

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

DATE: November 5, 2007
TO: The Board of Administration
FROM: Christopher W. Waddell, General Counsel
SUBJECT: November Legal Services Report

CW

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. The amended Petition contains the same legal errors as the Petition. SDCERS demurred to the Amended Petition. Due to recent fires, the hearing on SDCERS demurrer set for October 26, 2007 was continued to November 9, 2007, before the Honorable Linda Quinn. Sheila Jacobs represents the Board.

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. Sheila Jacobs represents the Board. Based on SDCERS agreement to refer the matter for adjudicator hearing, Margetts has agreed to dismiss the Petition and will do so when hearing dates are set. Prehearing is set for November 6, 2007.

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.

The Court divided the trial into three phases; trial on Phase 1 began October 25, 2006, and finished on November 29, 2006. The Court's final ruling stated 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. 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 then filed a Petition for review to the California Supreme Court, which has been denied.

On April 23, 2007, the Court directed 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 Intervenors' 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. Judgment was entered on that ruling on September 17, 2007. The City has appealed that ruling. SDCERS has moved to dismiss the appeal for lack of a final, appealable

judgment. It is expected the Court of Appeal will rule on SDCERS' motion before the end of the year.

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 was consolidated with Case No. GIC841845 before Judge Jeffrey Barton. SDCERS 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.

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). Counsel for SDCERS filed a second Motion for Summary Judgment on February 12, 2007, 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.

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. SCMV anticipates 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 filed a motion against the POA's counsel (not the POA itself) on September 7, 2007, 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, which was denied.

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.

City of San Diego vs. SDCERS, Superior Court Case No. 37-2007-00077604-CU-MC-CTL. On October 15, 2007, the City, through outside counsel (Wright & L'Estrange) filed a complaint stating a single cause of action for declaratory relief. Therein, the City seeks a judicial declaration that changes to Municipal Code section 24.1201.1, which was amended by ordinance on January 17, 2007, and became effective on February 16, 2007, nonetheless applies to all employees hired on or after July 1, 2005. The City has named only SDCERS as a defendant. The case has been assigned to Judge Barton. Counsel for SDCERS is evaluating the case and will provide its analysis and recommendations to the Board in closed session.

POA vs. Aguirre, et al, Superior Court Case No. 37-2007-00075432-CU-MC-CTL. On September 21, 2007, the POA filed a State Court action which appears to be identical in all relevant respects to the State law claims made in its now-dismissed Federal court action, discussed above. The POA has not yet served SDCERS, and instead provided a copy of the Complaint to SCMV on November 1, 2007, with a request for acknowledgement of service. Counsel for SDCERS is evaluating the case and will provide its analysis and recommendations to the Board in closed session.

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 and depositions are expected to begin in December 2007. 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. The Appellate Court's decision was filed on September 7, 2007. The court held that pension benefits are salary for purposes of the salary exemption under Sec. 1091.5(a)(9) but found that the salary exemption did not apply in *Lexin* because the contract at issue [MP2] *impacted* the employee Board member's department. This finding has greatly limited the protection afforded by Gov. Code Sec. 1091.5(a)(9) in that the salary exemption will not apply where a contract merely *impacts* a Board Member's department as opposed to directly involves the department. The *Lexin* defendants have petitioned the Supreme Court for review, with 17 retirement systems across the state filing an *amicus* brief in support of review.

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.

Torres v. City of San Diego, et. al., D049111, Plaintiffs are John A. Torres, Ronald L. Saathoff, Cathy Lexin, Terri A. Webster, Sharon K. Wilkinson, Mary Vattimo and Bruce Herring, former members of the Board of Administration of SDCERS). The board members sued the City of San Diego (City) for specific performance and declaratory relief, alleging that under a City resolution and Government Code section 995 the City was required to pay for their defense in a civil action the San Diego City Attorney, Michael Aguirre, filed against them on behalf of the People of California, and in another civil action in which he filed a cross-complaint against them on behalf of the City. The board members obtained summary judgment against the City. The City filed a late notice of appeal which was dismissed. Subsequently, the trial court issued an order awarding the board members attorney fees incurred in that action, under the City's resolution. The City timely appealed the order. The Court of Appeal affirmed the order on the attorney fees incurred in the action finding that plaintiffs were entitled to attorneys fees incurred in enforcing the resolution in addition to the fees incurred in defense of the underlying actions. The court stated that the City never made any finding of wrongdoing on the part of the board members that would have excused their duty to defend, and that fees incurred to enforce the resolution were necessary to effectuate the intent of the City in passing the resolution as Board members would obviously not be protected or encouraged to serve if they were required to incur substantial attorney fees and costs to enforce the City's duty of defense under the resolution.

Upcoming Hearing Dates

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| SDCERS v. City of San Diego (Legality of benefits) consolidated with SDCERS v. City & City Attorney (Attorney for SDCERS) | 12/07 | Motion to dismiss City Appeal |
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II. PUBLIC RECORDS REQUESTS

Last month, the Legal Services Division received and responded to four requests for public records pursuant to Government Code section 6250 et.seq. All non-public, private and/or confidential member information was withheld or redacted, pursuant to applicable laws. The first request was for records related to SDCERS Voluntary Compliance Program submissions to the IRS. The second request was for any correspondence from the IRS and/or outside attorney or law firm regarding the DROP program. The third and fourth requests were related to the

Preservation of Benefits plans. Sheila Jacobs manages the public records project with the assistance of Merlita Hilario.

III. COMMUNITY PROPERTY AND BENEFITS

In October, the community property/benefits legal assistant handled 65 phone calls. She met with 9 members. She reviewed 6 domestic relations orders, and 6 judgments and marital settlement agreements. 22 member files were reviewed for outstanding community property issues. 2 responses to joinders were filed with the court. 1 release of Interest and 5 member indemnity agreements were prepared. 25 letters and e-mails were sent to members and outside counsel. 9 community property information packages were sent out. 1 overpayment was handled. 1 child support garnishment was received and approved. 123 beneficiary designations were checked for community property issues, resulting in 18 inquiry letters being mailed out. Sally Nadeau, our senior legal assistant, assists with community property and benefits issues.

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