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GENERAL DIVISION

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1 MICHAEL J. AGUIRRE, City Attorney
 2 DONALD MCGRATH II, Executive Assistant City Attorney
 3 California State Bar No. 44139
 4 ANDRA DONOVAN, Deputy City Attorney
 5 California State Bar No. 177792
 6 Office of the City Attorney
 7 1200 Third Avenue, Suite 1100
 8 San Diego, California 92101-4100
 9 Telephone: (619) 533-5800
 10 Facsimile: (619) 533-5856
 11 Attorneys for Defendants and Cross-Complainants

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

10 SAN DIEGO CITY EMPLOYEES'
 11 RETIREMENT SYSTEM, by and through its
 12 Board of Administration,

12 Plaintiff,

13 v.

14 SAN DIEGO CITY ATTORNEY MICHAEL J.
 15 AGUIRRE; THE CITY OF SAN DIEGO and
 16 DOES 1-100,

16 Defendants.

17 CITY OF SAN DIEGO AND SAN DIEGO
 18 CITY ATTORNEY MICHAEL J. AGUIRRE,

19 Cross-Complainants,

20 v.

21 JOE FLYNN, an Individual in his capacity as a
 22 Trustee of the SAN DIEGO CITY
 23 EMPLOYEES' RETIREMENT SYSTEM Board
 24 of Administration; BILL LOPEZ, an Individual
 25 in his capacity as a Trustee of the SAN DIEGO
 26 CITY EMPLOYEES' RETIREMENT SYSTEM
 27 Board of Administration; STEVE MEYER, an
 28 Individual in his capacity as a Trustee of the
 SAN DIEGO CITY EMPLOYEES'
 RETIREMENT SYSTEM Board of
 Administration; PETER EMANUEL
 PREVOLOS, an Individual in his capacity as a
 Trustee of the SAN DIEGO CITY
 EMPLOYEES' RETIREMENT SYSTEM Board
 of Administration; WILLIAM JAMES

Case No. GIC841845

SECOND AMENDED CROSS-COMPLAINT:

- (1) DECLARATORY RELIEF (COUNT ONE)
- (2) DECLARATORY RELIEF (COUNT TWO)
- (3) DECLARATORY RELIEF (COUNT THREE)
- (4) DECLARATORY RELIEF (COUNT FOUR)
- (5) BREACH OF TRUST
- (6) BREACH OF FIDUCIARY DUTY
- (7) FRAUD/NEGLIGENT MISREPRESENTATION
- (8) FRAUD/INTENTIONAL MISREPRESENTATION
- (9) FRAUD/CONCEALMENT
- (10) NEGLIGENCE
- (11) CONSPIRACY
- (12) WRIT OF MANDATE

I/C Judge: Hon. Jeffrey B. Barton
 Dept.: 69
 Action filed: January 27, 2005
 Trial: Not Set

1 SHEFFLER, an Individual in his capacity as a)
 Trustee of the SAN DIEGO CITY)
 2 EMPLOYEES' RETIREMENT SYSTEM Board)
 of Administration; MARK SULLIVAN, an)
 3 Individual in his capacity as a Trustee of the)
 SAN DIEGO CITY EMPLOYEES')
 4 RETIREMENT SYSTEM Board of)
 Administration; JOHN THOMPSON, an)
 5 Individual in his capacity as a Trustee of the)
 SAN DIEGO CITY EMPLOYEES')
 6 RETIREMENT SYSTEM Board of)
 Administration; JOHN TORRES, an Individual)
 7 in his capacity as City of San Diego Auditor and)
 Comptroller; RICHARD M. KIPPERMAN, an)
 8 Individual in his capacity as a Trustee of the)
 SAN DIEGO CITY EMPLOYEES')
 9 RETIREMENT SYSTEM Board of)
 Administration; LAWRENCE GRISSOM;)
 10 LORAIN LEE CHAPIN aka LORAIN LEE)
 ETHERINGTON aka LORI CHAPIN; RON)
 11 SAATHOFF; MARY VATTIMO; CATHY)
 LEXIN; TERRI WEBSTER; SHARON)
 12 WILKINSON; JOHN TORRELL; and ROES 1-)
 50, inclusive,)

13
 14 Cross-Defendants.

15 Cross-Complainants CITY OF SAN DIEGO and SAN DIEGO CITY ATTORNEY
 16 MICHAEL J. AGUIRRE ["Aguirre"], on behalf of all beneficiaries of the SAN DIEGO CITY
 17 EMPLOYEE'S RETIREMENT SYSTEM ["SDCERS"], the citizens of San Diego, and other
 18 governmental interests, complain as follows:

19 This action is filed in an emergency manner by Aguirre as a result of a vote on July 5,
 20 2005, by the SDCERS Board of Administration ["SDCERS Board" or "Board"] to again not
 21 waive the attorney-client privilege. Said waiver is considered a mandatory step to obtaining an
 22 audited financial statement from the auditors for the City of San Diego, and various statutes of
 23 limitation are potentially running, and the City of San Diego is paralyzed.

24 **THE PARTIES**

25 1. Cross-Complainant CITY OF SAN DIEGO ["City"] is a municipal entity
 26 established by charter pursuant to California Constitution Article XI section 3.

27 2. Cross-Complainant Aguirre is the duly elected San Diego City Attorney. Aguirre
 28 was elected by the people of the City as an "independent city attorney." Aguirre's actions at all

1 times herein are governed by Section 40 of the San Diego City Charter ["Charter"], and were
2 taken in response to the crisis that has ensued as a result of the fraudulent, negligent and illegal
3 acts of the SDCERS Board. Section 40 of the Charter recites, among other things:

4
5 . . . the City Attorney shall be the chief legal adviser of, and attorney for the City
and all Departments and offices thereof in matters relating to their official powers
and duties. . .

6
7 . . . the City Attorney shall have charge and custody of all legal papers, books, and
dockets belonging to the City pertaining to his office, and, upon a receipt
8 therefore, may demand and receive from any officer of the City any book, paper,
documents, or evidence necessary to be used in any suit, or required for the
purpose of the office.

9
10 . . . the City Attorney shall apply, upon order of the Council, in the name of the
City, to a court of competent jurisdiction for an order or injunction to restrain the
11 misapplication of funds of the City or the abuse of corporate powers, or the
execution or performance of any contract made in behalf of the City which may
12 be in contravention of the law or ordinances governing it, or which was procured
by fraud or corruption. The City Attorney shall apply, upon order of the Council,
13 to a court of competent jurisdiction for a writ of mandamus to compel the
performance of duties of any officer or commission which fails to perform any
14 duty expressly enjoined by law or ordinance.

15 3. SDCERS is a public employee retirement system established pursuant to Article
16 IX, sections 141 and 144 of the Charter for the purposes of administering the City's retirement
17 system. SDCERS is not a legal entity capable of suit, and therefore each of the trustees of it are
18 named herein above individually as real parties in interest in their capacity as trustees and sued
19 as such.

20 4. Cross-Defendant JOE FLYNN ["Flynn"] is a trustee of SDCERS, having been
21 duly appointed as the "Retiree Representative" pursuant to the Charter. Flynn, at all relevant
22 times alleged in this operative complaint, was and is a resident of the County of San Diego, State
23 of California.

24 5. Cross-Defendant BILL LOPEZ ["Lopez"] is a trustee of SDCERS having been
25 duly appointed by the City Manager pursuant to the Charter. Lopez, at all relevant times alleged
26 in this operative complaint, was and is a resident of the County of San Diego, State of California.

27 6. Cross-Defendant STEVE MEYER ["Meyer"] is a trustee of SDCERS having
28 been duly appointed as the "General Member of the Board" pursuant to the Charter. Meyer, at

1 all relevant times alleged in this operative complaint, was and is a resident of the County of San
2 Diego, State of California.

3 7. Cross-Defendant PETER EMANUEL PREOVOLOS ["Preovolos"] is a trustee of
4 SDCERS, having been duly appointed by the Mayor of San Diego pursuant to the Charter.
5 Preovolos, at all relevant times alleged in this operative complaint, was and is a resident of the
6 County of San Diego, State of California.

7 8. Cross-Defendant WILLIAM JAMES SHEFFLER ["Sheffler"] is a trustee of
8 SDCERS having been duly appointed by the Mayor of San Diego (see above) pursuant to the
9 Charter. Sheffler, at all relevant times alleged in this operative complaint, was and is a resident
10 of the County of San Diego, State of California.

11 9. Cross-Defendant MARK SULLIVAN ["Sullivan"] is a trustee of SDCERS
12 having been duly appointed by members of the San Diego Police Officer's Association pursuant
13 to the Charter. Sullivan, at all relevant times alleged in this operative complaint, was and is a
14 resident of the County of San Diego, State of California.

15 10. Cross-Defendant JOHN THOMPSON ["Thompson"] is a trustee of SDCERS
16 having been duly appointed by the members of Local 145 of the San Diego Fire Department
17 bargaining unit pursuant to the Charter. Thompson, at all relevant times alleged in this operative
18 complaint, was and is a resident of the County of San Diego, State of California.

19 11. Cross-Defendant JOHN TORRES ["Torres"] is a trustee of SDCERS having been
20 duly appointed as the General Member representative pursuant to the Charter. Torres, at all
21 relevant times to these proceedings, was and is a resident of the County of San Diego, State of
22 California.

23 12. Cross-Defendant RICHARD M. KIPPERMAN ["Kipperman"] is a trustee of
24 SDCERS having been duly appointed by the Mayor of San Diego (see above) pursuant to the
25 Charter. Wallace, at all relevant times alleged in this operative complaint, was and is a resident
26 of the County of San Diego, State of California.

27 13. Cross-Defendant LAWRENCE GRISSOM ["Grissom"] at all relevant times
28 alleged in this operative complaint was and is a resident of the County of San Diego, State of

1 California. Grissom is, and was at all relevant times alleged herein, employed by SDCERS as
2 the SDCERS Administrator.

3 14. Cross-Defendant LORAIN EEE CHAPIN aka LORAIN EEE
4 ETHERINGTON aka LORI CHAPIN ["Chapin"] at all relevant times alleged in this operative
5 complaint was and is a resident of the County of San Diego, State of California. Chapin at all
6 relevant times alleged in this operative complaint was and is an attorney-at-law, and was and is
7 employed by SDCERS as legal counsel. Chapin claims to be the duly-appointed legal counsel
8 for the SDCERS Board.

9 15. Cross-Defendant RON SAATHOFF ["Saathoff"], at all relevant times alleged in
10 this operative complaint, is a former trustee and Board Member of SDCERS. Saathoff, at all
11 relevant times to this operative complaint, was and is a resident of the County of San Diego,
12 State of California.

13 16. Cross-Defendant MARY VATTIMO ["Vattimo"], at all relevant times alleged in
14 this operative complaint, is a former trustee and Board Member of SDCERS. Vattimo, at all
15 relevant times to, was and is a resident of the County of San Diego, State of California.

16 17. Cross-Defendant CATHY LEXIN ["Lexin"], at all relevant times alleged in this
17 operative complaint, is a former trustee and Board Member of SDCERS. Lexin, at all relevant
18 times to this operative complaint, was and is a resident of the County of San Diego, State of
19 California.

20 18. Cross-Defendant TERRI WEBSTER ["Webster"], at all relevant times alleged in
21 this operative complaint, is a former trustee and Board Member of SDCERS. Webster, at all
22 relevant times to this operative complaint, was and is a resident of the County of San Diego,
23 State of California.

24 19. Cross-Defendant SHARON WILKINSON ["Wilkinson"], at all relevant times
25 alleged in this operative complaint, is a former trustee and Board Member of SDCERS.
26 Wilkinson, at all relevant times to this operative complaint, was and is a resident of the County
27 of San Diego, State of California.

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1 Unless otherwise provided by Memorandum of Understanding between the City
2 Attorney and the Board of Administration, the City Attorney will designate one or
3 more Assistant or Deputy City Attorneys to advise and represent the Board in the
administration of the System.

4 25. On December 15, 2004, pursuant to Section 24.0910, Aguirre issued a letter to
5 Retirement Administrator Grissom terminating the 1998 MOU and declaring: . . effective
6 immediately, the undersigned assumes the role of Chief Legal Advisor to the Board of
7 Administration of the Retirement System.

8 26. Subsequent to the aforementioned letter of December 15, 2004, SDCERS refused,
9 and continues to refuse, to relinquish control of the legal functions of the SDCERS Board of
10 Administration to the City Attorney, in spite of the City Attorney's continued requests to take
11 over the legal representation of this Board.

12 **GOVERNING AUTHORITY FOR SDCERS**

13 27. Pursuant to Charter Section 114, SDCERS is managed by a Board of
14 Administration which consists of trustees ["the Board"] named hereinabove in paragraphs 4
15 through 12. The current composition of the Board was established on April 1, 2005, pursuant to
16 the Adoption of Proposition H in the November 2004 San Diego City election.

17 28. California Constitution Article XVI, section 17 provides the Board with the sole
18 and exclusive fiduciary responsibility over the assets of the retirement system. Pursuant to
19 California Constitution Article XVI, section 17, the Board must discharge its fiduciary duty
20 solely in the interest of and for the exclusive purpose of providing benefits to the retirement
21 system participants and the beneficiaries, minimizing employer contributions thereto, while also
22 defraying reasonable expenses of administering the retirement system. Pursuant to California
23 Constitution Article XVI, section 17 and the Charter, the SDCERS Board is duty-bound to
24 exercise the highest fiduciary duty to its members.

25 29. California Constitution Article XVI, section 18 provides in relevant part that no
26 city:

27 . . . shall incur any indebtedness or liability in any manner or for any purpose
28 exceeding in any year the income and revenue provided for such year, without the
assent of two-thirds of the voters of the public entity voting at an election to be

1 held for that purpose...

2 30. San Diego Municipal Code section 24.1111 requires that the City's contribution to
3 the retirement fund be an amount "as determined by the System's Actuary pursuant to the annual
4 actuarial evaluation".

5 31. San Diego Municipal Code section 27.3560 prohibits any City official, including
6 SDCERS trustees, Administrator and/or counsel from being financially interested in any contract
7 made by them in their official capacity.

8 32. California Government Code section 1090 provides in relevant part:
9 [C]ity officers or employees shall not be financially interested in any contract
10 made by them in their official capacity, or by any body or board of which they are
11 members.

11 33. California Government Code section 1092 provides: The core of Mike's case
12 Every contract made in violation of any of the provisions of Section 1090 may be
13 avoided at the instance of any party except the officer interested therein. No such
14 contract may be avoided because of the interest of an officer therein unless such
15 contract in made in the official capacity of such officer, or by a board or body of
16 which he is a member.

15 34. Pursuant to Charter Section 144, the Board has control of the administration and
16 investment of all funds given it by the San Diego City Council to fund the San Diego City
17 Retirement System. The Board is the sole authority and judge as to the conditions under which
18 persons may be admitted to benefits of any sort under the retirement system.

19 35. Pursuant to Charter Section 145, all monies contributed by City employees or
20 appropriated by the City Council are placed in a special fund in the City Treasury called the
21 "City Employees' Retirement Fund," a trust fund to be held and used only for the purpose of
22 carrying out the provisions of Article IX of the Charter. Monies in the trust fund may not be
23 merged with any other funds of the City. No payments may be made from the City Employees'
24 Retirement Fund except upon the Board's order.

25 36. Charter Section 144 also empowers the Board to invest, in the name of SDCERS,
26 monies held in trust by the City Employees' Retirement Fund.

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1 37. Charter Section 143 provides in relevant part:

2 The City shall contribute annually an amount substantially equal to that required
3 of the employees for normal retirement allowances, as certified by the actuary, but
4 shall not be required to contribute in excess to that amount, except in the case of
5 financial liabilities accruing under any new retirement plan or revised retirement
6 plan because of past services of the employees. The mortality, services,
7 experience or other table calculated by the actuary and the valuation determined
8 by him and approved by the board shall be conclusive and final, and any
9 retirement system established under this article shall be based thereon.

7 38. Charter Section 99 provides in relevant part: "The City shall not incur any
8 indebtedness or liability in any manner or for any purpose exceeding in any year the income and
9 revenue provided for such year. . . ." 0The section also provides:

10 No contract, agreement or obligation extending for a period of more than five
11 years may be authorized except by ordinance adopted by a two-thirds' majority vote of
12 the members elected to the Council after holding a public hearing which has been duly
13 noticed in the official City newspaper at least ten days in advance.

13 **MANAGER'S PROPOSAL I**

14 39. On or about January 21, 1996, SDCERS, through its Board, desired to enter into
15 an employer contribution deferral contract with the City, commonly referred to as Manager's
16 Proposal I ["MP I"]. The purpose of the agreement was to permit the City to contribute hundreds
17 of millions of dollars less to the SDCERS pension trust fund than was required by city and state
18 law including, but not limited to, the California Constitution, former Municipal Code section
19 24.0801 and Charter Section 143.

20 40. As consideration for the Board's acceptance of MP I, the San Diego City Council
21 agreed to adopt ordinances that would enhance the retirement benefits of City employees and
22 create millions of dollars of new pension benefits. All such consideration was contingent upon
23 the SDCERS Board voting to accept MP I.

24 41. Former SDCERS Trustees Saathoff, Webster, Torres, and Wilkinson, all herein
25 named as Cross-Defendants, had a substantial financial interest in the retirement benefit
26 enhancements set forth in MP I by virtue of the fact that they were also City employees at all
27 times relevant to this action.

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1 42. On or about June 21, 1996 SDCERS Trustees and Cross-Defendants herein
2 Saathoff, Webster, Torres, and Wilkinson all voted in favor of a motion to adopt MP I and/or to
3 enter into a formal written agreement adopting MP I. The motion passed.

4 43. At the time of the creation of MP I, Cross-Defendants Saathoff, Webster, Torres
5 and Wilkinson knew or had reason to know that MP I created a pension funding scheme that was
6 not actuarially sound and was therefore outside the scope of the Trustees' authority.

7 44. In a July 16, 1996 memorandum, former SDCERS trustee John Casey complained
8 that MP I was severely flawed. He stated, "The proposal as submitted by the Manager (MP I),
9 i.e., a benefit increase for a reduction in actuarial rates, placed the Board in the position of
10 negotiator. I submit that the Board function is to administer the benefits granted by the Plan
11 Sponsor and not negotiate what the benefits should be with the Plan Sponsor. There is no
12 authority for the Board to engage in this activity."

13 45. Former SDCERS trustee John Casey commented on May 2, 1996, at a SDCERS
14 Retirement Board Special Meeting, that a proposal similar to MP I had been brought forward the
15 previous year, and after expending a significant amount of money, the Board was advised by
16 outside fiduciary counsel [Morrison & Foerester LLP] that they could not move forward with the
17 City's proposal.

18 46. The law firm of Morrison & Foerester LLP was terminated by the Board.

19 47. Beginning on or about March 1, 1996, Plan Administrator and Cross-Defendant
20 herein Grissom actively encouraged the SDCERS Board to allow the City to contribute less
21 money to SDCERS in order to increase pension benefits for all participants of the plan, including
22 himself.

23 48. SDCERS in-house counsel and Cross-Defendant herein Chapin actively
24 encouraged the SDCERS Board to allow the City to contribute less money to SDCERS in order
25 to increase pension benefits for all participants of the plan, including herself.

26 49. The SDCERS Trustees named herein made no disclosure in the SDCERS annual
27 reports or financial statements of the changes to its retirement system resulting from MP I.
28 Specifically, no mention was made that the City had ceased contributing to SDCERS on an

1 Actuarially-determined basis but was instead contributing on a basis of an agreement entered
2 into between the Trustees and the City as described in MP I.

3 **MANAGER'S PROPOSAL II**

4 50. In 2002, SDCERS, through its Board, decided to enter into a second employer
5 contribution deferral contract with the City, commonly referred to as Manager's Proposal II
6 ["MP II"]. MP II was an expansion of the MP I scheme detailed above. As with MP I, the
7 purpose of the MP II agreement was to permit the City to contribute hundreds of millions of
8 dollars less to the SDCERS pension trust fund than was legally required under California
9 Constitution, Charter Section 143, and former Municipal Code section 24.0801.

10 51. As consideration for the Board's acceptance of MP II, the San Diego City Council
11 agreed to adopt ordinances that would enhance the retirement benefits of City employees and
12 create millions of dollars of new pension benefits. In addition to enhanced retirement benefits
13 that reached all City employees, then-Trustees and Cross-Defendants herein Saathoff and
14 Webster were granted specific additional benefits that enhanced their personal retirement and did
15 not flow to all City employees. All such consideration was contingent upon the Board of
16 Administration of SDCERS Board's acceptance of MP II. In addition, all Board members
17 serving at that time were granted indemnity for their acts and/or omissions arising from their
18 service on the Board.

19 52. Former SDCERS Trustees and Cross-Defendants herein Saathoff, Webster,
20 Wilkinson, Vattimo, Lexin, and Torres, and each of them, were City employees who had a
21 substantial financial interest in the retirement benefit enhancements described above and
22 therefore a substantial financial interest in SDCERS' entering into MP II.

23 53. On or about June 21, 2002, Cross-Defendants Saathoff, Webster, Wilkinson,
24 Vattimo, Lexin, and Torres all voted in favor of a motion to agree in principal and/or to enter
25 into the formal written agreement commonly referred to as MP II. The motion passed.

26 54. Plan Administrator and Cross-Defendant herein Grissom acquiesced and/or
27 actively encouraged the SDCERS Board to enter into MP II, in order to increase pension benefits
28 for all participants of the plan, including Grissom.

1 55. SDCERS in-house counsel and Cross-Defendant herein Chapin acquiesced and/or
2 actively encouraged the SDCERS Board to enter into MP II, in order to increase pension benefits
3 for all participants of the plan, including Chapin.

4 56. The SDCERS Trustees named herein made no disclosure in the SDCERS annual
5 reports or financial statements of the changes to its retirement system resulting from MP II.
6 Specifically, no mention was made that the City had ceased contributing to SDCERS on an
7 actuarially-determined basis but was instead contributing on a basis of an agreement entered into
8 between the Trustees and the City as described in MP II.

9 57. The aforementioned actions of the SDCERS Trustees named herein was designed
10 to conceal the depth of the funding crisis from San Diego taxpayers and investors who bought
11 City bonds. This scheme was carried out and continued by various City officials.

12 58. The SDCERS pension is currently at least \$1.7 billion underfunded as a result of
13 this scheme, which started in 1996 and continues to this day.

14 59. The aforementioned scheme by these individuals was withheld from public view
15 and was not uncovered until recently.

16 60. By offering to exchange and exchanging things of value as recited hereinabove,
17 SDCERS Trustees created an illegal and unenforceable contract.

18 61. Between 1996 and the present, the Trustees knew, or had reason to know, that
19 their investment advisors and/or managers were underperforming and/or providing unsound
20 advice. Notwithstanding, the Trustees neglected to take action to remedy these problems.

21 **FIRST CAUSE OF ACTION - DECLARATORY RELIEF (COUNT ONE)**

22 (Against Cross-Defendants Flynn, Lopez, Meyer, Prevolos, Sheffler, Sullivan, Torres,
23 Thompson, Kipperman, Grissom and Chapin)

24 62. Cross-Complainants incorporate by reference and reallege paragraphs 1 through
25 61 as though fully set forth herein.

26 63. An actual and justifiable controversy has arisen and now exists between Cross-
27 Complainants and Cross-Defendants concerning their respective rights and duties, in that Cross-
28 Complainants contend:

1 a. Cross-Complainant and current City Attorney Aguirre effectively
2 terminated the 1998 MOU between the Office of the City Attorney and the SDCERS Board by
3 his letter of December 15, 2004.

4 b. The City Attorney is the duly appointed legal counsel for the SDCERS
5 Board pursuant to Section 40 of the Charter.

6 64. Whereas Cross-Defendants contend:

7 a. Cross-Complainant and current City Attorney Aguirre did not effectively
8 terminate the 1998 MOU between the Office of the City Attorney and the SDCERS Board by his
9 letter of December 15, 2004.

10 b. The City Attorney is not the duly appointed legal counsel for the SDCERS
11 Board pursuant to Section 40 of the Charter.

12 **SECOND CAUSE OF ACTION - DECLARATORY RELIEF (COUNT TWO)**

13 (Against all Cross-Defendants)

14 65. Cross-Complainants incorporate by reference and reallege paragraphs 1 through
15 64 as though fully set forth herein.

16 66. An actual and justifiable controversy has arisen and now exists between Cross-
17 Complainants and Cross-Defendants concerning their respective rights and duties in that Cross-
18 Complainants contend that MP I and all benefits granted thereunder are illegal and void under
19 Civil Code sections 1598 and 1667 because:

20 a. Its implementation violated and continues to violate Article XVI, section
21 17, of the California Constitution, which requires that the Trustees "shall administer the system
22 in a manner that will assure prompt delivery of benefits to the participants and their
23 beneficiaries."

24 b. Its implementation resulted in a pension deficit in violation of Article
25 XVI, section 18 of the California Constitution and Section 99 of the Charter, which provide that
26 the City shall not incur any indebtedness or liability in any manner or for any purpose exceeding
27 in any year the income and revenue provided for such year.

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1 c. Its implementation resulted in enhanced pension benefits for certain
2 Cross-Defendants in violation of Probate Code section 16004, Civil Code section 1090, and the
3 California Political Reform Act of 1974, which prohibit city officers or employees from being
4 financially interested in any contract made by them in their official capacity, or by any body or
5 board of which they are members.

6 67. Whereas Cross-Defendants contend that MP I is not illegal and void under Civil
7 Code sections 1598 and 1667 although:

8 a. Its implementation violated and continues to violate Article XVI, section
9 17, of the California Constitution, which requires that the Trustees “shall administer the system
10 in a manner that will assure prompt delivery of benefits to the participants and their
11 beneficiaries.”

12 b. Its implementation resulted in a pension deficit in violation of Article
13 XVI, section 18 of the California Constitution and Section 99 of the Charter, which provide that
14 the City shall not incur any indebtedness or liability in any manner or for any purpose exceeding
15 in any year the income and revenue provided for such year.

16 c. Its implementation resulted in enhanced pension benefits for certain
17 Cross-Defendants in violation of Probate Code section 16004, Civil Code section 1090, and the
18 California Political Reform Act of 1974, which prohibit city officers or employees from being
19 financially interested in any contract made by them in their official capacity, or by any body or
20 board of which they are members.

21 **THIRD CAUSE OF ACTION - DECLARATORY RELIEF (COUNT THREE)**

22 **(Against all Cross-Defendants)**

23 68. Cross-Complainants incorporate by reference and reallege paragraphs 1 through
24 67 as though fully set forth herein.

25 69. An actual and justifiable controversy has arisen and now exists between Cross-
26 Complainants and Cross-Defendants concerning their respective rights and duties in that Cross-
27 Complainants contend that MP II and all benefits granted thereunder are illegal and void under
28 Civil Code sections 1598 and 1667 because:

1 a. Its implementation violated and continues to violate Article XVI, section
2 17, of the California Constitution, which requires that the Trustees “shall administer the system
3 in a manner that will assure prompt delivery of benefits to the participants and their
4 beneficiaries.”

5 b. Its implementation resulted in a pension deficit in violation of Article
6 XVI, section 18 of the California Constitution and Section 99 of the Charter, which provide that
7 the City shall not incur any indebtedness or liability in any manner or for any purpose exceeding
8 in any year the income and revenue provided for such year.

9 c. Its implementation resulted in enhanced pension benefits for certain
10 Cross-Defendants in violation of Probate Code section 16004, Civil Code section 1090, the
11 California Political Reform Act of 1974 and San Diego Municipal Code section 27.3560, which
12 prohibit city officers or employees from being financially interested in any contract made by
13 them in their official capacity, or by any body or board of which they are members.

14 70. Whereas Cross-Defendants contend that MP II is not illegal and void under Civil
15 Code sections 1598 and 1667 although:

16 a. Its implementation violated and continues to violate Article XVI, section
17 17, of the California Constitution, which requires that the Trustees “shall administer the system
18 in a manner that will assure prompt delivery of benefits to the participants and their
19 beneficiaries.”

20 b. Its implementation resulted in a pension deficit in violation of Article
21 XVI, section 18 of the California Constitution and section 99 of the Charter, which provide that
22 the City shall not incur any indebtedness or liability in any manner or for any purpose exceeding
23 in any year the income and revenue provided for such year.

24 c. Its implementation resulted in enhanced pension benefits for certain
25 Cross-Defendants in violation of Probate Code section 16004, Civil Code section 1090, the
26 California Political Reform Act of 1974 and San Diego Municipal Code section 27.3560, which
27 prohibit city officers or employees from being financially interested in any contract made by
28 them in their official capacity, or by any body or board of which they are members.

1 **FOURTH CAUSE OF ACTION - DECLARATORY RELIEF (COUNT FOUR)**

2 (Against Cross-Defendants Grissom, Chapin, Saathoff, Lexin, Vattimo, Webster, Torres and
3 Wilkinson)

4 71. Cross-Complainants incorporate by reference and reallege paragraphs 1 through
5 70 as though fully set forth herein.

6 72. An actual and justifiable controversy has arisen and now exists between Cross-
7 Complainants and Cross-Defendants named herein concerning their respective rights and duties
8 in that Cross-Complainants contend that:

9 a. The acts or omissions of Cross-Defendants named herein constituted a
10 breach of trust in violation of Probate Code section 16400 et seq. because said Cross-Defendants:

11 (1) Did not use reasonable prudence in the selection or retention of the
12 Board's agents, consultants and actuaries;

13 (2) Concealed the acts of the Board's agents, consultants and
14 actuaries;

15 (3) Neglected to take reasonable steps to compel the Board's agents,
16 consultants and actuaries to redress the wrongs committed by them;

17 (4) Intentionally and negligently failed to take reasonable steps to
18 compel the Board's members, Cross-Defendants' co-Trustees, to redress a breach of trust;

19 b. Said Cross-Defendants' approval of MP I constituted a breach of their
20 fiduciary duty under Article XVI, section 17 of the California Constitution and Article IX,
21 section 143 of the Charter;

22 c. Said Cross-Defendants' approval of MP II constituted a breach of their
23 fiduciary duty under Article XVI, section 17 of the California Constitution and Article IX,
24 section 143 of the Charter;

25 d. Said Cross-Defendants intentionally and actively concealed the true extent
26 of the pension fund's poor financial health;

27 e. Said Cross-Defendants are not entitled to indemnity for the
28 aforementioned acts and/or omissions.

1 73. Whereas, said Cross-Defendants contend that:

2 a. Their acts and/or omissions did not constitute a breach of trust in violation
3 of Probate Code section 16400 et seq. because Cross-Defendants:

4 (1) Used reasonable prudence in the selection or retention of the
5 Board's agents, consultants and actuaries;

6 (2) Did not conceal the acts of the Board's agents, consultants and
7 actuaries;

8 (3) Took reasonable steps to compel the Board's agents, consultants
9 and actuaries to redress the wrongs committed by them;

10 (4) Took reasonable steps to compel the Board's members—Cross-
11 Defendants' Co-Trustees—to redress their breach of trust;

12 b. Said Cross-Defendants' approval of MP I did not constitute a breach of
13 their fiduciary duty under Article XVI, section 17 of the California Constitution and Article IX,
14 section 143 of the Charter;

15 c. Said Cross-Defendants' approval of MP II did not constitute a breach of
16 their fiduciary duty under Article XVI, section 17 of the California Constitution and Article IX,
17 section 143 of the Charter;

18 d. Said Cross-Defendants did not conceal the true extent of the pension
19 fund's poor financial health;

20 e. Said Cross-Defendants are entitled to indemnity for the aforementioned
21 acts and/or omissions.

22 **FIFTH CAUSE OF ACTION - BREACH OF TRUST**

23 (Against Cross-Defendants Grissom, Chapin, Saathoff, Lexin, Vattimo, Webster, Torres and
24 Wilkinson)

25 74. Cross-Complainants incorporate by reference and reallege paragraphs 1 through
26 73 as though fully set forth herein.

27 75. SDCERS operates as a trust under Article XVI, section 17 of the California
28 Constitution and Charter article IX, section 145. The City is the plan sponsor. The SDCERS

1 Trustees, Administrator and counsel have a constitutional duty to act in furtherance of three main
2 goals: providing benefits to plan members; keeping employer contributions low; and minimizing
3 the cost of system operations.

4 76. In approving and/or implementing MP I, 1996 Cross-defendants Grissom, Chapin,
5 Saathoff, Webster, Torres and Wilkinson committed a breach of trust in violation of Probate
6 Code section 16400 in that their actions resulted in:

7 a. increased benefits for those Trustees and/or SDCERS employees who
8 were also City employees in violation of Probate Code section 16004, Civil Code section 1090,
9 and the California Political Reform Act of 1974, and

10 b. the underfunding of the pension system and reliance on a less than
11 normally calculated actuarially requested method of funding the City pension system in violation
12 of Article XVI, section 17 of the California Constitution and section 143 of the Charter.

13 77. In approving and/or implementing MP II, 2002, Cross-Defendants Grissom,
14 Chapin, Saathoff, Lexin, Vattimo, Torres, Webster and Wilkinson committed a breach of trust in
15 violation of Probate Code section 16400 in that their actions resulted in:

16 a. increased benefits for those Trustees and SDCERS employees who were
17 also City employees in violation of Probate Code section 16004, Civil Code section 1090, the
18 California Political Reform Act of 1974 and San Diego Municipal Code section 27.3560, and

19 b. the underfunding of the pension system and reliance on a less than
20 normally calculated actuarially requested method of funding the City pension system in violation
21 of Article XVI, section 17 of the California Constitution and section 143 of the Charter.

22 78. Cross-Defendants herein named knew or had reason to know that the Board's
23 investment advisors and/or managers were underperforming and/or providing unsound advice.
24 Notwithstanding, said Cross-defendants neglected to take action to remedy these problems in
25 violation of Probate Code section 16401.

26 79. Any applicable statute of limitations is tolled because Cross-Defendants
27 concealed and have continued to conceal their and their co-Trustees' and predecessor Trustees'

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1 breaches of trust b holding closed-session meetings and asserting attorney-client privilege to
2 prevent public scrutiny of their actions.

3 80. As a direct and proximate result of the Cross-Defendants' actions,
4 Cross-Complainants have suffered substantial loss and injury in an amount according to proof at
5 trial.

6 **SIXTH CAUSE OF ACTION - BREACH OF FIDUCIARY DUTY**

7 (Against Cross-Defendants Grissom, Chapin, Saathoff, Lexin, Vattimo, Webster, Torres and
8 Wilkinson)

9 81. Cross-Complainants incorporate by reference and reallege paragraphs 1 through
10 80 as though fully set forth herein.

11 82. As set forth in the Article XVI, section 17 of the California Constitution and
12 relevant case law, Cross-Defendants have "fiduciary responsibility" over the assets of the
13 pension system and their "duty to its participants and their beneficiaries shall take precedence
14 over any other duty."

15 83. In approving and/or implementing MP I, 1996 Cross-defendants Chapin, Grissom,
16 Saathoff, Webster, Torres, and Wilkinson committed a breach of their fiduciary duties in
17 violation of Probate Code section 16400 in that their actions resulted in:

18 a. increased benefits for those Trustees and/or SDCERS employees who
19 were also City employees in violation of Probate Code section 16004, Civil Code section 1090,
20 and the California Political Reform Act of 1974, and

21 b. the underfunding of the pension system and reliance on a less than
22 normally calculated actuarially requested method of funding the City pension system in violation
23 of Article XVI, section 17 of the California Constitution and Section 143 of the Charter.

24 84. In approving and/or implementing MP II, 2002 Cross-defendants Chapin,
25 Grissom, Saathoff, Torres, Webster and Wilkinson committed a breach of their fiduciary duties
26 in violation of Probate Code section 16400 in that their actions resulted in:

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1 a. increased benefits for those Trustees and/or SDCERS employees who
2 were also City employees in violation of Probate Code section 16004, Civil Code section 1090,
3 the California Political Reform Act of 1974 and San Diego Municipal Code section 27.3560, and

4 b. the underfunding of the pension system and reliance on a less than
5 normally calculated actuarially requested method of funding the City pension system in violation
6 of Article XVI, section 17 of the California Constitution and Section 143 of the Charter.

7 85. Cross-defendants herein named knew or had reason to know that the Board's
8 investment advisors and/or managers were underperforming and/or providing unsound advice.
9 Notwithstanding, said Cross-defendants neglected to take action to remedy these problems in
10 violation of Probate Code section 16401.

11 86. Any applicable statute of limitations is tolled because Cross-Defendants
12 concealed and have continued to conceal their and their co-Trustees' and predecessor Trustees'
13 breaches of fiduciary duty by holding closed-session meetings and asserting attorney-client
14 privilege to prevent public scrutiny of their actions.

15 87. As a direct and proximate result of the Cross-Defendants' actions,
16 Cross-Complainant has suffered substantial loss and injury in an amount according to proof at
17 trial.

18 **SEVENTH CAUSE OF ACTION - FRAUD-NEGLIGENT MISREPRESENTATION**

19 (Against Cross-Defendants Grissom, Chapin, Saathoff, Lexin, Vattimo, Webster, Torres and
20 Wilkinson)

21 88. Cross-Complainants incorporate by reference and reallege paragraphs 1 through
22 84 as though fully set forth herein.

23 89. Cross-Defendants misrepresented important facts about the financial health of
24 SDCERS, including the magnitude of SDCERS' underfunding, without reasonable grounds for
25 believing the misrepresentations to be true.

26 90. Cross-Defendants intended to induced the City to include the misrepresentations
27 about the financial health of SDCERS in the City's published financial statements.

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1 108. As Trustees and/or Administrators and/or Counsel for SDCERS Cross-defendants
2 herein named are required to “discharge their duties with respect to the system with the care,
3 skill, prudence, and diligence under the circumstances then prevailing that a prudent person
4 acting in a like capacity and familiar with these matters would use in the conduct of an enterprise
5 of a like character and with like aims.”

6 109. In approving and/or implementing MP I, 1996 Cross-defendants Grissom, Chapin,
7 Saathoff, Torres, Webster and Wilkinson violated their duty of care by approving:

8 a. increased benefits for those Trustees and SDCERS employees who were
9 also City employees in violation of Probate Code section 16004, Civil Code section 1090, and
10 the California Political Reform Act of 1974, and

11 b. the underfunding of the pension system and reliance on a less than
12 normally calculated actuarially requested method of funding the City pension system in violation
13 of Article XVI, section 17 of the California Constitution and Section 143 of the Charter.

14 110. In approving MP II, 2002 Cross-defendants Chapin, Grissom, Saathoff, Lexin,
15 Vattimo, Torres, Webster and Wilkinson violated their duty of care by approving:

16 a. Increased benefits for those Trustees and SDCERS employees who were
17 also City employees in violation of Probate Code section 16004, Civil Code section 1090, the
18 California Political Reform Act of 1974 and San Diego Municipal Code section 27.3560, and

19 b. The underfunding of the pension system and reliance on a less than
20 normally calculated actuarially requested method of funding the City pension system in violation
21 of Article XVI, section 17 of the California Constitution and Section 143 of the Charter.

22 111. Said Cross-defendants knew or had reason to know that the Board’s investment
23 advisors and/or managers were underperforming and/or providing unsound advice.
24 Notwithstanding, they neglected to take action to remedy these problems in violation of Probate
25 Code section 16401.

26 112. In so doing, said Cross-Defendants failed to discharge the duties under the
27 applicable standard of care.

28

1 113. Any applicable statute of limitations is tolled because Cross-Defendants
2 concealed information about the true impact of their decision and about SDCERS' poor financial
3 health through a series of acts since June of 2002.

4 114. As a direct and proximate result of the Cross-Defendants' actions,
5 Cross-Complainants have suffered substantial loss and injury in an amount according to proof at
6 trial.

7 **ELEVENTH CAUSE OF ACTION - CONSPIRACY**

8 (Against Cross-Defendants Grissom, Chapin, Saathoff, Lexin, Vattimo, Webster, Torres and
9 Wilkinson)

10 115. Cross-Complainants incorporate by reference and reallege paragraphs 1 through
11 114 as though fully set forth herein.

12 116. The City was defrauded by misrepresentations and concealments regarding the
13 financial health of SDCERS, and important facts about the financial health of SDCERS were
14 concealed from the City, as described more fully in paragraphs 85 through 103, above.

15 117. Cross-Defendants knew of and concurred in the frauds described in paragraphs 85
16 through 103, above.

17 118. As a direct and proximate result of Cross-Defendants' actions, Cross-
18 Complainants have suffered substantial loss and injury in an amount according to proof at trial.

19 **TWELFTH CAUSE OF ACTION - MANDATE**

20 (Against Cross-Defendants Flynn, King, Kipperman, Lopez, Meyer, Preovolos,
21 Sheffler, Sullivan, Thompson, Torres, Grissom, Chapin and Torell)

22 119. Cross-Complainants incorporate by reference and reallege paragraphs 1 through
23 118 as though fully set forth herein.

24 120. Notwithstanding that MP I and MP II are illegal and void, as more fully detailed
25 above, the Board, by and through the acts and omissions of Cross-Defendants Flynn, King,
26 Kipperman, Lopez, Meyer, Preovolos, Sheffler, Sullivan, Thompson, Torres, Grissom and
27 Chapin, continues to issue warrants to the City Auditor and Comptroller, Cross-Defendant
28 Torell, for payment of the increased pension benefits illegally created under MP I and MP II.

1 Cross-Complainants have requested that said Cross-Defendants cease issuing said warrants for
2 payments, which requests have been refused and/or ignored by said Cross-Defendants.

3 121. Cross-Complainants have further requested the Cross-Defendants to recalculate,
4 or to direct their agents and/or consultants to recalculate proper pension benefit amounts, based
5 solely upon agreements which are valid and legal, and which do not threaten the actuarial
6 soundness of SDCERS. Cross-Defendants have refused and/or ignored said requests.

7 122. Cross-Complainants have requested that Cross-Defendant City Auditor and
8 Comptroller Torell refrain from making further payment of the increased pension benefits
9 illegally created under MP I and MP II and ignore any further warrants for said payments issued
10 by SDCERS. Cross-Defendant Torell refused to comply with these requests.

11 123. Unless SDCERS is enjoined from issuing any further warrant for payment of the
12 pension benefits illegally created under MP I and MP II and directed to recalculate proper
13 pension benefit amounts, based solely upon agreements which are valid and legal, and which do
14 not threaten the actuarial soundness of SDCERS, and unless Cross-Defendant Torell is enjoined
15 from making further payment of the increased pension benefits illegally created under MP I and
16 MP II, Cross-Complainants and SDCERS beneficiaries will suffer great and irreparable injury in
17 that the pension fund will continue to be depleted to such extent that funds will not be available
18 to pay legal benefits to future beneficiaries. Cross-Complainants will suffer further great and
19 irreparable harm in that the City will remain unable to return to the bond market for the cash
20 infusion it needs to provide services for its citizens.

21 **PRAYER FOR RELIEF**

22 124. WHEREFORE, Cross-Complainants pray judgment against Cross-Defendants
23 and each of them as follows:

24 125. For a judicial declaration that:

25 a. Cross-Complainant and current City Attorney Aguirre effectively
26 terminated the 1998 MOU between the Office of the City Attorney and the SDCERS Board by
27 his letter of December 15, 2004; and
28

1 b. The City Attorney is the duly appointed legal counsel for the SDCERS
2 Board pursuant to Section 40 of the Charter.

3 126. For a judicial declaration that MP I and all benefits granted thereunder are illegal
4 and void under Civil Code sections 1598 and 1667. because:

5 a. Its implementation violated and continues to violate Article XVI, section
6 17, of the California Constitution, which requires that the Board “shall administer the system in a
7 manner that will assure prompt delivery of benefits to the participants and their beneficiaries.”

8 b. Its implementation resulted in a pension deficit in violation of Article
9 XVI, section 18 of the California Constitution and Section 99 of the Charter, which provide that
10 the City shall not incur any indebtedness or liability in any manner or for any purpose exceeding
11 in any year the income and revenue provided for such year.

12 c. Its implementation resulted in enhanced pension benefits for Board
13 members in violation of Government Code section 1090, which prohibits city officer or
14 employees from being financially interested in any contract made by them in their official
15 capacity, or by any body or board of which they are members.

16 127. For a judicial declaration that MP II and all benefits granted thereunder are illegal
17 and void under Civil Code sections 1598 and 1667 because:

18 a. Its implementation violated and continues to violate Article XVI, section
19 17, of the California Constitution, which requires that the Board “shall administer the system in a
20 manner that will assure prompt delivery of benefits to the participants and their beneficiaries.”

21 b. Its implementation resulted in a pension deficit in violation of Article
22 XVI, section 18 of the California Constitution and Section 99 of the Charter, which provide that
23 the City shall not incur any indebtedness or liability in any manner or for any purpose exceeding
24 in any year the income and revenue provided for such year.

25 c. Its implementation resulted in enhanced pension benefits for Board
26 members in violation of Government Code section 1090, which prohibits city officer or
27 employees from being financially interested in any contract made by them in their official
28 capacity, or by any body or board of which they are members.

1 128. For a judicial declaration that:

2 a. Cross-defendants Grissom, Chapin, Saathoff, Lexin, Vattimo, Torres,
3 Webster and Wilkinson committed a breach of trust in violation of Probate Code section 16400
4 et seq. because they:

5 (1) Did not use reasonable prudence in the selection or retention of its
6 agents, consultants and actuaries;

7 (2) Concealed the acts of its agents, consultants and actuaries;

8 (3) Neglected to take reasonable steps to compel the agents,
9 consultants and actuaries to redress the wrongs committed by them;

10 (4) Intentionally and negligently failed to take reasonable steps to
11 compel the Board's members, Cross-Defendants' co-Trustees, to redress a breach of trust;

12 (5) Intentionally and actively concealed the true extent of the pension
13 funds poor financial health;

14 b. Cross-defendants' approval of MP I constituted a breach of their
15 respective fiduciary duties under Article XVI, section 17 of the California Constitution and
16 Article IX, section 143 of the Charter;

17 c. Cross-defendants' approval of MP II constituted a breach of their
18 respective fiduciary duties under Article XVI, section 17 of the California Constitution and
19 Article IX, section 143 of the Charter;

20 d. Cross-defendants intentionally and actively concealed the true extent of
21 the pension fund's poor financial health; and

22 e. Cross-defendants are not entitled to indemnity for the aforementioned acts
23 and/or omissions.

24 129. For a writ of prohibitory mandate enjoining SDCERS and/or its Trustees, agents,
25 and/or employees from issuing any further warrant for payment of pension benefits illegally
26 created under MP I and/or MP II;

27 130. For a writ of prohibitory mandate enjoining Cross-Defendant Torell from making
28 any further payments of increased pension benefits illegally created under MP I and/or MP II;

1 131. For a writ of mandate directing SDCERS and/or its Trustees, agents and/or
2 employees to recalculate proper pension benefit amounts, based solely upon agreements which
3 are valid and legal, and which do not threaten the actuarial soundness of SDCERS, and to issue
4 warrants for payment in accordance therewith;

5 132. For appointment of a receiver to take control of and administer SDCERS;

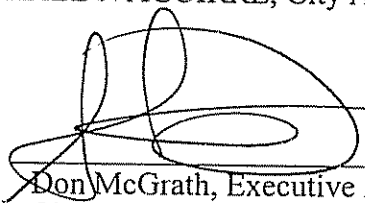
6 133. For damages from the named cross-defendants in the Fifth through Eleventh
7 causes of action, according to proof, in an amount to be determined by the Court;

8 134. For Cross-Complainants' costs of suit and any attorneys' fees or costs recoverable
9 by law;

10 135. For other such legal or equitable relief as the Court may deem just and proper.

11 Dated: July 25, 2005

MICHAEL J. AGUIRRE, City Attorney

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13
14 By 
15 Don McGrath, Executive Assistant
16 City Attorney
17 Attorneys for Defendants and Cross-
18 Complainants
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