The District Attorney filed felony conflict of interest charges against six former SDCERS Board Members alleging a violation of California Government Code section 1090. The case was assigned to Judge Frederick Link. SDCERS is not a party to this suit. The Preliminary Hearing concluded and Judge Link has found that there is sufficient evidence for the matter to proceed to trial. On August 2, Judge Roger Kravel issued a tentative ruling upholding Judge Link's decision.

McGuigan v. the City of San Diego, San Diego Superior Court case number GIC849883. Plaintiff William J. McGuigan filed the complaint on June 28, 2005. Plaintiff claims Defendant City of San Diego failed to fund the retirement plan as required by the City Charter and SDMC § 24.0801. The case is assigned to Judge Richard Strauss. Although a tentative settlement was purportedly reached in this case, it has not been finalized.

The City of San Diego v. Loraine Chapin, San Diego Superior Court case number GIC863096. The City Attorney in the name of the City filed a complaint on March 21, 2006 against Ms. Chapin alleging violation of Government Code section 1090. The City alleges that Ms. Chapin as a City Attorney had a conflict of interest when she opined on whether SDCERS was entitled to legal counsel independent from the City Attorney's office. The case has been assigned to Judge Linda Quinn. Although a formal settlement has not been approved, this case has tentatively been settled with the City paying a portion of Ms. Chapin's legal fees and the action being dismissed.

#### Upcoming Hearing Dates

<b>SDCERS v. City of San Diego (Legality of benefits) consolidated with SDCERS v. City &amp; City Attorney (Attorney for SDCERS)</b>	10/25/06	Trial (D-69)
<b>SDPOA v. Aguirre, et al. (Declaratory &amp; Injunctive Relief)</b>	10/13/06	Hearing on POA Summary Judgment Motions
	03/26/07	Pretrial Conference (10:30 AM Dept. 13); and Hearing on motions in limine

	04/02/07	Trial Status Conference (10:30 AM Dept. 13)
	04/03/07	Trial (9 AM, Dept. 13)
<b>SDCERS v. City of San Diego (Indemnity)</b>	01/12/07	Trial Readiness Conference (D-74 11 AM)
	02/09/07	Trial (D-74 9 AM)

### III. PUBLIC RECORDS REQUESTS

In September, the Legal Services Division received 4 and responded to 3 California Public Records Act requests. In all cases, non-public, private and/or confidential member information was withheld or redacted pursuant to applicable laws. The requested records include: Larry Grissom's salary increases, list of all real estate funds/partnership in which SDCERS is an investor, and a request for documents relating to administrative forms, reciprocity, pre-retirement handouts and administrative procedures.

### V. COMMUNITY PROPERTY AND BENEFITS

September continued to be another extremely busy month for Legal Services. The community property/benefits legal assistant handled 49 phone calls, met with 11 members and former spouses, and had 11 conferences with internal staff. Legal opened 8 workflows to operations staff, and completed 3 workflow requests from Operations. 32 member files and 8 domestic relations orders were reviewed. 19 final judgments and marital settlement agreements were reviewed and approved. 2 responses to joinders were filed with the court. 3 community property introduction packages were mailed out, along with 11 community property inquiry letters. 12 letters to members and opposing counsel were sent out. 27 formal staff memos were prepared, and 57 e-mails were sent to members, staff, outside counsel, and others. 13 tax liens were reviewed and 3 response letters were sent out. Staff researched 5 court files and attended 1 family law court hearing. Sally Nadeau, our senior legal assistant, assists with community property and benefits issues.

### VI. TAX DETERMINATION LETTER & VOLUNTARY CORRECTION PROGRAM

Before the October Board meeting, Ice Miller will be filing SDCERS' Request for a Private Letter Ruling approving the three plan sponsors' Preservation of Benefit (POB) plans. As background, section 415(b) of the Internal Revenue Code limits the annual benefit that can be paid to a member by a qualified plan. However, since 1994, state

and local governments have been allowed, under section 415(m) of the Code, to set up a "qualified excess benefit arrangement" (QEBA) to pay promised benefits that exceed the 415(b) limits.

In March 2001, the City Council amended the SDCERS Plan to establish a QEBA. And when the Airport and Port's separate retirement plans were created in December 2002, they also contained language establishing QEBAs. All three employers have named their QEBAs "Preservation of Benefit" plans. Ice Miller has now prepared the necessary plan and trust documents to implement the Preservation of Benefit plans, as well as a request for a private letter ruling from the IRS approving the plans.

By February 1 each year, the Board will provide each employer an estimate of the amount of "excess benefits" (benefits above the 415(b) limit) that are expected to be due to members in that calendar year. Each employer will be required to contribute that estimated amount plus the amount the Board determines is necessary to administer the employer's Preservation of Benefit plan that year. Any contributions that are not used during the year must be retained and used to fund administrative expenses and benefits in future years. The Board will have exclusive authority to control and manage the Preservation of Benefit plans.

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