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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SAN DIEGO POLICE OFFICERS ASSOCIATION, Plaintiff, v. JACKSON, DeMARCO, TIDUS & PECKENPAUGH, A LAW CORPORATION, GREGORY GLENN PETERSEN, an individual, MOHAMED ALIM AHMAD MALIK, an individual, and DOES 1-50, Defendants.	CASE NO: 37-2010-00088794-CU-PN-CTL PLAINTIFF SAN DIEGO POLICE OFFICERS ASSOCIATION'S RESPONSE TO DEFENDANT JACKSON, DEMARCO, TIDUS & PECKENPAUGH'S SPECIAL INTERROGATORIES [SET NO. ONE] Judge: Hon. Ronald S. Prager Dept: C-71 Complaint Filed: March 29, 2010 Trial: February 10, 2011

PROPOUNDING PARTY: **JACKSON, DeMARCO, TIDUS & PECKENPAUGH**

RESPONDING PARTY: **SAN DIEGO POLICE OFFICERS ASSOCIATION**

SET NUMBER: **ONE**

PRELIMINARY STATEMENT

These responses are made solely for the purpose of, and in relation to, this action. Each answer is given subject to all appropriate objections (including but not limited to objections concerning competency, relevancy, materiality, propriety and admissibility) which would require the exclusion of any statement contained herein if the Interrogatory were asked of, or any statement contained herein were made by, a witness present and testifying in Court. All such

objections and grounds therefore are reserved and may be interposed at the time of trial.

The party on whose behalf the answers are given has not yet completed investigation of the facts relating to this action, has not yet completed discovery in this action, and has not yet completed preparation for trial. Consequently, the following answers are given without prejudice to the answering party's right to produce, at the time of trial, subsequently discovered evidence relating to the proof of facts subsequently discovered to be material.

Except for facts explicitly admitted herein, no admission of any nature whatsoever is to be implied or inferred. The fact that any Interrogatory herein has been answered should not be taken as an admission, or a concession of the existence, of any facts set forth or assumed by such Interrogatory, or that such answer constitutes evidence of any fact thus set forth or assumed. All answers must be construed as given on the basis of present recollection. Any Interrogatory deemed as continuing is objected to as oppressive, over burdensome, improper and not in compliance with Code of Civil Procedure Section 2030, et seq., and will not be regarded as continuing in nature.

Many of the interrogatories ask: "please state all facts that *relate* to a fact," or words to that effect. Responding party objects to each of these requests as vague and ambiguous as phrased. Typically, the interrogatory refers to an allegation of the complaint which is itself a statement of fact. Without waiving these objection and his right to seek clarification, the responding party will treat the word "relate" to mean "support" in order to facilitate the exchange of information and provide discovery and provide responses accordingly.

Rather than repeating this objection for each such interrogatory response, responding party incorporates these general objections for each response below.

RESPONSES TO SPECIAL INTERROGATORIES

SPECIAL INTERROGATORY NO. 1:

IDENTIFY all litigation matters in which JACKSON DEMARCO breached a duty to YOU, as alleged in paragraphs 9-11 of the COMPLAINT.

[For the purposes of these interrogatories, the term 'IDENTIFY" shall include the date, nature, and entire contents of the subject matter described in the request in which the term appears;

"JACKSON DEMARCO" shall mean defendant Jackson, DeMarco, Tidus & Peckenpaugh, a Law Corporation, and any of its share holders, employees and/or agents, including Mohamed Alim Ahmad Mali; "YOU', "YOUR", and "YOURSELF" shall mean plaintiff San Diego Police Officers Association, and anyone working at the request or direction of the San Diego Police Officers Association, including any employee, attorney, or agent of the San Diego Police Officers Association; COMPLAINT shall refer to the complaint Plaintiff filed against Jackson, DeMarco, Tidus & Peckenpaugh on or about March 29, 2010 in Superior Court for San Diego County Case No. 37-2010-00088794-CU-PN-CTL.]

RESPONSE SPECIAL TO INTERROGATORY NO. 1:

SDPOA, on behalf of itself and on behalf of all of its members v. Aguirre, et al., United States District Court for the Southern District of California, Case No. 05-cv-1581 (and related appeals); *McGuigan v. City of San Diego*, San Diego Superior Court Case No. GIC 849883(and related appeals); and *SDPOA v. Aguirre, et al.*, San Diego Superior Court Case No. 37-2007-00075432-CU-MC-CTL.

SPECIAL INTERROGATORY NO. 2:

State all FACTS that RELATE TO YOUR allegation in paragraph 11 of the COMPLAINT that JACKSON DEMARCO "breached their duty" to YOU.

[For purposes of these interrogatories, "FACT' or "FACTS" means and refers to all circumstances, events, and evidence pertaining to, relating to, or touching upon the item in question, including the date of each respective event, who participated in each event, and the substance of each event; "RELATE TO" and "RELATES TO' shall apply to anything that discusses, mentions, describes, refers to, related to , or in any other way deals with the subject matter described in the request in which the term appears.]

RESPONSE SPECIAL TO INTERROGATORY NO. 2:

1. *2005 Labor Negotiations*

Pursuant to the Meyers-Milias-Brown Act (Gov. Code, § 3500, et seq., "MMBA"), the SDPOA is the recognized bargaining agent for its members with the City of San Diego ("the City"). Thus, the SDPOA meets periodically, typically every one or two

years, with labor negotiators for the City to "meet and confer" and arrive at a labor contract. These labor contracts are called "memoranda of understanding," or "MOUs," and they usually run for one to two fiscal years.

Long-time labor attorney Richard H. Castle served as the contract negotiator for the SDPOA from 1976 through 1982, and 1992 through 2009. Historically—in part because an endorsement from the SDPOA was politically important to would-be Mayors and Councilpersons—the union did well at the bargaining table, obtaining contract terms that were often the envy of other, less influential, City labor unions. However, in 2005, in an era of a particularly tight City budget, and in the beginning of the Robespierre-like reign of a new City Attorney, Michael J. Aguirre, the City and the SDPOA were unable to agree to contract terms. Therefore, in June 2005, as authorized by the MMBA, the City imposed contract terms on the SDPOA. Those terms included a decrease in the amount of *employee* pension contributions the City had previously paid on behalf of members,[1] a matching decrease in the salaries of employees in the deferred retirement option plan ("DROP"),[2] and the imposition of additional eligibility requirements for health insurance for employees after retirement ("retiree health").

Mr. Castle, dissatisfied that the City would impose "cutbacks" on SDPOA members, recommended that the SDPOA consult with Greg Petersen, with whom Mr.

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[1] San Diego City Charter section 143 requires the City and employees to make "substantially equal" contributions to fund employee pensions. Historically, the SDPOA had been able to negotiate contracts with the City in which the City paid, or "picked up," most of SDPOA members' required *employee* contributions. Current City Attorney Jan Goldsmith has opined that the City's past practice of paying employee contributions on behalf of employees violates the "substantially equal" clause of Charter section 143.

[2] The City's DROP program, adopted in 1997, allows an employee, otherwise qualified to retire and begin drawing a pension, to enter DROP and continue working for up to five years. During that period, however, the employer no longer earns additional years of retirement service credit, and no further pension contributions are made either by the City or by the DROP participant. During the DROP period, a monthly pension is paid to the employee and placed in an interest-bearing DROP account. The DROP program allows the City to retain experienced workers for a longer period at a lower cost (because no retirement contributions are made during the DROP period), and allows an employee to create a sometimes substantial savings account while continuing to work and earn an income sufficient to pay household bills.

Castle had formed a partnership in 2005. On June 3, 2005, the SDPOA entered into a "Legal Services Agreement" with Castle, Petersen & Krause, LLP ("CPK"). That agreement limited the "services to be provided . . . [to] initial evaluation, legal analysis and opinion regarding the City's declared intention, following negotiations, to reduce the City's 'pick up' of retirement contributions made by employees represented by the SDPOA . . . ." Notably, litigation was among the legal services specifically excluded "unless otherwise authorized by the client and agreed to by [CPK]." For such litigation, the agreement stated that "a separate written agreement between Attorney and Client will be required." The SDPOA agreed to pay an initial sum of $25,000.00 for the preliminary review and analysis of issues to be pursued.

2. *SDPOA v. Aguirre, et al.*

Without providing the SDPOA with any written evaluation or analysis, Mr. Petersen convinced the SDPOA to authorize litigation against the City, the City Attorney, numerous council members, and numerous City staffers. CPK also named the San Diego City Employees' Retirement System ("SDCERS"), even though it had absolutely no role in the 2005 SDPOA labor negotiations. The lawsuit was filed in federal court on August 9, 2005 and assigned to The Honorable Marilyn Huff. The complaint stated claims for violations of the First Amendment, violation of public policy, four section 1983 claims, breach of contract, conversion, fraud, violation of the MMBA, breach of fiduciary duty, breach of trust, conversion of trust, and declaratory relief.

As part of CPK's strategy to engender SDPOA member support, Mr. Petersen falsely inflated claims of success he had in previous litigation. As JDTP has acknowledged, Mr. Petersen "claimed he would . . . recover over $100 million in damages." Mr. Petersen held a large evangelical-style rally of SDPOA members at the Scottish Rite meeting hall in which he also told SDPOA members he "would recover far more in litigation that the SDPOA could ever achieve at the bargaining table," and that at the conclusion of the case, every SDPOA member would have a new Ford F-350 pickup truck parked at their house." Later, he told SDPOA members that they would soon own

Balboa Park.

The *SDPOA v. Aguirre* litigation was as expensive as it was unsuccessful. The SDPOA paid JDTP (and its predecessor CPK) over $2.6 million in attorney fees. Individual SDPOA members paid approximately $2 million more. JDTP took videotaped depositions of more than 45 witnesses, including all City council defendants, and used hardly any of them.

As the case proceeded, in the words of Reg Vitek, whose firm represented SDCERS, the SDPOA suffered "serial losses on the merits." Mr. Vitek engaged in no hyperbole. Despite Mr. Petersen's assurances, JDTP (and it predecessor CPK), lost every motion, including two motions to dismiss, an application for preliminary injunction, motions for summary judgment, and an appeal. Beginning on November 1, 2005, the Court dismissed several of the SDPOA's claims and ordered amendment on the remaining claims. Yet after each loss, in order to protect its income from the litigation, JDTP would falsely tout a loss as a victory. As the Ninth Circuit Court of Appeal would later write in handing JDTP its final loss on June 10, 2009: "[The SDPOA] seeks to emulate the alchemists in the Middle Ages in its effort to transmute the base metal of its *total loss on the merits* into the gold of 'prevailing party' status by asserting that the district court's order materially altered its relationship with Appellees.

During the pendency of the litigation, SDCERS made several settlement offers to the SDPOA, through its counsel, JDTP (and its predecessor CPK). These settlement offers, in which SDCERS offered to waive its costs (and its right to later file a malicious prosecution case) in exchange for a dismissal, were never forwarded to the SDPOA. As we will explain at the meditation, the SDPOA has since been subject to claims for malicious prosecution and has incurred expenses in attempting to stave off such a filing.

In May and June 2007, summary judgment was granted against the SDPOA on the remaining federal claims in its third amended complaint. Near the end of the litigation, in a desperate attempt to manufacture a viable theory, JDTP added a claim that the City's modification of eligibility requirements for retiree health was unconstitutional.

However, JDTP, which had no authority to pursue such a claim either on behalf of the SDPOA or individual members, was not prepared to present such a theory, as Judge Huff ruled in dismissing that claim. Indeed, *JDTP devoted only nine lines* in its opposition brief to this portentous issue.

"In the TAC, [the SDPOA] allege[d] that the City's imposition of the LBFO improperly adjusted eligibility qualifications for retiree health benefits for current employees in violation of its constitutional rights. (See, e.g., TAC ¶ 33.)" (Order dated May 18, 2007, p. 40:14-14.) In ruling against the SDPOA, Judge Huff stated: "[The SDPOA] alleges *without citation to authority* that retiree health was offered at employment and therefore vested immediately." (*Id*., p. 40:16-17.) Relying entirely on cases cited by the City, the Court stated: "[h]ere, [the SDPOA] has not directed the Court to any authority standing for the proposition that retiree health benefits are vested rights subject to constitutional protection under either the Contracts or Takings Clause." (*Id*., p. 41: 4-6.) "Accordingly, given the absence of authority to the contrary, Plaintiff's Second and Third Claims under the Contracts and Takings Clauses premised on the modification of retiree health benefits fail." (*Id*., at p. 41:6-8.) "In total, Plaintiff has not created an issue of triable fact as to whether the imposition of the LBFO and associated takeaways affected constitutionally protected benefits. Because the evidence and argument submitted by the parties demonstrate that none of the takeaways affected protected pension benefits, but instead affected employment rights, these claims fail." (*Id*., at p. 41:9-15.)

3. *Aaron, et al. v. Aguirre, et al.*

In one of its first losses in *SDPOA v. Aguirre*, the Court ruled that the SDPOA did not have standing to pursue damages for certain claims, such as section 1983 claims for violation of civil rights. Therefore, on August 1, 2006, JDTP (and its predecessor CPK), filed another lawsuit, totaling 1,427 pages, on behalf of approximately 1,600 individual police officers. That lawsuit was also completely unsuccessful. On September 3, 2008, the Court granted summary judgment against all of JDTP's clients, dismissed their state

claims without prejudice, and awarded costs to the defendants.

4. *McGuigan v. City of San Diego*

This litigation arose out of the underfunding of the City of San Diego's employee pension plan. McGuigan filed a representative declaratory relief action on June 28, 2005, on behalf of all beneficiaries of SDCERS. McGuigan alleged that from 1996 through 2005, the City paid less in employer contributions to SDCERS than the actuarially-determined amount that was required to be paid under the San Diego City Charter and Municipal Code. McGuigan sought: (1) judicial determinations that (a) the City had violated City Charter section 143 and former San Diego Municipal Code section 24.0801 and (b) the City's contribution shortfall rendered SDCERS actuarially unsound; and (2) "a peremptory writ of mandate directing the City to immediately pay to SDCERS the aggregate amount of the City's shortfall in employer contributions, as determined by the actuarial valuations for every fiscal year ending June 30, 1997 to June 30, 2005, with interest."

With McGuigan's motion for summary judgment and a motion for issue preclusion or terminating sanctions pending, the parties attended a mediation session with retired United States District Court Judge Lawrence Irving on June 8, 2006, reached a tentative settlement, and executed a term sheet. Pursuant to the tentative settlement, the City agreed to pay SDCERS a special additional employer contribution of $173 million ($15 million more than the highest calculation of underfunding, with interest), but only if the case could be successfully converted into a non-opt out class action and releases obtained from all SDCERS' beneficiaries for the claims McGuigan had asserted and prosecuted.

After learning of the proposed settlement of *McGuigan*, CPK sought to derail the settlement, hijack *McGuigan*'s claims, and assert them in *SDPOA v. Aguirre* and *Aaron*. This effort included both (1) unsuccessfully seeking a temporary restraining order from United States District Court Judge Marilyn Huff to stay all proceedings in *McGuigan*, and (2) interposing objections to the proposed settlement before Judge Strauss in *McGuigan*. Among the tactics used by CPK were to falsely inform SDPOA members that

McGuigan's counsel was sending out $1 checks to SDPOA members with hidden release language in them, and requesting SDPOA members to each call McGuigan's counsel's office and ask a lengthy list of questions prepared by CPK.[3] CPK's extensive and completely unsuccessful efforts in *McGuigan* were billed to the SDPOA without a written fee agreement.

Judge Strauss held numerous hearings regarding the proposed settlement. At a hearing on November 29, 2006, Mr. Petersen, on behalf of the 1,600 SDPOA member-objectors he represented, informed the trial court that he thought any remaining objections could be resolved and suggested a continuance of the fairness hearing to December 12, 2006, a date convenient to Mr. Petersen.

Then, after verbally communicating to counsel in *McGuigan* that all remaining issues were resolved, neither Mr. Petersen, nor any CPK attorney, appeared for the continued December 12, 2006 fairness hearing.[4] Judge Strauss proceeded with the fairness hearing and approved the proposed settlement after determining that the value of the claims being released by the class was "between $140 million and $158.9 million [and the] consideration the City has agreed to pay SDCERS on behalf of the class—$173 million—is more than fair, adequate and reasonable."

Two days after failing to appear at the December 12, 2006 fairness hearing, CPK posted a message on the SDPOA's web site proclaiming that:

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[3] CPK, which represented approximately 1,600 SDPOA members individually, simultaneously refused to grant McGuigan's counsel permission to speak to those members pursuant to rule 2-100(A) of the Rules of Professional Conduct, or to provide SDPOA members written answers to all of the questions posed by CPK provided to CPK.

[4] JDTP attorney Christopher Nissen would later falsely declare in the Court of Appeal that he did not appear because he was stuck in traffic. However, Mr. Nissen told Jeff Jordon, a member of the SDPOA Board, that he never attempted to attend the hearing because Mr. Petersen asked him to cover it at the last minute the morning of the hearing and Mr. Nissen could not make it to San Diego from Orange County in time. The SDPOA possesses substantial evidence of JDTP misrepresentations to judicial officers during its representation of the SDPOA. Because JDTP failed to inform the SDPOA of its actions and statements, it only learned of these misrepresentations recently.

> "The settlement entered yesterday [sic] in *McGuigan* does the following which *actually helps the SDPOA and its Members*: (1) its [sic] incorporates word-for-word, almost two-pages [sic] of written changes proposed directly by SDPOA lawyers, which changes preserved the Federal Lawsuits SDPOA and its Members are currently pursuing, and (2) it prevented the City from releasing over $3.5 billion in additional under funding and related claims that were not raised in the *McGuigan* lawsuit."

On February 9, 2007, CPK —as counsel for the unsuccessful objectors—sought more than $340,000 in attorney fees and costs. In that motion, CPK argued that "[s]uccessful litigants are entitled to attorney fees under [Code of Civil Procedure section] 1021.5."

That same day, despite (1) informing class counsel on December 6, 2006, that the proposed judgment was acceptable, (2) failing to submit objections to the proposed judgment by December 8, 2006, (3) failing to appear at the December 12, 2006 fairness hearing, (4) conceding that the judgment "actually helps" the Objectors, and (5) seeking more than $340,000 in fees and costs as "successful litigants" who had "realized [their] litigation objectives," CPK filed an appeal on behalf the 1,600 SDPOA member-objectors it represented. After extensive briefing, the appeal was completely unsuccessful.

5. *CPK and JDTP Merger*

In early 2007, JDTP acquired CPK and the firms merged. According to a declaration filed by Mr. Petersen on May 29, 2008, in another case, during the early part of 2007, he decided to diversify CPK by seeking to acquire another firm that was "fee based." His search led him to meet with JDTP's president, Ruth Mijuskovic, to discuss the possibility of her firm representing CPK in such an acquisition. Ms. Mijuskovic suggested that the two firms merge, and Mr. Petersen, who owned an 80 percent interest in CPK, agreed.

Mr. Petersen, CPK's majority shareholder, became a named partner of the newly-named firm, "Jackson, DeMarco, Tidus, *Petersen* & Peckenpaugh." In several courts, the firm simply filed a "Notice of Change of Firm Name." The SDPOA was told that "[t]he added strength of the new firm will provide great benefits to you and your lawsuit." "You will have the attorneys and staff of both firms now working on your case."

In the *SDPOA* case (United States District Court, Southern District of California, Case No. 05cv1581-H), Mr. Petersen began the May 1, 2007 hearing by announcing the new name of his law firm as Jackson, DeMarco, Tidus, *Petersen* and Peckenpaugh.

Jackson, DeMarco, Tidus, *Petersen* & Peckenpaugh filed several "Notice of Change of Firm Name and Address." In each, JDTP represented to the Court that "Castle, Petersen & Krouse LLP, has *changed its name* to Jackson DeMarco Tidus Petersen & Peckenpaugh." (Italics added.) This evidence supports both of our theories of merger or de facto partnership, which renders JDTP liable for all CPK acts even prior to May 1, 2007. (See Evid. Code, § 623 ["[w]henever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it"].) Of course, given the negligence of JDTP and its employees at the critical time period after May 1, 2007 and before May 18, 2007 (for failing to request a dismissal without prejudice despite knowing insufficient evidence had been presented to survive summary judgment), establishing merger or de facto partnership is academic. JDTP was on duty when the most critical error occurred.

In March 2008, after JDTP learned that Mr. Petersen had grossly misrepresented himself and his successes, JDTP terminated him. JDTP dropped Mr. Petersen from its firm name. Within one year, JDTP also terminated all former CPK attorneys.

After Mr. Petersen was terminated, nasty contested disputes arose throughout Southern California courts in which JDTP and Mr. Petersen fought over clients. Although JDTP had no fee agreements in any of the cases,[5] it successfully took the position—contested by Mr. Petersen—that it was the rightful attorney of record because it had acquired CPK and merged with it. Petersen filed a declaration acknowledging JDTP characterized its acquisition of CPK as a "merger."

6. *Appeal of SDPOA v. Aguirre, et al.*

[5] On March 19, 2008, JDTP proposed a legal representation agreement to the SDPOA. However, the SDPOA never agreed to or signed it.

Without providing any analysis or explaining the costs or benefits of an appeal, JDTP proceeded with an appeal of Judge Huff's grant of summary judgment in *SDPOA v. Aguirre*. That appeal was a complete loss. Significantly, based on the poor record and argument presented by JDTP, the Ninth Circuit, in a published opinion, found that retiree health benefits "were not protectible contract rights."

Since that ruling, the City has begun aggressive cuts to retiree health as it attempted to balance its budget and remove itself from potentially crushing $1.2 billion in unfunded liability for such a benefit. On July 27, 2009, less than two months after the Ninth Circuit's ruling, the City imposed a cap on the annual amount paid for retiree health care, a cap which has cost SDPOA members approximately $36 million.

7. *Appeal of Aaron, et al. v. Aguirre, et al.*

Also without providing any analysis or explaining the costs or benefits of an appeal, JDTP proceeded with an appeal of Judge Huff's grant of summary judgment. However, after the SDPOA announced its intent to pursue a malpractice claim against JDTP, it has informed its numerous clients that "the appeal . . . will be a very significant uphill battle with a very low prospect of success . . . ."

8. *State Court Actions*

Again without obtaining client consent or providing any analysis, JDTP filed state court actions on behalf of the SDPOA and individual members. After hiring outside counsel to analyze the merits and chance of success of the state court action, the SDPOA has dismissed its claim. Most of the individual lawsuits remain, although several adverse rulings have already occurred and lawyers at JDTP have recommended that its remaining abandon those cases.

Liability

The elements of a cause of action in tort for professional negligence are "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual

loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200; Judicial Council of California, Civil Jury Instructions ["CACI"], No. 600.) Moreover, an attorney who holds himself out as a specialist, such as Mr. Petersen, has an even higher standard of care. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810.)

A cause of action for breach of fiduciary duty requires the existence of a fiduciary relationship, a breach of the duty created by that relationship, and damages proximately caused by the breach. (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101.) "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' [Citations.] Whether an attorney has breached a fiduciary duty to his or her client generally is a question of fact. [Citation.]" (*Stanley v. Richmond* (1995)) 35 Cal.App.4th 1070, 1086-1087.)

There exist, at a minimum, nine separate liability theories on which to pursue these claims, including the following:

1. *Maintaining Objectively Meritless and Costly Litigation*

JDTP recommended and maintained objectively meritless litigations on behalf of the SDPOA. As a result, the SDPOA has expended more than $1.6 million with absolutely nothing to show for it except a mortgage on its union headquarters. And the SDPOA has already been exposed to claims of malicious prosecution by SDCERS.

Here, no reasonable attorney—much less a specialist—would have pursued the meritless litigation claiming several civil rights violations for routine labor negotiation matters.

"[A]n attorney does have a counseling role. An attorney should advise a client of substantial deficiencies in the merits or in available defenses so that the client can decide whether and how to proceed." (4 Mallen & Smith, Legal Malpractice (2010 ed.) The Litigation Attorney ("Mallen"), § 31:26, pp. 583-584.) "This principle recognizes that the client should have the ultimate control over crucial decisions concerning the lawsuit."

(*Id*., p. 584.)

2. *Losing Retiree Health Even Though Not Authorized to Pursue Such Litigation*

JDTP was never authorized to raise, much less pursue, any retiree health care claim. Then, when that unauthorized claim was raised, it was presented negligently. This resulted in an adverse ruling—subject to both collateral estoppel and res judicata—that retiree health is not a vested benefit. As JDTP's own memos demonstrate, ample evidence to support that claim was never presented in court.

Further, JDTP never informed the SDPOA of the economic *benefits* and economic *risks* of litigating whether retiree health is a vested right. JDTP's prosecution of any claim regarding retiree health benefits was *unauthorized*. "An extreme situation is if the lawyer acted without authority. An attorney can be liable for an unauthorized prosecution or defense." (Mallen, *supra*, § 31.26, p. 584.) Had Jackson exercised due care, the SDPOA would not have prosecuted any claim raising the issue whether retiree health benefits are a vested right for several reasons, including (a) there was no actual controversy regarding that issue because the City Attorney's Office, after specific research and analysis, had advised the City that such rights *were* likely vested; (b) the economic *risks* of litigating the issue greatly outweighed the potential economic benefits of the unauthorized claim prosecuted by JDTP; and (c) the *costs* of litigating the issue outweighed the potential economic benefits of the unauthorized claim prosecuted by JDTP.

In response to the defendants' motion for summary judgment in *SDPOA, on behalf of itself and on behalf of all of its members v. Aguirre, et al.*, United States District Court for the Southern District of California, Case No. 05-cv-1581 (and related appeals), and *Aaron, et al. v. Aguirre, et al.*, United States District Court for the Southern District of California, Case No. 06-cv-1451 (and related appeals) the defendants should have presented the following information, evidence, and legal authority to the court:

In 1982, the City desired to withdraw from the Social Security System. In order to

successfully withdraw from the Social Security System, City employees were required to approve the withdrawal. In order to induce its employees to vote in favor of the City's withdrawal from the Social Security system, the City offered its employees lifetime retiree health insurance (the "Retiree Health Benefit").

In a memorandum dated November 20, 1981, from City Manager Ray T. Blair, Jr., the City promised both hospitalization and medical insurance: "Retired employees will be included in the City health plans. The City will pay the premiums." This memo is dated November 20, 1981, from then City Manager Ray T. Blair, Jr., to all City employees (including all SDPOA members). It discusses the City's proposal and upcoming employee election to remove employees from Social Security and Medicare in exchange for additional benefits to be provided by employees to the City. As the memo explains, in order to opt out of Social Security and Medicare, the City had to agree to provide "another pension plan to supplement your regular City retirement program."

At page 2, paragraph 3, of the memo, entitled "Entry Date," it states that all existing employees "will be enrolled in the Plan as of January 8, 1982." All future employees "will join the Plan immediately *on their date of employment*." (Italics added.) "Vesting" is covered at pages 3 and 4, paragraph 9 of the memo. The Plan provides that benefits were 100% vested after 5 years of service.

In the attachment to the memo, entitled "WHAT HAPPENS IF WE PULL OUT OF SOCIAL SECURITY," beginning at Bate-stamp # SDPOA 0399, the City provided questions and answers. "Following are the most common questions asked concerning how withdrawal from Social Security will affect City employees. The questions and answers are divided into five categories [including] . . . 4) Medicare Hospital Insurance [and] 5) Medicare Medical Insurance. Question # 22 (page SDPOA 0402) asked: "What will the City provide for hospital insurance?" The Answer: "The retired employees will be included in the City health plans. The City will pay for the retired employee's health insurance. These costs will <u>not</u> be paid out of the Supplemental Pension Plan." Question # 24 (page SDPOA 0403) asked: "What will the City provide for medical insurance?" The Answer: "Retired employees will be included in the City

health plans. The City will pay the premiums. The cost of the premiums will not come from the Supplemental Pension Plan." Relying on the City's promise, City employees approved the City's withdrawal from the Social Security system and are no longer part of that system.

On March 14, 2006, during "Sunshine Week," present City Mayor Jerry Sanders promulgated a "Fact Sheet," which stated: "In 1982, City employees voted to get out of the Social Security/Medicare systems. In exchange, they were promised life-time health insurance upon retirement."

"Resolution R-255610, adopted January 4, 1982, effective January 1, 1982, set the parameters of the [Retiree] Health Benefit ." (City Attorney Opinion No. 2007-04, p. 2.) "Certain benefits were 'provided to employees in lieu of Social Security participation.'" (*Ibid*.) "In addition, it was the City Council's intent 'to provide such coverage as a permanent benefit to eligible retirees.'" (*Ibid*.) "The City Manager was authorized to establish a City-sponsored Group Health Insurance Plan for eligible retirees, providing the same choice of program coverage as offered to active employees of the City." (*Ibid*.) "On June 1, 1982, Ordinance No. O-15758, codified the [Retiree] Health Benefit." (*Ibid*.) "In 1985 . . . Police and Fire Safety Members on the active payroll on or after June 30, 1985 were added." (*Id*., at p. 3; Ordinance No. O-16449.) The Retiree Health Benefit has always been codified among the City's retirement ordinances.

Charter section 143.1 provides, in relevant part: "No ordinance amending the retirement system which affects the benefits of any employee under such retirement system shall be adopted without the approval of a majority vote of the members of said system." In 1985, before Ordinance No. O-16649 became effective, "a vote of the retirement system membership [was conducted], as required by Charter section 143.1[.]" (Ordinance No. O-16449.) "[S]aid vote was conducted and the ballots tallied on June 3, 1985[,] with a vote of 2,885-yes, 904-no, and 12-void[.]" (*Ibid*.)

"On September 30, 1985, Ordinance No. O-16510 provided [that] . . . it was the City's responsibility to provide [funds to pay for the Retiree Health Benefit] from the General Fund . . . ." (City Attorney Opinion No. 2007-04, p. 3.) In 1986 the City adopted Ordinance No.

O-16679 as part of the settlement of a class action lawsuit (the *Andrews* class action), and made the Retiree Health Benefit retroactive to all police officers on active City payroll as of October 6, 1980. In 1986, pursuant to Charter section 143.1, before Ordinance No. O-16679 became effective, "the matter was submitted to a vote of the active members of the System and approved by a vote of 2,630-Yes as opposed to 213-No[.]" (Ordinance No. O-16679.)

In 1992, the Retiree Health Benefit was modified by Ordinance No. O-17770. Again, before the modifications became effective, "these changes were voted upon by all [affected] members pursuant to Charter section 143.1 with [the] vote counted and certified on April 13, 1992 . . . ." (Ordinance No. O-17770.) Since at least 1992, the Retiree Health Benefit has been codified at San Diego Municipal Code sections 24.1201 and 24.1202.

On or about March 31, 1997, the City Council adopted Ordinance No. O-18392, which modified the Retiree Health Benefit. Ordinance No. O-18392 contained a provision in which the City agreed "that the level of health benefits to be provided [to retirees] not be diminished" below comparable health plans offered to active employees. Before any such 1997 modifications to the Retiree Health Benefit became effective, the City conducted a Charter section 143.1 vote, which passed 3,181 yes votes and 88 no votes.

In 2002, the City again sought to modify the Retiree Health Benefit. The 2002 modification placed a fixed dollar amount of the Retiree Health Benefit based on the cost of the City-sponsored PPO plan being offered to retirees for the 2003 plan year, with an automatic annual increase in this amount, not to exceed ten percent (10%) per year, based on an independent, objective source—the Centers for Medicare and Medicaid Services, Office of the Actuary, which tracks projected increases in National Health Expenditures. Before any such 2002 modifications to the Retiree Health Benefit became effective, the City conducted a Charter section 143.1 vote, which passed 2,193 in favor and 35 against the proposed modifications.

[B]oth the federal and state contract clauses protect the vested pension rights of public officers and employees from unreasonable impairment." (*California Ass'n of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 383.) "While some jurisdictions view public employees' retirement rights as a gratuity, California is firmly committed to the

proposition that these rights are contractual; that they are 'vested' in the sense that the lawmakers' power to alter them after they have been earned is quite limited." (*Ibid*.) "By entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer." (*Ibid*.) "A long line of California decisions has settled the principles applicable to [this situation]. A public employee's pension constitutes an element of compensation, and *a vested contractual right to pension benefits accrues upon acceptance of employment*. Such pension right *may not be destroyed*, once vested, without impairing a contractual obligation of the employing public entity." (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863, italics added.)

Prior to retirement:

> "'[a]n employee's vested contractual pension rights may be modified . . . for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. [Citations.] Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, *and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.' "* (*Betts* at p. 864, italics in original; accord, *Maffei v. Sacramento County Employees Retirement System* (2002) 103 Cal.App.4th 993, 999-1000; *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1132-1133; *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 783-784.)

(See *Pasadena Police Officers Association v. City of Pasadena* (1983) 147 Cal.App.3d 695; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, and the authorities cited in each of these cases.)

On May 18, 2007, the District Court ruled against plaintiff in *San Diego Police Officers' Association v. Aguirre, et al.*, Case No. 05-cv-1581: "In the TAC, [the SDPOA] allege[d] that the City's imposition of the LBFO improperly adjusted eligibility qualifications for retiree health benefits for current employees in violation of its constitutional rights. (See, e.g., TAC ¶ 33.)" (Order, Doc. No. 737, filed May 18, 2007 in Case No. 05-cv-1581, p. 40:14-14.) In ruling against the SDPOA, Judge Huff stated: "[The SDPOA] alleges *without citation to authority* that retiree health was offered at employment and therefore vested immediately." (*Id.*, p. 40:16-17,

italics added.) Relying entirely on cases cited by the City, the Court stated: "[h]ere, [the SDPOA] has not directed the Court to any authority standing for the proposition that retiree health benefits are vested rights subject to constitutional protection under either the Contracts or Takings Clause." (*Id.*, p. 41: 4-6.) "Accordingly, given the absence of authority to the contrary, Plaintiff's Second and Third Claims under the Contracts and Takings Clauses premised on the modification of retiree health benefits fail." (*Id.*, at p. 41:6-8.) "In total, Plaintiff *has not created an issue of triable fact* as to whether the imposition of the LBFO and associated takeaways affected constitutionally protected benefits. Because the evidence and argument submitted by the parties demonstrate that none of the takeaways affected protected pension benefits, but instead affected employment rights, these claims fail." (*Id.*, at p. 41:9-15, italics added.)

In memoranda researched and written six months after suffering this adverse ruling, JDTP explained in detail the evidence and legal analysis which provided the support Judge Huff found was lacking. (Memo dated December 5, 2007 ["Retiree Healthcare Case Workup"], p. 23 [concluding retiree health vested]; Memo dated December 4, 2007, p. 3 ["vested right to retiree heath benefit"].) However, it was too late, because summary judgment had long since been granted.

Instead of providing the court with available evidence or legal citation *supporting* their clients' position regarding retiree health, the defendants instead submitted *adverse* evidence. *First*, the only evidence cited by defendants in opposition to the City's motion to summarily adjudicate the retiree health issue in the City's favor was the "City of San Diego and POA Labor Negotiations Minutes dated March 30, 2005." (Doc. No. 613, p. 19:27.) However, those minutes supported the City's position and not the SDPOA's position on the issue of whether retiree health benefits were vested. *Second*, defendants also lodged an additional non-supportive document indicating that retiree health was not vested. Astoundingly, the non-supportive material was highlighted *by defendants* for the Court. Specifically, Mr. Nissen filed the exhibit with a circle around the heading "Current Employees," the word "Bad," and an arrow pointing to

the adverse evidence. (See Doc. No. 704, p. 77;[6] RT, April 23, 2007, p. 66:6-19.)

Finally, defendants' appellants' reply brief, filed May 28, 2008, erroneously and without their clients' knowledge or consent, *conceded* "post-retirement health benefits is a term and condition of employment that may be renegotiated . . . ." (Appellant San Diego Police Officers' Association's Consolidated Reply Brief, United States Court of Appeals for the Ninth Circuit, Case No. 07-56004.)

In light of the defendants' negligence at the trial court, and their appellate concession, the United States Court of Appeals issued an adverse published opinion on June 10, 2009. (*San Diego Police Officers' Association v. San Diego City Employees' Retirement System* ("*SDPOA*") (2009) 568 F.2d 725.) In that opinion, the court cited *Thorning v. Hollister Sch. Dist.* (1992) 11 Cal.App.4th 1598, *Cal. League of City Employee Ass'ns v. Palos Verde Library Dist.* (1978), and *San Bernadino Pub. Employees Ass'n v. City of Fontana* (1998) 67 Cal.App.4th 1215 and explained that if retiree health benefits had been "expressly granted to [employees] by an official declaration of policy during [the employees'] term of public office," those retiree health benefits would be vested, "fundamental and could not be unilaterally terminated." (*SDPOA* at pp. 739-740.) However, if the employee benefit at issue were merely "provided for by MOUs between the city and its bargaining groups [the benefits] could not have become permanently and irrevocably vested as a matter of contract law, because the benefits were earned on a year-to-year basis under previous MOU's that expired under their own terms . . . ." (*SDPOA* at p. 740.) Thus, because the defendant lawyers failed to present evidence (e.g., the Ray Blair memo and numerous ordinances and Charter section 143.1 votes) establishing retiree health benefits had been expressly granted to employees by an multiple official declarations of policy during the employees' term of public office, those retiree health benefits would be vested and the City's July 2009 $142 million to $152 million reduction of the plaintiff class' Retiree Health Benefit would not have been permitted.

"It is well settled that an attorney is liable for malpractice when his negligent

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[6] The Federal Court's PACER filing system allows proof that the document was filed by Mr. Nissen with the adverse evidence highlighted for the Court.

investigation, advice, or conduct of the client's affairs results in the loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900.) Here, as JDTP later acknowledged, ample evidence existed—but was not presented—which would have led to a different result on the retiree health issue.

3. *Failing to Keep the SDPOA Apprised of Material Developments in Violation of Business and Professions Code section 6068*

Subdivision (m) of Business and Professions Code section 6068 provides:

> "It is the duty of an attorney to do all of the following: . . . (m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

JDTP failed to keep the SDPOA timely apprised of significant developments. Board members, several of whom will be present at the mediation, will explain how difficult it was to get status reports or analyses. For example, after the adverse Ninth Circuit opinion was announced on June 10, 2009, the SDPOA learned about it from the media. JDTP refused to respond to requests for several days. JDTP never informed its clients of significant cost awards against the SDPOA and individual plaintiffs in the *Aaron* case.

Had JDTP (and its predecessor firm CPK) kept the SDPOA timely apprised of significant developments, the SDPOA would have realized much sooner the lack of merit of the litigation and been able to contain its expense.

4. *Misrepresenting the Nature of Several Adverse Rulings*

On numerous occasions JDTP (and its predecessor CPK) falsely characterized the nature of adverse rulings. Even when summary judgment was granted against it, JDTP characterized the ruling as the Court "not[ing] that [the claims] raised important issues of state law and policy." When JDTP failed to appear at the fairness hearing in *McGuigan*, it falsely informed clients that had prevailed in gaining important limitations in the case. At the mediation, the five SDPOA board members present will provide additional evidence of false statements. Given the millions of dollars being paid to JDTP by the

SDPOA and its members, these false statements were designed to keep fees flowing to JDTP. The SDPOA believes punitive damages are likely to be awarded due to this egregious fraudulent conduct by a fiduciary, JDTP.

5. *Making Numerous Guarantees of Success Which Were Not Fulfilled Which Allowed the Firm to Continue to Bill and Collect Fees*

JDTP, including its former named partner Mr. Petersen, made numerous guarantees of success which were not fulfilled. These statements, at least one of which JDTP acknowledges was made, will supports both negligent and intentional misrepresentation claims.

6. *Failure To Obtain a Retention Agreement in Violation of Business and Professions Code Section 6148*

Business and Professions Code section 6148, subdivision (a), requires contracts for legal services which will exceed $1,000 to be in writing. JDTP never obtained an agreement with the SDPOA,[7] and is limited to only the reasonable value of the services it rendered (Bus. & Prof. Code, § 6148, subd. (c)), which is less than zero. The fees that were paid should be disgorged.

7. *Charging Unreasonable Fees in Violation of Rule 4-200*

Rule 4-200 of the Rules of Professional conduct prohibits charging a client an unconscionable fee. "Among the factors to be considered . . . are . . . (1) [t]he amount of the fee in proportion to the value of the services performed[;] . . . (5) the amount involved and the results obtained[; and] . . . (11) the informed consent of the client to the fee." Here, although the SDPOA paid more than $1.6 million to JDTP (and its predecessor CPK), substantial evidence will support a finding that the fee charged was unconscionable, particularly because JDTP lost literally every contested motion and the lied to its client about the outcome.

[7] The agreement with its predecessor firm, CPK, expressly excluded litigation.

8. *Failing to Communicate Several Settlement Offers in Violation of Rule 3-510(A)(2)*

Rule 3-510(A)(2) of the Rules of Professional Conduct required JDTP to communicate SDCERS' written settlement offers to the SDPOA. These settlement offers were never communicated to the SDPOA. If they had been communicated, the SDPOA board would have realized sooner that the litigation lacked merit and would have been able to avoid (1) additional expenditure of union assets, (2) exposure to malicious prosecution claims, and (3) an adverse judgment on numerous issues, including a published Ninth Circuit opinion holding that retiree health is not a vested benefit.

9. *Failing to Apprise the Client of Malpractice by Mr. Petersen During His Representation of the SDPOA*

Although JDTP roundly criticized Mr. Petersen after he departed JDTP, and charged that he had lied to clients, JDTP failed to apprise the SDPOA of Mr. Petersen's malpractice and the SDPOA's limited time to proceed against him individually for malpractice.

"The nature of an attorney's function is such that an attorney is the only professional who may have a duty to advise a client that a malpractice action against another professional may provide a solution to the client's problems." (*Lewis v. Purvin* (1989) 208 Cal.App.3d 1208, 1217.) Moreover, two of the "four circumstances in which nondisclosure or concealment may constitute actionable fraud" apply: "(1) . . . the defendant is in a fiduciary relationship with the plaintiff [and] . . . (4) . . . The defendant makes partial representations but also suppresses some material facts . . . ." (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.) "The rule has long been settled in this state that although one may be under no duty to speak as to a matter, 'if he undertakes to do so, ... he is bound not only to state truly what he tells but also not to suppress or conceal any facts . . . . If he speaks at all he must make a full and fair disclosure." (*Marketing West, Inc. v. Wassermann* (1993) 5 Cal.4th 1082, 1093.)

SPECIAL INTERROGATORY NO. 3:

IDENTIFY all breaches of duty to YOU by JACKSON DEMARCO, as alleged in

paragraph 11 of the COMPLAINT.

RESPONSE SPECIAL TO INTERROGATORY NO. 3:

Defendants breached their duty to the SDPOA by, among other things:

(a) maintaining and losing numerous objectively frivolous claims;

(b) failing to present sufficient evidence to prevail on the retiree health claim in *SDPOA v. Aguirre, et al.*, although such evidence existed, resulting in a reduction of retiree health benefits to SDPOA members;

(c) failing to perform as promised, despite numerous guarantees of success which were not fulfilled;

(d) failing to obtain a retention agreement with the SDPOA in violation of Business and Professions Code section 6148;

(e) charging the SDPOA unreasonable fees in violation of rule 4-200 of the Rules of Professional Conduct;

(f) failing to communicate several written settlement offers in violation of rule 3-510(A)(2) of the Rules of Professional Conduct;

(g) failing to inform the SDPOA of Petersen's malpractice;

(h) failing to inform the SDPOA of the benefits and costs of the litigation undertaken by defendants; and

(i) failing to apprise he SDPOA of material developments in the litigation in violation of Business and Professions Code section 6068, and affirmatively misrepresenting the outcome of several hearings to the SDPOA.

SPECIAL INTERROGATORY NO. 4:

State all FACTS that RELATE TO YOUR allegation in paragraph 11(a) of the COMPLAINT that JACKSON DEMARCO breached a duty to YOU by "maintaining and losing numerous objectively frivolous claims."

RESPONSE SPECIAL TO INTERROGATORY NO. 4:

1. ***2005 Labor Negotiations***

Pursuant to the Meyers-Milias-Brown Act (Gov. Code, § 3500, et seq., "MMBA"), the SDPOA is the recognized bargaining agent for its members with the City of San Diego ("the City"). Thus, the SDPOA meets periodically, typically every one or two years, with labor negotiators for the City to "meet and confer" and arrive at a labor contract. These labor contracts are called "memoranda of understanding," or "MOUs," and they usually run for one to two fiscal years.

Long-time labor attorney Richard H. Castle served as the contract negotiator for the SDPOA from 1976 through 1982, and 1992 through 2009. Historically—in part because an endorsement from the SDPOA was politically important to would-be Mayors and Councilpersons—the union did well at the bargaining table, obtaining contract terms that were often the envy of other, less influential, City labor unions. However, in 2005, in an era of a particularly tight City budget, and in the beginning of the Robespierre-like reign of a new City Attorney, Michael J. Aguirre, the City and the SDPOA were unable to agree to contract terms. Therefore, in June 2005, as authorized by the MMBA, the City imposed contract terms on the SDPOA. Those terms included a decrease in the amount of *employee* pension contributions the City had previously paid on behalf of members,[8] a matching decrease in the salaries of employees in the deferred retirement option plan ("DROP"),[9] and the imposition of additional eligibility requirements for health insurance

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[8] San Diego City Charter section 143 requires the City and employees to make "substantially equal" contributions to fund employee pensions. Historically, the SDPOA had been able to negotiate contracts with the City in which the City paid, or "picked up," most of SDPOA members' required *employee* contributions. Current City Attorney Jan Goldsmith has opined that the City's past practice of paying employee contributions on behalf of employees violates the "substantially equal" clause of Charter section 143.

[9] The City's DROP program, adopted in 1997, allows an employee, otherwise qualified to retire and begin drawing a pension, to enter DROP and continue working for up to five years. During that period, however, the employer no longer earns additional years of retirement service credit, and no further pension contributions are made either by the City or by the DROP participant. During the DROP period, a monthly pension is paid to the employee and

for employees after retirement ("retiree health").

Mr. Castle, dissatisfied that the City would impose "cutbacks" on SDPOA members, recommended that the SDPOA consult with Greg Petersen, with whom Mr. Castle had formed a partnership in 2005. On June 3, 2005, the SDPOA entered into a "Legal Services Agreement" with Castle, Petersen & Krause, LLP ("CPK"). That agreement limited the "services to be provided . . . [to] initial evaluation, legal analysis and opinion regarding the City's declared intention, following negotiations, to reduce the City's 'pick up' of retirement contributions made by employees represented by the SDPOA . . . ." Notably, litigation was among the legal services specifically excluded "unless otherwise authorized by the client and agreed to by [CPK]." For such litigation, the agreement stated that "a separate written agreement between Attorney and Client will be required." The SDPOA agreed to pay an initial sum of $25,000.00 for the preliminary review and analysis of issues to be pursued.

2. *SDPOA v. Aguirre, et al.*

Without providing the SDPOA with any written evaluation or analysis, Mr. Petersen convinced the SDPOA to authorize litigation against the City, the City Attorney, numerous council members, and numerous City staffers. CPK also named the San Diego City Employees' Retirement System ("SDCERS"), even though it had absolutely no role in the 2005 SDPOA labor negotiations. The lawsuit was filed in federal court on August 9, 2005 and assigned to The Honorable Marilyn Huff. The complaint stated claims for violations of the First Amendment, violation of public policy, four section 1983 claims, breach of contract, conversion, fraud, violation of the MMBA, breach of fiduciary duty, breach of trust, conversion of trust, and declaratory relief.

As part of CPK's strategy to engender SDPOA member support, Mr. Petersen falsely inflated claims of success he had in previous litigation. As JDTP has

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placed in an interest-bearing DROP account. The DROP program allows the City to retain experienced workers for a longer period at a lower cost (because no retirement contributions are made during the DROP period), and allows an employee to create a sometimes substantial savings account while continuing to work and earn an income sufficient to pay household bills.

acknowledged, Mr. Petersen "claimed he would . . . recover over $100 million in damages." Mr. Petersen held a large evangelical-style rally of SDPOA members at the Scottish Rite meeting hall in which he also told SDPOA members he "would recover far more in litigation that the SDPOA could ever achieve at the bargaining table," and that at the conclusion of the case, every SDPOA member would have a new Ford F-350 pickup truck parked at their house." Later, he told SDPOA members that they would soon own Balboa Park.

The *SDPOA v. Aguirre* litigation was as expensive as it was unsuccessful. The SDPOA paid JDTP (and its predecessor CPK) over $2.6 million in attorney fees. Individual SDPOA members paid approximately $2 million more. JDTP took videotaped depositions of more than 45 witnesses, including all City council defendants, and used hardly any of them.

As the case proceeded, in the words of Reg Vitek, whose firm represented SDCERS, the SDPOA suffered "serial losses on the merits." Mr. Vitek engaged in no hyperbole. Despite Mr. Petersen's assurances, JDTP (and it predecessor CPK), lost every motion, including two motions to dismiss, an application for preliminary injunction, motions for summary judgment, and an appeal. Beginning on November 1, 2005, the Court dismissed several of the SDPOA's claims and ordered amendment on the remaining claims. Yet after each loss, in order to protect its income from the litigation, JDTP would falsely tout a loss as a victory. As the Ninth Circuit Court of Appeal would later write in handing JDTP its final loss on June 10, 2009: "[The SDPOA] seeks to emulate the alchemists in the Middle Ages in its effort to transmute the base metal of its *total loss on the merits* into the gold of 'prevailing party' status by asserting that the district court's order materially altered its relationship with Appellees.

During the pendency of the litigation, SDCERS made several settlement offers to the SDPOA, through its counsel, JDTP (and its predecessor CPK). These settlement offers, in which SDCERS offered to waive its costs (and its right to later file a malicious prosecution case) in exchange for a dismissal, were never forwarded to the SDPOA. As

we will explain at the meditation, the SDPOA has since been subject to claims for malicious prosecution and has incurred expenses in attempting to stave off such a filing.

In May and June 2007, summary judgment was granted against the SDPOA on the remaining federal claims in its third amended complaint. Near the end of the litigation, in a desperate attempt to manufacture a viable theory, JDTP added a claim that the City's modification of eligibility requirements for retiree health was unconstitutional.

However, JDTP, which had no authority to pursue such a claim either on behalf of the SDPOA or individual members, was not prepared to present such a theory, as Judge Huff ruled in dismissing that claim. Indeed, *JDTP devoted only nine lines* in its opposition brief to this portentous issue.

"In the TAC, [the SDPOA] allege[d] that the City's imposition of the LBFO improperly adjusted eligibility qualifications for retiree health benefits for current employees in violation of its constitutional rights. (See, e.g., TAC ¶ 33.)" (Order dated May 18, 2007, p. 40:14-14.) In ruling against the SDPOA, Judge Huff stated: "[The SDPOA] alleges *without citation to authority* that retiree health was offered at employment and therefore vested immediately." (*Id*., p. 40:16-17.) Relying entirely on cases cited by the City, the Court stated: "[h]ere, [the SDPOA] has not directed the Court to any authority standing for the proposition that retiree health benefits are vested rights subject to constitutional protection under either the Contracts or Takings Clause." (*Id*., p. 41: 4-6.) "Accordingly, given the absence of authority to the contrary, Plaintiff's Second and Third Claims under the Contracts and Takings Clauses premised on the modification of retiree health benefits fail." (*Id*., at p. 41:6-8.) "In total, Plaintiff has not created an issue of triable fact as to whether the imposition of the LBFO and associated takeaways affected constitutionally protected benefits. Because the evidence and argument submitted by the parties demonstrate that none of the takeaways affected protected pension benefits, but instead affected employment rights, these claims fail." (*Id*., at p. 41:9-15.)

3. *Aaron, et al. v. Aguirre, et al.*

In one of its first losses in *SDPOA v. Aguirre*, the Court ruled that the SDPOA did not have standing to pursue damages for certain claims, such as section 1983 claims for violation of civil rights. Therefore, on August 1, 2006, JDTP (and its predecessor CPK), filed another lawsuit, totaling 1,427 pages, on behalf of approximately 1,600 individual police officers. That lawsuit was also completely unsuccessful. On September 3, 2008, the Court granted summary judgment against all of JDTP's clients, dismissed their state claims without prejudice, and awarded costs to the defendants.

4. *McGuigan v. City of San Diego*

This litigation arose out of the underfunding of the City of San Diego's employee pension plan. McGuigan filed a representative declaratory relief action on June 28, 2005, on behalf of all beneficiaries of SDCERS. McGuigan alleged that from 1996 through 2005, the City paid less in employer contributions to SDCERS than the actuarially-determined amount that was required to be paid under the San Diego City Charter and Municipal Code. McGuigan sought: (1) judicial determinations that (a) the City had violated City Charter section 143 and former San Diego Municipal Code section 24.0801 and (b) the City's contribution shortfall rendered SDCERS actuarially unsound; and (2) "a peremptory writ of mandate directing the City to immediately pay to SDCERS the aggregate amount of the City's shortfall in employer contributions, as determined by the actuarial valuations for every fiscal year ending June 30, 1997 to June 30, 2005, with interest."

With McGuigan's motion for summary judgment and a motion for issue preclusion or terminating sanctions pending, the parties attended a mediation session with retired United States District Court Judge Lawrence Irving on June 8, 2006, reached a tentative settlement, and executed a term sheet. Pursuant to the tentative settlement, the City agreed to pay SDCERS a special additional employer contribution of $173 million ($15 million more than the highest calculation of underfunding, with interest), but only if the case could be successfully converted into a non-opt out class action and releases obtained

from all SDCERS' beneficiaries for the claims McGuigan had asserted and prosecuted.

After learning of the proposed settlement of *McGuigan*, CPK sought to derail the settlement, hijack *McGuigan*'s claims, and assert them in *SDPOA v. Aguirre* and *Aaron*. This effort included both (1) unsuccessfully seeking a temporary restraining order from United States District Court Judge Marilyn Huff to stay all proceedings in *McGuigan*, and (2) interposing objections to the proposed settlement before Judge Strauss in *McGuigan*. Among the tactics used by CPK were to falsely inform SDPOA members that McGuigan's counsel was sending out $1 checks to SDPOA members with hidden release language in them, and requesting SDPOA members to each call McGuigan's counsel's office and ask a lengthy list of questions prepared by CPK.[10] CPK's extensive and completely unsuccessful efforts in *McGuigan* were billed to the SDPOA without a written fee agreement.

Judge Strauss held numerous hearings regarding the proposed settlement. At a hearing on November 29, 2006, Mr. Petersen, on behalf of the 1,600 SDPOA member-objectors he represented, informed the trial court that he thought any remaining objections could be resolved and suggested a continuance of the fairness hearing to December 12, 2006, a date convenient to Mr. Petersen.

Then, after verbally communicating to counsel in *McGuigan* that all remaining issues were resolved, neither Mr. Petersen, nor any CPK attorney, appeared for the continued December 12, 2006 fairness hearing.[11] Judge Strauss proceeded with the

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[10] CPK, which represented approximately 1,600 SDPOA members individually, simultaneously refused to grant McGuigan's counsel permission to speak to those members pursuant to rule 2-100(A) of the Rules of Professional Conduct, or to provide SDPOA members written answers to all of the questions posed by CPK provided to CPK.

[11] JDTP attorney Christopher Nissen would later falsely declare in the Court of Appeal that he did not appear because he was stuck in traffic. However, Mr. Nissen told Jeff Jordon, a member of the SDPOA Board, that he never attempted to attend the hearing because Mr. Petersen asked him to cover it at the last minute the morning of the hearing and Mr. Nissen could not make it to San Diego from Orange County in time. The SDPOA possesses substantial evidence of JDTP misrepresentations to judicial officers during its representation of the SDPOA. Because JDTP failed to inform the SDPOA of its actions and statements, it only learned of these

fairness hearing and approved the proposed settlement after determining that the value of the claims being released by the class was "between $140 million and $158.9 million [and the] consideration the City has agreed to pay SDCERS on behalf of the class—$173 million—is more than fair, adequate and reasonable."

Two days after failing to appear at the December 12, 2006 fairness hearing, CPK posted a message on the SDPOA's web site proclaiming that:

> "The settlement entered yesterday [sic] in *McGuigan* does the following which *actually helps the SDPOA and its Members*: (1) its [sic] incorporates word-for-word, almost two-pages [sic] of written changes proposed directly by SDPOA lawyers, which changes preserved the Federal Lawsuits SDPOA and its Members are currently pursuing, and (2) it prevented the City from releasing over $3.5 billion in additional under funding and related claims that were not raised in the *McGuigan* lawsuit."

On February 9, 2007, CPK —as counsel for the unsuccessful objectors—sought more than $340,000 in attorney fees and costs. In that motion, CPK argued that "[s]uccessful litigants are entitled to attorney fees under [Code of Civil Procedure section] 1021.5."

That same day, despite (1) informing class counsel on December 6, 2006, that the proposed judgment was acceptable, (2) failing to submit objections to the proposed judgment by December 8, 2006, (3) failing to appear at the December 12, 2006 fairness hearing, (4) conceding that the judgment "actually helps" the Objectors, and (5) seeking more than $340,000 in fees and costs as "successful litigants" who had "realized [their] litigation objectives," CPK filed an appeal on behalf the 1,600 SDPOA member-objectors it represented. After extensive briefing, the appeal was completely unsuccessful.

5. *CPK and JDTP Merger*

In early 2007, JDTP acquired CPK and the firms merged. According to a declaration filed by Mr. Petersen on May 29, 2008, in another case, during the early part of 2007, he decided to diversify CPK by seeking to acquire another firm that was "fee based." His search led him to meet with JDTP's president, Ruth Mijuskovic, to discuss

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misrepresentations recently.

the possibility of her firm representing CPK in such an acquisition. Ms. Mijuskovic suggested that the two firms merge, and Mr. Petersen, who owned an 80 percent interest in CPK, agreed.

Mr. Petersen, CPK's majority shareholder, became a named partner of the newly-named firm, "Jackson, DeMarco, Tidus, *Petersen* & Peckenpaugh." In several courts, the firm simply filed a "Notice of Change of Firm Name." The SDPOA was told that "[t]he added strength of the new firm will provide great benefits to you and your lawsuit." "You will have the attorneys and staff of both firms now working on your case."

In the *SDPOA* case (United States District Court, Southern District of California, Case No. 05cv1581-H), Mr. Petersen began the May 1, 2007 hearing by announcing the new name of his law firm as Jackson, DeMarco, Tidus, *Petersen* and Peckenpaugh.

Jackson, DeMarco, Tidus, *Petersen* & Peckenpaugh filed several "Notice of Change of Firm Name and Address." In each, JDTP represented to the Court that "Castle, Petersen & Krouse LLP, has *changed its name* to Jackson DeMarco Tidus Petersen & Peckenpaugh." (Italics added.) This evidence supports both of our theories of merger or de facto partnership, which renders JDTP liable for all CPK acts even prior to May 1, 2007. (See Evid. Code, § 623 ["[w]henever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it"].) Of course, given the negligence of JDTP and its employees at the critical time period after May 1, 2007 and before May 18, 2007 (for failing to request a dismissal without prejudice despite knowing insufficient evidence had been presented to survive summary judgment), establishing merger or de facto partnership is academic. JDTP was on duty when the most critical error occurred.

In March 2008, after JDTP learned that Mr. Petersen had grossly misrepresented himself and his successes, JDTP terminated him. JDTP dropped Mr. Petersen from its firm name. Within one year, JDTP also terminated all former CPK attorneys.

After Mr. Petersen was terminated, nasty contested disputes arose throughout

Southern California courts in which JDTP and Mr. Petersen fought over clients. Although JDTP had no fee agreements in any of the cases,[12] it successfully took the position—contested by Mr. Petersen—that it was the rightful attorney of record because it had acquired CPK and merged with it. Petersen filed a declaration acknowledging JDTP characterized its acquisition of CPK as a "merger."

6. *Appeal of SDPOA v. Aguirre, et al.*

Without providing any analysis or explaining the costs or benefits of an appeal, JDTP proceeded with an appeal of Judge Huff's grant of summary judgment in *SDPOA v. Aguirre*. That appeal was a complete loss. Significantly, based on the poor record and argument presented by JDTP, the Ninth Circuit, in a published opinion, found that retiree health benefits "were not protectible contract rights."

Since that ruling, the City has begun aggressive cuts to retiree health as it attempted to balance its budget and remove itself from potentially crushing $1.2 billion in unfunded liability for such a benefit. On July 27, 2009, less than two months after the Ninth Circuit's ruling, the City imposed a cap on the annual amount paid for retiree health care, a cap which has cost SDPOA members approximately $36 million.

7. *Appeal of Aaron, et al. v. Aguirre, et al.*

Also without providing any analysis or explaining the costs or benefits of an appeal, JDTP proceeded with an appeal of Judge Huff's grant of summary judgment. However, after the SDPOA announced its intent to pursue a malpractice claim against JDTP, it has informed its numerous clients that "the appeal . . . will be a very significant uphill battle with a very low prospect of success . . . ."

8. *State Court Actions*

Again without obtaining client consent or providing any analysis, JDTP filed state court actions on behalf of the SDPOA and individual members. After hiring outside counsel to analyze the merits and chance of success of the state court action, the SDPOA

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[12] On March 19, 2008, JDTP proposed a legal representation agreement to the SDPOA. However, the SDPOA never agreed to or signed it.

has dismissed its claim. Most of the individual lawsuits remain, although several adverse rulings have already occurred and lawyers at JDTP have recommended that its remaining abandon those cases.

Liability

The elements of a cause of action in tort for professional negligence are "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200; Judicial Council of California, Civil Jury Instructions ["CACI"], No. 600.) Moreover, an attorney who holds himself out as a specialist, such as Mr. Petersen, has an even higher standard of care. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810.)

A cause of action for breach of fiduciary duty requires the existence of a fiduciary relationship, a breach of the duty created by that relationship, and damages proximately caused by the breach. (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101.) "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' [Citations.] Whether an attorney has breached a fiduciary duty to his or her client generally is a question of fact. [Citation.]" (*Stanley v. Richmond* (1995)) 35 Cal.App.4th 1070, 1086-1087.)

There exist, at a minimum, nine separate liability theories on which to pursue these claims, including the following:

1. *Maintaining Objectively Meritless and Costly Litigation*

JDTP recommended and maintained objectively meritless litigations on behalf of the SDPOA. As a result, the SDPOA has expended more than $1.6 million with absolutely nothing to show for it except a mortgage on its union headquarters. And the SDPOA has already been exposed to claims of malicious prosecution by SDCERS.

Here, no reasonable attorney—much less a specialist—would have pursued the meritless litigation claiming several civil rights violations for routine labor negotiation matters.

"[A]n attorney does have a counseling role. An attorney should advise a client of substantial deficiencies in the merits or in available defenses so that the client can decide whether and how to proceed." (4 Mallen & Smith, Legal Malpractice (2010 ed.) The Litigation Attorney ("Mallen"), § 31:26, pp. 583-584.) "This principle recognizes that the client should have the ultimate control over crucial decisions concerning the lawsuit." (*Id.*, p. 584.)

2. *Losing Retiree Health Even Though Not Authorized to Pursue Such Litigation*

JDTP was never authorized to raise, much less pursue, any retiree health care claim. Then, when that unauthorized claim was raised, it was presented negligently. This resulted in an adverse ruling—subject to both collateral estoppel and res judicata—that retiree health is not a vested benefit. As JDTP's own memos demonstrate, ample evidence to support that claim was never presented in court.

Further, JDTP never informed the SDPOA of the economic *benefits* and economic *risks* of litigating whether retiree health is a vested right. JDTP's prosecution of any claim regarding retiree health benefits was *unauthorized*. "An extreme situation is if the lawyer acted without authority. An attorney can be liable for an unauthorized prosecution or defense." (Mallen, *supra*, § 31.26, p. 584.) Had Jackson exercised due care, the SDPOA would not have prosecuted any claim raising the issue whether retiree health benefits are a vested right for several reasons, including (a) there was no actual controversy regarding that issue because the City Attorney's Office, after specific research and analysis, had advised the City that such rights *were* likely vested; (b) the economic *risks* of litigating the issue greatly outweighed the potential economic benefits of the unauthorized claim prosecuted by JDTP; and (c) the *costs* of litigating the issue outweighed the potential economic benefits of the unauthorized claim prosecuted by

JDTP.

In response to the defendants' motion for summary judgment in *SDPOA, on behalf of itself and on behalf of all of its members v. Aguirre, et al.*, United States District Court for the Southern District of California, Case No. 05-cv-1581 (and related appeals), and *Aaron, et al. v. Aguirre, et al.*, United States District Court for the Southern District of California, Case No. 06-cv-1451 (and related appeals) the defendants should have presented the following information, evidence, and legal authority to the court:

In 1982, the City desired to withdraw from the Social Security System. In order to successfully withdraw from the Social Security System, City employees were required to approve the withdrawal. In order to induce its employees to vote in favor of the City's withdrawal from the Social Security system, the City offered its employees lifetime retiree health insurance (the "Retiree Health Benefit").

In a memorandum dated November 20, 1981, from City Manager Ray T. Blair, Jr., the City promised both hospitalization and medical insurance: "Retired employees will be included in the City health plans. The City will pay the premiums." This memo is dated November 20, 1981, from then City Manager Ray T. Blair, Jr., to all City employees (including all SDPOA members). It discusses the City's proposal and upcoming employee election to remove employees from Social Security and Medicare in exchange for additional benefits to be provided by employees to the City. As the memo explains, in order to opt out of Social Security and Medicare, the City had to agree to provide "another pension plan to supplement your regular City retirement program."

At page 2, paragraph 3, of the memo, entitled "Entry Date," it states that all existing employees "will be enrolled in the Plan as of January 8, 1982." All future employees "will join the Plan immediately *on their date of employment*." (Italics added.) "Vesting" is covered at pages 3 and 4, paragraph 9 of the memo. The Plan provides that benefits were 100% vested after 5 years of service.

In the attachment to the memo, entitled "WHAT HAPPENS IF WE PULL OUT OF SOCIAL SECURITY," beginning at Bate-stamp # SDPOA 0399, the City provided

questions and answers. "Following are the most common questions asked concerning how withdrawal from Social Security will affect City employees. The questions and answers are divided into five categories [including] . . . 4) Medicare Hospital Insurance [and] 5) Medicare Medical Insurance. Question # 22 (page SDPOA 0402) asked: "What will the City provide for hospital insurance?" The Answer: "The retired employees will be included in the City health plans. The City will pay for the retired employee's health insurance. These costs will not be paid out of the Supplemental Pension Plan." Question # 24 (page SDPOA 0403) asked: "What will the City provide for medical insurance?" The Answer: "Retired employees will be included in the City health plans. The City will pay the premiums. The cost of the premiums will not come from the Supplemental Pension Plan." Relying on the City's promise, City employees approved the City's withdrawal from the Social Security system and are no longer part of that system.

On March 14, 2006, during "Sunshine Week," present City Mayor Jerry Sanders promulgated a "Fact Sheet," which stated: "In 1982, City employees voted to get out of the Social Security/Medicare systems. In exchange, they were promised life-time health insurance upon retirement."

"Resolution R-255610, adopted January 4, 1982, effective January 1, 1982, set the parameters of the [Retiree] Health Benefit ." (City Attorney Opinion No. 2007-04, p. 2.) "Certain benefits were 'provided to employees in lieu of Social Security participation.'" (*Ibid*.) "In addition, it was the City Council's intent 'to provide such coverage as a permanent benefit to eligible retirees.'" (*Ibid*.) "The City Manager was authorized to establish a City-sponsored Group Health Insurance Plan for eligible retirees, providing the same choice of program coverage as offered to active employees of the City." (*Ibid*.) "On June 1, 1982, Ordinance No. O-15758, codified the [Retiree] Health Benefit." (*Ibid*.) "In 1985 . . . Police and Fire Safety Members on the active payroll on or after June 30, 1985 were added." (*Id*., at p. 3; Ordinance No. O-16449.) The Retiree Health Benefit has always been codified among the City's retirement ordinances.

Charter section 143.1 provides, in relevant part: "No ordinance amending the

retirement system which affects the benefits of any employee under such retirement system shall be adopted without the approval of a majority vote of the members of said system." In 1985, before Ordinance No. O-16649 became effective, "a vote of the retirement system membership [was conducted], as required by Charter section 143.1[.]" (Ordinance No. O-16449.) "[S]aid vote was conducted and the ballots tallied on June 3, 1985[,] with a vote of 2,885-yes, 904-no, and 12-void[.]" (*Ibid*.)

"On September 30, 1985, Ordinance No. O-16510 provided [that] . . . it was the City's responsibility to provide [funds to pay for the Retiree Health Benefit] from the General Fund . . . ." (City Attorney Opinion No. 2007-04, p. 3.) In 1986 the City adopted Ordinance No. O-16679 as part of the settlement of a class action lawsuit (the *Andrews* class action), and made the Retiree Health Benefit retroactive to all police officers on active City payroll as of October 6, 1980. In 1986, pursuant to Charter section 143.1, before Ordinance No. O-16679 became effective, "the matter was submitted to a vote of the active members of the System and approved by a vote of 2,630-Yes as opposed to 213-No[.]" (Ordinance No. O-16679.)

In 1992, the Retiree Health Benefit was modified by Ordinance No. O-17770. Again, before the modifications became effective, "these changes were voted upon by all [affected] members pursuant to Charter section 143.1 with [the] vote counted and certified on April 13, 1992 . . . ." (Ordinance No. O-17770.) Since at least 1992, the Retiree Health Benefit has been codified at San Diego Municipal Code sections 24.1201 and 24.1202.

On or about March 31, 1997, the City Council adopted Ordinance No. O-18392, which modified the Retiree Health Benefit. Ordinance No. O-18392 contained a provision in which the City agreed "that the level of health benefits to be provided [to retirees] not be diminished" below comparable health plans offered to active employees. Before any such 1997 modifications to the Retiree Health Benefit became effective, the City conducted a Charter section 143.1 vote, which passed 3,181 yes votes and 88 no votes.

In 2002, the City again sought to modify the Retiree Health Benefit. The 2002 modification placed a fixed dollar amount of the Retiree Health Benefit based on the cost of the City-sponsored PPO plan being offered to retirees for the 2003 plan year, with an automatic annual increase in this amount, not to exceed ten percent (10%) per year, based on an independent, objective source—the Centers for Medicare and Medicaid Services, Office of the Actuary, which tracks projected increases in National Health Expenditures. Before any such 2002 modifications to the Retiree Health Benefit became effective, the City conducted a Charter section 143.1 vote, which passed 2,193 in favor and 35 against the proposed modifications.

[B]oth the federal and state contract clauses protect the vested pension rights of public officers and employees from unreasonable impairment." (*California Ass'n of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 383.) "While some jurisdictions view public employees' retirement rights as a gratuity, California is firmly committed to the proposition that these rights are contractual; that they are 'vested' in the sense that the lawmakers' power to alter them after they have been earned is quite limited." (*Ibid*.) "By entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer." (*Ibid*.) "A long line of California decisions has settled the principles applicable to [this situation]. A public employee's pension constitutes an element of compensation, and *a vested contractual right to pension benefits accrues upon acceptance of employment*. Such pension right *may not be destroyed*, once vested, without impairing a contractual obligation of the employing public entity." (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863, italics added.)

Prior to retirement:

> "'[a]n employee's vested contractual pension rights may be modified . . . for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. [Citations.] Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights

> must bear some material relation to the theory of a pension system and its successful operation, *and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.' "* (*Betts* at p. 864, italics in original; accord, *Maffei v. Sacramento County Employees Retirement System* (2002) 103 Cal.App.4th 993, 999-1000; *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1132-1133; *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 783-784.)

(See *Pasadena Police Officers Association v. City of Pasadena* (1983) 147 Cal.App.3d 695; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, and the authorities cited in each of these cases.)

On May 18, 2007, the District Court ruled against plaintiff in *San Diego Police Officers' Association v. Aguirre, et al.*, Case No. 05-cv-1581: "In the TAC, [the SDPOA] allege[d] that the City's imposition of the LBFO improperly adjusted eligibility qualifications for retiree health benefits for current employees in violation of its constitutional rights. (See, e.g., TAC ¶ 33.)" (Order, Doc. No. 737, filed May 18, 2007 in Case No. 05-cv-1581, p. 40:14-14.) In ruling against the SDPOA, Judge Huff stated: "[The SDPOA] alleges *without citation to authority* that retiree health was offered at employment and therefore vested immediately." (*Id.*, p. 40:16-17, italics added.) Relying entirely on cases cited by the City, the Court stated: "[h]ere, [the SDPOA] has not directed the Court to any authority standing for the proposition that retiree health benefits are vested rights subject to constitutional protection under either the Contracts or Takings Clause." (*Id.*, p. 41: 4-6.) "Accordingly, given the absence of authority to the contrary, Plaintiff's Second and Third Claims under the Contracts and Takings Clauses premised on the modification of retiree health benefits fail." (*Id.*, at p. 41:6-8.) "In total, Plaintiff *has not created an issue of triable fact* as to whether the imposition of the LBFO and associated takeaways affected constitutionally protected benefits. Because the evidence and argument submitted by the parties demonstrate that none of the takeaways affected protected pension benefits, but instead affected employment rights, these claims fail." (*Id.*, at p. 41:9-15, italics added.)

In memoranda researched and written six months after suffering this adverse

ruling, JDTP explained in detail the evidence and legal analysis which provided the support Judge Huff found was lacking. (Memo dated December 5, 2007 ["Retiree Healthcare Case Workup"], p. 23 [concluding retiree health vested]; Memo dated December 4, 2007, p. 3 ["vested right to retiree heath benefit"].) However, it was too late, because summary judgment had long since been granted.

Instead of providing the court with available evidence or legal citation *supporting* their clients' position regarding retiree health, the defendants instead submitted *adverse* evidence. *First*, the only evidence cited by defendants in opposition to the City's motion to summarily adjudicate the retiree health issue in the City's favor was the "City of San Diego and POA Labor Negotiations Minutes dated March 30, 2005." (Doc. No. 613, p. 19:27.) However, those minutes supported the City's position and not the SDPOA's position on the issue of whether retiree health benefits were vested. *Second*, defendants also lodged an additional non-supportive document indicating that retiree health was not vested. Astoundingly, the non-supportive material was highlighted *by defendants* for the Court. Specifically, Mr. Nissen filed the exhibit with a circle around the heading "Current Employees," the word "Bad," and an arrow pointing to the adverse evidence. (See Doc. No. 704, p. 77;[13] RT, April 23, 2007, p. 66:6-19.)

Finally, defendants' appellants' reply brief, filed May 28, 2008, erroneously and without their clients' knowledge or consent, *conceded* "post-retirement health benefits is a term and condition of employment that may be renegotiated . . . ." (Appellant San Diego Police Officers' Association's Consolidated Reply Brief, United States Court of Appeals for the Ninth Circuit, Case No. 07-56004.)

In light of the defendants' negligence at the trial court, and their appellate concession, the United States Court of Appeals issued an adverse published opinion on June 10, 2009. (*San Diego Police Officers' Association v. San Diego City Employees' Retirement System* ("*SDPOA*") (2009) 568 F.2d 725.) In that opinion, the court cited

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[13] The Federal Court's PACER filing system allows proof that the document was filed by Mr. Nissen with the adverse evidence highlighted for the Court.

Thorning v. Hollister Sch. Dist. (1992) 11 Cal.App.4th 1598, *Cal. League of City Employee Ass'ns v. Palos Verde Library Dist.* (1978), and *San Bernadino Pub. Employees Ass'n v. City of Fontana* (1998) 67 Cal.App.4th 1215 and explained that if retiree health benefits had been "expressly granted to [employees] by an official declaration of policy during [the employees'] term of public office," those retiree health benefits would be vested, "fundamental and could not be unilaterally terminated." (*SDPOA* at pp. 739-740.) However, if the employee benefit at issue were merely "provided for by MOUs between the city and its bargaining groups [the benefits] could not have become permanently and irrevocably vested as a matter of contract law, because the benefits were earned on a year-to-year basis under previous MOU's that expired under their own terms . . . ." (*SDPOA* at p. 740.) Thus, because the defendant lawyers failed to present evidence (e.g., the Ray Blair memo and numerous ordinances and Charter section 143.1 votes) establishing retiree health benefits had been expressly granted to employees by an multiple official declarations of policy during the employees' term of public office, those retiree health benefits would be vested and the City's July 2009 $142 million to $152 million reduction of the plaintiff class' Retiree Health Benefit would not have been permitted.

"It is well settled that an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in the loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900.) Here, as JDTP later acknowledged, ample evidence existed—but was not presented—which would have led to a different result on the retiree health issue.

3. *Failing to Keep the SDPOA Apprised of Material Developments in Violation of Business and Professions Code section 6068*

Subdivision (m) of Business and Professions Code section 6068 provides:

> "It is the duty of an attorney to do all of the following: . . . (m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

JDTP failed to keep the SDPOA timely apprised of significant developments. Board members, several of whom will be present at the mediation, will explain how difficult it was to get status reports or analyses. For example, after the adverse Ninth Circuit opinion was announced on June 10, 2009, the SDPOA learned about it from the media. JDTP refused to respond to requests for several days. JDTP never informed its clients of significant cost awards against the SDPOA and individual plaintiffs in the *Aaron* case.

Had JDTP (and its predecessor firm CPK) kept the SDPOA timely apprised of significant developments, the SDPOA would have realized much sooner the lack of merit of the litigation and been able to contain its expense.

4. *Misrepresenting the Nature of Several Adverse Rulings*

On numerous occasions JDTP (and its predecessor CPK) falsely characterized the nature of adverse rulings. Even when summary judgment was granted against it, JDTP characterized the ruling as the Court "not[ing] that [the claims] raised important issues of state law and policy." When JDTP failed to appear at the fairness hearing in *McGuigan,* it falsely informed clients that had prevailed in gaining important limitations in the case. At the mediation, the five SDPOA board members present will provide additional evidence of false statements. Given the millions of dollars being paid to JDTP by the SDPOA and its members, these false statements were designed to keep fees flowing to JDTP. The SDPOA believes punitive damages are likely to be awarded due to this egregious fraudulent conduct by a fiduciary, JDTP.

5. *Making Numerous Guarantees of Success Which Were Not Fulfilled Which Allowed the Firm to Continue to Bill and Collect Fees*

JDTP, including its former named partner Mr. Petersen, made numerous guarantees of success which were not fulfilled. These statements, at least one of which JDTP acknowledges was made, will supports both negligent and intentional misrepresentation claims.

6. *Failure To Obtain a Retention Agreement in Violation of Business and Professions Code Section 6148*

Business and Professions Code section 6148, subdivision (a), requires contracts for legal services which will exceed $1,000 to be in writing. JDTP never obtained an agreement with the SDPOA,[14] and is limited to only the reasonable value of the services it rendered (Bus. & Prof. Code, § 6148, subd. (c)), which is less than zero. The fees that were paid should be disgorged.

7. *Charging Unreasonable Fees in Violation of Rule 4-200*

Rule 4-200 of the Rules of Professional conduct prohibits charging a client an unconscionable fee. "Among the factors to be considered . . . are . . . (1) [t]he amount of the fee in proportion to the value of the services performed[;] . . . (5) the amount involved and the results obtained[; and] . . . (11) the informed consent of the client to the fee." Here, although the SDPOA paid more than $1.6 million to JDTP (and its predecessor CPK), substantial evidence will support a finding that the fee charged was unconscionable, particularly because JDTP lost literally every contested motion and the lied to its client about the outcome.

8. *Failing to Communicate Several Settlement Offers in Violation of Rule 3-510(A)(2)*

Rule 3-510(A)(2) of the Rules of Professional Conduct required JDTP to communicate SDCERS' written settlement offers to the SDPOA. These settlement offers were never communicated to the SDPOA. If they had been communicated, the SDPOA board would have realized sooner that the litigation lacked merit and would have been able to avoid (1) additional expenditure of union assets, (2) exposure to malicious prosecution claims, and (3) an adverse judgment on numerous issues, including a published Ninth Circuit opinion holding that retiree health is not a vested benefit.

[14] The agreement with its predecessor firm, CPK, expressly excluded litigation.

9. *Failing to Apprise the Client of Malpractice by Mr. Petersen During His Representation of the SDPOA*

Although JDTP roundly criticized Mr. Petersen after he departed JDTP, and charged that he had lied to clients, JDTP failed to apprise the SDPOA of Mr. Petersen's malpractice and the SDPOA's limited time to proceed against him individually for malpractice.

"The nature of an attorney's function is such that an attorney is the only professional who may have a duty to advise a client that a malpractice action against another professional may provide a solution to the client's problems." (*Lewis v. Purvin* (1989) 208 Cal.App.3d 1208, 1217.) Moreover, two of the "four circumstances in which nondisclosure or concealment may constitute actionable fraud" apply: "(1) . . . the defendant is in a fiduciary relationship with the plaintiff [and] . . . (4) . . . The defendant makes partial representations but also suppresses some material facts . . . ." (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.) "The rule has long been settled in this state that although one may be under no duty to speak as to a matter, 'if he undertakes to do so, ... he is bound not only to state truly what he tells but also not to suppress or conceal any facts . . . . If he speaks at all he must make a full and fair disclosure." (*Marketing West, Inc. v. Wassermann* (1993) 5 Cal.4th 1082, 1093.)

SPECIAL INTERROGATORY NO. 5:

IDENTIFY all "objectively frivolous claims" maintained by JACKSON DEMARCO, as alleged in paragraph 11(a) of the COMPLAINT.

RESPONSE SPECIAL TO INTERROGATORY NO. 5:

All claims presented by defendants in *SDPOA, on behalf of itself and on behalf of all of its members v. Aguirre, et al.*, United States District Court for the Southern District of California, Case No. 05-cv-1581 (and related appeals); *McGuigan v. City of San Diego*, San Diego Superior Court Case No. GIC 849883(and related appeals); and *SDPOA v. Aguirre, et al.*, San Diego Superior Court Case No. 37-2007-00075432-CU-MC-CTL.

SPECIAL INTERROGATORY NO. 6:

State all FACTS that RELATE TO YOUR allegation in paragraph 11(b) of the COMPLAINT that JACKSON DEMARCO failed to "present sufficient evidence to prevail on the retiree health claim in SDPOA v. Aguirre, et al."

RESPONSE SPECIAL TO INTERROGATORY NO. 6:

The pleadings filed in response to the defendants' motion for summary judgment in *SDPOA, on behalf of itself and on behalf of all of its members v. Aguirre, et al.*, United States District Court for the Southern District of California, Case No. 05-cv-1581 (and related appeals), and *Aaron, et al. v. Aguirre, et al.*, United States District Court for the Southern District of California, Case No. 06-cv-1451 (and related appeals) demonstrate the fact to be true, based on the additional facts that (1) no such evidence was presented in court, (2) abundant evidence was available to present, (3) no legal precedent was presented, and (4) legal precedent supportive of an opposition to the summary judgment was abundantly available. Plaintiffs in this case contend that the lawyers in the underlying cases did a very poor job of advocacy, far below the standard of care, that led to an adverse judgment to the effect that their retiree health benefit was not vested and could be unilaterally reduced by the City.

The defendants should have presented the following information, evidence, and legal authority to the court:

In 1982, the City desired to withdraw from the Social Security System. In order to successfully withdraw from the Social Security System, City employees were required to approve the withdrawal. In order to induce its employees to vote in favor of the City's withdrawal from the Social Security system, the City offered its employees lifetime retiree health insurance (the "Retiree Health Benefit").

In a memorandum dated November 20, 1981, from City Manager Ray T. Blair, Jr., the City promised both hospitalization and medical insurance: "Retired employees will be included in the City health plans. The City will pay the premiums." This memo is dated November 20, 1981, from then City Manager Ray T. Blair, Jr., to all City employees (including all SDPOA members). It discusses the City's proposal and upcoming employee election to remove

employees from Social Security and Medicare in exchange for additional benefits to be provided by employees to the City. As the memo explains, in order to opt out of Social Security and Medicare, the City had to agree to provide "another pension plan to supplement your regular City retirement program."

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[B]oth the federal and state contract clauses protect the vested pension rights of public officers and employees from unreasonable impairment." (*California Ass'n of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 383.) "While some jurisdictions view public employees' retirement rights as a gratuity, California is firmly committed to the proposition that these rights are contractual; that they are 'vested' in the sense that the lawmakers' power to alter them after they have been earned is quite limited." (*Ibid*.) "By entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer." (*Ibid*.) "A long line of California decisions has settled the principles applicable to [this situation]. A public employee's pension constitutes an element of compensation, and *a vested contractual right to pension benefits accrues upon acceptance of employment*. Such pension right *may not be destroyed*, once vested, without impairing a contractual obligation of the employing public entity." (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863, italics added.)

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On May 18, 2007, the District Court ruled against plaintiff in *San Diego Police Officers' Association v. Aguirre, et al.*, Case No. 05-cv-1581: "In the TAC, [the SDPOA] allege[d] that the City's imposition of the LBFO improperly adjusted eligibility qualifications for retiree health benefits for current employees in violation of its constitutional rights. (See, e.g., TAC ¶ 33.)" (Order, Doc. No. 737, filed May 18, 2007 in Case No. 05-cv-1581, p. 40:14-14.) In ruling against the SDPOA, Judge Huff stated: "[The SDPOA] alleges *without citation to authority* that retiree health was offered at employment and therefore vested immediately." (*Id.*, p. 40:16-17, italics added.) Relying entirely on cases cited by the City, the Court stated: "[h]ere, [the SDPOA] has not directed the Court to any authority standing for the proposition that retiree health benefits are vested rights subject to constitutional protection under either the Contracts or Takings Clause." (*Id.*, p. 41: 4-6.) "Accordingly, given the absence of authority to the contrary, Plaintiff's Second and Third Claims under the Contracts and Takings Clauses premised on the modification of retiree health benefits fail." (*Id.*, at p. 41:6-8.) "In total, Plaintiff *has not created an issue of triable fact* as to whether the imposition of the LBFO and associated takeaways affected constitutionally protected benefits. Because the evidence and argument submitted by the parties demonstrate that none of the takeaways affected protected pension

benefits, but instead affected employment rights, these claims fail." (*Id.*, at p. 41:9-15, italics added.)

In memoranda researched and written six months after suffering this adverse ruling, JDTP explained in detail the evidence and legal analysis which provided the support Judge Huff found was lacking. (Memo dated December 5, 2007 ["Retiree Healthcare Case Workup"], p. 23 [concluding retiree health vested]; Memo dated December 4, 2007, p. 3 ["vested right to retiree heath benefit"].) However, it was too late, because summary judgment had long since been granted.

Instead of providing the court with available evidence or legal citation *supporting* their clients' position regarding retiree health, the defendants instead submitted *adverse* evidence. *First*, the only evidence cited by defendants in opposition to the City's motion to summarily adjudicate the retiree health issue in the City's favor was the "City of San Diego and POA Labor Negotiations Minutes dated March 30, 2005." (Doc. No. 613, p. 19:27.) However, those minutes supported the City's position and not the SDPOA's position on the issue of whether retiree health benefits were vested. *Second*, defendants also lodged an additional non-supportive document indicating that retiree health was not vested. Astoundingly, the non-supportive material was highlighted *by defendants* for the Court. Specifically, Mr. Nissen filed the exhibit with a circle around the heading "Current Employees," the word "Bad," and an arrow pointing to the adverse evidence. (See Doc. No. 704, p. 77;[15] RT, April 23, 2007, p. 66:6-19.)

Finally, defendants' appellants' reply brief, filed May 28, 2008, erroneously and without their clients' knowledge or consent, *conceded* "post-retirement health benefits is a term and condition of employment that may be renegotiated . . . ." (Appellant San Diego Police Officers' Association's Consolidated Reply Brief, United States Court of Appeals for the Ninth Circuit, Case No. 07-56004.)

In light of the defendants' negligence at the trial court, and their appellate concession, the United States Court of Appeals issued an adverse published opinion on June 10, 2009. (*San*

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Diego Police Officers' Association v. San Diego City Employees' Retirement System ("*SDPOA*") (2009) 568 F.2d 725.) In that opinion, the court cited *Thorning v. Hollister Sch. Dist.* (1992) 11 Cal.App.4th 1598, *Cal. League of City Employee Ass'ns v. Palos Verde Library Dist.* (1978), and *San Bernadino Pub. Employees Ass'n v. City of Fontana* (1998) 67 Cal.App.4th 1215 and explained that if retiree health benefits had been "expressly granted to [employees] by an official declaration of policy during [the employees'] term of public office," those retiree health benefits would be vested, "fundamental and could not be unilaterally terminated." (*SDPOA* at pp. 739-740.) However, if the employee benefit at issue were merely "provided for by MOUs between the city and its bargaining groups [the benefits] could not have become permanently and irrevocably vested as a matter of contract law, because the benefits were earned on a year-to-year basis under previous MOU's that expired under their own terms . . . ." (*SDPOA* at p. 740.) Thus, because the defendant lawyers failed to present evidence (e.g., the Ray Blair memo and numerous ordinances and Charter section 143.1 votes) establishing retiree health benefits had been expressly granted to employees by an multiple official declarations of policy during the employees' term of public office, those retiree health benefits would be vested and the City's July 2009 $142 million to $152 million reduction of the plaintiff class' Retiree Health Benefit would not have been permitted.

SPECIAL INTERROGATORY NO. 7:

IDENTIFY all "evidence" that JACKSON DEMARCO should have presented, but did not, as alleged in paragraph 11(b) of the COMPLAINT.

RESPONSE SPECIAL TO INTERROGATORY NO. 7

The defendants should have presented the following information, evidence, and legal authority to the court:

In 1982, the City desired to withdraw from the Social Security System. In order to successfully withdraw from the Social Security System, City employees were required to approve the withdrawal. In order to induce its employees to vote in favor of the City's withdrawal from the Social Security system, the City offered its employees lifetime retiree health insurance (the "Retiree Health Benefit").

In a memorandum dated November 20, 1981, from City Manager Ray T. Blair, Jr., the City promised both hospitalization and medical insurance: "Retired employees will be included in the City health plans. The City will pay the premiums." This memo is dated November 20, 1981, from then City Manager Ray T. Blair, Jr., to all City employees (including all SDPOA members). It discusses the City's proposal and upcoming employee election to remove employees from Social Security and Medicare in exchange for additional benefits to be provided by employees to the City. As the memo explains, in order to opt out of Social Security and Medicare, the City had to agree to provide "another pension plan to supplement your regular City retirement program."

At page 2, paragraph 3, of the memo, entitled "Entry Date," it states that all existing employees "will be enrolled in the Plan as of January 8, 1982." All future employees "will join the Plan immediately *on their date of employment*." (Italics added.) "Vesting" is covered at pages 3 and 4, paragraph 9 of the memo. The Plan provides that benefits were 100% vested after 5 years of service.

In the attachment to the memo, entitled "WHAT HAPPENS IF WE PULL OUT OF SOCIAL SECURITY," beginning at Bate-stamp # SDPOA 0399, the City provided questions and answers. "Following are the most common questions asked concerning how withdrawal from Social Security will affect City employees. The questions and answers are divided into five categories [including] . . . 4) Medicare Hospital Insurance [and] 5) Medicare Medical Insurance. Question # 22 (page SDPOA 0402) asked: "What will the City provide for hospital insurance?" The Answer: "The retired employees will be included in the City health plans. The City will pay for the retired employee's health insurance. These costs will <u>not</u> be paid out of the Supplemental Pension Plan." Question # 24 (page SDPOA 0403) asked: "What will the City provide for medical insurance?" The Answer: "Retired employees will be included in the City health plans. The City will pay the premiums. The cost of the premiums will <u>not</u> come from the Supplemental Pension Plan." Relying on the City's promise, City employees approved the City's withdrawal from the Social Security system and are no longer part of that system.

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promulgated a "Fact Sheet," which stated: "In 1982, City employees voted to get out of the Social Security/Medicare systems. In exchange, they were promised life-time health insurance upon retirement."

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SPECIAL INTERROGATORY NO. 8

State all FACTS that RELATE TO YOUR allegation in paragraph 11(b) of the COMPLAINT that the "reduction of retiree health benefits to SDPOA members" was a result of JACKSON DEMARCO's failure to "present sufficient evidence."

RESPONSE SPECIAL TO INTERROGATORY NO. 8:

The pleadings filed in response to the defendants' motion for summary judgment in *SDPOA, on behalf of itself and on behalf of all of its members v. Aguirre, et al.*, United States District Court for the Southern District of California, Case No. 05-cv-1581 (and related appeals), and *Aaron, et al. v. Aguirre, et al.*, United States District Court for the Southern District of California, Case No. 06-cv-1451 (and related appeals) demonstrate the fact to be true, based on the additional facts that (1) no such evidence was presented in court, (2) abundant evidence was available to present, (3) no legal precedent was presented, and (4) legal precedent supportive of an opposition to the summary judgment was abundantly available. Plaintiffs in this case contend that the lawyers in the underlying cases did a very poor job of advocacy, far below the standard of care, that led to an adverse judgment to the effect that their retiree health benefit was not vested and could be unilaterally reduced by the City.

The defendants should have presented the following information, evidence, and legal

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(See *Pasadena Police Officers Association v. City of Pasadena* (1983) 147 Cal.App.3d 695; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, and the authorities cited in each of these cases.)

On May 18, 2007, the District Court ruled against plaintiff in *San Diego Police Officers' Association v. Aguirre, et al.*, Case No. 05-cv-1581: "In the TAC, [the SDPOA] allege[d] that the City's imposition of the LBFO improperly adjusted eligibility qualifications for retiree health benefits for current employees in violation of its constitutional rights. (See, e.g., TAC ¶ 33.)" (Order, Doc. No. 737, filed May 18, 2007 in Case No. 05-cv-1581, p. 40:14-14.) In ruling

against the SDPOA, Judge Huff stated: "[The SDPOA] alleges *without citation to authority* that retiree health was offered at employment and therefore vested immediately." (*Id.*, p. 40:16-17, italics added.) Relying entirely on cases cited by the City, the Court stated: "[h]ere, [the SDPOA] has not directed the Court to any authority standing for the proposition that retiree health benefits are vested rights subject to constitutional protection under either the Contracts or Takings Clause." (*Id.*, p. 41: 4-6.) "Accordingly, given the absence of authority to the contrary, Plaintiff's Second and Third Claims under the Contracts and Takings Clauses premised on the modification of retiree health benefits fail." (*Id.*, at p. 41:6-8.) "In total, Plaintiff *has not created an issue of triable fact* as to whether the imposition of the LBFO and associated takeaways affected constitutionally protected benefits. Because the evidence and argument submitted by the parties demonstrate that none of the takeaways affected protected pension benefits, but instead affected employment rights, these claims fail." (*Id.*, at p. 41:9-15, italics added.)

In memoranda researched and written six months after suffering this adverse ruling, JDTP explained in detail the evidence and legal analysis which provided the support Judge Huff found was lacking. (Memo dated December 5, 2007 ["Retiree Healthcare Case Workup"], p. 23 [concluding retiree health vested]; Memo dated December 4, 2007, p. 3 ["vested right to retiree heath benefit"].) However, it was too late, because summary judgment had long since been granted.

Instead of providing the court with available evidence or legal citation *supporting* their clients' position regarding retiree health, the defendants instead submitted *adverse* evidence. *First*, the only evidence cited by defendants in opposition to the City's motion to summarily adjudicate the retiree health issue in the City's favor was the "City of San Diego and POA Labor Negotiations Minutes dated March 30, 2005." (Doc. No. 613, p. 19:27.) However, those minutes supported the City's position and not the SDPOA's position on the issue of whether retiree health benefits were vested. *Second*, defendants also lodged an additional non-supportive document indicating that retiree health was not vested. Astoundingly, the non-supportive material was highlighted *by defendants* for the Court. Specifically, Mr. Nissen filed the exhibit

with a circle around the heading "Current Employees," the word "Bad," and an arrow pointing to the adverse evidence. (See Doc. No. 704, p. 77;[17] RT, April 23, 2007, p. 66:6-19.)

Finally, defendants' appellants' reply brief, filed May 28, 2008, erroneously and without their clients' knowledge or consent, *conceded* "post-retirement health benefits is a term and condition of employment that may be renegotiated . . . ." (Appellant San Diego Police Officers' Association's Consolidated Reply Brief, United States Court of Appeals for the Ninth Circuit, Case No. 07-56004.)

In light of the defendants' negligence at the trial court, and their appellate concession, the United States Court of Appeals issued an adverse published opinion on June 10, 2009. (*San Diego Police Officers' Association v. San Diego City Employees' Retirement System* ("*SDPOA*") (2009) 568 F.2d 725.) In that opinion, the court cited *Thorning v. Hollister Sch. Dist.* (1992) 11 Cal.App.4th 1598, *Cal. League of City Employee Ass'ns v. Palos Verde Library Dist.* (1978), and *San Bernadino Pub. Employees Ass'n v. City of Fontana* (1998) 67 Cal.App.4th 1215 and explained that if retiree health benefits had been "expressly granted to [employees] by an official declaration of policy during [the employees'] term of public office," those retiree health benefits would be vested, "fundamental and could not be unilaterally terminated." (*SDPOA* at pp. 739-740.) However, if the employee benefit at issue were merely "provided for by MOUs between the city and its bargaining groups [the benefits] could not have become permanently and irrevocably vested as a matter of contract law, because the benefits were earned on a year-to-year basis under previous MOU's that expired under their own terms . . . ." (*SDPOA* at p. 740.) Thus, because the defendant lawyers failed to present evidence (e.g., the Ray Blair memo and numerous ordinances and Charter section 143.1 votes) establishing retiree health benefits had been expressly granted to employees by an multiple official declarations of policy during the employees' term of public office, those retiree health benefits would be vested and the City's July 2009 $142 million to $152 million reduction of the plaintiff class' Retiree Health Benefit would not have been permitted.

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[17] The Federal Court's PACER filing system allows proof that the document was filed by Mr. Nissen with the adverse evidence highlighted for the Court.

On or about July 25, 2009, the City Council adopted Ordinance No. O-19874, amending the San Diego Municipal Code, including sections 24.1201 and 24.1202. Ordinance O-19874 substantially affected the benefits of al police officers under the retirement system by imposing a monetary freeze of $8,880 per year on the Retiree Health Benefit. As the cost of health care continues to escalate, the freeze will severely impair the Retiree Health Benefit for all similarly situated employees in their most elderly, and vulnerable, retirement years.

As Ordinance No. O-19874 worked its way through the City Council, several presentations were made to the Council by the City Attorney's Office relying on the adverse rulings from Judge Huff, and then the Ninth Circuit, to the effect that court rulings had established that the Retiree Health Benefit was not vested.

SPECIAL INTERROGATORY NO. 9:

State all FACTS that RELATE TO YOUR allegation in paragraph 11(c) of the COMPLAINT that JACKSON DEMARCO failed to "perform as promised, despite numerous guarantees of success which were not fulfilled."

RESPONSE SPECIAL TO INTERROGATORY NO. 9:

Mr. Petersen "claimed he would . . . recover over $100 million in damages." Mr. Petersen held a large evangelical-style rally of SDPOA members at the Scottish Rite meeting hall in which he also told SDPOA members he "would recover far more in litigation that the SDPOA could ever achieve at the bargaining table," and that at the conclusion of the case, every SDPOA member would have a new Ford F-350 pickup truck parked at their house." Later, he told SDPOA members that they would soon own Balboa Park.

SPECIAL INTERROGATORY NO. 10:

IDENTIFY all guarantees of success made by JACKSON DEMARCO, as alleged in paragraph 11(c) of the COMPLAINT.

RESPONSE SPECIAL TO INTERROGATORY NO. 10:

Mr. Petersen "claimed he would . . . recover over $100 million in damages." Mr. Petersen held a large evangelical-style rally of SDPOA members at the Scottish Rite

meeting hall in which he also told SDPOA members he "would recover far more in litigation that the SDPOA could ever achieve at the bargaining table," and that at the conclusion of the case, every SDPOA member would have a new Ford F-350 pickup truck parked at their house." Later, he told SDPOA members that they would soon own Balboa Park.

SPECIAL INTERROGATORY NO. 11:

Identify each person having knowledge or each respective guarantee disclosed in the answer to Special Interrogatory No. 11.

RESPONSE SPECIAL TO INTERROGATORY NO. 11

Mr. Petersen. Richard Castle. Responding party is unable to identify all of the persons at these meetings. Upon request, the SDPOA will send an e-blast to its membership and provide up to 25 witnesses.

SPECIAL INTERROGATORY NO. 12

IDENTIFY every instance in which JACKSON DEMARCO failed to "perform as promised," as alleged in paragraph 11(c) of the COMPLAINT.

RESPONSE SPECIAL TO INTERROGATORY NO. 12

1. *2005 Labor Negotiations*

Pursuant to the Meyers-Milias-Brown Act (Gov. Code, § 3500, et seq., "MMBA"), the SDPOA is the recognized bargaining agent for its members with the City of San Diego ("the City"). Thus, the SDPOA meets periodically, typically every one or two years, with labor negotiators for the City to "meet and confer" and arrive at a labor contract. These labor contracts are called "memoranda of understanding," or "MOUs," and they usually run for one to two fiscal years.

Long-time labor attorney Richard H. Castle served as the contract negotiator for the SDPOA from 1976 through 1982, and 1992 through 2009. Historically—in part because an endorsement from the SDPOA was politically important to would-be Mayors and Councilpersons—the union did well at the bargaining table, obtaining contract terms that were often the envy of other, less influential, City labor unions. However, in 2005, in

an era of a particularly tight City budget, and in the beginning of the Robespierre-like reign of a new City Attorney, Michael J. Aguirre, the City and the SDPOA were unable to agree to contract terms. Therefore, in June 2005, as authorized by the MMBA, the City imposed contract terms on the SDPOA. Those terms included a decrease in the amount of *employee* pension contributions the City had previously paid on behalf of members,[18] a matching decrease in the salaries of employees in the deferred retirement option plan ("DROP"),[19] and the imposition of additional eligibility requirements for health insurance for employees after retirement ("retiree health").

Mr. Castle, dissatisfied that the City would impose "cutbacks" on SDPOA members, recommended that the SDPOA consult with Greg Petersen, with whom Mr. Castle had formed a partnership in 2005. On June 3, 2005, the SDPOA entered into a "Legal Services Agreement" with Castle, Petersen & Krause, LLP ("CPK"). That agreement limited the "services to be provided . . . [to] initial evaluation, legal analysis and opinion regarding the City's declared intention, following negotiations, to reduce the City's 'pick up' of retirement contributions made by employees represented by the SDPOA . . . ." Notably, litigation was among the legal services specifically excluded "unless otherwise authorized by the client and agreed to by [CPK]." For such litigation, the agreement stated that "a separate written agreement between Attorney and Client will

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[18] San Diego City Charter section 143 requires the City and employees to make "substantially equal" contributions to fund employee pensions. Historically, the SDPOA had been able to negotiate contracts with the City in which the City paid, or "picked up," most of SDPOA members' required *employee* contributions. Current City Attorney Jan Goldsmith has opined that the City's past practice of paying employee contributions on behalf of employees violates the "substantially equal" clause of Charter section 143.

[19] The City's DROP program, adopted in 1997, allows an employee, otherwise qualified to retire and begin drawing a pension, to enter DROP and continue working for up to five years. During that period, however, the employer no longer earns additional years of retirement service credit, and no further pension contributions are made either by the City or by the DROP participant. During the DROP period, a monthly pension is paid to the employee and placed in an interest-bearing DROP account. The DROP program allows the City to retain experienced workers for a longer period at a lower cost (because no retirement contributions are made during the DROP period), and allows an employee to create a sometimes substantial savings account while continuing to work and earn an income sufficient to pay household bills.

be required." The SDPOA agreed to pay an initial sum of $25,000.00 for the preliminary review and analysis of issues to be pursued.

2. *SDPOA v. Aguirre, et al.*

Without providing the SDPOA with any written evaluation or analysis, Mr. Petersen convinced the SDPOA to authorize litigation against the City, the City Attorney, numerous council members, and numerous City staffers. CPK also named the San Diego City Employees' Retirement System ("SDCERS"), even though it had absolutely no role in the 2005 SDPOA labor negotiations. The lawsuit was filed in federal court on August 9, 2005 and assigned to The Honorable Marilyn Huff. The complaint stated claims for violations of the First Amendment, violation of public policy, four section 1983 claims, breach of contract, conversion, fraud, violation of the MMBA, breach of fiduciary duty, breach of trust, conversion of trust, and declaratory relief.

As part of CPK's strategy to engender SDPOA member support, Mr. Petersen falsely inflated claims of success he had in previous litigation. As JDTP has acknowledged, Mr. Petersen "claimed he would . . . recover over $100 million in damages." Mr. Petersen held a large evangelical-style rally of SDPOA members at the Scottish Rite meeting hall in which he also told SDPOA members he "would recover far more in litigation that the SDPOA could ever achieve at the bargaining table," and that at the conclusion of the case, every SDPOA member would have a new Ford F-350 pickup truck parked at their house." Later, he told SDPOA members that they would soon own Balboa Park.

The *SDPOA v. Aguirre* litigation was as expensive as it was unsuccessful. The SDPOA paid JDTP (and its predecessor CPK) over $2.6 million in attorney fees. Individual SDPOA members paid approximately $2 million more. JDTP took videotaped depositions of more than 45 witnesses, including all City council defendants, and used hardly any of them.

As the case proceeded, in the words of Reg Vitek, whose firm represented SDCERS, the SDPOA suffered "serial losses on the merits." Mr. Vitek engaged in no

hyperbole. Despite Mr. Petersen's assurances, JDTP (and it predecessor CPK), lost every motion, including two motions to dismiss, an application for preliminary injunction, motions for summary judgment, and an appeal. Beginning on November 1, 2005, the Court dismissed several of the SDPOA's claims and ordered amendment on the remaining claims. Yet after each loss, in order to protect its income from the litigation, JDTP would falsely tout a loss as a victory. As the Ninth Circuit Court of Appeal would later write in handing JDTP its final loss on June 10, 2009: "[The SDPOA] seeks to emulate the alchemists in the Middle Ages in its effort to transmute the base metal of its *total loss on the merits* into the gold of 'prevailing party' status by asserting that the district court's order materially altered its relationship with Appellees.

During the pendency of the litigation, SDCERS made several settlement offers to the SDPOA, through its counsel, JDTP (and its predecessor CPK). These settlement offers, in which SDCERS offered to waive its costs (and its right to later file a malicious prosecution case) in exchange for a dismissal, were never forwarded to the SDPOA. As we will explain at the meditation, the SDPOA has since been subject to claims for malicious prosecution and has incurred expenses in attempting to stave off such a filing.

In May and June 2007, summary judgment was granted against the SDPOA on the remaining federal claims in its third amended complaint. Near the end of the litigation, in a desperate attempt to manufacture a viable theory, JDTP added a claim that the City's modification of eligibility requirements for retiree health was unconstitutional.

However, JDTP, which had no authority to pursue such a claim either on behalf of the SDPOA or individual members, was not prepared to present such a theory, as Judge Huff ruled in dismissing that claim. Indeed, *JDTP devoted only nine lines* in its opposition brief to this portentous issue.

"In the TAC, [the SDPOA] allege[d] that the City's imposition of the LBFO improperly adjusted eligibility qualifications for retiree health benefits for current employees in violation of its constitutional rights. (See, e.g., TAC ¶ 33.)" (Order dated May 18, 2007, p. 40:14-14.) In ruling against the SDPOA, Judge Huff stated: "[The

SDPOA] alleges *without citation to authority* that retiree health was offered at employment and therefore vested immediately." (*Id*., p. 40:16-17.) Relying entirely on cases cited by the City, the Court stated: "[h]ere, [the SDPOA] has not directed the Court to any authority standing for the proposition that retiree health benefits are vested rights subject to constitutional protection under either the Contracts or Takings Clause." (*Id*., p. 41: 4-6.) "Accordingly, given the absence of authority to the contrary, Plaintiff's Second and Third Claims under the Contracts and Takings Clauses premised on the modification of retiree health benefits fail." (*Id*., at p. 41:6-8.) "In total, Plaintiff has not created an issue of triable fact as to whether the imposition of the LBFO and associated takeaways affected constitutionally protected benefits. Because the evidence and argument submitted by the parties demonstrate that none of the takeaways affected protected pension benefits, but instead affected employment rights, these claims fail." (*Id*., at p. 41:9-15.)

3. *Aaron, et al. v. Aguirre, et al.*

In one of its first losses in *SDPOA v. Aguirre*, the Court ruled that the SDPOA did not have standing to pursue damages for certain claims, such as section 1983 claims for violation of civil rights. Therefore, on August 1, 2006, JDTP (and its predecessor CPK), filed another lawsuit, totaling 1,427 pages, on behalf of approximately 1,600 individual police officers. That lawsuit was also completely unsuccessful. On September 3, 2008, the Court granted summary judgment against all of JDTP's clients, dismissed their state claims without prejudice, and awarded costs to the defendants.

4. *McGuigan v. City of San Diego*

This litigation arose out of the underfunding of the City of San Diego's employee pension plan. McGuigan filed a representative declaratory relief action on June 28, 2005, on behalf of all beneficiaries of SDCERS. McGuigan alleged that from 1996 through 2005, the City paid less in employer contributions to SDCERS than the actuarially-determined amount that was required to be paid under the San Diego City Charter and Municipal Code. McGuigan sought: (1) judicial determinations that (a) the City had

violated City Charter section 143 and former San Diego Municipal Code section 24.0801 and (b) the City's contribution shortfall rendered SDCERS actuarially unsound; and (2) "a peremptory writ of mandate directing the City to immediately pay to SDCERS the aggregate amount of the City's shortfall in employer contributions, as determined by the actuarial valuations for every fiscal year ending June 30, 1997 to June 30, 2005, with interest."

With McGuigan's motion for summary judgment and a motion for issue preclusion or terminating sanctions pending, the parties attended a mediation session with retired United States District Court Judge Lawrence Irving on June 8, 2006, reached a tentative settlement, and executed a term sheet. Pursuant to the tentative settlement, the City agreed to pay SDCERS a special additional employer contribution of $173 million ($15 million more than the highest calculation of underfunding, with interest), but only if the case could be successfully converted into a non-opt out class action and releases obtained from all SDCERS' beneficiaries for the claims McGuigan had asserted and prosecuted.

After learning of the proposed settlement of *McGuigan*, CPK sought to derail the settlement, hijack *McGuigan*'s claims, and assert them in *SDPOA v. Aguirre* and *Aaron*. This effort included both (1) unsuccessfully seeking a temporary restraining order from United States District Court Judge Marilyn Huff to stay all proceedings in *McGuigan*, and (2) interposing objections to the proposed settlement before Judge Strauss in *McGuigan*. Among the tactics used by CPK were to falsely inform SDPOA members that McGuigan's counsel was sending out $1 checks to SDPOA members with hidden release language in them, and requesting SDPOA members to each call McGuigan's counsel's office and ask a lengthy list of questions prepared by CPK.[20] CPK's extensive and completely unsuccessful efforts in *McGuigan* were billed to the SDPOA without a written fee agreement.

[20] CPK, which represented approximately 1,600 SDPOA members individually, simultaneously refused to grant McGuigan's counsel permission to speak to those members pursuant to rule 2-100(A) of the Rules of Professional Conduct, or to provide SDPOA members written answers to all of the questions posed by CPK provided to CPK.

Judge Strauss held numerous hearings regarding the proposed settlement. At a hearing on November 29, 2006, Mr. Petersen, on behalf of the 1,600 SDPOA member-objectors he represented, informed the trial court that he thought any remaining objections could be resolved and suggested a continuance of the fairness hearing to December 12, 2006, a date convenient to Mr. Petersen.

Then, after verbally communicating to counsel in *McGuigan* that all remaining issues were resolved, neither Mr. Petersen, nor any CPK attorney, appeared for the continued December 12, 2006 fairness hearing.[21] Judge Strauss proceeded with the fairness hearing and approved the proposed settlement after determining that the value of the claims being released by the class was "between $140 million and $158.9 million [and the] consideration the City has agreed to pay SDCERS on behalf of the class—$173 million—is more than fair, adequate and reasonable."

Two days after failing to appear at the December 12, 2006 fairness hearing, CPK posted a message on the SDPOA's web site proclaiming that:

> "The settlement entered yesterday [sic] in *McGuigan* does the following which *actually helps the SDPOA and its Members*: (1) its [sic] incorporates word-for-word, almost two-pages [sic] of written changes proposed directly by SDPOA lawyers, which changes preserved the Federal Lawsuits SDPOA and its Members are currently pursuing, and (2) it prevented the City from releasing over $3.5 billion in additional under funding and related claims that were not raised in the *McGuigan* lawsuit."

On February 9, 2007, CPK —as counsel for the unsuccessful objectors—sought more than $340,000 in attorney fees and costs. In that motion, CPK argued that "[s]uccessful litigants are entitled to attorney fees under [Code of Civil Procedure section] 1021.5."

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[21] JDTP attorney Christopher Nissen would later falsely declare in the Court of Appeal that he did not appear because he was stuck in traffic. However, Mr. Nissen told Jeff Jordon, a member of the SDPOA Board, that he never attempted to attend the hearing because Mr. Petersen asked him to cover it at the last minute the morning of the hearing and Mr. Nissen could not make it to San Diego from Orange County in time. The SDPOA possesses substantial evidence of JDTP misrepresentations to judicial officers during its representation of the SDPOA. Because JDTP failed to inform the SDPOA of its actions and statements, it only learned of these misrepresentations recently.

That same day, despite (1) informing class counsel on December 6, 2006, that the proposed judgment was acceptable, (2) failing to submit objections to the proposed judgment by December 8, 2006, (3) failing to appear at the December 12, 2006 fairness hearing, (4) conceding that the judgment "actually helps" the Objectors, and (5) seeking more than $340,000 in fees and costs as "successful litigants" who had "realized [their] litigation objectives," CPK filed an appeal on behalf the 1,600 SDPOA member-objectors it represented. After extensive briefing, the appeal was completely unsuccessful.

5. *CPK and JDTP Merger*

In early 2007, JDTP acquired CPK and the firms merged. According to a declaration filed by Mr. Petersen on May 29, 2008, in another case, during the early part of 2007, he decided to diversify CPK by seeking to acquire another firm that was "fee based." His search led him to meet with JDTP's president, Ruth Mijuskovic, to discuss the possibility of her firm representing CPK in such an acquisition. Ms. Mijuskovic suggested that the two firms merge, and Mr. Petersen, who owned an 80 percent interest in CPK, agreed.

Mr. Petersen, CPK's majority shareholder, became a named partner of the newly-named firm, "Jackson, DeMarco, Tidus, *Petersen* & Peckenpaugh." In several courts, the firm simply filed a "Notice of Change of Firm Name." The SDPOA was told that "[t]he added strength of the new firm will provide great benefits to you and your lawsuit." "You will have the attorneys and staff of both firms now working on your case."

In the *SDPOA* case (United States District Court, Southern District of California, Case No. 05cv1581-H), Mr. Petersen began the May 1, 2007 hearing by announcing the new name of his law firm as Jackson, DeMarco, Tidus, *Petersen* and Peckenpaugh.

Jackson, DeMarco, Tidus, *Petersen* & Peckenpaugh filed several "Notice of Change of Firm Name and Address." In each, JDTP represented to the Court that "Castle, Petersen & Krouse LLP, has *changed its name* to Jackson DeMarco Tidus Petersen & Peckenpaugh." (Italics added.) This evidence supports both of our theories of merger or de facto partnership, which renders JDTP liable for all CPK acts even prior to

May 1, 2007. (See Evid. Code, § 623 ["[w]henever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it"].) Of course, given the negligence of JDTP and its employees at the critical time period after May 1, 2007 and before May 18, 2007 (for failing to request a dismissal without prejudice despite knowing insufficient evidence had been presented to survive summary judgment), establishing merger or de facto partnership is academic. JDTP was on duty when the most critical error occurred.

In March 2008, after JDTP learned that Mr. Petersen had grossly misrepresented himself and his successes, JDTP terminated him. JDTP dropped Mr. Petersen from its firm name. Within one year, JDTP also terminated all former CPK attorneys.

After Mr. Petersen was terminated, nasty contested disputes arose throughout Southern California courts in which JDTP and Mr. Petersen fought over clients. Although JDTP had no fee agreements in any of the cases,[22] it successfully took the position—contested by Mr. Petersen—that it was the rightful attorney of record because it had acquired CPK and merged with it. Petersen filed a declaration acknowledging JDTP characterized its acquisition of CPK as a "merger."

6. *Appeal of SDPOA v. Aguirre, et al.*

Without providing any analysis or explaining the costs or benefits of an appeal, JDTP proceeded with an appeal of Judge Huff's grant of summary judgment in *SDPOA v. Aguirre*. That appeal was a complete loss. Significantly, based on the poor record and argument presented by JDTP, the Ninth Circuit, in a published opinion, found that retiree health benefits "were not protectible contract rights."

Since that ruling, the City has begun aggressive cuts to retiree health as it attempted to balance its budget and remove itself from potentially crushing $1.2 billion in unfunded liability for such a benefit. On July 27, 2009, less than two months after the

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[22] On March 19, 2008, JDTP proposed a legal representation agreement to the SDPOA. However, the SDPOA never agreed to or signed it.

Ninth Circuit's ruling, the City imposed a cap on the annual amount paid for retiree health care, a cap which has cost SDPOA members approximately $36 million.

7. *Appeal of Aaron, et al. v. Aguirre, et al.*

Also without providing any analysis or explaining the costs or benefits of an appeal, JDTP proceeded with an appeal of Judge Huff's grant of summary judgment. However, after the SDPOA announced its intent to pursue a malpractice claim against JDTP, it has informed its numerous clients that "the appeal . . . will be a very significant uphill battle with a very low prospect of success . . . ."

8. *State Court Actions*

Again without obtaining client consent or providing any analysis, JDTP filed state court actions on behalf of the SDPOA and individual members. After hiring outside counsel to analyze the merits and chance of success of the state court action, the SDPOA has dismissed its claim. Most of the individual lawsuits remain, although several adverse rulings have already occurred and lawyers at JDTP have recommended that its remaining abandon those cases.

Liability

The elements of a cause of action in tort for professional negligence are "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200; Judicial Council of California, Civil Jury Instructions ["CACI"], No. 600.) Moreover, an attorney who holds himself out as a specialist, such as Mr. Petersen, has an even higher standard of care. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810.)

A cause of action for breach of fiduciary duty requires the existence of a fiduciary relationship, a breach of the duty created by that relationship, and damages proximately caused by the breach. (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101.) "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules

of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' [Citations.] Whether an attorney has breached a fiduciary duty to his or her client generally is a question of fact. [Citation.]" (*Stanley v. Richmond* (1995)) 35 Cal.App.4th 1070, 1086-1087.)

There exist, at a minimum, nine separate liability theories on which to pursue these claims, including the following:

1. *Maintaining Objectively Meritless and Costly Litigation*

JDTP recommended and maintained objectively meritless litigations on behalf of the SDPOA. As a result, the SDPOA has expended more than $1.6 million with absolutely nothing to show for it except a mortgage on its union headquarters. And the SDPOA has already been exposed to claims of malicious prosecution by SDCERS.

Here, no reasonable attorney—much less a specialist—would have pursued the meritless litigation claiming several civil rights violations for routine labor negotiation matters.

"[A]n attorney does have a counseling role. An attorney should advise a client of substantial deficiencies in the merits or in available defenses so that the client can decide whether and how to proceed." (4 Mallen & Smith, Legal Malpractice (2010 ed.) The Litigation Attorney ("Mallen"), § 31:26, pp. 583-584.) "This principle recognizes that the client should have the ultimate control over crucial decisions concerning the lawsuit." (*Id*., p. 584.)

2. *Losing Retiree Health Even Though Not Authorized to Pursue Such Litigation*

JDTP was never authorized to raise, much less pursue, any retiree health care claim. Then, when that unauthorized claim was raised, it was presented negligently. This resulted in an adverse ruling—subject to both collateral estoppel and res judicata—that retiree health is not a vested benefit. As JDTP's own memos demonstrate, ample evidence to support that claim was never presented in court.

Further, JDTP never informed the SDPOA of the economic *benefits* and economic *risks* of litigating whether retiree health is a vested right. JDTP's prosecution of any claim regarding retiree health benefits was *unauthorized*. "An extreme situation is if the lawyer acted without authority. An attorney can be liable for an unauthorized prosecution or defense." (Mallen, *supra,* § 31.26, p. 584.) Had Jackson exercised due care, the SDPOA would not have prosecuted any claim raising the issue whether retiree health benefits are a vested right for several reasons, including (a) there was no actual controversy regarding that issue because the City Attorney's Office, after specific research and analysis, had advised the City that such rights *were* likely vested; (b) the economic *risks* of litigating the issue greatly outweighed the potential economic benefits of the unauthorized claim prosecuted by JDTP; and (c) the *costs* of litigating the issue outweighed the potential economic benefits of the unauthorized claim prosecuted by JDTP.

In response to the defendants' motion for summary judgment in *SDPOA, on behalf of itself and on behalf of all of its members v. Aguirre, et al.,* United States District Court for the Southern District of California, Case No. 05-cv-1581 (and related appeals), and *Aaron, et al. v. Aguirre, et al.*, United States District Court for the Southern District of California, Case No. 06-cv-1451 (and related appeals) the defendants should have presented the following information, evidence, and legal authority to the court:

In 1982, the City desired to withdraw from the Social Security System. In order to successfully withdraw from the Social Security System, City employees were required to approve the withdrawal. In order to induce its employees to vote in favor of the City's withdrawal from the Social Security system, the City offered its employees lifetime retiree health insurance (the "Retiree Health Benefit").

In a memorandum dated November 20, 1981, from City Manager Ray T. Blair, Jr., the City promised both hospitalization and medical insurance: "Retired employees will be included in the City health plans. The City will pay the premiums." This memo is dated November 20, 1981, from then City Manager Ray T. Blair, Jr., to all City employees

(including all SDPOA members). It discusses the City's proposal and upcoming employee election to remove employees from Social Security and Medicare in exchange for additional benefits to be provided by employees to the City. As the memo explains, in order to opt out of Social Security and Medicare, the City had to agree to provide "another pension plan to supplement your regular City retirement program."

At page 2, paragraph 3, of the memo, entitled "Entry Date," it states that all existing employees "will be enrolled in the Plan as of January 8, 1982." All future employees "will join the Plan immediately *on their date of employment*." (Italics added.) "Vesting" is covered at pages 3 and 4, paragraph 9 of the memo. The Plan provides that benefits were 100% vested after 5 years of service.

In the attachment to the memo, entitled "WHAT HAPPENS IF WE PULL OUT OF SOCIAL SECURITY," beginning at Bate-stamp # SDPOA 0399, the City provided questions and answers. "Following are the most common questions asked concerning how withdrawal from Social Security will affect City employees. The questions and answers are divided into five categories [including] . . . 4) Medicare Hospital Insurance [and] 5) Medicare Medical Insurance. Question # 22 (page SDPOA 0402) asked: "What will the City provide for hospital insurance?" The Answer: "The retired employees will be included in the City health plans. The City will pay for the retired employee's health insurance. These costs will <u>not</u> be paid out of the Supplemental Pension Plan." Question # 24 (page SDPOA 0403) asked: "What will the City provide for medical insurance?" The Answer: "Retired employees will be included in the City health plans. The City will pay the premiums. The cost of the premiums will <u>not</u> come from the Supplemental Pension Plan." Relying on the City's promise, City employees approved the City's withdrawal from the Social Security system and are no longer part of that system.

On March 14, 2006, during "Sunshine Week," present City Mayor Jerry Sanders promulgated a "Fact Sheet," which stated: "In 1982, City employees voted to get out of the Social Security/Medicare systems. In exchange, they were promised life-time health insurance upon retirement."

"Resolution R-255610, adopted January 4, 1982, effective January 1, 1982, set the parameters of the [Retiree] Health Benefit ." (City Attorney Opinion No. 2007-04, p. 2.) "Certain benefits were 'provided to employees in lieu of Social Security participation.'" (*Ibid*.) "In addition, it was the City Council's intent 'to provide such coverage as a permanent benefit to eligible retirees.'" (*Ibid*.) "The City Manager was authorized to establish a City-sponsored Group Health Insurance Plan for eligible retirees, providing the same choice of program coverage as offered to active employees of the City." (*Ibid*.) "On June 1, 1982, Ordinance No. O-15758, codified the [Retiree] Health Benefit." (*Ibid*.) "In 1985 . . . Police and Fire Safety Members on the active payroll on or after June 30, 1985 were added." (*Id*., at p. 3; Ordinance No. O-16449.) The Retiree Health Benefit has always been codified among the City's retirement ordinances.

Charter section 143.1 provides, in relevant part: "No ordinance amending the retirement system which affects the benefits of any employee under such retirement system shall be adopted without the approval of a majority vote of the members of said system." In 1985, before Ordinance No. O-16649 became effective, "a vote of the retirement system membership [was conducted], as required by Charter section 143.1[.]" (Ordinance No. O-16449.) "[S]aid vote was conducted and the ballots tallied on June 3, 1985[,] with a vote of 2,885-yes, 904-no, and 12-void[.]" (*Ibid*.)

"On September 30, 1985, Ordinance No. O-16510 provided [that] . . . it was the City's responsibility to provide [funds to pay for the Retiree Health Benefit] from the General Fund . . . ." (City Attorney Opinion No. 2007-04, p. 3.) In 1986 the City adopted Ordinance No. O-16679 as part of the settlement of a class action lawsuit (the *Andrews* class action), and made the Retiree Health Benefit retroactive to all police officers on active City payroll as of October 6, 1980. In 1986, pursuant to Charter section 143.1, before Ordinance No. O-16679 became effective, "the matter was submitted to a vote of the active members of the System and approved by a vote of 2,630-Yes as opposed to 213-No[.]" (Ordinance No. O-16679.)

In 1992, the Retiree Health Benefit was modified by Ordinance No. O-17770.

Again, before the modifications became effective, "these changes were voted upon by all [affected] members pursuant to Charter section 143.1 with [the] vote counted and certified on April 13, 1992 . . . ." (Ordinance No. O-17770.) Since at least 1992, the Retiree Health Benefit has been codified at San Diego Municipal Code sections 24.1201 and 24.1202.

On or about March 31, 1997, the City Council adopted Ordinance No. O-18392, which modified the Retiree Health Benefit. Ordinance No. O-18392 contained a provision in which the City agreed "that the level of health benefits to be provided [to retirees] not be diminished" below comparable health plans offered to active employees. Before any such 1997 modifications to the Retiree Health Benefit became effective, the City conducted a Charter section 143.1 vote, which passed 3,181 yes votes and 88 no votes.

In 2002, the City again sought to modify the Retiree Health Benefit. The 2002 modification placed a fixed dollar amount of the Retiree Health Benefit based on the cost of the City-sponsored PPO plan being offered to retirees for the 2003 plan year, with an automatic annual increase in this amount, not to exceed ten percent (10%) per year, based on an independent, objective source—the Centers for Medicare and Medicaid Services, Office of the Actuary, which tracks projected increases in National Health Expenditures. Before any such 2002 modifications to the Retiree Health Benefit became effective, the City conducted a Charter section 143.1 vote, which passed 2,193 in favor and 35 against the proposed modifications.

[B]oth the federal and state contract clauses protect the vested pension rights of public officers and employees from unreasonable impairment." (*California Ass'n of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 383.) "While some jurisdictions view public employees' retirement rights as a gratuity, California is firmly committed to the proposition that these rights are contractual; that they are 'vested' in the sense that the lawmakers' power to alter them after they have been earned is quite limited." (*Ibid*.) "By entering public service an employee obtains a vested contractual

right to earn a pension on terms substantially equivalent to those then offered by the employer." (*Ibid*.) "A long line of California decisions has settled the principles applicable to [this situation]. A public employee's pension constitutes an element of compensation, and *a vested contractual right to pension benefits accrues upon acceptance of employment*. Such pension right *may not be destroyed*, once vested, without impairing a contractual obligation of the employing public entity." (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863, italics added.)

Prior to retirement:

> "'[a]n employee's vested contractual pension rights may be modified . . . for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. [Citations.] Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, *and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.' "* (*Betts* at p. 864, italics in original; accord, *Maffei v. Sacramento County Employees Retirement System* (2002) 103 Cal.App.4th 993, 999-1000; *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1132-1133; *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 783-784.)

(See *Pasadena Police Officers Association v. City of Pasadena* (1983) 147 Cal.App.3d 695; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, and the authorities cited in each of these cases.)

On May 18, 2007, the District Court ruled against plaintiff in *San Diego Police Officers' Association v. Aguirre, et al.*, Case No. 05-cv-1581: "In the TAC, [the SDPOA] allege[d] that the City's imposition of the LBFO improperly adjusted eligibility qualifications for retiree health benefits for current employees in violation of its constitutional rights. (See, e.g., TAC ¶ 33.)" (Order, Doc. No. 737, filed May 18, 2007 in Case No. 05-cv-1581, p. 40:14-14.) In ruling against the SDPOA, Judge Huff stated: "[The SDPOA] alleges *without citation to authority* that retiree health was offered at employment and therefore vested immediately." (*Id.*, p. 40:16-17, italics added.) Relying

entirely on cases cited by the City, the Court stated: "[h]ere, [the SDPOA] has not directed the Court to any authority standing for the proposition that retiree health benefits are vested rights subject to constitutional protection under either the Contracts or Takings Clause." (*Id.*, p. 41: 4-6.) "Accordingly, given the absence of authority to the contrary, Plaintiff's Second and Third Claims under the Contracts and Takings Clauses premised on the modification of retiree health benefits fail." (*Id.*, at p. 41:6-8.) "In total, Plaintiff *has not created an issue of triable fact* as to whether the imposition of the LBFO and associated takeaways affected constitutionally protected benefits. Because the evidence and argument submitted by the parties demonstrate that none of the takeaways affected protected pension benefits, but instead affected employment rights, these claims fail." (*Id.*, at p. 41:9-15, italics added.)

In memoranda researched and written six months after suffering this adverse ruling, JDTP explained in detail the evidence and legal analysis which provided the support Judge Huff found was lacking. (Memo dated December 5, 2007 ["Retiree Healthcare Case Workup"], p. 23 [concluding retiree health vested]; Memo dated December 4, 2007, p. 3 ["vested right to retiree heath benefit"].) However, it was too late, because summary judgment had long since been granted.

Instead of providing the court with available evidence or legal citation *supporting* their clients' position regarding retiree health, the defendants instead submitted *adverse* evidence. *First*, the only evidence cited by defendants in opposition to the City's motion to summarily adjudicate the retiree health issue in the City's favor was the "City of San Diego and POA Labor Negotiations Minutes dated March 30, 2005." (Doc. No. 613, p. 19:27.) However, those minutes supported the City's position and not the SDPOA's position on the issue of whether retiree health benefits were vested. *Second*, defendants also lodged an additional non-supportive document indicating that retiree health was not vested. Astoundingly, the non-supportive material was highlighted *by defendants* for the Court. Specifically, Mr. Nissen filed the exhibit with a circle around the heading "Current Employees," the word "Bad," and an arrow pointing to the adverse evidence.

(See Doc. No. 704, p. 77;[23] RT, April 23, 2007, p. 66:6-19.)

Finally, defendants' appellants' reply brief, filed May 28, 2008, erroneously and without their clients' knowledge or consent, *conceded* "post-retirement health benefits is a term and condition of employment that may be renegotiated . . . ." (Appellant San Diego Police Officers' Association's Consolidated Reply Brief, United States Court of Appeals for the Ninth Circuit, Case No. 07-56004.)

In light of the defendants' negligence at the trial court, and their appellate concession, the United States Court of Appeals issued an adverse published opinion on June 10, 2009. (*San Diego Police Officers' Association v. San Diego City Employees' Retirement System* ("*SDPOA*") (2009) 568 F.2d 725.) In that opinion, the court cited *Thorning v. Hollister Sch. Dist.* (1992) 11 Cal.App.4th 1598, *Cal. League of City Employee Ass'ns v. Palos Verde Library Dist.* (1978), and *San Bernadino Pub. Employees Ass'n v. City of Fontana* (1998) 67 Cal.App.4th 1215 and explained that if retiree health benefits had been "expressly granted to [employees] by an official declaration of policy during [the employees'] term of public office," those retiree health benefits would be vested, "fundamental and could not be unilaterally terminated." (*SDPOA* at pp. 739-740.) However, if the employee benefit at issue were merely "provided for by MOUs between the city and its bargaining groups [the benefits] could not have become permanently and irrevocably vested as a matter of contract law, because the benefits were earned on a year-to-year basis under previous MOU's that expired under their own terms . . . ." (*SDPOA* at p. 740.) Thus, because the defendant lawyers failed to present evidence (e.g., the Ray Blair memo and numerous ordinances and Charter section 143.1 votes) establishing retiree health benefits had been expressly granted to employees by an multiple official declarations of policy during the employees' term of public office, those retiree health benefits would be vested and the City's July 2009 $142 million to $152 million reduction of the plaintiff class' Retiree Health Benefit

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[23] The Federal Court's PACER filing system allows proof that the document was filed by Mr. Nissen with the adverse evidence highlighted for the Court.

would not have been permitted.

"It is well settled that an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in the loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900.) Here, as JDTP later acknowledged, ample evidence existed—but was not presented—which would have led to a different result on the retiree health issue.

3. ***Failing to Keep the SDPOA Apprised of Material Developments in Violation of Business and Professions Code section 6068***

Subdivision (m) of Business and Professions Code section 6068 provides:

> "It is the duty of an attorney to do all of the following: . . . (m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

JDTP failed to keep the SDPOA timely apprised of significant developments. Board members, several of whom will be present at the mediation, will explain how difficult it was to get status reports or analyses. For example, after the adverse Ninth Circuit opinion was announced on June 10, 2009, the SDPOA learned about it from the media. JDTP refused to respond to requests for several days. JDTP never informed its clients of significant cost awards against the SDPOA and individual plaintiffs in the *Aaron* case.

Had JDTP (and its predecessor firm CPK) kept the SDPOA timely apprised of significant developments, the SDPOA would have realized much sooner the lack of merit of the litigation and been able to contain its expense.

4. ***Misrepresenting the Nature of Several Adverse Rulings***

On numerous occasions JDTP (and its predecessor CPK) falsely characterized the nature of adverse rulings. Even when summary judgment was granted against it, JDTP characterized the ruling as the Court "not[ing] that [the claims] raised important issues of state law and policy." When JDTP failed to appear at the fairness hearing in *McGuigan*,

it falsely informed clients that had prevailed in gaining important limitations in the case. At the mediation, the five SDPOA board members present will provide additional evidence of false statements. Given the millions of dollars being paid to JDTP by the SDPOA and its members, these false statements were designed to keep fees flowing to JDTP. The SDPOA believes punitive damages are likely to be awarded due to this egregious fraudulent conduct by a fiduciary, JDTP.

5. ***Making Numerous Guarantees of Success Which Were Not Fulfilled Which Allowed the Firm to Continue to Bill and Collect Fees***

JDTP, including its former named partner Mr. Petersen, made numerous guarantees of success which were not fulfilled. These statements, at least one of which JDTP acknowledges was made, will supports both negligent and intentional misrepresentation claims.

6. ***Failure To Obtain a Retention Agreement in Violation of Business and Professions Code Section 6148***

Business and Professions Code section 6148, subdivision (a), requires contracts for legal services which will exceed $1,000 to be in writing. JDTP never obtained an agreement with the SDPOA,[24] and is limited to only the reasonable value of the services it rendered (Bus. & Prof. Code, § 6148, subd. (c)), which is less than zero. The fees that were paid should be disgorged.

7. ***Charging Unreasonable Fees in Violation of Rule 4-200***

Rule 4-200 of the Rules of Professional conduct prohibits charging a client an unconscionable fee. "Among the factors to be considered . . . are . . . (1) [t]he amount of the fee in proportion to the value of the services performed[;] . . . (5) the amount involved and the results obtained[; and] . . . (11) the informed consent of the client to the fee." Here, although the SDPOA paid more than $1.6 million to JDTP (and its predecessor CPK), substantial evidence will support a finding that the fee charged was

[24] The agreement with its predecessor firm, CPK, expressly excluded litigation.

unconscionable, particularly because JDTP lost literally every contested motion and the lied to its client about the outcome.

8. *Failing to Communicate Several Settlement Offers in Violation of Rule 3-510(A)(2)*

Rule 3-510(A)(2) of the Rules of Professional Conduct required JDTP to communicate SDCERS' written settlement offers to the SDPOA. These settlement offers were never communicated to the SDPOA. If they had been communicated, the SDPOA board would have realized sooner that the litigation lacked merit and would have been able to avoid (1) additional expenditure of union assets, (2) exposure to malicious prosecution claims, and (3) an adverse judgment on numerous issues, including a published Ninth Circuit opinion holding that retiree health is not a vested benefit.

9. *Failing to Apprise the Client of Malpractice by Mr. Petersen During His Representation of the SDPOA*

Although JDTP roundly criticized Mr. Petersen after he departed JDTP, and charged that he had lied to clients, JDTP failed to apprise the SDPOA of Mr. Petersen's malpractice and the SDPOA's limited time to proceed against him individually for malpractice.

"The nature of an attorney's function is such that an attorney is the only professional who may have a duty to advise a client that a malpractice action against another professional may provide a solution to the client's problems." (*Lewis v. Purvin* (1989) 208 Cal.App.3d 1208, 1217.) Moreover, two of the "four circumstances in which nondisclosure or concealment may constitute actionable fraud" apply: "(1) . . . the defendant is in a fiduciary relationship with the plaintiff [and] . . . (4) . . . The defendant makes partial representations but also suppresses some material facts . . . ." (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.) "The rule has long been settled in this state that although one may be under no duty to speak as to a matter, 'if he undertakes to do so, ... he is bound not only to state truly what he tells but also not to suppress or conceal any facts . . . . If he speaks at all he must make a full and fair

disclosure." (*Marketing West, Inc. v. Wassermann* (1993) 5 Cal.4th 1082, 1093.)

SPECIAL INTERROGATORY NO. 13:

State all FACTS that RELATE TO YOUR allegation in paragraph 11(d) of the COMPLAINT that JACKSON DEMARCO failed to "obtain a retention agreement with the SDPOA in violation of Business and Professions Code section 6148."

RESPONSE SPECIAL TO INTERROGATORY NO. 13:

Objection. This interrogatory is unintelligible as phrased. There is no retention agreement. Business and Professions Code section 6148 requires one.

SPECIAL INTERROGATORY NO. 14:

State all FACTS that RELATE TO YOUR allegation in paragraph 11(e) of the COMPLAINT that JACKSON DEMARCO charged the SDPOA "unreasonable fees in violation of rule 4-200 of the Rules of Professional Conduct."

RESPONSE SPECIAL TO INTERROGATORY NO. 14:

Because the litigation was meritless, as explained at length in these responses, and should not have been pursued.

SPECIAL INTERROGATORY NO. 15:

State all FACTS that RELATE TO why the billing rates charged by JACKSON DEMARCO were unreasonable.

RESPONSE SPECIAL TO INTERROGATORY NO. 15:

Objection. This interrogatory assumes a contention not being made in this litigation.

SPECIAL INTERROGATORY NO. 16:

State all FACTS that RELATE TO why the number of hours charged by JACKSON DEMARCO were unreasonable.

RESPONSE SPECIAL TO INTERROGATORY NO. 16:

Because the litigation was meritless, as explained at length in these responses, and should not have been pursued.

SPECIAL INTERROGATORY NO. 17:

State all FACTS that RELATE TO YOUR allegation in paragraph 11(f) of the

COMPLAINT that JACKSON DEMARCO failed to "communicate several written settlement offers in violation of rule 3-510(A)(2) of the Rules of Professional Conduct."

RESPONSE SPECIAL TO INTERROGATORY NO. 17:

SDCERS made several written settlement offers in the litigation (see, e.g., Vitek letters date December 19, 2008, February 7, 2008, March 12, 2007, March 30, 2006, which were not presented to the SDPOA.

SPECIAL INTERROGATORY NO. 18:

IDENTIFY all written settlement offers were not communicated by JACKSON DEMARCO to YOU, as alleged in paragraph 11(f) of the COMPLAINT.

RESPONSE SPECIAL TO INTERROGATORY NO. 18:

December 19, 2008, February 7, 2008, March 12, 2007, March 30, 2006. Discovery is continuing.

SPECIAL INTERROGATORY NO. 19:

Identify each person having knowledge of each respective settlement offer disclosed in the answer to Special Interrogatory No. 18.

RESPONSE SPECIAL TO INTERROGATORY NO. 19:

Reg Vitek, Greg Petersen, Chris Nissen, Elaine Reagan, David Wescoe, Roxanne Story-Parks, Mike Leone, Chris Waddell, Alim Malik, Matt Mahoney, Ruth Mijuskovic, Roger Franks.

SPECIAL INTERROGATORY NO. 20:

State all FACTS that RELATE TO YOUR allegation in paragraph 11(g) of the COMPLAINT that JACKSON DEMARCO failed to "inform the SDPOA of Petersen's malpractice."

RESPONSE SPECIAL TO INTERROGATORY NO. 20:

Although JDTP roundly criticized Mr. Petersen after he departed JDTP, and charged that he had lied to clients, JDTP failed to apprise the SDPOA of Mr. Petersen's malpractice and the SDPOA's limited time to proceed against him individually for malpractice.

"The nature of an attorney's function is such that an attorney is the only

professional who may have a duty to advise a client that a malpractice action against another professional may provide a solution to the client's problems." (*Lewis v. Purvin* (1989) 208 Cal.App.3d 1208, 1217.) Moreover, two of the "four circumstances in which nondisclosure or concealment may constitute actionable fraud" apply: "(1) . . . the defendant is in a fiduciary relationship with the plaintiff [and] . . . (4) . . . The defendant makes partial representations but also suppresses some material facts . . . ." (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.) "The rule has long been settled in this state that although one may be under no duty to speak as to a matter, 'if he undertakes to do so, ... he is bound not only to state truly what he tells but also not to suppress or conceal any facts . . . . If he speaks at all he must make a full and fair disclosure." (*Marketing West, Inc. v. Wassermann* (1993) 5 Cal.4th 1082, 1093.)

SPECIAL INTERROGATORY NO. 21:

IDENTIFY all instances of Petersen's malpractice of which JACKSON DEMARCO failed to inform YOU.

RESPONSE SPECIAL TO INTERROGATORY NO. 21:

1. *2005 Labor Negotiations*

Pursuant to the Meyers-Milias-Brown Act (Gov. Code, § 3500, et seq., "MMBA"), the SDPOA is the recognized bargaining agent for its members with the City of San Diego ("the City"). Thus, the SDPOA meets periodically, typically every one or two years, with labor negotiators for the City to "meet and confer" and arrive at a labor contract. These labor contracts are called "memoranda of understanding," or "MOUs," and they usually run for one to two fiscal years.

Long-time labor attorney Richard H. Castle served as the contract negotiator for the SDPOA from 1976 through 1982, and 1992 through 2009. Historically—in part because an endorsement from the SDPOA was politically important to would-be Mayors and Councilpersons—the union did well at the bargaining table, obtaining contract terms that were often the envy of other, less influential, City labor unions. However, in 2005, in an era of a particularly tight City budget, and in the beginning of the Robespierre-like

reign of a new City Attorney, Michael J. Aguirre, the City and the SDPOA were unable to agree to contract terms. Therefore, in June 2005, as authorized by the MMBA, the City imposed contract terms on the SDPOA. Those terms included a decrease in the amount of *employee* pension contributions the City had previously paid on behalf of members,[25] a matching decrease in the salaries of employees in the deferred retirement option plan ("DROP"),[26] and the imposition of additional eligibility requirements for health insurance for employees after retirement ("retiree health").

Mr. Castle, dissatisfied that the City would impose "cutbacks" on SDPOA members, recommended that the SDPOA consult with Greg Petersen, with whom Mr. Castle had formed a partnership in 2005. On June 3, 2005, the SDPOA entered into a "Legal Services Agreement" with Castle, Petersen & Krause, LLP ("CPK"). That agreement limited the "services to be provided . . . [to] initial evaluation, legal analysis and opinion regarding the City's declared intention, following negotiations, to reduce the City's 'pick up' of retirement contributions made by employees represented by the SDPOA . . . ." Notably, litigation was among the legal services specifically excluded "unless otherwise authorized by the client and agreed to by [CPK]." For such litigation, the agreement stated that "a separate written agreement between Attorney and Client will be required." The SDPOA agreed to pay an initial sum of $25,000.00 for the preliminary

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[25] San Diego City Charter section 143 requires the City and employees to make "substantially equal" contributions to fund employee pensions. Historically, the SDPOA had been able to negotiate contracts with the City in which the City paid, or "picked up," most of SDPOA members' required *employee* contributions. Current City Attorney Jan Goldsmith has opined that the City's past practice of paying employee contributions on behalf of employees violates the "substantially equal" clause of Charter section 143.

[26] The City's DROP program, adopted in 1997, allows an employee, otherwise qualified to retire and begin drawing a pension, to enter DROP and continue working for up to five years. During that period, however, the employer no longer earns additional years of retirement service credit, and no further pension contributions are made either by the City or by the DROP participant. During the DROP period, a monthly pension is paid to the employee and placed in an interest-bearing DROP account. The DROP program allows the City to retain experienced workers for a longer period at a lower cost (because no retirement contributions are made during the DROP period), and allows an employee to create a sometimes substantial savings account while continuing to work and earn an income sufficient to pay household bills.

review and analysis of issues to be pursued.

2. *SDPOA v. Aguirre, et al.*

Without providing the SDPOA with any written evaluation or analysis, Mr. Petersen convinced the SDPOA to authorize litigation against the City, the City Attorney, numerous council members, and numerous City staffers. CPK also named the San Diego City Employees' Retirement System ("SDCERS"), even though it had absolutely no role in the 2005 SDPOA labor negotiations. The lawsuit was filed in federal court on August 9, 2005 and assigned to The Honorable Marilyn Huff. The complaint stated claims for violations of the First Amendment, violation of public policy, four section 1983 claims, breach of contract, conversion, fraud, violation of the MMBA, breach of fiduciary duty, breach of trust, conversion of trust, and declaratory relief.

As part of CPK's strategy to engender SDPOA member support, Mr. Petersen falsely inflated claims of success he had in previous litigation. As JDTP has acknowledged, Mr. Petersen "claimed he would . . . recover over $100 million in damages." Mr. Petersen held a large evangelical-style rally of SDPOA members at the Scottish Rite meeting hall in which he also told SDPOA members he "would recover far more in litigation that the SDPOA could ever achieve at the bargaining table," and that at the conclusion of the case, every SDPOA member would have a new Ford F-350 pickup truck parked at their house." Later, he told SDPOA members that they would soon own Balboa Park.

The *SDPOA v. Aguirre* litigation was as expensive as it was unsuccessful. The SDPOA paid JDTP (and its predecessor CPK) over $2.6 million in attorney fees. Individual SDPOA members paid approximately $2 million more. JDTP took videotaped depositions of more than 45 witnesses, including all City council defendants, and used hardly any of them.

As the case proceeded, in the words of Reg Vitek, whose firm represented SDCERS, the SDPOA suffered "serial losses on the merits." Mr. Vitek engaged in no hyperbole. Despite Mr. Petersen's assurances, JDTP (and it predecessor CPK), lost every

motion, including two motions to dismiss, an application for preliminary injunction, motions for summary judgment, and an appeal. Beginning on November 1, 2005, the Court dismissed several of the SDPOA's claims and ordered amendment on the remaining claims. Yet after each loss, in order to protect its income from the litigation, JDTP would falsely tout a loss as a victory. As the Ninth Circuit Court of Appeal would later write in handing JDTP its final loss on June 10, 2009: "[The SDPOA] seeks to emulate the alchemists in the Middle Ages in its effort to transmute the base metal of its *total loss on the merits* into the gold of 'prevailing party' status by asserting that the district court's order materially altered its relationship with Appellees.

During the pendency of the litigation, SDCERS made several settlement offers to the SDPOA, through its counsel, JDTP (and its predecessor CPK). These settlement offers, in which SDCERS offered to waive its costs (and its right to later file a malicious prosecution case) in exchange for a dismissal, were never forwarded to the SDPOA. As we will explain at the meditation, the SDPOA has since been subject to claims for malicious prosecution and has incurred expenses in attempting to stave off such a filing.

In May and June 2007, summary judgment was granted against the SDPOA on the remaining federal claims in its third amended complaint. Near the end of the litigation, in a desperate attempt to manufacture a viable theory, JDTP added a claim that the City's modification of eligibility requirements for retiree health was unconstitutional.

However, JDTP, which had no authority to pursue such a claim either on behalf of the SDPOA or individual members, was not prepared to present such a theory, as Judge Huff ruled in dismissing that claim. Indeed, *JDTP devoted only nine lines* in its opposition brief to this portentous issue.

"In the TAC, [the SDPOA] allege[d] that the City's imposition of the LBFO improperly adjusted eligibility qualifications for retiree health benefits for current employees in violation of its constitutional rights. (See, e.g., TAC ¶ 33.)" (Order dated May 18, 2007, p. 40:14-14.) In ruling against the SDPOA, Judge Huff stated: "[The SDPOA] alleges *without citation to authority* that retiree health was offered at

employment and therefore vested immediately." (*Id*., p. 40:16-17.) Relying entirely on cases cited by the City, the Court stated: "[h]ere, [the SDPOA] has not directed the Court to any authority standing for the proposition that retiree health benefits are vested rights subject to constitutional protection under either the Contracts or Takings Clause." (*Id*., p. 41: 4-6.) "Accordingly, given the absence of authority to the contrary, Plaintiff's Second and Third Claims under the Contracts and Takings Clauses premised on the modification of retiree health benefits fail." (*Id*., at p. 41:6-8.) "In total, Plaintiff has not created an issue of triable fact as to whether the imposition of the LBFO and associated takeaways affected constitutionally protected benefits. Because the evidence and argument submitted by the parties demonstrate that none of the takeaways affected protected pension benefits, but instead affected employment rights, these claims fail." (*Id*., at p. 41:9-15.)

3. *Aaron, et al. v. Aguirre, et al.*

In one of its first losses in *SDPOA v. Aguirre*, the Court ruled that the SDPOA did not have standing to pursue damages for certain claims, such as section 1983 claims for violation of civil rights. Therefore, on August 1, 2006, JDTP (and its predecessor CPK), filed another lawsuit, totaling 1,427 pages, on behalf of approximately 1,600 individual police officers. That lawsuit was also completely unsuccessful. On September 3, 2008, the Court granted summary judgment against all of JDTP's clients, dismissed their state claims without prejudice, and awarded costs to the defendants.

4. *McGuigan v. City of San Diego*

This litigation arose out of the underfunding of the City of San Diego's employee pension plan. McGuigan filed a representative declaratory relief action on June 28, 2005, on behalf of all beneficiaries of SDCERS. McGuigan alleged that from 1996 through 2005, the City paid less in employer contributions to SDCERS than the actuarially-determined amount that was required to be paid under the San Diego City Charter and Municipal Code. McGuigan sought: (1) judicial determinations that (a) the City had violated City Charter section 143 and former San Diego Municipal Code section 24.0801

and (b) the City's contribution shortfall rendered SDCERS actuarially unsound; and (2) "a peremptory writ of mandate directing the City to immediately pay to SDCERS the aggregate amount of the City's shortfall in employer contributions, as determined by the actuarial valuations for every fiscal year ending June 30, 1997 to June 30, 2005, with interest."

With McGuigan's motion for summary judgment and a motion for issue preclusion or terminating sanctions pending, the parties attended a mediation session with retired United States District Court Judge Lawrence Irving on June 8, 2006, reached a tentative settlement, and executed a term sheet. Pursuant to the tentative settlement, the City agreed to pay SDCERS a special additional employer contribution of $173 million ($15 million more than the highest calculation of underfunding, with interest), but only if the case could be successfully converted into a non-opt out class action and releases obtained from all SDCERS' beneficiaries for the claims McGuigan had asserted and prosecuted.

After learning of the proposed settlement of *McGuigan*, CPK sought to derail the settlement, hijack *McGuigan*'s claims, and assert them in *SDPOA v. Aguirre* and *Aaron*. This effort included both (1) unsuccessfully seeking a temporary restraining order from United States District Court Judge Marilyn Huff to stay all proceedings in *McGuigan*, and (2) interposing objections to the proposed settlement before Judge Strauss in *McGuigan*. Among the tactics used by CPK were to falsely inform SDPOA members that McGuigan's counsel was sending out $1 checks to SDPOA members with hidden release language in them, and requesting SDPOA members to each call McGuigan's counsel's office and ask a lengthy list of questions prepared by CPK.[27] CPK's extensive and completely unsuccessful efforts in *McGuigan* were billed to the SDPOA without a written fee agreement.

Judge Strauss held numerous hearings regarding the proposed settlement. At a

[27] CPK, which represented approximately 1,600 SDPOA members individually, simultaneously refused to grant McGuigan's counsel permission to speak to those members pursuant to rule 2-100(A) of the Rules of Professional Conduct, or to provide SDPOA members written answers to all of the questions posed by CPK provided to CPK.

hearing on November 29, 2006, Mr. Petersen, on behalf of the 1,600 SDPOA member-objectors he represented, informed the trial court that he thought any remaining objections could be resolved and suggested a continuance of the fairness hearing to December 12, 2006, a date convenient to Mr. Petersen.

Then, after verbally communicating to counsel in *McGuigan* that all remaining issues were resolved, neither Mr. Petersen, nor any CPK attorney, appeared for the continued December 12, 2006 fairness hearing.[28] Judge Strauss proceeded with the fairness hearing and approved the proposed settlement after determining that the value of the claims being released by the class was "between $140 million and $158.9 million [and the] consideration the City has agreed to pay SDCERS on behalf of the class—$173 million—is more than fair, adequate and reasonable."

Two days after failing to appear at the December 12, 2006 fairness hearing, CPK posted a message on the SDPOA's web site proclaiming that:

> "The settlement entered yesterday [sic] in *McGuigan* does the following which *actually helps the SDPOA and its Members*: (1) its [sic] incorporates word-for-word, almost two-pages [sic] of written changes proposed directly by SDPOA lawyers, which changes preserved the Federal Lawsuits SDPOA and its Members are currently pursuing, and (2) it prevented the City from releasing over $3.5 billion in additional under funding and related claims that were not raised in the *McGuigan* lawsuit."

On February 9, 2007, CPK —as counsel for the unsuccessful objectors—sought more than $340,000 in attorney fees and costs. In that motion, CPK argued that "[s]uccessful litigants are entitled to attorney fees under [Code of Civil Procedure section] 1021.5."

That same day, despite (1) informing class counsel on December 6, 2006, that the

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[28] JDTP attorney Christopher Nissen would later falsely declare in the Court of Appeal that he did not appear because he was stuck in traffic. However, Mr. Nissen told Jeff Jordon, a member of the SDPOA Board, that he never attempted to attend the hearing because Mr. Petersen asked him to cover it at the last minute the morning of the hearing and Mr. Nissen could not make it to San Diego from Orange County in time. The SDPOA possesses substantial evidence of JDTP misrepresentations to judicial officers during its representation of the SDPOA. Because JDTP failed to inform the SDPOA of its actions and statements, it only learned of these misrepresentations recently.

proposed judgment was acceptable, (2) failing to submit objections to the proposed judgment by December 8, 2006, (3) failing to appear at the December 12, 2006 fairness hearing, (4) conceding that the judgment "actually helps" the Objectors, and (5) seeking more than $340,000 in fees and costs as "successful litigants" who had "realized [their] litigation objectives," CPK filed an appeal on behalf the 1,600 SDPOA member-objectors it represented. After extensive briefing, the appeal was completely unsuccessful.

5. *CPK and JDTP Merger*

In early 2007, JDTP acquired CPK and the firms merged. According to a declaration filed by Mr. Petersen on May 29, 2008, in another case, during the early part of 2007, he decided to diversify CPK by seeking to acquire another firm that was "fee based." His search led him to meet with JDTP's president, Ruth Mijuskovic, to discuss the possibility of her firm representing CPK in such an acquisition. Ms. Mijuskovic suggested that the two firms merge, and Mr. Petersen, who owned an 80 percent interest in CPK, agreed.

Mr. Petersen, CPK's majority shareholder, became a named partner of the newly-named firm, "Jackson, DeMarco, Tidus, *Petersen* & Peckenpaugh." In several courts, the firm simply filed a "Notice of Change of Firm Name." The SDPOA was told that "[t]he added strength of the new firm will provide great benefits to you and your lawsuit." "You will have the attorneys and staff of both firms now working on your case."

In the *SDPOA* case (United States District Court, Southern District of California, Case No. 05cv1581-H), Mr. Petersen began the May 1, 2007 hearing by announcing the new name of his law firm as Jackson, DeMarco, Tidus, *Petersen* and Peckenpaugh.

Jackson, DeMarco, Tidus, *Petersen* & Peckenpaugh filed several "Notice of Change of Firm Name and Address." In each, JDTP represented to the Court that "Castle, Petersen & Krouse LLP, has *changed its name* to Jackson DeMarco Tidus Petersen & Peckenpaugh." (Italics added.) This evidence supports both of our theories of merger or de facto partnership, which renders JDTP liable for all CPK acts even prior to May 1, 2007. (See Evid. Code, § 623 ["[w]henever a party has, by his own statement or

conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it"].) Of course, given the negligence of JDTP and its employees at the critical time period after May 1, 2007 and before May 18, 2007 (for failing to request a dismissal without prejudice despite knowing insufficient evidence had been presented to survive summary judgment), establishing merger or de facto partnership is academic. JDTP was on duty when the most critical error occurred.

In March 2008, after JDTP learned that Mr. Petersen had grossly misrepresented himself and his successes, JDTP terminated him. JDTP dropped Mr. Petersen from its firm name. Within one year, JDTP also terminated all former CPK attorneys.

After Mr. Petersen was terminated, nasty contested disputes arose throughout Southern California courts in which JDTP and Mr. Petersen fought over clients. Although JDTP had no fee agreements in any of the cases,[29] it successfully took the position—contested by Mr. Petersen—that it was the rightful attorney of record because it had acquired CPK and merged with it. Petersen filed a declaration acknowledging JDTP characterized its acquisition of CPK as a "merger."

6. *Appeal of SDPOA v. Aguirre, et al.*

Without providing any analysis or explaining the costs or benefits of an appeal, JDTP proceeded with an appeal of Judge Huff's grant of summary judgment in *SDPOA v. Aguirre*. That appeal was a complete loss. Significantly, based on the poor record and argument presented by JDTP, the Ninth Circuit, in a published opinion, found that retiree health benefits "were not protectible contract rights."

Since that ruling, the City has begun aggressive cuts to retiree health as it attempted to balance its budget and remove itself from potentially crushing $1.2 billion in unfunded liability for such a benefit. On July 27, 2009, less than two months after the Ninth Circuit's ruling, the City imposed a cap on the annual amount paid for retiree health

[29] On March 19, 2008, JDTP proposed a legal representation agreement to the SDPOA. However, the SDPOA never agreed to or signed it.

care, a cap which has cost SDPOA members approximately $36 million.

7. *Appeal of Aaron, et al. v. Aguirre, et al.*

Also without providing any analysis or explaining the costs or benefits of an appeal, JDTP proceeded with an appeal of Judge Huff's grant of summary judgment. However, after the SDPOA announced its intent to pursue a malpractice claim against JDTP, it has informed its numerous clients that "the appeal . . . will be a very significant uphill battle with a very low prospect of success . . . ."

8. *State Court Actions*

Again without obtaining client consent or providing any analysis, JDTP filed state court actions on behalf of the SDPOA and individual members. After hiring outside counsel to analyze the merits and chance of success of the state court action, the SDPOA has dismissed its claim. Most of the individual lawsuits remain, although several adverse rulings have already occurred and lawyers at JDTP have recommended that its remaining abandon those cases.

Liability

The elements of a cause of action in tort for professional negligence are "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200; Judicial Council of California, Civil Jury Instructions ["CACI"], No. 600.) Moreover, an attorney who holds himself out as a specialist, such as Mr. Petersen, has an even higher standard of care. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810.)

A cause of action for breach of fiduciary duty requires the existence of a fiduciary relationship, a breach of the duty created by that relationship, and damages proximately caused by the breach. (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101.) "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to

other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' [Citations.] Whether an attorney has breached a fiduciary duty to his or her client generally is a question of fact. [Citation.]" (*Stanley v. Richmond* (1995)) 35 Cal.App.4th 1070, 1086-1087.)

There exist, at a minimum, nine separate liability theories on which to pursue these claims, including the following:

1. *Maintaining Objectively Meritless and Costly Litigation*

JDTP recommended and maintained objectively meritless litigations on behalf of the SDPOA. As a result, the SDPOA has expended more than $1.6 million with absolutely nothing to show for it except a mortgage on its union headquarters. And the SDPOA has already been exposed to claims of malicious prosecution by SDCERS.

Here, no reasonable attorney—much less a specialist—would have pursued the meritless litigation claiming several civil rights violations for routine labor negotiation matters.

"[A]n attorney does have a counseling role. An attorney should advise a client of substantial deficiencies in the merits or in available defenses so that the client can decide whether and how to proceed." (4 Mallen & Smith, Legal Malpractice (2010 ed.) The Litigation Attorney ("Mallen"), § 31:26, pp. 583-584.) "This principle recognizes that the client should have the ultimate control over crucial decisions concerning the lawsuit." (*Id*., p. 584.)

2. *Losing Retiree Health Even Though Not Authorized to Pursue Such Litigation*

JDTP was never authorized to raise, much less pursue, any retiree health care claim. Then, when that unauthorized claim was raised, it was presented negligently. This resulted in an adverse ruling—subject to both collateral estoppel and res judicata—that retiree health is not a vested benefit. As JDTP's own memos demonstrate, ample evidence to support that claim was never presented in court.

Further, JDTP never informed the SDPOA of the economic *benefits* and economic

risks of litigating whether retiree health is a vested right. JDTP's prosecution of any claim regarding retiree health benefits was *unauthorized*. "An extreme situation is if the lawyer acted without authority. An attorney can be liable for an unauthorized prosecution or defense." (Mallen, *supra*, § 31.26, p. 584.) Had Jackson exercised due care, the SDPOA would not have prosecuted any claim raising the issue whether retiree health benefits are a vested right for several reasons, including (a) there was no actual controversy regarding that issue because the City Attorney's Office, after specific research and analysis, had advised the City that such rights *were* likely vested; (b) the economic *risks* of litigating the issue greatly outweighed the potential economic benefits of the unauthorized claim prosecuted by JDTP; and (c) the *costs* of litigating the issue outweighed the potential economic benefits of the unauthorized claim prosecuted by JDTP.

In response to the defendants' motion for summary judgment in *SDPOA, on behalf of itself and on behalf of all of its members v. Aguirre, et al.*, United States District Court for the Southern District of California, Case No. 05-cv-1581 (and related appeals), and *Aaron, et al. v. Aguirre, et al.*, United States District Court for the Southern District of California, Case No. 06-cv-1451 (and related appeals) the defendants should have presented the following information, evidence, and legal authority to the court:

In 1982, the City desired to withdraw from the Social Security System. In order to successfully withdraw from the Social Security System, City employees were required to approve the withdrawal. In order to induce its employees to vote in favor of the City's withdrawal from the Social Security system, the City offered its employees lifetime retiree health insurance (the "Retiree Health Benefit").

In a memorandum dated November 20, 1981, from City Manager Ray T. Blair, Jr., the City promised both hospitalization and medical insurance: "Retired employees will be included in the City health plans. The City will pay the premiums." This memo is dated November 20, 1981, from then City Manager Ray T. Blair, Jr., to all City employees (including all SDPOA members). It discusses the City's proposal and upcoming

employee election to remove employees from Social Security and Medicare in exchange for additional benefits to be provided by employees to the City. As the memo explains, in order to opt out of Social Security and Medicare, the City had to agree to provide "another pension plan to supplement your regular City retirement program."

At page 2, paragraph 3, of the memo, entitled "Entry Date," it states that all existing employees "will be enrolled in the Plan as of January 8, 1982." All future employees "will join the Plan immediately *on their date of employment*." (Italics added.) "Vesting" is covered at pages 3 and 4, paragraph 9 of the memo. The Plan provides that benefits were 100% vested after 5 years of service.

In the attachment to the memo, entitled "WHAT HAPPENS IF WE PULL OUT OF SOCIAL SECURITY," beginning at Bate-stamp # SDPOA 0399, the City provided questions and answers. "Following are the most common questions asked concerning how withdrawal from Social Security will affect City employees. The questions and answers are divided into five categories [including] . . . 4) Medicare Hospital Insurance [and] 5) Medicare Medical Insurance. Question # 22 (page SDPOA 0402) asked: "What will the City provide for hospital insurance?" The Answer: "The retired employees will be included in the City health plans. The City will pay for the retired employee's health insurance. These costs will <u>not</u> be paid out of the Supplemental Pension Plan." Question # 24 (page SDPOA 0403) asked: "What will the City provide for medical insurance?" The Answer: "Retired employees will be included in the City health plans. The City will pay the premiums. The cost of the premiums will <u>not</u> come from the Supplemental Pension Plan." Relying on the City's promise, City employees approved the City's withdrawal from the Social Security system and are no longer part of that system.

On March 14, 2006, during "Sunshine Week," present City Mayor Jerry Sanders promulgated a "Fact Sheet," which stated: "In 1982, City employees voted to get out of the Social Security/Medicare systems. In exchange, they were promised life-time health insurance upon retirement."

"Resolution R-255610, adopted January 4, 1982, effective January 1, 1982, set the

parameters of the [Retiree] Health Benefit ." (City Attorney Opinion No. 2007-04, p. 2.) "Certain benefits were 'provided to employees in lieu of Social Security participation.'" (*Ibid*.) "In addition, it was the City Council's intent 'to provide such coverage as a permanent benefit to eligible retirees.'" (*Ibid*.) "The City Manager was authorized to establish a City-sponsored Group Health Insurance Plan for eligible retirees, providing the same choice of program coverage as offered to active employees of the City." (*Ibid*.) "On June 1, 1982, Ordinance No. O-15758, codified the [Retiree] Health Benefit." (*Ibid*.) "In 1985 . . . Police and Fire Safety Members on the active payroll on or after June 30, 1985 were added." (*Id*., at p. 3; Ordinance No. O-16449.) The Retiree Health Benefit has always been codified among the City's retirement ordinances.

Charter section 143.1 provides, in relevant part: "No ordinance amending the retirement system which affects the benefits of any employee under such retirement system shall be adopted without the approval of a majority vote of the members of said system." In 1985, before Ordinance No. O-16649 became effective, "a vote of the retirement system membership [was conducted], as required by Charter section 143.1[.]" (Ordinance No. O-16449.) "[S]aid vote was conducted and the ballots tallied on June 3, 1985[,] with a vote of 2,885-yes, 904-no, and 12-void[.]" (*Ibid*.)

"On September 30, 1985, Ordinance No. O-16510 provided [that] . . . it was the City's responsibility to provide [funds to pay for the Retiree Health Benefit] from the General Fund . . . ." (City Attorney Opinion No. 2007-04, p. 3.) In 1986 the City adopted Ordinance No. O-16679 as part of the settlement of a class action lawsuit (the *Andrews* class action), and made the Retiree Health Benefit retroactive to all police officers on active City payroll as of October 6, 1980. In 1986, pursuant to Charter section 143.1, before Ordinance No. O-16679 became effective, "the matter was submitted to a vote of the active members of the System and approved by a vote of 2,630-Yes as opposed to 213-No[.]" (Ordinance No. O-16679.)

In 1992, the Retiree Health Benefit was modified by Ordinance No. O-17770. Again, before the modifications became effective, "these changes were voted upon by all

[affected] members pursuant to Charter section 143.1 with [the] vote counted and certified on April 13, 1992 . . . ." (Ordinance No. O-17770.) Since at least 1992, the Retiree Health Benefit has been codified at San Diego Municipal Code sections 24.1201 and 24.1202.

On or about March 31, 1997, the City Council adopted Ordinance No. O-18392, which modified the Retiree Health Benefit. Ordinance No. O-18392 contained a provision in which the City agreed "that the level of health benefits to be provided [to retirees] not be diminished" below comparable health plans offered to active employees. Before any such 1997 modifications to the Retiree Health Benefit became effective, the City conducted a Charter section 143.1 vote, which passed 3,181 yes votes and 88 no votes.

In 2002, the City again sought to modify the Retiree Health Benefit. The 2002 modification placed a fixed dollar amount of the Retiree Health Benefit based on the cost of the City-sponsored PPO plan being offered to retirees for the 2003 plan year, with an automatic annual increase in this amount, not to exceed ten percent (10%) per year, based on an independent, objective source—the Centers for Medicare and Medicaid Services, Office of the Actuary, which tracks projected increases in National Health Expenditures. Before any such 2002 modifications to the Retiree Health Benefit became effective, the City conducted a Charter section 143.1 vote, which passed 2,193 in favor and 35 against the proposed modifications.

[B]oth the federal and state contract clauses protect the vested pension rights of public officers and employees from unreasonable impairment." (*California Ass'n of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 383.) "While some jurisdictions view public employees' retirement rights as a gratuity, California is firmly committed to the proposition that these rights are contractual; that they are 'vested' in the sense that the lawmakers' power to alter them after they have been earned is quite limited." (*Ibid*.) "By entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the

employer." (*Ibid*.) "A long line of California decisions has settled the principles applicable to [this situation]. A public employee's pension constitutes an element of compensation, and *a vested contractual right to pension benefits accrues upon acceptance of employment*. Such pension right *may not be destroyed*, once vested, without impairing a contractual obligation of the employing public entity." (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863, italics added.)

Prior to retirement:

> "'[a]n employee's vested contractual pension rights may be modified . . . for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. [Citations.] Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, *and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.*' " (*Betts* at p. 864, italics in original; accord, *Maffei v. Sacramento County Employees Retirement System* (2002) 103 Cal.App.4th 993, 999-1000; *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1132-1133; *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 783-784.)

(See *Pasadena Police Officers Association v. City of Pasadena* (1983) 147 Cal.App.3d 695; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, and the authorities cited in each of these cases.)

On May 18, 2007, the District Court ruled against plaintiff in *San Diego Police Officers' Association v. Aguirre, et al.*, Case No. 05-cv-1581: "In the TAC, [the SDPOA] allege[d] that the City's imposition of the LBFO improperly adjusted eligibility qualifications for retiree health benefits for current employees in violation of its constitutional rights. (See, e.g., TAC ¶ 33.)" (Order, Doc. No. 737, filed May 18, 2007 in Case No. 05-cv-1581, p. 40:14-14.) In ruling against the SDPOA, Judge Huff stated: "[The SDPOA] alleges *without citation to authority* that retiree health was offered at employment and therefore vested immediately." (*Id.*, p. 40:16-17, italics added.) Relying entirely on cases cited by the City, the Court stated: "[h]ere, [the SDPOA] has not

directed the Court to any authority standing for the proposition that retiree health benefits are vested rights subject to constitutional protection under either the Contracts or Takings Clause." (*Id.*, p. 41: 4-6.) "Accordingly, given the absence of authority to the contrary, Plaintiff's Second and Third Claims under the Contracts and Takings Clauses premised on the modification of retiree health benefits fail." (*Id.*, at p. 41:6-8.) "In total, Plaintiff *has not created an issue of triable fact* as to whether the imposition of the LBFO and associated takeaways affected constitutionally protected benefits. Because the evidence and argument submitted by the parties demonstrate that none of the takeaways affected protected pension benefits, but instead affected employment rights, these claims fail." (*Id.*, at p. 41:9-15, italics added.)

In memoranda researched and written six months after suffering this adverse ruling, JDTP explained in detail the evidence and legal analysis which provided the support Judge Huff found was lacking. (Memo dated December 5, 2007 ["Retiree Healthcare Case Workup"], p. 23 [concluding retiree health vested]; Memo dated December 4, 2007, p. 3 ["vested right to retiree heath benefit"].) However, it was too late, because summary judgment had long since been granted.

Instead of providing the court with available evidence or legal citation *supporting* their clients' position regarding retiree health, the defendants instead submitted *adverse* evidence. *First*, the only evidence cited by defendants in opposition to the City's motion to summarily adjudicate the retiree health issue in the City's favor was the "City of San Diego and POA Labor Negotiations Minutes dated March 30, 2005." (Doc. No. 613, p. 19:27.) However, those minutes supported the City's position and not the SDPOA's position on the issue of whether retiree health benefits were vested. *Second*, defendants also lodged an additional non-supportive document indicating that retiree health was not vested. Astoundingly, the non-supportive material was highlighted *by defendants* for the Court. Specifically, Mr. Nissen filed the exhibit with a circle around the heading "Current Employees," the word "Bad," and an arrow pointing to the adverse evidence.

(See Doc. No. 704, p. 77;[30] RT, April 23, 2007, p. 66:6-19.)

Finally, defendants' appellants' reply brief, filed May 28, 2008, erroneously and without their clients' knowledge or consent, *conceded* "post-retirement health benefits is a term and condition of employment that may be renegotiated . . . ." (Appellant San Diego Police Officers' Association's Consolidated Reply Brief, United States Court of Appeals for the Ninth Circuit, Case No. 07-56004.)

In light of the defendants' negligence at the trial court, and their appellate concession, the United States Court of Appeals issued an adverse published opinion on June 10, 2009. (*San Diego Police Officers' Association v. San Diego City Employees' Retirement System* ("*SDPOA*") (2009) 568 F.2d 725.) In that opinion, the court cited *Thorning v. Hollister Sch. Dist.* (1992) 11 Cal.App.4th 1598, *Cal. League of City Employee Ass'ns v. Palos Verde Library Dist.* (1978), and *San Bernadino Pub. Employees Ass'n v. City of Fontana* (1998) 67 Cal.App.4th 1215 and explained that if retiree health benefits had been "expressly granted to [employees] by an official declaration of policy during [the employees'] term of public office," those retiree health benefits would be vested, "fundamental and could not be unilaterally terminated." (*SDPOA* at pp. 739-740.) However, if the employee benefit at issue were merely "provided for by MOUs between the city and its bargaining groups [the benefits] could not have become permanently and irrevocably vested as a matter of contract law, because the benefits were earned on a year-to-year basis under previous MOU's that expired under their own terms . . . ." (*SDPOA* at p. 740.) Thus, because the defendant lawyers failed to present evidence (e.g., the Ray Blair memo and numerous ordinances and Charter section 143.1 votes) establishing retiree health benefits had been expressly granted to employees by an multiple official declarations of policy during the employees' term of public office, those retiree health benefits would be vested and the City's July 2009 $142 million to $152 million reduction of the plaintiff class' Retiree Health Benefit

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[30] The Federal Court's PACER filing system allows proof that the document was filed by Mr. Nissen with the adverse evidence highlighted for the Court.

would not have been permitted.

"It is well settled that an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in the loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900.) Here, as JDTP later acknowledged, ample evidence existed—but was not presented—which would have led to a different result on the retiree health issue.

3. ***Failing to Keep the SDPOA Apprised of Material Developments in Violation of Business and Professions Code section 6068***

Subdivision (m) of Business and Professions Code section 6068 provides:

> "It is the duty of an attorney to do all of the following: . . . (m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

JDTP failed to keep the SDPOA timely apprised of significant developments. Board members, several of whom will be present at the mediation, will explain how difficult it was to get status reports or analyses. For example, after the adverse Ninth Circuit opinion was announced on June 10, 2009, the SDPOA learned about it from the media. JDTP refused to respond to requests for several days. JDTP never informed its clients of significant cost awards against the SDPOA and individual plaintiffs in the *Aaron* case.

Had JDTP (and its predecessor firm CPK) kept the SDPOA timely apprised of significant developments, the SDPOA would have realized much sooner the lack of merit of the litigation and been able to contain its expense.

4. ***Misrepresenting the Nature of Several Adverse Rulings***

On numerous occasions JDTP (and its predecessor CPK) falsely characterized the nature of adverse rulings. Even when summary judgment was granted against it, JDTP characterized the ruling as the Court "not[ing] that [the claims] raised important issues of state law and policy." When JDTP failed to appear at the fairness hearing in *McGuigan*,

it falsely informed clients that had prevailed in gaining important limitations in the case. At the mediation, the five SDPOA board members present will provide additional evidence of false statements. Given the millions of dollars being paid to JDTP by the SDPOA and its members, these false statements were designed to keep fees flowing to JDTP. The SDPOA believes punitive damages are likely to be awarded due to this egregious fraudulent conduct by a fiduciary, JDTP.

5. ***Making Numerous Guarantees of Success Which Were Not Fulfilled Which Allowed the Firm to Continue to Bill and Collect Fees***

JDTP, including its former named partner Mr. Petersen, made numerous guarantees of success which were not fulfilled. These statements, at least one of which JDTP acknowledges was made, will supports both negligent and intentional misrepresentation claims.

6. ***Failure To Obtain a Retention Agreement in Violation of Business and Professions Code Section 6148***

Business and Professions Code section 6148, subdivision (a), requires contracts for legal services which will exceed $1,000 to be in writing. JDTP never obtained an agreement with the SDPOA,[31] and is limited to only the reasonable value of the services it rendered (Bus. & Prof. Code, § 6148, subd. (c)), which is less than zero. The fees that were paid should be disgorged.

7. ***Charging Unreasonable Fees in Violation of Rule 4-200***

Rule 4-200 of the Rules of Professional conduct prohibits charging a client an unconscionable fee. "Among the factors to be considered . . . are . . . (1) [t]he amount of the fee in proportion to the value of the services performed[;] . . . (5) the amount involved and the results obtained[; and] . . . (11) the informed consent of the client to the fee." Here, although the SDPOA paid more than $1.6 million to JDTP (and its predecessor CPK), substantial evidence will support a finding that the fee charged was unconscionable, particularly because JDTP lost literally every contested motion and the

[31] The agreement with its predecessor firm, CPK, expressly excluded litigation.

lied to its client about the outcome.

8. *Failing to Communicate Several Settlement Offers in Violation of Rule 3-510(A)(2)*

Rule 3-510(A)(2) of the Rules of Professional Conduct required JDTP to communicate SDCERS' written settlement offers to the SDPOA. These settlement offers were never communicated to the SDPOA. If they had been communicated, the SDPOA board would have realized sooner that the litigation lacked merit and would have been able to avoid (1) additional expenditure of union assets, (2) exposure to malicious prosecution claims, and (3) an adverse judgment on numerous issues, including a published Ninth Circuit opinion holding that retiree health is not a vested benefit.

9. *Failing to Apprise the Client of Malpractice by Mr. Petersen During His Representation of the SDPOA*

Although JDTP roundly criticized Mr. Petersen after he departed JDTP, and charged that he had lied to clients, JDTP failed to apprise the SDPOA of Mr. Petersen's malpractice and the SDPOA's limited time to proceed against him individually for malpractice.

"The nature of an attorney's function is such that an attorney is the only professional who may have a duty to advise a client that a malpractice action against another professional may provide a solution to the client's problems." (*Lewis v. Purvin* (1989) 208 Cal.App.3d 1208, 1217.) Moreover, two of the "four circumstances in which nondisclosure or concealment may constitute actionable fraud" apply: "(1) . . . the defendant is in a fiduciary relationship with the plaintiff [and] . . . (4) . . . The defendant makes partial representations but also suppresses some material facts . . . ." (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.) "The rule has long been settled in this state that although one may be under no duty to speak as to a matter, 'if he undertakes to do so, ... he is bound not only to state truly what he tells but also not to suppress or conceal any facts . . . . If he speaks at all he must make a full and fair disclosure." (*Marketing West, Inc. v. Wassermann* (1993) 5 Cal.4th 1082, 1093.)

SPECIAL INTERROGATORY NO. 22:

State all FACTS that RELATE TO YOUR allegation in paragraph 11(h) of the COMPLAINT that JACKSON DEMARCO failed to "inform the SDPOA of the benefits and costs of the litigation undertaken by defendants."

RESPONSE SPECIAL TO INTERROGATORY NO. 22:

There was never such an analysis provided. The litigation was very costly and completely unsuccessful. This was not disclosed.

SPECIAL INTERROGATORY NO. 23:

IDENTIFY all "benefits and costs" of the litigation which JACKSON DEMARCO should have informed YOU, but failed to do so, as alleged in paragraph 11(h) of the COMPLAINT.

RESPONSE SPECIAL TO INTERROGATORY NO. 23:

There were no benefits because the litigation objectively lacked merit. The costs were enormous, both in terms of monetary cost and in terms of damages the SDPOA's relationship with the City of San Diego and costing taxpayers more than $7 million to defend the frivolous litigation.

SPECIAL INTERROGATORY NO. 24:

State all FACTS that RELATE TO YOUR allegation in paragraph 11(i) of the COMPLAINT that JACKSON DEMARCO failed to "apprise he [sic] SDPOA of material developments in the litigation in violation of Business and Professions Code section 6068."

RESPONSE SPECIAL TO INTERROGATORY NO. 24:

Because no such reports were provided on a regular basis.

SPECIAL INTERROGATORY NO. 25:

IDENTIFY all "material developments in the litigation" of which JACKSON DEMARCO failed to apprise YOU, a alleged in paragraph 11(i) of the COMPLAINT.

RESPONSE SPECIAL TO INTERROGATORY NO. 25:

The material developments include, but are not limited to: (1) settlement offers, (2) the filing of defense motions, (3) the filing of motions by the plaintiff, (4) court rulings, (5)

comments by a judicial officer at hearings regarding the problems with the case, (6) adverse case authority, (7) failures by lawyers that harm the case.

SPECIAL INTERROGATORY NO. 26:

State all FACTS that RELATE TO YOUR allegation in paragraph 11(i) of the COMPLAINT that JACKSON DEMARCO "affirmatively misrepresent[ed] the outcome of several hearings" to YOU.

RESPONSE SPECIAL TO INTERROGATORY NO. 26:

After a hearing, when a status report was given, the report was not accurate. (See, e.g., communications dated February 8, 2006, December 14, 2006, March 19, 2007, May 20, 2007, June 11, 2007.)

SPECIAL INTERROGATORY NO. 27:

IDENTIFY all instances in which JACKSON DEMARCO affirmatively misrepresented the outcome of a hearing, as alleged in paragraph 11(i) of the COMPLAINT.

RESPONSE SPECIAL TO INTERROGATORY NO. 27:

Objection. This interrogatory is unclear as phrased. Assuming the request is for dates, that information is in the possession of defendants, which have not yet produced it to the SDPOA. The SDPOA contends that every post-hearing communication, when it occurred, was inaccurate. (See, e.g., communications dated February 8, 2006, December 14, 2006, March 19, 2007, May 20, 2007, June 11, 2007.)

SPECIAL INTERROGATORY NO. 28

Identify each person who affirmatively misrepresented the outcome of a hearing to YOU, as alleged in paragraph 11(i) of the COMPLAINT.

RESPONSE SPECIAL TO INTERROGATORY NO. 28

Gregory Glenn Petersen, Chris Nissen.

SPECIAL INTERROGATORY NO. 29

Identify each person having knowledge of each respective misrepresentation disclosed in the answer to Special Interrogatory No. 28 by stating the person's full name, business and residence address, and telephone number.

RESPONSE SPECIAL TO INTERROGATORY NO. 29

Brian Marvel and Jeff Jordon.

SPECIAL INTERROGATORY NO. 30:

IDENTIFY all damages being sought by YOU in this case.

RESPONSE SPECIAL TO INTERROGATORY NO. 30:

A return of all attorney fees and costs paid to the defendants.

SPECIAL INTERROGATORY NO. 31:

Explain how all damages being sought in this case were calculated.

RESPONSE SPECIAL TO INTERROGATORY NO. 31:

Adding up the amount the SDPOA paid to the defendants.

Dated: June 17, 2010

LAW OFFICE OF MICHAEL A. CONGER

By: _____
Michael A. Conger
Attorney for Plaintiff