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To the benefit of the City of San Diego

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

RODITO ABITRIA; DAVID ABSHIER; SAMIR ABU-QAOUD, et al. , Plaintiffs, v. SAN DIEGO CITY EMPLOYEES RETIREMENT SYSTEM, CITY OF SAN DIEGO, and DOES 1-100, inclusive, Defendants.	Case No. 37-2011-00096899-CU-PO-CTL CITY OF SAN DIEGO'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS DEMURRER TO PLAINTIFFS' COMPLAINT I/C Judge: Hon. Ronald S. Prager Date: January 27, 2012 Time: 10:00 a.m. Dept.: 71 Complaint filed: August 26, 2011 Trial: None set.

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I. INTRODUCTION

Defendant City of San Diego ("City") allowed Plaintiffs to purchase up to five additional years of pension service credits. These service credits or "air time" do nothing more than increase Plaintiffs' final pension from the City. Pursuant to San Diego Municipal Code ("SDMC") section 24.1312, Plaintiffs are required to pay both the employee and the City's full cost of any purchased retirement service credits.

Despite this unequivocal law, in 2007, Defendant San Diego City Employees Retirement System ("SDCERS") revealed a multi-million dollar shortfall related to the service credits purchased by Plaintiffs and other employees. Recognizing that someone must contribute funds to eliminate this shortfall, in 2007, SDCERS voted to charge the City for all the underfunding.

In response, the City filed a Petition for Writ of Mandate challenging the legality of SDCERS' decision. The trial court, Hon. William R. Nevitt, Jr., presiding, ruled that SDCERS' action was contrary to the law. The Court of Appeal affirmed in full Judge Nevitt's decision in a published decision, *City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69 ("*PSC Case.*")

In the *PSC Case*, the Court of Appeal held, "City employees were *not* entitled to purchase service credits at a rate that did not reflect the full cost of those credits." (*Id.* at 82; italics in original.) As a consequence of the Court of Appeal decision, SDCERS necessarily took corrective measures that now affect Plaintiffs' purchases of service credits.

Plaintiffs, apparently not liking SDCERS' correction measures, instituted this action in order to retain their purchased service credits without paying any additional amounts. Plaintiffs' theory is, but for the judgment issued in the *PSC Case,* they would not have been harmed. Thus, Plaintiffs seek to set aside the effect of Judge Nevitt's judgment upon them and/or collect monetary damages from City and SDCERS.

To that end, Plaintiffs, in their First Cause of Action, allege that the City procured the judgment by fraud. However, since the fraud alleged by Plaintiffs does not rise to the level required to set aside a judgment, to wit, extrinsic fraud, Plaintiffs First Cause of Action, for this and other reasons, fails as a matter of law.

Plaintiffs also seek monetary damages from the City based on the charge that the City aided and abetted SDCERS in 2003 when SDCERS allegedly violated SDMC section 24.1312. However, because the SDMC does not provide for any cause of action for aiding and abetting a violation of SDMC section 24.1312, Plaintiffs' Second Cause of Action fails as a matter of law.

Finally, the decision of the Court of Appeal conclusively negates several of the *prima facie* elements required for a valid aiding and abetting breach of fiduciary duty cause of action, Plaintiffs' Third Cause of Action. Because Plaintiffs cannot circumvent the holding of the Court of Appeal in the *PSC Case*, Plaintiffs have not and cannot allege facts sufficient to state a valid aiding and abetting breach of fiduciary duty cause of action against the City.

II. LEGAL ARGUMENT

A. Enabling Authority for City's Demurrer

The City brings its Demurrer based on Code of Civ. Proc. sections 430.10(a) and (e), lack of jurisdiction and failure to plead sufficient facts to constitute a cause of action.

B. Plaintiffs' First Cause of Action Fails for (1) Want of Jurisdiction, (2) Lack of Infringement of Any Right and (3) Failure to Plead Extrinsic Fraud

Twenty-one plus months after Judge Nevitt entered judgment in the *PSC Case* and fourteen plus months after the Court of Appeal affirmed Judge Nevitt's decision, Plaintiffs, in this action, like Monday morning quarterbacks, attempt to "re-litigate" an issue not affecting the merits of the *PSC Case* in the hopes that they can change the outcome. Specifically, Plaintiffs allege that the City Attorney's Office did not have the authority to file and maintain the *PSC Case* and fraudulently withheld that information from the Court and SDCERS. (Compl. ¶¶ 163, 165.) If the City Attorney's Office had not engaged in such fraudulent activity, Plaintiffs allege that Judge Nevitt would have sustained SDCERS' Demurrer without leave to amend, and thus, no judgment in the City's favor would have ever been issued in the *PSC Case*. (*Id.*) Unfortunately for Plaintiffs, this cause of action fails as a matter of law for numerous reasons.

1. One Department of the Court Cannot Enjoin, Restrain or Otherwise Interfere with the Judicial Act of Another Department of the Court

Respectfully, this department lacks jurisdiction to adjudicate Plaintiffs' First Cause of Action. Rather, Judge Nevitt's department is the only department of this Court that can hear this

cause of action. This is because the law holds that a judgment rendered in one department of the superior court is binding on that matter upon all other departments until such time as the judgment is overturned. (*People v. Superior Court* (1967) 249 Cal.App.2d 727, 734.)

The rationale for this rule is based on the fact that one department of the superior court cannot enjoin, restrain, or otherwise interfere with the judicial act of another department of the superior court. (*Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 742; *Curtin v. Koskey* (1991) 231 Cal.App.3d 873.) "A superior court is but one tribunal, even if it be composed of numerous departments.... An order made in one department during the progress of a cause can neither be ignored nor overlooked in another department...." (*Sandco American, Inc. v. Notrica* (1990) 216 Cal.App.3d 1495, 1508; citations and internal quotation marks omitted.) For one superior court judge, no matter how well intended, to nullify a duly made ruling of another superior court judge would be to place the second judge in the role of a one-judge appellate court. (*In re Alberto* (2002) 102 Cal.App.4th 421.) Therefore, "[o]ne department of the superior court cannot enjoin, restrain or otherwise interfere with the judicial act of another department in the [same court]." (*Ford v. Superior Court, supra,* 188 Cal.App.3d at 742.)

On September 15, 2011, the City appeared *ex parte* before the Hon. Judge John S. Meyer and sought a transfer of this action to Judge Nevitt based solely on the above law. (Exhibit "A" to City's Request for Judicial Notice ("RJN").) Plaintiffs opposed the transfer. (Exhibit "B" to RJN.) Accordingly, Plaintiffs have voluntarily chosen to avoid the one department of this Court that could entertain this cause of action.

2. Plaintiffs Had No Legal Right That was Infringed by the Judgment

"A stranger to the record, who was not a party to the action in which the judgment was rendered nor in privity with a party, is not prohibited from impeaching the validity of the judgment in a collateral proceeding; but in order to do so he must show that he has rights, claims, or interests which would be prejudiced or injuriously affected by the enforcement of the judgment, and which ***accrued prior to its rendition***, unless the judgment is absolutely void. Thus situated he may attack the judgment on the ground of want of jurisdiction, or for fraud or collusion; but he cannot object to it on account of mere errors or irregularities, or for any matters

which might have been set up in defense to the original action." (*Consolidated Rock Prod. Co. v. Higgins* (1942) 54 Cal.App.2d 779, 781; emphasis added, citing, 34 C. J. 526: "Judgments", section 832; 15 Cal. Jur. 56; 31 Am. Jur. 192; and 15 R. C. L. 841. See also *Villarruel v. Arreola* (1977) 66 Cal.App.3d 309, 317.)

In this case, Plaintiffs have failed to allege and cannot allege that, prior to the issuance of the judgment in the *PSC Case*, they had any legal right that was adversely affected by the judgment. At all times relevant, SDMC section 24.1312 required SDCERS to charge and the Plaintiffs to pay both the employer and employee costs of the service credits purchased by Plaintiffs. With regard to Plaintiffs' purchases, the Court of Appeal held, "City employees were *not* entitled to purchase service credits at a rate that did not reflect the full cost of those credits." (*PSC Case* at 82; italics in original.) Therefore, the judgment in the *PSC Case* did not affect any right of Plaintiffs which accrued prior to the rendition of the judgment.

3. Plaintiffs Have Alleged Intrinsic Fraud, Not Extrinsic Fraud

Plaintiffs allege that the City procured the judgment in the *PSC Case* through extrinsic fraud.[1] However, the Plaintiffs' allegations make clear that they have only pled intrinsic fraud. Intrinsic fraud is always insufficient to set aside the effects of the judgment. This is because equitable relief from the effect of a judgment or decree may only be obtained upon allegations and proof of ***extrinsic and collateral fraud***. (*Baldwin v. Daniels* (1955) 132 Cal.App.2d 560, 562.)

The difference between extrinsic and intrinsic fraud is as follows. " 'By contrast, fraud is intrinsic and not a valid ground for setting aside a judgment when the party has been given notice of the action and has had an opportunity to present his case and to protect himself from any mistake or fraud of his adversary but has unreasonably neglected to do so. [Citation.]' [Citation.]" (*Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 844. See also *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 10-11, intrinsic fraud occurs

[1] Plaintiffs' claim that the City engaged in extrinsic fraud is a legal contention and/or conclusion which this Court need not accept as true for purposes of the City's Demurrer. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

during the course of the proceedings through fraudulently suppressed, concealed or falsified evidence and does not provide a basis for equitable relief.) In other words, the basis for Plaintiffs claim for equitable relief cannot be based on "any matters which might have been set up in defense to the original action." (*Consolidated Rock Prod., supra*, 54 Cal.App.2d at 781.)

The reason for this rule was enunciated by the California Supreme Court. "These cases denying a tort remedy for the presentation of false evidence or the suppression of evidence rest on a concern for the finality of adjudication. This same concern underlies another line of cases that forbid direct or collateral attack on a judgment on the ground that evidence was falsified, concealed, or suppressed. After the time for seeking a new trial has expired and any appeals have been exhausted, a final judgment may not be directly attacked and set aside on the ground that evidence has been suppressed, concealed, or falsified; in the language of the cases, such fraud is 'intrinsic' rather than 'extrinsic.'" (*Cedars-Sinai Medical Center v. Superior Court, supra,* 18 Cal.4th at 10.) "In *Rubin v. Green* (1993) 4 Cal.4th 1187, in the course of balancing the utility of a tort remedy for litigation-related misconduct (improper attorney solicitation of clients) against the burdens it would impose, we noted: "[I]t does not follow [from the existence of litigation-related misconduct] that we should adopt a remedy that itself encourages a spiral of lawsuits. [¶] ... [¶] ... [W]e [have] specifically discounted another round of litigation as an antidote for the fevers of litigiousness, preferring instead the increased use of sanctions within the underlying lawsuit and legislative measures." (*Id.* at 9, citing *Rubin v. Green, supra,* 4 Cal.4th at 1199.)

In this case, Plaintiffs' theory of fraud with regard to the City procuring the judgment in the *PSC Case* is based on the following allegations:

(1) the City Attorney's authority to file and maintain the prior action was subject to authorization and approval of the City Council. (Compl. ¶ 151.)

(2) the City Attorney exceeded its authority to file and maintain the prior action because the City Council did not authorize the filing of the Petition. (*Id.* at ¶ 152.)

(3) five affirmative votes of the City Council were necessary to authorize the filing of the petition. (*Id.* at ¶ 160.)

(4) the City Council voted 4 to 1 to authorize the filing of the City's petition. (*Id.* at ¶ 161.)

All of these facts were known to SDCERS during the pendency of the *PSC Case*. In fact, prior to the City Council authorizing the filing of the *PSC Case*, SDCERS had sought to dismiss the City's Petition for Writ of Mandate on the basis that the City Attorney lacked authority to file the action. Specifically, SDCERS filed a Demurrer to the City's original petition based on the City Attorney's lack of authority. (Compl. ¶¶ 88, 153.) While the demurrer was pending, the City Attorney met in closed session with the City Council to discuss this matter. (*Id.* at ¶ 161.) Following that closed session, in an open and public session of the City Council, Executive Assistant City Attorney Donald McGrath reported out that the City Council voted 4 to 1 to authorize the filing of the City's petition. (*Id.*) Following this announcement, SDCERS voluntarily entered into a stipulation by and with the City in which SDCERS agreed that "the City Council authorized the City Attorney to maintain this action." (Exhibit "C" to the RJN at ¶ 4; Compl. ¶ 89.) As the stipulation makes clear, based on SDCERS agreeing that the City had authority to file and maintain the action, SDCERS agreed to withdraw its demurrer and allowed the City to file a First Amended Petition for Writ of Mandate ("Petition"). (*Id.* at ¶ 5.)

The law holds that Plaintiffs cannot attack the *PSC Case* judgment "for any matters which might have been set up in defense to the original action." (*Consolidated Rock Prod., supra*, 54 Cal.App.2d at 781.) Despite this, Plaintiffs argue exactly what the law prevents: SDCERS would have prevailed in the *PSC Case* based on the defense that the City Attorney did not have authority to file that action. (Compl. ¶ 165.) However, because that defense could have been raised in the *PSC Case*, and in fact SDCERS did raise that defense and later voluntarily agreed that the City Council had authorized the action and withdrew its Demurrer, Plaintiffs have pled only intrinsic fraud, not extrinsic fraud. Accordingly, as a matter of law, Plaintiffs have failed to plead facts sufficient to support their First Cause of Action.

C. Plaintiffs' Second and Third Causes of Action are Barred for Failure to Timely File a Required Claim

Plaintiffs seek monetary damages in tort. (Compl. ¶¶ 181, 187.) Therefore, the filing of a timely claim by Plaintiffs is a mandatory prerequisite for this action. (Gov. Code section 945.4.) Gov. Code section 911.2(a) required the Plaintiffs' claim to be filed within six months of the

accrual of the action. If the Plaintiffs filed a ***timely*** claim, Plaintiffs then had six months from the date of any written denial, or if no written denial was provided, two years from the date the cause of action accrued, to file their complaint against the City. (Code Civ. Proc. section 342; Gov. Code section 945.6.)

A cause of action accrues at the time when it is complete with all of its elements. (*Fox v. Ethicon Endo–Surgery, Inc.* (2005) 35 Cal.4th 797, 806.) For torts, this usually occurs at the time the alleged tortious act occurs. (*Howe v. Pioneer Mfg. Co.* (1968) 262 Cal.App.2d 330, 339-340.) In this case, Plaintiffs allege that the City encouraged them to buy service credits in 2003. Plaintiffs' purchases of the service credits occurred between August 15, 2003 to November 1, 2003 ("window period.") (*Id.* at ¶ 40.) Therefore, Plaintiffs' cause of action against City for their alleged encouragement in purchasing the service credits accrued on November 1, 2003 at the latest.

Pursuant to Gov. Code section 911.2(a), Plaintiffs had until May 1, 2004 or six months from November 1, 2003 to file their claim with the City. However, the Plaintiffs did not present their claim to the City until July 7, 2011, over seven years after the claim filing date had expired. (Compl. ¶ 139.)

Even if Plaintiffs argue that their cause of action did not accrue until much later, based on the discovery rule, their cause of action is still barred for failure to file a timely claim. A plaintiff has reason to discover a cause of action when he or she has reason to at least suspect a factual basis for its elements. (*Fox v. Ethicon Endo–Surgery, Inc, supra,* 35 Cal.4th at 807.) On June 7, 2010, the Court of Appeal issued is decision in the *PSC Case*. The Court of Appeal ruled that "in this case City employees were *not* entitled to purchase service credits at a rate that did not reflect the full cost of those credits." (*PSC Case* at 82; italics in original.) In fact, based on the *PSC Case* decision, in July 2010, SDCERS made a "written disclosure" to Plaintiffs and other plan participants that there would be a "potential adverse effect" on their service credits. (Compl. ¶ 114.)

The fact that Plaintiffs may not have known with any certainty their amount of monetary damages against the City does not toll the statute of limitations. Rather, "the infliction of

appreciable and actual harm, however uncertain in amount, will commence the statutory period.... [N]either uncertainty as to the amount of damages nor difficulty in proving damages tolls the period of limitations." (*Davies v. Krasna* (1975) 14 Cal.3d 502, 514.)

Accordingly, based on the publication of the Court of Appeal decision in the *PSC Case*, clearly, Plaintiffs knew or should have known that SDCERS would be requiring them to contribute additional sums for their purchased service credits. Therefore, at the very latest, when this decision was issued on June 7, 2010, Plaintiffs claim against the City accrued. Therefore, Plaintiffs had until December 7, 2010 to file a timely claim. However, they did not file their claim until July 7, 2011. (Compl. ¶ 139.) Therefore, their claim is still untimely.

Inasmuch as a the timely filing of a claim is a prerequisite to the filing of this action and Plaintiffs did not timely file such claim, Plaintiffs' Second and Third Causes of Action are both barred.

D. Plaintiffs' Second Cause of Action is Not a Valid Cause of Action

1. San Diego Municipal Code Does Not Provide for an Aiding and Abetting Cause of Action

Plaintiffs' Second Cause of Action alleges that, in 2003, City employee appointees to the SDCERS' board approved the "window period" for PSC contracts without charging the full cost to the employees, and thus, City aided and abetted SDCERS violation of SDMC section 24.1312. (Compl. ¶ 175.) Plaintiffs also allege that the City aided and abetted SDCERS violation of law when it took no action to close the window period in which Plaintiffs purchased their service credits. (*Id.* at ¶ 176.)

In California, "[l]iability may ... be imposed on one who aids and abets the commission of an intentional ***tort*** . . . ." (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846, citing, Rest.2d Torts, section 876; emphasis added.) However, there can be no civil cause of action for aiding and abetting a violation of law, except where the law itself allows for such claim or the act constitutes an intentional tort. (*Toy v. Triware Engineering Solutions, Inc.* (2010 N.D. Cal.) 2010 WL 3448535, *3. See also e.g. *Gentry v. eBay* (2002) 99 Cal.App.4th 816, 832-24, the trial

court dismissed a civil aiding and abetting breach of statute claim as "the statute in question was silent as to any aiding and abetting liability.")

The SDMC does not authorize any civil action for aiding and abetting a breach of SDMC section 24.1312. Therefore, as a matter of law, Plaintiffs' Second Cause of Action fails.

2. Since There Was No Primary Wrong, There Can Be No Liability for Aiding and Abetting

Even if there is a valid cause of action for breach of violation of SDMC section 24.1312, without a finding that SDCERS' breached that statute when it entered into contracts with Plaintiffs in 2003, the City cannot be held liable for aiding and abetting that alleged breach. This is because, unless there is a primary wrong, there can be no liability for aiding and abetting. (*LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 575.)

Plaintiffs allege that the Court in the *PSC Case* found that SDCERS had violated the law when it "knowingly offered to lock-in PSC contract rates for plan participants which the Board *knew* were no longer 'equivalent to the employer and employee cost of such service' within the meaning of SDMC section 24.1312. (Compl. ¶ 171; italics in original.)

However, no decision regarding any violation of the law with regard to Plaintiffs' PSC contracts was made in the *PSC Case*. Rather, as the Court of Appeal stated, the sole issue was "a very narrow issue: Did SDCERS have the right to charge the City of San Diego (City) for SDCERS's underfunding of pension service credits during the time period of August 15, 2003 through November 1, 2003, when the authorizing statute states that the employees purchasing such service credits were and are to pay the full cost of service credits purchased?" (*PSC Case* at 72.) In response to that narrow issue, the Court of Appeal held, "[w]hen the board decided to charge the City for the underfunding [in 2007], that decision was in violation of the law and thus exceeded its power." (*Id.* at 80.)

As to any other potential violations of law by SDCERS, when the trial court denied the City's request that "SDCERS 'take no further action absent full compliance with San Diego Ordinance [No.] O–18383 and [SDMC] Section 24.1312'" it passed on adjudicating any other potential breaches of the law. (*PSC Case* at 85.) In affirming the trial court's decision, the Court

of Appeal stated that such denial "allows SDCERS to take what action it deems necessary to resolve the situation ***without having to first determine if they are in violation of the law.***" (*Id.* at 85; emphasis added.) The only thing the Court held SDCERS could not do was "charge the City for the underfunding . . . or it would be in violation of the judgment." (*Id.*)

Regardless, SDCERS did not violate SDMC section 24.1312 in 2003 when it entered into the contracts with Plaintiffs. In 2003, prior to SDCERS voting on enacting the window period, the Court of Appeal found, "[a] member of the [SDCERS'] board expressed concern that the 60-day window allowing purchase of service credits at the old rates would not cover the costs of the benefit, and another board member asked who would bear the cost of the purchases during the 60-day window. In response, board member Saathoff stated that the cost of the purchase during the 60-day period would be borne by the employees." (*Id.* at 76.) Thus, in 2003, SDCERS complied with SDMC section 24.1312 when it stated that it would hold the employees responsible for the total cost.

In this case, Plaintiffs do not attempt to establish the alleged primary wrong - that SDCERS violated the law in 2003 when it entered into contracts with Plaintiffs for their purchases of service credits.[2] Nor was SDCERS found to have violated the law with regard to Plaintiffs' contracts for the purchase of service credits in the *PSC Case*. Without any primary wrong against Plaintiffs being established, as a matter of law, there can be no secondary liability on the part of City based on aiding and abetting as aiding and abetting requires participation in a specific primary wrong. (*Casey v. U.S. Nat. Bank Assn.* (2005) 127 Cal.App.4th 1138, 1152, citing *Lomita Land Water Co. v. Robinson* (1908) 154 Cal. 36, 47.) Therefore, even if there is a valid cause of action for aiding and abetting a violation of SDMC section 24.1312, as a matter of law, the City cannot be liable for aiding and abetting a non-existent primary wrong.

3. Plaintiffs Have Failed to Plead Any Acts of Substantial Assistance

Even if a valid cause of action for aiding and abetting a violation of SDMC section 24.1312 existed, Plaintiffs have failed to plead any facts that demonstrate that the City provided

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[2] If Plaintiffs claim that SDCERS violated the law in the formation of the contracts, such contracts may be subject to rescission pursuant to Civ. Code section 1689(b)(5) and (6).

SDCERS with substantial assistance in breaching the law, a necessary element of any aiding and abetting cause of action. Plaintiffs' allegations that the City gave substantial assistance to SDCERS in breaching the law when the City's three *ex officio* members cast votes in support of creating the window period in 2003 is meritless. (Compl. ¶ 175.) This is because whether City officials serve on SDCERS' board based on their position in the City (i.e. *ex officio* status), the SDCERS' "[b]oard is a separate entity." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1064.) Therefore, in 2003, the votes of the three *ex officio* City members on the SDCERS' board approving the window period was an act of SDCERS, not City, negating Plaintiffs' allegations.

Nor does Plaintiffs' allegations that the City failed to take action to oppose and close the window period in 2003 equate to substantial assistance by the City. (Compl. ¶¶ 176-77.) This is because the law holds that the "[m]ere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1326.)

Having shown that Plaintiffs allegations of "substantial assistance" fail as a matter of law, even if the SDMC provided for a cause of action for aiding and abetting a violation of SDMC section 24.1312, Plaintiffs have failed to plead sufficient facts of the City's alleged substantial assistance to SDCERS in violating that law. Therefore, this cause of action fails for this separate and distinct reason.

E. Plaintiffs' Third Cause of Action Fails Because SDCERS Did Not Commit the Underlying Tort of Intentional Breach of Fiduciary Duty

1. If There is No Primary Wrong, There Can be No Aiding and Abetting

"California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort. ' 'Liability may ... be imposed on one who aids and abets the commission of an intentional tort . . . .' (citations omitted.)" (citation omitted.)' " (*Casey v. U.S. Nat. Bank Assn., supra*, 127 Cal.App.4th at 1144.) Moreover, unless SDCERS committed the underlying tort, the City cannot be held liable as an aider and abettor. (*LeVine, Inc. v. Higashi, supra* 131 Cal.App.4th at 575.) In other words, if SDCERS did not commit the primary wrong, then, as a matter of law, City cannot be secondarily liable as an aider and abettor.

In order for the City to be liable for aiding and abetting a breach of fiduciary duty by SDCERS, it must be established that SDCERS intentionally breached a fiduciary duty to Plaintiffs. However, no intentional breach by SDCERS was established in the *PSC Case*. This is because the only question the Court resolved was "Did SDCERS have the right to charge the City of San Diego (City) for SDCERS's underfunding of pension service credits during the time period of August 15, 2003 through November 1, 2003, when the authorizing statute states that the employees purchasing such service credits were and are to pay the full cost of service credits purchased?" (*PSC Case* at 72.) In fact, the trial court and the Court of Appeal specifically declined to determine if SDCERS had violated any laws beyond this narrow issue. (*Id.* at 85.)

Nor in this case do the Plaintiffs allege that SDCERS intentionally breached any fiduciary duty owed to them in 2003 when Plaintiffs entered into their contracts with SDCERS to purchase service credits. Rather, all of Plaintiffs' causes of action for breach of fiduciary duty against SDCERS in this case are based on actions taken by SDCERS in and after 2007.

There can be no secondary liability for aiding and abetting if no primary wrong is established. The alleged primary wrong, intentional breach of fiduciary duty by SDCERS, was not established in the *PSC Case*. Nor do the Plaintiffs attempt to establish the alleged primary wrong in this case. Accordingly, without SDCERS being found by any court to have intentionally breached any fiduciary duty to Plaintiffs, the City, as a matter of law, cannot be secondarily liable for aiding and abetting a primary wrong that does not exist.

2. The City Took No Action to Promote the Sale of the Service Credits

Plaintiffs allege that "City management personnel" informed, reminded and encouraged Plaintiffs to buy service credits during the 2003 window period, and thus, provided substantial assistance to SDCERS when SDCERS breached its fiduciary duty to Plaintiffs in 2003.[3] (Compl. ¶ 41.) However, "City management personnel" are not the equivalent of the City. The City, like

[3] Interestingly, Plaintiffs admit that the "City's labor organizations representing thousands of City employees, similarly disseminated the ***same information and messages as SDCERS and City*** were both publishing." (Compl. ¶¶ 42-43; emphasis added.) Since, City disseminated the same message as the labor unions, than the Plaintiffs must agree that the unions too are as equally liable for aiding and abetting SDCERS' alleged breaches of fiduciary duties.

a corporation, is a fictitious entity. As such, it acts through individuals. However, those individuals must be authorized to so act on behalf of the City. (*See e.g. Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1450-51, "a corporation is a separate legal entity that can only act through people. The authority of those people to act on behalf of the corporation is defined by the law of agency." Civil Code section 2315 states, "An agent has such authority as the principal, actually or ostensibly, confers upon him.")

In this case, the Plaintiffs have not alleged that the unnamed "City management personnel" were authorized by the City via any official act of the City Council to inform, remind and/or encourage Plaintiffs to purchase service credits during the 2003 window period. Nor will Plaintiffs be able to so plead. This is because the City did not adopt any policy, proclamation, declaration, resolution or ordinance encouraging Plaintiffs to purchase the service credits.

Therefore, legally, the City could not have provided any assistance, substantial or otherwise, to SDCERS when SDCERS allegedly breached its fiduciary duties to Plaintiffs in 2003. (Compl. ¶ 186.) Accordingly, Plaintiffs have failed to plead any facts supporting the requisite element of substantial assistance for an aiding and abetting a breach of fiduciary duty cause of action.

3. The City Had No Knowledge of the Illegality

In California, "a defendant can only aid and abet another's tort if the defendant ***knows*** what 'that tort' is." (*Casey v. U.S. Bank Nat. Assn., supra,* 127 Cal.App.4th at 1146; emphasis added.) In other words, "the defendant must have acted to aid the primary tortfeasor 'with knowledge of the object to be attained.' [Citation.]" (*Id.*)

In this case, Plaintiffs own allegations prove that the City had no knowledge of the alleged illegality during the relevant time period. Plaintiffs purchased their service credits during the window period authorized by SDCERS, August 15, 2003 to November 1, 2003. (Compl. ¶ 38.) A signed application to purchase service credits had to have been received by SDCERS prior to November 1, 2003. (Compl. ¶ 40.) However, Plaintiffs allege, in January 2004, the City "became aware of the likely violation of the San Diego Municipal Code related to the pricing of 4,000 purchase of service credit contracts being allowed during the 2003 'window period,' and

took no timely action to oppose or close the 'window' before employees relied to their detriment upon the service credits being purchased." (Compl. ¶ 45. See also *Id.* at ¶ 100, the City "had *actual* knowledge **in January 2004**...." [italics and bold in original.]) January 2004 is nearly ***three months after*** the last day Plaintiffs could have submitted their application to purchase service credits. Thus, even if City had promoted the sale of the service credits from August 15, 2003 to November 1, 2003, because Plaintiffs admit the City had no knowledge of any breach of duty or violation of the law by SDCERS during that time, the City, as a matter of law, cannot be liable as an aider or abettor.

Even if the Plaintiffs had not made this concession, the City did not have the requisite knowledge required to aid and abet SDCERS. This is because the Court of Appeal held, "[t]here was no indication at that 2003 [SDCERS] meeting that the City would bear any of the cost of purchases made at the old rates." (*PSC Case* at 83.) Rather, SDCERS "board member Saathoff confirmed the cost of the benefit would be borne by the employees." (*Id.* at 83.) Therefore, as a matter of law, the City could not have had any knowledge that SDCERS violated SDMC section 24.1312 when it entered in the contracts with Plaintiffs in 2003 as SDCERS stated that it would comply with the law and charge the employees the full cost of the service credits they purchased.

4. City's Alleged Failure to Act Does Not Constitute Aiding and Abetting

Plaintiffs allege that if the City had "exercised their legislative authority to take action in January 2004 to object to SDCERS' allowance of a 'window period'" Plaintiffs would not have been harmed because their contracts would not have been finalized. (Compl. ¶ 49.) Even if the City knew that SDCERS was violating the law or breaching its fiduciary duties to Plaintiffs, the City's failure to act cannot serve as the basis for liability under an aiding and abetting theory. This is because the law holds that the "[m]ere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting." (*Fiol v. Doellstedt, supra,* 50 Cal.App.4th at 1326.) Accordingly, the City's alleged failure to act cannot be a valid basis for any aiding and abetting claim, another independent reason Plaintiffs' cause of action fails.

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5. City Has Statutory Immunity

Finally, even if the City had taken action to officially promote the sale of service credits to Plaintiffs, the City has immunity from such actions. To the extent that Plaintiffs allege that City induced them to buy the credits based on the City's encouragement and promotion, the City has immunity from misrepresentations and omissions, including intentionally fraudulent representations. (Gov. Code section 818.8)

Additionally, under California law, public entities and officials are statutorily immune from liability for discretionary acts. (Gov. Code sections 815.2, 820.2; *Turner v. Martire* (2000) 82 Cal.App.4th 1042, 1053.) The promotion of the sale of service credits by the City in 2003, if City had actually done so, would have been a discretionary act.

Thus, even if the City had promoted the sale of the service credits to Plaintiffs, there is no non-immune conduct of the City that could be used to form the basis of an actionable aiding and abetting claim.

III. LEAVE TO AMEND

Plaintiffs cannot plead allegations that circumvent the fact that SDCERS agreed that the City had authority to prosecute the *PSC Case.* Plaintiffs cannot plead facts that circumvent the findings and holdings of the Court of Appeal in the *PSC Case.* Accordingly, City respectfully submits that allowing Plaintiffs to amend their Complaint would be futile, and therefore, City requests that, in the event this Court sustains this Demurrer, leave to amend not be granted.

IV. CONCLUSION

Through this lawsuit, Plaintiffs attempt to evade the unequivocal law which holds that they are responsible for the full cost of any service credits they purchased. While Plaintiffs' theories against the City are "creative," such creativity cannot negate the Court of Appeal decision in the *PSC Case* nor the fact that the City committed no extrinsic fraud in obtaining that judgment. Thus, respectfully, this Court should sustain City's Demurrer without leave to amend.

Dated: October 14, 2011

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By _____
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