

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

DATE: September 7, 2007
TO: The Board of Administration
FROM: Christopher W. Waddell, General Counsel ^W
SUBJECT: September Legal Services Report

I. LITIGATION

Benefits/Disability Litigation

Rochelle Glenn v. SDCERS, San Diego Superior Court Case No. GIC 872600. Petition for Writ of Mandate challenging a Board decision that Ms. Glenn failed to timely file an application for disability retirement and thus, was not eligible to apply. SDCERS filed a Demurrer to the Petition which was granted with leave to amend. On August 10, Glenn filed an amended Petition. SDCERS responded to the amended petition on September 5, 2007. Sheila Jacobs represents the Board.

Janis Valencia v. SDCERS, San Diego Superior Court Case No. GIC 878519. Petition for Writ of Mandate challenging Board's decision to deny Ms. Valencia's application for industrial disability retirement. SDCERS' Answer was filed April 11. Gibbs & Fuerst, L.L.P. represents SDCERS.

Stephen Margetts v. SDCERS, San Diego Superior Court Case No. 37-2007-00065778-CU-WM-CTL. On April 26, Stephen Margetts filed a Petition for Writ of Mandate challenging the Board's January 19, 2007 denial of his application for industrial disability retirement. SDCERS' Answer was filed May 23. The case has been assigned to the Honorable Rafael A. Arreola. The court has not yet set a briefing schedule. The parties have agreed to calendar an adjudicator hearing on the matter. Once the hearing is calendared, Mr. Margetts has agreed to dismiss his Petition with prejudice. Sheila Jacobs represents the Board.

General Litigation

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 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. 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.

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.

Trial of this action has commenced. The Court divided the trial into three phases; trial on Phase 1 began October 25, 2006, and finished on November 29, 2006. On December 14, 2006, the Court issued its proposed statement of decision on Phase 1. The Court ruled that the Unions had carried their burden and established that the City (1) is estopped by the Corbett judgment from challenging the MPI benefits; (2) is barred from contesting the benefits of MP2 as to those beneficiaries who were class members in the Gleason I litigation; and (3) cannot pursue a remedy against SDCERS for violation of debt limit laws. The Court ordered that, prior to the City proceeding with the remaining relief sought in its Fifth Amended Cross-Complaint, all necessary parties must be joined. The Court also found, without prejudice, that the Unions did not carry their burden on whether the matter constitutes a justiciable controversy. On December 27, 2006, the City filed an objection to the Court's proposed statement of decision and requested a hearing on the same. The Court entered its final decision on Phase 1, substantially denying most of the City's claims with some exceptions, which will be the subject of further litigation. The City filed a writ to the Fourth District Court of Appeal on the issues set forth in the trial court's final decision, which was denied. The City has now filed a Petition for review to the California Supreme Court, which is currently pending.

A status conference was held on April 12, 2007. On April 23, 2007, the Court issued a ruling following the status conference directing the City Attorney to file a Sixth Amended Cross-complaint which conformed to its ruling following Phase 1 regarding proper claims and parties against which such claims may be asserted. The court had a hearing on June 21, 2007, at which all of the Intervenor's challenges to the Sixth Amended Cross-complaint were heard. A second hearing was held on July 24, 2007, to

address new case law affecting the statute of limitations applicable to Government Code section 1090.

On August 14, 2007, the Court confirmed its ruling dismissing the City's Sixth Amended Cross-complaint with prejudice on the grounds the claims remaining following Phase 1 were barred by the currently-applicable statute of limitations as a matter of law. After further hearings between SDCERS and the City, the Court set a motion for summary adjudication of issues on the City's affirmative defenses to SDCERS' Compulsory Cross-complaint for October 9, 2007. The Court set a trial date for SDCERS' Compulsory cross-complaint of October 18, 2007.

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. The Court granted judgment in SDCERS' favor, holding that SDCERS may continue to pay the challenged benefits until they are otherwise declared illegal.

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 was 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.

Through November, the parties continued to exchange written discovery. Through all of 2006, the POA's attorneys took fewer than five depositions. However, with the discovery cutoff set for February 26, 2007, a flurry of depositions was taken by the POA and the Defendants in February, and extending into March. Of note, counsel for SDCERS deposed the POA's Officers, including Bill Nemec, Bill Farrar, Steve McMillan, and POA attorney Richard Castle. For its part, the POA took the depositions of numerous present and former City employees and SDCERS employees, including Messrs. Arce, Wilson, and McCalla, and Ms. Wilson. Technically, the discovery period is now closed; however, counsel for SDCERS anticipated future attempts by the POA's attorneys to reopen discovery.

On January 3, 2007, SCMV filed a Motion for Summary Judgment. The legal basis for that motion was that the applicable periods of limitation had run on the majority of the POA's claims pertaining to MP-2 (the Court has already dismissed claims pertaining to MP-1). The hearing on that Motion for Summary Judgment was initially set for Monday, February 5, 2007; however, the Court granted the POA's request for an extension on the hearing date, which resulted in the hearing being re-calendared for March 12, 2007. Counsel for SDCERS filed a second Motion for Summary Judgment on February 12, 2007, this time challenging the POA's ability to recover any form of relief from SDCERS, including monetary relief, injunctive relief, or declaratory relief. That Motion was also set to be heard on March 12, 2007. Subsequently, counsel for the POA – Castle, Petersen & Krause (“CPK”) – sought additional postponement of both the Summary Judgment Hearings and the Trial date, claiming CPK's senior trial attorney was unable to proceed due to health issues. Consequently, the Court agreed to postpone the hearing on SDCERS' Summary Judgment Motions to April 23, 2007, and the Trial to July 3, 2007.

The Court made one final scheduling change, adding a hearing on May 1, 2007 to take additional oral argument on matters not addressed during the April 23 hearing.

On April 23, 2007, the Court conducted the first hearing on the Summary Judgment Motions. The Court limited oral argument during that hearing to the City's arguments surrounding the 2005 labor negotiations and to the issues raised by Mr. Aguirre's Summary Judgment Motion. At the May 1, 2007 hearing, the Court took oral argument on the remaining Summary Judgment Motions, including SDCERS' motions regarding

the statute of limitations and the POA's inability to recover damages from SDCERS. At the conclusion of both hearings, the Court took all matters under submission. On May 18, 2007, the Court issued an omnibus ruling on all of the outstanding Summary Judgment Motions filed by the parties. Significantly, the Court dismissed the POA's claims pertaining to the City's imposition of its Last, Best, Final offer in the 2005 labor negotiations. Those claims represented a large part of the POA's case. It further expressly ruled in SDCERS' favor by holding that the POA could not pursue any monetary damages from SDCERS. The Court also dismissed the causes of action against SDCERS for Brown Act Violations, Conspiracy, Conversion and Breach of Contract. However, the Court also denied SDCERS' motion to dismiss the pension underfunding claims based on the statute of limitations. Although the Court agreed that the POA was on notice of the underfunding claims prior to the statutory period, the Court ultimately concluded that there was an issue of fact regarding the POA's arguments that equitable doctrines tolled the statute of limitations, and thus that those issues should be addressed at trial.

Shortly thereafter, the Court expressed a concern that with the dismissal of the claims surrounding the 2005 labor negotiations, there were no federal law claims left before the Court. The Court requested further briefing to determine whether that was the case, and additional briefing on whether the Court should retain jurisdiction over the matter if only state law claims remained. The parties briefed the issues and the Court conducted the hearing on June 25, 2007. After taking the matter under submission, the Court issued its final ruling on June 26, 2007. In that ruling, the Court concluded that there were no federal law claims remaining in the case. As such, the Court declined to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. 1367(c) and the Colorado River Doctrine, and dismissed the entire case, without prejudice. The Defendants are to submit a final judgment by July 9, 2007. That will, in effect, conclude the litigation. Although it is too early to be certain, we anticipate an appeal from the SDPOA.

Upon post-judgment application of the defendants, the Court awarded both SDCERS and the City their costs of litigation incurred in defending against the POA's action. Although the Court's order stated no attorney's fees would be awarded to defendants, SDCERS had notified the POA's counsel of its intent to pursue Rule 11 sanctions in the event the POA did not dismiss its frivolous claims against SDCERS. On September 7, 2007, SDCERS filed a motion against the POA's counsel (not the POA itself) seeking to recover approximately \$300,000 in attorney's fees which were incurred in the course of defending what SDCERS ultimately proved were frivolous claims. A hearing on this motion will be held in approximately 30 days.

Aaron, et al. v. Aguirre, et al., United States District Court 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 originally was assigned to the Honorable James Miller, but was transferred to Judge Huff's court as a matter related to the POA case.

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.

In October, 2006, the POA filed its Second Amended Class Action Complaint. Despite the Court's strong recommendation that the POA limit the class it sought to have certified, the POA kept the broad class allegations that had appeared in the First Amended Complaint. The only real changes to the Complaint involved allegations pertaining to KPMG. Shortly after the Second Amended Complaint was filed, SCMV filed a Motion to Dismiss. That motion, along with motions filed by the City, Mr. Aguirre and KPMG, were heard on December 4, 2006. The Court granted SDCERS' Motion to Dismiss on nearly all grounds, most important of which was the dismissal of the Conspiracy Claim for Relief against SDCERS which alleged SDCERS had conspired with the City and Mr. Aguirre to violate the civil rights of the POA's members. The POA was afforded the ability to amend its complaint, again. On January 12, 2007, the POA filed a Third Amended Complaint that was in most respects identical to the Second Amended Complaint. Thus, on January 28, 2007, SDCERS filed a Motion to Dismiss the Third Amended Complaint that was based primarily on the same arguments addressed in the previous Motion to Dismiss. On March 8, 2007, the Court decided the Motion to Dismiss without oral argument. It granted SDCERS' Motion in its entirety, dismissing the Breach of Contract, Interference with Contract, Conversion and Conspiracy Claims for Relief. With respect to all but the Conspiracy Claim, the Court prohibited the POA from refileing those Claims against SDCERS. The class representatives also filed a motion to certify the class on August 25, 2006. That motion was set for hearing on September 22, 2006, but the Court declined to formally rule on that motion due to the fact that the POA had filed an amended complaint. To date, the POA has not renewed its efforts to certify a class.

The POA filed their Fourth Amended Complaint on April 9, 2007. As required by the Court's Order granting SDCERS' Motion to Dismiss the Third Amended Complaint, the POA did not allege against SDCERS causes of action for Breach of Contract, Interference with Contract or Conversion. However, because the Court granted the POA leave to amend its Conspiracy claims against SDCERS, the POA realleged those conspiracy claims in the Fourth Amended Complaint, though it failed to make any

substantive changes sufficient to address the defects in those claims that existed in the Third Amended Complaint. As such, a new Motion to Dismiss was filed by SDCERS which focuses exclusively on the POA's deficient Conspiracy claims. The Court heard the motion on June 11, 2007. Shortly thereafter, on June 12, 2007, the Court issued its ruling, agreeing with SDCERS' position and dismissing, with prejudice, the conspiracy claims.

The dismissal of the SDPOA v. Aguirre, et al. lawsuit will likely have an effect on this lawsuit. With few variations, the subject of the lawsuits is the same, though the plaintiffs are different. We believe that just as in the SDPOA case, the Court will dismiss the federal claims in this case pertaining to the 2005 labor negotiations. That will again expose the remaining state court claims to dismissal, unless Plaintiffs can establish that their claim involves additional federal rights that were not raised in the SDPOA case.

Securities Litigation

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 is a lead plaintiff in *In re Alstom SA Securities Litigation*, a securities fraud class action pending in the U.S. District Court for the Southern District of New York. The case seeks damages for all purchasers of Alstom securities from August 3, 1999, to August 6, 2003 (the "Class Period"). Plaintiffs allege that the price of Alstom securities was fraudulently inflated during the Class Period investments as a result of Alstom's materially false and misleading statements and omissions, which failed to disclose that (a) Alstom had secretly provided vendor financing (in the form of guaranteeing loans) to a financially troubled cruise company so that the cruise company could obtain the financing it needed to buy cruise ships from Alstom's marine unit; and (b) Alstom's transport unit had significantly underbid a major contract to provide railcars to New Jersey transit, and had experienced significant undisclosed cost overruns on that contract. Plaintiffs filed a Revised Second Amended Complaint ("RSAC") in December, 2006, which asserts the theories noted above (and which deleted certain other claims that the Court's prior orders had dismissed). The pleadings were finalized in March 2007. Discovery is continuing. Plaintiff's motion for Class Certification was filed in June. The New York City office of Bernstein, Litowitz, Berger and Grossman is representing SDCERS.

Other Cases of Interest:

People of the State of California v. Cathy Lexin, et. al., San Diego Superior Court Case No. SCD190930. 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. On September 25, 2006, the 4th DCA denied the defendants' petition for review. On November 29, 2006, the California Supreme Court ordered the 4th DCA to issue an order to show cause why the case should not be dismissed. On July 17, 2007, the Court of Appeal heard oral argument from all parties and amicus. On September 7, a 3 judge panel of the Court of Appeal ruled unanimously, upholding the District Attorney's right to continue criminal prosecution of the six former Board members for violating the conflict of interest prohibition of Government Code section 1090.

United States of America v. Saathoff, et al., 06CR0043-BEN. A Federal Grand Jury was impaneled to investigate issues relating to whether the City of San Diego made material misrepresentations in certain bond disclosures regarding the method by which it funds its pension system, and potential conflicts of interest by certain SDCERS Board members and staff relating to Manager's Proposal 2. On January 6, 2006, the Grand Jury filed indictments against former SDCERS' Board members, Ron Saathoff, Cathy Lexin, and Terri Webster, as well as SDCERS' former Retirement Administrator, Lawrence B. Grissom, and SDCERS' former General Counsel, Loraine Chapin. The indictment states charges arising from alleged violations of Title 18, U.S.C. Section 371, conspiracy to commit wire and mail fraud; Title 18, U.S.C. Sections 1343 and 1346, mail fraud; and Title 18, U.S.C. Section 2, Aiding and Abetting. No dates have been set, and the trial judge has indicated that the Appellate Court's decision in the matter of People v. Lexin may impact the federal case.

Upcoming Hearing Dates

SDCERS v. City of San Diego (Legality of benefits) consolidated with SDCERS v. City & City Attorney (Attorney for SDCERS)	10/18/07	Trial (D-69)
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II. PUBLIC RECORDS REQUESTS

Last month, Legal Services Division received two requests for public records. All non-public, private and/or confidential member information was withheld or redacted pursuant to applicable laws. The first request was for SDCERS-maintained records relating to a former SDCERS Board member. The second requested information regarding law firm billing rates in two litigated matters to which SDCERS is a party. Sheila Jacobs manages the public records project with the assistance of Merlita Hilario.

III. COMMUNITY PROPERTY AND BENEFITS

In August, the community property/benefits legal assistant handled 72 phone calls. She met with 4 members. She reviewed 7 domestic relations orders, 14 judgments and marital settlement agreements, and 32 member files. 1 response to a joinder was filed with the court. She prepared 5 Member Indemnity Agreements and 1 Release of Interest. 44 letters and e-mails were sent to members and outside counsel. 84 beneficiary designations were checked for community property issues. 4 public records searches and 5 family law court records were researched by staff. 1 power of attorney, 2 trusts, and 1 death benefit were reviewed and approved. 1 overpayment was resolved. 14 child support garnishments were reviewed and 3 child support orders were revised. 2 spousal support orders were stopped. Responses to 1 IRS and 3 FTB garnishments were completed. Sally Nadeau, our senior legal assistant, assists with community property and benefits issues.

CWW/SMJ/mrh