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SAN DIEGO COUNTY, CA

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10 IN AND FOR COUNTY OF SAN DIEGO

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CASE NO. 37-2011-00096899-GU-PO-CTL
COMPLAINT FOR EQUITABLE
RELIEF AGAINST JUDGMENT DUE
TO EXTRINSIC FRAUD; COMPLAINT
FOR DAMAGES AGAINST CITY OF
SAN DIEGO FOR AIDING AND
ABETTING SDCERS' VIOLATION OF
LAW AND BREACH OF FIDUCIARY
DUTY AND AGAINST SDCERS FOR
BREACH OF CONSTITUTIONAL AND
FIDUCIARY DUTIES

[Unlimited Civil Case]

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 WOOD; BETTY WOOD; DAUN)
 14 WORTHINGTON; CALVIN YELDELL,)
 15 Plaintiffs,)
 16 vs.)
 17 SAN DIEGO CITY EMPLOYEES')
 RETIREMENT SYSTEM, CITY OF)
 18 SAN DIEGO, and DOES 1-100, inclusive,)
 19 Defendants.)

20
 21 GENERAL ALLEGATIONS

22 1. Each Plaintiff is a current or former employee of the CITY OF SAN DIEGO
 23 ("CITY"), and a Member of the SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM
 24 ("SDCERS"). SDCERS is a defined benefit pension plan established by CITY in 1927 to
 25 provide retirement, disability and death benefits to its members and their beneficiaries. As a
 26 current or former CITY employee, each Plaintiff's participation in, and contributions to,
 27 SDCERS is/was mandatory during employment.

28 ///

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1 2. Venue is proper in San Diego County because the Defendants committed the
2 wrongs alleged in this Complaint in the City of San Diego.

3 3. CITY is a municipal entity established by Charter pursuant to the California
4 Constitution, Article XI, § 3. Pursuant to City Charter section 11, the City Council is the
5 legislative body for the CITY with the power to enact laws and to make binding commitments for
6 the expenditure of funds, including but not limited to the establishment of pension benefits for
7 CITY employees under SDCERS.

8 4. SDCERS is a public employee retirement system established and maintained by
9 CITY as a governmental defined benefit pension plan for its employees in accordance with
10 California Constitution, Article XVI, Section 17, City Charter, Article IX, §§ 141 through 149,
11 and San Diego Municipal Code §§ 24.0100 through 24.1809.

12 5. Defendant DOES 1 through 100, inclusive, are sued herein under fictitious names.
13 The true names and capacities of these DOE Defendants, whether individual, corporate,
14 associate, or otherwise, are unknown to Plaintiffs at this time. Plaintiffs will amend this
15 Complaint by inserting their true names and capacities after they have been discovered and
16 identified by Plaintiffs. Each of the fictitiously named Defendants is responsible in some manner
17 for the acts, omissions, conduct and occurrences herein alleged.

18 6. At all relevant times, each Defendant named in this action and each DOE
19 defendant, was the agent, ostensible agent, servant, employee, representative, assistant, joint
20 venturer, and/or co-conspirator of each of the other Defendants, or otherwise exercised some
21 form of authority, direction or control over the remaining Defendants and, in acting or failing to
22 act as alleged in this Complaint, each Defendant was at all times acting within the course and
23 scope of his, her, or its authority as agent, ostensible agent, servant, employee, representative,
24 joint venturer, and/or co-conspirator, and with the same authorization, knowledge, consent,
25 permission or ratification of each of the other defendants or under the direction and control of
26 each of the remaining Defendants.

27 7. This case arises from CITY's and SDCERS' wrongful conduct which includes the
28 procurement of a judgment in CITY's name and in its favor by extrinsic fraud and SDCERS'

1 violation of law and breach of fiduciary duties with CITY's direct aid, participation and
2 encouragement. Despite Plaintiffs' faithful and full performance of their own employment and
3 pension bargain, CITY and SDCERS have imposed devastating financial consequences upon
4 them for which they seek this Court's intervention at law and in equity.

5 FACTUAL ALLEGATIONS

6 SDCERS' Fiduciary Duty To Plaintiffs As Plan Participants
7 Takes Precedence Over Any Other Duty

8 8. SDCERS is a defined benefit pension plan which was created by ordinance
9 enacted by CITY's legislative body pursuant to Section 141 of the CITY Charter. SDCERS is
10 one of three participating trust plans in a group trust. As settlor of the trust and sponsoring
11 employer of the defined benefit pension plan, CITY, acting through its elected City Council, has
12 non-delegable legislative authority to determine and amend the plan terms, including the level of
13 benefits provided, by the enactment of ordinances. CITY's plan, as established and amended
14 from time to time by ordinance, is codified in the San Diego Municipal Code, Article 2, Chapter
15 4, City Employees' Retirement System, sections 24.0100 *et seq.*

16 9. The SDCERS trust is administered by its Board of Administration. The Board is
17 a fiduciary as to all members of SDCERS, including all Plaintiffs and their beneficiaries, and
18 thus owes them the highest duty recognized in the law. (*Lexin v. Superior Court* (2010) 47
19 Cal.4th 1050, 1102; *Hittle v. Santa Barbara County Employees Retirement Association* (1985)
20 39 Cal.3d 374, 392-393.

21 10. By dictate of California's Constitution, article XVI, section 17, the SDCERS
22 Board must administer its system in a manner that will assure prompt delivery of benefits and
23 related services to the plan participants and their beneficiaries. While the SDCERS Board has
24 subsidiary duties to minimize employer contributions and to defray reasonable expenses of
25 administering the system, its fiduciary duty to trust fund members and their beneficiaries takes
26 precedence over any other duty.

27 11. At all relevant times, the make-up of the SDCERS Board has been determined
28 under CITY Charter, Article IX, section 144, which was amended by vote of the San Diego

1 electorate in November 2004 and became effective on April 1, 2005. A certain number of
2 SDCERS Board Members have always been elected by General/Safety/Retired SDCERS
3 Members and these Board Members are themselves SDCERS plan participants; a certain number
4 of SDCERS Board Members are non-CITY employee private citizens who serve as unpaid
5 volunteer trustees by appointment of the Mayor and City Council. Prior to April 1, 2005, three
6 SDCERS Board Members were high level CITY officials serving by virtue of their official
7 positions – CITY Manager, CITY Auditor and Comptroller, and CITY Treasurer. After April 1,
8 2005, these three *ex officio* positions on the SDCERS Board had been reduced to one Board
9 Member who is appointed as the Mayor’s delegatee.

10 12. At all relevant times, by City Council’s adoption of one or more resolutions to this
11 effect, CITY has accepted the duty to defend and indemnify all SDCERS Board Members,
12 whether they are paid CITY employees or unpaid volunteers who, by City Charter, are deemed to
13 be unclassified employees of CITY.

14
15 CITY Exercised Its Legislative Power To Establish
16 A Purchase of Service Credit Program
17 By Duly-Enacted Ordinances

18 13. Under SDCERS, a CITY employee’s pension allowance is determined by
19 application of a formula with three critical component parts: (1) the employee’s total years of
20 *creditable service*; (2) the employee’s highest one-year of pensionable or “final” compensation;
21 and (3) the percentage factor or multiplier based on the employee’s age at retirement. An
22 employee’s “*creditable service*” is not necessarily the same as his/her actual years of CITY
23 employment because CITY’s defined benefit pension plan (like most other public pension plans
24 in California) permits an employee to *purchase* service not otherwise actually worked.

25 14. In 1993, CITY established a purchase of service credit (“PSC”) program by
26 Ordinance O-17938 which allows employees to purchase *creditable* service credits for periods of
27 CITY and non-CITY employment when the employee did not contribute to SDCERS and thus
28 did not earn *creditable service*; for example, an employee’s probationary period; missed service
between termination and reinstatement; service for which prior contributions were refunded;

1 missed service during military leave and other approved leaves of absence; time worked hourly
2 or part-time; and the difference in time between part-time and full-time prior to January 1, 1997.

3 15. In 1997, CITY enacted a new Ordinance O-18383 expanding the PSC program to
4 allow employees to purchase up to a maximum of five (5) years of *creditable service* in addition
5 to the types of service purchases already allowed.

6 16. The CITY's 1997 ordinance expanding the PSC program to permit this 5-year
7 maximum service purchase stated that "the cost [of such service] purchased shall be the amount
8 determined by the [SDCERS'] Board to be the equivalent of the employee and employer cost of
9 that service credit." The City Council did not otherwise set a price for employees to pay; nor did
10 it establish a formula to be applied (as was done with other pension benefits); nor did it set forth
11 guidelines to be followed in the pricing process.

12 17. Ordinance O-18383, as adopted in 1997 and amended thereafter, was codified in
13 the San Diego Municipal Code ("SDMC"), Article 4, San Diego City Employees' Retirement
14 System, section 24.1312.

15 The SDCERS Board Set The PSC Purchase Rates
16 Pursuant to CITY's Ordinance

17 18. City Charter, Article IX, section 142 and SDMC section 24.0901, provide for the
18 SDCERS Board to employ an actuary to study historical data regarding the Retirement System,
19 project employee demographic trends, make reasonable actuarial assumptions, and assist the
20 Board in its determination of the amount of annual employer and employee contributions which
21 will assure the ongoing financial integrity of the System. The Board's decisions on actuarial
22 assumptions to be used in administering the System, made in consultation with its actuary, are
23 "conclusive and final." (Charter, Art. IX, § 143; SDMC § 24.0902.)

24 19. In fulfilling its responsibility under SDMC section 24.1312 to determine the cost
25 to be charged employees under CITY's permissive 5-year PSC program, the SDCERS Board
26 considered the advice of its actuary.

27 20. The "cost" of pension benefits available under SDCERS can only be estimated on
28 the basis of "assumed" values for each of the factors affecting the employees' pension benefits,

1 including the age at which employees retire, their highest compensation level during
2 employment, how long employees live after retirement, and the rate of return on investment of
3 funds contributed by CITY and employee during the period of employment. CITY's plan
4 specifies that the Board must conduct an actuarial review of these assumptions at least every five
5 years to compare "assumed" experience with "actual" experience and adjust accordingly.

6 21. When determining the "cost" of purchased service credits, an additional
7 assumption must be added to the relevant factors related to the date at which employees would
8 purchase service credits in relation to their assumed retirement date. Thus, "determination" of
9 the purchase price for service credits required SDCERS to evaluate all of the following factors
10 for CITY's employee population: (a) total number of years of employment, with and without
11 "purchased" years; (b) highest salary achieved during employment; (c) rate of return on
12 investment of contributions made during employment; (d) number of years remaining until
13 retirement; (e) number of years lived after retirement; and (f) the retirement factor to be applied
14 in calculating the final retirement benefit. Because so many variables affect the outcome, it was
15 impossible to prospectively fix the "cost" of purchased service credits.

16 22. In 1997, the permissive 5-year PSC program was a new retirement benefit for
17 which no historical data existed. The initial rate-setting process therefore could not proceed with
18 the level of actuarial rigor inherent in analyses for which historical data existed. In this context,
19 pursuant to SDMC section 24.1312, the SDCERS Board adopted rates for CITY's PSC program
20 based on its actuary's conclusion that these rates would be sufficient: 15% of annual salary for
21 General Members for each year purchased and 26% for Safety Members.

22 23. At the time the SDCERS Board adopted these rates for CITY's permissive PSC
23 program, CITY itself had three Trustees on the SDCERS Board who served *ex officio* pursuant to
24 the CITY Charter: CITY Manager, CITY Auditor and Comptroller, and CITY Treasurer. The
25 SDCERS Board adopted these rates during an open meeting of the SDCERS Board. CITY had
26 actual or constructive knowledge of these rates, the actuarial basis for them, as well as the
27 actuarial limitations associated with determining them. The SDCERS Board vote adopting these
28 rates was unanimous.

1 24. SDCERS and the CITY recognized at the time these PSC purchase rates were
2 adopted that they were imprecise because of the variables described above and because the use of
3 an "average" pricing structure for all General Members at 15% and for all Safety Members at
4 26% (regardless of the age or service of the member at the time of purchase) meant that younger
5 members necessarily paid more and older members necessarily paid less for service credits than
6 would have been the case if individualized rates rather than "average" rates were used. In other
7 words, it was understood that the potential for an actuarial loss to occur was greater when more
8 older members purchased service credits at the "average" rates than younger members because
9 SDCERS had fewer years in which to invest and earn interest on the purchase funds before
10 retirement benefits became due and payable.

11 25. Once the PSC program expansion became effective in 1997, and the purchase
12 rates had been set by the SDCERS Board, SDCERS invited SDCERS plan participants to enter
13 into PSC contracts for the purchase of service credits up to the allowed maximum of five (5)
14 years. Plan participants did not "bargain" over the price SDCERS demanded for these purchases;
15 SDCERS calculated and set the price and offered each contract on the basis of the price
16 demanded. If a plan participant executed the PSC contract at the price SDCERS set, the plan
17 participant paid that price (1) by a transfer of monies to SDCERS from other retirement savings
18 accounts [a 401(k), qualified IRA, Deferred Compensation (457) plan or CITY's Supplemental
19 Pension Savings Plan which replaced participation in Social Security]; (2) by a direct lump sum
20 cash payment to SDCERS, or (3) by biweekly payroll deduction on a pre-tax or post-tax basis
21 with interest charges added to each installment until paid.

22 26. After signing a PSC contract with SDCERS, each employee/plan participant was
23 required to pay the contract in full prior to retirement, termination from CITY service, or entering
24 into CITY's Deferred Retirement Option Plan ("DROP"). After an employee has made his or her
25 significant financial investment in purchasing service credits for the stated price, nothing in the
26 PSC Contract itself or in SDMC section 24.1312, states that SDCERS reserves the right to
27 increase the price and force the employee to "re-purchase" the same service credits at a higher
28 cost if subsequent events increased the *value* of the service credits purchased. Thus, in this

1 transaction between an employee and his/her pension plan fiduciary, there was every reason to be
2 confident in the correctness and in the finality of the contract once signed and performed.

3 Any Unfunded Liability Associated With PSC Contracts Was Amortized
4 And Paid for By CITY With CITY's Knowledge

5 27. Between 1997, when SDCERS first adopted the 15/26% rates for CITY's
6 permissive 5-year PSC program, and August 15, 2003, when the SDCERS Board adopted
7 increased rates on the advice of its actuary (see ¶ 35 below), CITY had actual and constructive
8 knowledge that the 15/26% rates were resulting in a net actuarial deficiency notwithstanding the
9 requirement of CITY's enabling ordinance that the PSC purchase cost be the "equivalent of the
10 employee and employer cost of that service credit."

11 28. This net actuarial deficiency arose in part because of the imprecise nature of the
12 "cost" determination, the use of an "average" for all members, and because service credits were
13 priced and purchased an indeterminate number of years before the employee retired. However, a
14 net actuarial deficiency also arose between 1997 and 2003 for reasons exclusively within CITY's
15 control as the plan sponsor and beyond the control of the SDCERS Board as the plan trustee and
16 administrator.

17 29. CITY knew when the permissive PSC rates were set in 1997 that these rates were
18 set and paid based on existing pension benefits and formulas as well as actuarial assumptions.
19 Between a plan participant's purchase date and his/her retirement date, many new events can
20 affect the *value* – and *eventual cost* – of the purchased years of service, not the least of which is
21 CITY's exclusive authority to grant benefit increases which retroactively enhance the value of
22 previously purchased years of service. CITY increased the single most important factor in
23 calculating employees' pension allowances – the age-based retirement factor or multiplier – three
24 different times after SDCERS set the permissive PSC purchase rates using the existing benefit
25 structure in 1997. Salary increases were another factor which increased the *value* – and
26 *eventual cost* – of the purchased years of service and these increases were also within CITY's not
27 SDCERS' control.

28 ///

1 30. Each of the retroactive benefit increases which CITY enacted by ordinance had
2 the effect of making a year of service purchased and paid for in 1997 more *valuable* to the
3 employee and more *expensive* to the system than the price previously charged or agreed upon in
4 the employee's PSC contract. CITY could have but did not exclude years purchased under the
5 permissive PSC program using the 1997 rates from the retroactive benefit increases it enacted.
6 As a result, CITY's own legislative actions, not SDCERS' plan administration, created a net
7 actuarial deficiency which was added to the system's unfunded actuarial accrued liability and, in
8 turn, increased CITY's Actuarial Required Contribution to SDCERS each year.

9 31. SDCERS' annual actuarial valuations expressly tracked the amount of system
10 "losses" or funding deficiencies associated with the purchase of permissive service credits under
11 CITY's PSC program. These losses were factored into all gains and losses for the system
12 annually with net actuarial losses amortized and added to the CITY's Annual Required
13 contribution to SDCERS in accordance with SDMC section 24.0801 ["All deficiencies that occur
14 due to the adoption of any retirement ordinances must be amortized over a period of 30 years or
15 less."]

16 32. SDCERS annual actuarial valuation for the plan year ending on June 30, 2001,
17 was published in early February 2002. SDCERS' actuary included this cautionary note: "We are
18 recommending that we receive service credit data for service purchases. Currently, valued
19 liabilities for active members are understated to the extent that they have purchased service."

20 33. The SDCERS Board directed its actuary to evaluate whether the PSC program
21 rates originally set in 1997 reflected the current "employee and employer cost" of the benefit
22 based on actual experience gained over the first five years of the program, especially in view of
23 CITY's three retroactive pension benefit increases during that time.

24 34. SDCERS' annual actuarial valuation for the plan year ending June 30, 2002, was
25 presented at the SDCERS Board meeting in January 2003. SDCERS' actuary noted in this
26 valuation that \$77.7 million in unfunded liabilities had been added to the system since the
27 inception of the permissive 5-year PSC program for all purchasers who were *still* active members
28 of SDCERS as of June 30, 2002 – i.e., retirees and deferred vested former CITY employees were

1 not included in this amount and thus CITY's gross total liability for this PSC program due to net
2 actuarial deficiencies was even greater.

3 35. By e-mail on January 27, 2003, directed to SDCERS' Assistant Retirement
4 Administrator, Deputy CITY Auditor Terri Webster (who also served as an SDCERS *ex officio*
5 Trustee by delegation of CITY Auditor and Comptroller) wrote, in pertinent part: "Why is the
6 Board administering the PSC program at a loss for the (Trust) Fund?"

7 36. In a subsequent e-mail to a fellow SDCERS Board Member before the Board's
8 meeting on August 15, 2003, Deputy CITY Auditor/Trustee Webster specifically cautioned that
9 the Board may have violated CITY's ordinance establishing the 5-year permissive PSC program
10 (codified in SDMC section 24.1312) by not increasing the PSC program rates previously in 2002
11 because CITY's ordinance required the Board to administer this benefit in a cost neutral manner
12 and, instead, the Board had been administering the benefit at a loss to the trust fund which meant
13 the unfunded actuarial accrued liability of the system increased as did CITY's required
14 contributions to the system as well.

15 The SDCERS Board Increased The PSC Purchase Rates
16 On August 15, 2003

17 37. In an open meeting of the SDCERS Board on August 15, 2003, the Board
18 considered the results of its actuary's findings related to the permissive PSC rates and voted to
19 adopt his recommendation that the PSC purchase rates be increased from 15% to 27% for
20 General Members and from 26% to 37% for Safety Members.

21 38. When adopting the new PSC rates on August 15, 2003, the SDCERS Board also
22 voted to delay their effective date until November 1, 2003, in order to give fair notice to plan
23 participants of the impending increases and allow employees to submit a PSC Request Form
24 before November 1, 2003, and thereby lock-in the lower rates. CITY's three representatives on
25 the SDCERS Board, including Deputy City Auditor/Trustee Webster (who had authored the e-
26 mails described above in paragraphs 35-36), voted to approve the establishment of this "window
27 period," as did all but one of the private citizen, Mayoral-appointed Trustees. In addition to
28 multiple attorneys for SDCERS who were in attendance for the discussion leading to this vote,

1 other CITY representatives, including CITY's Labor Relations Manager and a Deputy City
2 Attorney, were also present and expressed no objection or concern over this "window period."

3 39. Accordingly, by and through its executive officers, CITY knew on August 15,
4 2003, based on the report and recommendation of SDCERS' actuary, that the PSC purchase rates
5 being charged during the "window period" would likely be less than the "equivalent of the
6 employee and employer cost of that service credit" within the meaning of SDMC section 24.1312

7
8 Both SDCERS And CITY Encouraged Employees
9 To Submit PSC Request Forms Within The "Window Period"

10 40. Following the SDCERS Board's vote on August 15, 2003, SDCERS sent a
11 "Notice to All Active City of San Diego Employees" informing them of the pending increase in
12 the rates applicable to the 5-year PSC program. SDCERS' Notice warned that a signed PSC
13 purchase application must be received by SDCERS prior to November 1, 2003, for the 15/26%
14 lower rates to apply while applications received after that date would be priced at the higher 27%
15 rate for General Members and 37% for Safety Members. CITY employees were invited to
16 download an application from SDCERS' website or to call SDCERS' office to request one.
17 SDCERS included the same message and information in its *Free Spirit* quarterly magazine
18 mailed to the homes of all active and retired CITY employee/plan participants in the fall of 2003.

19 41. Following the SDCERS Board's vote on August 15, 2003, CITY management
20 personnel also brought this same information to employees' attention – encouraging and
21 reminding them in workplace meetings, line-ups and at tailgates to submit a PSC purchase
22 application before the impending deadline on November 1, 2003. CITY's payroll clerks, among
23 others, sent blast e-mail messages to CITY employees in their service areas informing them of
24 the SDCERS Board's decision to increase rates for CITY's 5-year PSC program and alerting
25 them to the "window period" deadline for submitting an application to lock-in a PSC purchase at
26 the old rates.

27 42. Following the SDCERS Board's vote on August 15, 2003, CITY's labor
28 organizations, representing thousands of CITY employees, similarly disseminated the same
information and message as SDCERS and CITY were both publishing.

1 43. In addition to the transparency of the SDCERS Board's decision in an open
2 meeting in the presence of multiple attorneys advising them and CITY, and the widespread
3 publicity regarding the "window period" by SDCERS, CITY and CITY's labor organizations, the
4 "PSC request form" itself offered employees further reassurance that all was in order: "The San
5 Diego Municipal Code and Retirement Board Rules govern the PSC benefit; therefore, SDCERS
6 must adhere to all regulations and rules pertaining to each PSC."

7 CITY Knew That The "Window Period" Would Add To
8 SDCERS' Unfunded Liability And Increase CITY's
9 Annual Required Contribution To SDCERS

10 44. As settlor of the SDCERS trust, with the sole and exclusive power to establish
11 benefits by ordinance, CITY had the right to challenge the SDCERS Board's decision to allow
12 PSC purchase requests to be made during the "window period" at the old rates once the Board
13 had learned from its actuary that these rates no longer covered the "employee and employer cost
14 of that service" as required by CITY's ordinance. However, CITY did *not* do so; instead, CITY's
15 three Trustees (who also served among its highest-ranking executive officers) voted to approve
16 the "window period."

17 45. At least as early as January 2004, the Mayor and City Council, the City Attorney
18 and other "CITY leaders" became aware of the likely violation of the San Diego Municipal Code
19 related to the pricing of 4,000 purchase of service credit contracts being allowed during the 2003
20 "window period," and took no timely action to oppose or close the "window" before employees
21 relied to their detriment upon the service credits being purchased.

22 46. On or about January 27, 2004, the Mayor and City Council conducted a closed
23 session conference with counsel related to the pending *Gleason* Class Action litigation. In
24 anticipation of this closed session, outside counsel Timothy Pestotnik of Luce, Forward,
25 Hamilton & Scripps addressed a confidential Memorandum (later publicly released by CITY) to
26 **the Mayor and City Council**, which was routed **through the City Attorney's Office**, and
27 which stated, in pertinent part:

28 "The Purchase of Service Credit Cost Issue and Resulting Losses. ¶ City leaders
have taken note of the fact that SDCERS has apparently failed to collect the full
cost from employees who elect to participate in the "purchase of service credits"

1 benefit. . . the City believes the Municipal Code requires the SDCERS Board to
2 set the purchase price so that the purchase of service credit would be cost neutral
3 to the retirement system. SDCERS has allowed city employees to contribute at a
4 considerable discount, which results in a significant actuarial loss. Even after
5 recognizing the problem, SDCERS allowed city employees to continue purchasing
6 service credits at a discount, which generated further losses. SDCERS has
7 approved new rates for this program, but they did not take effect until November
8 14, 2003. Apparently, SDCERS will "grandfather" at the discounted rates those
9 who applied for purchase of service credits prior to this date. This includes more
10 than 4,000 new purchase of service requests. (¶) The total actuarial loss which
11 can be attributed to SDCERS' failure to collect the full cost for the purchase of
12 service credits could be as much as approximately \$180 million if initial estimates
13 from the City are correct, and assuming the 4,000 new applicants are in fact
14 grandfathered. . . We are now working on how to use the issue of the purchase of
15 service credits to the City's advantage if the case does not settle. We will discuss
16 this during the closed session."

17 47. Despite its actual or constructive knowledge at least by late **January 2004** that as
18 many as 4,000 new applicants for PSC contracts would be "grandfathered" during the "window
19 period" and charged PSC purchase rates which were not "cost neutral" for each purchasing plan
20 participant, CITY's authorized legislative body *ratified* this result and treated the matter as
21 closed with the entry of judgment by the San Diego County Superior Court in the *Gleason Class*
22 Action on July 27, 2004.

23 48. As of January 2004, many employees/plan participants who had submitted a
24 timely *application* to purchase service credits before the "window period" closed on November
25 1, 2003, had not yet signed or performed these contracts by the payment of the amount SDCERS
26 demanded. In fact, most did not do so until months later in 2004 when SDCERS had completed
27 the necessary calculations and paperwork.

28 49. Accordingly, had the Mayor and City Council exercised their legislative authority
to take action in January 2004 to object to SDCERS' allowance of a "window period" as an
unlawful violation of SDMC section 24.1312, this "window period" would have been withdrawn
or closed and these "window period" PSCs would never have been finalized.

50. Instead, with actual knowledge of a likely violation of the San Diego Municipal
Code and actual knowledge that a substantial actuarial loss was being added to the system's
unfunded actuarial accrued liability, the Mayor, City Council, City Attorney and "other CITY
leaders" used the PSC underfunding situation to CITY's advantage in settling the *Gleason Class*

1 Action case against it, and otherwise ratified and condoned the “window period” while knowing
2 that net actuarial deficiencies would be associated with it – just as had occurred when CITY
3 amended the pension plan and allowed increases in the retirement factor or multiplier to be
4 applied *retroactively* to all prior years of actual or *purchased* service under SDCERS.

5 51. Accordingly, with CITY’s express approval on August 15, 2003, and subsequent
6 ratification in January 2004, SDCERS continued to process and calculate PSC applications
7 received during the “window period,” and CITY employees, including Plaintiffs, continued to
8 sign these PSC contracts and to pay the contract price SDCERS demanded by one of the payment
9 options allowed under San Diego Municipal Code section 24.1310 (see ¶ 25 above).

10 52. Likewise, CITY continued to sign its approval of employees’ irrevocable contracts
11 to enter CITY’s Deferred Retirement Option Plan (DROP) with their eligibility and the amount
12 of their benefit dependent upon “window period” purchased service credits.

13 53. SDCERS’ annual actuarial valuation for the plan year ending June 30, 2004,
14 included an additional actuarial loss of \$27.1 million related to CITY’s permissive PSC program.
15 Thus, by publication of SDCERS’ annual actuarial valuations through June 30, 2004, CITY had
16 actual or constructive knowledge that the *cumulative* actuarial losses associated with the
17 permissive PSC program since inception (included the losses generated by CITY’s retroactive
18 benefit increases) had grown to a total of \$96.2 million. This amount included a spike for the
19 fiscal year ending June 30, 2004, due to the effects of the “window period” purchases. These
20 losses resulted in an increase in SDCERS’ total unfunded actuarial accrued liability and a
21 corresponding increase in CITY’s annual amortized contribution to SDCERS on July 1, 2005.

22 CITY’s First PSC Lawsuit

23 54. Pursuant to City Charter, Article IX, section 144, the SDCERS Board “shall be
24 the sole authority and judge under such general ordinances as may be adopted by the Council as
25 to the conditions under which persons may be admitted to benefits of any sort under the
26 retirement system . . . Provided, however, that the [CITY] Auditor and Comptroller shall refuse
27 to allow any warrant drawn for payment of a retirement allowance if, in the opinion of the

28 ///

1 Auditor and Comptroller, such retirement allowance has been granted in contravention of this
2 Article or any ordinances passed under the authority granted herein.”

3 55. On or about June 17, 2005, City Attorney Michael J. Aguirre issued a
4 Memorandum to the CITY Auditor and Comptroller, with a copy to SDCERS’ Board of
5 Trustees, its Retirement Administrator and its General Counsel – as well as the Mayor and City
6 Council – directing the Auditor and Comptroller to instruct SDCERS not to pay certain
7 retirement benefits which Mr. Aguirre asserted were “illegal,” including but not limited to “any
8 retirement benefit based on a Purchase of Service Credit that was purchased by a member at a
9 rate that was not actuarially neutral.”

10 56. SDCERS’ annual actuarial valuation for the plan year ending on June 30, 2005,
11 which was prepared by SDCERS’ new actuary, Cheiron, disclosed an additional experience loss
12 of \$7.57 million related to CITY’s permissive PSC program. This loss factored into SDCERS’
13 calculation of the system’s Unfunded Actuarial Accrued Liability (where it was offset by
14 *substantial* investment and liability experience gains) which determined the amortized portion of
15 CITY’s Actuarial Required Contribution to SDCERS payable on July 1, 2006.

16 57. In response to this demand, on July 26, 2005, SDCERS filed a declaratory relief
17 action (*SDCERS v. City of San Diego*, GIC 851286; consolidated with *SDCERS v. Aguirre, et al.*,
18 GIC 841845), stating in paragraph 24: “Pursuant to its duties under the California Constitution
19 and the Charter, the Board has a fiduciary duty to seek a judicial determination of the legality of
20 payment of retirement benefits to its members upon reasonable notice that the legality of such
21 benefits is disputed. Therefore, the Board has filed this declaratory relief action for the express
22 purpose of discharging its fiduciary duty to all of its members and their beneficiaries to determine
23 the legality of the Contested Benefits.”

24 58. SDCERS’ Declaratory Relief Action included a single Cause of Action seeking a
25 declaration from the Court: “That SDCERS may properly and legally pay all City Retirement
26 Benefits, including, but not limited to, the Contested Benefits,” which SDCERS specifically
27 itemized per Mr. Aguirre’s Memorandum dated June 17, 2005, to include “(f) Any retirement

28 ///

1 benefit based on a Purchase of Service Credit that was purchased by a member at a rate that was
2 not actuarially neutral.”

3 59. In the same consolidated action, CITY placed the “legality” of these Contested
4 Benefits in issue by a series of cross-complaints initiated on July 8, 2005, and amended thereafter
5 on August 3, 2005 (2ACC), September 30, 2005 (3ACC), February 8, 2006 (4ACC), followed by
6 a Fifth Amended Cross Complaint (“5ACC”) filed on May 3, 2006.

7 60. While this consolidated legal action was pending, SDCERS’ annual actuarial
8 valuation for the plan year ending on June 30, 2006, disclosed an additional experience loss of
9 \$1.2 million related to CITY’s permissive PSC program. This loss factored into the calculation
10 of the system’s Unfunded Actuarial Accrued Liability (where it was offset by *substantial*
11 investment and liability experience gains) which determined the amortized portion of CITY’s
12 Actuarial Required Contribution to SDCERS payable on July 1, 2007.

13 61. On September 18, 2006, City Attorney Michael J. Aguirre issued an “interim
14 report” declaring that the SDCERS Board had violated its fiduciary duties and the San Diego
15 Municipal Code by setting rates for CITY’s PSC program which were allegedly not “cost
16 neutral.”

17 62. CITY opposed SDCERS’ Motion for Summary Judgment on its single Cause of
18 Action for Declaratory Relief seeking to establish “that SDCERS may properly and legally pay
19 all City Retirement Benefits, including, but not limited to, the Contested Benefits.”

20 63. On October 16, 2006, the Hon. Jeffrey B. Barton filed his Final Ruling granting
21 SDCERS’ Motion thereby providing a judicial determination that SDCERS “may properly and
22 legally pay all of the Contested Benefits.” As both CITY and SDCERS had defined them,
23 “Contested Benefits” included PSCs which a member had purchased at a rate which allegedly
24 was not actuarially cost neutral.

25 64. Following this ruling, CITY and SDCERS filed a Stipulation with the Court
26 whereby SDCERS agreed that it would be bound by any and all orders of the court related to the
27 legality and enforceability of the pension benefits being challenged in CITY’s Fifth Amended
28 Cross Complaint and to take no role in litigating their legality. However, SDCERS’ trial counsel

1 continued to attend all proceedings related to the trial of CITY's cross claims challenging the
2 legality of the Contested Benefits.

3 65. During the first phase of trial on CITY's Fifth Amended Cross Complaint, the
4 City Attorney presented the testimony of CITY's retained expert actuary Joseph Esuchanko. He
5 testified under oath on November 13, 2006, that CITY employee/plan participants were not at
6 fault for the underpricing of service credits they had purchased and that the estimated actuarial
7 loss or unfunded actuarial accrued liability associated with the 5-year PSC program since its
8 inception in 1997 through the plan year ending June 30, 2005, was approximately **\$110.8**
9 **million**. This amount included the losses generated by CITY's retroactive pension benefit
10 increases in 1997, 2000, and in 2002.

11 66. On December 12, 2006, during the pendency of the trial on CITY's challenge to
12 the legality of the Contested Benefits, a Judgment Approving Settlement of Class Action was
13 entered in *McGuigan v. City of San Diego*, SDSC Case No. GIC 849883. This Judgment was
14 binding on "all past, present and future San Diego City Employees' Retirement System members
15 and beneficiaries." Although this action challenged CITY's failure to fully fund its pension
16 obligations in accordance with law, CITY filed no compulsory cross-complaint against plan
17 participants who had allegedly failed to pay a "cost neutral" price for their purchased service
18 credits thereby causing or contributing to an increased unfunded liability in the pension plan and
19 thus a corresponding detrimental increase in CITY's contribution obligation.

20 67. After the Honorable Jeffrey B. Barton issued a Phase One Statement of Decision
21 in January 2007, rejecting nearly all aspects of CITY's claims related to the legality of the
22 Contested Benefits, CITY filed a Sixth Amended Cross-Complaint ("6ACC") on May 10, 2007.

23 68. On August 3, 2007, Judge Barton sustained a demurrer to CITY's 6ACC without
24 leave to amend, and, thereafter entered a Judgment of Dismissal on CITY's 6ACC on September
25 17, 2007, with CITY taking nothing on its claims. With this entry of Judgment, CITY's
26 challenge to the legality of the Contested Benefits – including service credits purchased at a rate
27 which was allegedly not actuarially neutral – ended. [This judgment became final for *res judicata*
28 purposes when CITY dismissed its appeal on June 20, 2011.]

After Entry of Both Judgments, SDCERS Conducted
Two Board Meetings Related To PSCs

69. SDCERS' annual actuarial valuation for the plan year ending on June 30, 2007, disclosed an additional experience loss of \$1.5 million related to CITY's permissive PSC program. This loss factored into the calculation of the system's Unfunded Actuarial Accrued Liability (where it was offset by *substantial* investment and liability experience gains and losses) which determined the amortized portion of CITY's Actuarial Required Contribution to SDCERS payable on July 1, 2008.

70. Meanwhile, at the SDCERS' Board's request, SDCERS' actuary updated previous analyses of the experience of the PSC program *since inception* in 1997.

71. By letter dated August 14, 2007, SDCERS' actuary estimated that, as of June 30, 2006, there was a net actuarial deficiency between the additional value of benefits due to the additional service credits and the accumulated amounts paid by all plan participants who had purchased under CITY's 5-year PSC program, totaling \$146 million. The actuary noted that this analysis was based on June 30, 2006 actual data and "reflects accumulative experience gains and losses (people living longer, retiring different than assumed, salary increases, etc.) that *could not be anticipated* at the time any member actually purchased service." This analysis was consistent with the testimony given by CITY's expert actuary during CITY's presentation of evidence related to the alleged illegality of the Contested Benefits in November 2006 (see ¶ 65 above), and this amount likewise included the losses generated by CITY's retroactive pension benefit increases in 1997, 2000, and in 2002.

72. Of this \$146 million estimated total net actuarial deficiency, SDCERS' actuary estimated that approximately \$34 million was associated with all "window period" PSCs, of which \$13 million was attributed to retirees, their beneficiaries, and former CITY employees with a deferred vested benefit, and the remaining \$21 million to active CITY employees.

73. In his letter dated August 14, 2007, SDCERS' actuary also confirmed that the annual funding shortfalls or net actuarial deficiencies associated with the PSC program *since*

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1 inception had been included in the system's unfunded actuarial accrued liability each year and
2 recovered through CITY's Annual Required Contribution.

3 74. On September 21, 2007, SDCERS issued a news release with the headline: "San
4 Diego City Employees' Retirement System Board Evaluates Past Pricing Practices for Purchase
5 of Service Credit Program." In pertinent part, the news release stated that SDCERS' actuary had
6 determined that the full projected cost was not reflected in the service credit pricing structure in
7 place prior to November 2003, with the result that a \$146 million shortfall had occurred since the
8 program's inception, and that its actuary's conclusion was consistent with previous analyses
9 published in Mercer's 2004 actuarial audit and in Navigant Consulting's Report in January 2006.

10 75. SDCERS' news release also announced that "in accordance with our fiduciary
11 obligation to the System and its members," the Board would conduct two days of public meetings
12 to hear the views of interested parties on the past pricing of purchased service credits before the
13 Board decided "if any additional action (was) necessary."

14 76. SDCERS conducted the first of two special Board Meetings on October 19, 2007.
15 Four of the twelve Board Members in office at the time recused themselves because, as elected
16 employee representatives and plan participants, they had made service credit purchases
17 themselves.

18 77. In a written background statement explaining the purpose of the special meeting,
19 SDCERS stated that "the Board is considering carefully its options regarding the prior pricing of
20 PSC contracts" and that "with respect to some or all past PSC contracts, these options include:
21 (1) continuing to amortize the associated liability as part of the system's Unfunded Actuarial
22 Liability; (2) renegotiating or adjusting contracts either to provide for additional member
23 payments or reduced amounts of service credit and recovering past overpayments of benefits; or
24 (3) initiating declaratory relief litigation to establish the respective rights and obligations of the
25 City, SDCERS and the members. The Board's statement also noted that, in considering its
26 options, the Board would also take into consideration the bases on which the prior board made its
27 pricing determinations, the length of time that had passed since these contracts were signed, and
28 the members' good faith reliance on the prices they were asked to pay for their purchases.

1 78. On October 19, 2007, before hearing from speakers and “stakeholders,” the
2 SDCERS Board received formal presentations from its fiduciary counsel and its actuary.

3 79. The Board’s fiduciary counsel stated that, in connection with the PSC pricing
4 matter before it, the Board’s duty to minimize employer contributions to the plan was
5 *subordinate* to its fiduciary duty to plan members and their beneficiaries and that this subordinate
6 duty must be discharged in a manner consistent with the Board’s fiduciary duties to these
7 members and beneficiaries.

8 80. SDCERS’ actuary cautioned the Board “to keep in mind” that “when the (PSC)
9 contracts first went into place . . . that’s the time the particular member had a salary and a . . .
10 projected benefit and after that point in time no board would have had the knowledge as to what
11 the actual salary increases would have been, when the person might have retired, when the person
12 may have died, terminated employment prematurely and what the investment returns actually
13 were.” The actuary also emphasized that he had *not* done an analysis of each individual PSC
14 contract to compare what was paid (based on the rates charged and the assumptions in effect at
15 the time) and what the actual experience for each plan participant/purchaser had been since the
16 contract was signed; nor did he determine the actual investment return which SDCERS had
17 earned on the employee’s purchase funds.

18 81. Multiple speakers addressed the SDCERS Board. In an oral presentation
19 supported by an accompanying 18-page hand-out, counsel for CITY’s largest labor union
20 representing 4,000 CITY employees (also undersigned counsel on this Complaint) urged the
21 Board to take *no further action* “because SDCERS had already won – and the City had already
22 lost – the legal battle” related to past pricing of purchased service credits. In support of this
23 “take-no-further-action” plea, both the oral and written presentation detailed the history of the
24 “first PSC lawsuit” described above at paragraphs 54 through 68, as well as the legal effect of
25 earlier class action judgments entered in the *Gleason* and *McGuigan* cases – meaning CITY had
26 no timely, viable remaining claim to challenge plan participants’ PSC contracts based on any
27 alleged past “underfunding” of these service credits.

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1 82. In short, this presentation underscored for the Board (1) that SDCERS had
2 *already* filed a declaratory relief action in 2005 response to the City Attorney's earlier demand
3 that SDCERS and the City Auditor stop paying "Contested Benefits," which included benefits
4 based on purchased service credits which were allegedly not actuarially cost neutral; (2) that
5 SDCERS had done so to "discharge its fiduciary duty to all of its members and their beneficiaries
6 to determine the legality of the Contested Benefits;" (3) that SDCERS had prevailed in this prior
7 declaratory relief action over CITY's opposition; (4) that a judgment had already been entered
8 *against CITY* dismissing its claims challenging the legality of the Contested Benefits; and (5) that
9 any action taken by SDCERS which was contrary to these prior litigation results would be a
10 breach of its fiduciary duty to its members and their beneficiaries because the Judgment entered
11 against CITY on September 17, 2007, unless reversed on appeal, barred CITY from taking legal
12 action to challenge the Contested Benefits on the grounds alleged in CITY's various cross
13 complaints from July 8, 2005, through May 10, 2007, as well as on any other grounds which
14 could have been alleged but were not.

15 83. Finally, this presentation also emphasized that affected plan participants and their
16 beneficiaries had not negotiated the rates SDCERS set for their PSC contracts with CITY's
17 knowledge and consent. They had understandably relied on SDCERS' expertise and knowledge
18 as plan administrator and on the propriety and finality of these PSC contracts when doing their
19 career, retirement and financial planning.

20 84 After a second public meeting on November 16, 2007, the SDCERS Board held a
21 closed session before reporting out in public that, by a unanimous 8 to 0 vote, the non-recused
22 Board Members had voted "to allow the existing purchased service contracts to remain as
23 formulated and to continue to amortize the shortfall through the existing unfunded actuarial
24 liability."

25 85. At the time the SDCERS Board took this action on November 16, 2007, each
26 SDCERS' actuary had been calculating and reporting the net actuarial deficiencies associated
27 with CITY's 5-year PSC program on an annual basis since the program's inception in 1997. The
28 amount of each year's deficiency had been reported as an experience or liability loss in

1 SDCERS' published annual actuarial valuations. CITY had actual or constructive notice of the
2 contents of each annual SDCERS' actuarial valuation which set the amount CITY paid to
3 SDCERS as an annual contribution in 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006,
4 and again on July 1, 2007.

5 86. The SDCERS Board's vote had the effect (if not the purpose) of permitting CITY
6 to file a *new* lawsuit directed at this *new* action while effectively ignoring the course of
7 SDCERS' and CITY's own conduct since the inception of CITY's 5-year PSC program.

8 CITY's Second PSC Lawsuit
9 Responding To SDCERS Board's New "Action"

10 87. Four days later, on November 20, 2007, City Attorney Michael J. Aguirre filed a
11 petition for writ of mandate challenging the SDCERS Board's decision to *continue* to charge the
12 CITY any unfunded actuarial liability associated with the PSC program when the enabling
13 ordinance, codified in SDMC section 24.1312, required the Board to charge an amount for
14 purchased service credits equivalent to the "employer and employee cost of such service."

15 88. A review of the filings in CITY's second PSC lawsuit reveals that SDCERS
16 demurred to CITY's writ petition on the ground that CITY was the real party in interest and had
17 not authorized the action through its City Council as required by CITY's Charter. By tentative
18 ruling, the court sustained the demurrer with leave to amend; after oral argument on February 22,
19 2008, the hearing on SDCERS' demurrer was continued to permit supplemental briefing, and
20 thereafter continued on two additional occasions at the request of the City Attorney to permit him
21 to discuss the matter with the City Council.

22 89. With the demurrer hearing re-scheduled for May 2, 2008, CITY and SDCERS
23 filed a "Joint Stipulation to Grant Petitioner Leave to File First Amended Writ," on April 24,
24 2008. Petitioner CITY OF SAN DIEGO entered into the Stipulation "by and through its
25 attorneys Don McGrath, II and Walter C. Chung," stating in pertinent part:

26 "The City Attorney met with the City Council in closed session on April 15, 2008,
27 to discuss this instant matter. During that closed session, the City Council
28 authorized the City Attorney to maintain this action. Following the action of the
City Council, the City discussed with counsel for SDCERS whether or not they
would be amenable to taking their Demurrer off calendar and allowing the City to

1 file a first amended writ. Counsel for SDCERS so agrees. Counsel for SDCERS
2 has the authority to act on behalf of SDCERS. Accordingly, the parties request
3 that this Court grant the City leave to file an amended writ on or before April 30,
4 2008.”

5 90. However, the public record discloses that, on April 21, 2008, Assistant City
6 Attorney Donald McGrath reported during an open session of City Council that the results of a
7 Closed Session Item on April 15, 2008, were “now reportable.” On a motion to authorize the
8 filing of the writ action, City Council had voted *four-to-one* (4-to-1). McGrath added: “whether
9 the 4-to-1 vote is binding on CITY is a legal question that may need to be resolved by a court.”

10 91. City Charter, Article XV, section 270, subd. (c) requires the affirmative vote of
11 five (5) members of the Council for any action to be passed or become effective. Thus, the City
12 Attorney’s attempt to cure the fatal defect in CITY’s initial writ petition – which was addressed
13 in SDCERS’ demurrer and in the court’s tentative ruling sustaining the demurrer – failed when
14 the requisite five affirmative votes were not cast. However, the City Attorney’s Office never
15 informed the court that this four-to-one vote had occurred; instead the Joint Stipulation filed on
16 April 24, 2008, contained only the bare assertion that the “City Council authorized the City
17 Attorney to maintain this action.” Thereafter, the City Attorney’s Office affirmatively stated and
18 re-stated throughout its briefing to the court on this writ that “CITY had authorized this writ.”

19 92. When this second PSC lawsuit was filed by the City Attorney in CITY’s name on
20 November 20, 2007, he also filed a Notice of Related Case acknowledging that the above-
21 referenced case, *San Diego City Employees’ Retirement System v. City of San Diego*,
22 Consolidated under GIC 841845, was pending before the Hon. Jeffrey B. Barton in Department
23 69 and “involves the same parties and is based on the same or similar claims.”

24 93. SDCERS failed to raise either a plea in abatement pursuant to Code of Civil
25 Procedure section 430.10, subdivision (c), or the rule of exclusive concurrent jurisdiction in
26 response to CITY’s writ petition despite the fact that the same allegedly underfunded PSC
27 contracts at issue in this writ petition were already included in the “Contested Benefits” covered
28 by Judge Barton’s Final Order Granting Summary Judgment in SDCERS’ favor on October 16,
2006, and by his entry of Judgment Dismissing CITY’s Cross-Complaint on September 17, 2007.

1 94. Had SDCERS raised either of these defenses, an order of abatement or an order
2 enforcing the judicial rule of exclusive concurrent jurisdiction would have been mandatory and
3 CITY's writ petition would have been stayed until the *first* PSC lawsuit had been finally
4 resolved. (*People ex rel. Garamendi v. Amer. Autoplan, Inc.* (1993) 20 CA4th 760, 770-771.)
5 [This judgment became final for *res judicata* purposes when CITY dismissed its appeal on June
6 20, 2011.]

7 95. Since both judgments in the first PSC lawsuit were favorable to SDCERS' plan
8 participants and their beneficiaries, SDCERS' failure to raise either defense in response to
9 CITY's second PSC lawsuit was adverse to those plan participants who had purchased service
10 credits under CITY's 5-year PSC program because SDCERS put these plan participants and their
11 beneficiaries at risk that a new ruling would be adverse to their interests.

12 96. Although SDCERS raised a statute of limitations defense to CITY's writ petition,
13 it was rejected because CITY represented to the Court in writing and at oral argument (apparently
14 without contradiction) that the SDCERS Board vote on November 16, 2007, was *the first time*
15 *CITY knew that it was going to be charged* for the underfunding of service credits purchased by
16 CITY employees under CITY's 5-year PSC program. The court held that CITY's writ was
17 challenging SDCERS' *new action* on November 16, 2007, *rather than the SDCERS Board's*
18 *earlier decision on August 15, 2003, to allow a "window period."*

19 97. Whether the court's conclusion related to SDCERS' statute of limitations defense
20 in CITY's second PSC lawsuit was correct or erroneous, it would never have been reached – to
21 the detriment of SDCERS' plan participants – if the SDCERS Board had heeded the warning
22 given orally and in writing on October 19, 2007, to discharge its fiduciary duty by "taking no
23 further action" related to its past PSC pricing. Instead, the SDCERS Board's action had the
24 effect of restarting the statute of limitations on CITY's time-barred claims related to service
25 credit contracts arising from the "window period." (*Marin Healthcare District v. Sutter Health*
26 (2002) 103 CA4th 861, 879 [statutes of limitation apply even to void contracts].)

27 98. SDCERS also argued unsuccessfully that CITY should be required to bring the
28 affected plan participants and their beneficiaries before the court as necessary/indispensable

1 parties. However, in making its “necessary parties” argument, SDCERS failed to inform the
2 court that the affected plan participants and their beneficiaries had arguments and defenses
3 separate and different from its own and, in fact, had legitimate interests adverse to both CITY
4 *and SDCERS* because plan participants had paid the PSC purchase rates set by SDCERS *with*
5 *CITY’s knowledge, consent and ratification* and had detrimentally relied on their finality.

6 99. Based on the materials presented at SDCERS’ two special Board meetings in
7 October and November 2007, SDCERS had apparently already decided that if it could not charge
8 CITY for the actuarial deficiency associated with PSC contracts, *it would recover the money*
9 *instead from the plan participants and their beneficiaries*. Yet SDCERS itself, as a fiduciary,
10 did not bring affected plan participants and their beneficiaries into the case so that they could be
11 heard *before* the court determined the respective rights and obligations of SDCERS and CITY in
12 a matter which would *not* directly affect SDCERS *but would directly affect them*.

13 100. In responding to CITY’s second PSC lawsuit, SDCERS failed to litigate an
14 unclean hands defense to bar CITY’s writ relief notwithstanding CITY’s course of conduct as
15 plan sponsor (1) in approving the PSC purchase “window period” when it was before the
16 SDCERS Board for determination, (2) in encouraging employees to make a timely submittal of a
17 purchase application prior to the close of the “window period,” and (3) in ratifying SDCERS’
18 decision to establish a “window period” when the Mayor, City Council, City Attorney and “other
19 CITY leaders” had *actual* knowledge **in January 2004** that the availability of this “window
20 period” was likely in violation of the San Diego Municipal Code and would add substantially to
21 SDCERS’ unfunded actuarial accrued liability and increase CITY’s annual contribution
22 obligations to SDCERS.

23 101. When CITY amended its second PSC lawsuit to *exclude* the allegedly
24 underfunded PSC contracts of plan participants who had *retired* as of November 20, 2007 (the
25 date the City Attorney filed the original writ petition in CITY’s name), SDCERS failed to clarify
26 with CITY or the court – *before* CITY’s writ was decided and judgment entered – that the
27 excluded group of pre-11/20/07 retirees should also include those SDCERS plan participants
28 who had entered CITY’s Deferred Retirement Option Plan (“DROP”) *before November 20,*

1 2007, because these plan participants, like their fellow “retirees,” had also detrimentally relied on
2 the final calculation of a pension allowance using their “window period” purchased service
3 credits and were trapped by the irrevocable DROP contracts they *and CITY* had already signed
4 *before* November 20, 2007.

5 102. SDCERS’ imprudent and negligent acts permitted CITY’s second PSC lawsuit to
6 be adjudicated on the merits in CITY’s favor. The trial court filed its Minute Order granting
7 CITY’s writ petition on November 13, 2008, and, thereafter entered judgment in CITY’s favor
8 on December 12, 2008, commanding that the SDCERS Board’s action on November 16, 2007 be
9 set aside. The trial court concluded that it was unlawful for the SDCERS Board to vote to charge
10 CITY for the shortfall resulting from the “window period” PSC contracts because SDMC section
11 24.1312 directs that the purchase of service credits shall be ‘cost-neutral’ to the CITY.

12 103. SDCERS filed a Notice of Appeal on March 3, 2009. Thereafter, by decision
13 filed on June 7, 2010, the Court of Appeal upheld the trial court’s judgment granting CITY’s writ
14 and setting aside the Board’s November 16, 2007 action. (*City of San Diego v. San Diego City*
15 *Employees’ Retirement System* (2010) 186 Cal.App.4th 69.) A remittitur issued on August 30,
16 2010.

17 From The Time It Was Filed Through Appeal,
18 SDCERS Failed To Disclose The Pendency Of CITY’s Second PSC Lawsuit
19 To Plan Participants Applying To Enter DROP Or Retire
20 In Reliance On Window Period PSC Contracts

21 104. After November 20, 2007, and during the entire pendency of CITY’s writ petition
22 through appeal, SDCERS continued to provide Member Counseling by in-office meetings,
23 telephone sessions, and group seminars and presentations in order to inform CITY employee/plan
24 participants about their pension benefit rights. SDCERS determined eligibility and prepared
25 written benefit estimates for CITY employee/plan participants applying for a service retirement
26 or to enter CITY’s DROP plan. SDCERS confirmed these eligibility and benefit determinations
27 prior to an employee’s final decision to have his or her application added to the SDCERS
28 Board’s official agenda for action. The agenda included the employee’s total years of *creditable*
service on which his/her benefit was calculated.

1 105. During the pendency of CITY's second PSC lawsuit, when making eligibility and
2 benefit determinations for plan participants seeking its counsel, SDCERS was required to
3 calculate all qualifying *creditable service*, including service actually worked and service credits
4 permissibly purchased under CITY's plan.

5 106. From November 20, 2007, through July 2010, when SDCERS gave CITY
6 employee/plan participants information regarding eligibility and benefits in its capacity as a
7 fiduciary, SDCERS knew that it was acting in a position of trust and that plan participants were
8 relying and would continue to rely on the accuracy of the information provided when making
9 life-altering decisions about their employment, retirement, and financial security.

10 107. When providing information and calculations to employee/plan participants after
11 November 20, 2007, SDCERS *never disclosed* to Plaintiffs that CITY had a pending legal
12 challenge to their "window period" PSC contracts such that, if they entered DROP or retired in
13 reliance on these service credits and these service credits were later invalidated, they would no
14 longer be eligible for *any* pension allowance or would face a reduction in their pension allowance
15 after making life-altering decisions in reliance on the availability and amount of this pension to
16 provide financial security during old age. Nor did SDCERS disclose the risk that, in such event,
17 Plaintiffs would also be obligated to repay SDCERS for any "overpaid" pension benefits with
18 interest at or near 8%.

19 108. SDCERS failed to make these material disclosures to plan participants *after*
20 CITY's writ petition was filed on November 20, 2007.

21 109. SDCERS failed to make these disclosures to plan participants *after* the trial court
22 had filed its Minute Order granting CITY's writ on November 13, 2008, and failed to do so after
23 the court had entered judgment in CITY's favor on December 12, 2008.

24 110. SDCERS failed to make these disclosures to plan participants at any time after
25 SDCERS filed its notice of appeal on March 3, 2009, or while its appeal was pending.

26 CITY Continued To Sign-Off On DROP Contracts And Process Retirements

27 111. On and after November 20, 2007, CITY continued to provide its required sign-off
28 on irrevocable DROP contracts for CITY employee/plan participants whose eligibility had been

1 determined and whose pension allowance had been calculated by inclusion of “window period”
2 service credits *without any disclosure by CITY* that CITY was challenging the enforceability of
3 these service credits in court such that their eligibility for DROP and the amount of their pension
4 allowance being deposited into their DROP account might be retroactively and adversely affected
5 in the future if CITY prevailed.

6 112. On and after November 20, 2007, SDCERS informed CITY in writing when an
7 employee/plan participant had applied to retire and provided the date of his or her impending
8 retirement. While CITY was processing appropriate paperwork in response, CITY never
9 informed or warned its employees that CITY had a pending legal challenge to purchased service
10 credits which might adversely affect their retirement eligibility or benefit amounts.

11 CITY’S/SDCERS’ Communications Came Only After-The-Fact

12 113. Neither SDCERS nor CITY used CITY’S oft-used internal communications
13 system to disseminate a message to CITY employees informing them of the pendency of CITY’S
14 legal challenge to their PSC contracts or the court’s entry of judgment granting CITY’S writ
15 related to their “window period” PSC contracts. SDCERS and CITY only used this available
16 internal communications system after it was too late and the second PSC lawsuit had been
17 decided on appeal to Plaintiffs’ detriment.

18 114. Beginning in *July 2010*, SDCERS made a written disclosure to those plan
19 participants seeking its counsel about their pension benefits that there would be a potential
20 adverse effect from CITY’S second PSC lawsuit. In this written disclosure, SDCERS noted that
21 the final outcome remained uncertain because the SDCERS Board might still appeal the PSC-
22 related ruling in CITY’S favor to the California Supreme Court; however, SDCERS nevertheless
23 warned those plan participants who had “window period” PSC contracts that “there will likely be
24 a future impact on your retirement account relative to the total amount of service credit you have.
25 Because of this development, it is imperative that you consider this before making any decision
26 concerning your benefits, including an irrevocable entry into DROP or retirement.”

27 115. In *August 2010*, CITY use its internal communications system to send an e-blast
28 message to CITY employees about a special SDCERS PSC Ad Hoc Committee meeting where

1 employees could offer their comments on how SDCERS should proceed when responding to the
2 outcome in CITY's favor on CITY's second PSC lawsuit.

3 116. Thereafter, in *April 2011*, CITY again used its internal communications system to
4 send an e-blast message to all CITY employees alerting them that SDCERS would be sending
5 certified "PSC Options Letters" (requiring a signature to acknowledge receipt) to all active
6 SDCERS members who received a prior letter from SDCERS in February 2011 informing them
7 that they were affected by the outcome of the PSC litigation. In each instance, CITY directed its
8 supervisors to print the e-mail message and provide it to those employees without computer
9 access. This e-blast message also clarified that Active DROP Members would not receive these
10 PSC Options Letters because "SDCERS is working to clarify two open items affecting Active
11 DROP Members before communicating your Correction Options," and directed employees to
12 SDCERS' website at www.sdccers.org for more information.

13
14 SDCERS Develops "Correction Process" And Seeks Direction
From CITY Before Implementation

15 117. After the trial court's judgment in CITY's favor was affirmed on appeal by
16 decision filed on June 7, 2010, SDCERS determined that it would not seek review before the
17 California Supreme Court and the remittitur issued on August 30, 2010.

18 118. SDCERS publicly declared that, since it could no longer charge CITY for net
19 actuarial deficiencies associated with "window period" PSC contracts as it had done since 2004,
20 it must transfer these deficiencies to plan participants who had signed "window period" PSC
21 contracts at SDCERS' invitation and with CITY's knowledge and encouragement.

22 119. On November 5, 2010, the SDCERS Board adopted Board Rule 4.90 outlining a
23 proposed "PSC Correction Process." Despite its benign title, this process involves SDCERS'
24 demand that affected plan participants accept a "correction" of their "window period" PSC
25 contracts by permitting SDCERS to re-write these fully-performed PSC contracts and "re-sell"
26 the service credits to them at a higher price, or otherwise suffer the consequences of SDCERS'
27 unilateral rescission of their PSC contracts and the expungement of their service credits.

28 SDCERS' new "re-sale" price for these previously-performed PSC contracts also includes a

1 demand for payment of interest charges at 8% compounded monthly over the 8-year period since
2 these PSC contracts were signed. In short, despite SDCERS' and CITY's *blameworthy* conduct
3 leading to the PSC Correction Process, its harsh consequences fall entirely on *blameless*
4 employees and retirees.

5 120. Pursuant to this Board Rule, SDCERS gave CITY, as plan sponsor, a 60-day
6 period following SDCERS' written notice to formally advise SDCERS whether CITY would
7 voluntarily pay some or all of the unfunded liability related to the affected "window period" PSC
8 contracts through the amortization of the system's unfunded actuarial accrued liability and
9 thereby avoid the need to "correct" some or all of the affected PSC contracts.

10 121. On November 29, 2010, SDCERS brought its proposed PSC Correction Process
11 to City Council with a request for direction as to how to remedy the underfunding associated with
12 each discrete group of plan participants who had affected "window period" PSC contracts, i.e.,
13 those who were already retired; those who were still active employees; those who were in DROP
14 before CITY filed its writ petition on November 20, 2007; those who had entered DROP after
15 that date; and those who were deceased with their beneficiaries receiving survivors' benefits.

16 122. The City Council discussed SDCERS' request in an open session with multiple
17 speakers urging the City Council to accept responsibility for CITY's own prior conduct in the
18 matter (1) by approving the "window period" in 2003 through its three high-ranking executive
19 officers (City Manager, City Auditor and Comptroller, City Treasurer) who served as trustees on
20 the SDCERS Board and joined other vocal Mayoral-appointed trustees Richard Vortmann and
21 Diane Shipione when doing so; (2) by encouraging employees, through CITY's managers and
22 supervisors, to submit timely purchase applications before the "window period" closed in order
23 to lock-in the old purchase rates; and (3) by ratifying the "window period" in January 2004 when
24 the Mayor, City Council, City Attorney and "other CITY leaders" were briefed on the Board's
25 likely violation of SDMC section 24.1312 and the anticipated increase in the system's unfunded
26 actuarial accrued liability which this "window period" would cause to CITY's detriment.

27 123. Multiple speakers also noted that innocent CITY employee/plan participants had
28 already been "trapped" in irrevocable DROP contracts (which CITY had approved) before

1 CITY's 2007 writ challenge had even been filed, and that others had since retired or entered
2 DROP without warning and in reliance on "window period" PSCs which SDCERS had used to
3 determine both their eligibility to retire and the amount of their monthly pension allowance.
4 Finally, it was emphasized that CITY was not offering to re-hire those dedicated CITY
5 employees who had kept their part of the employment/retirement bargain and had voluntarily
6 retired without any warning that they were at risk of losing their retirement or having their
7 benefits reduced.

8 124. Thereafter, the City Council met on January 24, 2011, pursuant to a Closed
9 Session Docket which stated:

10 "On November 29, 2010, SDCERS appeared before the City Council **requesting**
11 **direction as to how to remedy the underfunding.** Questions and issues were
12 raised that the City Council asked the City Attorney to advise on. . . . The City
13 Attorney will discuss the status of this case **and seek direction from the Mayor**
14 **and City Council.**" (Emphasis added.)

15 125. By letter dated January 25, 2011, City Attorney Jan I. Goldsmith conveyed to
16 SDCERS the direction given by the City Council in pertinent part as follows:

17 "Other than clarification for 280 individuals who were already in DROP on
18 November 20, 2007, and limited discretion of SDCERS to address individual
19 circumstances of other DROP participants – without cost to the City – **we do not**
20 **see a legal basis for adjustments.**"

21 126. As to these 280 individuals, the City Attorney acknowledged that they were
22 already "trapped" in CITY's DROP program at the time CITY filed its writ petition and that the
23 terms of DROP precluded them from leaving the program to resume normal employment and
24 required them to terminate their CITY employment after five years. The City Attorney further
25 acknowledged that the petition and judgment were silent as to whether these individuals are
26 included in the judgment (as normal employees) or excluded (as retirees), and agreed that the
27 judgment should be clarified by SDCERS' motion requesting that clarification.

28 127. Upon receipt of this letter providing CITY's response to SDCERS' request for
direction on how to remedy the underfunding, SDCERS mailed written notices to plan
participants on or about February 23, 2011, to advise that their PSC contracts were affected by

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1 the court's PSC judgment in CITY's favor and that they would receive a letter within the next
2 four to six weeks identifying the specific options available to them.

3 128. Also upon receipt of the City Attorney's letter dated January 25, 2011, stating that
4 it was left "to the executive branch of CITY government (i.e., the Mayor's Office) to decide
5 whether to allow an employee to work outside of DROP," SDCERS mailed a letter on or about
6 February 23, 2011, to all plan participants who were in DROP informing them that SDCERS was
7 working with the Mayor's Office to determine whether or not DROP contracts could be reformed
8 or rescinded in connection with the PSC Correction Process.

9 129. Finally, upon receipt of the City Attorney's letter dated January 25, 2011,
10 SDCERS mailed a letter on or about February 23, 2011, to those 280 employees/plan participants
11 who were already "trapped" in DROP as of November 20, 2007, informing them that they might
12 be exempt or excluded from the correction process based on a clarification being sought from the
13 trial judge who made the initial ruling in the case.

14 130. Having encouraged SDCERS to seek a clarification of the judgment as to these
15 280 employees/plan participants, CITY then opposed SDCERS' motion and the clarification was
16 denied on April 28, 2011.

17 131. On or about April 11, 2011, SDCERS mailed certified letters to all affected plan
18 participants who were still actively employed by CITY notifying them that SDCERS would not
19 honor the "window period" PSC contracts they had signed and subsequently performed by
20 payment of thousands of dollars. SDCERS informed them that they must "correct" these PSC
21 contracts by paying SDCERS more money than previously charged (plus 8% interest,
22 compounded monthly, for the prior eight-year period) or SDCERS would unilaterally rescind
23 their PSC contracts with an adverse impact on their pension rights and other economic harm.

24 132. On or about June 8, 2011, SDCERS mailed certified letters to all affected plan
25 participants who had been awarded a Service Retirement or were in a Deferred Vested status
26 notifying them that SDCERS would not honor the "window period" PSC contracts they had
27 signed and subsequently performed by payment of thousands of dollars. SDCERS informed
28 them that they must "correct" these PSC contracts by paying SDCERS more money than

1 previously charged (plus 8% interest, compounded monthly, for the prior eight-year period) or
2 SDCERS would unilaterally rescind their PSC contracts with an adverse impact on their pension
3 rights and other economic harm.

4 133. For some retirees, the result of such a unilateral rescission of their PSC contracts
5 would mean that, notwithstanding the SDCERS Board's prior official approval of their
6 *creditable service* and monthly pension allowance, they would now have insufficient *creditable*
7 *service* to be eligible for a retirement benefit *at all* and thus their pension allowance would stop;
8 for other retirees, who would still have sufficient *creditable service* to remain eligible to retire,
9 their monthly pension allowance would be reduced; in either case, all retirees would be obligated
10 to repay SDCERS for the "overpaid" pension benefits with interest added at 8%, compounded
11 monthly, until paid.

12 134. In its letter to each Retiree, SDCERS states: "SDCERS cannot require that the
13 CITY return you to employment."

14 135. For deferred vested plan participants who left CITY employment with sufficient
15 *creditable service* to assure that their right to receive a pension benefit in the future upon age
16 eligibility had *vested*, the unilateral rescission of their PSC contracts would destroy this vesting
17 and no future pension would be awarded.

18 136. On or about June 15, 2011, SDCERS mailed certified letters to all affected plan
19 participants who were or had been in DROP and remained active or had since retired notifying
20 them that SDCERS would not honor the "window period" PSC contracts they had signed and
21 subsequently performed by payment of thousands of dollars *or* the irrevocable DROP they and
22 CITY had previously signed. SDCERS informed them that they must "correct" these PSC
23 contracts by paying SDCERS more money than previously charged (plus 8% interest,
24 compounded monthly, for the prior eight-year period) or SDCERS would unilaterally rescind
25 their PSC contracts with an adverse impact on their pension rights and other economic harm.
26 For plan participants who had retired from DROP, the result of such a rescission would be the
27 same as those who had retired without participating in DROP; some would no longer be eligible

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1 to receive *any* pension allowance; others would have their allowance reduced; all would *owe*
2 SDCERS money for “overpaid” benefits with interest.

3 Claims Filings

4 137. To the extent that the Government Claims Act is interpreted to apply to the
5 damage claims made in this Complaint despite the exemptions set forth in Government Code
6 section 905, subdivisions (c) and (f), Plaintiffs have complied as set forth herein.

7 138. On July 1, 2011, Plaintiffs presented a Claim to SDCERS and, thereafter,
8 supplemented this Claim on August 10, August 15, and August 18, 2011, in response to
9 SDCERS’ notices of insufficiency. SDCERS has rejected Plaintiffs’ Claim.

10 139. On July 7, 2011, Plaintiffs presented a Claim to CITY and, thereafter, presented
11 an Amended Claim on July 19, 2011, in response to CITY’s rejection, which CITY also rejected.
12 Plaintiffs supplemented their Claim on August 16, 2011, and again on August 18, 2011.

13 FIRST CAUSE OF ACTION
14 ALL PLAINTIFFS AGAINST BOTH SDCERS AND CITY OF SAN DIEGO
15 FOR EQUITABLE RELIEF AGAINST JUDGMENT DUE TO EXTRINSIC FRAUD

16 140. Plaintiffs incorporate paragraphs 1 through 136 as if fully set forth herein.

17 141. Plaintiffs were not parties to CITY’s second PSC lawsuit and are not bound by the
18 judgment entered.

19 142. In support of its second PSC lawsuit, CITY assured the court that it was *not*
20 asking the court to direct, or itself seeking to direct, SDCERS to take any particular action related
21 to PSC contracts other than to set aside its November 16, 2007 vote. CITY also emphasized that
22 the writ it sought against SDCERS “did *not* directly implicate the members’ interests.” As CITY
23 explained it to the court, if CITY’s writ were granted and SDCERS were directed to set aside its
24 November 16, 2007 action, SDCERS would then have to “decide what steps to take . . . only then
25 would the members potentially be affected . . . and until then their potential claims were not
26 ripe.” CITY further informed the court that “if the Board believes the prices they charged were
27 accurate at the time, the Board could make up the shortfall itself and honor the “contracts” they
28 drafted and entered into with its members to provide the service years sold at the price it
unilaterally decided to charge.”

1 143. After the judgment in *City of San Diego v. San Diego City Employees' Retirement*
2 *System* (2010) 186 Cal.App.4th 69, became final and the remittitur issued, SDCERS adopted
3 Board Rule 4.90 on November 5, 2010, establishing a proposed "PSC Correction Process."

4 144. SDCERS has informed affected plan participants that *either CITY or the plan*
5 *participants themselves* must pay the underfunding associated with "window period" PSC
6 contracts. According to SDCERS, to avoid being in violation of the judgment, SDCERS must
7 either get CITY's prior authorization to charge CITY for some or all of this PSC-related
8 underfunding or it must implement its "PSC Correction Process" regardless of the harm caused
9 to its affected plan participants and their beneficiaries.

10 145. SDCERS thereafter appeared before the City Council on November 29, 2010, to
11 present this proposed "PSC Correction Process" to the City Council with a request for direction
12 as to how to remedy the underfunding associated with each discrete group of plan participants
13 who had affected "window period" PSC contracts. SDCERS' purpose, as noted in Board Rule
14 4.90, was to ascertain whether the CITY would voluntarily pay some or all of this underfunding
15 through the amortization of the system's UAAL and thus spare some or all of the affected plan
16 participants the hardships otherwise associated with implementation of the proposed "PSC
17 Correction Process" due to the passage of time and their reliance on the finality of these contracts
18 when doing their career and financial planning and when making life-altering, irreversible
19 decisions to retire.

20 146. During a closed session on January 24, 2011, the City Council discussed
21 SDCERS' request for direction as to how to remedy the underfunding and determined that CITY
22 would not voluntarily pay any of the underfunding associated with "window period" PSC
23 contracts. The City Attorney conveyed this position to SDCERS by letter dated January 25,
24 2011, along with the admonition that CITY expected SDCERS to obey the judgment entered in
25 CITY's favor precluding SDCERS from requiring CITY to pay the underfunding associated with
26 "window period" PSC contracts.

27 147. By certified letters mailed to Plaintiffs on and after April 11, 2011, SDCERS
28 began taking steps to implement the judgment *against Plaintiffs* by transferring the unfunded

1 liability for “window period” PSC contracts to *them* – despite CITY’s express approval and
2 ratification of this “window period.” To cure the alleged underfunding, SDCERS demands that
3 Plaintiffs pay substantial additional sums of money for the service credits they purchased under
4 contracts arising from the “window period,” with interest added at 8%, compounded monthly
5 over an 8-year period, on threat of having SDCERS unilaterally rescind these contracts with
6 adverse effects on their pension benefit rights and other economic harm.

7 148. Though Plaintiffs are not parties to the judgment entered in CITY’s favor in *City*
8 *of San Diego v. San Diego City Employees’ Retirement System* (2010) 186 Cal.App.4th 69, their
9 interests are adversely affected by that judgment as evidenced by SDCERS’ implementation of
10 its “PSC Correction Process.”

11 149. Accordingly, in response to SDCERS’ adverse actions against them, which CITY
12 refuses to prevent or mitigate, Plaintiffs are entitled to equitable relief against this judgment
13 which cannot be conscientiously enforced for CITY’s benefit and to Plaintiffs’ detriment due to
14 the extrinsic fraud which occurred in procuring it.

15 150. The judgment at issue arises from a petition for writ of mandate which former
16 City Attorney Michael J. Aguirre filed against SDCERS on November 20, 2007. Although the
17 petition was filed in the name of the CITY of San Diego as the real party in interest in seeking
18 relief against the SDCERS Board action on November 16, 2007, Mr. Aguirre filed the petition
19 without the approval of the City Council as required by the City Charter.

20 151. The City Attorney’s authority to act on behalf of CITY is strictly proscribed by the
21 City Charter, Article V, section 40 setting forth the prerequisites to prosecute a petition for writ
22 of mandate in the CITY’s name:

23 The City Attorney shall apply, upon order of the Council, to a court of competent
24 jurisdiction for a writ of mandamus to compel the performance of duties of any
25 officer or commission which fails to perform any duty expressly enjoined by law
26 or ordinance. (Emphasis added.)

27 152. In filing the Petition on November 20, 2007, without such an “order of the
28 Council,” the City Attorney exceeded his limited authority under the City Charter and acted

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1 outside the scope of his enumerated powers such that his action was *ultra vires* and the Petition
2 itself void as a matter of law.

3 153. SDCERS demurred to CITY's writ petition on the ground that the City Attorney
4 lacked the legal capacity, right or standing to file the petition in the absence of City Council
5 approval, and, as such, the Petition failed to state a cause of action.

6 154. In presenting its demurrer, SDCERS noted that this was not the first time the City
7 Attorney had tried to sue SDCERS without the authorization of his client, the CITY. In CITY's
8 first PSC lawsuit, *San Diego City Employees' Retirement System vs. San Diego City Attorney*
9 *Michael J. Aguirre, et al.*, SDSC Case No. GIC 841845, the Honorable Jeffrey B. Barton ruled
10 that the City Attorney could not prosecute a cross-complaint against SDCERS and others without
11 Council authorization. Judge Barton cited Charter section 40 when ruling that the:

12 City Attorney must have legal authority to bring this suit under [Charter section
13 40] which allows the City Attorney to initiate an action on behalf of the City only
14 "upon order of the Council."

15 155. The City Attorney opposed SDCERS' demurrer but later changed course after a
16 hearing on the court's tentative ruling sustaining it. At the hearing, the court vacated its tentative
17 ruling, requested additional briefing related to Charter section 40, and re-set the demurrer hearing
18 for March 21, 2008.

19 156. Faced with SDCERS' demurrer and the threatened demise of its writ petition,
20 CITY requested and SDCERS agreed to stipulate to a continuance of this March 21st hearing to
21 April 18th; thereafter, CITY requested and received another continuance of the demurrer hearing
22 to May 2, 2008. The City Attorney justified each continuance by explaining his need to "meet
23 with the City Council in closed session to discuss this instant matter." With each continuance,
24 CITY also sought and received a delay in the date for filing the additional briefing the court had
25 requested on February 22, 2008.

26 157. When the May 2nd hearing date and supplemental briefing deadline of April 25th
27 were imminent, CITY and SDCERS filed a "Joint Stipulation to Grant Petitioner Leave to File
28 First Amended Writ," on April 24, 2008. This Stipulation was entered into on behalf of

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1 "Petitioner CITY OF SAN DIEGO" by and through its attorneys Don McGrath, II and Walter C.
2 Chung, stating in pertinent part:

3 "The City Attorney met with the City Council in closed session on April 15, 2008,
4 to discuss this instant matter. During that closed session, the City Council
5 authorized the City Attorney to maintain this action. Following the action of the
6 City Council, the City discussed with counsel for SDCERS whether or not they
7 would be amenable to taking their Demurrer off calendar and allowing the City to
8 file a first amended writ. Counsel for SDCERS so agrees. Counsel for SDCERS
9 has the authority to act on behalf of SDCERS. Accordingly, the parties request
10 that this Court grant the City leave to file an amended writ on or before April 30,
11 2008."

12 158. On information and belief, SDCERS' counsel signed this Joint Stipulation on
13 behalf of SDCERS and withdrew SDCERS' demurrer to the Petition because SDCERS' counsel
14 accepted the representations of Assistant City Attorney McGrath and Deputy City Attorney
15 Chung that the City Council had in fact authorized the City Attorney to maintain the writ action
16 and believed these representations to be true.

17 159. However, the public record discloses that the representations of former Executive
18 Assistant City Attorney Don McGrath and current Deputy City Attorney Walter C. Chung on
19 behalf of the City Attorney were false and that the City Council had not in fact authorized the
20 writ petition to be filed or maintained as required by the City Charter.

21 160. City Charter, Article XV, section 270 states:

22 No resolution, ordinance, or other action of the Council shall be passed or become
23 effective without receiving the affirmative vote of five members of the Council,
24 unless a greater number is otherwise required by the Charter or other superseding
25 law. (Emphasis added.)

26 161. Although the City Council did, in fact, discuss the "instant matter in closed
27 session on April 15, 2008," as attorneys McGrath and Chung represented in the Joint Stipulation,
28 it was *not until April 21, 2008*, when Executive Assistant City Attorney Donald McGrath
reported during an open session of City Council that the results of this Closed Session Item were
"now reportable" as follows: on a motion to authorize the filing of the writ action, the City
Council voted *four-to-one* (4-to-1). Recognizing the Charter's strict requirement for "five
affirmative votes" in order for an action to pass or become effective, McGrath added: "whether
the 4-to-1 vote is binding on CITY is a legal question that may need to be resolved by a court."

1 162. Neither Executive Assistant City Attorney McGrath, nor Deputy City Attorney
2 Chung, nor the City Attorney himself informed the court that this four-to-one vote had occurred
3 when the “affirmative vote of five members of the Council” was required. Nor, presumably, did
4 they inform SDCERS’ counsel. Instead the Joint Stipulation filed on April 24, 2008, contained
5 only the bare assertion that the “City Council authorized the City Attorney to maintain this
6 action.” Thereafter, the City Attorney’s Office affirmatively stated and re-stated throughout its
7 briefing to the court on “CITY’S” writ petition that “CITY had authorized this writ.”

8 163. By engaging in this deceptive conduct constituting extrinsic fraud, the City
9 Attorney’s Office wrongfully prevented SDCERS from pursuing its demurrer on the grounds that
10 the writ petition was void for lack of City Council authorization and failed to state a proper cause
11 of action due to the City Attorney’s lack of standing.

12 164. By bringing the matter before the City Council for a vote, the City Attorney
13 conceded, in a manner consistent with Judge Barton’s ruling in prior litigation between CITY
14 and SDCERS related to pension benefits, that Council authorization was required under the City
15 Charter as SDCERS had argued. Since the motion before the City Council to authorize the City
16 Attorney to proceed with the writ petition *failed* because the requisite five affirmative votes were
17 not cast, the City Attorney was duty-bound to dismiss the writ petition. He did not do so.

18 165. Had the true facts not been concealed from SDCERS’ counsel and the court,
19 SDCERS’ demurrer would have been sustained without leave to amend and no judgment would
20 have been entered in CITY’s favor and enforced thereafter by SDCERS in a manner adverse to
21 Plaintiffs as described in this Complaint.

22 166. In a court of equity, the doctrine of unclean hands prevents a party from taking
23 advantage of its own wrong. CITY’s prior conduct violated conscience and good faith such that
24 the doors of this Court should be shut against it and this Court should refuse to acknowledge any
25 right in CITY to have the judgment in the second PSC lawsuit enforced against Plaintiffs.

26 167. Accordingly, Plaintiffs are entitled to equitable relief against this judgment in the
27 form of an order directing CITY to cease and desist from making a demand upon SDCERS to
28 enforce the judgment to Plaintiffs’ detriment, and directing SDCERS to honor the “window

1 period” PSC contracts Plaintiffs signed as originally written and priced without the “corrections”
2 which SDCERS has unilaterally imposed since April 11, 2011, and to make Plaintiffs whole for
3 their losses.

4 168. If, in the alternative, SDCERS *knew* that the City Council had *not* in fact
5 authorized the writ petition at the time its counsel signed the “Joint Stipulation” on April 24,
6 2008, but chose nevertheless to abandon its demurrer and “consent” to the writ petition being
7 prosecuted in CITY’s name but without its authorization, such an act of wrongful collusion with
8 the City Attorney’s Office would constitute separate and independent grounds for equitable relief
9 against this judgment.

10 169. In this event, Plaintiffs are entitled to an order directing CITY and SDCERS to
11 cease and desist from taking adverse action against Plaintiffs pursuant to this judgment and
12 directing SDCERS to honor the “window period” PSC contracts Plaintiffs signed as originally
13 written and priced without the “corrections” which SDCERS has unilaterally imposed since April
14 11, 2011, and to make Plaintiffs whole for their losses.

15
16 SECOND CAUSE OF ACTION
17 ALL PLAINTIFFS AGAINST CITY OF SAN DIEGO AND DOES 1-10
18 FOR AIDING AND ABETTING SDCERS’ VIOLATION OF SDMC § 24.1312

19 170. Plaintiffs incorporate paragraphs 1 through 136 as if fully set forth herein.

20 171. When procuring a writ of mandate in its second PSC lawsuit directing the
21 SDCERS Board to set aside its November 16, 2007 action, CITY established that the SDCERS
22 Board had acted unlawfully when it voted to *continue* charging CITY for underfunding
23 associated with PSC contracts arising from the 2003 “window period.” CITY argued, and the
24 court agreed, that this vote in 2007 was unlawful because the underfunding being charged to
25 CITY by this vote resulted from the SDCERS Board’s prior action on August 15, 2003, when it
26 voted to approve increases in PSC rates based on its actuary’s recommendation *but delayed their*
27 *implementation*. In so doing, the SDCERS Board violated CITY’s enabling ordinance
28 establishing this permissive PSC program codified in the San Diego Municipal Code, exceeded
its authority as plan administrator, and knowingly offered to lock-in PSC contract rates for plan

1 participants which the Board *knew* were no longer “equivalent to the employer and employee
2 cost of such service” within the meaning of SDMC section 24.1312.

3 172. As a direct result of CITY’s success on its second PSC lawsuit, SDCERS has
4 taken action by mailing certified letters to Plaintiffs’ homes on and after April 11, 2011, for the
5 purpose of demanding substantial additional sums of money from Plaintiffs, with onerous
6 interest charges added, if Plaintiffs seek to prevent SDCERS’ unilateral rescission of their
7 “window period” PSC contracts and avoid the harmful economic consequences of such a
8 rescission.

9 173. As alleged above in paragraphs 44 through 53, CITY knew or had reason to know
10 when the SDCERS Board acted to establish the “window period” in 2003 that this “window
11 period” was likely a violation of the San Diego Municipal Code. CITY’s Deputy City Auditor
12 and Comptroller suggested this in an e-mail to a fellow SDCERS Board Member *before* the vote
13 to create the “window period” was taken on August 15, 2003 (see ¶ 36). Thereafter, in January
14 2004, the likelihood of such a violation (with a corresponding increase in the system’s unfunded
15 actuarial accrued liability) was expressly acknowledged in writing in a memorandum from
16 CITY’s outside counsel defending the *Gleason* Class Action case which was directed through the
17 City Attorney’s Office to the Mayor and City Council (see ¶ 46).

18 174. Notwithstanding CITY’s actual knowledge as early as August 15, 2003, but no
19 later than January 2004, that SDCERS’ approval of a “window period” to permit CITY
20 employees to apply for PSC purchases at the old rates was likely a violation of the San Diego
21 Municipal Code and would increase the system’s unfunded actuarial accrued liability (“UAAL”)
22 and thus the CITY’s annual amortized contribution to pay down this UAAL, CITY aided and
23 abetted SDCERS in this violation and is equally liable with SDCERS for it.

24 175. CITY gave substantial assistance and encouragement to SDCERS in violating the
25 San Diego Municipal Code by casting its three votes on the SDCERS Board in favor of the
26 “window period.” Had CITY not cooperated with or lent its aid to the violation in this manner, it
27 is likely, if not certain, that all four of the private citizen Board Members who had been
28 appointed by the Mayor would have joined them in opposition. Instead, only one of the four

1 private citizen Board Members voted against the motion establishing the “window period,” and
2 CITY’s three high-ranking executives were joined by the other three private citizen Board
3 Members and the elected employee Board Members in a twelve-to-one (12-to-1) vote in favor of
4 the “window period.”

5 176. Thereafter, CITY gave further substantial assistance and encouragement to
6 SDCERS in violating the San Diego Municipal Code when the Mayor and City Council ratified
7 the availability of the “window period” in January 2004, after being informed by counsel that this
8 “window period” was likely in violation of the San Diego Municipal Code and would add to the
9 pension system’s UAAL.

10 177. Instead of taking immediate action to oppose and close the “window period” and
11 thereby prevent the PSC purchase applications which CITY employees had submitted during the
12 “window period” (at CITY’s own urging) from becoming signed, fully-performed PSC contracts,
13 CITY, acting through its authorized legislative body, made a deliberate decision to use its
14 knowledge of this violation as leverage against SDCERS in order to achieve a settlement of the
15 *Gleason Class Action case which was satisfactory to CITY and served its interests.* Accordingly,
16 CITY intentionally participated in and ratified SDCERS’ violation of the San Diego Municipal
17 Code for its own benefit with the specific intent of achieving its own goal to extend the
18 amortization period for paying down *all* unfunded liabilities associated with its pension plan,
19 including those unfunded liabilities specifically created by underpricing of service credits.

20 178. Judgment in the *Gleason Class Action* was entered on July 26, 2004. This
21 judgment permitted CITY to make a pension contribution to SDCERS for 2005 in a fixed
22 amount less than its actuarially required contribution and also reset the amortization of the
23 pension system’s UAAL from eighteen (18) to thirty (30) years such that CITY’s annual
24 contribution to SDCERS in the future would also be smaller.

25 179. With knowledge that the PSC-related underfunding would be exacerbated by
26 accepting PSC applications during the “window period” locking-in the old purchase rates, *both*
27 CITY and SDCERS sought to avoid further exposure to claims that their conduct constituted
28 unlawful underfunding of the pension trust fund. Accordingly, the Settlement Agreement, on

1 which the *Gleason* judgment was entered, included a release of all claims, actual or potential, by
2 the Plaintiffs' Class *against CITY*, SDCERS, their employees, agents, trustees, administrators
3 and representatives, relating to actions by SDCERS *or the CITY* concerning the purchase of
4 service credits by members of SDCERS."

5 180. Having aided and abetted SDCERS in its violation of the San Diego Municipal
6 Code when establishing the "window period" in 2003, CITY's wrongful conduct was a
7 substantial factor in causing the harm and damage which Plaintiffs are now incurring since April
8 11, 2011, when SDCERS notified them that it will not honor their "window period" PSC
9 contracts and, in fact, will unilaterally rescind them unless substantial additional sums of money
10 with interest are paid.

11 181. As a direct result of CITY's own wrongful conduct in aiding and abetting
12 SDCERS' violation of law, Plaintiffs have suffered and will continue to suffer economic and
13 non-economic damages compensable under Civil Code section 3333, for which CITY is equally
14 liable with SDCERS. These damages include but are not limited to financial losses, emotional
15 distress and mental suffering, including fear, worry, anxiety, and anger. CITY's liability for its
16 own wrongful conduct in aiding and abetting SDCERS' violation of law is in addition to its
17 liability to Plaintiffs as the indemnitor of the SDCERS Board pursuant to CITY's Resolutions R-
18 297335 and R-301414 and *Torres, et al. v. City of San Diego* (2007) 154 Cal.App.4th 214.

19 THIRD CAUSE OF ACTION
20 ALL PLAINTIFFS AGAINST CITY OF SAN DIEGO AND DOES 1-10
21 FOR AIDING AND ABETTING SDCERS' BREACH OF FIDUCIARY DUTY

22 182. Plaintiffs incorporate paragraphs 1 through 136 and 171 through 180 as if fully set
23 forth herein.

24 183. When procuring a writ of mandate in its second PSC lawsuit, CITY argued, and
25 the court agreed, that in allowing a "window period" for the purchase of service credits at the old
26 rates, the SDCERS Board violated CITY's plan document related to the PSC program and
27 exceeded its lawful authority as plan administrator.

28 184. By doing the acts as CITY alleged, the SDCERS Board breached its common law
and constitutional-based fiduciary duty to plan participants, including Plaintiffs, who relied on

1 SDCERS' knowledge, expertise and lawful authority when accepting SDCERS' invitation to
2 sign "window period" PSC contracts and, thereafter, make career, retirement and financial
3 planning decisions in reliance on the propriety and finality of these contracts.

4 185. By engaging in the acts of substantial assistance, encouragement, cooperation and
5 ratification described above in paragraphs 36 through 51 and 187 through 195, CITY aided and
6 abetted SDCERS in the breach of its fiduciary duty.

7 186. Having aided and abetted SDCERS in its breach of fiduciary duty when
8 establishing the "window period" in 2003, CITY's wrongful conduct was a substantial factor in
9 causing the harm and damage which Plaintiffs are now incurring since April 11, 2011, when
10 SDCERS notified them that it will not honor their "window period" PSC contracts and, in fact,
11 will unilaterally rescind them unless substantial additional sums of money with interest are paid.

12 187. As a direct result of CITY's own wrongful conduct in aiding and abetting
13 SDCERS' breach of fiduciary duty, Plaintiffs have suffered and will continue to suffer economic
14 and non-economic damages compensable under Civil Code section 3333, for which CITY is
15 equally liable with SDCERS. These damages include but are not limited to financial losses,
16 emotional distress and mental suffering, including fear, worry, anxiety, and anger. CITY's
17 liability for its own wrongful conduct in aiding and abetting SDCERS' breach of fiduciary duty is
18 in addition to its liability to Plaintiffs as the indemnitor of the SDCERS Board pursuant to
19 CITY's Resolutions R-297335 and R-301414 and *Torres, et al. v. City of San Diego* (2007) 154
20 Cal.App.4th 214.

21 FOURTH CAUSE OF ACTION
22 ALL PLAINTIFFS AGAINST SDCERS AND DOES 1-10
FOR BREACH OF COMMON LAW AND CONSTITUTIONAL FIDUCIARY DUTIES

23 188. Plaintiffs incorporate paragraphs 1 through 136 as if fully set forth herein.

24 189. On November 16, 2007, Defendants, including SDCERS, breached their common
25 law fiduciary duty to Plaintiffs by taking an imprudent and unnecessary action to affirm an
26 existing actuarial practice which had been in effect without change since 1999 related to the net
27 actuarial deficiencies associated with CITY's 5-year PSC program. If SDCERS had not taken
28 this unnecessary and imprudent action on November 16, 2007, CITY's claim that Plaintiffs'

1 “window period” PSC contracts were unlawful and unenforceable because the SDCERS Board
2 violated SDMC section 24.1312 when approving a “window period,” was already time-barred.
3 Whether by intent or by imprudence, this action re-started the statute of limitations on CITY’s
4 previously time-barred claim and gave rise to CITY’s second PSC lawsuit.

5 190. By the same imprudent and unnecessary action taken on November 16, 2007,
6 Defendants, including SDCERS, breached their constitutional-based fiduciary duty to Plaintiffs
7 under section 17 of article 16 of the California Constitution.

8 191. As a result of these common law and constitutional-based breaches of fiduciary
9 duty, Plaintiffs have suffered and will continue to suffer economic and non-economic damages
10 compensable under Civil Code section 3333 because, beginning on and after April 11, 2011,
11 SDCERS notified Plaintiffs that it will not honor the PSC contracts they were invited to sign by
12 application submitted during the 2003 “window period” approved by SDCERS and CITY, and
13 that the burden is Plaintiffs to pay substantial additional monies, including onerous interest
14 charges, to maintain their PSC contracts in effect and avoid the harmful consequences of
15 SDCERS’ unilateral rescission. These damages include but are not limited to financial losses,
16 emotional distress and mental suffering, including fear, worry, anxiety, and anger.

17 FIFTH CAUSE OF ACTION
18 ALL PLAINTIFFS AGAINST SDCERS AND DOES 1-10
19 FOR BREACH OF COMMON LAW AND CONSTITUTIONAL FIDUCIARY DUTIES

20 192. Plaintiffs incorporate paragraphs 1 through 136 as if fully set forth herein.

21 193. Defendants, including SDCERS, breached their common law fiduciary duty to
22 Plaintiffs by engaging in imprudent and negligent acts in response to CITY’s second PSC lawsuit
23 filed on November 20, 2007, as more specifically described in paragraphs 88 through 101,
24 including but not limited to (1) stipulating that City Attorney Michael J. Aguirre had the
25 necessary City Council authority to file the action on CITY’s behalf when the Charter-required
26 five votes were lacking and the Court had already tentatively sustained SDCERS’ demurrer on
27 the ground the City Attorney lacked authority; and (2) failing to raise either a plea in abatement
28 pursuant to Code of Civil Procedure section 430.10, subdivision (c), or the rule of exclusive
concurrent jurisdiction based on the *two* judgments already entered in CITY’s first PSC lawsuit.

1 194. By these same imprudent and negligent acts in response to CITY's second PSC
2 lawsuit filed on November 20, 2007, Defendants, including SDCERS, breached their
3 constitutional-based fiduciary duty to Plaintiffs under section 17 of article 16 of the California
4 Constitution.

5 195. If SDCERS had not engaged in these imprudent and negligent acts, CITY's
6 second PSC lawsuit filed on November 20, 2007, would not have been heard on its merits and
7 the judgments favorable to Plaintiffs which had already been entered in CITY's first PSC lawsuit
8 before November 20, 2007, would have prevented the harm now being caused by SDCERS' and
9 CITY's claim that, as a result of CITY's second PSC lawsuit, Plaintiffs' "window period" PSC
10 contracts are unlawful and unenforceable.

11 196. As a result of these common law and constitutional-based breaches of fiduciary
12 duty, Plaintiffs have suffered and will continue to suffer economic and non-economic damages
13 compensable under Civil Code section 3333 because, beginning on and after April 11, 2011,
14 SDCERS notified Plaintiffs that it will not honor the PSC contracts each was invited to sign by
15 application submitted during the 2003 "window period" approved by SDCERS and CITY, and
16 that the burden is on each Plaintiff to pay substantial additional monies, including onerous
17 interest charges, if he or she wishes to maintain the contract in effect and avoid the harmful
18 consequences of SDCERS' unilateral rescission. These damages include but are not limited to
19 financial losses with pre-judgment interest accruing until paid, and emotional distress and mental
20 suffering, including fear, worry, anxiety, and anger.

21 SIXTH CAUSE OF ACTION
22 ALL PLAINTIFFS AGAINST SDCERS AND DOES 1-10
23 FOR BREACH OF COMMON LAW AND CONSTITUTIONAL FIDUCIARY DUTIES

24 197. Plaintiffs incorporate paragraphs 1 through 136 as if fully set forth herein.

25 198. In granting CITY's writ and directing that the action taken by the SDCERS Board
26 on November 16, 2007 be set aside, the court made no determination related to the lawfulness of
27 Plaintiffs' individual "window period" PSC contracts. CITY itself assured the court (1) that the
28 prior pricing of service credits was not directly at issue in its action, (2) that it was *not* asking the
court to direct or itself seeking to direct SDCERS to take any particular action related to PSC

1 contracts other than to set aside its November 16, 2007 vote, and (3) that the writ it sought
2 against SDCERS “did *not* directly implicate the members’ interests.” In any event, Plaintiffs
3 were not parties to the writ action between CITY and SDCERS and they are not bound by the
4 judgment entered in CITY’s favor.

5 199. On and after April 11, 2011, Defendants, including SDCERS, mailed certified
6 letters to Plaintiffs’ homes in which SDCERS threatened to rescind their “window period” PSC
7 contracts (with adverse consequences) unless Plaintiffs paid a substantial additional sum of
8 money to SDCERS within ninety (90) days. SDCERS warned that this additional payment must
9 be received by the deadline to maintain the PSC contract in effect and to avoid SDCERS’
10 unilateral rescission.

11 200. SDCERS demanded additional money from each Plaintiff on threat of contract
12 rescission (1) without first proving in a court of equity that SDCERS, acting in its capacity as a
13 fiduciary, has grounds for rescission under all the circumstances, and (2) without determining if
14 the amount Plaintiff had previously paid for this PSC contract *was* or *was not* an amount
15 “equivalent to the employer and employee cost of that service” within the meaning of SDMC
16 section 24.1312. SDCERS did *not* conduct an actuarial analysis of each individual PSC contract
17 to compare what was paid (based on the rates charged and the assumptions in effect at the time)
18 and what the actual experience for this plan participant/purchaser had been since the contract was
19 signed; nor did SDCERS determine the actual investment return which SDCERS had earned on
20 the employee’s purchase funds. To the contrary, SDCERS resorted to the use of an “average”
21 assumed cost which is a methodology that SDCERS has replaced on the advice of its actuary
22 with an *individualized* cost structure based on age and years of service at the time of purchase.

23 201. Having failed to prove that it has equitable grounds for rescission of Plaintiffs’
24 PSC contracts and having failed to make a determination whether Plaintiffs’ “window period”
25 PSC contracts violated SDMC section 24.1312, SDCERS then compounded the economic harm
26 to each Plaintiff by adding to its “average” calculation a demand for payment of onerous interest
27 charges at 8% compounded monthly over the past 8-year period.

28 ///

1 202. In the absence of proof (1) that SDCERS has grounds to support an equitable
2 rescission of Plaintiffs' PSC contracts and (2) that the amount each Plaintiff previously paid for
3 his or her "window period" PSC contract was *not*, at the time calculated, the "equivalent to the
4 employer and employee cost of that service" within the meaning of SDMC section 24.1312,
5 SDCERS has no lawful basis as a fiduciary to treat Plaintiffs' PSC contracts as unlawful and
6 unenforceable and thus threaten to dishonor or to dishonor them.

7 203. By making these improper threats and demands for money and interest,
8 Defendants, including SDCERS, breached their common law fiduciary duty to Plaintiffs.

9 204. By making these improper threats and demands for money and interest,
10 Defendants, including SDCERS, breached their constitutional-based fiduciary duty to Plaintiffs
11 under section 17 of article 16 of the California Constitution.

12 205. As a result of these common law and constitutional-based breaches of fiduciary
13 duty, Plaintiffs have suffered economic and non-economic damages compensable under Civil
14 Code section 3333. These damages include but are not limited to financial losses, emotional
15 distress and mental suffering, including fear, worry, anxiety, and anger.

16 SEVENTH CAUSE OF ACTION
17 ALL PLAINTIFFS AGAINST SDCERS AND DOES 1-10
 FOR BREACH OF CONTRACT

18 206. Plaintiffs incorporate paragraphs 1 through 136 and 199 through 202 as if fully set
19 forth herein.

20 207. Plaintiffs' PSC contracts were formed when SDCERS prepared a document
21 entitled "Election to Purchase Service," which stated that the option to purchase and be granted
22 credit for the service indicated was in accordance with Pension Regulations. SDCERS set a total
23 cost to purchase the service. Plaintiffs had a choice to elect to go forward with the purchase or to
24 decline the offer. If Plaintiffs elected to make the purchase, they designated their method of
25 payment. On issuance of this "Election to Purchase Service" document, SDCERS warned that
26 Plaintiffs' failure to make an election and the required payment within a certain time period, the
27 PSC contract would be deemed null and void. Plaintiffs' PSC contracts included no reservation
28 of rights by SDCERS to re-calculate and demand additional monies in the future.

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1 208. Plaintiffs made a timely election to purchase service credits based on the total
2 purchase cost SDCERS had calculated and Plaintiffs thereafter performed their PSC contracts by
3 making the payments according to the method selected.

4 209. By doing the acts alleged in paragraphs 199 through 202 above, Defendants,
5 including SDCERS, have breached Plaintiffs' PSC contracts.

6 210. As a result of this breach of contract, Plaintiffs have suffered and will continue to
7 suffer economic damages, including financial losses.

8

9 EIGHTH CAUSE OF ACTION
10 CERTAIN PLAINTIFFS AGAINST SDCERS AND DOES 1-10
FOR BREACH OF COMMON LAW AND CONSTITUTIONAL FIDUCIARY DUTIES

11 211. Plaintiffs Thomas Badua, Robert Blaisdell, Jimmy Canale, Joseph Carmody, Jose
12 Castenada, Ricardo Cuevas, Peter Dargusch, Carlos Davalos, David Dobbs, Ruth Donovan,
13 Darrell Esparza, Gloria Esparza, Steven Evans, Nina Fishman, Peter Gascon, James Grable, John
14 Greenhalgh, Yvonne Hamilton, Barbara Jean Harris, Connie Hernandez, Gerard King, Patricia
15 Kuebitz, Werner Landry, Martin Lederer, Alicia Legaspi, Claude Lovelace, Susan Luque, Chun
16 Chi Ma, Elsa Marquez, Luis Martinez, Gayle May, William Kent McConnell, Joseph McDowell,
17 Bess Nacino, Michelle Nickols, Vernon Noble, Emy Orofino, Jacqueline Poole, Terry Price,
18 Sylvia Repine, George Sandoval, Jacqueline Scott, Noreen Shirk, Leslie Simmons, Sharon
19 Stevelman, Frances Tessmer, Thomas Thayer, Paula Thomas, Lois Thompson, Dorothy
20 VanDyke, Warren Wazny, Vernon Westenberger, Lynn Whitehouse, Jerry Williams, and Betty
21 Wood incorporate paragraphs 1 through 136 as if fully set forth herein.

22 212. At the time CITY filed its writ petition on November 20, 2007, both SDCERS and
23 CITY knew that certain CITY employee/plan participants had already entered CITY's DROP
24 program in reliance on purchased service credits. SDCERS had used these purchased service
25 credits when tallying their total *creditable service* to determine if (1) they were eligible to enter
26 DROP at all; and (2) if so, what the amount of their pension allowance would be.

27 213. SDCERS and CITY knew that, in reliance on these purchased service credits,
28 these CITY employee/plan participants had signed irrevocable DROP contracts which meant that

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1 (1) their continued service while employed by CITY under the DROP program would not count
2 as *creditable service* for purposes of retirement eligibility; (2) the amount of their pension
3 allowance would be frozen on entry into DROP and would not be increased by additional years
4 of service or by increases in their salary; (3) the employee's and CITY's regular pension
5 contributions would cease on the employee's entry into DROP; and (4) the employee would be
6 obligated to terminate his or her CITY employment within a maximum of five years after entry
7 into DROP regardless of any changed circumstances.

8 214. Each DROP contract involved three signatories: the employee/plan participant,
9 SDCERS and CITY. Plaintiff's entry into DROP was approved by the SDCERS Board during an
10 open meeting.

11 215. Plaintiffs had all signed irrevocable DROP contracts before November 20, 2007,
12 in reliance on SDCERS' determination that their "window period" purchased service credits
13 constituted valid *creditable service* to be used when calculating their eligibility to enter DROP
14 and the amount of their pension allowance.

15 216. Before November 20, 2007, the SDCERS Board had approved Plaintiffs' entry
16 into DROP based on these calculations and each Plaintiff made financial planning and retirement
17 decisions in reliance on this approved DROP status and contract.

18 217. After CITY filed its writ petition on November 20, 2007, neither CITY nor
19 SDCERS notified employees whose irrevocable DROP contracts both SDCERS *and* CITY had
20 approved and signed prior to November 20, 2007, that these contracts might later be invalidated
21 if CITY prevailed. Nor did SDCERS and CITY offer these employee/plan participants an
22 opportunity to rescind their irrevocable DROP contracts, earn additional service credits by their
23 continued employment, and await the outcome of CITY's challenge to their purchased service
24 credits on which their eligibility for DROP and/or the amount of their pension allowance being
25 deposited into their DROP accounts depended.

26 218. By failing to provide such notice and opportunity to rescind the irrevocable DROP
27 contract signed in reliance on the propriety and finality of their purchased service credits,
28 SDCERS breached its common law and constitutional-based fiduciary duty to Plaintiffs which

1 required a full and fair disclosure to Plaintiffs of information which threatened their previously-
2 determined award of benefits under CITY's plan on which they were relying when continuing
3 their participation in DROP.

4 219. As a result of these breaches, Plaintiffs have suffered and will continue to suffer
5 economic and non-economic damages compensable under Civil Code section 3333, when
6 Defendants, including SDCERS, notified them on and after June 15, 2011, that SDCERS would
7 not honor and continue to perform the window period PSC contracts which SDCERS had used
8 when calculating their *creditable service* in order to determine their eligibility to enter DROP and
9 the amount of their monthly pension allowance. These damages include but are not limited to
10 financial losses with pre-judgment interest accruing until paid, and emotional distress and mental
11 suffering, including fear, worry, anxiety, and anger.

12 NINTH CAUSE OF ACTION
13 CERTAIN PLAINTIFFS AGAINST SDCERS AND DOES 1-10
14 FOR BREACH OF COMMON LAW AND CONSTITUTIONAL FIDUCIARY DUTIES

15 220. Plaintiffs Kathleen Aceves, George Alfonso, John Anderson, James Anthony,
16 Shirley Atencio, Janice Aud, Raul Ayala, Barry Ayers, Jessica Battaglia, David Beers, Victoria
17 Bender, Bruce Blumer, Frank Bolinger, David Burgett, Roger Bush, Edward Cahill, Jean
18 Cameron, John Canning, Lisa Canning, Bonnie Colston, Ali Darvishi, Roxanne Davis, Marilyn
19 De Jarnette, Timothy Dewey, Brian Drummy, Michael Elling, Jerry Fabula, Joanne Fouche,
20 Robert Frick, Mark Gallegos, Vanassa Goodman, Howard Greenstein, Jeffrey Harkness, Harry
21 Herman, Julie Hertel-Latimer, Gary Hudson, Susan Hurst, Stuart Karasik, Yevgeniya
22 Khazanovsky, Kathryn Kirk, Enrico Layug, Simin LeGrand, Roberto Madrigal, John Makinster,
23 Brendan McClory, Steven McHenry, Manuel Mojica, John Morales, Darlene Morrow-Truver,
24 Theodore Morse, David Nashelsky, Michael O'Brien, John Odou, Patricia Parker, Marie Perry,
25 Henry Pio, John Quigley, Oscar Rafael, Bradley Ramstead, Harold Ritchie, Raquel Rodgers,
26 Madeline Rugama, Luis Sanchez, Ellen Schauer, Paul Schmidt, Paul Seiley, Shirley Sever,
27 Velma Smith, Daniel Stricker, Dennis Sweeney, Carol Tellez, Keith Thomas, Joseph Tolentino,
28 Mona Vallon, Deborah Wiley, Kip Willet, Jo Ann Wirick, Kris Witczak, Po Wong, Carol Wood,
and David Wood incorporate paragraphs 1 through 136 as if fully set forth herein.

1 221. In the faithful performance of its common law fiduciary duty, SDCERS had an
2 obligation to deal fairly and in good faith with Plaintiffs as SDCERS plan participants, which
3 included a duty to fully and adequately apprise them of options under CITY's pension plan.

4 222. SDCERS' duty of full disclosure included an obligation to inform those Plaintiffs
5 who sought SDCERS' counsel regarding both their eligibility to enter CITY's DROP program
6 and the amount of their pension allowance if they did, that CITY had a pending legal challenge to
7 purchased service credits being used to make these determinations.

8 223. SDCERS knew that, once Plaintiffs signed irrevocable DROP contracts, their
9 additional years of service with CITY while in DROP would *no longer* count as creditable
10 service and thus could not be considered when determining either eligibility for a pension or the
11 amount of a pension allowance under CITY's plan.

12 224. After November 20, 2007, and while CITY's second PSC lawsuit was pending,
13 Plaintiffs consulted SDCERS to seek information, counsel and assistance in understanding their
14 pension benefit rights and in making a decision whether to sign a DROP contract which would
15 (1) fix their pension allowance based on *creditable service* (including qualifying purchased
16 service credits); (2) stop their accrual of additional *creditable service* even though they continued
17 to be in CITY's employ; and (3) require them to terminate CITY employment after a maximum
18 of five (5) years. Once Plaintiffs made this decision and signed DROP contracts, CITY added its
19 signature to these DROP contracts and they became final, binding and irrevocable.

20 225. SDCERS failed to disclose to Plaintiffs that CITY's pending second PSC lawsuit
21 posed a risk that SDCERS' determinations regarding eligibility and benefit amounts could be
22 retroactively reversed to their detriment if CITY prevailed in its legal challenge. Instead, without
23 making any such disclosure, SDCERS invited Plaintiffs to sign irrevocable DROP contracts
24 based on their purchased service credits and they did so.

25 226. By making eligibility determinations and benefit calculations for Plaintiffs while
26 failing to disclose the material fact of CITY's pending legal challenge, SDCERS induced
27 Plaintiffs to trust in the accuracy and completeness of the information SDCERS was providing as
28 a fiduciary and to make life-altering and irreversible decisions regarding their employment and

1 retirement rights without warning them of material risks related to their benefits which were
2 known to SDCERS.

3 227. In failing to make this material disclosure to Plaintiffs when determining their
4 eligibility for DROP and the amount of their pension allowance – and before preparing
5 irrevocable DROP contracts for Plaintiffs’ signatures and Board action – Defendants, including
6 SDCERS, breached their common law and constitutional-based fiduciary duty of full disclosure.

7 228. As a result of these breaches, Plaintiffs have suffered and will continue to suffer
8 economic and non-economic damages compensable under Civil Code section 3333, when
9 Defendants, including SDCERS, notified them on and after June 15, 2011, that SDCERS would
10 not honor and continue to perform the window period PSC contracts which SDCERS had used
11 when calculating their *creditable service* in order to determine their eligibility to enter DROP and
12 the amount of their monthly pension allowance. These damages include but are not limited to
13 financial losses with pre-judgment interest accruing until paid, and emotional distress and mental
14 suffering, including fear, worry, anxiety, and anger.

15
16 TENTH CAUSE OF ACTION
17 CERTAIN PLAINTIFFS AGAINST SDCERS AND DOES 1-10
18 FOR BREACH OF COMMON LAW AND CONSTITUTIONAL FIDUCIARY DUTIES

19 229. Plaintiffs Sally Amezcua, James Anthony, Shirley Atencio, Teri Avakian-Hughes,
20 Thomas Badua, Victoria Bender, Robert Blaisdell, Jimmy Canale, Jose Castenada, Anna Daniels,
21 Peter Dargusch, Carlos Davalos, Ruth Donovan, Darrell Esparza, Gloria Esparza, Gayle Evans,
22 Steven Evans, Nina Fishman, Joanne Fouche, Frederrick Gabbard, Peter Gascon, James Grable,
23 John Greenhalgh, Andrew Guyer, Yvonne Hamilton, Barbara Jean Harris, Connie Hegey, Gary
24 Hudson, Susan Hurst, Gerard King, Patricia Kuebitz, Linda Kunde, Werner Landry, Martin
25 Lederer, Alicia Legaspi, Cynthia Lewis, Roland Luque, Susan Luque, Chun Chi Ma, John
26 Makinster, Elsa Marquez, Luis Martinez, Gayle May, William Kent McConnell, Joseph
27 McDowell, Steven McHenry, Joseph McDowell, Bess Nacino, David Nashelsky, Michelle
28 Nickols, Vernon Noble, Michael O'Brien, John Odou, Jacob Orbin, Emy Orofino, Patricia
Parker, Henry Pio, Jacqueline Poole, Cynthia Potts, Terry Price, Kathy Puplava, Sylvia Repine,

1 Shirley Rowoldt, Jacqueline Scott, Paul Seiley, Velma Smith, James Smullen, Sharon Stevelman,
2 Daniel Stricker, Frances Tessmer, Thomas Thayer, Keith Thomas, Paula Thomas, Lois
3 Thompson, Joseph Tolentino, Mona Vallon, Dorothy VanDyke, Warren Wazny, Vernon
4 Westenberger, Lynn Whitehouse, Carolyn Williams, Robert Wilson, Betty Wood, and Carol
5 Wood incorporate paragraphs 1 through 136 as if fully set forth herein.

6 230. After November 20, 2007, while CITY's second PSC lawsuit was pending.
7 Plaintiffs became retirees under SDCERS. In some cases, the SDCERS Board approved their
8 change in status from Active DROP plan participants to Retired DROP. In other cases, they were
9 never participants in CITY's DROP plan and their applications for a Service Retirement were
10 approved by the SDCERS Board. In every case, Plaintiffs' eligibility to retire and the amount of
11 their monthly pension allowance were determined in reliance on "window period" purchased
12 service credits.

13 231. At no time prior to Plaintiffs' retirement and the irreversible forfeiture of their
14 right to continue in CITY's active employ did SDCERS disclose to them that CITY had a
15 pending legal challenge to their purchased service credits which put them at risk for a
16 retroactive reduction in their *creditable service* with a corresponding loss of eligibility to be
17 retired with benefits or with a reduction in the amount of their pension benefits.

18 232. By making eligibility determinations and benefit calculations for Plaintiffs while
19 failing to disclose the material fact of CITY's pending legal challenge, SDCERS induced
20 Plaintiffs to trust in the accuracy and completeness of the information SDCERS was providing as
21 a fiduciary and to make a life-altering and irreversible decision to *retire*. While SDCERS knew
22 that Plaintiffs had not participated in the Social Security system during their employment with
23 CITY and that they would rely on their SDCERS pension benefits for their financial security
24 during old age, SDCERS did not disclose the material risks related to their benefits which were
25 known to SDCERS. SDCERS also knew that those Plaintiffs who would no longer be eligible to
26 retire if their "window period" PSCs did not count as *creditable service*, would not only lose *all*
27 pension benefits but would lose their retiree health insurance as well. Had Plaintiffs known of
28 these risks, they would not have retired.

1 233. In failing to make this material disclosure to Plaintiffs before approving their
2 retirements, Defendants, including SDCERS, breached their common law and constitutional-
3 based fiduciary duty of full disclosure.

4 234. As a result of these breaches, Plaintiffs have suffered and will continue to suffer
5 economic and non-economic damages compensable under Civil Code section 3333, when
6 Defendants, including SDCERS, notified them on and after June 8, 2011, that SDCERS would
7 not honor and continue to perform the window period PSC contracts which SDCERS had used
8 when calculating their *creditable service* in order to determine their eligibility to retire and the
9 amount of their monthly pension allowance, and, further, that "SDCERS cannot require that the
10 CITY return you to employment." CITY has refused to offer Plaintiffs the opportunity to return
11 to the jobs they left in reliance on their SDCERS' pension.

12 235. In response to SDCERS' demands, Plaintiffs have suffered and will continue to
13 suffer emotional distress and mental suffering, including fear, worry, anxiety, and anger. Some
14 Plaintiffs have been forced to deplete their "safety net" savings or borrow money at high interest
15 rates to prevent the threatened rescission of their service credits and corresponding reduction in
16 their pensions; other Plaintiffs had no savings to deplete such that their monthly pensions will be
17 reduced and they will be obligated to repay "overpaid" benefits to SDCERS with 7.75% interest
18 charged until paid in full. All Plaintiffs have suffered and will continue to suffer financial losses
19 and an impairment of the retirement plans and dreams they worked a lifetime to enjoy.

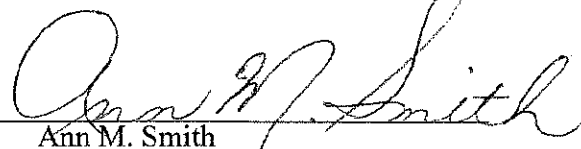
20 WHEREFORE, Plaintiffs pray for judgment as follows:

21 1. For equitable relief against the judgment entered in CITY's favor on its second
22 PSC lawsuit due to extrinsic fraud by an order directing Defendant CITY to cease and desist
23 from making a demand upon Defendant SDCERS to enforce this judgment to Plaintiffs'
24 detriment or, in the alternative, directing Defendants CITY and SDCERS to cease and desist
25 from taking adverse action against Plaintiffs pursuant to this judgment; and, in either case,
26 directing Defendant SDCERS to honor the "window period" PSC contracts Plaintiffs signed as
27 originally written and priced without the "corrections" which SDCERS has unilaterally imposed
28 since April 11, 2011, and to make Plaintiffs whole for their losses.

- 1 2. For past and future economic and non-economic damages according to proof
2 against Defendants CITY, SDCERS, and Does 1 through 10;
3 3. For prejudgment interest against CITY, SDCERS, and Does 1 through 10;
4 4. For reasonable attorneys fees against CITY, SDCERS, and Does 1 through 10;
5 5. For costs of suit against CITY, SDCERS, and Does 1 through 10;
6 6. For such other and further relief against CITY, SDCERS, and Does 1 through 10,
7 as this Court deems just and proper.

8
9 Dated: August 26, 2011

TOSDAL, SMITH, STEINER & WAX

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11 By: 
12 Ann M. Smith
13 Attorneys for Plaintiffs

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& WAX
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