1	MICHAEL A. CONGER, ESQUIRE (State Bar I LAW OFFICE OF MICHAEL A. CONGER	No. 147882)
2	P.O. Box 9374 16236 San Dieguito Road, Suite 4-14 Rancho Santa Fe, California 92067	
4	Telephone: (858) 759-0200 Facsimile: (858) 759-1906	
5	Attorneys for Plaintiffs Kelly Lancaster, David Boen Mary Erickson and Richard Gilb, individually, and o	
6	behalf of all others similarly situated	11
7	CANADATOR COMPARIOR WATER	DAME OF CALIFORNIA
8	SUPERIOR COURT OF THE S'	
9	FOR THE COUNTY O	OF SAN DIEGO
10	KELLY LANCASTER, DAVID BOENTIZ, MARY ERICKSON and RICHARD GILB,	CASE NO: 37-2011-00096238- CU-PO-CTL
11	Plaintiffs,	DECLARATION OF MICHAEL A.
12 13	v.	) CONGER IN SUPPORT OF ) PLAINTIFFS' MOTION TO CERTIFY CLASS ACTION
14	SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM, and DOES 1-30,	[Cal. Rules of Court 3.764]
15	Defendants.	) Date: April 17, 2013
16		Time: 10:00 A.M. Judge: Hon. Ronald S. Prager Dept: C-71
17		Action Filed: August 12, 2011 Trial Date: Not yet set
18		
19	I, Michael A. Conger, declare as follows:	
20	1. I am an attorney at law duly licensed	to practice before all courts of the State of
21	California. I have personal knowledge of the matters	s stated herein and if called to do so could
22	testify competently thereto.	
23	2. I attended Vanderbilt University in Na	ashville, Tennessee from 1979 to 1983, and
24	obtained an undergraduate degree in economics and	was invited to join and joined Omicron
25	Delta Epsilon, an economics honorary society based	on scholastic merit. I thereafter attended
26	law school at Vanderbilt and graduated in 1986. Fro	m 1986 to 1990 I practiced litigation with a
27	very good firm in Tulsa, Oklahoma. In 1990 I move	d to San Diego with my family and have
28	practiced law continuously in San Diego since then.	
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- 3. I have a great deal of experience in civil litigation, including class action cases and pension-related litigation, including several pension class actions involving the City of San Diego's employee pension fund. I have been lead counsel or co-counsel in several class action cases or multiple plaintiff cases in both state and federal court, including:
- a. Stapel, et al. v. San Diego County Employees Retirement Association, San Diego Superior Court Case No. 722450 (Judicial Council Coordination Proceeding No. 4049), a class action on behalf of more than 27,000 members of the San Diego County Employees Retirement Association ("SDCERA"). This case was coordinated with 16 cases pending in other counties in California and assigned to Judge Pollack in San Francisco. Judge Pollak granted class certification over the objections of the County of San Diego and SDCERA. This case resolved favorably, after motions for summary adjudication/judgment, on February 14, 2002, for a total settlement of approximately \$1.2 billion;
- b. Corbett, et al. v. San Diego City Employees Retirement System

  ("Corbett"), San Diego Superior Court Case No. 722449, before The Honorable Robert E. May, a class action on behalf of more than 15,000 members of the San Diego City Employees' Retirement System ("SDCERS"). I brought the case and acted as lead class counsel, although four additional attorneys intervened and represented various sub-classes. The case was resolved in May of 2000 for more than \$162 million;
- c. Andrecht, et al. v. San Diego Unified Port District, et al. ("Andrecht"),
  San Diego Superior Court Case No. GIC746436. This class action, brought before The
  Honorable Robert E. May, resolved favorably for slightly more than \$15 million in November,
  2001. I was the lead attorney for the class of more than 850 current and former Port District
  employees, including the San Diego Harbor Police Officers Association;
- d. *Hines, et al. v. CSK Auto, Inc.*, San Diego Superior Court Case No. 720346 (Judicial Council Coordination Proceeding No. 4067). This was a class action brought before The Honorable Kevin A. Enright on behalf of Kragen Auto Parts store managers and senior assistant managers which settled in 2001 for more than \$11 million. I was co-class counsel for a class of more than 1,500 employees;

Retirement Act of 1937. This case was resolved two days before Judge E. Mac Amos, Jr., was

Association, et al., San Diego Superior Court Case No. 782445. I was lead class counsel in a

case challenging the actuarial treatment of excess earnings under the County Employees

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scheduled to rule on cross motions for summary judgment for, among other things, prospective declaratory relief regarding the actuarial treatment of SDCERA's surplus undistributed reserve, and the settlement resulted in the safeguarding of \$350 million of health and cost of living benefits;

- k. Crouch, et al. v. Unites States of America, United States District Court Case No. 01-CV-2189 LAB(NLS). I was lead counsel for a class of 352 property owners in the City of El Cajon who were incorrectly placed in a flood plain by FEMA and forced to buy flood insurance they did not need. The primary theory of this case was violation of the Due Process Clause of the Fifth Amendment to the United States Constitution and, although the case was filed several years after FEMA's error and subsequent correction, it resulted in refunds to property owners who made claims:
- 1. Gleason, et al. v. City of San Diego, et al, San Diego Superior Court Case No. GIC 803779. I was lead counsel for a class of 6,330 SDCERS members and obtained increased pension contributions to SDCERS of \$109 million for the period 2005 to 2008; such additional contributions were secured by \$535 in unencumbered City property as collateral to protect the class against the possibility of municipal bankruptcy. The settlement of this class action was approved by Judge Cowett on July 26, 2004;
- Wood v. Hanson, Bridgett, et al., San Diego Superior Court Case No. m. 830558. I was class counsel for a class of all of the beneficiaries of SDCERS in a case alleging that fiduciary counsel for the pension plan committed malpractice by advising the retirement board that entering into an underfunding agreement with the City of San Diego was consistent with its fiduciary duty. The case resolved in 2005 in a class action settlement approved by Judge William Pate for fiduciary counsel's insurance policy limits (\$15.5 million) after it was established that the defendants lacked financial resources to satisfy a judgment which would justify any further exhaustion of their self-burning malpractice policies;
- n. McGuigan v. City of San Diego, San Diego Superior Court Case No. GIC 849883. I was class counsel for a class of approximately 18,000 SDCERS members and obtained additional increased pension contributions to SDCERS of \$173 million. The settlement

of this class action was approved by the Honorable Richard E. L. Strauss on December 12, 2006, and affirmed on September 25, 2008, by the Court of Appeal for the Fourth Appellate District, Division One;

- o. Short, et al. v. CC-La Jolla, Inc., et al., San Diego Superior Court Case
  No. GIC 877707. I was class counsel for a class of 267 elderly residents of Classic Residence by
  Hyatt at La Jolla Village. This fraud and elder abuse case was certified on December 14, 2007,
  by the Honorable Yuri Hofmann. The case resolved for a value of between \$8 to \$12 million
  (depending on how long the elderly class lives) in August 2008, less than two weeks before trial.
  Not a single class member objected to the settlement;
- p. Rodriguez, et al. v. United Title Company, et al., United States District
  Court for the Southern District of California Case No. 05cv1019-JAH (POR). I was appointed
  class counsel by The Honorable John A. Houston for a class of approximately 30,000 buyers or
  sellers of real property in San Diego County who paid title or escrow fees in violation of the
  federal Real Estate Settlement Practices Act. The case resolved for \$1 million after all
  defendants either declared bankruptcy or demonstrated insolvency in the wake of the collapse of
  the real estate market in Southern California over the past two years. Not a single class member
  objected to the settlement;
- q. Janet Wood v. City of San Diego, United States District Court for the Southern District of California Case No. 03cv1910-MMA (POR). I was appointed class counsel by The Honorable Michael M. Anello in a gender discrimination class action involving the City of San Diego's employee pension fund;
- r. Sloan, et al. v. City of San Diego, San Diego Superior Court Case No. GIC 848641. This case involved the proper calculation of retirement benefits due to dozens of San Diego Police officers in the canine unit. It was favorably tried before The Honorable Judith Hayes in May 2006, and successfully defended on an appeal by the City to the Court of Appeal for the Fourth Appellate District, Division One, Case No. D049158;
- s. Lopez, et al. v. City of San Diego, San Diego Superior Court Case No. GIC 869054. This case involved the proper calculation of retirement benefits due to dozens of San

Diego Police officers in the motorcycle unit. It was favorably resolved in 2008 after the Court of Appeal issued its opinion in the *Sloan* case;

- t. *McElroy, et al. v. City of San Diego*, San Diego Superior Court Case No. 37-2009-00081178-CU-MC-CTL. This case involved the proper calculation of retirement benefits due to dozens of San Diego Police officers in the canine and motorcycles units not covered by the *Sloan* or *Lopez* cases. It was favorably resolved in August 2010 after the City lost key rulings before The Honorable Judith Hayes;
- u. Ellis, et al. v. Jackson, DeMarco, Tidus & Peckenpaugh, et al., San Diego
  Superior Court Case No. 37-2010-00086284-CU-PN-CTL. This case involved a claim of legal
  malpractice in handling pension litigation. It was brought on behalf of more than 1,500 San
  Diego police officers. The case was certified as a class action and successfully resolved in
  March, 2012; and
- v. SDPOA v. Jackson, DeMarco, Tidus & Peckenpaugh, et al., San Diego Superior Court Case No. 37-2010-00088794-CU-PN-CTL. This case involved a claim of legal malpractice in handling pension litigation. It was brought on behalf of the San Diego Police Officers Association, and successfully resolved in March, 2012.
- 4. Many of the judges in the class action cases I have handled have been very complimentary of my performance as class counsel. For example, on December 12, 2006, at the final approval hearing in the *McGuigan* case, Judge Strauss stated that he "appreciated the effort of all of the attorneys involved in [the case]. . . . It's been a real service, I think, to the community to get this resolve[d]." I have received similar compliments from Judges Enright (both Kevin and William B.), May, Cowett, Pollak, Burns, Di Figlia, Amos, Houston, and Pate.
- 5. I have also been involved in many noteworthy cases. The *Argo* case was the largest jury verdict (\$101 million) in the State of California in 1997. In the early 1990s I was one of the attorneys representing the family of Cara Knott in a wrongful death case against the State of California arising out of Cara's murder by highway patrolman Craig Peyer. I have argued cases before the United States Court of Appeals for the Ninth Circuit and the California Court of Appeal for the Fourth and Fifth Appellate Districts. I have been asked to and have provided

continuing legal education courses for attorneys on numerous topics.

- 6. I have received several professional awards and distinctions from my peers in the legal profession, including: an "AV" rating from Martindale-Hubbell, designation as one of San Diego's top attorneys in by other attorneys in balloting conducted by the <u>San Diego Daily</u>

  <u>Transcript</u>, an Outstanding Trial Lawyer Award and an Outstanding Advocacy Award from the Consumer Attorneys of San Diego. I have been asked to be Master in both the J. Clifford Wallace and William B. Enright Chapters of the American Inns of Court, and have accepted both requests.
- 7. I believe I am one of the most experienced class action attorneys in the San Diego area. I am frequently approached by other attorneys—including those also experienced in class actions—and requested to provide assistance in other class action cases.
- 8. I have met extensively with the named plaintiffs in this matter and discussed with them their duties and responsibilities as class representatives. I am confident they understand these duties and responsibilities. They have all volunteered to serve as class representatives. They each have, without any expectation of compensation, donated several hours for the benefit of the putative class, despite the burden of responding to several written discovery requests.
- 9. In addition to my services, the plaintiffs have retained a certified appellate specialist, Richard H. Benes. I have worked on cases with Mr. Benes for almost 20 years.

  Attached at Exhibit 1 is a true and correct copy of Mr. Benes' curriculum vitae.
- 10. Among the other cases listed in paragraphs 3 and 4, *ante*, Mr. Benes assisted me with the cases set forth in paragraphs 3(b), 3 (g), 3(j), 3(l), 3(m), 3(n), 3(o), 3(q), 3(r), 3(s), 3(t), 3(u) and 3(v).
- 11. I have met on several occasions with the putative class members of Sub-classes A, B, and C. None has expressed an interest in controlling his or her case personally. Based on communications with these three groups (*Baidya* [general members], *Lancaster* [Airport Authority members], and *Lenhart* [safety members]) if the case is not certified, I would estimate another 700 individual cases will be filed (*Baidya* 500; *Lenhart* 160; *Lancaster* 40).
  - 12. The City expressly waived the attorney-client privilege regarding its closed

session memoranda attached as Exhibits 12 and 14 to the Notice of Lodgment of Documents in Support of Motion to Certify Class Action ("NOL").

- On November 16, 2007, SDCERS publicly promised a full explanation for its decision to restart the statute of limitations for the City's second PSC lawsuit, but it has never provided that explanation. (NOL, Exh. 19 ["[t]he Board will issue a report at a future date documenting the process and reasoning that it employed in reaching its decision"].)
- 14. Although the Government Claims Act does not apply to the claims made in the *Baidya, Lancaster*, or *Lenhart* complaints (Gov. Code, § 905, subds. (c), (f)), all of the plaintiffs in those cases nevertheless made timely claims, on behalf of themselves and all others similarly situated. Those claims were rejected by SDCERS.
- 15. The named plaintiffs' interest in the litigation is not antagonistic to the class and they have no disabling conflict of interest that might hinder the prosecution of the action on behalf of the class. Originally, the three cases I filed were filed (*Baidya* [general members], *Lancaster* [Airport Authority members], and *Lenhart* [safety members]) separately because the Airport Authority plaintiffs and the safety plaintiffs each had one claim which was different than the general members. However, the court granted demurrers to the unique claims in these cases and now all three cases only have remaining claims in common.
- 16. Each of the documents attached to the accompanying Notice of Lodgment in Support of Plaintiffs' Motion for Class Certification and Request for Judicial Notice in Support of Plaintiffs' Motion for Class Certification are true and correct copies of what they purport to be.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 24th day of January, 2013, at Rancho Santa Fe, California.



# EXHIBIT 1

Certified Specialist Appellate law The State bar of California Board of Legal Specialization

# ATTORNEY AT LAW 716 CORDOVA STREET SAN DIEGO, CALIFORNIA 92107-4220

TELEPHONE (619) 223-7700 FACSIMILE (619) 223-7746 E-MAIL IDENES@COX.RET

#### CURRICULUM VITAE OF RICHARD H. BENES

### 1. Education:

School	Years Attended	<u>Degree</u>
Yale University	1965-1969	B.A.
University of Southern California	1972-1976	J.D.

Executive Editor of Publication, Southern California Law Review, 1974-1975

#### 2. Admission to Law Practice:

Jurisdiction	Date
California	1976
United States Supreme Court	1981
United States Tax Court	1982
United States Court of Appeals for the Ninth Circuit	1980
United States District Court for the Southern District of California	1976

### 3. Specialization:

Certified Specialist, Appellate Law, The State Bar of California Board of Legal Specialization (since May 17, 1996)

#### 4. Martindale-Hubbell Rating: AV

### 5. Legal Employment:

Employer/Address

Dates of Employment

a. Summer Associate

Summer, 1974

O'Melveny & Myers 400 South Hope Street Los Angeles, California 90071

b. Summer Associate

Summer, 1975

Keatinge, Bates & Pastor Los Angeles, California

c. Extern Law Clerk to Associate Justice Stanley Mosk August, 1975 - January, 1976

California Supreme Court 350 McAllister Street San Francisco, California 94102

d. Senior Research Attorney and Writs Attorney March, 1976 - June, 1978

Court of Appeal of the State of California, Fourth Appellate District, Division One 750 B Street, Suite 300 San Diego, California 92101

e. Associate and Partner

July 1, 1978 - January 15, 1984

Procopio, Cory, Hargreaves & Savitch 530 B Street, Suite 1900 San Diego, California 92101

f. Partner and President

January 16, 1984 -September 30, 1990

Benes & Fiorello, A P.C. 401 West A Street, Suite 1300 San Diego, California 92101

### Employer/Address

### Dates of Employment

### g. Sole Proprietor

October 1, 1990 - Present

Richard H. Benes, Attorney at Law 716 Cordova Street San Diego, California 92107-4220

### 6. Appellate Law Activities:

a. Past and present appellate law-related activities and publications:

2000-2001	Co-Editor, California Appellate Practice Handbook (7th ed.), published by the San Diego County Bar Association
1995-1999	Appointed Member, Committee on Appellate Courts, State Bar of California (Chair, 1998-1999; Vice Chair, 1997-1998)
1995	Panelist for San Diego County Bar Association Appellate Practice Seminar
1995	Presenter of Program on "Thinking Appeal During Trial" to the Litigation Section of the Bar Association for Northern San Diego County
1993	Panelist for San Diego County Bar Association Program on the Nuts and Bolts of Civil Appellate Practice
1992	Moderator for San Diego Legion Lex American Inn of Court Program on The Appellate ProcessFrom the Perspective of Appellate Court Justices
1992	Panelist for Continuing Education of the Bar Seminar on Handling Civil Appeals
1991-1992	Appointed Member, Delay Reduction Committee, Court of Appeal, Fourth Appellate District, Division One
1991	Chair, Civil Rules Subcommittee, Appellate Court Committee, San Diego County Bar Association
1987	Panelist for Continuing Education of the Bar Seminar on Handling Civil Appeals

1985	Co-author of syllabus for seminar presented by the Appellate Court Committee of the San Diego County Bar Association <u>California Appellate Practice</u>
1985	Coordinated Support for Proposition 32 in San Diego
1983	Chair, Appellate Court Committee, San Diego County Bar Association
1980	Panelist and co-author of syllabus for San Diego Trial Lawyers Association seminar Appellate Practice: How To Handle Appeals & Writs in the Appellate Courts

### 7. Non-Appellate Law Activities:

	•
1992- Present	Charter Member, William L. Todd, Jr. American Inn of Court (Executive Committee, 1997-2001)
2005-2007	Member of the Board of Trustees, Institute for Criminal Defense Advocacy [sponsor of the California Innocence Project] (Treasurer/Secretary, 2005-2006)
1994-2007	Director of Appellate Defenders, Inc. and Federal Defenders of San Diego, Inc. (President, 1999-2001; Vice President, 1997-1998; Secretary, 1996-1997; Treasurer, 1995-1996)
2000-2005	Member, Sunset Cliffs Natural Park Recreation Council
1990-1996	Member of the Board of Directors, Legion Lex (San Diego Chapter)
1985-1992	Appointed Member, Lawyer Referral and Information Service Committee, San Diego County Bar Association
1984-1992	Member, San Diego Trial Lawyers Association
1987-1991	Member of the Board of Visitors, University of San Diego School of Law
1983-1991	Member, American Judicature Society
1984-1990	Director, San Diego County Bar Foundation

1983-1990	Member, San Diego County Bar Association Delegation, Conference of Delegates
1986-1988	Member of the Advisory Board, The San Diego Law Center
1986	Vice President and Director, San Diego County Bar Association
1985	Treasurer and Director, San Diego County Bar Association
1984	Judge Pro Tempore, San Diego County Superior Court
1984	Director, San Diego County Bar Association
1983-1984	Vice-Chair, State Bar Committee on Mandatory Fee Arbitration
1981-1982	Chair, Arbitration Committee, San Diego County Bar Association
1989- Present	Arbitrator, American Arbitration Association
1978- Present	Member, Lawyers Club of San Diego
1976- Present	Member, San Diego County Bar Association
1976-2006	Member, American Bar Association

## 8. Published Appellate Cases Handled as Lead Counsel:

Case Name	Number	Court	Date	Citation
a. Wood v. City of San Diego	10-56826	9th Cir.	05/09/12	678 F.3d 1075
b. Cahill v. San Diego Gas & Electric Co.	D057024	CA(4/1)	04/27/11	194 Cal.App.4th 939
c. Wherry v. Award, Inc.	G042404	CA(4/3)	02/09/11	192 Cal.App.4th 1242
d. McGuigan v. City of San Diego	D055199	CA(4/1)	04/06/10	183 Cal.App.4th 610
e. Townsend v. Townsend	D052325	CA(4/1)	02/23/09	171 Cal.App.4th 389

Case Name	Number	Court	<u>Date</u>	Citation
f. Crawford, et al. v. Weather Shield Mfg. Co.	S141541	California Supreme Court	07/21/08	44 Cal.4th 541
g. San Diego County Employees Retirement Assn. v. County of San Diego	D048038	CA(4/1)	06/07/07	151 Cal.App.4th 1163
h. Bonner v. County of San Diego	D045238	CA(4/1)	05/26/06	139 Cal.App.4th 1336
i. Bandt v. Board of Retirement	D044999	CA(4/1)	01/30/06	136 Cal.App.4th 140
j. Emerald Bay				
Community Assn. v. Golden Eagle Ins. Corp.	G032597	CA(4/3)	06/29/05	130 Cal.App.4th 1078
k. Caira v. Offner	D042481	CA(4/1)	01/26/05	126 Cal.App.4th 12
1. In re Estate of Stoddart	D041026	CA(4/1)	02/19/04	115 Cal.App.4th 1118
m. Stephens v. Superior Court	D038328	CA(4/1)	02/08/02	96 Cal.App.4th 54
n. Williamson, et al. v. General Dynamics Corp.	98-55783	9th Cir.	04/12/00	208 F.3d 1144
o. Tinseltown Video, Inc., et al. v. Transportation Insurance Co.	D024037	CA(4/1)	01/30/98	61 Cal.App.4th 184
p. Bay Summit Community Assn. v. Shell Oil Co.	D018345	CA(4/1)	12/16/96	51 Cal.App.4th 762
q. Wilson v. Gentile	B057235	CA(2/7)	08/04/92	8 Cal.App.4th 759
т. Holliday v. Jones	D006879	CA(4/1)	09/28/89	215 Cal.App.3d 102

# RICHARD H. BENES ATTORNEY AT LAW

Case Name	Number	Court	<u>Date</u>	<u>Citation</u>
s. Security Pacific National Bank v. Williams	D004365	CA(4/1)	08/31/89	213 Cal.App.3d 927 (decertified)
t. Yarbrough v. Superior Court (amicus curiae brief)	S.F. 24698	California Supreme Court	07/29/85	39 Cal.3d 197
u. I.E. Associates v. Safeco Title Insurance Co.	4 Civ. 31042	CA(4/1)	07/02/84	158 Cal.App.3d 52
v. E.S. Bills, dba Sanesco v. Tzucanow	4 Civ. 26757	CA(4/1)	08/30/83	147 Cal.App.3d 1194
w. Moran v. Harris	4 Civ. 22798	CA(4/1)	04/20/82	131 Cal.App.3d 913
x. United Nuclear Corp. v. Superior Court	4 Civ. 24286	CA(4/1)	12/16/80	113 Cal.App.3d 359
y. New Linen Supply v. Eastern Environmental Controls, Inc., et al.	4 Civ. 18628 4 Civ. 18630	CA(4/1)	09/11/79	96 Cal.App.3d 810
9. Professional Awards:		•	•	
a. May 1, 1987	Annual Award for Outstanding Service to the San Diego County Bar Association			
b. April 5, 1983	Award in Recog	o Bar Associa		ces as the Chairman on Committee

### 10. Expert Witness Experience:

2003 Reis, et al. v. Kolodny & Pressman, et al.;
American Arbitration Association Case No. 71 194 1126 02 SACO
Appellate malpractice

for 1981 and 1982

1997	Shega v. Southern California Physicians Insurance Exchange; San Diego County Superior Court Case No. 666735 Appellate malpractice
1996	Short v. Scuba; San Diego County Superior Court Case No. 685645 Legal malpractice
1994	Rouse v. Kershek, et al.; San Diego County Superior Court Case No. 674195 Appellate malpractice
1993	Hammond v. Ravin, et al.; San Diego County Superior Court Case No. 655111; Appellate malpractice
1992	Keiser v. Cannon, et al.; San Diego County Superior Court Case No. 646207; Appellate malpractice
1992	Hughes v. Backes, Friesen & Wolf, San Diego County Superior Court Case No. 649135; Appellate malpractice
1984	Voss & Cook v. Mahfouz; United States District Court for the Southern District of California Case No. 84-0537-JLI(CM) Court-appointed expert witness on the subject of attorneys' fees in appellate representation