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18 BEFORE THE

19 PUBLIC EMPLOYMENT RELATIONS BOARD

20 SAN DIEGO MUNICIPAL EMPLOYEES)
21 ASSOCIATION,)
22 Charging Party,)
23 v.)
24 CITY OF SAN DIEGO,)
25 Respondent.)
26

CASE NO.: LA-CE-746-M

**CONSOLIDATED POST-HEARING
BRIEF OF CHARGING PARTIES
SAN DIEGO MUNICIPAL EMPLOYEES
ASSOCIATION, AFSCME LOCAL 127,
AND SAN DIEGO CITY FIREFIGHTERS,
IAFF LOCAL 145**

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AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO, LOCAL 127,

Charging Party,

v.

CITY OF SAN DIEGO,

Respondent.

CASE NO.: LA-CE-755-M

SAN DIEGO CITY FIREFIGHTERS,
IAFF LOCAL 145,

Charging Party,

v.

CITY OF SAN DIEGO,

Respondent.

CASE NO.: LA-CE-758-M

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1 **I. INTRODUCTION**

2 This case puts at issue whether a local public agency has the power – at will and with
3 impunity – to opt out of the meet and confer obligations imposed by the State’s Meyers-Milias-
4 Brown Act (“MMBA”) by using the legal fiction that its designated representatives under Section
5 3505 of the Act are acting as “private citizens” not as agents of the covered agency.

6 There is no dispute that the subject matter of the “Comprehensive Pension Reform Initiative”
7 (“CPRI”) – which became Proposition B on the June 2012 ballot – was within the scope of
8 representation under Section 3504 of the Act. This initiative does exactly what San Diego Mayor
9 Jerry Sanders said it would when he made it the primary objective for his last two years in office.
10 CPRI does not simply “reform” pensions in the City of San Diego, it “transforms” them by
11 eliminating traditional defined benefit pensions and replacing them with a 401(k)-style plan for all
12 new City employees, except police.

13 There is also no dispute that the City’s recognized employee organizations and represented
14 employees were entirely excluded from the “transformation” which CPRI has imposed on them over
15 matters at the very heart of the employment (and representation) bargain – pensions and
16 compensation. Despite his Charter-mandated role as the City’s Chief Executive Officer and its Chief
17 Labor Negotiator under a “Strong Mayor Form of Governance,” Mayor Sanders did *not negotiate*
18 over the actual contents of the CPRI with the City’s recognized employee organizations.

19 The City admits that it failed and refused to meet and confer – arguing in response to these
20 unfair practice charges that the Mayor’s admitted course of conduct related to CPRI is of no legal
21 consequence because he was acting as a “private citizen.” By this legal fiction, the City concludes
22 that *the City* did not fail and refuse to bargain with recognized employee organizations over the
23 subject matter of the Mayor’s “transformative” pension reform agenda.

24 Charging Parties assert that this self-serving private citizen/opt-out theory is inimical to the
25 purpose of the MMBA and defeats the rights of public employees and their recognized bargaining
26 representatives which the Act protects. If adopted, the City’s theory would make the Act
27 discretionary rather than mandatory and would defeat the legislative goal of a uniform statewide
28 public sector bargaining law.

1 As the expert state labor relations agency entrusted with the duty and the responsibility to
2 enforce the MMBA in a manner consistent with its legislative purpose, PERB must decisively reject
3 the City's theory and, after finding in Charging Parties' favor on the merits, order a remedy which
4 fully reverses the impact of the City's unlawful conduct and restores the status *quo ante*.

5 **II. THE CITY OF SAN DIEGO'S CHARTER ESTABLISHES ITS MAYOR AS CEO**
6 **AND CHIEF LABOR NEGOTIATOR**

7 Mayor Jerry Sanders first took office in December 2005. (II, 37:26-28) The City of San
8 Diego's "Strong Mayor Form of Governance" took effect on January 1, 2006, as a trial program.
9 This trial period ended in 2010 when the voters made this form of governance permanent. (Exhibit
10 175) Mayor Sanders has governed continuously under the Strong Mayor Form of Governance from
11 January 1, 2006, to the present. (II, 38:1-16; III, 10:11-26)

12 Under City Charter, Article XV, Section 260, "all executive authority, power, and
13 responsibilities" conferred upon the City Manager under Charter Articles V (City Manager), VII
14 (Finance) and IX (Retirement of Employees), were transferred to, assumed and carried out by Mayor
15 Sanders as the "Strong Mayor." (Exhibits 8-11; II, 37:20-25; 38:17-23) [The CPRI amended Articles
16 VII and IX of the City's Charter. (Exhibit 11).]

17 Article XV, Section 265: The Mayor, provides in pertinent part:

18 (b) In addition to exercising the authority, power, and responsibilities formally
19 conferred upon the City Manager as described in section 260, the Mayor shall
20 have the following additional rights, powers, and duties:

- 21 (1) To be the chief executive officer of the City;
- 22 (2) To execute and enforce all laws, ordinances, and policies of
23 the City, including the right to promulgate and issue
24 administrative regulations that given controlling direction to
25 the administrative service of the City
- 26 (3) To recommend to the Council such measures and ordinances
27 as he or she may deem necessary or expedient, and to make
28 such other recommendations to the Council concerning the
29 affairs of the City as the Mayor finds desirable; . . .
- 30 (8) Sole authority to direct and exercise control over the City
31 Manager in managing those affairs of the City under the
32 purview of the Mayor as expressly permitted in the Charter;
33 . . . (Exhibit 8, Bates 277-278)

34 In his Charter-mandated capacity as the City's CEO, the Mayor is not just one of several
35 elected officials. He is the City's highest-ranking executive officer in charge of the City as a
36 municipal corporation and as an employer. Under the old City Council/City Manager form of

1 governance, one city manager reported to the entire City Council and thus had multiple masters.
2 Under the Strong Mayor form of governance, a chief operating officer reports to *one chief executive*
3 who is in charge of the City and that, according to the Mayor’s Chief of Staff Julie Dubick, is “a very
4 significant difference.” (III, 211:23-212:14)

5 Before the Strong Mayor Form of Governance was established, the City’s Mayor sat as
6 another member of the City Council and a ninth vote on the Council itself. Under the City’s Strong
7 Mayor form of governance, there are currently eight councilmembers elected by district who serve
8 as the City’s legislative body. (Exhibit 8, Bates 281, Article XV, Section 270)

9 Having been removed from the City’s legislative body and made the City’s CEO, the Mayor
10 lost his voting rights as one of nine co-equal Councilmembers but gained critical veto powers as set
11 forth in the City Charter. (Exhibit 8; Article XV) Moreover, while the City Charter continues to
12 vest power in the eight-member City Council to put proposed ballot measures amending the City’s
13 Charter before the voters, nothing in the City Charter empowers the Strong Mayor, acting
14 unilaterally, to do so. (II, 193:7-194:4) Instead, the Mayor must bring his proposals for ballot
15 measures to the *City Council* for determination under Council Policy 000-21.¹ (Exhibit 16)

16 The Mayor’s Office has an operations side and a policy side – with Jay Goldstone crossing
17 between both functions as Chief Operating Officer and a direct report to the Mayor on policy
18 matters. (IV, 116:20-117:2) As COO, Mr. Goldstone is responsible for the actual day-to-day
19 operations of the City and he reports to the Mayor as Chief Executive Officer. (III, 25:12-22)

20 Mayor Sanders agrees that he is ultimately responsible for the day-to-day operations of the
21 City as a business, as a government, and as an employer. (II, 48:21-49:8) He agrees that, as Mayor,
22 *he* has certain duties related to how the City fulfills its obligations under the MMBA and that it is
23 *his* duty to communicate with the City’s recognized employee organizations and employees in a
24 manner consistent with the MMBA. (II, 49:25-50:4)

25 Mayor Sanders also agrees that it is his duty to conduct the meet and confer process under
26 the MMBA with the City’s recognized employee organizations “whenever, under the law, the

27
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¹ This is, in fact, what Mayor Sanders did in 2006, (Exhibits 154 through 156; II, 45:3-20);
and again in 2008 (Exhibits 134 through 150, 153, 161 and 163; III, 12:25-14:7; 125:8-25)

1 obligation to meet and confer is triggered.” (II, 49:9-16) As Mayor and the City’s lead negotiator,
2 he determines what he believes the City’s objectives ought to be – what concessions, reforms,
3 changes in terms and conditions of employment or pensions are important for the City to achieve in
4 bargaining in his judgment, and he pushes these objectives forward to the City Council through his
5 Negotiating Team. He lays out the parameters and takes input from the Council since, ultimately,
6 the Council must act to adopt any agreements that are reached. (II, 51:3-52:3)

7 As the City’s Mayor, he is the person who leads the meet and confer process with the City’s
8 recognized employee organizations. (II, 50:8-12) In performing this role, he has selected and hired
9 several different individuals from outside the City to serve as lead negotiator at the bargaining table
10 during the meet and confer process. (II, 50:13-20) During this meet and confer process, the Mayor’s
11 Negotiating Team meets with the Mayor to brief him on the status of the negotiations and to get
12 direction from him about positions and proposals. (III, 203:17-28) As the City’s Human Resources
13 Director explained, when he is preparing with the Mayor’s Office to engage in a meet and confer
14 process, it is the Mayor who ultimately makes the determination of policy with regard to a meet and
15 confer position the City is going to bring forward to the unions. (I, 66:12-18)

16 In addition to the limitations on his behavior imposed by the MMBA, the City’s own Code
17 of Ethics limited the Mayor’s rights to pursue matters of personal interest when incompatible with
18 his official duties. Council Policy 000-04, Code of Ethics, became effective on September 24, 2002,
19 and has remained in effect to the present. It applies to all persons employed by the City at whatever
20 level. (Exhibit 15; I, 43:4-25) In pertinent part, this Code states:

21 **No elected official . . . of The City of San Diego shall engage in any**
22 **business or transaction or shall have a financial or other personal**
23 **interest, direct or indirect, which is incompatible with the proper**
24 **discharge of his or her official duties or would tend to impair his or**
her independence or judgment or action in the performance of
such duties. (Exhibit 15, emphasis added.)

25 Finally, before this controversy erupted, the City Attorney’s Office issued a comprehensive
26 Memorandum of Law (“MOL”) on January 26, 2009, defining the respective roles and duties of the
27 Mayor and City Council under the MMBA in view of the City’s Strong Mayor Form of Governance.
28 (Exhibit 24) As noted in the Memorandum’s Introduction, it was specifically prompted by PERB’s
decision issued in 2008 in favor of Charging Parties AFSCME Local 127 and the San Diego

1 Municipal Employees Association in unfair practice Case No. HO-U-946-M. In pertinent part, this
2 MOL correctly acknowledges this controlling legal principle:

3
4 Notwithstanding any distinctions in the Charter's roles for the Council, the Mayor,
5 the Civil Service Commission, and other City officials or representatives, the City is
6 considered a single employer under the MMBA. Employees of the City are
7 employees of the municipal corporation. See Charter § 1. The City itself is the
8 public agency covered by the MMBA. **In determining whether or not the City has
9 committed an unfair labor practice in violation of the MMBA, PERB will
10 consider the actions of all officials and representatives acting on behalf of the
11 City.** (Exhibit 24, Bates 538, Emphasis added.)

12 The City's Human Resources Director Scott Chadwick testified that the description of the
13 Mayor's duties and responsibilities which is set forth in this 2009 MOL (in particular at pages 9-10),
14 is consistent with his understanding of the Mayor's role since 2006. (Exhibit 24, Bates 535-536; I,
15 65:16-66:5) Mr. Chadwick also confirmed that this MOL represents the "City's current
16 understanding" of the impasse procedure and the respective roles of the Mayor and City Council
17 when it comes to matters of meet and confer. (Exhibit 24; I, 64:9-65:2)

18 **III. IN 2008, THE CITY ATTORNEY'S OFFICE ISSUED A MEMORANDUM
19 ESTABLISHING THE CITY'S MEET AND CONFER OBLIGATION IF THE
20 CITY'S STRONG MAYOR INITIATED OR SPONSORED A PENSION-RELATED
21 BALLOT INITIATIVE TO AMEND THE CITY'S CHARTER**

22 After Mayor Sanders had announced in May 2008 that he would lead a voter initiative
23 himself to amend the City Charter to achieve pension reform, then City Attorney Michael Aguirre
24 issued a Memorandum of Law, establishing that, because of the Mayor's position under the Charter
25 as CEO and Chief Labor negotiator, such a mayoral initiative effort would be deemed the action of
26 *the City* and would therefore require a meet-and-confer process. As a result, Mayor Sanders changed
27 course and brought his ballot measure proposal to the City Council under City Council Policy 000-
28 21. (Exhibit 16; III, 125:8-25)

29 Exhibit 23 is then City Attorney Aguirre's Memorandum dated June 19, 2008, addressed to
30 the Honorable Mayor and Members of the City Council on the subject of "Pension Ballot Measure
31 Questions." Question Number 4 in this Memorandum asks: "Can the Mayor initiate or sponsor a
32 voter petition drive to place a ballot measure to amend the City Charter provisions related to
33 retirement pensions? If so, what, if any, are the meet and confer requirements under the California

1 Government Codes and how would those be fulfilled? (Exhibit 23, Bates 517; II, 69:27-70:6) The
2 “short answer” given to these questions states:

3 “The Mayor has the same rights as a citizen with respect to elections and
4 propositions. The Mayor does not give up his constitutional rights upon becoming
5 elected. He has the right to initiate or sponsor a voter petition drive. However, such
6 sponsorship would legally be considered as acting with apparent governmental
7 authority because of his position as Mayor and his right and responsibility under the
8 strong mayor Charter provisions to represent the City regarding labor issues and
9 negotiations, including employee pensions. As the Mayor is acting with apparent
10 authority with regard to his sponsorship of a voter petition, the City would have the
11 same meet and confer obligations with its unions as set forth . . . above.” (Exhibit 23,
12 Bates 519; II, 70:11-71:2)

13 Having changed course in response to this Memorandum, Mayor Sanders brought his
14 proposed ballot measure to amend the City’s Charter on pensions to the City Council. The agenda
15 for the City Council Subcommittee on Rules, Open Government and Intergovernmental Relations
16 for June 25, 2008, includes Item 3 – Discussion regarding proposed ballot measures submitted by
17 independent departments and members of the public for placement on the November 4, 2008 ballot.
18 (Exhibit 153; III, 12:25-13:18) Under that Item is a reference to “proposals submitted regarding
19 pension reform,” and a further reference to “Mayor Jerry Sanders’ new pension plan for non-safety
20 employees hired on or after July 1, 2009.” (III, 13:19-14:7) The committee voted to do as Mayor
21 Sanders had requested by advancing his proposal to the full City Council for consideration. (Exhibit
22 163; III, 14:8-15:1)

23 After this Rules Committee meeting on June 25, 2008, Mayor Sanders and Council President
24 Scott Peters developed a compromise pension reform proposal through an on-going meet and confer
25 process with the affected recognized employee organizations representing non-safety employees.
26 This meet and confer process led to a Tentative Agreement between Mayor Sanders and the affected
27 employee organizations. (Exhibit 143)

28 This new pension plan reduced the factor for determining the amount of an employee’s
pension allowance from 2-1/2% at age 55 for general members of the pension plan to 1% at age 55
in order to achieve the Mayor’s reform objective of de-incentivizing early retirements. Instead of
getting 2.5% at age 55, under the new plan, an employee would not get 2.6% until age 65. The
pension allowance would also be calculated on the average of the three highest years of eligible
compensation instead of the highest one year; there was also a cap of 80%. As a “hybrid” defined

1 benefit/defined contribution reform plan, there was also a modest 401(k)-style plan component to
2 supplement the lower formula. New hires covered under this 2008 reform plan – like existing
3 employees – were still not covered by Social Security but, unlike existing employees, they were also
4 not given the benefit of the Supplemental Pension Savings Plan which had replaced Social Security
5 for City employees when the vote “out” had occurred under Mayor Pete Wilson’s administration.
6 (Exhibit 143; III, 126:18-128:4)

7 Mayor Sanders conducted a press conference on the City Concourse to announce the
8 Tentative Agreement. COO Goldstone also attended. (III, 15:2-26) In pertinent part, Mayor
9 Sanders said:

10 We are all assembled here today to announce **that the unions and I as the City’s**
11 **lead negotiator have arrived at a tentative agreement regarding pension reform.**
12 We have all worked very hard *and together* to get to this point today. **One of the**
13 **immediate benefits of the agreement is it will keep the measure off the ballot in**
14 **November and avoid threatened costly litigation. It will also help us save the**
15 **cost of going to the ballot. . . .** This compromise helps us achieve the same
16 underlying principles that I always thought were critical. The plan helps taxpayers
17 save almost \$23 million dollars annually when fully implemented. The plan helps
18 shift risk away from taxpayers and it reduces some of the costly retirement benefits
19 associated with the current system. Let me review each of these elements. The plan
20 will help us save a substantial amount of money from the time the plan is first
21 implemented next July and almost \$23 million annually when all future non-public
22 safety employees are part of the system approximately 20 years from now. As you
23 all know part of the reason for these savings is that the multipliers used to calculate
24 the retirement benefits have been substantially lowered. The compromise also begins
25 to shift away risk away from taxpayers by establishing a 401(k)-type component to
26 the retirement system. The compromise also establishes a retiree medical trust to
27 which both the City and the employee will contribute equal portions. This is so that
28 future employees – who will not be given medical insurance in retirement by the City
and are responsible for saving for their own healthcare – can begin to save for this
important component to retire. Lastly, the compromise reduces some of the costly
benefits associated with the current pension system. . . . All in all I think this is a very
fair compromise for both taxpayers and future City employees. I want to end by
thanking the unions and their representatives . . . for being willing to come and stay
at the table until this compromise has been worked out. I think it’s in the best
interest of all parties that we arrived at this arrangement and would urge the City
counsel to pass it unanimously once its before them. (Exhibit 161 – video clip;
emphasis added)

As Mayor Sanders had urged, the City Council subsequently adopted a resolution approving
and ratifying this Tentative Agreement, and the terms of this new pension plan for non-safety
employees were incorporated into MEA’s MOU effective July 1, 2009. (III, 16:9-17:1) In addition,
AFSCME’s MOU incorporated this compromise in express language into Article 29, Section III, of
its MOU effective on July 1, 2010, which states: “On July 21, 2008, the City and the Union agreed

1 to a new retirement formula for General Members hired on or after July 1, 2009, on the condition
2 that the City would not pursue a San Diego Charter amendment. . .” (Exhibit 289, page 3)

3 **IV. IN 2010, MAYOR JERRY SANDERS MADE A POLICY DECISION FOR THE CITY**
4 **OF SAN DIEGO RELATED TO PENSION REFORM AND DETERMINED A**
5 **COURSE OF ACTION FOR ACHIEVING IT WHICH WAS INTENDED TO, AND**
6 **DID, AVOID THE MMBA OBLIGATION TO MEET AND CONFER**

7 **A. The Mayor Made An Executive Decision On Pension Reform For The City**

8 Mayor Sanders testified that, after Proposition D failed at the polls in November 2010, he
9 and his staff in the Office of the Mayor discussed what to do with his remaining two-year term.
10 Proposition D was a revenue/reform tax measure which called for a temporary sales tax increase in
11 the City of San Diego. (III, 29:18-28) From these discussions, the concept of a 401(k) style pension
12 plan for non-safety employees was born. (II, 6:27-7:9)

13 COO Goldstone understood that, based on a decision made “within the Mayor’s Office, under
14 the Mayor’s leadership, Mayor Sanders would promote and pursue this 401(k)-style pension concept
15 as his focus during the last two years of his term in office.” (III, 30:21-26)

16 **B. The Mayor Implemented His Pension Reform Policy Decision Using the Power**
17 **& Visibility of His Office And His City-Paid Staff Resources**

18 **1. The Mayor Announced His Policy Decision And The Means To Achieve**
19 **It On His Home Page On The City’s Website**

20 Having made a policy decision related to the City’s future pension plan for new hires – and
21 having determined that an amendment to the City’s Charter was the means to accomplish this
22 momentous change, Mayor Sanders published an announcement about his plans on the City’s
23 website on November 19, 2010. Accompanied by a picture of Mayor Sanders and the City Seal, the
24 Mayor’s home page touted:

25 “Mayor will push ballot measure to eliminate traditional pensions for new hires at
26 City. . . . (the Mayor) will place an initiative on the ballot to eliminate traditional
27 pensions and replace them for non-safety new hires with a 401(k) style plan. . . . (the
28 Mayor) and Councilmember Kevin Faulconer “will craft the ballot initiative language
and lead the signature-gathering effort to place the initiative on the ballot.” There is
no reference to any notion that this is a plan the Mayor is announcing he will do as
a “private citizen.” (Exhibit 25; II, 7:10-9:21)

The Mayor’s Director of Communications Darren Pudgil (Mr. Pudgil) is responsible for the
Mayor’s page(s) on the City’s website; he reviews and gives final approval to the content for the

1 Mayor's page. He approved this website homepage announcing the Mayor's intent to "push ballot
2 measure to eliminate traditional pensions for new hires at City." (Exhibit 25; IV, 192:8-24)

3 **2. The Mayor's Office Issued A News Release To Announce His Decision**

4 Using the Mayor's Office customary format for a news release to the press and to the public,
5 a "Mayor Jerry Sanders Fact Sheet" dated November 19, 2010, repeats the same information as
6 appeared on the City's website. (Exhibit 26; II, 7:23-8:11) It identifies Mayoral staff member Rachel
7 Liang as the Mayor's contact. (Exhibit 26; II, 10:28-12:17) Mr. Pudgil either writes, approves, or
8 has a "say" in 99% of the press releases that go out from the Mayor's Office. (IV, 193:2-13)

9 Also on November 19, 2010, Councilmember Faulconer sent out an announcement from his
10 sandiego.gov e-mail address on the subject: "Mayor, Faulconer propose plan to replace pensions with
11 401(k) plan," and encloses a copy of the Mayor's press release. (Exhibit 188; IV, 52:18-53:26) This
12 e-mail message states, in pertinent part: "The Mayor and I announced today that we would craft a
13 groundbreaking pension reform ballot measure and lead the signature gathering effort to place the
14 measure before voters." (Exhibit 188)

15 **3. The Mayor Had A Kick-Off Press Conference On the Mayor's 11th Floor
16 At City Hall With City Attorney Jan Goldsmith At His Side**

17 In addition to the published announcement on the City's web page, Mayor Sanders held a
18 press conference on November 19, 2010, in his offices on the 11th floor of City Hall to promote his
19 proposed initiative. (II, 12:18-13:1) Others joined him for the press conference, including
20 Councilmember Kevin Faulconer, City Attorney Jan Goldsmith, COO Jay Goldstone, and –
21 according to the media advisory – Chief Financial Officer (CFO) Mary Lewis. (Exhibit 26, Bates
22 552; II, 13:2-12)

23 Mr. Pudgil – who prepared the Mayor's "talking points" for this press conference – attended
24 it as well. (IV, 195:13-16) He believes that "a few staff members would have been involved" in the
25 preparation of these remarks; he got draft ideas or input from others on the Mayor's staff, put them
26 together with others' help – maybe Gerry Braun (Mayor's Director of Special Projects) – and then
27 circulated them to others, including COO Goldstone. (IV, 195:23-196:27; III, 31:17-32:9)

28 City Attorney Jan Goldsmith participated in the Mayor's press conference at the Mayor's
invitation. And the Mayor invited him **"because there would be legal issues involved in all of this**

1 **and I think it was important for him to be there to guide us.”** (II, 19:23-20:12; emphasis added)
2 For his part, Mr. Pudgil thought that the City Attorney’s role was “legal support,” i.e., the City
3 Attorney said that “legally this could be done.” (IV, 198:18-27)

4 NBC San Diego news coverage of the Mayor’s press conference included a photograph of
5 the Mayor standing in front of the City seal to make the announcement about his initiative. Under
6 the photograph, NBC wrote: “Mayor proposes to replace pensions with 401(k) retirement plans.”
7 (Exhibit 27; II, 13:13-14:1) The NBC news account also accurately informs the public that “San
8 Diego voters will soon be seeing signature gatherers for a ballot measure that would end guaranteed
9 pensions for new City employees.” (Exhibit 27; II, 14:6-27) NBC quoted Mayor Sanders as saying
10 that “the notion that all public employees should have a richer retirement benefit than the taxpayers
11 they serve, while now enjoying comparable pay and great job security, is thoroughly outdated.” (II,
12 14:28-15:14)

13 **4. The Mayor Sent An E-Blast E-Mail To Thousands Of Community**
14 **Leaders & Community Members To Announce His Policy Decision And**
15 **Initiative Plans**

16 On November 19, 2010, in addition to the website announcement, the press release, and the
17 press conference, an e-mail was disseminated from the JerrySanders@sandiego.gov e-mail address
18 at 1:43 p.m. on the subject: “Rethinking City Government.” This message includes the text: “Today
19 Councilmember Kevin Faulconer joined me to announce our intention to craft language and gather
20 signatures for a ballot initiative that will eliminate public pensions as we know them.” (Exhibit 182;
21 IV, 188:10-189:6) This e-mail was addressed to ChristinaDiLeva@gmail.com. (Exhibit 182; IV,
22 189:15-21) It was sent out as part of what’s called the Blue Hornet – “our mass email system . . . of
23 about three to five thousand names . . . community leaders, community members, all sorts of
24 people.” (IV, 191:17-192:7; 193:14-24; 194:9-14) Ms. DiLeva forwarded this e-mail message to
25 Aimee Faucett, Councilmember Faulconer’s Chief of Staff at the time, who produced it in response
26 to Charging Parties’ subpoenas. (Exhibits 108 and 182; IV, 50:11-27)

27 **5. The Mayor Used His Power And Position As Mayor To Build Support**
28 **For His Pension Reform Initiative With Key Business Groups**

The Mayor’s Policy Advisor Erik Caldwell prepared an Agenda for a meeting with “some
community leaders” which Mayor Sanders initiated and over which he presided on December 3,

1 2010, at the Paul Robinson law firm in downtown San Diego. (Exhibit 201; IV, 199:7-15; 200:9-18;
2 201:6-22) The meeting lasted “an hour or two” with “probably 20 people or so there,” including Tom
3 Sudberry and Malin Burnham, Lani Lutar from the San Diego County Taxpayers Association, Steve
4 Williams from Sentre Partners, and both April Boling and T. J. Zane “could have been there.” (IV,
5 201:23-202:11, 27-28) The general Agenda topic was “solving the problem,” which included both
6 near-term and long-term solutions. Under section C of the Agenda is the topic of pension reform
7 with these bullet points: • December 2010 organization session; • what will the ballot measure
8 include; • who will guide the campaign; • survey poll to test elements of the ballot measure; •
9 drafting of language – attorney must draft; • January through May 2011 – signature gathering
10 operation – 93,000 signatures needed; • June through July qualification; • waiting for scheduled or
11 special election – November 2011 versus spring 2012. (Exhibit 201; IV, 199:16-200:22)

12 Also on December 3, 2010, Mr. Pudgil sent various members of the media an e-mail
13 attaching an article from *Bloomberg Today* which focused on Mayor Sanders’ pension reform
14 initiative. (Exhibit 30) Mr. Pudgil also responded to a media inquiry about the Mayor’s intentions
15 with regard to contributions to this 401(k) style plan. (Exhibit 30; II, 20:23-22:2; IV, 203:21-204:27)

16 Meanwhile, Mayoral staff member Rachel Laing sent two e-mails to everyone on the Mayor’s
17 11th floor – as well as to COO Goldstone and CFO Mary Lewis. (Exhibits 258-259) In Ms. Laing’s
18 first e-mail sent at 11:56 a.m., she described the subject as “National article on Mayor Sanders’
19 Pension Reform Efforts, and writes:

20 “Bloomberg News today published this article on the mayor’s leadership on pension
21 reform, which includes San Jose’s mayor acknowledging San Diego is ahead of the
curve with all we’ve done. Please share it with your contacts as appropriate.”

22 She provided a link to the article entitled “San Diego’s Radical Idea May Help Cities Slash \$382
23 Billion Pension Gap.” Ms. Laing concluded: “Also, this article will be in Business Week magazine,
24 which is owned by Bloomberg. They’re sending a photographer from LA to shoot the photo today.”
25 (Exhibit 259) In her second e-mail sent at 4:58 p.m. on December 3, 2010, Ms. Laing told her City
26 colleagues: “Below is another national story on the mayor’s leadership on pension reform, this one
27 by Reuters,” and includes a full copy of the Reuters news story entitled: “Analysis: San Diego’s
28 polemic plan for California pension woes.” (Exhibit 258; IV, 270:26-271:11)

1 By reference to Ms. Laing’s two e-mails, Mr. Pudgil explained that these were sent “about
2 a week or two after we announced (the initiative).” (IV, 271:8-24)

3 On December 6, 2010, Mayor Sanders appeared on the KUSI morning show. Mr. Pudgil
4 prepared the Mayor’s talking points and accompanied him to the appearance. The “pension reform”
5 bullet points included: “• we’re going to take a big step • no more defined benefit retirement • have
6 a ballot measure for the next regularly scheduled election • a 401(k) style system like the private
7 sector • will include elected officials but not public safety • Kevin Faulconer involved • citywide
8 signature gathering effort • “I will ask you to help us get it passed.” (Exhibit 202; IV, 204:28-206:2)
9 Mr. Pudgil agrees that there isn’t anything in the prepared “talking points” about the Mayor’s
10 intention to do this pension reform ballot initiative as a private citizen. (IV, 206:7-11)

11 On December 7, 2010, Mayor Sanders announced that Julie Dubick, his Director of Policy
12 and Deputy Chief of Staff, would be promoted to Chief of Staff effective January 15, 2011. (III,
13 132:8-133:7) Julie Dubick is an active member of the California bar, having first been admitted in
14 1981. (III, 131:18-22) She has been employed in the Mayor’s Office since he was first elected and
15 sworn into office at the end of 2005. (III, 131:23-27) The Mayor’s press release stated that she “had
16 shepherded several high-profile projects, including the Mayor’s pension reform efforts.” The Mayor
17 continued: “I look forward to working with Julie to implement the next phase of my reform agenda,
18 which I will unveil at my State of the City Address in January.” (III, 138:28-139:3)

19 Ms. Dubick recalls that, after Mayor Sanders made his decision to use the initiative process
20 to achieve pension reform by transition to a 401(k)-style plan, as announced on November 19, 2010,
21 he and members of his staff met “offsite after hours about whether this initiative is a viable thing to
22 be able to do” – meaning that “it has to make sense financially, set out a way that’s fair for
23 employees and the citizens, and have to raise a lot of money to do a private initiative.” (III, 166:26-
24 167:16; 168:28-169:16) “Off and on,” from sometime in November 2010 through calendar year
25 ending 2010, those meetings included herself, the Mayor, Councilmember Kevin Faulconer,
26 sometimes Jay Goldstone, sometimes Erik Caldwell (Mayoral staff member), Kris Michell (outgoing
27 Chief of Staff), and Aimee Faucett. (III, 169:17-170:27)

28 ///

1 For her part, the Mayor's Deputy Chief of Staff/Director of Policy, Aimee Faucett, recalls
2 that she participated in meetings to discuss the initiative in November and December 2010 – both
3 before and after the Mayor's press conference on November 19, 2010, and before the Mayor's State
4 of the City Address on January 12, 2011.² (IV, 74:17-75:12) The meetings were "usually at Tom
5 Shepard's office," with the Mayor present, as well as Councilmember Kevin Faulconer, the Mayor's
6 outgoing Chief of Staff Kris Michell and his incoming/current Chief of Staff Julie Dubick. (IV,
7 74:17-28; 75:13-16) These meetings included both policy and strategy discussions. (IV, 75:17-19)

8 The Mayor's Deputy Chief of Staff Aimee Faucett also confirms that she was in "the
9 meeting" when the Mayor and Councilmember Faulconer met with a group of business leaders,
10 which included Mr. Sudberry, relating to the intention of bringing a pension reform initiative to the
11 voters – probably at the end of 2010 "prior to the January 3rd meeting." (IV, 78:14-79:5; 79:22-80:5;
12 80:24-28) This meeting was in addition to the meetings the Mayor had on December 14th and 16th
13 at the Chamber of Commerce (below). (IV, 80:6-11) It was at the law offices of Hecht and Solberg
14 and was coordinated by Paul Robinson. (IV, 81:1-3) Business leaders from a number of groups were
15 in attendance, such as the Lincoln Club, the Taxpayers Association Board, members of the Chamber
16 Board, and members of various different business-type organizations – maybe the Lodging Industry
17 Association, the Building Industry Association. (IV, 80:12-23) The subject matter of the meeting
18 was the Mayor's intent, in partnership with Councilmember Faulconer, to bring an initiative before
19 the voters regarding 401(k). (IV, 81:6-9)

20 On December 14, 2010, Mayor Sanders attended the Chamber of Commerce public policy
21 committee meeting with Councilmember Faulconer. The subject matter was "defined contribution
22 plan/pension." It is likely that Mr. Pudgil prepared the Mayor's talking points for this speaking
23 event. (Exhibit 189; IV, 206:12-207:18)

24 On December 16, 2010, Mayor Sanders addressed the full Board of Directors for the
25 Chamber of Commerce on the subject of "defined contribution plan/pension." Again, Mr. Pudgil

26
27 ² Ms. Faucett did not become Mayor Sanders' Deputy Chief of Staff and Director of Policy
28 until January 15, 2011. (IV, 10:24-11:1) Thus, at the time of these meetings in November and
December and before the State of the City address, she was a paid City employee serving as Chief
of Staff to Councilmember Kevin Faulconer. (IV, 11:8-22)

1 likely prepared the Mayor's talking points for the speaking engagement involving about thirty (30)
2 people. (Exhibit 190; 207:19-208:9)

3 On December 20, 2010, according to a meeting invite generated by the Mayor's scheduling
4 system, a meeting on "pension reform" took place in the large conference room on the Mayor's floor
5 at City Hall, with Mayoral staff members Kris Michell (out-going Chief of Staff), Julie Dubick
6 (Director of Policy/Deputy Chief of Staff and in-coming Chief of Staff), COO Goldstone and City
7 Attorney Jan Goldsmith – all scheduled to be in attendance. Mayor Sanders does not recall if he
8 attended this meeting. (Exhibit 31; II, 22:28-24:2; 25:4-16)

9 On January 3, 2011, at 2:08 p.m., Tom Sudberry sent an e-mail to a list of recipients outside
10 the City and in the City, including the Mayor and Councilmembers DeMaio and Faulconer, with a
11 copy to the Mayor's Chief of Staff Kris Michell and his Executive Assistant Rachel Shira, in which
12 he writes on the subject of "pension reform meeting" that "the Mayor's Office just called and needs
13 to reschedule tomorrow's meeting at 5 p.m. We will get back to you when a new time and date has
14 been identified." At the time of this email, Mr. Sudberry was a leader in the San Diego Lincoln Club
15 – either the Chairman of the Board or the immediate past Chairman of the Board with Steve
16 Williams having assumed the role as Chair. (Exhibit 35; II, 25:17-26:28)

17 On January 7, 2011, Mr. Pudgil sent an email to a reporter at Fox News on the subject of
18 "San Diego leading the way on pension reform." Mr. Pudgil forwarded an article which appeared
19 in *The Bond Buyer* to Fox News with the comment that the *Bond Buyer* was recognizing the City as
20 a national leader in pension reform. Mr. Pudgil added:

21 "We're eliminating employee pensions as we know them and putting in place a
22 401(k) plan like the private sector. *My boss, San Diego Mayor Jerry Sanders* is
23 available any time to come on The Factor to talk about what he's doing here in San
24 Diego and the greater national problem," etcetera. (Exhibit 36; II, 29:5-18; 30:27-
31:10)

24 **6. The Mayor Formed A Campaign Committee – "San Diegans for Pension
25 Reform" – Under FPPC Rules**

26 As accurately reported in the Union Tribune, Mayor Sanders formed a committee in January
27 2011 – "San Diegans for Pension Reform" – to raise and spend money in connection with his idea
28 for a 401(k) style pension initiative. (Exhibits 45 & 34; II, 78:3-14; 79:9-16; 134:18-135:18)

1 Mayor Sanders' friend and political consultant/strategist Tom Shepard set it up by retaining
2 treasurer Nancy Haley who did the first filing under Fair Political Practices Commission ("FPPC")
3 rules on January 5, 2011. (Exhibits 34 & 50; II, 109:23-110:2; 111:13-19; 132:25-133:9; 134:10-12;
4 138:12-28; 140:22-28) Mr. Shepard had run Mayor Sanders' two mayoral campaigns and Nancy
5 Haley had been the Mayor's treasurer for both campaigns. (II, 110:3-25; 138:25-139:7) This
6 committee was "pushing forward with financing and fundraising" for the ideas that the Mayor and
7 Kevin Faulconer had or were formulating. (II, 137:28-138:11)

8 The FPPC filings disclose that the initial \$3,000 in start-up funds for San Diegans for Pension
9 Reform came in on January 3, 2011, from San Diegans for Accountability at City Hall, Yes on D,
10 which was the committee formed to support the ballot measure making the strong mayor form of
11 governance permanent in 2010 after a five-year trial period. April Boling was the treasurer of this
12 committee – and she is one of the Mayor's fellow proponents for the pension reform initiative drive
13 launched during the Mayor's press conference on April 5, 2011. (Exhibit 33; 135:19-137:9; Exhibit
14 50; 141:5-16)

15 The FPPC filing by San Diegans for Pension Reform for the period January 1st through March
16 31st of 2011, shows expenditures during this period which included payments to the law firm of
17 Atkinson, Andelson, Loya, Ruud & Romo in Cerrito, California where attorney Nate Kowalski was
18 employed as a partner. Mayor Sanders agrees that his committee paid money for Mr. Kowalski's
19 legal opinions related to a pension reform ballot measure. (Exhibit 50; II, 139:23-27; 141:17-27)
20 This information was accurately reported in a Union Tribune article. (Exhibit 45; II, 79:17-27) The
21 Mayor's Chief of Staff Julie Dubick recalls Mr. Kowalski as the attorney who was working on
22 certain legal issues related to what was under discussion for the Sanders' initiative, and also recalls
23 that she spoke with him "on one or two occasions," but is "not sure" what she spoke to him about.
24 (III, 171:24-173:25)

25 Mayor Sanders assumes that the committee's treasurer Nancy Haley gave updates to Tom
26 Shepard about monies being raised but he "has no idea" if she gave updates to anyone on his staff.
27 (II, 142:5-12) The Mayor's Chief of Staff Julie Dubick is not sure that she ever spoke with Ms. Haley
28 herself but the Mayor's Deputy Chief of Staff, Aimee Faucett, did communicate with Ms. Haley and

1 would, in turn, tell Ms. Dubick about a conversation or some other communication she had with Ms.
2 Haley as treasurer of San Diegans for Pension Reform. (III, 167:22-168:12) Ms. Faucett admitted
3 that she reviewed the FPPC filings related to San Diegans for Pension Reform because she “was
4 keeping tabs on the activities of the committee – just monitoring, keeping up to speed on where
5 things were in anything related to it.” (IV, 97:16-98:6)

6 **7. The Mayor Announced His Initiative Plans During His Official “State
7 of the City” Address**

8 The obligation to deliver a State of the City address is one of the Mayor’s Charter obligations.
9 (II, 36:26-37:1) The State of the City is a formal, ceremonial event and it is the only speech which
10 the City Charter requires the Mayor to deliver. (I, 150:14-20; 161:19-22)

11 In accordance with Charter Article XV, Section 265, subsection C, on or before the 15th day
12 of January of each year, the Mayor “shall communicate by message to the *City Council* a statement
13 of the conditions and affairs of the City and make recommendations on such matters as he or she
14 may deem expedient and proper.” (II, 38:24-39:13) The “State of the City” is delivered at a
15 regularly-scheduled City Council meeting and the City Council President introduced the Mayor. (II,
16 41:25-42:7; I, 161:15-28)

17 On January 12, 2011, Mayor Sanders stood at a podium bedecked with the City seal to
18 deliver his “State of the City” Address. (I, 162:5-8) Whatever initial uncertainty there was when
19 he announced the initiative at his press conference in November 2010, about going through the meet
20 and confer process versus going through a citizens’ initiative process, by the time he gave his State
21 of the City address, Mayor Sanders was clear that he was not going to go through meet and confer.
22 (II, 76:25-77:5) Having determined that he would not go “the meet and confer route” but instead
23 take action on this initiative as a “private citizen,” Mayor Sanders offered this explanation for why
24 he included it in his State of the City address:

25 “Because I think the reason the Charter outlines that the Mayor has to deliver a State
26 of the City and I think the state of the City at that point, after the defeat of
27 Proposition D, the sales tax initiative, with the continuing financial problems, I think
28 it was my obligation to tell the public what I felt were the answers and the solutions
to do about them. . . . and to tell them at the same time what (he) intended to
do about them. . . . and that the 401(k) style pension would be the solution.” (II,
46:14-47:8)

1 For his part, COO Goldstone agrees that part of the purpose of the State-of-the-City address,
2 as a Charter-required event, is for the Mayor to describe the state of the City, as well as his vision
3 and his plans for the coming year as Mayor. (III, 42:13-17) Mr. Goldstone understood that this
4 401(k)-style pension reform initiative would be a central part of the Mayor’s agenda for the coming
5 year. (III, 42:8-12) And he agrees that the reason the Mayor gives this address about the state of the
6 City is *because he’s Mayor*. (III, 42:18-43:1)

7 The Mayor’s Director of Special Projects, Gerard Braun, was in charge of drafting and then
8 vetting the Mayor’s State of the City Address. (I, 143:27-144:4; 150:10-13) The process started with
9 a conversation with the Mayor about what he wanted to include in the speech – “this is his moment
10 and it’s his Charter obligation.” (I, 154:3-12; II, 36:14-25) He writes the first draft based on his
11 conversations with the Mayor and his understanding of what he wants to see in it. (I, 154:12-15) He
12 circulates this first draft to the Mayor’s “top staff” which, for the 2011 State of the City, was Kris
13 Michell (outgoing Chief of Staff), Julie Dubick (incoming Chief of Staff) and Darren Pudgil,
14 Director of Communications. (I, 154:15-155:27)

15 Mayor Sanders had the final word on the contents of the speech he personally delivered. (II,
16 39:18-22; I, 157:5-11) He “absolutely” approved the inclusion in his speech of the information about
17 his 401(k) style pension plan. (II, 39:23-40:5)

18 In the very first draft – and in all succeeding drafts through draft number ten, there is a
19 statement about the Mayor’s intentions with regard to a pension reform initiative which reads:

20 “A few months ago, Councilman Kevin Faulconer and I announced we would bring
21 to voters an initiative that would end public pensions as we know them in San Diego
22 and replace them with a 401(k) plan similar to what is used in the private sector. We
are doing this in the public interest, but as private citizens, and we welcome to this
effort anyone who shares our goal.” (I, 157:12-17; 158:14-159:11)

23 The eleventh draft which Mr. Braun wrote and circulated changes this part of the Mayor’s draft State
24 of the City Address to “Councilman Kevin Faulconer, City Attorney Jan Goldsmith and I will bring
25 to voters an initiative. . .” However, Mr. Braun has “no knowledge or memory of how the City
26 Attorney came to be either in the picture or in the State of the City address.” (I, 159:11-21) This
27 version continued in the drafts until the final version which deletes the City Attorney’s actual *name*
28 – Jan Goldsmith – and leaves only a reference to his official position: “Councilman Kevin Faulconer,

1 *the city attorney* and I . . .” Mr. Braun has no recollection of how that occurred or why. (Exhibits
2 39 and 39a; I, 160:9-19)

3 Although his direct involvement “ended the moment (he) delivered that speech safely to the
4 Mayor,” Mr. Braun knew, “as a consumer of news and a consumer of information about what’s
5 going on in the City,” about the Mayor’s activities related to this initiative proposal after the State
6 of the City address; in fact, “I think that everyone was aware that the Mayor was working on this and
7 it was the subject of conversation and news broadcasts, and you know, I think my neighbors were
8 aware of it.” (I, 149:19-28; 168:20-169:26)

9 **8. In A News Release After The State of the City Address, The Mayor’s**
10 **Office Confirmed His Plans For The “Next Wave of Pension Reform”**

11 The Mayor’s Office issued another “Mayor Jerry Sanders Fact Sheet” on January 12, 2011,
12 to recap what Mayor Sanders had said during his State of the City address the same evening. The
13 headline – “Mayor lays out vigorous agenda for 2011 ” – was followed with the news that Mayor
14 Sanders was calling it a “time of optimism and opportunity,” while pledging to use a ballot initiative
15 to eliminate traditional pensions and replace them with a 401(k) style plan. (Exhibit 38; II, 34:14-
16 36:6) Darren Pudgil prepared this press release and is identified as the contact person. (Exhibit 38;
17 IV, 215:27-216:217:1)

18 **9. After the “State of the City,” The Mayor Promoted And Fine-Tuned His**
Pension Reform Initiative Design Using City Staff

19 On January 13, 2011, at 2:41 p.m. Darren Pudgil sent an e-mail to a host of Mayoral staff
20 members – including the Mayor’s Chief of Staff Kris Michell, Director of Policy/Deputy Chief of
21 Staff Julie Dubick, Assistant Policy Advisor Erik Caldwell – as well as Rachel Laing, Alex Roth and
22 Kevin Klein on the Mayor’s Press Team who reported to him – that a meeting scheduled the next
23 day at 1:15 p.m. for the “hold harmless brief” would need to be rescheduled “to make way for the
24 Mayor’s live interview on MSNBC “re: mayor’s pension reform efforts.” The e-mail notes that both
25 Mr. Pudgil himself and staffer Kevin Klein would be involved. (Exhibit 260; IV, 271:27-272:3)

26 On January 14, 2011, Mayor Sanders gave an interview on MSNBC related to pensions.
27 Mayoral staff member Rachel Laing prepared the Mayor’s talking points for this interview which
28 included under “pension reform,” reference to the 401(k) initiative process. (Exhibit 203; IV, 218:8-

1 23; 220:6-7) The same day, Mr. Pudgil sent an e-blast e-mail to a (blind) list of recipients providing
2 a link to the Mayor’s interview on MSNBC with the message: “Attached is the video link to an
3 interview Mayor Sanders conducted today on MSNBC re: his efforts to reform San Diego’s pension
4 system.” He “signs” his message as “Darren Pudgil, Director of Communications, Office of Mayor
5 Jerry Sanders.” (Exhibit 261; IV, 272:8-13)

6 On January 19, 2011, Mayor Sanders gave an interview on the Mark Larson radio talk show
7 on KPRZ. Mr. Pudgil prepared his talking points for that interview – which included a section about
8 pension reform – a 401(k) type plan. Under the “pension reform” section of these talking points,
9 there was also a reference to “base compensation” which was part of the Mayor’s conceptual
10 framework for achieving pension reform by way of initiative. (Exhibit 204; IV, 220:24-221:26) Mr.
11 Pudgil would have gotten that information from the Mayor or from one of his policy advisors. (IV,
12 221:27-222:3)

13 On February 9, 2011, following earlier e-mail exchanges which began on December 9, 2010,
14 with Aimee Faucett, the Vice President for Government Relations at TIAA-CREF, a financial
15 services company, met with the Mayor’s policy advisor Erik Caldwell to discuss “the flaws” in
16 Mayor Sanders’ 401(k) pension plan to replace traditional pensions. Mayor’s Deputy Chief of Staff
17 Aimee Faucett scheduled the meeting and intended to participate but had to leave it to Mr. Caldwell
18 to handle alone. Mr. Caldwell was a policy advisor to the Mayor who reported to Aimee Faucett.
19 (IV, 91:7-27) As Ms. Faucett understood it, TIAA-CREF wanted to do business with the City and
20 felt the “flaw” in the Mayor’s proposal was simply that a 401(k) may not be the best vehicle for
21 replacing defined benefit pensions. (Exhibit 193; IV, 66:7-69:19)

22 Exhibit 45 is a *SignOnSanDiego Union Tribune* article written by Craig Gustafson and
23 published on March 11, 2011. (Exhibit 45; II, 78:3-14) Mayor Sanders agrees that this *Union*
24 *Tribune* article accurately presents the state of affairs related to his initiative as of March 11, 2011,
25 when the article was published. (Exhibit 45; II, 81:25-28) This included the facts, as reported: (1)
26 that, based on Mr. Kowalski’s legal research and opinions, the Mayor concluded that his initiative
27 plan was more legally defensible than a competing ballot measure being pushed by Councilmember
28 Carl DeMaio; (2) that neither the exact language of the Mayor’s proposed ballot measure nor of the

1 measure that Councilmember DeMaio was apparently working on, had been released yet; (3) that,
2 as a result of getting the legal research and opinions from Mr. Kowalski, Mayor Sanders intended
3 to focus on incorporating other elements into his measure that would be legally defensible and
4 provide immediate cost savings; and (4) that Mayor Sanders intended to release his proposed ballot
5 measure in the next few weeks. (II, 79:22-81:24) San Diegans for Pension Reform paid Los
6 Angeles attorney Nate Kowalski for his research and advice related to the Mayor's 401(k) style plan
7 concept. (II, 79:17-27)

8 On March 11, 2011, the Mayor's Office conducted a "pre-brief" weekly meeting in the large
9 conference room on the Mayor's 11th floor of City Hall. The purpose of these weekly "pre-briefs"
10 is for Mayoral staff to brief him on the events which he would be attending that they're responsible
11 for. (Exhibit 46; II, 82:1-9, 21-23) "Frequently," according to the Mayor, his personal plans are also
12 included on this pre-brief calendar and "it will say personal" but those are not discussed during the
13 pre-brief meeting with his staff. (II, 82:24-83:4)

14 The "pre-brief" staff meeting on March 11, 2011, includes a reference to a "press conference
15 – pension reform initiative" scheduled for March 15, 2011, with three staff members who are noted
16 as doing the "pre-brief" on this item: the Mayor's Director of Communications Darren Pudgil,
17 Mayoral Policy Advisor/Deputy Chief of Staff Aimee Faucett, and Assistant Policy Advisor Erik
18 Caldwell. There is no "personal" designation associated with this entry. (Exhibit 46; II, 83:5-84:13;
19 IV, 222:4-28) As to whether all three staff members were involved in the pre-brief on that pension
20 reform initiative press conference, Mayor Sanders explains:

21 A. "Well, I can only tell you that we normally don't pre-brief on any of them that
22 had to do with an election, with an initiative or anything else. I don't know
23 that they pre-briefed on that or that was just on the calendar. Normally we
24 just go right over those and I'll talk to them later.

25 Q. Meaning later when?

26 A. At the end of the day whenever I see them, but not during a meeting.

27 Q. So you are meaning to say that you would talk with them when they're off
28 duty?

A. **Well, no, I would talk to them when they're on duty.**

Q. **But not in this meeting?**

A. **Right.** (II, 84:17-85:1; emphasis added)

29 The Mayor's Deputy Chief of Staff Aimee Faucett confirms that she was in this "pre-brief"
30 meeting on March 11, 2011, and offers no such distinction about how the pre-briefing related to a

1 press conference on the pension reform initiative would have been or was handled. (Exhibit 46; IV,
2 90:14-91:11; 91:28-92:3) [Nor did Dubick or Pudgil in their testimony.] While agreeing that she,
3 Darren Pudgil and policy advisor Erik Caldwell are noted as the staff for pre-briefing the Mayor on
4 this press conference, she also confirmed that Darren Pudgil “prepares most of the Mayor’s remarks
5 for his traditional City business and sometimes for non-traditional City business.” (IV, 91:3-11;
6 91:28-92:10)

7 On March 17, 2011, Mayor Sanders appeared on the KUSI San Diego People Program hosted
8 by Alan Denton. Darren Pudgil prepared the Mayor’s talking points for that program which included
9 information about his Pension Reform Initiative with Kevin Faulconer. The bullet points include:
10 “• 2012 ballot • End public pensions as we know them – Move to 401K-style plans for all general
11 employees – One of the first cities in the country – Eliminate our unfunded liability – Savings
12 beginning in Year 1 • Working on other cost-saving measures to include • Will announce full
13 package within the next couple of weeks • Considered pensionable pay; not legally defensible – Not
14 going to waste the voters’ time – Not going to waste contributors’ money.” (Exhibit 205; IV, 223:1-
15 18; 229:9-12)

16 Exhibit 195 is a “staff pre-brief” for March 18, 2011, with a press conference on pension
17 reform listed for March 24, 2011. Mr. Pudgil is noted as the staff member doing the “pre-brief” of
18 the Mayor on this item. Mr. Pudgil recalls that this press conference did go forward as scheduled
19 and that there was news coverage related to it. (Exhibit 195; IV, 229:13-230:9) Deputy Chief of
20 Staff Aimee Faucett also recalls being in attendance for this “pre-brief” and that the Mayor’s
21 scheduled press conference did in fact go forward on March 24, 2011, as planned. (Exhibit 195; IV,
22 108:26-109:14)

23 On March 22, 2011, Mr. Pudgil sent an e-mail to everyone on the Mayor’s 11th floor to bring
24 their attention to the fact that Mayor Sanders had spoken on KUSI’s San Diego People about pension
25 reform among other things and to provide the link to the video clip. (Exhibit 206; IV, 230:17-231:1)

26 Exhibit 49 is another *SignOnSanDiego Union Tribune* (UT) article written by Craig
27 Gustafson and first published on March 24, 2011, at 4:00 a.m., then updated at 6:41 a.m. (Exhibit
28 49; 86:11-21) This article reports that Mayor Sanders, with Councilmember Kevin Faulconer, have

1 a press conference planned for the same day (Thursday, March 24) to announce the Mayor's ballot
2 measure as "they launch a signature drive that would place it on the June 2012 ballot." (Exhibit 49;
3 II, 86:22-87:2)

4 Darren Pudgil prepared the Mayor's remarks for this March 24th press conference and
5 attended it with the Mayor. (IV, 231:2-5; 232:26-28) These remarks open with Mayor Sanders
6 saying: "Good morning. Joining me today are Council President Pro Tem Kevin Faulconer and
7 Dean Oliver, Co-Chair, San Diegans for Pension Reform." Mr. Oliver is a developer. (Exhibit 207,
8 page 1; IV, 231:2-17) The prepared outline includes a recap of pension reforms already achieved,
9 as well as a reference to negotiations in progress with the City's unions "to reduce the City's retiree
10 healthcare cost for current employees." (Exhibit 207, page 2) It continues:

11 "Today, we announce not just a way to *reform* our pension system – but a far
12 reaching proposal that will *transform* our pension system – *in fact*, it will end public
13 employee pensions as we know them. . . . To address this, Councilmember Faulconer
14 and I recently announced that we – as private citizens – had begun exploring the idea
15 of placing an initiative on the ballot that would eliminate traditional pensions . . . and
16 replace them with private-sector 401K-style plans.

17 Today, we are here to announce that not only will we be putting such a measure on
18 the June 2012 ballot, but that we will bolster it with new caps and restrictions that
19 will make it even stronger and produce greater savings to taxpayers. . . . This
20 initiative is the answer to our pension challenges. It's a common sense approach that
21 I believe is legally defensible and can be put into effect immediately." (Exhibit 207,
22 pages 2-3)

23 The UT article also correctly reports that the campaign committee which Mayor Sanders and
24 Councilmember Faulconer created – San Diegans for Pension Reform – had raised about a hundred
25 thousand dollars to pay for legal and financial analyses of his plan. (II, 91:11-25) And it accurately
26 describes the major provisions of the Mayor's proposed initiative: (1) the most strict cap on public
27 safety pensions among the state's largest cities; (2) a switch to a 401(k) for new hires in all other City
28 jobs; (3) a cap on the City's overall payroll for five years; and (4) a Charter change to eliminate the
workers' ability to veto benefit changes by a majority vote – referring to a decades-old Charter
section 143.1 which called for City employee to vote on approving any ordinance that changes
benefits. (Exhibit 49; II, 87:27-88:28) These were the major provisions he was including in his
initiative at that time – though there may have been others which Mayor Sanders doesn't presently
recall. (II, 92:17-93:1; *See also* Exhibit 207, pages 2-3)

1 Mayor Sanders agrees that the UT article correctly describes that the Mayor's proposed
2 initiative would initially achieve savings with the payroll cap he was promoting at that time, and then
3 later through lower pension costs as a growing number of workers rely on 401(k)s instead of
4 guaranteed pensions – and also that he and Councilmember Faulconer hoped that, by releasing their
5 plan first, they would rally the business community behind the ballot measure and get their important
6 endorsement in view of how expensive it is to gather signatures and fund a successful campaign.
7 (Exhibit 49; II, 88:28-89:20) The UT article says that the Mayor's proposed ballot measure “would
8 alter San Diego's pension system in profound ways and (they say) would save a projected \$1.6
9 billion for taxpayers over the next three decades.” Mayor Sanders believes that “(they) were talking
10 in the neighborhood of \$1.2 billion to 2.1 billion . . . any number in between there could be argued.”
11 (Exhibit 49; II, 87:14-26)

12 COO Goldstone believes that this reported information about cost savings comes from the
13 Buck Consultants' fiscal analysis on which he assisted. (Exhibit 49; III, 63:28-64:9) In fact, in a later
14 update to this article at 8:26 p.m. that same evening, reporter Gustafson states that “Jay Goldstone,
15 the City's Chief Operating Officer, said the actuary who analyzed the ballot measure projected the
16 City would save 8.3 million off its projected annual pension payment.” (III, 64:10-17) Gustafson
17 goes on to attribute to Mr. Goldstone additional information about savings that would be realized
18 from the payroll cap. (III, 64:17-19)

19 Finally, although Mayor Sanders agrees that he probably told Mr. Gustafson, as reported, that
20 he “hoped this ballot initiative would contribute to permanently fixing the City's budget woes,” he
21 never uses the term “legacy” because he believes that it will be up to other people to determine what
22 his “legacy” is as Mayor. Thus, as to whether he also said, as reported, that this would be “his legacy
23 as Mayor,” he cannot vouch for what he actually said to Mr. Gustafson – because “(he doesn't)
24 remember the conversation,” but he doesn't use the term “legacy.” (II, 90:16-91:10)

25 **10. COO Goldstone Assisted With the Fiscal Analysis To Support the** 26 **Mayor's Initiative**

27 Jay Goldstone began his employment with the City as its Chief Financial Officer (“CFO”)
28 in 2006, became interim COO on July 1, 2007, and then, in October 2007, he became COO/CFO
until he hired a CFO in January 2008. In March 2012, Jay Goldstone again assumed the dual role

1 as both COO and CFO. (III, 6:13-7:25) Mr. Goldstone serves at the sole and exclusive pleasure of
2 Mayor Sanders. (III, 7:26-28) Under the Charter, Mayor Sanders has the sole and exclusive
3 authority to discharge him without recourse. (III, 8:1-4)

4 Mayor Sanders knew that his advisors were trying to calculate the fiscal impact of his
5 initiative proposal, and he “believes” that his committee, San Diegans for Pension Reform, retained
6 Buck Consultants to calculate the fiscal impact of what he was proposing, and that (City’s Operating
7 Officer) Jay Goldstone met with them about the fiscal analysis they were doing on his initiative. (II,
8 108:19-109:10) Mayor Sanders does not know how these meetings between Buck Consultants and
9 Jay Goldstone were arranged and he “didn’t ask Jay to do that specifically” but he recalls that he and
10 Mr. Goldstone were in a “couple” of meetings to discuss the pension initiative with the Mayor’s
11 friend and political consultant/strategist Tom Shepard who said “we needed to do this.” (II, 109:23-
12 110:2; 111:13-19)

13 As Mayor Sanders remembers it, the meetings between himself, Jay Goldstone and Tom
14 Shepard were in the January through March 2011 time frame when they “were in the formulation
15 stage, looking at numbers, trying to figure out what the savings would be.” (II, 111:27-112:4) He
16 thinks there were other meetings which he didn’t attend where Mr. Goldstone met with Buck
17 Consultants on this subject matter. (II, 112:5-9)

18 COO Goldstone recalls that, initially, he did some fiscal analysis related to the Mayor’s
19 401(k)-style pension reform initiative “to try to determine the impact that any proposal of this
20 magnitude might have on the City.” He did this in his role as COO. (III, 43:2-24)

21 Mr. Goldstone’s first request in the “early 2011” time-frame was to Mark Hovey, CEO for
22 the San Diego City Employees Retirement System (SDCERS) – which is the retirement system that
23 administers the city’s defined benefit pension plan. (III, 44:24-27; 45:5-9) He asked Mr. Hovey to
24 undertake some analysis of the cost impacts of the Mayor’s initial concepts, and Mr. Hovey, in turn,
25 asked SDCERS’ retained actuary, Cheiron, to analyze and answer the questions Mr. Goldstone was
26 asking. (III, 43:7-10; 25-44:9) Cheiron bills SDCERS for this work and the City pays the bill
27 indirectly as an SDCERS administrative expense. (III, 44:10-20)

28 ///

1 COO Goldstone then contacted Buck Consultants to get them to “work with the Mayor and
2 his committee or group to do a formal analysis for the committee on what was being contemplated.”
3 (III, 44:28-45:4) Mr. Goldstone sent an e-mail on February 4, 2011, to Ronald Thompson, Harold
4 Loeb, and Charlie Shittenden – all three with Buck Consultants – with a copy to Mark Hovey, on the
5 subject of pension data. Mr. Goldstone asked that one of them contact Mr. Hovey to get from him
6 the SDCERS actuarial data through June 30, 2010, to update their database. (III, 45:10-18) These
7 individuals at Buck Consultants are also the ones he contacted to get assistance from them in costing
8 and otherwise doing the financial analysis related to the Mayor’s proposal. (III, 45:19-22) They are
9 the same Buck Consultants who were doing work under contract with the City as the City’s pension
10 actuaries – though “under separate contracts.” (III, 46:10-15)

11 Mr. Goldstone acknowledged that he did not see and approve the “separate contract” related
12 to Buck’s work on the Mayor’s initiative and he does not know who did. (III, 46:16-19) Other than
13 making the initial contact with Buck, Mr. Goldstone “doesn’t believe” that he had any role in either
14 negotiating or overseeing that separate contact with Buck Consultants. (III, 48:14-17) And, after
15 making this initial contact, Mr. Goldstone doesn’t recall ever seeing any contract or any invoices
16 from Buck that might have ultimately been paid and he does not “specifically” know who did. (III,
17 48:18-19) As to whether the Mayor’s Chief of Staff Julie Dubick or someone on the Mayor’s staff
18 was responsible for that, Mr. Goldstone says: “I don’t know.” (III, 48:20-26)

19 Mr. Goldstone also acknowledged that, because they were the City’s actuaries, Buck
20 Consultants already had the updated SDCERS/Cheiron database, knew how the system works and
21 knew the benefits. Mr. Goldstone admits that, to be able to do the analysis the Mayor needed on his
22 initiative, “somebody would have had to have the SDCERS database or Cheiron’s database,” and
23 “not anybody can get that.” (III, 46:20-47:4) In other words, someone off the street who might be
24 interested in that subject matter doesn’t have the right to call SDCERS and have SDCERS order up
25 an actuarial analysis or provide an actuarial database. (III, 47:5-9)

26 By initiating the request to Buck to get the current data from SDCERS/Cheiron, Mr.
27 Goldstone facilitated the availability of this data for the Mayor’s purpose in having a fiscal analysis
28 done for his initiative. (III, 47:10-22)

1 Mr. Goldstone recalls that, after Buck Consultants came out with their results and analysis,
2 he “was asked as a favor to take a look at the results to see if they made sense in relationship to other
3 information that (he) had.” (III, 49:4-14) He doesn’t recall who asked him for this favor but he
4 “doesn’t believe” it was the Mayor or someone on the Mayor’s staff – he “just (doesn’t) remember.
5 It was somebody from the committee . . . it may have even come from Tom Shepard.” (III, 49:15-27)
6 Mr. Goldstone acknowledges that he participated in “one or two meetings” with the Mayor in Mr.
7 Shepard’s office to discuss the fiscal analysis. (III, 49:28-50:4; 54:27-55:1) This was sometime after
8 the state of the City address on January 12, 2011, and before April 5, 2011, when the Mayor had the
9 press conference on the City Concourse with Carl DeMaio, April Boling and T. J. Zane. (III, 50:5-9)

10 The fiscal analysis under discussion in Mr. Shepard’s office involved Buck’s numbers based
11 on what was being proposed at that point in time for the pension reform initiative – i.e., a 401(k)-
12 style pension plan with a three-year payroll cap or a five-year payroll cap. (III, 50:10-26) There may
13 have been some smaller components as well. (III, 53:11-15; 54:23-26) The analyses assumed that
14 all non-safety new hires would go into a 401(k)-style plan and all safety employees would remain
15 the defined benefit plan, and that there would be changes to the defined benefit plan for safety new
16 hires – that the average of highest three years of compensation would be used to calculate their
17 benefit instead of the highest one year and that the total benefit could not exceed 80% of final
18 compensation. (III, 54:6-22)

19 The payroll cap concept meant that the City’s payroll would have been capped to not go
20 above a predetermined dollar amount for some duration – with the result that the City’s pension
21 payment (the actuarially required contribution or ARC) would have been reduced because a cap on
22 payroll would be treated as an actuarial gain since a growth in payroll is one of the actuarial
23 assumptions. (III, 50:27-51:11)

24 The opinion Mr. Goldstone gave to the Mayor and Tom Shepard related to the work the Buck
25 Consultants had done was that a payroll cap was needed at some level if one of their objectives was
26 to not have the cost to the City go up in the early years – and “I believe a five-year payroll cap was
27 discussed.” (III, 53:16-54:5) COO Goldstone also took the Buck analysis and did further
28 calculations based on it to determine whether the Mayor’s initiative plan would save the City money.

1 This included making an assumption about what the City would contribute to a 401(k) plan. As Mr.
2 Goldstone explained: “(he) did not need Buck to do that calculation.” (III, 5-16) Mr. Goldstone made
3 assumptions as to (1) a City contribution to a 401(k)-style plan, (2) a turnover rate for employees,
4 (3) how many new employees would be hired, and (4) at what average salary. Even though there was
5 no cap on City’s contribution to a 401(k) plan in the Mayor’s initial proposal, Mr. Goldstone used
6 one in order to do a cost analysis. (III, 71:27-72:9) However, Mr. Goldstone did not recall what
7 assumption he used for the City’s contribution to a 401(k)-style plan. “I’d have to go back to my
8 documents.” (III, 71:24-26) In addition to the actual work done by Buck Consultants, Mr.
9 Goldstone did these calculations and gave them to the Mayor for his consideration in terms of the
10 fiscal impact of his initiative. (III, 71:17-23; 72:10-12)

11 Mr. Goldstone subsequently clarified that he did not destroy the documents related to the
12 fiscal analysis he did on the Mayor’s initiative using the Buck Consultants’ data. He explained:

13 “When I looked through the documents more recently, I realized that they were not
14 included in the documents that were provided (in response to the subpoena). And I
plan on providing those to you.” (III, 113:2-23)

15 “It’s a spreadsheet that would show the calculation.” (III, 113:26-114:1) [Pursuant to a stipulation
16 of the parties due to Mr. Goldstone’s unavailability to return to the hearing on July 23, 2012, to
17 testify further with regard to this spreadsheet, Mr. Goldstone produced the spreadsheet (Exhibit 301)
18 and a Declaration explaining what the spreadsheet reflects and what assumptions he used to prepare
19 it. (Exhibit 302). (See III, 114:2-28)]

20 **11. The Mayor Enlisted and Negotiated With Fellow Ballot Proponents** 21 **Outside the City To Achieve His City Goals**

22 Mayor Sanders never wavered in his belief that the City needed to replace traditional
23 pensions with a 401(k) style plan; nor did he waver in his decision that the means to accomplish this
24 change would be through the citizens’ initiative “so that (he) didn’t go through meet and confer.”
25 (II, 76:7-21) However, “what (he) thought (his) 401(k) initiative would look like . . . is not what
26 ultimately ended up on the ballot.” (II, 76:14-21) His initiative concept involved a set of pension-
27 related, compensation-related reforms which changed as a result of negotiations between him “as an
individual” or “private citizen” and various individuals outside of the City. (II, 77:6-26) These
28 negotiations did *not* occur between him as Mayor and the City’s recognized employee organizations.

1 (II, 77:13-16) Instead, he was negotiating with various individuals outside the City but not, he insists,
2 in his Charter role as Mayor. (II, 77:27-78:2)

3 a. Negotiations With Whom, When And Where

4 According to Mayor Sanders, “it was negotiations with a lot of people” which led to the
5 agreement on a single ballot initiative which was reached sometime between the Mayor’s press
6 conference on March 24, 2011, as reported in Exhibit 49, and early April when the press conference
7 depicted in Exhibit 51 took place to announce the agreement. (II, 96:10-23)

8 “Some of them” were members of the Lincoln Club and the San Diego County Taxpayers
9 Association. (II, 96:24-26) The “principal people” involved in the negotiations were: (1) Bill Lynch
10 with the Lincoln Club; (2) Tom Sudberry, Chair or Past Chair of the Lincoln Club; (3) Lani Lutar,
11 President or CEO of the San Diego County Taxpayers Association; (4) **Steve Williams**, Chair or
12 Chair-Elect of the Lincoln Club; (5) **T. J. Zane**, Executive Director of the Lincoln Club; (6) attorney
13 Paul Robinson, Member of the Lincoln Club’s Board of Directors; and (7) **April Boling**. Williams,
14 Zane and Boling became signatories on the Notice of Intent to Circulate the petition to qualify the
15 initiative for the ballot. (II, 96:27-99:18; emphasis added) “There were probably other people there
16 but I’m having trouble picturing who was at the table.” (II, 99:19-22) Attorneys Lounsbery, Lough
17 and John Witt were also in at least one of the meetings. (II, 104:26-105:26)

18 As far as the time frame for these negotiations, Mayor Sanders recalls “a two, three, four-
19 week process that culminated, obviously, on April 4th or right around there. And I think there were
20 quite a few meetings, and . . . I went to a few of them. I didn’t go to all of them. I participated
21 mainly by talking with different individuals on the phone.” (II, 100:9-15) He believes that he
22 personally attended two or three meetings. (II, 101:18-20; 105:27-28) He went to “kind of the
23 opening one and then to one or two at the end where we were finally down to, well, what’s it going
24 to actually look like because . . . we have to make a decision on whether we’re going to be able to
25 get together or not.” (II, 103:2-7) Councilmember Kevin Faulconer went with him. Although he
26 is “not sure who from our staff would have been there,” he thinks his assistant policy director David
27 Graham attended two or three meetings with him. (II, 100:16-101:20) And there were “probably”
28 other meetings which Mayor Sanders himself did not attend but his Chief of Staff Julie Dubick or

1 Assistant Policy Director David Graham attended. (II, 106:1-8) Aimee Faucett became his Policy
2 Advisor in January 2011 and she may also have attended meetings. (II, 108:4-14) Ms. Faucett agrees
3 that “(she) came in and out of meetings” related to the negotiations which led to an agreement on
4 a single initiative. (IV, 102:8-21)

5 Mayor Sanders explained that this “negotiations table moved.” Mayor Sanders attended a
6 meeting in Paul Robinson’s office – though “it wasn’t necessarily a negotiation at that point – it was
7 a meeting of all the people to try to convince us to work together.” (II, 99:23-100:2) The point being
8 made was that they couldn’t “have two competing initiatives . . . because it is very costly to gather
9 signatures and there wouldn’t be an appetite for two signature-gathering efforts.” There had to be
10 only one initiative so that people could pool their resources. (II, 101:21-102:16) At the time of the
11 meeting in Robinson’s office, Mayor Sanders had actually been raising money through the San
12 Diegans for Pension Reform committee to fund this signature drive, as well as to pay for legal
13 research and advice related to his initiative ideas. (II, 102:6-12) Mayor Sanders also attended a
14 meeting or two at Steve Williams’ downtown office for SENTRE Partners, and another at the
15 Downtown Partnership offices. (II, 100:2-8; 104:9-25)

16 b. The Negotiations Goal of A Single Initiative

17 After his State of the City address, “people in the business and development community”
18 communicated to Mayor Sanders that “you can’t have two proposals. There’s not enough money to
19 fund two proposals and it would be too confusing to the public, so you guys have to get together.”
20 (II, 180:19-181:1) Mayor Sanders believes that Bill Lynch, Lincoln Club member, “played a large
21 role in getting everybody together.” (II, 114:5-17) He “acted more or less as the middleman, the one
22 who kept people at the table, kept people calling people, and wanted to make sure they continued.”
23 (II, 187:3-5) He explained:

24 “I think everyone played a part in this. I think we all played different roles, and I
25 think that Bill (Lynch) is the one who kept everybody coming back together. So I
26 think he did a great job.” (II, 115:5-8)

26 Mayor Sanders believes that Craig Gustafson’s article published on the Union Tribune’s
27 *SignOnSanDiego* website on April 5, 2011, accurately reported that the ballot measure “combined
28 elements from what (Mayor Sanders) was proposing with Councilmember Kevin Faulconer – with

1 ideas from Councilmember Carl DeMaio and business leaders. (Exhibit 52; II, 120:10-28) Mayor
2 Sanders acknowledges that the “official position” of the Lincoln Club and the San Diego County
3 Taxpayers Association was that “they thought the DeMaio plan was better than ours because it was
4 tougher.” (II, 121:28-122:9) However, as to the description of the proposed ballot measure as
5 having been the result of weeks of negotiations “between Faulconer and Sanders on one side and
6 DeMaio, the pro-business Lincoln Club, and the San Diego County Taxpayers Association on the
7 other side,” Mayor Sanders puts it differently:

8 “There was certainly a side we were on with the proposal that we came up with. I
9 believe that some Lincoln Club members, a lot of business community members
10 agreed with what we were doing. I think there was another side at the Lincoln Club
11 probably, and Taxpayers and business leaders, some who felt that it didn’t go far
12 enough and they were on the other side. And they were trying to get these two
13 measures joined together.” (II, 121:14-27)

14 c. The Substantive Outcome of the Negotiations

15 On substance, Mayor Sanders put forward his initiative in those meetings because “(he) felt
16 that it was a good initiative. . . . that we had some things in place that I felt more comfortable with,
17 and I wasn’t willing to give up on those at that point. . . . I was trying to exclude all of public safety
18 (police, firefighters and lifeguards). I was trying to put a freeze on payroll, which is very different
19 than a cap on pensionable pay. . . . I don’t believe that we had a set limit on the (City’s) contributions
20 (to a 401(k) plan). We thought that was more negotiable.” Others in the meetings felt that there
21 were other “equally or more important” issues that “they wanted to see as part of it or to substitute
22 for part of it.” (II, 102:17-104:9) Some supported the pension reform proposals put forward by
23 Councilmember Carl DeMaio in a “roadmap to recovery” in late 2010. (II, 179:6-23; 180:12-18;
24 181:2-7; 185:10-18)

25 Contrary to the City’s Opening Statement in which Assistant City Attorney Worley
26 characterized Mayor Sanders as the “loser” in these negotiations – i.e., “he wasn’t the parent who
27 really gave the DNA to it,” Mayor Sanders denies that, in the end, he agreed with the DeMaio
28 “roadmap to recovery” plan.

“No. In the end, I didn’t agree with that. And, in fact, I think that we were able to
change a couple of things that I thought were critically important. Number one was
keeping police out of a defined contribution plan When we give a test for police
officers, we have a very difficult time hiring, recruiting, getting them through a
background process and retaining. And I didn’t feel that, at this point, that would

1 make sense because of that factor. . . . We don't have a problem retaining firefighters,
2 and it wouldn't affect any current firefighters. My feeling was that I wanted to keep
3 public safety together. I've always felt that it was better when they were together on
4 issues. And finally, I didn't have a choice on this. If I wanted to keep police in a
5 competitive position so that we could hire police officers and retain and compete
6 with other cities, then I was going to have to give up some other things." (II, 122:10-
7 123:10)

8 Mayor Sanders acknowledges that this process of compromising went on between him and
9 these various other individuals he has described. As to the quote Gustafson attributes to Lani Lutar,
10 President of the Taxpayers Association, in his published *SignOnSanDiego* article – that the result
11 of these negotiations was a “beautiful marriage of ideas” – Mayor Sanders is “not sure” that he
12 “would have characterized it necessarily that way.” (Exhibit 52; II, 123:11-21) He puts it this way:

13 “I think we had difficult negotiations, and I think we came up with something that
14 I think is important for the City in the long run. I don't have to like every piece of
15 it, but I felt that I had gotten the pieces that I really needed, which was a 401(k) and
16 having police remain competitive so that we can hire and retain. . . . I don't know that
17 you're ever satisfied in a negotiation. I think negotiations always leave you feeling
18 I could have done this or I wished I'd have got this. I guess the way I felt was that
19 one ballot initiative was moving forward. I felt it was an extremely important ballot
20 initiative, and that's the reason I supported it.” (II, 123:21-124:9)

21 d. The Chief of Staff Participated in the Negotiations

22 Ms. Dubick was involved in the negotiations with other citizens about the Mayor's initiative
23 and what it would look like. (III, 174:14-17) For this purpose, she attended “more than five and less
24 than 20” meetings. (III, 174:18-20) Sometimes the Mayor was present and at other times he was not.
25 (III, 174:21-23) There was a group of people who regularly attended the meetings which Ms. Dubick
26 attended – representatives from the Lincoln Club, particularly **T. J. Zane, April Boling, Steve
27 Williams**, and Bill Lynch, as well as representatives from the San Diego County Taxpayers
28 Association, particularly its President Lani Lutar and another official Chris Cate. Someone
associated with Carl DeMaio was often there, as well as attorney Paul Robinson. (III, 174:24-
176:18; emphasis added)

According to Ms. Dubick, “the subject matter of these meetings was an attempt to arrive at
an initiative that could be put to the voters, rather than two or multiple initiatives, and ways to get
at that, plus discussion about fund-raising.” (III, 176:17-23) As to whether these meetings involved
“a negotiation regarding what the final initiative would look like,” Ms. Dubick explains:

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1 “Sometimes. Sometimes they were just everybody trying to get along and talking
2 about fund-raising. It’s hard to negotiate with that many people, but sometimes they
3 were that.” (III, 176:24-177:3)

4 e. The Deputy Chief of Staff Participated in the Negotiations

5 Aimee Faucett became Mayor Sanders’ Deputy Chief of Staff and Director of Policy on
6 January 15, 2011. (IV, 10:24-11:1)

7 Ms. Faucett recalls that, in addition to her attendance at the meeting with the larger group of
8 business leaders and the Mayor in December, she attended other meetings on the subject of the
9 Mayor’s pension reform initiative but with smaller gatherings of some of the same people. (IV,
10 92:11-22) She participated in this type of meeting until the initiative was filed with the City – “an
11 intent.” (IV, 92:23-27) She attended such meetings “a handful of times,” meaning “I don’t know,
12 less than half a dozen.” (IV, 92:28-93:9) Ms. Dubick was “sometimes” in these meetings with her
13 but she doesn’t recall any particular other people from the Mayor’s staff who were also present when
14 she was – “not to say they weren’t there.” (IV, 93:10-20)

15 Ms. Faucett testified that occasionally these meetings took place at the law offices of Hecht
16 and Solbery through Paul Robinson who is a member of the Lincoln Club Board, and there were also
17 meetings at Steve Williams’ office. He is with Sentre Partners and is the Chair of the San Diego
18 Lincoln Club Board – and actually became one of the official ballot proponents who filed the
19 paperwork. (IV, 94:3-25) April Boling was in attendance at a few of these meetings and she also
20 became one of the official ballot proponents. Ms. Faucett has known Ms. Boling since 1996 when
21 Ms. Faucett became Council Representative for Councilmember Judy McCarty – and, in fact, at one
22 point Ms. Boling ran unsuccessfully to fill that District Seven Council seat. The Executive Director
23 of the Lincoln Club, T. J. Zane, was also in attendance at these meetings. (IV, 94:26-95:13) She also
24 attended meetings at Tom Shepard’s office. (IV, 95:21-25)

25 f. The Chief Operating Officer Attended the Negotiations

26 COO Jay Goldstone attended one of these “negotiations” meetings between the Mayor and
27 “certain individuals outside the City about what the initiative would look like.” (III, 66:2-7) Either
28 Mayor Sanders or his Chief of Staff Julie Dubick asked Mr. Goldstone if he was willing to attend
the meeting to discuss the fiscal impacts of what was under discussion – i.e., who would be covered

1 under the 401(k)-style plan, specific contribution caps for the 401(k) plan, a cap on pensionable pay
2 versus a cap on total payroll. (III, 69:21-70:2; 70:24-71:4) As to the actual timing of the meeting,
3 Mr. Goldstone does not remember the date or even whether it was in February or March but it was
4 “definitely” before the press conference announcing the deal on April 5, 2011. (III, 70:12-23)

5 Mr. Goldstone recalls that the meeting he attended was on a Saturday at the law offices of
6 attorney Paul Robinson who had been active in City matters. The meeting lasted “two hours or so.”
7 Mayor Sanders was present, as well as his Chief of Staff Julie Dubick and his Deputy Chief of Staff
8 Aimee Faucett. Mr. Goldstone believes that T. J. Zane was there and April Boling “might have
9 been” as well. “There could have been 15 or 20 people” there in Paul Robinson’s conference room.
10 (III, 66:8-69:7) He does “not recall” if the City Attorney was there but he is *not* testifying that he was
11 *not* there. (III, 67:13-25) He does not recall if Councilmember Faulconer was there but he does recall
12 that Councilmember DeMaio was not. (III, 74:9-12)

13 As COO Goldstone understood it, the purpose of the Saturday meeting in Robinson’s office
14 was to see if a compromise agreement could be reached to have one ballot initiative. As to whether
15 this was a negotiation process, Mr. Goldstone explained:

16 “It essentially was an acknowledgment that they needed one proposal, that they were
17 not going to support the Mayor’s original concept, and that they were willing to take
18 their even more significant changes forward with or without the Mayor, and they
19 were hoping to try to reach an agreement.” (III, 69:8-12; 73:2-11)

20 As Mr. Goldstone remembers it, no agreement was reached in that meeting but an agreement was
21 eventually reached as a result, he assumes, of other meetings after that one. (III, 69:13-20) However,
22 he believes that it was at that (Saturday) meeting (in Paul Robinson’s office) when the Mayor agreed
23 to include firefighters in the 401(k)-style plan but not police officers – though “there were other
24 components that still needed to be worked out.” (III, 72:13-19)

25 **12. The Mayor’s Group Filed Lobbying Disclosure Forms Identifying Their
26 Work As Lobbying Over the “Municipal Decision” of Employee Pension
27 Revisions to the Charter**

28 The City’s Municipal Lobbying Ordinance is codified in San Diego Municipal Code, Article
7, Division 40. (Exhibit 14) For purposes of the lobbying ordinance, the City maintains a list of City
officials, unclassified officers and employees who trigger the disclosure requirement when an
attempt is made to influence them about a municipal decision. Mayor Sanders is on this list.

1 (Exhibit 122) Mayor Sanders agrees that, although he does not have a vote on the City Council, he
2 does “obviously have power and influence,” such that, as a City official and the elected Mayor of
3 the City, he is one of the people to whom the municipal lobbying ordinance applies when people
4 attempt to influence his decision making on municipal matters. (II, 143:11-144:28) Mayor Sanders
5 also acknowledges that the disclosure requirements of this Municipal Lobbying Law are not triggered
6 if someone is trying to influence what he does with his own back or front yard at his home in San
7 Diego; this law has to do with his municipal decision-making in his capacity as Mayor. (II, 145:1-8)

8 Mayor Sanders recalls that attorneys Lounsbery, Witt and Lough participated in the meeting
9 *at the Downtown Partnership* which he attended during the negotiations which led to the single
10 pension reform ballot initiative. (II, 147:15-23; 104:26-105:26; 100:2-8; 104:9-25) Mayor Sanders
11 explains: “We were simply having a conversation about the legality of certain pension issues.” (II,
12 148:11-16) For his part, COO Goldstone’s memory is that attorneys from the Lounsbery firm –
13 including Ken Lounsbery and John Witt and maybe Jim Lough – “may have been” at the Saturday
14 meeting he attended in Paul Robinson’s office. (III, 77:7-78:5)

15 On the other hand, the City’s only witness during its case, was attorney Ken Lounsbery. His
16 firm is Lounsbery, Ferguson, Altona & Peak. Mr. Lounsbery testified that his firm filed two
17 lobbying reports – covering the first two quarters of 2011 – which he signed under penalty of perjury.
18 (Exhibits 125 & 126; IV, 279:17-19; 280:13-14) He felt that it was prudent to file these disclosures
19 because “we were retained by the San Diego County Taxpayers Association to work on the measure,
20 which would likely involve discussions with the City.” (IV, 280:15-22) The “municipal decision”
21 which he described on these lobbying disclosure forms was the “revision of City employee pension
22 proposals,” with the “outcome” being sought “an amendment of the City Charter by election ballot.”
23 (Exhibits 125 & 126; II, 280:23-281:3)

24 According to Mr. Lounsbery, the first quarter report which disclosed a payment to his firm
25 of \$18,000 by the San Diego County Taxpayers Association related to *one meeting* which he and
26 fellow firm attorneys Jim Lough, Felix Tinkov, and John Witt attended on Wednesday, March 30,
27 2011, with all of the persons they identified on the disclosure form in attendance – **Mayor Sanders,**
28 **Councilmember Faulconer, City Attorney Jan Goldsmith, Jay Goldstone, and Julie Dubick.**

1 **“They were all at the March 30 meeting.”** (Exhibit 125; IV, 281:24-282:4; 284:8-12; emphasis
2 added) Mr. Lounsbery insists that, although the disclosure statement uses the term “lobbying,” the
3 “conduct was not consistent with lobbying.” It was a meeting and the Mayor was “separately
4 represented” by “his own attorney – Nathan Kowalski.” (IV, 281:4-14; 282:23-27) However, Mr.
5 Lounsbery does not know whether Mr. Kowalski had done any legal work on the issues related to
6 the initiative. (IV, 283:3-5)

7 Mr. Goldstone confirmed that the only contact *he* had with the four attorneys identified on
8 this lobbying disclosure form on the specific “municipal decision” of revising City employee pension
9 proposals by an “amendment of the City Charter by election ballot” – was during the meeting in Paul
10 Robinson’s office. (Exhibits 125-126; 78:6-80:8; 82:10-83:5; 83:16-21) Thus, if Mr. Lounsbery is
11 correct, the “one” negotiations meeting which COO Goldsmith recalls attending with the Mayor and
12 others was *not* on a Saturday but on Wednesday, March 30, 2011 – and City Attorney Jan Goldsmith
13 *was also present*. However, Mr. Goldstone is not aware of the contacts between the Lounsbery
14 firm’s attorneys and others identified on the lobbying disclosure form. (III, 80:9-11)

15 And Mr. Lounsbery himself is “sure” that his client (San Diego County Taxpayers
16 Association) met with Mayor Sanders “more than once.” (IV, 281:4-11) In fact, Mr. Lounsbery
17 testified that “it could be true” that there had been several meetings that the Mayor had participated
18 in and/or his staff had participated in with a number of individuals – “I’ve heard that testimony
19 today.” (IV, 281:20-23) Indeed, Mr. Lounsbery knew when he was doing work for his client on this
20 initiative that his client – and others his client was working with – attended additional meetings with
21 some or all of the individuals listed on the lobbying disclosure forms he signed. (IV, 282:5-14;
22 Exhibit 125-126) He also admitted that he was not “fully aware” of the extent of communications
23 between his client (San Diego County Taxpayers Association) and the Mayor’s Office – in particular,
24 Jay Goldstone and Julie Dubick. (IV, 283:10-15)

25 Indeed, Mr. Lounsbery was sufficiently “out of the loop” that he did not know if the Mayor
26 and others held a press conference on April 5, 2011 – just days after this meeting – to announce the
27 agreed-upon single initiative, and he was not present. (IV, 286:4-9)

28 ///

1 **13. The Mayor’s Chief of Staff, His COO, And The City Attorney Reviewed**
2 **Drafts To Shape The Text of the Initiative Being Written To Achieve**
3 **The Proponents Agreed-Upon Objectives**

4 a. Attorney Lounsbery’s Firm Did the Drafting To Embody What All of
5 the Proponents Had Agreed Upon

6 When called as the City’s only witness in its case, Mr. Lounsbery testified on direct that (1)
7 his firm drafted Proposition B (the CPR Initiative); and (2) the San Diego County Taxpayers
8 Association, not Mayor Jerry Sanders, paid for his firm’s services. (IV, 275:22-276:11)

9 On cross-examination, Mr. Lounsbery admitted that he was “more a strategist” and that his
10 partner, attorney Jim Lough, was the “craftsman – he was the principal re-drafts person.” (IV,
11 283:15-284:6) Since it was Mr. Lough who did the work, Mr. Lounsbery does not know when the
12 writing began but it “went on for several weeks,” and his “best recollection” is that “it was complete
13 on or about the date that we had the March 30 meeting.” (IV, 286:10-20)

14 Mr. Lounsbery was aware that the draft language of the initiative had been provided to the
15 Mayor. However, he did not learn from his client that the draft language of the initiative had been
16 provided to the Mayor’s staff for review and comment; nor did he know that City’s COO Jay
17 Goldstone was reviewing language related to this initiative. (IV, 282:15-23)

18 Nevertheless, Mr. Lounsbery agrees that the writer(s) or drafter(s) – however many
19 participated – were trying to embody into language the concepts and ideas and provisions that were
20 being agreed upon by the proponents of the initiative – not just his client group as proponents but
21 all of the proponents “involved in the process of determining what would be in the initiative.” (IV,
22 284:20-285:6)

23 b. The Mayor Made Sure the Text Was Right Before He Announced
24 The Proponents’ Deal On April 5, 2011

25 Mayor Sanders testified that he “thinks” it was the Lounsbery firm that drafted the actual
26 ballot language but he’s “not positive.” (II, 182:13-17) However, Mayor Sanders had somebody
27 review it – “somebody legal reviewed it.” (II, 191:12-17)

28 As to the actual final text of the proposed Charter amendment, Mayor Sanders had not read
29 it “first line to last line” but he had been briefed and he knew what the “primary substance of it was,”
30 and certainly the “points (he) thought were important.” (Exhibit 54, Bates 691-699; II, 130:17-

1 131:7) When Mayor Sanders stood up in front of the cameras on April 5, 2011, to say he had
2 reached a deal and it was big deal and it would be a national model, he was talking about the
3 contents of this initiative. (Exhibit 54; II, 131:8-13)

4 c. The Chief of Staff Participated in the Drafting

5 While the negotiations over the initiative's contents were going on, the Mayor's Chief of
6 Staff Julie Dubick "certainly" reviewed the language of the actual initiative on the Mayor's behalf
7 and she "knows that Jay Goldstone reviewed language." (III, 178:21-25) Ms. Dubick also knew that
8 City Attorney Jan Goldsmith had input into the language of the initiative as it finally appeared in the
9 form for signature gathering. (III, 183:3-15)

10 Ms. Dubick looked at drafts drafted by attorneys hired by, she thinks, the Taxpayers
11 Association or by the Lincoln Club – or it might have been both of them. (III, 179:5-10) She
12 understood that it was attorneys from the Lounsbery firm who were involved in drafting what she
13 was reviewing. (III, 180:12-15)

14 Her "best memory" of when she reviewed the first draft of language for this initiative is
15 "about March 2011," and there was more than one draft which she was getting from Lani Lutar,
16 President of the San Diego County Taxpayers Association. (III, 179:16-26) She did have comments
17 and feedback on these drafts which she provided "primarily" to Lani (Lutar) or to Bill Lynch at the
18 Lincoln Club – or perhaps even by direct conversation with Mr. Lough and maybe Mr. Lounsbery.
19 (III, 179:27-180:11; 182:23-26) She probably also saw "some" of the feedback and comments on the
20 drafts which Mr. Goldstone provided based on his review of the drafts. (III, 182:27-183:2)

21 By reference to the lobbying disclosure report which the Lounsbery firm filed under penalty
22 of perjury on April 25, 2011, for the first quarter of the year, January 1st through March 31st, Ms.
23 Dubick testified that she "either attended a meeting or spoke by telephone with at least Jim (Lough),
24 if not Ken (Lounsbery). (Exhibit 125; III, 181:5-182:13) And she agrees that the purpose of the
25 City's Municipal Lobbying Ordinance is to assure the public that there is disclosure of efforts by
26 certain persons to influence the municipal decision-making of specified City officials. (III, 180:16-
27 181:4)

28 ///

1 Ms. Dubick's memory is that the initiative language was finalized "very close" to the press
2 conference depicted in Exhibit 51. (III, 183:27-184:6) Looking at Exhibit 54, which is a
3 Memorandum from the City Clerk to the Honorable Mayor, Council President, and Councilmembers
4 dated April 4, 2011, with a Notice of Intent to Circulate Charter Amendment Initiative Petition, Ms.
5 Dubick confirmed that the actual text of the proposition charter amendment entitled "Comprehensive
6 Pension Reform for San Diego" is the text that was the subject of the drafts she was reviewing and
7 commenting on before this final version was achieved. (III, 184:10-185:3) In fact, Ms. Dubick
8 agrees that one of the Mayor's objectives and one of her concerns when she was reviewing the drafts
9 presented to her was to have the initiative be written in a manner that would be legally defensible
10 and ultimately enforceable. (Exhibit 57; III, 191:21-192:18)

11 d. The COO Participated in the Drafting

12 "Probably a week or so" before the press conference on April 5, 2011, COO Jay Goldstone
13 received a draft of the ballot initiative language from the Taxpayers Association – either by e-mail
14 or in person. (III, 74:26-75:17) Since no e-mail showing such a transmittal was produced in response
15 to the subpoena served on him, Mr. Goldstone agrees that he "would have had an e-mail if it came
16 in through (his) work e-mails." He acknowledges that he received "a few" e-mails on his personal
17 e-mail on the subject matter of the Mayor's initiative. (III, 75:18-76:7) He elaborated: "I don't
18 know if I was on a particular list, but there were a couple of e-mails that were sent around that may
19 have had this (draft initiative) language in there or other correspondence." (III, 76:8-13)

20 Mr. Goldstone explained that, if he had received e-mails on his personal e-mail account from
21 the San Diego County Taxpayers Association, he would have deleted them within some number of
22 days after receipt. Thus, although he checked his personal e-mail account to locate any e-mails
23 which might be responsive to the subpoena, he didn't find any personal e-mails relating to the
24 subject of the Mayor's initiative which he had kept. (III, 80:26-82:3) However, he confirms that he
25 recalls receiving one or more e-mails on the subject of the Mayor's initiative on his personal e-mail
26 account and that he deleted them before being served with the subpoena. (III, 82:4-9)

27 Mr. Goldstone understood that it was Ken Lounsbery's firm which was involved in drafting
28 the language that was sent to him. (III, 77:7-12; 80:19-22) He does not remember if he heard this

1 “from the San Diego County Taxpayers Association itself or from somebody else.” (III, 80:23-25)
2 What he received from the San Diego County Taxpayers Association was a draft, not the final
3 version, of the initiative language. It came to him from Lani Lutar, President of the San Diego
4 County Taxpayers Association, and he did offer his input back to her by e-mail and “we had some
5 phone conversations.” (III, 83:22-84:13) “During this period,” all of his contacts with Ms. Lutar
6 were either over the telephone or via e-mail and he “doesn’t believe” she came to his office for any
7 meetings related to the initiative. (III, 86:17-23) He “doesn’t recall” if there were “other people
8 included in the (e-mail) transmittal” or if City Attorney Jan Goldsmith was “one of the recipients.”
9 (III, 84:14-22) Mr. Goldstone also “doesn’t recall” if Goldsmith was included on any e-mails at his
10 private e-mail address when he himself was getting e-mails on this subject at his private e-mail
11 address. (III, 84:23-26)

12 Mr. Goldstone did not keep a copy of the feedback he sent to Ms. Lutar in response to the
13 draft she sent him. (III, 84:27-85:1) And there was more than one written response to her – “there
14 may have been multiple correspondence” because there were other drafts that followed on that first
15 draft to which he had offered his comments. His “ballpark estimate” is that there “might have been
16 two or three” drafts. (III, 85:2-11) Mr. Goldstone “may have responded via e-mail,” by accessing
17 his personal e-mail account at the office – “but most of these were done in the evenings or on
18 weekends at my home.” (III, 85:12-27)

19 Mr. Goldstone “may have” also conferred with the Mayor’s Chief of Staff Julie Dubick, who
20 is an attorney, about the text he was reviewing. (III, 85:28-86:8) He also “may have” had more than
21 one conversation with her about the drafts he was reviewing. (III, 86:12-16) But he “doesn’t recall”
22 if Ms. Dubick was the principal point person for the Mayor on getting this initiative language
23 finalized to his satisfaction. (III, 86:4-6) He did understand, though, that Ms. Dubick and perhaps
24 Aimee Faucett, the Mayor’s Director of Policy/Deputy Chief of staff were providing input on behalf
25 of Mayor Sanders. (III, 87:6-8) He also believes that City Attorney Jan Goldsmith was providing
26 input though he “doesn’t recall” on what basis he believes this: “I just have the impression that he
27 had provided some input.” (III, 87:9-14) And he has heard the City Attorney himself say more than
28 once that he *did provide input* related to the section amending the City Charter, Article IX,

1 Retirement of Employees, and the substantially equal nature of contributions from the City and its
2 employees. (III, 87:18-27)

3 When he was reviewing and commenting on draft versions of the initiative language, COO
4 Goldstone understood that Mayor Sanders was a proponent of this compromise initiative. (III,
5 88:20-89:3)

6 e. The Deputy Chief of Staff Knew That Ms. Dubick, Mr. Goldstone
7 and the City Attorney Were Involved With the Drafting

8 Deputy Chief of Staff Aimee Faucett confirmed that she knew that Ms. Dubick and Jay
9 Goldstone had the initiative language under review. (IV, 102:27-103:13) She understood that the
10 drafts were coming to them through the San Diego County Taxpayers Association and the Lincoln
11 Club and that those two groups were paying attorneys Ken Lounsbury and, she thinks, Jim Lough.
12 (IV, 103:26-104:15) She had also heard through conversations that City Attorney Jan Goldsmith was
13 also one of the persons who was reviewing the draft language. (IV, 104:16-25) In fact, when these
14 drafts were being circulated, she “presumed that the City Attorney was supportive” of this initiative
15 effort because, in addition to the Mayor’s announcement at the State of the City which included
16 reference to the City Attorney, she had “heard it through conversations.” (IV, 105:3-17)

17 Thus, the two highest-ranking direct reports to Mayor Sanders – his Chief of Staff and his
18 Chief Operating Officer – brought their legal, policy, finance and operational expertise to bear to
19 assist the Mayor in assuring that the final version of the language for this initiative reflected the
20 agreed-upon terms and would be, as Ms. Dubick testified: “legally defensible and ultimately
21 enforceable.” Indeed, even the City Attorney – who was prohibited by City Charter, Article V,
22 Section 40 from engaging in the private practice of law – participated in the drafting exercise. While
23 the City prefers to focus on the drafting role played by the Lounsbury firm, Mr. Lounsbury himself
24 acknowledged that this drafting was done for *all of the proponents* not just his client group the San
25 Diego County Taxpayers Association.

26 **14. Three of The Mayor’s Fellow Proponents Filed The Notice of Intent to**
27 **Circulate Petition Which Was Timed to Coincide With The Press**
28 **Conference Mayor Sanders Led On April 5, 2011**

29 Exhibit 54 is a Memorandum from the City Clerk Elizabeth Maland to the Honorable Mayor,
30 Council President and Councilmembers, advising them that a Notice of Intent to Circulate Charter

1 Amendment Initiative Petition has been filed and attaching a copy. The first page of the attachment
2 to the City Clerk's Memorandum is a letter signed by three of the proponents which is addressed to
3 the City Clerk and originally dated April 5, 2011. However, the typewritten April 5th date has been
4 written over by hand to read April 4th.

5 In her Memorandum, the City Clerk advises the Mayor and Council that the City Attorney
6 must prepare a ballot title and summary, and the proponents must then publish the Notice of Intent
7 in a newspaper of general circulation before the petition may be circulated. (Exhibit 54)

8 Mayor Sanders knew when he was having the press conference on April 5, 2011, that they
9 were filing or had filed this notice of intent with the City Clerk related to the initiative effort being
10 announced at the press conference. (Exhibit 54; II, 128:28-130:13) As to the three signatories of
11 the Notice of Intent to Circulate, Mayor Sanders confirmed that they were among the "principal
12 people" involved in the negotiations which led to the single initiative announced at the press
13 conference on April 5, 2011. (II, 96:27-99:18)

14 Catherine A. Boling is actually April Boling who stood with Mayor Sanders at the press
15 conference on April 5, 2011; she had previously run for a City Council seat for District 7 and lost.
16 T. J. Zane, as previously described, was the President and CEO or the Executive Director of the
17 Lincoln Club; he also stood with the Mayor at the press conference on April 5, 2011. Steven
18 Williams was an officer of the Lincoln Club and the person associated with SENTRE Partners who
19 hosted at least one of the meetings which the Mayor attended during the negotiations which led to
20 the "big deal" being announced during the press conference on April 5, 2011. (Exhibit 51; II,
21 131:14-132:24; 95:28-96:3)

22 COO Goldstone acknowledged that City Attorney Jan Goldsmith has made reference to his
23 relationship with the Lincoln Club, and has said that he and April Boling "know each other." Indeed,
24 Mr. Goldsmith "may have" described Boling as a close friend – he doesn't recall. (III, 88:4-14)

25 **15. Mayor Sanders Approved One of His Fellow Proponents To Run The**
26 **Campaign From The Lincoln Club**

27 Once Mayor Sanders reached agreement with the others with whom he was negotiating about
28 what the final language would be, the only discussion he had about how it would go forward and be
put on the ballot was to say that it would be a signature process. He was asked and did agree that

1 T. J. Zane (a signatory on the Notice of Intent) could run the ballot initiative from the Lincoln Club.
2 (II, 191:21-192:10)

3 **16. Mayor Sanders Led The Press Conference Outside City Hall To**
4 **Announce Agreement On A Single Initiative**

5 Exhibit 51 is a photograph of Mayor Sanders standing behind a podium with the sign
6 “Pension Reform Now” surrounded by a number of people. Mayor Sanders agrees that this press
7 conference took place on Tuesday, April 5, 2011. (Exhibit 52; II, 119:15-24; cf. II, 94:5-95:15)

8 At this press conference, Mayor Sanders, Councilmembers DeMaio and Faulconer, and the
9 other people in attendance “announced that (they) had reached an agreement on a single ballot
10 initiative.” (II, 96:4-9) Mayor Sanders agrees that the *SignOnSanDiego* article authored by Craig
11 Gustafson and published at 4:04 a.m. on April 5, 2011, accurately describes that “proponents of
12 dueling ballot measures to curtail San Diego City pensions reached a compromise Monday to
13 combine forces behind a single initiative for the June 2012 ballot.” (Exhibit 52; II, 119:25-120:5)

14 Mayor Sanders agrees that “there were a lot of cameras” at the press conference and that
15 “probably” every station in San Diego broadcast some form of coverage about what he had
16 announced. (II, 115:9-22) Although he was introduced and referred to as “Mayor Jerry Sanders”
17 during this press conference, he has no recollection whether he said at any time during it that he was
18 there as “private citizen Jerry Sanders.” (II, 119:5-14) He acknowledges that his staff member Alex
19 Roth was present at the press conference. (II, 116:17-117:2) His Director of Communications,
20 Darren Pudgil, was also present but he “(doesn’t) remember what (his) involvement was.” (IV,
21 229:1-8; 234:4-7) The Mayor’s Deputy Chief of Staff Aimee Faucett “may have attended” – she
22 doesn’t recall. (IV, 106:16-22)

23 Mayor Sanders identified the following individuals who were present with him for this
24 announcement: Councilmember Carl DeMaio; Council President Pro Tem Kevin Faulconer, City
25 Attorney Jan Goldsmith, April Boling (one of the proponents who signed the initiative), and T. J.
26 Zane (another proponent who signed the initiative). (Exhibit 51; II, 95:3-27) Lani Lutar, President
27 of the San Diego County Taxpayers Association also participated in the negotiating meetings and
28 is standing next to City Attorney Jan Goldsmith. (III, 197:15-19; IV, 107:21-27)) As to whether the
third official ballot proponent, Steven Williams, was also present, Mayor Sanders acknowledges that

1 there are a couple of people he cannot make out in the photograph but he doesn't believe he sees him
2 there. (II, 95:28-96:3)

3 The press conference was on the City Concourse in the central plaza area outside City Hall;
4 it was on a Tuesday during what was a normal workday for City employees. (II, 112:10-19) Mayor
5 Sanders "has no clue" who arranged the press conference. Someone prepared remarks for him –
6 either his Director of Communications Darren Pudgil or "somebody from the committee." (II,
7 112:24-28) Mayor Sanders asserts that he is "not bright enough" to do a press conference without
8 prepared written remarks which he had each time he did a press conference. (II, 113:1-5; 10-15) He
9 has no recollection as to who prepared his remarks for any of the press conferences related to the
10 initiative, including this one in early April. (II, 113:16-22)

11 Mayor Sanders stood at the podium bedecked with the sign "Pension Reform Now" – with
12 the same banner hanging as a backdrop over the assembled group – and said: "We've made progress
13 over the last few years in reforming our (pension) system. Today we're taking the next step and let
14 me tell you it's a big one." (Exhibit 159, KUSI videoclip)

15 Councilmember Carl DeMaio took to the podium to say: "The biggest appreciation that I
16 have today is for our Mayor." Then, turning to him: "Mr. Mayor, it was your leadership that allowed
17 us to reach the deal we have today." (Exhibit 159, KUSI videoclip)

18 While Mayor Sanders does not specifically recall his remarks at the press conference, he does
19 agree that he "probably" said what Craig Gustafson's Union Tribune *SignOnSanDiego* article
20 reported he said — i.e., that the measure would create a national model and that:

21 "We worked with a coalition of concerned citizens and the result is a legally
22 defensible measure that will save taxpayers hundreds of millions of dollars that can
23 be used to enhance vital City services for decades to come." (Exhibit 52; II, 121:1-
13; *See also* 113:23-114:4)

24 Referring to the quote which Craig Gustafson attributes to **T. J. Zane** (Executive Director
25 of the Lincoln Club and "official" ballot proponent) in his published Union Tribune
26 *SignOnSanDiego* article on April 5, 2011 – about a "willingness on the part of all stakeholders to
27 come to a compromise" – Mayor Sanders agrees that City employees and their recognized employee
28 organizations were not among the "stakeholders" who reached this compromise:

1 “Once again, I felt this was important to be a citizens’ initiative and there’s no meet
2 and confer consulting obligations on that.” (Exhibit 52; II, 124:10-125:3; emphasis
added)

3 The major points of the initiative deal, as highlighted in the KUSI/Channel 9 video clip of
4 the press conference on April 5, 2011, included (1) an end to so-called pension “spiking” by using
5 the highest three years of compensation instead of the highest one year; (2) blocking employees’
6 right to vote on changes to the pension plan under Charter section 143.1; (3) a 401(k) plan to replace
7 the defined benefit plan; and (4) a pensionable pay freeze. The 401(k) plan was, of course, the
8 centerpiece of what Mayor Sanders set in motion back in November 2010, with the only issue having
9 been whether or not firefighters and lifeguards would be covered under the new 401(k) plan or not.
10 The other major points of the initiative, as reported in the video clip, had also been part of his
11 proposal before the “agreement,” except that he had favored a payroll cap instead of a pensionable
12 pay freeze as the means to control pension costs. (II, 117:13-119:4) Exhibit 57 is a similar Fox News
13 recap of the principal features of the initiative announced at the press conference on April 5, 2011,
14 with the piece entitled: “Pension Reformers Unite Behind Compromise Plan.”

15 **17. Mayor Sanders Admits That He Was An Enthusiastic *Proponent* of This**
16 **Initiative**

17 Mayor Sanders agrees that the process for this Comprehensive Pension Reform Initiative
18 began with his announcement on November 19, 2010, and ended with the passage of this initiative
19 at the polls on June 5, 2012. (II, 188:9-22) Indeed, Mayor Sanders’ initiative plans, as he had
20 announced them on the City’s website on November 19, 2010, had finally reached the signature-
gathering stage after his press conference on April 5, 2011. As he had predicted:

21 “Mayor will push ballot measure to eliminate traditional pensions for new hires at
22 City. . . (the Mayor) will place an initiative on the ballot to eliminate traditional
23 pensions and replace them for non-safety new hires with a 401(k) style plan. . . (the
24 Mayor) and Councilmember Kevin Faulconer “will craft the ballot initiative language
and lead the signature-gathering effort to place the initiative on the ballot.” (Exhibit
25 25; II, 7:10-9:21)

25 While he was not one of the three official proponents who signed the Notice of Intent to
26 Circulate Charter Amendment Initiative Petition, Mayor Sanders agrees that, during the negotiations
27 that resulted in this initiative, he didn’t get everything he wanted but he “got many things (he)
28 wanted,” and that he was “an enthusiastic proponent of this initiative.” (II, 188:23-189:3) Indeed,

1 the Mayor's Director of Communications remembers Mayor Sanders saying that this pension reform
2 ballot initiative was the most important initiative in the City's history. (IV, 226:4-14)

3 **18. COO Goldstone Applied His Financial and Operational Expertise To**
4 **Conduct A Further Analysis of the Compromise Single Initiative**

5 After the Mayor became a proponent of the compromise single initiative, COO Goldstone
6 reviewed a fiscal analysis that was done relating to the single agreed-upon initiative. (III, 91:7-19)
7 This analysis included elements of what Buck Consultants had done for the Mayor initially, as well
8 as other work done by another actuary, Bill Sheffler – but Mr. Goldstone does not know who
9 retained him. (III, 91:20-92:6) He received the work product related to the new combined analysis
10 from Lani Lutar at the Taxpayers Association but he does not recall if it came to him on his personal
11 e-mail. (III, 92:7-23) He looked at it “from a reasonableness standpoint” based on what he knew
12 about the results from the Mayor's initial proposal because “there were some conclusions that could
13 be drawn that were similar” and others where he had to rely on the Sheffler actuarial work. (III,
14 92:24-93:3) Mr. Goldstone gave his comments – which related to what he thought the savings might
15 be based on that information – directly to Ms. Lutar at the Taxpayers Association. (III, 93:8-11) He
16 “may have” also given comments or interviews to the media about the fiscal analysis related to the
17 new merged single initiative for which Mayor Sanders was a proponent. (III, 94:10-13)

18 **19. After the Press Conference on April 5, 2011, The Mayor Transferred All**
19 **Funds From His Campaign Committee to the *Unfunded* “Comprehensive**
20 **Pension Reform Initiative” Committee**

21 As the FPPC filing for the first quarter of 2011 shows, the committee called “Comprehensive
22 Pension Reform for San Diego” (CPR for San Diego), sponsored by the Lincoln Club of San Diego
23 County, had only an initial \$1,000 set-up contribution – which came from the Lincoln Club itself –
24 but had no other money coming in from January 1st through March 31st. (Exhibit 151; II, 150:21-
25 151:16) This filing was verified by the committee's treasurer, April Boling. (Exhibit 151; II, 151:5-
26 7) Ms. Boling, of course, was the Mayor's fellow proponent of the single “CPR” initiative and stood
27 with him to announce it on April 5, 2011. (Exhibit 51)

28 The CPR for San Diego Committee's verified FPPC filing for the second quarter of 2011
shows that, after Mayor Sanders announced the agreement on a single initiative at the press
conference on April 5, 2011, all of the funds raised by his committee San Diegans for Pension

1 Reform were paid to CPR for San Diego. This second quarter filing for CPR notes “major funding
2 by San Diegans for Pension Reform.” (Exhibit 152; II, 150:21-151:23)

3 Before April 1, 2011, when San Diegans for Pension Reform donated all of its money to the
4 CPR committee, only the original set-up contribution of \$1,000 sat in its treasury. (II, 152:18-
5 153:14) In fact, all of the money which San Diegans for Pension Reform had raised during the first
6 quarter of 2011 went to the CPR Committee – as well as the work product from the professional
7 legal services it had procured for \$38,000 and the research services it had procured for another
8 \$9,970. (Exhibit 152, Bates 251; II, 153:15-154:17)

9 Mayor Sanders also clarified that there were additional monies transferred later from San
10 Diegans for Pension Reform to the CPR committee:

11 “As some of their pledges came in, we simply turned them over to Comprehensive
12 Pension Reform from the . . . San Diegans for Pension Reform” (II, 154:18-28)

13 **20. The Mayor Pushed the Signature-Gathering Effort To Qualify This**
14 **Pension Reform Initiative For the Ballot As He Vowed To Do On**
15 **November 19, 2010**

16 After the kick-off press conference and the filing of the Notice of Intent to Circulate, Mayor
17 Sanders and his Office continued their efforts to promote this initiative.

18 On April 8, 2011, the calendar for the Mayor’s Chief of Staff Julie Dubick shows a meeting
19 related to “Pension reform for all customized for sd including police,” with Ms. Dubick noted as the
20 “organizer.” (Exhibit 183; III, 204:19-205:21)

21 On April 14, 2011, Mayor Sanders led a press conference on the 11th floor at City Hall related
22 to the release of his new budget. His Director of Special Projects Gerry Braun and his Director of
23 Communications Darren Pudgil were both involved in preparing the Mayor’s remarks for this event.
24 (Exhibit 208; IV, 237:19-238:5, 16-24) On the issue of pension reform, the Mayor’s prepared
25 remarks included: “I am part of a private effort, along with Councilmembers Faulconer and DeMaio
26 to place a measure on the ballot.” (Exhibit 208, page 3; IV, 239:2-12)

27 A staff “pre-brief” for June 24, 2011, included an entry for June 29, 2011, when the Mayor
28 had a “possible” meeting with the UT Editorial Board “re pension reform financial analysis.” Aimee
Faucett was designated as the staff member to “pre-brief” the Mayor with regard to this item.
(Exhibit 68; IV, 101, 1-24) Also on the “pre-brief” for June 24, 2011, is another entry for June 30,

1 2011, related to “possible morning TV re pension reform financial analysis.” The “pre-brief”
2 identifies Ms. Faucett as the assigned staff person, and she agrees that Mayor Sanders “may have”
3 done these morning TV programs. (Exhibit 68; IV, 101:25-102:7)

4 A meeting invite was noticed within the Mayor’s Office for Wednesday, June 29, 2011, at
5 10:00 a.m. for a possible UT Editorial Meeting with the Mayor related to “Pension Reform Financial
6 Analysis.” The Mayor’s Deputy Chief of Staff Aimee Faucett is noted as the lead on the assignment
7 with additional required attendees being Mr. Pudgil and Mayoral staff members Alex Roth, Rachel
8 Laing and Kevin Klein. (Exhibit 263; IV, 272:27-273:4) This is the financial analysis related to the
9 single initiative that the Mayor was a proponent of and Aimee Faucett is the one pre-briefing the
10 Mayor on this. (III, 190:1-16)

11 On July 25, 2011, Darren Pudgil sent an e-mail to everyone on the Mayor’s 11th floor on the
12 subject of “Mayor Q & A in Sunday’s UT.” Mr. Pudgil included a copy of the full article printed
13 in the *Union Tribune* entitled: “A conversation with the mayor.” (Exhibit 262; IV, 272:18-26)
14 Mayor Sanders told the UT: “We’re moving forward with a pension reform initiative where we’re
15 going to a 401(k) for all employees except police. . . . But that will end the pension problems as we
16 know them. . . .” (Exhibit 262)

17 On September 6, 2011, the San Diego Regional Chamber of Commerce sent an e-blast email
18 message to an unknown number of recipients with the subject line: “Letter From Mayor Jerry
19 Sanders.” The Mayor’s Chief of Staff received a copy at her City e-mail address
20 Jdubick@sandiego.gov. (Exhibit 197) The Mayor’s Letter reads:

21 Over the past few months, the Comprehensive Pension Reform campaign has been
22 gathering signatures to put the most comprehensive pension reform measure in San
23 Diego history on the June 2012 ballot. The San Diego Regional Chamber of
24 Commerce has stepped up by helping to fund our efforts, and now we need individual
businesses to put us over the finish line. Only a few weeks remain and we need your
help because this initiative will bring the city’s workforce more in line with the
private sector through the following reforms: . . .

25 With your company’s financial support and assistance in meeting our signature goals,
26 we can lock in permanent, lasting reforms to the city’s pension system. I need you
to act today. Please contact the campaign to participate in our Business Outreach
Program. We need you, your friends, and neighbors to:

- 27 1. Sign the petition
- 28 2. Hold a petition drive at your place of business
3. Volunteer to join us on a signature gathering drive

1 4. Contribute to the signature gathering effort

2 This is your opportunity to help put San Diego on a sustainable fiscal path for the
3 future. Please join me and countless others, including your Chamber leaders, as we
complete the job of getting this critical ballot measure qualified.

4 Sincerely,

5 Mayor Jerry Sanders (Exhibit 197)

6 Then on September 14, 2011, Vincent E. Mudd, Chairman of the San Diego Chamber of
7 Commerce sent an e-blast email to the same list of recipients with the subject line: “Note from
8 Mayor Jerry Sanders.” In his e-mail, Mr. Mudd informs the recipient that he wants to be sure that
9 the recipient saw the message from Mayor Jerry Sanders about the importance of involvement in the
10 comprehensive pension reform initiative. A “Message from Mayor Jerry Sanders” is then printed
11 in full for the recipient which is a verbatim repetition of the “Letter From Mayor Jerry Sanders”
12 which the Chamber had transmitted on September 6, 2011. (Exhibit 80; II, 168:11-169:5)

13 On September 16, 2011, the *OB (Ocean Beach) Rag* published a story about the “Mayor’s
14 Message” disseminated by the Chamber of Commerce entitled “Blue Smoke and Mirrors
15 Department: Is Mayor Sanders supporting pension reform as a private citizen or as Mayor?”
16 Referring to the Chamber’s e-mail with a “Message from Mayor Jerry Sanders,” the author asks:
17 “Using the Mayor card when it suited him?” (Exhibit 81)

18 On October 12, 2011, Mayor Sanders addressed the Economic Development and
19 Corporations Board with talking points prepared by Darren Pudgil. First among these points was
20 “pension reform,” with the Mayor thanking them for their support and updating them that the
21 signatures had been submitted for this “single most important ballot measure – a model for the
22 nation.” (Exhibit 213; 245:19-246:9)

23 The next day, on October 13, 2011, Mayor Sanders addressed the Hotel-Motel Association
24 membership with similar remarks on the pension reform initiative which Mr. Pudgil also
25 “presumably” prepared. (Exhibit 214; IV, 246:9-20)

26 ///

27 ///

28 ///

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1 **21. The Mayor Urged the Voters to Approve His Initiative Once It Qualified**
2 **For the Ballot**

3 On November 8, 2011, Mayoral spokesperson Darren Pudgil responded to a *City News*
4 request for a quote from Mayor Sanders on the qualification of CPR for the ballot. Mr. Pudgil
5 provided this quote from Mayor Sanders which was reported:

6 “I’ve been in San Diego for more than 40 years, and I can’t think of a ballot initiative
7 more critical to our City’s future than this one. Hopefully, the voters will embrace
8 it and approve it.” (Exhibit 215; IV, 249:14-250:5)

9 Although Mr. Pudgil does not remember if he consulted with the Mayor on this or not before
10 providing this quote, he understood this sentiment to be the Mayor’s belief such that he was prepared
11 to offer this quote. (IV, 250:6-14)

12 The same day, November 8, 2011, Mr. Pudgil sent the same Mayoral quote to Craig
13 Gustafson at the *Union Tribune* in response to his request for a comment from the Mayor on the CPR
14 initiative’s qualification for the ballot. (Exhibit 216; IV, 250:15-19)

15 Also on November 8, 2011, the *Voice of San Diego* published an article announcing that the
16 pension initiative will go on the ballot. The article reports that “Mayor Jerry Sanders, who also
17 helped write the measure, told the *Union Tribune* . . .(repeats the quote from above). (Exhibit 217;
18 IV, 250:24-251:3)

19 On November 9, 2011, Mayoral spokesperson Darren Pudgil “made the rounds” with Mayor
20 Sanders on the morning television shows. He was in one of the studios with the Mayor at about 6
21 a.m. when he sent this “tweet” – “Look for Mayor on the morning shows today making pitch for his
22 pension reform initiative now headed for June ballot. Many people to thank.” (Exhibit 89; IV,
23 252:19-253:9) Rachel Laing, who reported to Mr. Pudgil, did many “tweets” from the Mayor’s
24 Twitter account – JerrySanders@MayorSanders Twitter account. (Exhibit 230; IV, 252:8-18)

25 On November 10, 2011, *San Diego CityBeat* Magazine reported on this “tweet” and the
26 reference made by Darren Pudgil to “his pension reform initiative” when speaking of Mayor Sanders.
27 (Exhibit 90; IV, 254:9-255:8)

28 A meeting invite was noticed within the Mayor’s Office for Wednesday, November 16, 2011,
at 5:30 p.m. for a possible UT Editorial Meeting with the Mayor related to “Pension Reform
Financial Analysis.” The Mayor’s Deputy Chief of Staff Aimee Faucett is noted as the lead on the

1 assignment with additional required attendees being the City's Chief Operating Officer Jay
2 Goldstone, Mayor's Chief of Staff Julie Dubick, Mayor's Director of Communications Darren Pudgil
3 and other Mayoral staff members Alex Roth, Rachel Laing, Kevin Klein, and David Graham.
4 (Exhibit 265; IV, 274:4-11)

5 On December 8, 2011, Mayor Sanders addressed a civic leadership group with remarks
6 prepared by Mr. Pudgil or someone on the Mayoral staff. (Exhibit 218; IV, 257:3-258:1) The
7 Mayor's remarks included an update that, on December 5, 2011, the City Council had taken action
8 to commit to putting the comprehensive pension reform initiative on the June ballot, and that "San
9 Diego will become a national model" with this "single most important ballot measure" which will
10 "put (City's) pension problems to rest once and for all." (Exhibit 218, page 3; IV, 257:14-27)
11 Rebuffing the notion that he had advocated getting this initiative on the ballot for June 2012 because
12 a very low voter turnout was predicted, Mayor Sanders asserted that he was an advocate of getting
13 it on the ballot for June "because we wanted it done as soon as possible." (II, 196:18-22)

14 22. The Mayor Declared Victory On Election Night And Took Credit In The 15 Days That Followed

16 On election morning, Mayoral spokesman Darren Pudgil sent a blast e-mail message to the
17 national media and the cable networks on the subject of "pension reform vote in San Diego today."
18 He wrote: "Folks: **The people of San Diego are voting today on what is perhaps the most**
19 **sweeping pension reform proposal in America. San Diego Mayor Jerry Sanders, the**
20 **initiative's primary backer**, is available for interview today and tomorrow." (Exhibit 222; IV,
21 266:20-267:11; emphasis added)

22 During election day, Mr. Pudgil received an inquiry from the Associated Press about the
23 logistics of getting a comment from the Mayor that night once the trend became clear on whether the
24 initiative was passing. Mr. Pudgil responded that he'd be with the Mayor – inviting the reporter to
25 call his cell phone to make contact with the Mayor and get a comment. (Exhibit 223; IV, 267:12-20)

26 On election night, June 5, 2012, the Lincoln Club sponsored a room at the U. S. Grant Hotel
27 where T. J. Zane addressed the crowd and introduced the Mayor to declare victory. (Exhibit 162
28 (videoclip); II, 189:4-190:3) Mr. Pudgil was also present. (IV, 267:25-268:2)

1 Acknowledging that there are about 1.3 million residents in the City of San Diego – though
2 not all are registered to vote or even eligible to register, Mayor Sanders admits that he never looked
3 at the actual raw numbers of those who voted in favor of the comprehensive pension reform initiative
4 (154,000 or so in favor versus 80,000 or so against) to know how many residents actually weighed
5 in on this important subject. He “only knows and quotes the percentages” – 66% in favor. (II,
6 195:8-196:17)

7 On June 11, 2012, Mayor Sanders addressed a group of CEOs at the Chamber of Commerce
8 Roundtable with remarks prepared by Mayoral spokesman Darren Pudgil on the Proposition B
9 victory, the City’s place as a national leader in pension reform, and a list of related points. (Exhibit
10 224; IV, 268:3-23) Also on June 11, 2012, Mr. Pudgil facilitated the Mayor’s recorded interview
11 with reporter Holeywell at www.governing.com about the significance of the passage of Proposition
12 B. (Exhibit 225; IV, 268:24-269:6) Then Mr. Pudgil accompanied Mayor Sanders to give a live
13 interview on the Lou Dobbs show at Fox Business News on the subject of pension reform. (Exhibit
14 226; IV, 269:7-16)

15 As Mayor Sanders’ Director of Communications, Darren Pudgil agrees that there has been
16 a host of other requests for interviews and coverage of Mayor Sanders’ involvement in passing this
17 historic trendsetting initiative. (IV, 269:17-20) In fact, Mr. Pudgil also agrees that, from April 5,
18 2011, through the date of the election, there has been a series of published media accounts which
19 refer to Mayor Jerry Sanders as one of the crafters of the initiative. (IV, 269:21-25)

20 COO Goldstone agrees that promoting and achieving this 401(k)-style plan was one of the
21 “primary objectives” of the Mayor’s agenda in the last year-and-a-half. (III, 30:27-31:3)

22 **C. The Mayor’s Intended and Public Purpose In Using An Initiative To Achieve**
23 **His Pension Reform Objectives For the City Was To Avoid The Meet and**
24 **Confer Process**

25 In his State of the City address, Mayor Sanders announced: “And we are rethinking pensions
26 even further. Councilman Kevin Faulconer, the city attorney and I will soon bring to voters an
27 initiative to enact a 401(k) style plan that is similar to the private sector and reflects the reality of our
28 times. We are acting in the public interest, *but as private citizens.*” (Exhibit 39a; 41:8-17)

///

1 Mayor Sanders meant that each of them – Councilmember Faulconer, City Attorney
2 Goldsmith, and he – would be acting as private citizens. (II, 42: 8-12) As to what this meant
3 specifically for him as the Mayor, he explained:

4 “It meant that I believed the best way to do this would be to do it as a private citizen.
5 I was simply announcing to the public that that was the case and that we would be
6 going the citizens’ signature route, which means that it becomes a private initiative.
7 . . . I think there were several reasons for it. Number one, I felt that a 401(k) style
8 plan was the only thing that can bring financial stability to the City in terms of
9 pensions. Secondly, I didn’t believe that Council would be – would put this on the
10 ballot in terms of a Council ballot initiative or Charter amendment. And third, I think
11 it’s important to let the people know that that was the route that we were going. So
12 that’s the reason I brought that forward in that method.” (II, 42:13-43:2)

13 As of the date when Mayor Sanders delivered his State of the City address on January 12,
14 2011, he had not brought any proposal for a 401(k) style pension plan for new hires to the City
15 Council. (II, 43:3-10) He did not bring it to the City Council because he didn’t think the Council
16 would support it; nevertheless, he did *not* bring it to them. (II, 43:28-44:9)

17 Mayor Sanders’ related purpose in not bringing it to the City Council and using a citizens’
18 signature initiative instead was to “avoid any obligation to meet and confer with the City’s
19 recognized employee organizations . . . because you don’t meet and confer prior to putting that onto
20 the ballot.” (II, 44:10-17) He explained:

21 “I didn’t want this to go out for a year and not give us a chance to collect signatures,
22 which I think is a very real possibility. And I also believed that the 401(k) style
23 system was critically important to the City and its financial stability and to long-term
24 viability for the City. I felt that was important enough to take directly to the voters
25 and allow the voters to voice their opinion by signing petitions to put than on the
26 ballot. And that’s the reason I chose that.” (II, 44:20-45:2)

27 “I wanted it to be substantive reform that I felt the citizens should have an
28 opportunity to vote on, and I felt they should have an opportunity to weigh in by
giving their signature to put it on the ballot. I feel very strongly that way. I also did
not feel that the City Council would put that on the ballot under any circumstances.”
(II, 59:15-25)

Again, Mayor Sanders agrees that he did not test this conclusion by bringing his pension
reform ideas to the City Council – he didn’t even try this process because he “didn’t think that was
the correct way to put a 401(k) style initiative on the ballot.” (II, 59:26-60:15)

However, Mayor Sanders emphasized that his point was not that he didn’t believe there was
sufficient time to meet and confer but he “didn’t believe that it was necessary. As long as you go

1 out and collect the correct amount of signatures, meet and confer is not necessary prior to putting that
2 onto the ballot.” (II, 45:21-46:1)

3 Mayor Sanders thinks it “might be accurate” to say that he went through the ballot initiative
4 process with regard to this pension reform so that he could get the terms of the reform that he
5 actually wanted rather than going through the meet and confer process where you don’t know how
6 it’s going to look at the end of that process. However, Mayor Sanders admits that he did not get it
7 entirely “his way” in any event:

8 “I see it as the concept that we took forward I felt was the correct concept, and that’s
9 not what finally ended up there. It was a compromise later on, but I certainly felt that
10 it was perfectly legitimate, within my right to take an initiative out, let the voters take
11 a look at it and see if they agree with it, and that’s what I chose to do.” (II, 61:7-20;
12 76:7-13)

13 On September 7, 2011, *San Diego CityBeat* Magazine published an article which included
14 certain explanations offered up by the Mayor’s Director of Communications Darren Pudgil in
15 response to the author’s query – what’s the difference between 2008 and now? (referring to former
16 City Attorney’s Legal Memorandum dated 6/19/08, Exhibit 23). Mr. Pudgil sent an e-mail to
17 *CityBeat* to say: “For starters, though the Mayor, along with Councilmembers Kevin Faulconer and
18 DeMaio, authored the ballot measure, Sanders is bringing it forward as a private citizen, not as
19 Mayor.” The article continued:

20 “If Mayor Sanders, as opposed to private citizen Sanders, had authored the initiative,
21 he’d have been legally obligated to meet with the City’s labor unions, which is
22 exactly what happened in July of 2008. While he wouldn’t have had to accept the
23 union’s counterproposals, he’d at least have to entertain them.”

24 Quoting Mr. Pudgil again: “The Mayor took this route because the public deserves the right to decide
25 a measure of this magnitude and importance.” (Exhibit 77; IV, 241:20-243:18)

26 Then, in a tape-recorded and **unscripted** interview with reporter David Rolland at *San Diego*
27 *CityBeat* magazine on December 2, 2011 – *after* MEA’s repeated demands for meet and confer had
28 been persistently rebuffed – Mayor Sanders himself put the matter of motive to rest:

David Rolland: . . . I noticed that you were referred to as Mayor a couple of
times here.
Mayor Sanders: I, you know, I am a private citizen and a mayor.
David Rolland: . . . but today, you are a private citizen, you’re not a mayor?
Mayor Sanders: Oh no, you know, I can be a private citizen and a mayor.
David Rolland: Did you . . . punch out as you left the office?

1 Mayor Sanders: I think that the Courts have held that a politician can take time
2 off during the day without . . . because we don't accrue any
3 time, vacation time or anything else. . . .
4 David Rolland: Your . . . presence here, you were referred to as Mayor by T.
5 J. Zane, Carl DeMaio just pointed to you when he talked
6 about the Mayor's Office, so . . . legally speaking, you think
7 that you are, you can . . . walk this line?
8 Mayor Sanders: I do, I do. I mean, when I go out and I go to a campaign
9 appearance with Bonnie Dumanis or I go to one with a judge
10 candidate or whatever, they can call me Mayor, uh people
11 know who I am. And I can still do that legally.
12 David Rolland: . . . but when it comes to the meet and confer trigger, what is
13 your understanding of what you are allowed to do . . .
14 Mayor Sanders: Well the meet and confer trigger, in my estimation, and I'm
15 not a legal expert, that's what the legal experts all look at, but,
16 the meet and confer trigger, I did this as a private citizen, um
17 whether I'm mayor or not doesn't matter. Uhh and we went
18 out and collected signatures from the public. If we'd have
19 had the Council put this initiative on, then there's a meet and
20 confer obligation before we put it on. With this, as us getting
21 the signatures gathered, there is a meet and confer obligation
22 after it passes on the implementation. That's my
23 understanding.
24 David Rolland: Talk about the differences between this and 2008. . . .
25 Mayor Sanders: . . . 2008 . . . those were part of labor negotiations, so that's
26 normal meet and confer over wages, hours and working
27 conditions. And that's where we came up with the new
28 pension system. That was not a ballot initiative, never
intended to be one, we didn't go to the voters for that. Uhh
that was done through the normal meet and confer process. .
. . Now I can give you two other ones though. The managed
competition and the, any new enhancements in the pension
system have to be voted on by the people. That was in 2006,
both of them. We put those on with the Council put them on
the ballot. So we had to meet and confer prior to putting
those on the ballot. So I mean, the difference is when you
have the legislative body put something on the ballot for a
charter change, then you have to meet and confer prior.

20 David Rolland: So you think it's strictly, the way you understand it, is strictly
21 a technical -
22 Mayor Sanders: It's not technical.
23 David Rolland: By-product of, of who actually does the putting -
24 Mayor Sanders: Right.
25 David Rolland: Put it, put it on the ballot.
26 Mayor Sanders: Well, see, I mean -
27 David Rolland: Because you're here, I don't know if it's, I don't know if what
28 you're doing here is uh, violating the spirit of those rules
because you are here backing it. . . .

25 Mayor Sanders: . . . **When you go out and signature gather and it costs a
26 tremendous amount of money, it takes a tremendous
27 amount of time and effort . . . But you do that so that you
28 get the ballot initiative on that you actually want. Uh and
that's what we did. Otherwise, we'd have gone through
meet and confer and you don't know what's going to go
on at that point then through the meet and confer process.**
(Exhibit 91 – transcript; Exhibit 160 – copy of audiotape)

1 For his part as the City's Chief Operating Officer, Jay Goldstone understood directly from
2 the Mayor that he was going to bring this forward somehow in the capacity as a private citizen
3 through a signature-gathering process to qualify it for the ballot. (III, 36:1-14) Mr. Goldstone
4 testified that "it never came up in any discussions" how the Mayor's intended course of action would
5 be reconciled with his Charter responsibilities in terms of being the City's chief labor negotiator.
6 (III, 36:15-19) Although Mr. Goldstone was aware of former City Attorney Aguirre's opinion issued
7 on June 19, 2008, about the legal consequences of the Mayor leading a ballot initiative or bringing
8 an initiative directly to the voters, he admits that he did not "have it in mind when these events were
9 unfolding" in 2010 and in 2011 after the Mayor had his press conference on November 19, 2010.
10 (Exhibit 23; III, 57:3-18; 58:28-59:8) Nor did he have any discussion with anyone as to whether or
11 not this (2008) opinion from the City Attorney's office was still the opinion of that office on the
12 question of whether the Mayor could lawfully bring forward a ballot initiative without meeting and
13 conferring under the MMBA. (III, 57:19-25)

14 Although familiar with the obligations of the MMBA, Mr. Goldstone did not discuss with
15 the Mayor any questions or concerns he had about the City's obligations under the MMBA and how
16 those obligations might be impacted by what the Mayor was planning to do. (III, 38:9-16) He does
17 remember seeing a new opinion from the current City Attorney related to the Mayor's and the City
18 Council's responsibilities to meet and confer under the MMBA, which is the Memorandum of Law
19 dated January 26, 2009, and he understood from this Memorandum that, as CEO and Chief Labor
20 Negotiator, the Mayor has a duty to fulfill the City's obligations under the MMBA. But he adds –
21 "this is when he's acting as Mayor." (III, 58:2-11; 59:9-18 III, 60:6-10)

22 As to whether he recalled anything in this Memorandum that led him to believe that the City
23 Attorney's Office had given legal clearance for the Mayor to decide to bring matters that were
24 otherwise within the scope of representation to an initiative rather than to the bargaining table, Mr.
25 Goldstone asserts that he "never had that discussion." Nor is he aware of any request that the Mayor
26 made or anyone in the Mayor's office made to have the City Attorney's Office address the Mayor's
27 intentions to go directly to an initiative on what he was calling the next wave of pension reform as
28 of November 19, 2010. (III, 60:23-28)

1 Mr. Goldstone also does not recall having any conversations with the Mayor in which he
2 expressed any concerns to him about how the Mayor's intentions might impact the City's labor
3 relationship with its recognized employee organizations. (III, 36:20-24) When asked whether he had
4 any concerns as COO that employees would misunderstand what the Mayor was doing with regard
5 to this initiative and conclude that he was thwarting their rights as represented employees to bargain
6 with the City over pension reform and other matters related to their employment, he explained:

7 "I had not taken into consideration what the employees may or may not have been
8 thinking. Obviously, if there was something going on that was inappropriate or
9 illegal, the City Attorney's office would have weighed in." (III, 61:1-10)

9 Mr. Goldstone assumed that the City Attorney's Office would have taken action if what the Mayor
10 was doing was improper or illegal. (III, 62:6-14)

11 **V. CONSISTENT WITH HIS PURPOSE TO CIRCUMVENT THE MEET AND**
12 **CONFER OBLIGATIONS – AND INCONSISTENT WITH HIS CLAIM THAT HE**
13 **COULD SWITCH PRIVATE AND PUBLIC ROLES AT WHIM, THE MAYOR**
14 **PICKED AND CHOSE AMONG MANDATORY SUBJECTS FOR MEET AND**
15 **CONFER, IN ORDER TO DEFER TO HIS INITIATIVE**

14 **A. As CEO And Chief Labor Negotiator, Mayor Sanders Was Engaged In Meet**
15 **and Confer With the City's Recognized Employee Organizations Over Pension**
16 **Benefits and Compensation**

16 **1. Meet and Confer Related to Retiree Health Benefits Led to A "Historic**
17 **Deal" Announced On May 6, 2011**

18 By January 2011 when he delivered his State of the City address, Mayor Sanders was
19 preparing for or already in negotiations with all six recognized employee organizations about the
20 issue of retiree health benefits. As the City's Chief Labor Negotiator, he was directing the City's
21 outside negotiator and his negotiating team members with regard to that meet and confer process.
22 (II, 52:4-18) Mayor Sanders agrees that he was the "leader in that negotiation process with the City's
23 recognized employee organizations." (II, 10:24-27) The meet and confer process related to retiree
24 health benefits was ongoing at the bargaining table between the Mayor's representatives – under the
25 Mayor's direction – and the City's recognized employee organizations from at least January 2011,
26 if not before, until an agreement was reached in May 2011. (II, 52:19-24; III, 19:5-20:21)

27 On May 6, 2011, the Mayor's Office issued a "Mayor Jerry Sanders Fact Sheet" for
28 immediate release announcing: "City labor unions reach historic deal on retiree healthcare benefits."
This Fact Sheet describes the general nature of the terms included in the tentative agreement. Mayor

1 Sanders agrees that this was an agreement “where no one was quite satisfied, but everybody
2 compromised.” (Exhibit 62; II, 125:4-21; III, 20:22-21:10)

3 Mayor Sanders conducted a news conference to announce this historic deal on retiree health.
4 (Exhibit 63; II, 125:22-24; 126:5-13) The City Council gave final approval to the agreement which
5 implemented the retiree health benefit reform objectives which Mayor Sanders had set forth.
6 (Exhibits 66 & 67; III, 21:17-22)

7 A year later, on April 19, 2012, Mayor Sanders issued another press release on the subject
8 of retiree health benefits to announce that there were even greater savings than had initially been
9 forecasted when the “historic deal” between the City and its recognized employee organizations was
10 reached in 2011. (Exhibit 129; III, 21:23-22:8)

11 **2. Meet and Confer Related to Existing MOUs Led to Continued** 12 **Compensation Reductions To Ease City’s Budget Deficit**

13 MEA had an MOU in effect with the City for the period July 1, 2009, through June 30, 2011.
14 (Exhibit 44) This 2-year MOU covered the four bargaining units which MEA represents:
15 Professional, Supervisory, Technical, and Administrative Support and Field Service. (Exhibit 44;
16 Bates 655-657; I, 53:28-54:9) It included a number of compensation reductions which the Mayor had
17 sought to achieve to address the City’s budget issues. (I, 56:6-12) It also included Article 32,
18 Modification and Waiver whereby, notwithstanding the finality of the MOU terms, MEA “agrees
19 to meet and confer during the term of the MOU if the City proposes to introduce ballot measures,
20 which relate to or would impact wages, hours, working conditions or employee-employer relations.”
21 (Exhibit 44a - page 46; I, 57:3-58:14) This provision was in effect for the entire term of the MOU
22 from July 1, 2009, through June 30, 2011. (I, 58:15-17)

23 As a result of the meet and confer process during early 2011 between the Mayor’s
24 Negotiating Team and MEA’s Negotiating Team, an Addendum was agreed upon to extend MEA’s
25 MOU for another year through June 30, 2012. This one-year extension continued in effect for a third
26 year the six percent (6%) overall compensation *reduction* which had been in effect since July 1,
27 2009. (I, 58:27-59:3) It was on April 6, 2011, when the Mayor submitted a request to the City
28 Council for its approval and ratification of this one-year extension on which the Mayor’s Negotiating
Team and MEA had reached a Tentative Agreement. (Exhibit 56, Bates 705 & 707; I, 59:4-26) The

1 City Council adopted and ratified this Tentative Agreement by Resolution R-306776 on April 25,
2 2011. (Exhibit 60; III, 17:25-18:27)

3 This Addendum extending MEA's MOU *did include* changes to Article 22, Retirement,
4 based on the Mayor's proposals but there were no changes to the "reform" pension plan which had
5 taken effect on July 1, 2009, following the successful meet and confer process which Mayor Sanders
6 announced during his press conference on the City Concourse in July 2008. (Exhibit 60, Bates 723-
7 724 and 161; III, 18:28-19:4) There was also no change to Article 32, Modification and Waiver,
8 including MEA's obligation to meet and confer over ballot measures if the City requested it
9 notwithstanding the finality of the MOU extension. (Exhibit 60, Bates 718-725; I, 60:25-61:2)

10 In negotiations with AFSCME Local 127, the City's commitment not to seek a Charter
11 amendment remains intact.

12 **3. Mayor Sanders' Reassurances To Firefighters Related to His "Private**
13 **Citizen" Initiative Induced Them To Enter A Tentative Agreement On**
14 **A New MOU With Reduced Pensions For New Hires**

15 Mayor Sanders met with three officers of the Firefighters Local 145 at the law offices of
16 Hecht and Solberg where he affirmed and reaffirmed his commitment to exempt future firefighters
17 from any new 401(k) style plan designed to replace the traditional defined benefit plan. (II, 170:20-
18 171:22) He told the Firefighters' leadership that he had raised about a hundred thousand dollars for
19 his initiative and he "made clear that the firefighters were going to be excluded from the 401(k)."
(II, 172:16-173:1)

20 On **April 4**, 2011, San Diego City Firefighters Local 145 signed a Tentative Agreement with
21 the Mayor's Negotiating Team for a one-year extension of their MOU through June 30, 2012.
22 (Exhibit 174; II, 173:7-13; emphasis added) This Tentative Agreement included a change in the
23 pension formula for future new firefighters from the existing 3% at age 50 to a less favorable 3% at
24 age 55. (Exhibit 174, page 2; III, 129:15-130:8) Other than on this issue, during those extension
25 negotiations, the Mayor's Negotiating Team did not present to Firefighters Local 145, any of the
26 other ideas or concepts that he had in his pension reform initiative. (II, 174:24-176:16)

27 After signing the Tentative Agreement based on the Mayor's commitment to exclude
28 firefighters from an initiative, at or near 5 p.m. on April 4, 2011, Mayor Sanders informed

1 Firefighters' Union President Frank DeClercq that, in order to make a deal on the initiative, he had
2 to include future firefighters in the new 401(k) idea rather than exclude them as he had previously
3 committed just two weeks earlier. (II, 173:14-174:7) The "deal" he was referring to resulted from
4 negotiations *with* Councilmember DeMaio, T. J. Zane, Lani Lutar and other business people, but not
5 *with* Firefighters Local 145. (II, 190:27-191:5) When asked if he had negotiated with the firefighters
6 over whether they would be excluded from or included in his 401(k) pension reform plan, Mayor
7 Sanders left no room for doubt: "**No, I didn't negotiate with any labor unions.**" (II, 191:6-8,
8 emphasis added)

9 **B. By Making Concessions And Agreeing to Reforms At the Bargaining Table, the**
10 **City's Recognized Employee Organizations Promoted the City's Fiscal Recovery**
11 **Which the Mayor Announced in Early 2012**

12 The Mayor's Office issued a series of "Mayor Jerry Sanders Fact Sheets" in early 2012
13 announcing an end to the City's decade-long structural budget deficit. (Exhibits 127, 128 and 131)
14 In these news releases, Mayor Sanders explained that the end to the City's structural budget deficit
15 was due in part to improved revenues and in part to employees' concessions made at the bargaining
16 table on compensation and other reforms made through the meet and confer process over managed
17 competition, a new pension plan, and retiree healthcare as well. (II, 167:2-168:6) On February 23,
18 2012, Mayor Sanders had a press conference to announce an end to the City's structural budget
19 deficit. (Exhibit 127; III, 22:20-27)

20 On April 11, 2012, Mayor Sanders announced that he was releasing the first structurally-
21 balanced budget in decades and that he will be leaving the next mayor a \$119 million dollar surplus
22 over the next five years. (Exhibit 128; III, 23:3-14)

23 COO Goldstone played a role in moving the City toward this financial achievement which
24 included his involvement in the meet and confer process with the City's recognized employee
25 organizations. (III, 23:21-25) This meet and confer process resulted in budget relief through
26 employee compensation reductions which took effect on July 1, 2009, and continue to the present.
27 (III, 23:26-24:7) In fact, those compensation reductions continue in the new MOUs reached between
28 the City and its employee organizations during negotiations in the spring of 2012. The tentative
agreements reached with the Mayor's Negotiating Team were approved and ratified by the City

1 Council on June 18, 2012. The terms will be in effect through June 30, 2013. (Exhibit 181; III,
2 24:8-25:4) These MOUs continue in effect the reform pension plan which Mayor Sanders announced
3 during his 2008 press conference, and which apply to all non-safety employees hired after July 1,
4 2009. (Exhibit 181; III, 5-11)

5 Notwithstanding the Charging Parties' willingness to negotiate and craft agreements to save
6 the City money through ongoing structural reform – and the Charging Parties' success in reaching
7 agreements on difficult issues, including pensions and retiree health benefits, and getting those
8 agreements ratified, the Mayor, acting for the City, picked and chose subjects within the scope of
9 representation under the MMBA to “save” for his initiative with the “left over” subjects –ones that
10 did not interfere with his initiative – becoming part of meet and confer. The Mayor could only
11 accomplish this “selection” process *as Mayor* because no “private citizen” has the authority to pick
12 and chose what will become the subject of the City’s meet and confer obligations. Whatever
13 argument the City can make that the Mayor decide when to act “as Mayor” and when to act as a
14 “private citizen,” there can be no argument that, in doing so, the Mayor can take some subjects
15 within the scope of representation out of the meet and confer process and leave others.

16 **VI. THE MAYOR AND THE CITY FAILED AND REFUSED TO MEET AND CONFER**
17 **OVER THE MAYOR’S PENSION REFORM OBJECTIVES**

18 **A. As Chief Labor Negotiator, Mayor Sanders Was Engaged In Meet and Confer**
19 **With the City’s Recognized Employee Organizations Over Pension Benefits and**
20 **Compensation But Failed to Present His Pension Reform Initiative Objectives**
21 **At Any MMBA-Sanctioned Bargaining Table**

22 **1. The City Failed To Meet and Confer Over the Pension Reforms Mayor**
23 **Sanders Had Determined To Be In the City’s Best Interest As of His**
24 **Initiative Announcement On the City’s Website On November 19, 2010**

25 During the entire period when Mayor Sanders was in meet and confer with the City’s
26 recognized employee organizations from **January through May 2011** related to retiree health
27 benefits, and from **February through April 2011** related to MOU extensions, he did not direct his
28 negotiating team to bring a proposal to the bargaining table related to a 401(k) style pension plan for
29 new hires after a certain date; nor did he direct his negotiators to bring to the bargaining table any
30 proposal related to freezing pensionable pay or changing pensionable pay in any way, shape or form.

(II, 54:2-21; emphasis added)

1 In short, Mayor Sanders made no proposals to MEA on any of the subject matter which he
2 was putting forward for a ballot measure. (III, 37:22-27) Nor did he direct his negotiators to bring
3 to the bargaining table any pension reform objective which he had identified as necessary or
4 important for the City's fiscal future because he had "decided that the citizens' initiative was the
5 right way to go on that." (II, 54:15-21; III, 37:28-38:8)

6 After the press conference on April 5, 2011, and the contemporaneous filing of the Notice
7 of Intent to Circulate Charter Amendment Initiative Petition, signatures were gathered and turned
8 in to the City Clerk. After a sampling by the County Registrar, a certification issue in November
9 2011, that sufficient valid signatures had been obtained to qualify the initiative for the ballot. At no
10 time throughout this process did Mayor Sanders ever initiate any meet and confer process with any
11 of the City's employee organizations over the subject matter of what was in this pension reform
12 initiative. (II, 165:11-22) Nor did he initiate any proposal to the City Council to have the Council
13 address, in whole or in part, the subject matter that was contained in this initiative with the potential
14 for the Council to put a ballot measure amending the Charter on the ballot – though Mayor Sanders
15 agrees that he had the power and the right to bring such a proposal to the Council. (II, 165:23-166:3)

16 **2. In the Face of Repeated Demands, The City Refused To Meet and**
17 **Confer Over the Mayor's Pension Reform Objectives**

18 Mayor Sanders "probably" saw MEA's demand dated July 15, 2011, to meet and confer on
19 the pension reform initiative "fairly close to the time" MEA's attorney Ann M. Smith sent it.
20 (Exhibit 72; II, 155:16-28) He believes that a copy of this letter was put on his desk. (II, 156:1-5)
21 Mayor Sanders did not respond to this letter; instead, he asked the City Attorney to respond to the
22 letter – or he asked his Chief of Staff Julie Dubick to ask the City Attorney to respond to it "because
23 it appeared to be legal issues." (II, 156:6-11) As to whether Mayor Sanders had in mind that the
24 City Attorney would be responding on behalf of the City or on his behalf as Mayor:

25 "I don't know that I had that conscious thought process. All I said was I don't
26 understand the meet and confer. It's a signature initiative. You know, what do we
27 have to do? And either Julie or somebody contacted the City Attorney and they
28 basically said you can't meet and confer on a citizens' initiative. It's not yours." (II,
156:12-24)

29 Mayor Sanders acknowledges that he also read a second shorter letter from MEA's attorney
30 dated August 10, 2011, which noted that there had been no response to the earlier July 15th letter –

1 and which renewed MEA's demand to meet and confer over the pension reform initiative. (Exhibits
2 75 & 178; II, 157:7-10) He asked staff if "we" had responded to the last letter yet and "they said they
3 had contacted the City Attorney's Office." In fact, Mayor Sanders "saw the City Attorney not long
4 after and asked them to please respond," but he himself did not respond. (II, 157:9-17) As to
5 whether Mayor Sanders did anything further to follow-up on whether or not the City Attorney's
6 Office was responding to MEA's letters:

7 "Well, I was told they were responding, and that, once again, this is a citizens'
8 initiative. There is no obligation or duty to meet and confer, and, in fact, you can't
because it's a citizens' initiative." (II, 157:18-24)

9 Mayor Sanders was copied on City Attorney Jan Goldsmith's letter to MEA's attorney dated
10 August 16, 2011. (Exhibit 76) He doesn't remember going through the details of this response
11 "because it's legalese to me." Mayor Sanders elaborated:

12 "I do remember either he or somebody else or one of our staff telling me that
13 basically he had said it's a citizens' initiative and signatures are being obtained and
you can't do meet and confer." (II, 158:23-159:2)

14 Mayor Sanders confirmed that he did *not* have any discussion with anyone in his office or
15 in the City Attorney's Office about initiating meet and confer over the general topics covered by
16 what he was calling the citizens' initiative. In other words, he did *not* have a discussion to the effect
17 that, while the citizens' initiative is gathering signatures, let me take this subject matter and my
18 objectives to the bargaining table and talk with recognized employee organizations about this subject
19 matter. (II, 159:3-13)

20 Mayor Sanders agrees that the letters continued and that he "looked at" anything MEA's
21 attorney sent. "I can't say I digested it all, but I saw it." (II, 160:25-161:2)

22 Exhibit 78 is MEA's third letter dated September 9, 2011, related to its meet and confer
23 demand which Mayor Sanders does not remember reading "in its entirety." (II, 161:10-16)

24 As Smith's letters continued, starting with MEA's first demand on July 15, 2011, and ending
25 with MEA's last letter dated October 5, 2011, "it was settled" in Mayor Sanders' mind, based on
26 what the City Attorney's Office told him, that "not only did (he) have no duty to meet and confer but
27 (he) could not meet and confer about this pension reform initiative." (II, 165:2-10)

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1 **3. The City Refused To Bargain In Response To The Meet and Confer**
2 **Demands of Other Charging Parties**

3 On September 15, 2011, George Schaefer, then incumbent president of the Deputy City
4 Attorneys' Association (DCAA) attended a meeting in the City's labor relations office to discuss
5 issues of concern with City's Human Resources Director Scott Chadwick. (IV, 297:7-298:2) During
6 this meeting, Mr. Schaefer raised the "concern that the DCAA had over the fact that there had been
7 no meeting and conferring over the Mayor's initiative." (IV, 298:3-5) Mr. Schaefer explained that
8 he "had been privy to the correspondence between Ann Smith and the Mayor's Office and City
9 Attorney Goldsmith, and that the DCAA fully concurred in all of the positions that MEA had made
10 that there was a requirement to meet and confer regarding the ballot initiative." (IV, 298:6-11)

11 Mr. Chadwick responded that, "based on the advice of the City Attorney, the Mayor was
12 taking the position that there would be no meeting and conferring and it was not required." (IV,
13 298:12-15) Mr. Shaefer reminded Mr. Chadwick of the *Seal Beach* case and told him that "it was
14 obvious to everyone concerned that this was an initiative that the Mayor was sponsoring, that there
15 had been a press conference where the Mayor was present with the City Attorney and other officials,
16 and it was just very apparent that meeting and conferring was required under the law. That was our
17 position." (IV, 298:16-23)

18 The City likewise rejected the meet and confer demands of Charging Party San Diego City
19 Firefighters, Local 145 (Exhibits 251 and 252), and AFSCME, Local 127. (Exhibits 253 through
20 255) The City stipulated that no meet and confer took place with San Diego City Firefighters, Local
21 145 (IV, 137:15-17), and that the City never responded to AFSCME, Local 127's follow-up letter.
22 (IV, 137:1-9)

23 **B. On Behalf of the City, the City Attorney Rejected All Demands For Meet and**
24 **Confer**

25 **1. City Attorney Goldsmith's Rejection of Charging Parties' Demands for**
26 **Meet and Confer Contradicted The City's 2008 Legal Position Related**
27 **To Mayoral-Sponsored Initiatives**

28 It is undisputed that Mayor Sanders never responded to MEA's repeated demands for meet
and confer and that he deferred to the City Attorney who responded on behalf of the City. Each

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28

1 response from City Attorney Goldsmith was a refusal to bargain, as was the third response from his
2 Deputy Joan Dawson. (Exhibits 76, 79, and 83)

3 The legal position articulated by the City Attorney's office in 2011 under City Attorney
4 Goldsmith contradicted the position previously taken by this Office in 2008 under former City
5 Attorney Michael J. Aguirre in a Memorandum which was never withdrawn or superseded. This
6 Memorandum was issued on June 19, 2008, in response to Mayor Sanders' announced intention to
7 lead a voter initiative to amend the City Charter to achieve pension reform. This Memorandum
8 established that, because of the Mayor's position under the Charter as CEO and Chief Labor
9 negotiator, such a mayoral initiative effort would be deemed the action of *the City* and would
10 therefore require a meet-and-confer process. In a nutshell, this Memorandum concluded:

11 "The Mayor . . . has the right to initiate or sponsor a voter petition drive. However,
12 such sponsorship would legally be considered as acting with apparent governmental
13 authority because of his position as Mayor and his right and responsibility under the
14 strong mayor Charter provisions to represent the City regarding labor issues and
15 negotiations, including employee pensions. As the Mayor is acting with apparent
16 authority with regard to his sponsorship of a voter petition, the City would have the
17 same meet and confer obligations with its unions as set forth . . . above." (Exhibit 23,
18 Bates 517 & 519)

16 **2. City Attorney Goldsmith's Rejection of Charging Parties' Demands for
17 Meet And Confer By Ignoring The Mayor's Conduct Contradicted The
18 City's 2009 Legal Position Related to the MMBA**

18 While City Attorney Goldsmith did not publish a new Memorandum contradicting or
19 superseding this prior analysis and conclusion, he did issue a Memorandum of Law on January 26,
20 2009, making clear what the respective duties of the Mayor and City Council were under the MMBA
21 in the context of the City's Strong Mayor Form of Governance. In this 2009 Memorandum, he also
22 emphasized that (1) *the City* is considered a single employer under the MMBA; (2) that employees
23 of the City are employees of the municipal corporation; and (3) that the City itself is the public
24 agency covered by the MMBA, such that:

25 In determining whether or not the City has committed an unfair labor practice in
26 violation of the MMBA, PERB will consider the actions **of all officials and
representatives acting on behalf of the City.** (Exhibit 24)

27 Indeed, in this 2009 Memorandum, the City Attorney noted in a footnote that it "specifically
28 supersedes" a prior Memorandum of Law, dated Septemeber 18, 2008, as a well as a Memorandum
dated December 4, 2006. (Exhibit 24, Bates 528, footnote 1.)

1 Nor did City Attorney Goldsmith make any inquiry or conduct any investigation in response
2 to MEA's repeated demands to meet and confer which were replete with factual assertions about the
3 conduct of the Mayor and his Office. As Mayor Sanders confirmed, when MEA's letters demanding
4 meet and confer were arriving on his desk and he was sending them over to the City Attorney's
5 Office to be answered, the City Attorney's Office did not make any inquiry to learn what he had done
6 or what anyone on his staff had done related to this pension reform initiative. (II, 161:17-22) No one
7 sat down with him to "get all of the facts out on the table" in terms of dealing with and responding
8 to MEA's meet and confer demand. (II, 161:26-162:1) Deputy Chief of Staff Aimee Faucett also
9 confirmed that, in connection with any of the letters she saw from the City Attorney's Office
10 responding to MEA's demands to meet and confer, the City Attorney's Office did not request any
11 information from her or anyone in the Mayor's Office, to her knowledge, about any Mayoral staff
12 activities related to the pension reform initiative. (IV, 124:9-15)

13 **3. City Attorney Goldsmith's "Global Settlement" Invitation Was Not A**
14 **Substitute for Meet and Confer**

15 Mayor Sanders disavowed the City Attorney's vague suggestion in his responsive letter dated
16 September 12, 2011, that the City's recognized employee organizations had an opportunity to meet
17 and confer *with him* (the City Attorney) in early 2011 *to prevent an initiative* and they didn't pursue
18 it. In this response to MEA's continuing demands for meet and confer over the pension reform
19 initiative subject matter, City Attorney Goldsmith enclosed a copy of a letter dated January 13, 2011,
20 which *he* had addressed to a number of attorneys, including Charging Parties' attorneys – as well as
21 the General Counsel for the San Diego City Employees Retirement System (SDCERS) – inviting a
22 mediated settlement negotiation process related to pending lawsuits. The City Attorney emphasized
23 that this process "was not to be confused with labor negotiations under the MMBA." When asked
24 about the nature of this process, Mayor Sanders explained:

25 "I don't think I was invited. . . . I knew that he (Goldsmith) was engaged in global
26 settlement talks. . . . I have no idea about the meetings or about the issues or anything
27 else other than he talked about global settlement on several different lawsuits that
28 were pending. And he felt that there was an opportunity for his office and (MEA's
attorney) and POA (San Diego Police Officers Association) and fire (San Diego City
Firefighters, IAFF Local 145) and 127 (AFSCME Local 127), everybody, to reach
a global solution on that." (II, 162:7-163:4)

1 Mayor Sanders made clear that, in connection with that “global settlement process,” he did not
2 delegate to the City Attorney his Charter authority related to the meet and confer process: “I have
3 never delegated my authority on anything to anybody.” (II, 163:5-9)

4 **4. The City Attorney Was Part of the Unlawful “Private Citizen”
5 Opt-Out Scheme**

6 City Charter, Article V, Section 40, states: “The City Attorney and his or her deputies shall
7 devote their full time to the duties of the office and shall not engage in private legal practice during
8 the term for which they are employed by the City.” (Exhibit 9, Bates 298)

9 The City Attorney stood with the Mayor at his press conference on November 19, 2010, to
10 announce his plan to “push a ballot measure to eliminate traditional pensions for new hires at City.
11 . . . and replace them for non-safety new hires with a 401(k) style plan. . . by crafting the ballot
12 initiative language and leading the signature-gathering effort to place the initiative on the ballot.”
13 (Exhibit 25)

14 Mayor Sanders announced during his State of the City address that: “Councilman Kevin
15 Faulconer, **the city attorney** and I will soon bring to voters an initiative to enact a 401(k) style plan
16 that is similar to the private sector and reflects the reality of our times. We are acting in the public
17 interest, *but as private citizens.*” (Exhibit 39a; 41:8-17)

18 The Lounsbery firm’s Municipal Lobbying disclosure forms include City Attorney Jan
19 Goldsmith as one of the City Officials lobbied over the “municipal decision” to revise City employee
20 pension proposals by an amendment of the City Charter by election ballot. (Exhibits 125 & 126; II,
21 280:23-281:3) Mr. Lounsbery testified that the City Attorney was present in the negotiating meeting
22 among the ballot proponents on Wednesday, March 30, 2011. (Exhibit 125; IV, 281:24-282:4;
23 284:8-12) COO Jay Goldstone, Chief of Staff Julie Dubick and Deputy Chief of Staff Aimee Faucett
24 all confirmed that the City Attorney participated in the review of language drafts related to the
25 initiative; indeed, the City Attorney personally confirmed that he had done so. (III, 87:9-27; 183:3-
26 15; IV, 104:16-25; 105:3-17)

27 During the Mayor’s press conference on the City Concourse on Tuesday, April 5, 2011, City
28 Attorney Jan Goldsmith stood prominently with the Mayor as he announced the agreement on a
single initiative. (Exhibit 51; II, 127:14-21) Though he did not discuss it with him, Mayor Sanders

1 assumed that the City Attorney was present as a “private citizen” – just as the Mayor was – and that
2 the City Attorney had “the same privilege to move between his role as elected City Attorney and
3 private citizen as the need arose.” (II, 127:22-128:13)

4 In one of Craig Gustafson’s Union Tribune *SignOnSanDiego* articles published on April 9,
5 2011, he wrote that:

6 “[L]awyers hired by the campaign committee support the measure, signed off on the
7 ballot language although no formal legal opinion has been released. City Attorney
8 Jan Goldsmith said: ‘It does provide pension relief within legal parameters.’”
(Exhibit 58; II, 126:16-28)

9 Yet even before this article was published, the Mayor’s Chief of Staff Julie Dubick had learned from
10 Lani Lutar, President of the San Diego County Taxpayers Association, that City Attorney Goldsmith
11 had said “something to the effect of what’s in this article.” (Exhibit 58; III, 192:19-193:24)

12 When Mayor Sanders himself got the City Attorney’s legal opinion about the initiative –
13 either directly from him or through an intermediary – he didn’t consider whether he was giving that
14 opinion in his role as City Attorney or as a private citizen. “You know, I didn’t really look it at that
15 way.” (II, 127:1-13)

16 VII. ARGUMENT

17 A. A Local Public Agency’s Duty to Meet and Confer Is the “Centerpiece” of the MMBA

18 With the enactment of the George Brown Act in 1961, California became “one of the first
19 states to recognize the right of government employees to organize collectively and to confer with
20 management as to the terms and conditions of their employment.” *Glendale City Employees Ass’n*
21 *v. City of Glendale* (1975)15 Cal. 3d 328, 332. The George Brown Act sought to improve employer-
22 employee relations by establishing “orderly methods of communication between employees and the
23 public agencies by which they are employed.” *Id.* at 335. However, the George Brown Act required
24 “only that management representatives should listen to and discuss the demands of the unions.” *Id.*
25 The “failure of [the George Brown Act] to resolve the continual controversy between the growing
26 public employees’ organizations and their employers led to further legislative inquiry.” *Id.* In the
27 years immediately following passage of the George Brown Act, other states enacted laws “grant[ing]
28 public employees far more extensive bargaining rights, further expos[ing] the limitations of the

1 George Brown Act." Recognizing the limitations of the George Brown Act, in 1968 the Legislature
2 enacted the Meyers-Milias-Brown Act ("MMBA"). *Id.* at 336.

3 "The MMBA has two stated purposes: (1) to promote full communication between employers
4 and employees; and (2) to improve personnel management and employer-employee relations within
5 the various public agencies." *People ex. rel. Seal Beach v. City of Seal Beach* (1984) 36 Cal. 3d 591,
6 597. "These purposes are to be accomplished by establishing methods for resolving disputes over
7 employment conditions and by recognizing the right of public employees to organize and be
8 represented by employee organizations." *Id.* At the time the MMBA was enacted, the state Supreme
9 Court had already held that "labor relations are a matter of statewide concern, subject to governance
10 by general law in contravention of local legislation, even by chartered cities." Grodin, *Public*
11 *Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 23 Hastings L.J.
12 719, 723 (citing *International Ass'n of Fire Fighters v. City of Palo Alto* (1963) 60 Cal. 2d 295, 298).
13 The Supreme Court has recognized that in enacting a scheme to govern labor relations for public
14 agencies, the Legislature did not intend "to permit local entities to adopt regulations which would
15 frustrate the declared policies and purposes of the [MMBA]." *Seal Beach*, 36 Cal. 3d at 597.
16 Further, "the Legislature clearly intended that the MMBA apply to charter cities: a public agency
17 under section 3501, subdivision (c) includes 'every town, city, county, city and county and municipal
18 corporation, whether incorporated or not and whether chartered or not.'" *Id.*

19 The "centerpiece" of the MMBA is the duty of local public agencies to meet and confer in
20 good faith contained in section 3505. *Voters for a Responsible Retirement v. Bd. of Supervisors of*
21 *Trinity County* (1994) 8 Cal. 4th 765, 780 (*Trinity County*). The MMBA defines meet and confer
22 in good faith to mean:

23 that a public agency, or such representatives as it may designate, and representatives
24 of recognized employee organizations, shall have the mutual obligation personally
25 to meet and confer promptly upon request by either party and continue for a
26 reasonable period of time in order to exchange freely information, opinions, and
proposals, and to endeavor to reach agreement on matters within the scope of
representation prior to the adoption by the public agency of its final budget for the
ensuing year.

27 Gov't Code § 3505 (emphasis added). As the Court recognized in *Glendale*, by adding the "in good
28 faith" requirement and by defining meeting and conferring in good faith as being done with the

1 objective of reaching an agreement, the Legislature intended the MMBA to go beyond the George
2 Brown Act's requirements that public employers merely listen to and discuss the demands of unions.
3 15 Cal.3d at 335-36. "[T]he definition of the revised [meet and confer] commandment made clear
4 that the goal of the process was not simply communication but agreement." Grodin, 23 Hastings L.J.
5 at 731.

6 In its present form, the MMBA mandates that the governing body undertake
7 negotiations with employee organizations not merely to listen to their grievances, but
8 also with the objective of reaching agreement on matters within the scope of
9 representation. *Trinity County*, 8 Cal. 4th at 781.

10 **B. The City Committed Unfair Practices In Violation of the MMBA**

11 The City, in part directly and in part through Mayor Jerry Sanders as its designated
12 representative and actual agent within the meaning of Government Code section 3505:

13 (1) made a determination of policy or course of conduct related to certain pension and
14 compensation objectives while failing and refusing to meet and confer in good faith.

15 (2) interfered with the rights of bargaining unit employees to be represented by Charging
16 Parties in violation of sections 3502 and 3506, and,

17 (3) refused Charging Parties their rights to represent bargaining unit employees in
18 violation of Section 3503.

19 The City's conduct constitutes unfair practices under section 3509(b) and PERB Regulations
20 32603(b) and (c).

21 **C. PERB Determines Agency On A Case-By-Case Basis**

22 PERB determines whether a person acts as an agent of an employer on a case-by-case basis,
23 based on whether it is reasonable to believe that the alleged agent acted on behalf of the employer.
24 *Inglewood Teachers Ass'n v. PERB*, 227 Cal. App. 3d 767, 776-77 (1991).

25 PERB applies common law principles to determining the existence of agency. *Regents of*
26 *the University of California*, PERB Decision No. 1771-H at p. 3, n. 2 (2005). Agency can be created
27 through an express grant of authority from the principal to the agent. 3 Witkin, Summary of Cal.
28 Law (10th), Agency and Employment § 134. An agent has authority to "do everything necessary and
proper and usual in the ordinary course of business for effecting the purpose of the agency." *Id.* at
§ 135; Civil Code § 2319(1).

1 In *Chula Vista Elementary School District*, PERB Decision No. 1647 (2004), PERB held that
2 a principal acted as the agent of the District when he unlawfully polled and threatened teachers in
3 the lead-up to a union election. PERB found that the principal was an actual agent of the District,
4 and that he was acting within the scope of his authority “since meeting teachers during the school
5 day at the school site is within a principal’s authority.” *Id.* at p. 9. PERB thus found that it was
6 reasonable for employees to believe that the principal was an agent of the District, and therefore
7 under the *Inglewood* test the principal “was acting with the ostensible or apparent authority of the
8 District to engage in the unlawful conduct.” *Id.*

9 PERB then looked to whether the District properly retracted the principal’s apparent
10 authority. PERB found that, despite being warned by teachers about the principal’s actions, there
11 was no evidence that any District administrator investigated the allegations. *Id.* at p. 10. Although
12 an assistant superintendent advised teachers to “vote their consciences,” he “never specifically
13 acknowledged or repudiated [the principal’s] misconduct.” *Id.* PERB concluded:

14 In sum, there is no evidence that the District either conducted an investigation, took
15 any further action to become informed about [the principal’s] misconduct or its
16 effects upon the [teachers], or otherwise responded to teacher complaints about [the
17 principal’s] conduct. . . . We therefore conclude that under [PERB’s agency
standards], [the principal] acted as an agent of the District when he committed unfair
practices against [the teachers]. *Id.* at 10-11.

18 In *San Diego Unified School District*, PERB Decision No. 137 at pp. 2-3 (1980), PERB held
19 that two members of the school board acted as agents of the District when they prepared letters of
20 commendation for teachers who did not go out on strike and had them placed in the teachers’
21 personnel folders. The two members had dissented from a vote of the school board not to impose
22 sanctions on strikers. *Id.* at 2. The two members acted without informing the other three members
23 of the board. *Id.* PERB found that the school board members acted as agents of the District on two
24 separate grounds. First, when informed of the placement of the letters, the other three members of
25 the board took no action and thus effectively condoned the actions of the two members. *Id.* at 6-7.
26 Additionally, PERB held that:

27 a finding of employer status prior to such condonation is based on the subject matter
28 of the letters (i.e., praise by governing officials for the professionalism of
non-striking teachers), the regular District stationery that was used, the titles
identifying the authors of the letter as school board members, and the decision of
District managerial employees authorizing placement of the letters in personnel

1 folders. Under these circumstances employees in the District had reasonable cause
2 to believe that the District's personnel were acting with the authority of the employer
and that the District is liable for their actions. *Id.* at p. 7.

3 In both *Chula Vista Elementary School District* and *San Diego Unified School District*,
4 PERB found that a combination of the alleged agents' exercise of their actual authority, the
5 appearance of authority to others, and the employer's failure to retract the conduct or authority,
6 supported a conclusion that the employer was liable for the agents' unfair practices.

7 **D. The Mayor Is An Actual Agent of the City and Neither He Nor the City Can**
8 **"Opt-Out" of the MMBA**

9 Throughout these proceedings, the City has denied that any unfair practice occurred when
10 the City failed and refused to meet and confer over the CPRI subject matter – otherwise admittedly
11 within the scope of representation under the MMBA – on the ground that the Mayor was acting as
12 a private citizen rather than as an agent of the City. As such, the City argues, his actions are of no
13 legal consequence and do not trigger the City's meet-and-confer obligations under the MMBA.

14 However, the City Charter grants the Mayor substantial authority to manage the day-to-day
15 affairs of the City, and grants him particular authority to represent the City on labor relations matters
16 with the corresponding duty to comply with the MMBA. The evidence clearly establishes the
17 Mayor's agency when he acted in accordance with his Charter-mandated duties as the City's Chief
18 Executive Officer when he determined fundamental City policy on pension and compensation issues
19 for employees and when he set out to achieve implementation of that policy by using the power,
20 prestige, visibility *and resources* of his Office. Thus, the Mayor's actions in pursuing the CPRI were
21 not only taken in accordance with his Charter authority, they were undertaken in a manner which
22 would lead a reasonable observer to believe that he was acting *as Mayor* not as a private citizen.

23 **1. The City Charter – Through its Strong Mayor Provisions – Expressly**
24 **Vests the Mayor With the Authority and Responsibility to Represent the**
City in Labor Relations Matters And Establishes His Actual Agency

25 The City's Strong Mayor Form of Government is established by Article XV of the City's
26 Charter. (Exhibit 8) The Strong Mayor has all of the executive authority, power and responsibilities
27 that had, at one time, been conferred on the City Manager when there was a City Council/City
28 Manager form of government. (II, 37:20-25)

1 Mayor Sanders agrees that, among his duties under the Charter, is the duty to serve as the
2 City's Chief Executive Officer, responsible for the day-to-day operations of the City as a business,
3 as a government, and as an employer. (II 48:21-49:8) His duties under the Charter also include
4 conducting the meet and confer process under the MMBA with the City's recognized employee
5 organizations, and fulfilling the City's obligations under the MMBA by communicating with the
6 City's recognized employee organizations in a manner consistent with the MMBA. (II 49:17-28;
7 50:1-4) In his role as Chief Labor Negotiator for the City, the Mayor determines what he believes
8 the City's objectives ought to be – what concessions, reforms, changes in terms and conditions of
9 employment or pensions are important in his judgment. (II, 51:26-52:3) He lays out the policy
10 objectives and parameters he thinks are important and takes input from the City Council which,
11 ultimately, must act to adopt any agreements that are reached. (II, 51:3-25)

12 Under the City's Charter, representing the City's position on employee pensions is so clearly
13 within the scope of the Mayor's authority that this fact alone supports the conclusion that, when he
14 promoted the CPRI, he acted as the City's actual agent. Thus, the Mayor's actual Charter authority
15 establishes agency in this case.

16 This initiative was Mayor Sanders' primary objective during his last two years in office. He
17 publicly described it as the most important initiative in the City's history. He told multiple audiences
18 that it would be the "solution" to the City's fiscal issues. Mayor Sanders treated his work – and his
19 staff's work – on this initiative as part and parcel of the goals and objectives of the Mayor's Office
20 in moving the City forward in accordance with Mayor Sanders' executive determination of what was
21 in the City's best interest.

22 Furthermore, the extent to which the Mayor made the CPRI a City activity, internally and
23 externally, made it reasonable for employees (and others) to believe that he was acting with authority
24 of the City in promoting the CPRI without meeting-and-conferring with the Charging Parties. The
25 City made no showing that it retracted or disavowed the use of Mayoral authority in pursuing the
26 CPRI without meeting and conferring with the City's unions. Under any theory or test of agency,
27 the City is liable for the Mayor's conduct in committing unfair practices against the Charging Parties.

28 ///

1 **2. The Mayor Used the Full Trappings and Resources of His Office in**
2 **Pursuit of the CPRI**

3 A finding of actual agency is also supported by the degree to which the Mayor used his
4 official title, as well as the trappings and resources of his Office and his access to the mechanisms
5 of City government in pursuing and promoting the CPRI. See *San Diego Unified School District*,
6 PERB Decision No. 137 at pp. 2-3 (1980) (holding that school board members who sent letters
7 commending teachers who did not join strike acted as agents of the school district supported by fact
8 that letters were written on district stationary and identified the titles of the board members).

9 The record here is clear – the CPRI was not an initiative crafted by three PTA Moms in a
10 garage. It is a sophisticated and complicated document which *transformed* the pension and
11 compensation bargain in the City of San Diego by amending multiple Articles in the City’s Charter.
12 Extensive and undisputed evidence proves that Mayor Sanders used his title, the City’s website, his
13 highly-trained City-paid staff, including the financial and operational expertise of the City’s Chief
14 Operating Officer and the legal expertise of the City Attorney, his special access to the press and to
15 the community at large *as Mayor* – even the high profile platform of the Charter-mandated “State
16 of the City” address which he delivered because he is *Mayor* – to pursue and promote the CPRI.

17 Mayor Sanders never directed his Director of Communications or his media staff members
18 to demand either corrections or retractions at any time about how the media was repeatedly and
19 consistently characterizing his involvement in the initiative. (II, 62:21-25) “Mayor Sanders
20 acknowledges that every time he spoke, whether on TV or in another setting, he was introduced as
21 “Mayor Jerry Sanders.” (II, 63:3-8) And when he did speak about this issue, he was on his own floor
22 at City Hall or out on the City Concourse or in other public settings where he was introduced as
23 Mayor. **He never had a press conference, for example, in the front yard of his home on a**
24 **weekend where he said: “I’m Jerry Sanders, citizen of San Diego.”** (II, 63:9-18, emphasis
25 added) He also does not believe that he ever put out any statement that came from Jerry Sanders at
26 his home address in San Diego. (II, 64:4-6) He doesn’t know if every statement that he put out
27 relating to this initiative identified him as “Mayor Jerry Sanders” because “he didn’t read them all.”
28 (II, 64:7-12) Mayor Sanders is not aware of any message that he ever asked anyone on his staff to
 disseminate to City employees defining and clarifying for them what they might be reading and

1 hearing and how it related to his role as Mayor under the Charter versus his role as private citizen
2 Jerry Sanders. (II, 63:26-64:3)

3 In the face of this avalanche of evidence, the claim that he acted as a “private citizen” was
4 clearly a sham. The Mayor cannot use all the advantages of his office in conducting his charter-
5 mandated responsibility to represent the City on a labor relations matter while claiming to be a
6 private citizen for purposes of evading the MMBA. The Mayor advocating for pension reform
7 during his State of the City address “as a private citizen” would be akin to a union president speaking
8 at a union meeting claiming the right to say: “As a private citizen, I will do whatever I can to ensure
9 all agency fee payers lose their jobs.” The City seeks a test of agency whereby an individual can
10 simply disavow agency for the purposes evading requirements under the MMBA while maintaining
11 all other features and privileges of being an agent. Clearly such a test is unsustainable and should
12 not be applied in this case. Notwithstanding his hollow assertions to the contrary, every action
13 Mayor Sanders took in developing and promoting the CPRI was done in his capacity as Mayor, Chief
14 Executive Officer, and Chief Labor Negotiator of the City of San Diego.

15 **3. Even The Mayor's Fellow Proponents of the CPRI Recognized That,**
16 **From a Legal Standpoint, the Mayor Was Representing the City in His**
Pursuit of the CPRI

17 Despite the Mayor’s assertion that he was acting as a private citizen, his allies and fellow
18 proponents of pension reform recognized that, as a legal matter, the Mayor was representing the City
19 in their negotiations with him over the contents of his initiative, as evidenced by lobbying disclosure
20 reports filed under the City’s Municipal Lobbying Ordinance. Kenneth Lounsbury’s firm was
21 retained by the San Diego County Taxpayers Association to work on the pension reform proposal.
22 Mr. Lounsbury himself was the City's lone witness at hearing. He signed two lobbying disclosure
23 reports under penalty of perjury related to a meeting which he and other attorneys in his firm
24 attended on Wednesday, March 30, 2011, with the Mayor and several other City officials, including
25 City Attorney Goldsmith, COO Goldstone, Councilmember Faulconer, and Mayor's Chief of Staff.
26 (Exhibits 125-126)

27 Mr. Lounsbury felt that it was prudent to report these contacts because “we were retained by
28 the San Diego County Taxpayers Association to work on the measure, which would likely involve

1 discussions with *the City*.” (IV, 280:15-22) The “municipal decision” which he described on these
2 two disclosure forms covering the first two quarters of 2011 was the “revision of City employee
3 pension proposals,” with the “outcome” being sought of “an amendment of the City Charter by
4 election ballot.” (II, 280:23-281:3)

5 Thus, even the Mayor’s allies in pursuing and promoting the CPRI recognized that -- talking
6 points aside – *as a legal matter*, the Mayor and the City officials he engaged to assist him in his
7 efforts, were representing *the City* with respect to developing and promoting the CPRI. These
8 lobbying disclosure forms offer confirmation from an unexpected source that the Mayor's “private
9 citizen” claim was seen as a sham even by his allies.

10 **E. Prior to the Mayor's Pursuit of the CPRI, the City Recognized That the**
11 **Mayor Acts as an Agent of the City When Pursuing a Charter Amendment**
12 **Implicating Terms and Conditions of Employment**

13 The two Memoranda of Law (“MOL”) issued by the San Diego City Attorney's office in 2008
14 and 2009 demonstrate that, contrary to its position in this case, the City once recognized that the
15 Mayor cannot pursue a charter amendment by initiative without triggering the City's meet-and-confer
16 obligations under the MMBA.

17 In the 2008 MOL, the City Attorney concluded, based on the Strong Mayor provisions
18 discussed above, that the Mayor cannot “initiate or sponsor a voter petition drive to place a ballot
19 measure to amend the City Charter provisions related to retirement pensions” without meeting and
20 conferring with the unions:

21 The Mayor has the same rights as a citizen with respect to elections and propositions.
22 The Mayor does not give up his Constitutional rights upon becoming elected. He has
23 the right to initiate or sponsor a voter petition drive. However, such sponsorship
24 would legally be considered as acting with apparent governmental authority because
25 of his position as Mayor, and his right and responsibility under the Strong Mayor
26 Charter provisions to represent the City regarding labor issues and negotiations,
27 including employee pensions. As the Mayor is acting with apparent authority with
28 regard to his sponsorship of a voter petition; the City would have the same meet and
confer obligations with its unions as [if he were proposing a ballot measure on behalf
of the City]. (Exhibit 23, Bates 519)

When expanding on its answer, the City Attorney's office emphasized the effect the “Strong Mayor”
Charter provisions have in triggering this obligation to meet and confer:

The City Charter itself under the Strong Mayor Provisions grants the Mayor the
authority to represent the City regarding labor issues and labor negotiations,
including employee pensions. . . . [T]he Council had confirmed this authority in

1 Council Policy 300-6, providing for the Mayor to present and negotiate his proposals
2 on behalf of the City with the labor unions. Since the Strong Mayor Amendment was
3 added, the City Council has repeatedly acknowledged the Mayor's authority as the
4 City's spokesperson on labor negotiations by enforcing Council Policy 300-6. In
5 some instances, this included his authority to negotiate on behalf of the City over his
6 ballot proposals to amend the charter. *Id.*

7 The 2009 MOL demonstrates the City's recognition that, in addition to the Mayor's specific
8 responsibilities as the City's Chief Labor Negotiator, *all* City officials have an obligation to act in
9 conformity with the City's bargaining obligations because, for purposes of the MMBA, the City is
10 "a single employer." This 2009 MOL states:

11 Notwithstanding any distinctions in the Charter's roles for the Council, the Mayor,
12 the Civil Service Commission, and other City officials or representatives, the City is
13 considered a single employer under the MMBA. Employees of the City are
14 employees of the municipal corporation. See Charter § 1. The City itself is the
15 public agency covered by the MMBA. In determining whether or not the City has
16 committed an unfair labor practice in violation of the MMBA, PERB will consider
17 the actions of all officials and representatives acting on behalf of the City. (Exhibit
18 24)

19 The conclusion stated in this 2009 MOL that the City "is considered a single employer under
20 the MMBA" conforms to PERB's holding in *City of San Diego (Office of the City Attorney)*, PERB
21 Decision No. 2103-M (2010), that even City officers who lack the Mayor's explicit duties with
22 respect to representing the City on labor relations issues can violate the City's meet-and-confer
23 obligations under the MMBA.

24 In *City of San Diego*, PERB held that *the City* violated the MMBA when its City Attorney
25 by-passed the exclusive bargaining representative by encouraging employees to rescind their
26 purchase of service credits from the City's retirement system. PERB rejected the City's argument
27 that the City Attorney's duties under the City Charter required him to make the challenged
28 statements, holding that "the City fail[ed] to explain or provide any evidence as to how [the city
attorney's] duties authorize the city attorney to disregard the state collective bargaining statute." *Id.*
at p. 14. This holding applies *a fortiori* to the Mayor, who, the City acknowledges, is empowered
by the City Charter to represent the City regarding labor issues.

Notably, in these proceedings, the City has not explained why the consistent advice to the
City and the Mayor on the Mayor's agent status is incorrect.

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1 **F. Both the City’s Own Analysis and PERB Recognize That the Actions of City**
2 **Officials Other than the City Council Can Constitute a Violation of the City’s**
3 **Meet-and-Confer Obligations**

4 In previous briefing in this matter, the City has suggested that the Mayor’s actions cannot be
5 the basis for a violation of the City’s duty to meet-and-confer because, under the MMBA, the
6 responsibility to meet-and-confer is vested *exclusively* in the “legislative body” (in this case the City
7 Council). This argument is contrary to the actual allocation of responsibilities between the Mayor
8 and the City Council under the City’s Strong Mayor Form of Governance whereby *the Mayor* is
9 vested with the authority to be the City’s Chief Executive Officer and Chief Labor Negotiator. This
10 argument is also contrary to the City’s own legal analysis in the 2009 MOL that “[i]n determining
11 whether or not the City has committed an unfair labor practice in violation of the MMBA, PERB will
12 consider the actions of all officials and representatives acting on behalf of the City.” Finally, such
13 an argument would also be contrary to PERB precedent which holds that the actions of City officials
14 other than the City Council can constitute a violation of the City’s bargaining obligations. (See *City*
15 *of San Diego (Office of the City Attorney)*, PERB Decision No. 2103-M (2010).)

15 **G. The Mayor’s “Splitting It” Concept Ignores The Distinction Between His**
16 **“Political” Role And His Role As The City’s Chief Executive Officer**

17 Mayor Sanders believes that, on any given day, at the same time during the day, he can be
18 acting as Mayor and also acting as a private citizen – and that he can move seamlessly between those
19 two roles. In fact, he would say that “it’s a necessity.” He offers the example of running for a
20 second term while in office:

21 You’re doing both. You’re not allowed to campaign on City time, but elected
22 officials also don’t have private time per se. We don’t get vacation time. We don’t
23 get sick time. We don’t get any of those. You move back and forth in the electoral
24 process all the time. I mean that’s just part of it. (II, 47:26-48:14)

25 When asked whether the activities of running for office or supporting someone else who may
26 be running for office are distinct from those situations which involve the duties imposed on him
27 under the Charter, Mayor Sanders acknowledges that he doesn’t know “the distinctions in that.” (II,
28 48:15-20) He believes, however, that he can “split” his meet and confer Charter duties such that he
29 does some of them as Mayor and avoids doing some of them by acting as a private citizen. In
30 support of this “splitting” scenario, he offers the example of the Proposition D sales tax ballot

1 initiative **which the City Council voted to put it on the ballot.** (II, 58:19-26; emphasis added) This
2 sales tax increase was defeated at the polls on November 2, 2010 (and led to his decision to bring
3 forward an initiative to replace traditional pensions with a 401(k) style plan):

4 I certainly split it there. I was a Mayor. I supported Prop D, but I also raised money
5 for the ballot initiative off-site in a private capacity as a citizen **because as Mayor**
6 **you can't raise money for a ballot initiative.** The City of San Diego can't raise
7 money for a ballot initiative. **I had to do that completely on my own, off-site,**
8 **using my own cell phone and the rest of it.** So I mean I think that throughout this,
9 there was issues around that where sometimes you're doing it as a private citizen.
10 You certainly don't give up your First Amendment right to freedom of associations
11 or to say what I think, and I think that I can move back and forth in those. (II, 57:28-
12 58:18; emphasis added)

13 The examples of "splitting it" offered by the Mayor miss the point. Even if there are some
14 actions the Mayor can take as a private citizen, whether he acts as the Mayor or as a private citizen
15 is defined by his legal duties and obligations, and not by the label he chooses to use at a given time.
16 Running for re-election is not something the Mayor is required by the charter to do. It is not an
17 action he takes in either his role as Chief Executive Officer or Chief Labor Negotiator. Nonetheless,
18 when the Mayor is campaigning, his legal obligations remain with him. If a sitting mayor were to
19 pledge that, in his second term, he would fire all union leaders, this almost certainly would be an
20 unfair labor practice.

21 The example of raising money for Proposition D is even more illuminating. By describing
22 this as a "split" role, the Mayor acknowledges that he was acting as Mayor in promoting Proposition
23 D. The Mayor's assertions about what he could or could not do with respect to Proposition D do not
24 support his claim that he can avoid his *legal obligation* to meet-and-confer under the MMBA. Like
25 Proposition D, the CPRI is an initiative developed and promoted by the Mayor in his capacity as the
26 City's Chief Executive. The Mayor cannot excuse himself from those obligations which fall on him
27 by virtue of his Office and his role as the City's Chief Labor Negotiator. The duty to meet-and-
28 confer is imposed on the City by the MMBA and delegated to the Mayor through the City's Charter.
The Mayor's, and the City's, failure to meet-and-confer over the CPRI cannot be excused by any
claims that the City's designated representative acted as a private citizen.

The affirmative act of *refusing* to meet-and-confer – as the City indisputably did in this case
– can only be undertaken by the Mayor in his capacity as an agent of the City and under the authority

1 granted to him by the City’s Charter. There is no dispute that the subject matter of the CPRI is
2 within the scope of representation and that the Charging Parties requested to meet-and-confer over
3 the CPRI subject matter. Whatever actions the Mayor claims he was permitted to take as a private
4 citizen, there can be no dispute that he acted in his capacity as Mayor when he refused the Charging
5 Parties’ requests to meet-and-confer over the CPRI.

6 **H. Initiative Rights Are Not Absolute and Must Yield to Controlling Statewide**
7 **Public Sector Labor Law**

8 **1. The Initiative Rights of a Local Electorate Are Not Absolute When the**
9 **Legislature Acts In An Area of Statewide Concern**

10 In briefing to the Supreme Court related to this matter – and likely to be repeated here – the
11 City argues that “A citizen's right to directly propose changes to a city charter is absolute.” This
12 assertion is false. Courts have frequently invalidated measures enacted through initiative when the
13 initiative is beyond the power of the electorate to enact. *See, e.g., Committee of Seven Thousand v.*
14 *Superior Court* (1988) 45 Cal.3d 491,500; *L.I.F.E. Committee v. City of Lodi* (1989) 213 Cal.App.3d
15 1139, 1145-46; *Citizens for Responsible Behavior v. Superior Court* (1992) 1 Cal.App.4th 1013,
16 1022-23; *City of Burbank v. Burbank-Glendale-Pasadena Airport Auth.* (2003) 113 Cal.App.4th
17 465, 474-79. Indeed, of particular relevancy here, the Supreme Court has recognized that “the local
18 electorate's right to initiative . . . is generally co-extensive with the *legislative power* of the local
19 governing body.” *DeVita v. County of Napa* (1995) 9 Cal. 4th 763, 775. Where the state has
20 legislated in an area of statewide concern, neither the local legislative body *nor the electorate* can
21 enact conflicting legislation. *Id.* at 776 (“[W]e have concluded that the initiative and referendum
22 power could not be used in areas in which the local legislative body's discretion was largely
23 preempted by statutory mandate.”)

24 In some cases, the power of the electorate to enact law by initiative may be even more limited
25 than that of the legislative body: “[I]n some cases, the Legislature did not intend to restrict local
26 legislative authority but rather to delegate the exercise of that authority exclusively to the governing
27 body, thereby precluding initiative and referendum.” *Id.* Thus, when legislating in an area of
28 statewide concern, the Legislature may limit the right the local electorate’s initiative rights either
by restricting the scope of the local legislative body’s authority (and thus restricting the scope of the

1 electorate’s initiative rights) or by delegating the authority and ability to act *exclusively* to the local
2 legislative body (and thus displacing altogether the local electorate’s right to govern by initiative).

3 **2. When Enacting the MMBA to Foster Statewide Public Sector Labor**
4 **Relations, the Legislature Imposed Lawful Limits on the Local**
5 **Electorate’s Power of Initiative and Referendum**

6 The state Supreme Court has twice looked at the intersection between *local* ballot measures
7 and the MMBA, and in both cases found that *constitutional* rights to initiative and referendum are
8 limited by the MMBA. *People ex. rel Seal Beach Police Officers Ass'n v. City of Seal Beach* (1984)
9 36 Cal. 3d 591 (*Seal Beach*), and *Voters for Responsible Retirement v. Bd. of Supervisors of Trinity*
10 *County* (1994) 8 Cal. 4th 765 (*Trinity County*). Even though initiative and referendum rights
11 originate in the Constitution, the Legislature can restrict *local* ballot measures pursuant to “its power
12 to enact general laws of statewide importance that override local legislation.” *Trinity County*, 8 Cal.
13 4th at 779. In both *Seal Beach* and *Trinity County*, our high court has held that the MMBA is just
14 such a general law of statewide importance that it may lawfully limit the right to enact local ballot
15 measures.

16 a. *Seal Beach Holds That the MMBA Limits A Charter City’s*
17 *Constitutional Right to Propose Ballot Measures On Matters Within*
18 *the Scope of Representation*

19 “Fair labor practices, uniform throughout the state” are a matter of statewide concern. *Seal*
20 *Beach*, 36 Cal. 3d at 600. The MMBA represents the Legislature's intent to establish methods for
21 resolving disputes over employment conditions and to recognize the right of public employees to
22 organize and to be represented by employee organizations. *Id.* at 597. The MMBA was clearly
23 intended to apply to charter cities. *Id.* In *Seal Beach*, the Supreme Court held that a charter city
24 must meet-and-confer before putting a council-sponsored initiative to amend certain terms and
25 conditions of employment on the ballot. *Id.* at 601. The Court recognized that the “meet-and-confer
26 requirement [of the MMBA] is an essential component for regulating the city's employment
27 practices.” *Id.*

28 The *Seal Beach* court held that the right of a charter city to propose charter amendments was
limited by the MMBA even though it recognized that a charter city's power to put charter
amendments on the ballot derives from the state constitution. *Id.* at 594-95. The city's constitutional

1 right to propose charter amendments was *not* absolute, but instead had to be harmonized with state
2 law such as the MMBA. *Id.* at 598-600. In reaching this conclusion, the *Seal Beach* court rejected
3 the outcome in *San Francisco Firefighters v. Bd. of Supervisors* (1979) 96 Cal. App. 3d 538, which
4 held that a charter city's constitutional right to propose charter amendments to the electorate could
5 not be abridged by the Legislature through the MMBA. *Seal Beach*, 36 Cal. 3d at 598. Although
6 the *Seal Beach* court expressly declined to provide an advisory opinion as to whether the meet-and-
7 confer requirement would apply to a citizen-sponsored initiative which was not before it [*id.* at 599,
8 n. 8], the high court's reasoning related to council-sponsored ballot measures offered the likely
9 answer because the rights in both instances implicate the Constitution. Having determined that the
10 MMBA is general legislation on a matter of statewide concern such it restrained the exercise of the
11 City Council's constitutional rights in *Seal Beach*, the conclusion is inescapable that the electorate
12 of a local agency would be no more empowered to undermine that legislative scheme than the local
13 legislative body was.

14 b. *Trinity County Holds That MMBA Eliminates People's Right to*
15 *Determine Local Compensation By Referendum*

16 Ten years after *Seal Beach*, in *Trinity County*, the Supreme Court directly confronted the
17 intersection between the MMBA and the power of the electorate to take legislative action by
18 referendum. In *Trinity County*, the Court held that a provision of the Government Code section
19 25123(e), which requires ordinances adopting memoranda of understanding between a county and
20 an employee organization to take immediate effect, barred a challenge to such ordinances through
21 referendum, *and* that the Legislature had the authority to limit the people's right to challenge
22 governmental action by referendum. The *Trinity County* court held that, as a general matter, the
23 Legislature has the authority to restrict the constitutionally-guaranteed right to local referendum
24 through "its power to enact general laws of statewide importance that override local legislation."
25 *Id.* at 779.

26 In determining whether Section 25123(e) "fulfills some legislative purpose of statewide
27 import," the Court "naturally turn[ed] to an examination of the [MMBA]." *Id.* at 780. The Court
28 found "that the MMBA embodies a statutory scheme in an area of statewide concern that justifies
the referendum restriction inherent in [Section 25123(e)]." *Id.* Recognizing that the meet-and-

1 confer requirement is the “centerpiece of the MMBA” [*id.* at 781], the Court found there to be a
2 “problematic” relationship between the MMBA and the local referendum power. *Id.* at 782.

3 Thus, as it had in *Seal Beach*, the high court in *Trinity County* recognized that, although the
4 substance of compensation for employees of charter cities is a municipal affair and not subject to
5 general state laws, the state can impose a process by which disputes over employment issues are
6 resolved. *Id.* at 781. It found that the dispute resolution process mandated by the MMBA would be
7 undermined by making memoranda of understanding subject to referendum:

8 If the bargaining process and ultimate ratification of the fruits of this dispute
9 resolution procedure by the governing agency is to have its purpose fulfilled, then the
10 decision of the governing body to approve the MOU must be binding and not subject
11 to the uncertainty of referendum. . . . Stated differently, the effectiveness of the
12 collective bargaining process rests in large part upon the fact that the public body that
13 approves the MOU under section 3505.1 – i.e., the governing body – is the same
14 entity that, under section 3505, is mandated to conduct or supervise the negotiations
15 from which the MOU emerges. *If the referendum were interjected into this process, then the power to negotiate an agreement and the ultimate power to approve an agreement would be wholly divorced from each other, with the result that the bargaining process established by the MMBA could be undermined.*

14 *Id.* at 782 (emphasis added). The *Trinity County* court concluded that “the Legislature's exercise of
15 its preemptive power to prescribe labor relations procedures in public employment includes the
16 power to exclusively delegate negotiating authority to the [legislative body], and therefore the power
17 to curtail the local right of referendum.” *Id.* at 784.

18 c. *Trinity County Disapproves The Notion in United Public Employees*
19 *That The MMBA's Aim Is Limited to Communication Rather Than*
20 *Dispute Resolution*

20 The *Trinity County* court also disapproved the decision in *United Public Employees v. City*
21 *and County of San Francisco* (1987) 190 Cal.App.3d 419 (*United Public Employees*), which had
22 attempted to apply *Seal Beach*. The *United Public Employees* court upheld a provision in San
23 Francisco's charter requiring all negotiated agreements on fringe benefits between San Francisco and
24 its employee organizations to be submitted to the voters for approval. Citing *Seal Beach*, the *United*
25 *Public Employees* court recognized that, “while the amount of compensation is considered strictly
26 a local affair and not preempted by the general law, the procedure by which such compensation is
27 determined is subject to the provisions of the MMBA.” *Id.* at 423 (internal citations omitted).

28 ///

1 However, the *United Public Employees* court concluded that, under *Seal Beach*, the
2 requirements of the MMBA were compatible with the disputed charter provision because San
3 Francisco had to meet and confer with its employee organizations and reach agreement before
4 anything could be submitted to the voters. *Id.* at 423-24. Thus, the *United Public Employees* court
5 held that the objectives of the MMBA were served and that the situation was akin to *Seal Beach*.
6 *Id.* at 425-26. “The city has recognized its duty to meet and confer on the subject of fringe benefits,
7 thereby guaranteeing public employees an opportunity to have their views seriously considered.”
8 *Id.* at 426 (internal quotations and citations omitted). The *United Public Employees* court stressed
9 that, since employee organizations were still able to meet and confer over the terms and conditions
10 of employment at issue, the charter provision at issue did not undermine the MMBA.

11 When reviewing the result in *United Public Employees* from the vantage point of the
12 referendum at issue in the *Trinity County* case, the Supreme Court found that the *United Public*
13 *Employees* court had “understated the problematic relationship between the MMBA and the local
14 referendum process.”

15 As we have noted, the purpose of the MMBA is more than promoting communication
16 between employees and employers. Its aim is also to resolve disputes regarding
17 wages, hours, and other terms and conditions of employment between public
employers and public employee organizations through negotiation and binding
agreements. *Trinity County*, 8 Cal. 4th at 782.

18 Although the *Trinity County* court did not declare whether *United Public Employees* was correctly
19 decided [*id.*], its criticism of that decision – together with the general discussion of the problematic
20 relationship between the MMBA and the local referendum process allowing the electorate to modify
21 terms and conditions of employment – indicate a belief that *Seal Beach* represents a limited
22 circumstance in which the local electorate can directly vote on terms and conditions of employment
23 for represented employees after a good faith meet-and-confer process between the public agency and
24 its recognized employee organizations has occurred.

25 d. *Trinity County Supports the Conclusion That the MMBA Implicitly*
26 *and Permissibly Limits A Local Electorate’s Rights of Referenda and*
 Initiative

27 As the history of the MMBA discussed above indicates, the MMBA represents a policy
28 choice by the Legislature towards *effective* collective bargaining and away from a scheme where

1 employers merely had to listen to employees. The goal of the MMBA is for terms and conditions
2 of employment to reflect either an *agreement* between employees and employers or, at a minimum,
3 the product of a good faith collective bargaining process.

4 The *Trinity County* court left open the question of whether the restriction on submitting
5 memoranda of understanding to referenda originates with Section 25123 or whether Section 25123
6 “merely embodies the legislative recognition that the MMBA already implicitly contains such a
7 restriction.” *Id.* at 783. What is clear from the *Trinity County* court's holding, however, is that the
8 purpose and objectives of the MMBA are a matter of statewide concern such that the Legislature has
9 the power to restrict the ability of the electorate to enact legislation which could undermine it. The
10 *Trinity County* court's reasoning leads to the conclusion that the MMBA contains an implicit
11 restriction on the ability of the electorate to govern directly on matters within the scope of
12 representation, and that the policy reasons for such an implicit restriction apply equally to referenda
13 and initiatives.

14 A *true* citizens' initiative on a matter within the scope of bargaining (untainted by the direct
15 actions and involvement of the public entity's agents as occurred here) – just like the offending
16 referendum on a memorandum of understanding in *Trinity County* – would “divorce” the power to
17 negotiate an agreement from the ultimate power to approve an agreement. Allowing citizens'
18 initiatives on matters within the scope of representation is tantamount to allowing referenda on
19 negotiated agreements by another means: any agreement negotiated between an employee
20 organization and a public agency would be forever uncertain, subject to being amended or reversed
21 by an electorate that has no part in the bargaining process. Such a result is shown by this case: each
22 of the Charging Parties has a Memorandum of Understanding (MOU) with the City that establishes
23 the compensation, pension benefits and other terms and conditions of employment for represented
24 employees. Many of these MOU provisions – otherwise made final and binding when approved by
25 the City's governing body – have now been supplanted by an initiative over which the Charging
26 Parties had no opportunity to bargain. It is no exaggeration to say that the entire legislative scheme
27 enacted by the Legislature to govern public sector labor relations in California – and to achieve
28 uniformity in its interpretation and application – would be undermined if the result here stands.

1 **3. A Determination Regarding The Preemptive Force of the MMBA Does**
2 **Not Turn on A “Procedure” Versus “Substance” Distinction**

3 The City will likely argue that the MMBA is nothing more than a set of procedural
4 requirements which the state has chosen to impose on public agencies and that it does not limit the
5 right of a local electorate to take action on employee compensation which is substantively a matter
6 of local concern. This argument misreads the substance vs. procedure distinction discussed in *Seal*
7 *Beach* and *Trinity County*.

8 The pre-emptive force of the MMBA derives from its status as a state law. The autonomy
9 of charter cities, even over local affairs, is subject to pre-emptive state law. *Associated Home*
10 *Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal 4th 352, 363. The result
11 in *Seal Beach* shows that the MMBA, as a state law, limits any conflicting action by a charter city.
12 The rationale and conclusion in *Trinity County* make clear that, when legislating in an area of
13 statewide concern, the Legislature has the authority to impose procedural requirements which
14 effectively restrict the right of a local electorate to legislate in a manner which undermines that state
15 legislation – even on the matter of employee compensation which is substantively a municipal affair.

16 Thus, the proper inquiry when determining whether a state law restricts the initiative and
17 referendum power of the local electorate is not whether the legislation is procedural or substantive.
18 Rather, the inquiry is whether (1) the state law addresses an area of statewide concern; and (2)
19 whether the Legislature intended the state law to have the effect of restricting the right of local
20 initiative. *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal. 3d 491, 500-01; *see also*
21 *Petty v. City and County of San Francisco* (2004) 118 Cal. App. 4th 233, 246 [“The point is that
22 the state/local dichotomy is one of degree. Our inquiry is whether a statutory scheme that
23 contemplates spheres of local decision-making under a statewide scheme also reflects an intention
24 that *only the representatives of the people, but not the people themselves*, can make those decisions.”
25 (Emphasis added.)]

26 As shown above, the MMBA addresses a matter of statewide concern. Further, its purpose
27 in fostering agreements over terms and conditions of employment through collective bargaining
28 would be fatally undermined if voters retain the power to propose and enact legislation unilaterally

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1 setting those terms and conditions. Such a reserved power in the local electorate would divorce the
2 statutory duty to bargain from the authority to enact the fruits of that bargain or impose terms *after*
3 *good faith bargaining* has occurred.

4 In light of the undeniably corrosive effect any citizens' initiative would have on the meet-and-
5 confer requirements of MMBA, it must be read as barring local electorate initiatives on matters
6 within the scope of representation. Otherwise, such local initiatives will threaten to undermine the
7 Legislature's objective in establishing a uniform, statewide public sector *collective bargaining* law.
8 Since the MMBA requires a public agency's *legislative body* to meet and confer with recognized
9 employee organizations before placing a Charter amendment on a matter within the scope of
10 representation before the electorate, the continued vitality of the MMBA requires the conclusion that
11 the local electorate has been displaced from exercising such legislative power. As stated in *Pettye*
12 *v. City and County of San Francisco* (2004) 118 Cal. App. 4th 233, 246, the "statutory scheme . . .
13 reflects an intention that *only the representatives of the people, but not the people themselves*, can
14 make those decisions."

15 **4. Outcomes In Zoning, Planning & CEQA Cases Are Distinguishable**
16 **Because the Legislature Did Not Intend To Restrict Local Initiative**
17 **Rights In Furtherance of a Statewide Interest As It Did With the MMBA**

18 Cases arising in the planning and CEQA context in which the courts have held that the
19 procedural requirements imposed by state law do not restrict the right to initiative are easily
20 distinguishable. These cases address the procedural requirements dictated by other state laws in
21 which either (1) the state's interest is not as strong as it is under the MMBA, or (2) the procedural
22 requirements are less necessary than they are under the MMBA in effectuating the Legislature's
23 intended purpose.

24 With respect to zoning and planning law, courts have held that the procedural limitations in
25 state legislation were intended to apply only to local legislative bodies but not to the electorate, and,
26 therefore, do not bar initiatives related to these subjects. *See, e.g., DeVita v. County of Napa* (1995)
27 9 Cal. 4th 763, and *Associated Home Builders & Contractors, Inc. v. San Francisco Airports Com.*
28 (1999) 21 Cal 4th 352, 363. These cases emphasize, however, that zoning and planning are primarily
matters of local rather than statewide concern. *DeVita*, 9 Cal. 4th at 782. ("We have recognized that

1 a city's or county's power to control its own land use decisions derives from this inherent police
2 power, not from the delegation of authority by the state.”) The *DeVita* court noted that when it
3 enacted state law with respect to zoning, the Legislature expressly declared that its intention was “to
4 provide only a minimum of limitation in order that counties and cities may exercise the maximum
5 degree of control over local zoning matters.” *Id.* (quoting Gov't Code 65800). State planning law
6 similarly expresses an intent to impose only “minimal regulation on what remains essentially locally
7 determined land use decisions.” *Id.* The *DeVita* court further noted that the Legislature implicitly
8 recognized that planning was not a matter of statewide concern when it left the amendment of a
9 *charter city's* general plan entirely to the discretion of the city. *Id.* at 784.

10 Against this backdrop, the court in *DeVita* found that there was “no clear indication” that the
11 Legislature intended the procedural requirements set forth in state planning law – specifically, the
12 requirements that a general plan amendment be prepared by a planning agency and reviewed by a
13 planning commission, and that the planning agency consult with other agencies and with the public
14 at large – to bar the amendment of a general plan by initiative. *Id.* at 785-86. Again, the *DeVita*
15 court emphasized the strength of the local interest in planning law. “Since the Legislature did not
16 consider these statutory procedures of sufficient statewide importance to impose on charter cities,
17 it is highly doubtful that it intended to give them precedence over the constitutional right to
18 initiative.” *Id.* at 785.

19 Implicit in this discussion over the preemptive force of procedural requirements in state law
20 is a recognition that the state could intend such procedures to bar the local electorate's constitutional
21 right to initiative where the state interest is strong enough. In contrast to the planning law discussed
22 in *DeVita*, there is clear indication that the state intended the MMBA to have such an effect. As
23 discussed in *Trinity County*, the statutory scheme would be undermined if the collective bargaining
24 process can be bypassed entirely by means of local initiative. Public sector collective bargaining and
25 labor relations are a matter of statewide rather than local concern; indeed, that statewide concern is
26 of sufficient strength that the Legislature intended the MMBA to apply (and it does apply) to charter
27 cities. *Seal Beach*, 36 Cal. 3d at 597. Rather than impose “minimal regulation” as it did in the areas
28 of zoning and planning, the Legislature enacted multiple statutory schemes to govern public sector

1 labor relations throughout California’s public sector, and created an entire agency with the expertise
2 to administer and interpret these statutes on a uniform basis to effectuate the purposes of the MMBA.

3 Moreover, the court in *DeVita* found that it was unlikely that the Legislature intended the
4 procedural requirements in planning law to bar the use of initiative because the initiative process
5 itself achieves some of the same effect.

6 “Obviously, when the governing body votes on a general plan amendment, the
7 expression of public opinion on the amendment must come before the vote. When
8 the people exercise their right of initiative, then public input occurs in the act of
proposing and circulating the initiative itself, and at the ballot box.” *DeVita*, 9 Cal.
4th at 786.

9 Indeed, the Supreme Court employed similar reasoning in *Friends of Sierra Madre v. City*
10 *of Sierra Madre* (2001) 25 Cal. 4th 165, 190, when holding that procedural requirements in the
11 California Environmental Quality Act (“CEQA”) apply to council-sponsored initiatives but not to
12 citizen-sponsored initiatives:

13 Voters who are advised that an initiative has been placed on the ballot by the city
14 council will assume that the city council has done so only after itself making a study
15 and thoroughly considering the potential environmental impact of the measure. For
16 that reason a pre-election [environmental impact report] should be prepared and
17 considered by the city council before the council decides to place a council-
generated initiative on the ballot. By contrast, voters have no reason to assume that
the impact of a voter-sponsored initiative has been subjected to the same scrutiny
and, therefore, will consider the potential environmental impacts more carefully in
deciding whether to support or oppose the initiative.

18 Thus, in both the zoning/planning and CEQA contexts, the courts emphasized that the
19 intended effect of the procedural requirements at issue would be achieved through the electoral
20 process itself. Because the Legislature's intent was not frustrated by the initiative process, there was
21 no reason for the courts to conclude that the Legislature intended the procedural requirements in
22 these laws to bar the use of initiative. Clearly, such is not the case with the MMBA. The purposes
23 of the MMBA's meet-and-confer requirements cannot similarly be satisfied through the initiative
24 process except, as recognized in *Seal Beach*, where the body proposing the terms of the initiative is
25 empowered to meet-and-confer with the affected employee organizations. With a purely citizens'
26 initiative, the purpose of the MMBA is frustrated for the reasons recognized in *Trinity County* – the
27 power to negotiate is wholly divorced from the power to approve an agreement. Whereas the entity
28 empowered to bargain in the *Seal Beach* case (the City Council) also formulated what would

1 ultimately go to the voters, in the context of a *true* citizens' initiative, the only entity empowered by
2 statute to meet-and-confer with the relevant employee organizations – the public agency's governing
3 body or designated representatives – is wholly divorced from either formulating or approving what
4 is enacted. Allowing the local electorate to “legislate” by initiative on matters within the scope of
5 representation is entirely inconsistent with the MMBA and defeats the Legislature's purpose of
6 establishing a statewide, uniform collective bargaining law throughout California's public sector.

7 **5. Even If A *True* Citizens' Initiative Could Be Reconciled With the**
8 **Statewide MMBA Statutory Scheme, the City's Use of An Initiative Here**
9 **For the Express Purpose of Avoiding the MMBA Is Unlawful**

10 PERB can decide in this case without deciding whether the MMBA totally preempts citizens'
11 initiatives on matters within the scope of representation. The issue here is whether the City and its
12 agents acted unlawfully in designing, promoting, negotiating, drafting, funding and pursuing the
13 CPRI without meeting-and-conferring with the Charging Parties – and for the express purpose of
14 avoiding any obligation to do so. The issue of whether the voters could have enacted the CPRI
15 absent the City's unlawful involvement is *not* before PERB in this case.

16 Nonetheless, the problematic relationship between the meet-and-confer requirements of the
17 MMBA and citizen initiatives does demonstrate why PERB should be especially vigilant in
18 preventing public agencies such as the City from abusing the initiative process to evade their
19 bargaining obligations under the MMBA. Here, the problem identified in *Trinity County* – divorcing
20 the power to negotiate an agreement from the power to approve an agreement – is not simply a
21 byproduct of the initiative process, but the result of an intentional decision by the Mayor and the City
22 to evade the City's meet-and-confer obligations under the MMBA. The City used the initiative
23 process to achieve what it was unable or unwilling to accomplish through the bargaining process
24 mandated by the MMBA. Such an egregious flaunting of its statutory obligations cannot be
25 permitted.

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1 **I. The City’s Various Theories To Defeat Liability Are Wrong On The Law,**
2 **Wrong On The Facts, Speculative, Irrelevant – Or All Four**

3 **1. The City Asserts That No Violation of the MMBA Occurred Because**
4 **The Mayor Was the “Loser” In the Negotiations With His Fellow**
5 **Proponents and the CPRI Wasn’t the Mayor’s Initiative**

6 The City’s defense of this case as explained during the Opening Statement offered by
7 Assistant City Attorney Donald Worley displays, at best, the City’s profound misunderstanding of
8 the MMBA, or, at worst, a chilling disregard for the MMBA’s purpose and obligations. The City’s
9 position is that no unfair practice occurred because “there was nothing for meet and confer to attach
10 to because (the Mayor) had lost control of the initiative . . . his fingerprints are barely recognizable
11 on Prop B. . . . and hence there was nothing for meet and confer to attach to because he had lost
12 control of the initiative. . . . (though) he finally acquiesced in that and he did later support the CPRI,
13 and he did perhaps some fund-raising and support for it, but it no longer was his. He didn’t own it.”

14 Mr. Worley elaborated, in pertinent part, as follows:

15 [T]he key to the Charging Parties’ case is that the genesis of the CPRI, the very
16 specific drafted charter change that went out for signatures and qualified for the
17 ballot and went to the ballot – the key to their charge is that the Mayor was
18 responsible for everything from the beginning until the end. . . . the evidence that we
19 will show is that the CPRI has a very specific genealogy, and in a nutshell, it was not
20 the Mayor’s proposal. . . . So bottom line is what went to circulation in the petitions
21 and what went to the ballot and what got approved . . . was not the Mayor’s proposal.
22 It was not the Mayor’s plan. Prop B is not the Mayor’s initiative. It is an initiative
23 mainly embraced – It started out with a concept by DeMaio running in parallel with
24 the Mayor’s concept and embraced by some powerful citizens groups, and it was a
25 genuine citizens’ initiative. And the Mayor had no control. He did the best he could
26 during these negotiations. And as I said, all he could do really is to save the police
27 officers . . . Now DeMaio, obviously is not the chief labor negotiator. He has nothing
28 to do with the labor negotiations other than sitting as one of eight City Councilmen
 . . . (who approve or disapprove) of specific terms negotiated by the Mayor’s team.
 But the point is it wasn’t the Mayor’s initiative. Prop B was not the Mayor’s
 initiative. The Mayor lost out in those negotiations. . . . He didn’t own it. He didn’t
 control it, and he had no way of, other than through the negotiations in which he did
 the best he could to save the police offices, and unfortunately, couldn’t save the
 firefighters. He did the best he could, so there wasn’t anything for him to control that
 would have made any sense for a meet and confer process to attach because he could
 not change that initiative once it was solidified, once it was drafted and these people
 were committed to go forward with it. . . . So that’s basically the case. That the City
 will show that the genealogy of Prop B, that the Mayor wasn’t the parent who really
 gave the DNA to it. It was Councilmen DeMaio initially and the citizen groups that
 supported him and carried forward and were committed to go to the ballot with his
 proposals regardless of whether the Mayor joined them or not. That’s the City’s case.

27
28 ///

1 Consistent with this misguided approach, the City’s single evidentiary focus during the hearing was
2 a (failed) attempt to prove that (1) the CPRI was more like Councilmember DeMaio’s “Roadmap
3 to Recovery” than Mayor Sanders’ original initiative design announced in his press conference on
4 November 19, 2010; and (2) the Mayor’s fellow proponents would have gone forward without him
5 if he hadn’t reached agreement with the single CPRI pension reform initiative.

6 a. The CPRI Was A Compromise But It Was *Not* DeMaio’s “Roadmap”

7 It is of no legal consequence in this proceeding to enforce the MMBA whether Mayor
8 Sanders changed or didn’t change the contents of his initiative as he negotiated its terms with fellow
9 proponents. He testified – and the evidence is undisputed – that the CPRI represented a fulfillment
10 of the initiative objectives he had originally described on November 19, 2010, and that he was an
11 enthusiastic proponent of it. In fact, Mayor Sanders specifically contradicted the assertions made
12 in Mr. Worley’s Opening Statement on behalf of the City.

13 Nevertheless, even on this central factual assertion, the City offered no credible evidence that
14 the CPRI was actually Councilmember DeMaio’s “Roadmap to Recovery.” The City’s sole witness,
15 attorney Kenneth Lounsbery, was not credible on this point due to his actual lack of personal
16 knowledge and his decision to disclose selective client communications while refusing to answer
17 questions regarding others.

18 Cross-examination revealed that the document which Mr. Lounsbery called the “DeMaio
19 draft” did *not* come from Councilmember DeMaio’s office; instead, a draft document “of some type”
20 came to him from his client the San Diego County Taxpayers Association “who told (him) it came
21 from DeMaio.” (IV, 277:20-26; 278:1-9) When asked about this communication from his client,
22 Mr. Lounsbery insisted that he had “waived the privilege only for the purpose of the very questions
23 that (City’s counsel) Mr. Worley had asked,” and that if a question exceeds that, he “will not
24 answer.” (IV, 278:10-20) Leaving no room for doubt, Mr. Lounsbery confirmed that he was “willing
25 to tell us part of what (his) client told (him), but not all of it,” and that he is “willing to tell us the
26 part that (his) client permits (him) to tell (us).” (IV, 278:21-27) All Mr. Lounsbery would disclose
27 was that the San Diego County Taxpayers Association gave him a document and said it came from
28

1 Councilmember DeMaio but he can't tell us anything about that document, nor can he produce it
2 "today." (IV, 278:28-279:5)

3 Mr. Lounsbery insisted on repeating limited testimony regarding what his client allegedly *did*
4 *tell* him. This insistence led to the following exchange with counsel for Charging Party MEA:

5 Q. And you were told by your client that the essential terms of the initiative were being
6 determined by a group that included Mayor Sanders.

6 A. No, that's not what I was told. I was told that the DeMaio –

7 Q. If you can answer the question and it's by the San Diego County Taxpayers
8 Association, Mr. Lounsbery, then I want to inquire about your communications.

7 A. You won't get an answer.

8 Q. Well, it can't be only one way. You can't just pick and choose a few things that you
9 want to tell us your client told you and decline to answer the rest of the questions.

9 A. That's the way it is. (IV, 285:7-19)

10 Mr. Lounsbery then repeated that "it was the DeMaio measure from which we worked and
11 that the revisions made of the DeMaio measure were relatively few." (IV, 285:19-21) Ultimately,
12 however, Mr. Lounsbery admits that he was "more a strategist," and not a craftsman. (IV, 283:15-
13 284:6) As to whether his reference to the "DeMaio measure" meant "DeMaio's Roadmap to
14 Recovery":

15 Q. Are you talking about the DeMaio Roadmap to Recovery?

16 A. I've never read the Roadmap for (sic) Recovery, so I don't know. (IV, 285:19-25)

16 ...

17 Q. Are you familiar with all of the provisions of Councilmember DeMaio's Roadmap
18 to Recovery?

18 A. No, I'm not.

19 Q. Are you familiar with all of the provisions of the initiative?

19 A. Mr. Lough would be the better person to answer that question.

20 Q. So if I were to ask you about specific provisions and when it was added and whose
21 idea it was, would you know the answer?

20 A. I would have to call Mr. Lough. (IV, 286:21-287:3)

21 The City tried again to make this central factual point about the DeMaio "Roadmap" through
22 the testimony of the Mayor's Deputy Chief of Staff Aimee Faucett. However, she had limited
23 knowledge related to the specifics of the DeMaio "Roadmap" and could only confirm that a host of
24 issues in the DeMaio "Roadmap" were *not* included in the CPRI. (IV, 154:21-161:4) In the final
25 analysis, she agreed that, to the extent Mayor Sanders wanted to exclude all public safety employees
26 from his original 401(k) initiative design, he compromised by including firefighters and lifeguards,
27 and, to the extent that Councilmember DeMaio wanted to include all employees, including all public
28 safety employees in his 401(k) initiative design, he compromised by excluding sworn police officers.

1 (IV, 165:3-21) In terms of raw numbers, she does not know if it is true that the City employs nearly
2 double the number of sworn police officers compared with firefighters and lifeguards combined.

3 (IV, 165:22-166:3)

4 Moreover, although she acknowledged “having seen at some point” a copy of each of the
5 City’s Exhibits I through M, Ms. Faucett had absolutely no personal knowledge regarding the truth
6 or falsity of their contents. (IV, 161:28-164:27) These exhibits should be given little, if any, weight.

7 Finally, not only did Mayor Sanders disprove the City’s central factual assertion, the City’s
8 COO Jay Goldstone undermined it as well. He testified that, in a fundamental and key respect,
9 Mayor Sanders’ original initiative proposal was actually “tougher” than the negotiated outcome. As
10 Mr. Goldstone explained – the final version of the initiative that the Mayor became a proponent of
11 as announced at the press conference on April 5, 2011, included a provision for a pensionable pay
12 freeze – but not a hard cap or freeze as the Mayor’s original initiative proposal had contemplated.

13 (III, 93:12-21) The Mayor’s concept was that, as long as the total capped payroll amount was not
14 exceeded, changes could occur in the compensation of individual employees or job classifications.

15 (III, 53:6-10) The effect of a payroll cap would have been to minimize, if not eliminate, any
16 temporary increase in the pension payment by closing the system – yet the payroll cap concept would
17 have also allowed for negotiations of pay increases within the parameters of the payroll cap. (III,
18 128:5-27) But putting a cap on payroll would have the effect of offsetting the increases associated

19 with a 401(k) transition. (III, 51:12-52:12) Instead, the final version of the actual initiative called
20 for the City’s opening negotiations position with its recognized employee organizations to be a pay
21 freeze subject to a meet-and-confer process with the authority vested in the City Council to make
22 increases in pensionable pay with six votes of the City Council. (III, 93:20-28) Thus, in any given

23 collective bargaining cycle, the City Council would have the power to increase pensionable pay,
24 notwithstanding the initiative, if the requisite six votes are cast. (III, 94:1-5) Moreover, six votes
25 of the City Council are needed to give final approval to any multiple-year MOU between the City
26 and its labor organizations. (III, 94:6-9) Accordingly, what resulted from this compromise was not

27 as tough as the Mayor’s original plan because there was no actual mandate prohibiting the City
28 Council from increasing total payroll; instead, it was left to the City Council’s discretion on a year-

1 to-year basis and thus would not produce as great a reduction in the City's annual required
2 contribution to the defined benefit plan. (III, 111:24-113:1)

3 b. It Is Both Speculative and Irrelevant What the Mayor's Fellow
4 Proponents Would Have Done Without Him

5 It is entirely speculative to say what the Mayor's fellow proponents would have done if he
6 had not become a proponent of the single compromise CPRI. And it is irrelevant because the facts
7 are undisputed on this point. Mayor Sanders did reach an agreement on this initiative and this case
8 turns on that undisputed fact, not on any inadmissible speculation about what *did not happen*.

9 Moreover, it is very clear from the evidence that his fellow proponents wanted to be involved
10 with *Mayor Jerry Sanders* as a fellow proponent of this initiative in order to take full advantage of
11 his power, prestige, visibility, credibility – and the fund-raising prowess he brought to their common
12 endeavor. They also took advantage of the legal, financial and operational expertise he and his key
13 staff brought to the endeavor. Every media account related to this initiative – and there were many
14 – referred to Mayor Sanders as its crafter or one of its crafters. No media account ever referred to
15 the actual signatories on the Notice of Intent to Circulate – T. J. Zane, April Boling, or Steve
16 Williams – as the crafters or, for that matter, even as the proponents. This was *the Mayor's* initiative
17 and he proudly laid claim to it before and after it passed.

18 **2. Speech Used By a Public Employer or Its Agents as a Means of Violating
19 the MMBA is Not Protected by the Constitution**

20 The City is also likely to re-assert the argument it made in its initial response to Charging
21 Parties' unfair practice charges that the Mayor's speech in "support" of the CPRI is protected by the
22 First Amendment of the Constitution. However, PERB has long recognized that speech which is
23 used as a means of violating California's public employee labor relations statutes is not protected
24 by the Constitution. *Rio Hondo Community College Dist.*, PERB Decision No. 128 at p. 19 (1980).
25 While recognizing that a public employer is "entitled to express its views on employment related
26 matters over which it has legitimate concerns in order to facilitate full and knowledgeable
27 debate," PERB also acknowledges that this protection is not without limits and a public
28 employer is not entitled to use speech as a vehicle for violating the collective bargaining
rights of its employees. *Id.* at 19-20.

1 In *Rio Hondo*, PERB adopted a standard for permissible employer speech in conformity with
2 Section 8(c) of the NLRA, 29 U.S.C. §158(c). *Id.* Thus, “an employer’s speech which contains a
3 threat of reprisal or a promise of benefit will be perceived as a means of violating the Act and will,
4 therefore, lose its protection.” *Id.* at 20. PERB also cited other instances in which speech could be
5 used as means of violating employee relations statutes and lose its protection, such as bypassing an
6 exclusive bargaining agent (*id.* at p. 20, n. 11) or discouraging employees or employee
7 representatives from exercising their right to utilize PERB’s unfair practice procedures (*id.* at 23-24).

8 Subsequently, in *City of San Diego (Office of the City Attorney)*, PERB Decision No. 2103-M
9 (2010) at p. 12, PERB explained that the relevant inquiry under *Rio Hondo* is whether the public
10 employer merely “communicate[s] existing facts, views, arguments, or opinions” or “advocate[s] a
11 course of action in circumvention of the exclusive representative, or otherwise use[s] the
12 communication to commit an unfair labor practice.” In *City of San Diego*, PERB held that the City
13 violated the MMBA when its City Attorney bypassed the exclusive bargaining representative in
14 encouraging employees to rescind their purchase of service credits from the City’s retirement system.
15 *Id.* at p. 8. Because the City Attorney, as the City’s agent, had advocated a specific course of action
16 and used his statement to unlawfully bypass the employees’ exclusive representative, PERB found
17 that the City violated the MMBA.

18 Moreover, here, as the City’s Chief Executive Officer and Chief Labor Negotiator, the
19 Mayor’s “freedom of speech” is constrained, not just by the obligations of the MMBA, but by the
20 City’s *own laws* and policies which expressly limit his right to pursue personal or private interests
21 which are incompatible with his official duties or which might impair his judgment and
22 independence in the performance of those official duties.³ Mayor Sanders did not have a lawful
23 “option” to negotiate with fellow ballot proponents in furtherance of his constitutional rights as a
24

25 ³ See, e.g., Council Policy 000-04, Code of Ethics (Exhibit 15); Administrative Regulation
26 95.60, Conflict of Interest (Exhibit 19); SDMC, Art. 7, Div. 40: Municipal Lobbying (Exhibit 14);
27 City Attorney’s Memorandum dated 6/29/10 re “Restrictions on the Use of Public Resources for
28 Ballot Measures” (Exhibit 21); League of California Cities pamphlet “Working On A Ballot Measure
Campaign: Some Rules for City Officials” (Exhibit 22); and City Attorney’s Memorandum dated
8/10/10 re “Misuse of Public Resources for Ballot Measures” (Exhibit 229).

1 “private citizen” when to do so was in derogation of his Charter-mandated role and in violation of
2 *the City’s* duties under the MMBA.

3 **J. The City’s Violation of the MMBA Requires PERB To Restore the *Status Quo***
4 **Ante**

5 **1. The Mayor’s and City’s Conduct In Violation of the MMBA Is Inimical**
6 **to Its Core Purpose**

7 The “centerpiece” of the MMBA is the duty of local public agencies to meet and confer in
8 good faith. *Voters for a Responsible Retirement v. Bd. of Supervisors of Trinity County* (1994) 8
9 Cal. 4th 765, 780 (*Trinity County*). The MMBA defines this obligation to mean that the parties will
10 *endeavor to reach agreement on matters within the scope of representation.*

11 There are no issues more central to the employment bargain than compensation and pensions,
12 and thus no issues more critical than these when a recognized employee organization goes to the
13 bargaining table to advocate on behalf of represented employees. In the City of San Diego, Charging
14 Parties have fulfilled their duty to meet and confer in good faith – and represented employees have
15 ratified the results of that process – time and again in the course of addressing the Mayor’s “reform
16 agenda.” One need look no further than the Mayor’s own “Fact Sheets” announcing the historic
17 retiree health benefit deal and the end to the City’s structural budget deficit to see the success of that
18 process when done in compliance with the MMBA.

19 The conduct at issue in this case is so inimical to the central duty of the MMBA that it must
20 be definitively addressed and thoroughly redressed to prevent the spread of the City’s cancerous
21 “private citizen/opt-out” device. No public agency can be permitted to treat the MMBA as an
22 optional statutory scheme which governs the collective bargaining process only if the public agency
23 *chooses to use it.*

24 **2. The Remedy Must Be Adequate to Cure the Violation By Not Leaving**
25 **the Consequences of the Violation Intact and *Unremedied***

26 The City’s failure and refusal to bargain over the subject matter of the CPRI adversely
27 affects existing employees represented by Charging Parties and future employees who will be hired
28 into the bargaining units Charging Parties represent. The City admits that the subject matter of the
CPRI is within the scope of representation under the MMBA.

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1 Bargaining over effects of the CPRI following its passage on June 5, 2012, does not and
2 cannot cure the harm to Charging Parties' and represented employees' rights because the contents
3 and language of the CPRI – which Mayor Sanders negotiated with his fellow proponents but not with
4 Charging Parties – cannot be changed.

5 When addressing and redressing violations of the MMBA pursuant to the authority vested
6 in it by Government Code section 3509, subdivision (b), PERB must determine what remedy is
7 appropriate to *effectuate the purposes* of the Act. Here, because the City's conduct is inimical to the
8 core purpose of the MMBA in promoting the rights of public employees to be represented in a good
9 faith bargaining process over key pension and compensation decisions, the appropriate and *only*
10 adequate remedy to effectuate the purposes of the Act is to order a restoration of the *status quo ante*.
11 The City itself has acknowledged, when arguing to defeat PERB's motion for a preliminary
12 injunction in the companion civil case:

13 PERB has the power to place employees back in the position they were in prior to the
14 unfair labor practice. Once PERB concludes that new hires should not have been
15 subject to CPRI, it could order those employees to be provided the City's defined
16 benefit retirement plan subject, of course, to judicial review. (Exhibit 158, Bates
17 1324, lines 1-5)

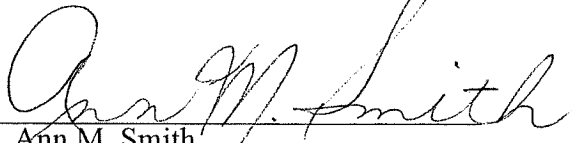
18 Accordingly, an order should issue directing the City to take all necessary steps to restore
19 affected employees to the same terms and conditions of employment which were in effect before the
20 CPRI was passed and chaptered by the Secretary of State on July 20, 2012, and to make them whole
21 for any losses incurred. If it is necessary for the City to enact or to amend an ordinance to effectuate
22 this order, the City shall do so. *San Leandro Police Officers Association v City of San Leandro*
23 (1976) 55 Cal App 3d 553, 557-558.

24 Finally, *had* the City met and conferred as required by the MMBA, the outcome of that
25 process is entirely speculative – whether an initiative would have, or lawfully could have, appeared
26 on a ballot; how a ballot proposition would have been placed on the ballot; what a ballot proposition
27 would have looked like and whether or how it would have affected non-represented City employees.
28 Based on the record before it, PERB has the authority to restore the *status quo ante* before the
initiative was ever conceived and placed on the ballot, and the authority to invalidate the CPRI with
respect to Charging Parties. What that such an order will mean for non-represented City employees

1 and/or what subsequent or further effects such an order will have on Charging Parties are issues
2 beyond the scope of the matter presently before the Administrative Law Judge, and may be the
3 subject for proceedings under other laws and/or in subsequent PERB compliance proceedings.
4

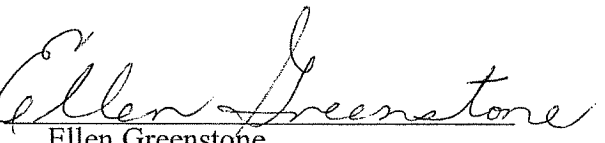
5 Dated: September 19, 2012

TOSDAL, SMITH, STEINER & WAX

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7 By: 
8 Ann M. Smith
9 Attorneys for San Diego Municipal
Employees Association

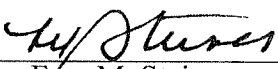
10 Dated: September 19, 2012

ROTHNER, SEGALL AND GREENSTONE

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12 By: 
13 Ellen Greenstone
14 Anthony Resnick
15 Attorneys for AFSCME LOCAL 127,
AFL-CIO

16 Dated: September 19, 2012

TOSDAL, SMITH, STEINER & WAX

17
18 By: 
19 Fern M. Steiner
20 Attorneys for SAN DIEGO CITY
21 FIREFIGHTERS LOCAL 145
22
23
24
25
26

27 TOSDAL, SMITH, STEINER
& WAX
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San Diego, CA 92101
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28 Facsimile: (619) 239-6048

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Tosdal, Smith, Steiner & Wax
401 West A Street, Suite 320, San Diego, California 92101

On September 19, 2012, I served the CONSOLIDATED POST-HEARING BRIEF OF
(Date) (describe document(s))
CHARGING PARTIES SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, AFSCME LOCAL 127, AND
SAN DIEGO CITY FIREFIGHTERS, IAFF LOCAL 145

on the parties listed below (include name, address and, where applicable, fax number) by (check the applicable method or methods):

placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid; **AND Email;**

personal delivery;

facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

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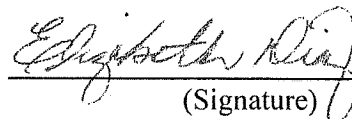
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Donn Ginoza
Administrative Law Judge
Public Employment Relations Board
San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Email: DGinoza@perb.ca.gov

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 19, 2012, at San Diego, California.

ELIZABETH DIAZ
(Type or print name)


(Signature)