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8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **FOR THE COUNTY OF SAN DIEGO, CENTRAL DISTRICT**

11 RODITO ABITRIA; et al.,
12
13 Plaintiffs,
14
15 vs.
16 SAN DIEGO CITY EMPLOYEES'
RETIREMENT SYSTEM, CITY OF SAN
17 DIEGO, and DOES 1 to 100, inclusive,
18
19 Defendants.

Case No. 37-2011-00096899-CU-PO-CTL

**MEMORANDUM OF POINTS AND
AUTHORITIES OF DEFENDANT
SAN DIEGO CITY EMPLOYEES'
RETIREMENT SYSTEM IN SUPPORT
OF DEMURRER TO COMPLAINT**

Date: January 31, 2012
Time: 10:00 a.m.
Judge: Hon. Ronald S. Prager
Dept.: C-71

Action Filed: August 19, 2011
Trial Date: None Set

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1. INTRODUCTION

This is one of four related lawsuits brought by certain members in the governmental defined benefit pension plan known as the San Diego City Employees' Retirement System ("SDCERS"). SDCERS is administered by its Board of Administration (the "Board").

The four lawsuits stem from a June 7, 2010, opinion in the case *City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69 (the "City Lawsuit"). In this and the other lawsuits, the Plaintiffs seek to make an "end run" around the City Lawsuit decision. Under the guise of an unprecedented claim for substantial monetary damages, Plaintiffs seek to recover without further payment by them, the very benefits that Judge Nevitt ruled SDCERS could not pay without adequate funding from the Plaintiffs (as opposed to further funding from the City). To do so, Plaintiffs manufacture claims that SDCERS breached its fiduciary duties to them by voting to "continue to charge the City" for the underpricing, by negligently defending the litigation brought by the City, by supposedly failing to advise the Plaintiffs of the existence and ramifications of the publicly filed and well publicized City Lawsuit (*see* RJN Ex. 16), and by correcting the underpricing.

As a matter of law, the Plaintiffs' lawsuit, and each cause of action alleged therein, fails to state facts sufficient to constitute a cause of action. SDCERS' demurrer should be sustained without leave to amend.

2. THE FACTUAL BACKGROUND

A. The PSC Program.

The PSC program allowed active employees to purchase up to five additional years of pension service to increase their lifetime pension annuity. *City of San Diego*, 186 Cal.App.4th at 72. As expanded in 1997, the program allowed employees to purchase up to five additional years of service credits for periods that were not actually worked. Complaint, ¶¶14, 15; *City of San Diego*, 186 Cal.App.4th at 73. These credits were euphemistically referred to as "air time."

There is no dispute that the ordinance authorizing these air time purchases provided that the PSC program was to be cost neutral to the City, meaning that the purchase price for the air time credits was to be an amount that would equal the employer and employee full cost of the

1 service credit being purchased. Complaint, ¶¶16, 17; *City of San Diego*, 186 Cal.App.4th at 73-
2 74; see San Diego Municipal Code ("SDMC") §§ 24.1312; 24.0202; 24.0305.

3 **B. SDCERS Sets PSC Purchase Rates.**

4 When the air time PSC program was adopted in 1997, SDCERS was advised by its actuary
5 that a two tiered rate structure – 15% for general members and 26% for safety members – would
6 be sufficient to meet the required cost and those rates were implemented. Complaint, ¶22; *City of*
7 *San Diego*, 186 Cal.App.4th at 74-75.

8 In 2000 and 2002, the City retroactively increased the retirement factors used to calculate
9 benefits which caused an increase in benefit value. This in turn resulted in an increase in the cost
10 of a year of purchased service credit under the PSC program. *City of San Diego*, 186 Cal.App.4th
11 at 75, Complaint, ¶29. In response to the benefit increase, SDCERS directed its actuary to
12 evaluate whether the original PSC rate structure accurately reflected the current employee and
13 employer costs of the benefit. Complaint, ¶33, *City of San Diego*, 186 Cal.App.4th at 75. In
14 August 2003, the actuary completed his study and recommended that the rates be adjusted
15 upwards to 27% for general members and 37% for safety members. Complaint, ¶37; *City of*
16 *San Diego*, 186 Cal.App.4th at 75.

17 The Board considered the actuary's report and recommendations and, at a meeting held
18 August 15, 2003, adopted the recommendations and voted to establish the new rates. Complaint,
19 ¶37, *City of San Diego*, 186 Cal.App.4th at 76. The Board also voted to briefly delay
20 implementing the rate increase until November 1, 2003, to allow employees to continue
21 purchasing service credits at the old rates. Complaint, ¶38. During this window period,
22 substantial PSC purchases were made at the old rates. *City of San Diego*, 186 Cal.App.4th at 76.

23 **C. The Underpriced Window Period Purchases Led To An Increased Actuarial**
24 **Shortfall.**

25 The actuarial shortfall due to the underpricing was a necessary consequence of the decision
26 to use a price that was then known to be insufficient. Other than earnings from investments, the
27 pension trust fund administered by SDCERS is funded by two sources: (i) employee contributions
28 from mandatory paycheck deductions; and (ii) annual employer contributions from the City.

1 Thus, when the employee contributions are deliberately priced too low, there will be a shortfall for
2 which the only remaining source of revenues is the City's annual employer contribution.¹

3 The City's annual employer contribution is determined in actuarial valuations, and is
4 provided by SDCERS to the City on an annual basis. Complaint, ¶31. The City's employer
5 contribution includes both the City's "normal" contribution as well as an additional contribution
6 designed to amortize any unfunded liability over a period not to exceed 15 years. Where the PSC
7 pricing did not cover the full cost of the service credits purchased, the City would amortize the
8 deficiency and make such an amortized payment as part of its annual contribution. *Id.* at ¶31.

9 **D. SDCERS Considers the Shortfall and Votes to Continue to Charge the City**
10 **With the Shortfall as Part of the City's Annual Contribution.**

11 In August 2007, SDCERS' new actuary reported that the non-neutral cost pricing of PSC
12 credits, including those purchases made during the window period, accounted for \$146 million of
13 SDCERS unfunded actuarial liability. *City of San Diego*, 186 Cal.App.4th at 76; Complaint, ¶71.
14 The SDCERS Board held meetings during October and November 2007 to consider "carefully its
15 options regarding the prior pricing of PSC contracts." Complaint, ¶¶ 76, 77, 84. At an October
16 2007 public meeting SDCERS fiduciary counsel informed the Board as follows:

17 ... SDCERS' fiduciary counsel informed the Board that they had the "1. Duty to
18 preserve and protect the fund; to pay benefits that are promised and earned and
19 collect sufficient contributions to support the benefits. 2. Duty to correct errors
20 when appropriate and not perpetuate erroneous interpretations of the Plan." The
21 fiduciary counsel opined that SDCERS could legally take several courses of action
22 to remedy the underfunding, including "voiding contracts," "collecting arrears
23 payments," "offering rewritten contracts," "spreading out additional payments,"
24 "reducing benefit levels," and "continuing to collect the shortfall through the
25 amortization of the system's unfunded liability.

26 *City of San Diego*, 186 Cal.App.4th at 77 (emphasis in original).

27 Various people spoke at the October and November 2007 meetings, including one of
28 plaintiff's counsel from these four lawsuits. The speakers explained, among other things, that "the

26 ¹ Investment earnings cannot be used to cover the underpricing because, among other
27 reasons, doing so would increase the City's unfunded actuarial liability. In other words,
28 investment earnings cannot be used to subsidize the statutory price members are required to pay
for the PSC benefit.

1 City had already lost – the legal battle related to past pricing of purchased service credits."
2 Complaint, ¶81. The Board then voted unanimously to continue to amortize the shortfall through
3 the existing unfunded liability. Complaint, ¶84. As the Court of Appeal noted, the Board's
4 decision meant that the Board would continue "to charge the City for the underfunding." *City of*
5 *San Diego*, 186 Cal.App.4th at 77.

6 **E. The City Files Suit to Challenge SDCERS' Decision to Continue to Charge the**
7 **City for the PSC Underpricing.**

8 Four days after the Board voted, the City filed a lawsuit "challenging the SDCERS
9 Board's decision to *continue* to charge the City any unfunded actuarial liability associated with the
10 PSC program." Complaint, ¶87. The relief sought by the lawsuit was for an order commanding
11 SDCERS to set aside its November 16, 2007, action in full and to take no further action absent full
12 compliance with the statutory sections governing PSC pricing.

13 The trial court granted the City's writ in part. The trial court found that there was no
14 dispute that SDMC §24.1312 required that the purchase of service credits be cost neutral to the
15 City, and further that it was "unlawful to charge City for the shortfall that resulted for the service
16 credits that were purchased" during the window period. *City of San Diego*, 186 Cal.App.4th at 78.
17 The Court then set aside the November 16, 2007, action of the Board. *Id.*

18 **F. The Fourth District Court of Appeals Affirms the Trial Court Ruling.**

19 In its June 7, 2010, opinion, the Court of Appeals affirmed Judge Nevitt's decision. It
20 found in part that granting retirement benefits was a legislative action within the exclusive
21 jurisdiction of the City and that it was undisputed that the enabling legislation passed by the City
22 for the PSC program dictated that "the total cost of such purchases would be borne by the
23 employees." *Id.* at 79-80. As such, charging the City for SDCERS' continuation of the known
24 underpricing exceeded SDCERS' authority: "When the board decided to charge the City for the
25 underfunding, that decision was in violation of the law and thus exceeded its power." *Id.* at 80.
26 The ruling was limited in that it did not invalidate the benefits but only mandated that SDCERS
27 could not charge the City for a benefit that was required to be cost neutral to the City. *See id.* at 85
28

1 ("The only thing they [SDCERS] may not do is charge the city for the underfunding that was the
2 subject of the court's order").

3 **G. SDCERS Adopts and Implements Corrective Measures to Remedy the**
4 **Underpricing Without Charging the City for Such.**

5 To remedy the problem caused by the window period underpricing, SDCERS evaluated
6 and adopted corrective measures so as to impose the total costs of any window period PSC
7 purchases on the purchasers – and not the City – as mandated by the Court's rulings, or to permit
8 the members to rescind their service purchases and receive back their prior payments with interest
9 (if they decide they would rather undo their prior purchases rather than pay the full costs of the
10 legally correct price for that service). The Board adopted Board Rule 4.90 which provided to
11 window period purchasers several options for dealing with their underpriced PSC purchases. *See*
12 *RJN Ex. 3.*

13 **3. PLAINTIFFS' FIRST CAUSE OF ACTION IS WITHOUT MERIT**
14 **BECAUSE THE CITY LAWSUIT JUDGMENT WAS**
15 **NOT PROCURED BY FRAUD**

16 A court has discretion to relieve a *party* from a judgment on the grounds of extrinsic fraud.
17 C.C.P. § 473(b). Extrinsic fraud occurs when a party is deprived of the opportunity to present a
18 claim or defense to the court as a result of being kept in ignorance or in some other manner being
19 fraudulently prevented by the opposing party from fully participating in the proceeding. *County of*
20 *San Diego v. Gorham* (2010) 186 Cal.App.4th 1215. In contrast, intrinsic fraud is fraud that was
21 part of the case itself. *In re Margarita D.* (1999) 72 Cal.App.4th 1288, 1295. Intrinsic fraud is not
22 a valid ground for setting aside a judgment. *Id.*

23 Plaintiffs contend that the City engaged in extrinsic fraud by concealing the fact that the
24 City Council voted 4-1 to allow the City to file its First Amended Writ (thereby concealing that
25 the City may have lacked standing and the authority to file the First Amended Writ). Complaint
26 ¶¶ 162, 163.² Such a purported fraud (if it exists and which SDCERS denies) was intrinsic fraud.

27 ² Of note, the 4-1 vote was reported during an open session of a City Council meeting on
28 April 21, 2008, four days before the parties filed a stipulation to file the First Amended Writ.
(footnote continued)

1 Moreover, Plaintiffs were not parties to the judgment, and therefore they do not have standing to
2 set aside the judgment. *Id.* at ¶ 148. Thus, this claim fails.

3 **4. PLAINTIFFS' FOURTH THROUGH TENTH CAUSES**
4 **OF ACTION ARE WITHOUT MERIT BECAUSE**
5 **SDCERS IS ABSOLUTELY IMMUNE FROM LIABILITY**

6 **A. SDCERS Is Immune From Liability For Performing Discretionary Functions.**

7 SDCERS is immune from liability under circumstances where its employees have
8 discretionary immunity for their acts or omissions. Govt Code §§815.2(b), 820.2.

9 In *Johnson v. State of California* (1968) 69 Cal.2d 782, the California Supreme Court
10 explained the difference between "discretionary" actions, which are immune, and "ministerial"
11 actions, which are not immune (*Johnson*, 69 Cal.2d at 793-798) and concluded that discretionary
12 immunity should apply when public entities make decisions in areas that have been committed to
13 them:

14 Courts and commentators therefore centered their attention on an assurance of
15 judicial abstention *in areas in which the responsibility for basic policy decisions*
16 *has been committed to coordinate branches of government.* Any wider judicial
17 review, we believe, would place the court in the unseemly position of determining
18 the propriety of decisions expressly entrusted to a coordinate branch of
19 government.

20 *Id.* at 793 (emphasis added); *see also id.* at 794, fn. 8 (concluding that the proper focus was to
21 prevent courts from re-examining consciously balanced policy decisions that are in the province of
22 the public entity).

23 The Supreme Court's analysis about immune policy decisions was applied in the case
24 *Masters v. San Bernardino County Employees' Retirement Association* (1995) 32 Cal.App.4th 30.
25 What was particularly important to the Court of Appeal in *Masters* was that the public entity was
26 authorized by the Legislature to make the disability determination that was at issue in that case:

27 Here, we are concerned with quasi-judicial determinations which have, by statute,
28 been expressly entrusted to a coordinate branch of government. The members of
the board, and no one else, are explicitly charged by statute with the responsibility
to determine whether a member is incapacitated.]

Complaint, ¶¶ 161, 62. Plaintiffs were on notice of the 4-1 vote, had an opportunity to intervene
and contest the City's right to file the First Amended Writ, but neglected to do so.

1 *Masters*, 32 Cal.App.4th at 46.

2 **B. Plaintiffs' Fourth Through Tenth Causes Of Action Are Without Merit**
3 **Because They Are Predicated on SDCERS' Discretionary Functions.**

4 Plaintiffs' Fourth Cause of Action is based on SDCERS voting on November 16, 2007, to
5 affirm the existing actuarial practice of charging the City for the service credits purchased during
6 the window period. *Id.* at ¶189. The Fifth Cause of Action is based on SDCERS failing to raise
7 certain defenses in the City Lawsuit. *Id.* at ¶¶193-195. Plaintiffs' Sixth and Seventh Causes of
8 Action are based on SDCERS' conduct in correcting and thereby purportedly breaching the PSC
9 contracts. *Id.* at ¶¶199, 208, 209. The Eighth, Ninth, and Tenth Causes of Action are based on
10 SDCERS' purported failure to apprise certain Plaintiffs about the City's Lawsuit. *Id.* at ¶¶217,
11 225, 232. The challenged conduct is clearly within the province of authority granted to SDCERS.

12 The California Legislature has specifically vested SDCERS, as the Administrator of the
13 City's pension system, with plenary authority to administer the City's pension system. *See*, Cal.
14 Const., Art. XVI, §17, subd. (a). The City's Charter gives SDCERS "exclusive control of the
15 administration and investment of such fund or funds as may be established." City Charter,
16 Art. IX, Sec. 144. SDCERS is vested with the authority to administer the system in a way that
17 "assure(s) the competency of the assets of the...retirement system." Cal. Const. Art. XVI, Sec. 17.
18 The Board "may establish such rules and regulations as it may deem proper ...[and] shall be the
19 sole authority and judge under such general ordinances as may be adopted by the Council as to the
20 conditions under which persons may be admitted to benefits of any sort under the retirement
21 system." SDMC §24.0901. Importantly, SDCERS is vested with the authority to "revise by Rule
22 the members' contribution rates as it deems necessary, to provide the benefits of the Plan." SDMC
23 §24.0902.

24 SDCERS is also vested with the authority "to commence or defend suit or legal
25 proceedings" whenever, in its judgment, any interest of the pension system requires it, and to
26 represent the pension system "in all suits or legal proceedings in any court." RJN Exs. 5, 6 at
27 §3.2(n). Such a grant of authority to manage litigation is well within the area of traditional
28 governmental immunity. *See* Govt Code § 821.6 (establishing that a public employee acting

1 within the scope of his or her employment is not liable for an injury caused by prosecuting a
2 judicial proceeding – even if he or she acts maliciously and without probable cause); *All Angels*
3 *Preschool/Daycare v. County of Merced* (2011) 197 Cal.App.4th 394, 407; *Richardson-Tunnell v.*
4 *School Insurance Program for Employees* (2007) 157 Cal.App.4th 1056, 1062.

5 The policy decisions in 2007 about how to administer the PSC program in response to the
6 new actuary's report, including voting to continue to charge the City for the underpricing, were all
7 discretionary decisions that are within the province of SDCERS' authority. In addition, the
8 manner in which SDCERS handled the City Lawsuit, and the policy decisions in 2010 in response
9 to the Court of Appeal decision (such as how to correct the underpricing and the options to
10 provide to the members) were all discretionary decisions within the province of SDCERS'
11 authority. In making their policy decisions about the PSC benefit, SDCERS consciously balanced
12 the risks and advantages, and developed standards for its policy decisions concerning the PSC
13 benefit. *See City of San Diego*, 186 Cal.App.4th at 177; Complaint, ¶¶37-40. SDCERS is
14 immune from liability for its discretionary decisions concerning how to administer the PSC
15 benefits.

16 **C. Plaintiffs' Eighth, Ninth, And Tenth Causes Of Action Are Without Merit For**
17 **The Additional Reason That SDCERS Is Absolutely Immune From Liability**
18 **For The Alleged Non-Disclosure.**

19 SDCERS, as a public entity, is not liable for an injury caused by misrepresentation by its
20 employees, whether or not the misrepresentation is negligent or intentional. Govt Code § 818.8;
21 *Tokeshi v. State of California* (1990) 217 Cal.App.3d 999, 1004. The immunity provided
22 SDCERS by Govt Code § 818.8 applies to those areas in which private defendants typically face
23 liability for deceit, such as where the deceit interferes with a financial or commercial interest.
24 *Johnson, supra*, 69 Cal.2d at 800; *see also Tokeshi*, 217 Cal.App.3d at 1006 (noting that, "outside
25 the narrow context of the social service area, immunity will prevail where the governmental
26 misrepresentation interfered with either a commercial or financial interest").

27 Because the immunity provided by Govt Code § 818.8 is based on liability for deceit, the
28 immunity extends to deceit based on concealment or suppression of fact. *Harshbarger v. City of*
Colton (1988) 197 Cal.App.3d 1335, 1343.

1 In this case, the Plaintiffs' Eighth, Ninth and Tenth Causes of Action are based on
2 SDCERS' purported concealment about the City Lawsuit. The alleged failure to disclose or notify
3 Plaintiffs about the City Lawsuit directly interfered with their ability to make choices about the
4 PSC benefit or their pensions. Thus, the essence of the causes of action are a concealment that
5 interfered with Plaintiffs' financial interests. *Id.* at ¶¶217-219, 225-228, 232-234. It does not
6 matter that the Plaintiffs couch their cause of action as a breach of common law or constitutional
7 fiduciary duties. *Tokeshi*, 217 Cal.App.3d at 1008. The essence of Plaintiffs' cause of action is
8 clearly encompassed by Govt Code § 818.8. SDCERS has absolute immunity for these Causes of
9 Action.

10 **D. Plaintiffs' Reliance On The *Hittle* Case Is Misplaced.**

11 In their complaint, the Plaintiffs refer to the case *Hittle v. Santa Barbara County*
12 *Employees Retirement Association* (1985) 39 Cal.3d 374, to suggest that SDCERS is liable in tort
13 for damages resulting from the claimed failure to disclose the City Lawsuit to Plaintiffs. *See, e.g.*,
14 Complaint, ¶9. SDCERS has explained in the demurrers from the other related lawsuits how the
15 *Hittle* case is distinguishable from this case and does not authorize a suit for damages under the
16 facts of this case. Among other reasons, *Hittle* is meaningfully different from this case because it
17 was a CCP § 1085 petition for writ of mandate case, not a civil action for damages. Additionally,
18 the *Hittle* court made clear that by its ruling it was not intending to "impose unreasonable
19 obligations upon trustees of a pension trust." *Hittle*, 39 Cal.3d at 394. The *Hittle* case does not
20 purport to extend the scope of a pension board's fiduciary duty to inform members about the
21 unknown outcomes of pending litigation.

22 **5. PLAINTIFFS' FOURTH, FIFTH, SIXTH, EIGHTH, NINTH,**
23 **AND TENTH CAUSES OF ACTION ARE WITHOUT**
24 **MERIT FOR THE ADDITIONAL REASON THAT**
25 **SDCERS' CONDUCT DOES NOT CONSTITUTE**
26 **A BREACH OF FIDUCIARY DUTY**

27 As noted, Plaintiffs' fiduciary duty claims are based on four acts or omissions: SDCERS
28 correcting the PSC underpricing; the act of voting to continue to charge the City for the
underpricing; SDCERS' purported failure to raise certain defenses in the City Lawsuit; and
SDCERS' purported failure to notify the PSC participants about the City Lawsuit. Complaint at

1 ¶¶199, 202, 189, 193, 217, 225, 232. Plaintiffs' allegations fundamentally misconstrue SDCERS'
2 function and do not establish causes of action for breach of fiduciary duty.

3 **A. As To Plaintiffs' Sixth Cause Of Action, SDCERS Has The Right, As Well As**
4 **The Duty, To Correct Errors And Comply With The Law**

5 After the Court of Appeal ruling, SDCERS adopted a correction process with respect to the
6 affected PSCs. That correction process is contained in SDCERS' Board Rule 4.90 as adopted by
7 Board Resolution 2010-02 and contained a wide range of options. RJN Ex. 3. The correction
8 options available to Plaintiffs include: (i) rescinding the original PSC benefit and receiving a
9 refund of the PSC contributions plus interest; (ii) rescinding the original PSC benefit and applying
10 the full refund, plus interest, to a new PSC benefit at current rates; (iii) reducing the service credit
11 to that which would have been legally purchased by the member's actual contribution assuming
12 the higher rate had been applied; and (iv) paying, with interest, the difference between the amount
13 paid at the "old" rate and the higher rate that should have been paid at the outset.

14 Plaintiffs' cause of action proceeds on the faulty premise that the City Lawsuit "made no
15 determination related to the lawfulness of Plaintiffs' individual 'window period' PSC contracts"
16 and as such, SDCERS has no grounds for correcting the contracts. Complaint, ¶198. Plaintiffs'
17 premise is not correct. In the City Lawsuit, the Court of Appeal's expressed rationale was that
18 SDCERS had wrongfully permitted the Plaintiffs to purchase PSCs at a rate less than the statutory
19 cost under circumstances where the cost was owed by the purchasers. *City of San Diego*,
20 186 Cal.App.4th at 80. *See also id.* at 82 ("However, in this case, city employees were not entitled
21 to purchase credits at a rate that did not reflect *the full cost of those credits.*") (emphasis added).
22 The Court's message could not be more clear: If Plaintiffs are to receive the subject benefits – the
23 window period PSCs – the cost of providing those benefits must be borne by the Plaintiff
24 members – not the City.

25 Indeed, Plaintiffs do not dispute: (i) that the PSC purchases during the window period
26 were underpriced; (ii) that Plaintiffs were not entitled to purchase PSCs at less than their full cost;
27 (iii) that SDCERS had been charging the City for the resulting actuarial deficiency through the
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1 City's Annual Required Contributions; and (iv) that SDCERS was now legally prohibited from
2 continuing to so charge the City. Complaint, ¶¶31, 32, 34, 36, 43, 44, 53, 60, 69 and 73.

3 In addition, SDCERS has an obligation to comply with the law and correct past errors.
4 *City of San Diego*, 186 Cal.App.4th at 78 (noting that while SDCERS has exclusive authority to
5 administer plan assets, "it did not have plenary authority to evade the law"); *Barrett vs. Stanislaus*
6 *County Employees' Retirement Ass'n.*, 189 Cal.App.3d 1593, 1599, 1608, 1609 (1987).

7 Plaintiffs' additional assertion that SDCERS cannot undertake to correct any PSC contract
8 without first conducting "an actuarial analysis of each individual PSC contract" is specious.
9 SDMC §24.0901; City Charter §144. SDCERS' authority to establish pricing of a member's
10 contribution is indisputable.

11 Finally, SDCERS owes a duty to all of its members, not just single members, or groups of
12 members in isolation, or just the Plaintiffs in this action. *See McIntyre v. Santa Barbara County*
13 *Employees' Retirement System, Board of Retirement* (2001) 91 Cal.App.4th 730, 734. This is
14 precisely why the law allows retirement systems to correct for past errors and SDCERS' conduct
15 in implementing the PSC correction process cannot constitute a breach of fiduciary duty as a
16 matter of law.

17 **B. SDCERS' Conduct As Alleged In The Fourth, Fifth, And Eighth Through**
18 **Tenth Causes Of Action Does Not Constitute Breaches Of Fiduciary Duty.**

19 A vote is required for SDCERS to take final action on any decision. SDMC §24.0907.
20 And SDCERS must determine the funding obligations of the City for pension benefits on an
21 annual basis. *See*, Article IX, Section 143. These requirements mean that SDCERS is required to
22 vote on an annual basis to take any action with respect to the City's obligation to fund pension
23 benefits. *See, e.g.*, RJN Ex. 12. SDCERS must administer the pension and it must vote to carry
24 out its function. SDCERS cannot "act" by any other means.

25 As the complaint makes clear, Plaintiffs did not object to, and in fact favored, the act of
26 SDCERS continuing to cure the underpricing by amortizing it as part of the City's annual
27 employer contribution. *See* Complaint, ¶81. But to do this, both in the past and in the future, the
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1 Board needed to act and the only way the Board can act is through a vote. Thus, the act of voting
2 is not and cannot be a breach of fiduciary duty subjecting SDCERS to monetary damages.

3 With respect to managing the City Lawsuit, SDCERS is not authorized to practice law and
4 must rely on independent counsel to conduct litigation. *Merrit v. Reserve Ins. Co.* (1973)
5 34 Cal.App.3d 858, 881-882. The outside counsel retained by SDCERS acts as independent
6 contractors. *Merrit*, 34 Cal.App.3d at 881-882. Because SDCERS' Board members cannot be
7 liable for any act or omission of outside counsel – SDCERS itself cannot be held liable. Govt
8 Code §§815.2(b), 820.8.³

9 Moreover, SDCERS' members are not clients of SDCERS' counsel who handled the City
10 Lawsuit and, as such, SDCERS' counsel owed no duty to SDCERS' members. *Borisoff v. Taylor*
11 *& Faust* (2004) 33 Cal.4th 523; *Goldberg v. Frye* (1990) 217 Cal.App.3d 1258; see *Chang v.*
12 *Lederman* (2009) 172 Cal.App.4th 67, 76. Plaintiffs cannot sue SDCERS for the litigation
13 decisions it and its counsel made in the City Lawsuit. *Solin v. O'Melveny & Myers, LLP* (2001)
14 89 Cal.App.4th 451, 463, 466-67; *McDermott, Will & Emery v. Superior Court* (2000)
15 83 Cal.App.4th 378, 385.

16 Finally, with respect to apprising Plaintiffs about the City Lawsuit, for the same reasons
17 that *Hittle* does not apply for immunity purposes, it likewise does not apply to define SDCERS'
18 fiduciary duties under the facts alleged in Plaintiffs' complaint.

19 **6. PLAINTIFFS' FOURTH, FIFTH, EIGHTH, NINTH AND**
20 **TENTH CAUSES OF ACTION ARE WITHOUT MERIT**
21 **FOR THE ADDITIONAL REASON THAT THEY**
22 **ARE SPECULATIVE AND LACK CAUSATION**

23 To demonstrate actual or legal causation, the plaintiff must show that there was "some
24 substantial link or nexus between omission and injury." *Saelzler v. Advanced Group* 400 (2001)
25 25 Cal.4th 763, 778. "Abstract negligence," without proof of a causal connection between the

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27 ³ It must be emphasized that SDCERS denies any inference that its outside counsel acted
28 negligently or made any errors in connection with the City Lawsuit.

1 defendant's breach and a plaintiff's injury, is insufficient. *Saelzler*, 25 Cal.4th at 773, citing
2 *Nobel v. Los Angeles Dodgers, Inc.* (1985) 168 Cal.App.3d 912, 916, 918.

3 Moreover, it is well established that the causation element, in cases concerning the manner
4 in which a lawsuit was handled, is more speculative than in other situations. *Viner v. Sweet* (2003)
5 30 Cal.4th 1232, 1241; *see also, Mattco Forge v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820,
6 834. In such a situation, a plaintiff must prove a clear causal connection between the alleged
7 negligent conduct and the damages suffered. *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th
8 1194, 1199.

9 With respect to the manner in which SDCERS managed the City Lawsuit, the affirmative
10 defenses that the Plaintiffs allege should have been asserted, if asserted, would not have made it
11 proper or legal for SDCERS to charge the City for the underpricing. Equitable principles cannot
12 be invoked to make an act that is contrary to law valid or to force SDCERS to keep paying a
13 benefit where to do so is contrary to law. *Medina v. Board of Retirement, Los Angeles County*
14 *Employees Retirement Association* (2003) 112 Cal.App.4th 864, 870-871 (holding that, because
15 the plaintiffs were not legally entitled to benefits as safety members, "Any purported contract to
16 give [plaintiffs] the pension benefits of safety members was invalid").

17 Moreover, the plea in abatement and exclusive concurrent jurisdiction defenses are not
18 merits-based defenses. Thus, even in the event SDCERS delayed or dismissed the City Lawsuit
19 based on such non-merits-based defenses, that fact does not mean that charging the City for the
20 underpricing was lawful. The reason that SDCERS could not charge the City for the underpricing
21 was because such a charge was contrary to the law and exceeded SDCERS' authority.⁴

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⁴ Plaintiffs' allegation that Judge Barton ruled that SDCERS may properly and legally pay the PSC benefit is incorrect. RJN Ex. 9 at 3:8-22. As relevant here, Judge Barton's ruling was that "SDCERS could continue to pay certain retirement benefits unless, and until such benefits were declared illegal." RJN Ex. 10 at 5:1-3. Any allegations by Plaintiffs contrary to the actual rulings are a nullity. *See, C.R. v. Tenet Healthcare Corporation* (2009) 169 Cal.App.4th 1094, 1102 ("[A]ny allegations that are contrary to the law or to a fact of which judicial notice may be taken will be treated as a nullity").

1 With respect to Plaintiffs' other allegations, the act of voting did not make charging the
2 City for the underpricing illegal. For the same reasons, the alleged failure to advise the Plaintiffs
3 about the City's challenge to the service credits did not make charging the City for the
4 underpricing illegal. Charging the City for the underpricing was contrary to SDMC § 24.1312
5 whether or not SDCERS voted and whether or not SDCERS advised the Plaintiffs about the
6 lawsuit.

7 **7. PLAINTIFFS' SIXTH AND SEVENTH CAUSES OF ACTION**
8 **FAIL FOR THE ADDITIONAL REASON THAT PLAINTIFFS**
9 **DO NOT HAVE THE ALLEGED CONTRACTUAL RIGHT**

10 **A. As A Preliminary Matter, SDCERS Does Not Have The Authority To, And As**
11 **A Matter Of Law Cannot, Create The PSC Benefit; Thus, The PSC Form**
12 **Does Not And Cannot Create A Contractual Right To The PSC Benefit.**

13 To establish a cause of action for breach of contract, the Plaintiffs must allege a valid and
14 enforceable contract, its performance or excuse from performance, breach, and damages. *Spinks v.*
15 *Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1031.

16 The right to receive pension benefits stems solely from ordinances enacted by the City, not
17 by contracts. *See* City Charter, Article IX, §§141, 143.1, 144, 146; *City of San Diego*,
18 186 Cal.App.4th at 79-80. Because SDCERS does not have the authority or power to grant
19 pension benefits, any alleged right to the PSC benefit stemmed solely from the ordinances enacted
20 by the City. The right to the pension benefit was not, and could not have been, created by the
21 alleged PSC "contract" with SDCERS. What Plaintiffs allege is a contract is not a stand-alone
22 document that creates a separate right to receive the benefit. Rather, that document must be
23 viewed in connection with the corresponding, duly-enacted ordinance that creates the benefit. In
24 this case, the PSC benefit was required to be cost neutral to the City. SDCERS, as a matter of law,
25 could not charge the underpricing to the City.

26 **B. As A Matter Of Law, Plaintiffs Do Not Have A Contractual Right To Receive**
27 **Benefits In Which The City Funds The Shortfall That, By Statute, Must Be**
28 **Paid By The Members.**

29 The Plaintiffs do not have a right to receive benefits based on contracts that are invalid,
30 illegal, or unenforceable. *Medina, supra*, 112 Cal.App.4th at 871. SDCERS cannot charge the
31 City for the underpricing of the PSC benefit because, to do so, is "contrary to law" and exceeds

1 SDCERS' "authority to administer the pension system's assets". *City of San Diego*,
2 186 Cal.App.4th at 72.

3 In *Medina*, the two plaintiffs were erroneously classified as "safety members" when they
4 should have been classified as "general members." *Medina*, 112 Cal.App.4th at 867. When the
5 Retirement Association tried to correct the error, the plaintiffs sued. The Court of Appeal held
6 that the plaintiffs were not entitled to be classified as "safety members" and, as a result, neither
7 estoppel nor a claimed vested contractual right applied. *Id.* at 869, 870-871.

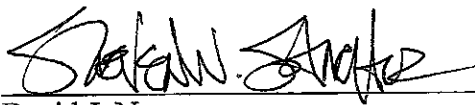
8 The situation in this case is identical to the situation in *Medina* and *Barrett*. If Plaintiffs
9 here wish to maintain the PSCs purchased during the window period they are simply being
10 required to pay the additional contributions, with interest, that they would have been required to
11 pay had those purchases been priced on a cost neutral basis to the City in the first place. The
12 Plaintiffs do not have a right – and SDCERS does not have the authority – to confer a PSC benefit
13 in which the underpricing is paid by the City. *City of San Diego*, 186 Cal.App.4th at 80. Because
14 of this, any purported contractual right to such a benefit is invalid. *Medina*, 112 Cal.App.4th at
15 871.

16 **8. PLAINTIFFS' CLAIMS ARE BARRED BY THE**
17 **STATUTE OF LIMITATIONS**

18 Plaintiffs Fourth through Tenth Causes of Action, seeking monetary damages in tort are
19 time barred. The Court of Appeal issued its ruling on June 7, 2010, putting Plaintiffs on notice of
20 the facts giving rise to this action. Plaintiffs did not file their claims until July 7, 2011, and
21 therefore these claims are time barred. Govt Code §§ 911.2(2), 945.4; RJN Ex. 27.

22 DATED: October 14, 2011

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