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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **FOR THE COUNTY OF SAN DIEGO**

12 SAN DIEGO POLICE OFFICERS )  
13 ASSOCIATION, )

14 Plaintiff, )

15 v. )

16 JACKSON, DeMARCO, TIDUS & )  
17 PECKENPAUGH, A LAW CORPORATION, )  
18 GREGORY GLENN PETERSEN, an individual, )  
19 MOHAMED ALIM AHMAD MALIK, an )  
20 individual, and DOES 1-50, )

21 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

22 **PROPOUNDING PARTY: JACKSON, DeMARCO, TIDUS & PECKENPAUGH**  
23 **RESPONDING PARTY: SAN DIEGO POLICE OFFICERS ASSOCIATION**  
24 **SET NUMBER: ONE**

25 **PRELIMINARY STATEMENT**

26 These responses are made solely for the purpose of, and in relation to, this action. Each  
27 answer is given subject to all appropriate objections (including but not limited to objections  
28 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

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

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

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

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

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

23                                   **RESPONSES TO SPECIAL INTERROGATORIES**

24 **SPECIAL INTERROGATORY NO. 1:**

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

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

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

9 **RESPONSE SPECIAL TO INTERROGATORY NO. 1:**

10 *SDPOA, on behalf of itself and on behalf of all of its members v. Aguirre, et al.*, United  
11 States District Court for the Southern District of California, Case No. 05-cv-1581 (and related  
12 appeals); *McGuigan v. City of San Diego*, San Diego Superior Court Case No. GIC 849883 (and  
13 related appeals); and *SDPOA v. Aguirre, et al.*, San Diego Superior Court Case No. 37-2007-  
14 00075432-CU-MC-CTL.

15 **SPECIAL INTERROGATORY NO. 2:**

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

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

24 **RESPONSE SPECIAL TO INTERROGATORY NO. 2:**

25 **1. 2005 Labor Negotiations**

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

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

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

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

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19  
20 <sup>1</sup> San Diego City Charter section 143 requires the City and employees to make  
21 “substantially equal” contributions to fund employee pensions. Historically, the SDPOA had  
22 been able to negotiate contracts with the City in which the City paid, or “picked up,” most of  
23 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.

24 <sup>2</sup> The City’s DROP program, adopted in 1997, allows an employee, otherwise  
25 qualified to retire and begin drawing a pension, to enter DROP and continue working for up to  
26 five years. During that period, however, the employer no longer earns additional years of  
27 retirement service credit, and no further pension contributions are made either by the City or by  
28 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.

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

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

12 Without providing the SDPOA with any written evaluation or analysis, Mr.  
13 Petersen convinced the SDPOA to authorize litigation against the City, the City Attorney,  
14 numerous council members, and numerous City staffers. CPK also named the San Diego  
15 City Employees’ Retirement System (“SDCERS”), even though it had absolutely no role  
16 in the 2005 SDPOA labor negotiations. The lawsuit was filed in federal court on August  
17 9, 2005 and assigned to The Honorable Marilyn Huff. The complaint stated claims for  
18 violations of the First Amendment, violation of public policy, four section 1983 claims,  
19 breach of contract, conversion, fraud, violation of the MMBA, breach of fiduciary duty,  
20 breach of trust, conversion of trust, and declaratory relief.

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

1 Balboa Park.

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

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

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

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

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

5           “In the TAC, [the SDPOA] allege[d] that the City’s imposition of the LBFO  
6 improperly adjusted eligibility qualifications for retiree health benefits for current  
7 employees in violation of its constitutional rights. (See, e.g., TAC ¶ 33.)” (Order dated  
8 May 18, 2007, p. 40:14-14.) In ruling against the SDPOA, Judge Huff stated: “[The  
9 SDPOA] alleges *without citation to authority* that retiree health was offered at  
10 employment and therefore vested immediately.” (*Id.*, p. 40:16-17.) Relying entirely on  
11 cases cited by the City, the Court stated: “[h]ere, [the SDPOA] has not directed the Court  
12 to any authority standing for the proposition that retiree health benefits are vested rights  
13 subject to constitutional protection under either the Contracts or Takings Clause.” (*Id.*, p.  
14 41: 4-6.) “Accordingly, given the absence of authority to the contrary, Plaintiff’s Second  
15 and Third Claims under the Contracts and Takings Clauses premised on the modification  
16 of retiree health benefits fail.” (*Id.*, at p. 41:6-8.) “In total, Plaintiff has not created an  
17 issue of triable fact as to whether the imposition of the LBFO and associated takeaways  
18 affected constitutionally protected benefits. Because the evidence and argument  
19 submitted by the parties demonstrate that none of the takeaways affected protected  
20 pension benefits, but instead affected employment rights, these claims fail.” (*Id.*, at p.  
21 41:9-15.)

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

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

1 claims without prejudice, and awarded costs to the defendants.

2 **4. *McGuigan v. City of San Diego***

3 This litigation arose out of the underfunding of the City of San Diego's employee  
4 pension plan. McGuigan filed a representative declaratory relief action on June 28, 2005,  
5 on behalf of all beneficiaries of SDCERS. McGuigan alleged that from 1996 through  
6 2005, the City paid less in employer contributions to SDCERS than the actuarially-  
7 determined amount that was required to be paid under the San Diego City Charter and  
8 Municipal Code. McGuigan sought: (1) judicial determinations that (a) the City had  
9 violated City Charter section 143 and former San Diego Municipal Code section 24.0801  
10 and (b) the City's contribution shortfall rendered SDCERS actuarially unsound; and (2)  
11 "a peremptory writ of mandate directing the City to immediately pay to SDCERS the  
12 aggregate amount of the City's shortfall in employer contributions, as determined by the  
13 actuarial valuations for every fiscal year ending June 30, 1997 to June 30, 2005, with  
14 interest."

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

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



1 McGuigan’s counsel was sending out \$1 checks to SDPOA members with hidden release  
2 language in them, and requesting SDPOA members to each call McGuigan’s counsel’s  
3 office and ask a lengthy list of questions prepared by CPK.<sup>3</sup> CPK’s extensive and  
4 completely unsuccessful efforts in *McGuigan* were billed to the SDPOA without a written  
5 fee agreement.

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

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

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

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21 <sup>3</sup> CPK, which represented approximately 1,600 SDPOA members individually,  
22 simultaneously refused to grant McGuigan’s counsel permission to speak to those members  
23 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.

24 <sup>4</sup> JDTP attorney Christopher Nissen would later falsely declare in the Court of  
25 Appeal that he did not appear because he was stuck in traffic. However, Mr. Nissen told Jeff  
26 Jordon, a member of the SDPOA Board, that he never attempted to attend the hearing because  
27 Mr. Petersen asked him to cover it at the last minute the morning of the hearing and Mr. Nissen  
28 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.

1 “The settlement entered yesterday [sic] in *McGuigan* does the following  
2 which *actually helps the SDPOA and its Members*: (1) its [sic] incorporates  
3 word-for-word, almost two-pages [sic] of written changes proposed directly  
4 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.”

5 On February 9, 2007, CPK —as counsel for the unsuccessful objectors—sought  
6 more than \$340,000 in attorney fees and costs. In that motion, CPK argued that  
7 “[s]uccessful litigants are entitled to attorney fees under [Code of Civil Procedure section]  
8 1021.5.”

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

##### 16 **5. CPK and JDTP Merger**

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

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

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

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

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

19 After Mr. Petersen was terminated, nasty contested disputes arose throughout  
20 Southern California courts in which JDTP and Mr. Petersen fought over clients.  
21 Although JDTP had no fee agreements in any of the cases,<sup>5</sup> it successfully took the  
22 position—contested by Mr. Petersen—that it was the rightful attorney of record because it  
23 had acquired CPK and merged with it. Petersen filed a declaration acknowledging JDTP  
24 characterized its acquisition of CPK as a “merger.”

25  
26 **6. *Appeal of SDPOA v. Aguirre, et al.***

27  
28 <sup>5</sup> On March 19, 2008, JDTP proposed a legal representation agreement to the  
SDPOA. However, the SDPOA never agreed to or signed it.

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

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

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

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

17 **8. *State Court Actions***

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

24 **Liability**

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

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

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

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

16 **1. *Maintaining Objectively Meritless and Costly Litigation***

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

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

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

1 (Id., p. 584.)

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

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

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

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

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

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

5 In a memorandum dated November 20, 1981, from City Manager Ray T. Blair, Jr., the  
6 City promised both hospitalization and medical insurance: "Retired employees will be included  
7 in the City health plans. The City will pay the premiums." This memo is dated November 20,  
8 1981, from then City Manager Ray T. Blair, Jr., to all City employees (including all SDPOA  
9 members). It discusses the City's proposal and upcoming employee election to remove  
10 employees from Social Security and Medicare in exchange for additional benefits to be provided  
11 by employees to the City. As the memo explains, in order to opt out of Social Security and  
12 Medicare, the City had to agree to provide "another pension plan to supplement your regular  
13 City retirement program."

14 At page 2, paragraph 3, of the memo, entitled "Entry Date," it states that all existing  
15 employees "will be enrolled in the Plan as of January 8, 1982." All future employees "will join  
16 the Plan immediately *on their date of employment.*" (Italics added.) "Vesting" is covered at  
17 pages 3 and 4, paragraph 9 of the memo. The Plan provides that benefits were 100% vested after  
18 5 years of service.

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

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

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

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

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

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



1 O-16679 as part of the settlement of a class action lawsuit (the *Andrews* class action), and made  
2 the Retiree Health Benefit retroactive to all police officers on active City payroll as of October 6,  
3 1980. In 1986, pursuant to Charter section 143.1, before Ordinance No. O-16679 became  
4 effective, “the matter was submitted to a vote of the active members of the System and approved  
5 by a vote of 2,630-Yes as opposed to 213-No[.]” (Ordinance No. O-16679.)

6 In 1992, the Retiree Health Benefit was modified by Ordinance No. O-17770. Again,  
7 before the modifications became effective, “these changes were voted upon by all [affected]  
8 members pursuant to Charter section 143.1 with [the] vote counted and certified on April 13,  
9 1992 . . . .” (Ordinance No. O-17770.) Since at least 1992, the Retiree Health Benefit has been  
10 codified at San Diego Municipal Code sections 24.1201 and 24.1202.

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

17 In 2002, the City again sought to modify the Retiree Health Benefit. The 2002  
18 modification placed a fixed dollar amount of the Retiree Health Benefit based on the cost of the  
19 City-sponsored PPO plan being offered to retirees for the 2003 plan year, with an automatic  
20 annual increase in this amount, not to exceed ten percent (10%) per year, based on an  
21 independent, objective source—the Centers for Medicare and Medicaid Services, Office of the  
22 Actuary, which tracks projected increases in National Health Expenditures. Before any such  
23 2002 modifications to the Retiree Health Benefit became effective, the City conducted a Charter  
24 section 143.1 vote, which passed 2,193 in favor and 35 against the proposed modifications.

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

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

10 Prior to retirement:

11 “[a]n employee's vested contractual pension rights may be modified . . .  
12 for the purpose of keeping a pension system flexible to permit adjustments  
13 in accord with changing conditions and at the same time maintain the  
14 integrity of the system. [Citations.] Such modifications must be  
15 reasonable, and it is for the courts to determine upon the facts of each case  
16 what constitutes a permissible change. To be sustained as reasonable,  
17 alterations of employees' pension rights must bear some material relation  
18 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.)

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

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

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

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

18 Instead of providing the court with available evidence or legal citation *supporting* their  
19 clients’ position regarding retiree health, the defendants instead submitted *adverse* evidence.  
20 *First*, the only evidence cited by defendants in opposition to the City’s motion to summarily  
21 adjudicate the retiree health issue in the City’s favor was the “City of San Diego and POA Labor  
22 Negotiations Minutes dated March 30, 2005.” (Doc. No. 613, p. 19:27.) However, those  
23 minutes supported the City’s position and not the SDPOA’s position on the issue of whether  
24 retiree health benefits were vested. *Second*, defendants also lodged an additional non-supportive  
25 document indicating that retiree health was not vested. Astoundingly, the non-supportive  
26 material was highlighted *by defendants* for the Court. Specifically, Mr. Nissen filed the exhibit  
27 with a circle around the heading “Current Employees,” the word “Bad,” and an arrow pointing to  
28

1 the adverse evidence. (See Doc. No. 704, p. 77;<sup>6</sup> RT, April 23, 2007, p. 66:6-19.)

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

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

26 "It is well settled that an attorney is liable for malpractice when his negligent  
27

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28 <sup>6</sup> 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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27  
28 <sup>7</sup> The agreement with its predecessor firm, CPK, expressly excluded litigation.

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

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

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

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

16           “The nature of an attorney’s function is such that an attorney is the only  
17           professional who may have a duty to advise a client that a malpractice action against  
18           another professional may provide a solution to the client’s problems.” (*Lewis v. Purvin*  
19           (1989) 208 Cal.App.3d 1208, 1217.) Moreover, two of the “four circumstances in which  
20           nondisclosure or concealment may constitute actionable fraud” apply: “(1) . . . the  
21           defendant is in a fiduciary relationship with the plaintiff [and] . . . (4) . . . The  
22           defendant makes partial representations but also suppresses some material facts . . . .”  
23           (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.) “The rule has long been  
24           settled in this state that although one may be under no duty to speak as to a matter, ‘if he  
25           undertakes to do so, . . . he is bound not only to state truly what he tells but also not to  
26           suppress or conceal any facts . . . . If he speaks at all he must make a full and fair  
27           disclosure.” (*Marketing West, Inc. v. Wassermann* (1993) 5 Cal.4th 1082, 1093.)

28           **SPECIAL INTERROGATORY NO. 3:**

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

1 paragraph 11 of the COMPLAINT.

2 **RESPONSE SPECIAL TO INTERROGATORY NO. 3:**

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

- 4 (a) maintaining and losing numerous objectively frivolous claims;
- 5 (b) failing to present sufficient evidence to prevail on the retiree health  
6 claim in *SDPOA v. Aguirre, et al.*, although such evidence existed,  
7 resulting in a reduction of retiree health benefits to SDPOA  
8 members;
- 9 (c) failing to perform as promised, despite numerous guarantees of success  
10 which were not fulfilled;
- 11 (d) failing to obtain a retention agreement with the SDPOA in violation of  
12 Business and Professions Code section 6148;
- 13 (e) charging the SDPOA unreasonable fees in violation of rule 4-200 of the  
14 Rules of Professional Conduct;
- 15 (f) failing to communicate several written settlement offers in  
16 violation of rule 3-510(A)(2) of the Rules of Professional Conduct;
- 17 (g) failing to inform the SDPOA of Petersen’s malpractice;
- 18 (h) failing to inform the SDPOA of the benefits and costs of the litigation  
19 undertaken by defendants; and
- 20 (i) failing to apprise he SDPOA of material developments in the litigation in  
21 violation of Business and Professions Code section 6068, and  
22 affirmatively misrepresenting the outcome of several hearings to the  
23 SDPOA.

24 **SPECIAL INTERROGATORY NO. 4:**

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

28



1 **RESPONSE SPECIAL TO INTERROGATORY NO. 4:**

2 **1. 2005 Labor Negotiations**

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

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

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21  
22 <sup>8</sup> San Diego City Charter section 143 requires the City and employees to make  
23 “substantially equal” contributions to fund employee pensions. Historically, the SDPOA had  
24 been able to negotiate contracts with the City in which the City paid, or “picked up,” most of  
25 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 <sup>9</sup> The City’s DROP program, adopted in 1997, allows an employee, otherwise  
27 qualified to retire and begin drawing a pension, to enter DROP and continue working for up to  
28 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

1 for employees after retirement (“retiree health”).

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

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

15 Without providing the SDPOA with any written evaluation or analysis, Mr.  
16 Petersen convinced the SDPOA to authorize litigation against the City, the City Attorney,  
17 numerous council members, and numerous City staffers. CPK also named the San Diego  
18 City Employees’ Retirement System (“SDCERS”), even though it had absolutely no role  
19 in the 2005 SDPOA labor negotiations. The lawsuit was filed in federal court on August  
20 9, 2005 and assigned to The Honorable Marilyn Huff. The complaint stated claims for  
21 violations of the First Amendment, violation of public policy, four section 1983 claims,  
22 breach of contract, conversion, fraud, violation of the MMBA, breach of fiduciary duty,  
23 breach of trust, conversion of trust, and declaratory relief.

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

26 \_\_\_\_\_  
27 placed in an interest-bearing DROP account. The DROP program allows the City to retain  
28 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.

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

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

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

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

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

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

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

11 "In the TAC, [the SDPOA] allege[d] that the City's imposition of the LBFO  
12 improperly adjusted eligibility qualifications for retiree health benefits for current  
13 employees in violation of its constitutional rights. (See, e.g., TAC ¶ 33.)" (Order dated  
14 May 18, 2007, p. 40:14-14.) In ruling against the SDPOA, Judge Huff stated: "[The  
15 SDPOA] alleges *without citation to authority* that retiree health was offered at  
16 employment and therefore vested immediately." (*Id.*, p. 40:16-17.) Relying entirely on  
17 cases cited by the City, the Court stated: "[h]ere, [the SDPOA] has not directed the Court  
18 to any authority standing for the proposition that retiree health benefits are vested rights  
19 subject to constitutional protection under either the Contracts or Takings Clause." (*Id.*, p.  
20 41: 4-6.) "Accordingly, given the absence of authority to the contrary, Plaintiff's Second  
21 and Third Claims under the Contracts and Takings Clauses premised on the modification  
22 of retiree health benefits fail." (*Id.*, at p. 41:6-8.) "In total, Plaintiff has not created an  
23 issue of triable fact as to whether the imposition of the LBFO and associated takeaways  
24 affected constitutionally protected benefits. Because the evidence and argument  
25 submitted by the parties demonstrate that none of the takeaways affected protected  
26 pension benefits, but instead affected employment rights, these claims fail." (*Id.*, at p.  
27 41:9-15.)

28

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

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

9           **4.     *McGuigan v. City of San Diego***

10          This litigation arose out of the underfunding of the City of San Diego’s employee  
11 pension plan. McGuigan filed a representative declaratory relief action on June 28, 2005,  
12 on behalf of all beneficiaries of SDCERS. McGuigan alleged that from 1996 through  
13 2005, the City paid less in employer contributions to SDCERS than the actuarially-  
14 determined amount that was required to be paid under the San Diego City Charter and  
15 Municipal Code. McGuigan sought: (1) judicial determinations that (a) the City had  
16 violated City Charter section 143 and former San Diego Municipal Code section 24.0801  
17 and (b) the City’s contribution shortfall rendered SDCERS actuarially unsound; and (2)  
18 “a peremptory writ of mandate directing the City to immediately pay to SDCERS the  
19 aggregate amount of the City’s shortfall in employer contributions, as determined by the  
20 actuarial valuations for every fiscal year ending June 30, 1997 to June 30, 2005, with  
21 interest.”

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

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

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

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

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

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22 <sup>10</sup> CPK, which represented approximately 1,600 SDPOA members individually,  
23 simultaneously refused to grant McGuigan's counsel permission to speak to those members  
24 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.

25 <sup>11</sup> JDTP attorney Christopher Nissen would later falsely declare in the Court of  
26 Appeal that he did not appear because he was stuck in traffic. However, Mr. Nissen told Jeff  
27 Jordon, a member of the SDPOA Board, that he never attempted to attend the hearing because  
28 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

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

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

7 “The settlement entered yesterday [sic] in *McGuigan* does the following  
8 which *actually helps the SDPOA and its Members*: (1) its [sic] incorporates  
9 word-for-word, almost two-pages [sic] of written changes proposed directly  
10 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.”

11 On February 9, 2007, CPK —as counsel for the unsuccessful objectors—sought  
12 more than \$340,000 in attorney fees and costs. In that motion, CPK argued that  
13 “[s]uccessful litigants are entitled to attorney fees under [Code of Civil Procedure section]  
14 1021.5.”

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

22 **5. CPK and JDTP Merger**

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

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28  
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misrepresentations recently.

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

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

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

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

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

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



1 Southern California courts in which JDTP and Mr. Petersen fought over clients.  
2 Although JDTP had no fee agreements in any of the cases,<sup>12</sup> it successfully took the  
3 position—contested by Mr. Petersen—that it was the rightful attorney of record because it  
4 had acquired CPK and merged with it. Petersen filed a declaration acknowledging JDTP  
5 characterized its acquisition of CPK as a “merger.”

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

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

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

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

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

23 **8. *State Court Actions***

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

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27  
28 <sup>12</sup> On March 19, 2008, JDTP proposed a legal representation agreement to the SDPOA. However, the SDPOA never agreed to or signed it.

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

4 **Liability**

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

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

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

24 **1. *Maintaining Objectively Meritless and Costly Litigation***

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

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

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

10  
11 **2. *Losing Retiree Health Even Though Not Authorized to Pursue***  
***Such Litigation***

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

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

1 JDTP.

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

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

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

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

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

1 questions and answers. “Following are the most common questions asked concerning how  
2 withdrawal from Social Security will affect City employees. The questions and answers  
3 are divided into five categories [including] . . . 4) Medicare Hospital Insurance [and] 5)  
4 Medicare Medical Insurance. Question # 22 (page SDPOA 0402) asked: “What will the  
5 City provide for hospital insurance?” The Answer: “The retired employees will be  
6 included in the City health plans. The City will pay for the retired employee's health  
7 insurance. These costs will not be paid out of the Supplemental Pension Plan.” Question  
8 # 24 (page SDPOA 0403) asked: “What will the City provide for medical insurance?”  
9 The Answer: “Retired employees will be included in the City health plans. The City will  
10 pay the premiums. The cost of the premiums will not come from the Supplemental  
11 Pension Plan.” Relying on the City’s promise, City employees approved the City’s  
12 withdrawal from the Social Security system and are no longer part of that system.

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

17 “Resolution R-255610, adopted January 4, 1982, effective January 1, 1982, set the  
18 parameters of the [Retiree] Health Benefit .” (City Attorney Opinion No. 2007-04, p. 2.)  
19 “Certain benefits were ‘provided to employees in lieu of Social Security participation.’”  
20 (*Ibid.*) “In addition, it was the City Council’s intent ‘to provide such coverage as a  
21 permanent benefit to eligible retirees.’” (*Ibid.*) “The City Manager was authorized to  
22 establish a City-sponsored Group Health Insurance Plan for eligible retirees, providing  
23 the same choice of program coverage as offered to active employees of the City.” (*Ibid.*)  
24 “On June 1, 1982, Ordinance No. O-15758, codified the [Retiree] Health Benefit.” (*Ibid.*)  
25 “In 1985 . . . Police and Fire Safety Members on the active payroll on or after June 30,  
26 1985 were added.” (*Id.*, at p. 3; Ordinance No. O-16449.) The Retiree Health Benefit has  
27 always been codified among the City’s retirement ordinances.

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

1 retirement system which affects the benefits of any employee under such retirement  
2 system shall be adopted without the approval of a majority vote of the members of said  
3 system.” In 1985, before Ordinance No. O-16649 became effective, “a vote of the  
4 retirement system membership [was conducted], as required by Charter section 143.1[.]”  
5 (Ordinance No. O-16449.) “[S]aid vote was conducted and the ballots tallied on June 3,  
6 1985[,] with a vote of 2,885-yes, 904-no, and 12-void[.]” (*Ibid.*)

7 “On September 30, 1985, Ordinance No. O-16510 provided [that] . . . it was the  
8 City’s responsibility to provide [funds to pay for the Retiree Health Benefit] from the  
9 General Fund . . . .” (City Attorney Opinion No. 2007-04, p. 3.) In 1986 the City  
10 adopted Ordinance No. O-16679 as part of the settlement of a class action lawsuit (the  
11 *Andrews* class action), and made the Retiree Health Benefit retroactive to all police  
12 officers on active City payroll as of October 6, 1980. In 1986, pursuant to Charter section  
13 143.1, before Ordinance No. O-16679 became effective, “the matter was submitted to a  
14 vote of the active members of the System and approved by a vote of 2,630-Yes as  
15 opposed to 213-No[.]” (Ordinance No. O-16679.)

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

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

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

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

24 Prior to retirement:

25 “[a]n employee's vested contractual pension rights may be modified  
26 . . . for the purpose of keeping a pension system flexible to permit  
27 adjustments in accord with changing conditions and at the same time  
28 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

1 must bear some material relation to the theory of a pension system  
2 and its successful operation, *and changes in a pension plan which*  
3 *result in disadvantage to employees should be accompanied by*  
4 *comparable new advantages.’ ” (Betts at p. 864, italics in original;*  
5 *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.)*

6 (See *Pasadena Police Officers Association v. City of Pasadena* (1983) 147 Cal.App.3d  
7 695; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210  
8 Cal.App.3d 1095, and the authorities cited in each of these cases.)

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

28 In memoranda researched and written six months after suffering this adverse



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

6       Instead of providing the court with available evidence or legal citation *supporting*  
7 their clients’ position regarding retiree health, the defendants instead submitted *adverse*  
8 evidence. *First*, the only evidence cited by defendants in opposition to the City’s motion  
9 to summarily adjudicate the retiree health issue in the City’s favor was the “City of San  
10 Diego and POA Labor Negotiations Minutes dated March 30, 2005.” (Doc. No. 613, p.  
11 19:27.) However, those minutes supported the City’s position and not the SDPOA’s  
12 position on the issue of whether retiree health benefits were vested. *Second*, defendants  
13 also lodged an additional non-supportive document indicating that retiree health was not  
14 vested. Astoundingly, the non-supportive material was highlighted *by defendants* for the  
15 Court. Specifically, Mr. Nissen filed the exhibit with a circle around the heading  
16 “Current Employees,” the word “Bad,” and an arrow pointing to the adverse evidence.  
17 (See Doc. No. 704, p. 77;<sup>13</sup> RT, April 23, 2007, p. 66:6-19.)

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

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

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27  
28       <sup>13</sup>       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.

1 *Thorning v. Hollister Sch. Dist.* (1992) 11 Cal.App.4th 1598, *Cal. League of City*  
2 *Employee Ass'ns v. Palos Verde Library Dist.* (1978), and *San Bernadino Pub.*  
3 *Employees Ass'n v. City of Fontana* (1998) 67 Cal.App.4th 1215 and explained that if  
4 retiree health benefits had been “expressly granted to [employees] by an official  
5 declaration of policy during [the employees’] term of public office,” those retiree health  
6 benefits would be vested, “fundamental and could not be unilaterally terminated.”  
7 (*SDPOA* at pp. 739-740.) However, if the employee benefit at issue were merely  
8 “provided for by MOUs between the city and its bargaining groups [the benefits] could  
9 not have become permanently and irrevocably vested as a matter of contract law, because  
10 the benefits were earned on a year-to-year basis under previous MOU’s that expired  
11 under their own terms . . . .” (*SDPOA* at p. 740.) Thus, because the defendant lawyers  
12 failed to present evidence (e.g., the Ray Blair memo and numerous ordinances and  
13 Charter section 143.1 votes) establishing retiree health benefits had been expressly  
14 granted to employees by an multiple official declarations of policy during the employees’  
15 term of public office, those retiree health benefits would be vested and the City’s July  
16 2009 \$142 million to \$152 million reduction of the plaintiff class’ Retiree Health Benefit  
17 would not have been permitted.

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

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

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

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

1  
2 JDTP failed to keep the SDPOA timely apprised of significant developments.  
3 Board members, several of whom will be present at the mediation, will explain how  
4 difficult it was to get status reports or analyses. For example, after the adverse Ninth  
5 Circuit opinion was announced on June 10, 2009, the SDPOA learned about it from the  
6 media. JDTP refused to respond to requests for several days. JDTP never informed its  
7 clients of significant cost awards against the SDPOA and individual plaintiffs in the  
8 *Aaron* case.

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

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

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

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

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



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

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

7           “The nature of an attorney’s function is such that an attorney is the only  
8 professional who may have a duty to advise a client that a malpractice action against  
9 another professional may provide a solution to the client’s problems.” (*Lewis v. Purvin*  
10 (1989) 208 Cal.App.3d 1208, 1217.) Moreover, two of the “four circumstances in which  
11 nondisclosure or concealment may constitute actionable fraud” apply: “(1) . . . the  
12 defendant is in a fiduciary relationship with the plaintiff [and] . . . (4) . . . The  
13 defendant makes partial representations but also suppresses some material facts . . . .”  
14 (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.) “The rule has long been  
15 settled in this state that although one may be under no duty to speak as to a matter, ‘if he  
16 undertakes to do so, . . . . he is bound not only to state truly what he tells but also not to  
17 suppress or conceal any facts . . . . If he speaks at all he must make a full and fair  
18 disclosure.” (*Marketing West, Inc. v. Wassermann* (1993) 5 Cal.4th 1082, 1093.)

19           **SPECIAL INTERROGATORY NO. 5:**

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

22           **RESPONSE SPECIAL TO INTERROGATORY NO. 5:**

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

28

1 **SPECIAL INTERROGATORY NO. 6:**

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

5 **RESPONSE SPECIAL TO INTERROGATORY NO. 6:**

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

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

19 In 1982, the City desired to withdraw from the Social Security System. In order to  
20 successfully withdraw from the Social Security System, City employees were required to  
21 approve the withdrawal. In order to induce its employees to vote in favor of the City’s  
22 withdrawal from the Social Security system, the City offered its employees lifetime retiree health  
23 insurance (the “Retiree Health Benefit”).

24 In a memorandum dated November 20, 1981, from City Manager Ray T. Blair, Jr., the  
25 City promised both hospitalization and medical insurance: “Retired employees will be included  
26 in the City health plans. The City will pay the premiums.” This memo is dated November 20,  
27 1981, from then City Manager Ray T. Blair, Jr., to all City employees (including all SDPOA  
28 members). It discusses the City's proposal and upcoming employee election to remove

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

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

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

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

27 "Resolution R-255610, adopted January 4, 1982, effective January 1, 1982, set the  
28 parameters of the [Retiree] Health Benefit ." (City Attorney Opinion No. 2007-04, p. 2.)

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

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

17 “On September 30, 1985, Ordinance No. O-16510 provided [that] . . . it was the City’s  
18 responsibility to provide [funds to pay for the Retiree Health Benefit] from the General  
19 Fund . . . .” (City Attorney Opinion No. 2007-04, p. 3.) In 1986 the City adopted Ordinance No.  
20 O-16679 as part of the settlement of a class action lawsuit (the *Andrews* class action), and made  
21 the Retiree Health Benefit retroactive to all police officers on active City payroll as of October 6,  
22 1980. In 1986, pursuant to Charter section 143.1, before Ordinance No. O-16679 became  
23 effective, “the matter was submitted to a vote of the active members of the System and approved  
24 by a vote of 2,630-Yes as opposed to 213-No[.]” (Ordinance No. O-16679.)

25 In 1992, the Retiree Health Benefit was modified by Ordinance No. O-17770. Again,  
26 before the modifications became effective, “these changes were voted upon by all [affected]  
27 members pursuant to Charter section 143.1 with [the] vote counted and certified on April 13,  
28 1992 . . . .” (Ordinance No. O-17770.) Since at least 1992, the Retiree Health Benefit has been



1 codified at San Diego Municipal Code sections 24.1201 and 24.1202.

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

8 In 2002, the City again sought to modify the Retiree Health Benefit. The 2002  
9 modification placed a fixed dollar amount of the Retiree Health Benefit based on the cost of the  
10 City-sponsored PPO plan being offered to retirees for the 2003 plan year, with an automatic  
11 annual increase in this amount, not to exceed ten percent (10%) per year, based on an  
12 independent, objective source—the Centers for Medicare and Medicaid Services, Office of the  
13 Actuary, which tracks projected increases in National Health Expenditures. Before any such  
14 2002 modifications to the Retiree Health Benefit became effective, the City conducted a Charter  
15 section 143.1 vote, which passed 2,193 in favor and 35 against the proposed modifications.

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

1 Prior to retirement:

2 “[a]n employee's vested contractual pension rights may be modified . . .  
3 for the purpose of keeping a pension system flexible to permit adjustments  
4 in accord with changing conditions and at the same time maintain the  
5 integrity of the system. [Citations.] Such modifications must be  
6 reasonable, and it is for the courts to determine upon the facts of each case  
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9 to the theory of a pension system and its successful operation, *and*  
10 *changes in a pension plan which result in disadvantage to employees*  
11 *should be accompanied by comparable new advantages.’ ” (Betts at p.*  
12 *864, italics in original; accord, Maffei v. Sacramento County Employees*  
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16 (See *Pasadena Police Officers Association v. City of Pasadena* (1983) 147 Cal.App.3d 695;  
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20 *Association v. Aguirre, et al.*, Case No. 05-cv-1581: “In the TAC, [the SDPOA] allege[d] that  
21 the City’s imposition of the LBFO improperly adjusted eligibility qualifications for retiree health  
22 benefits for current employees in violation of its constitutional rights. (See, e.g., TAC ¶ 33.)”  
23 (Order, Doc. No. 737, filed May 18, 2007 in Case No. 05-cv-1581, p. 40:14-14.) In ruling  
24 against the SDPOA, Judge Huff stated: “[The SDPOA] alleges *without citation to authority* that  
25 retiree health was offered at employment and therefore vested immediately.” (*Id.*, p. 40:16-17,  
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28 health benefits are vested rights subject to constitutional protection under either the Contracts or  
29 Takings Clause.” (*Id.*, p. 41: 4-6.) “Accordingly, given the absence of authority to the contrary,  
30 Plaintiff’s Second and Third Claims under the Contracts and Takings Clauses premised on the  
31 modification of retiree health benefits fail.” (*Id.*, at p. 41:6-8.) “In total, Plaintiff *has not*  
32 *created an issue of triable fact* as to whether the imposition of the LBFO and associated  
33 takeaways affected constitutionally protected benefits. Because the evidence and argument  
34 submitted by the parties demonstrate that none of the takeaways affected protected pension

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

3 In memoranda researched and written six months after suffering this adverse ruling,  
4 JDTP explained in detail the evidence and legal analysis which provided the support Judge Huff  
5 found was lacking. (Memo dated December 5, 2007 [“Retiree Healthcare Case Workup”], p. 23  
6 [concluding retiree health vested]; Memo dated December 4, 2007, p. 3 [“vested right to retiree  
7 heath benefit”].) However, it was too late, because summary judgment had long since been  
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10 clients’ position regarding retiree health, the defendants instead submitted *adverse* evidence.  
11 *First*, the only evidence cited by defendants in opposition to the City’s motion to summarily  
12 adjudicate the retiree health issue in the City’s favor was the “City of San Diego and POA Labor  
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16 document indicating that retiree health was not vested. Astoundingly, the non-supportive  
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18 with a circle around the heading “Current Employees,” the word “Bad,” and an arrow pointing to  
19 the adverse evidence. (See Doc. No. 704, p. 77;<sup>15</sup> RT, April 23, 2007, p. 66:6-19.)

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

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

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28 <sup>15</sup> 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.

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

18 **SPECIAL INTERROGATORY NO. 7:**

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

21 **RESPONSE SPECIAL TO INTERROGATORY NO. 7**

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

24 In 1982, the City desired to withdraw from the Social Security System. In order to   
25 successfully withdraw from the Social Security System, City employees were required to   
26 approve the withdrawal. In order to induce its employees to vote in favor of the City’s   
27 withdrawal from the Social Security system, the City offered its employees lifetime retiree health   
28 insurance (the “Retiree Health Benefit”).

1 In a memorandum dated November 20, 1981, from City Manager Ray T. Blair, Jr., the  
2 City promised both hospitalization and medical insurance: "Retired employees will be included  
3 in the City health plans. The City will pay the premiums." This memo is dated November 20,  
4 1981, from then City Manager Ray T. Blair, Jr., to all City employees (including all SDPOA  
5 members). It discusses the City's proposal and upcoming employee election to remove  
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7 by employees to the City. As the memo explains, in order to opt out of Social Security and  
8 Medicare, the City had to agree to provide "another pension plan to supplement your regular  
9 City retirement program."

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11 employees "will be enrolled in the Plan as of January 8, 1982." All future employees "will join  
12 the Plan immediately *on their date of employment.*" (Italics added.) "Vesting" is covered at  
13 pages 3 and 4, paragraph 9 of the memo. The Plan provides that benefits were 100% vested after  
14 5 years of service.

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

28 On March 14, 2006, during "Sunshine Week," present City Mayor Jerry Sanders

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

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

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

22 “On September 30, 1985, Ordinance No. O-16510 provided [that] . . . it was the City’s  
23 responsibility to provide [funds to pay for the Retiree Health Benefit] from the General  
24 Fund . . . .” (City Attorney Opinion No. 2007-04, p. 3.) In 1986 the City adopted Ordinance No.  
25 O-16679 as part of the settlement of a class action lawsuit (the *Andrews* class action), and made  
26 the Retiree Health Benefit retroactive to all police officers on active City payroll as of October 6,  
27 1980. In 1986, pursuant to Charter section 143.1, before Ordinance No. O-16679 became  
28 effective, “the matter was submitted to a vote of the active members of the System and approved

1 by a vote of 2,630-Yes as opposed to 213-No[.]” (Ordinance No. O-16679.)

2 In 1992, the Retiree Health Benefit was modified by Ordinance No. O-17770. Again,  
3 before the modifications became effective, “these changes were voted upon by all [affected]  
4 members pursuant to Charter section 143.1 with [the] vote counted and certified on April 13,  
5 1992 . . . .” (Ordinance No. O-17770.) Since at least 1992, the Retiree Health Benefit has been  
6 codified at San Diego Municipal Code sections 24.1201 and 24.1202.

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

13 In 2002, the City again sought to modify the Retiree Health Benefit. The 2002  
14 modification placed a fixed dollar amount of the Retiree Health Benefit based on the cost of the  
15 City-sponsored PPO plan being offered to retirees for the 2003 plan year, with an automatic  
16 annual increase in this amount, not to exceed ten percent (10%) per year, based on an  
17 independent, objective source—the Centers for Medicare and Medicaid Services, Office of the  
18 Actuary, which tracks projected increases in National Health Expenditures. Before any such  
19 2002 modifications to the Retiree Health Benefit became effective, the City conducted a Charter  
20 section 143.1 vote, which passed 2,193 in favor and 35 against the proposed modifications.

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

27 Instead of providing the court with available evidence or legal citation *supporting* their  
28 clients’ position regarding retiree health, the defendants instead submitted *adverse* evidence.

1 *First*, the only evidence cited by defendants in opposition to the City’s motion to summarily  
2 adjudicate the retiree health issue in the City’s favor was the “City of San Diego and POA Labor  
3 Negotiations Minutes dated March 30, 2005.” (Doc. No. 613, p. 19:27.) However, those  
4 minutes supported the City’s position and not the SDPOA’s position on the issue of whether  
5 retiree health benefits were vested. *Second*, defendants also lodged an additional non-supportive  
6 document indicating that retiree health was not vested. Astoundingly, the non-supportive  
7 material was highlighted *by defendants* for the Court. Specifically, Mr. Nissen filed the exhibit  
8 with a circle around the heading “Current Employees,” the word “Bad,” and an arrow pointing to  
9 the adverse evidence. (See Doc. No. 704, p. 77;<sup>16</sup> RT, April 23, 2007, p. 66:6-19.)

10 **SPECIAL INTERROGATORY NO. 8**

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

14 **RESPONSE SPECIAL TO INTERROGATORY NO. 8:**

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

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

27 \_\_\_\_\_  
28 <sup>16</sup> 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.



1 authority to the court:

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

7 In a memorandum dated November 20, 1981, from City Manager Ray T. Blair, Jr., the  
8 City promised both hospitalization and medical insurance: "Retired employees will be included  
9 in the City health plans. The City will pay the premiums." This memo is dated November 20,  
10 1981, from then City Manager Ray T. Blair, Jr., to all City employees (including all SDPOA  
11 members). It discusses the City's proposal and upcoming employee election to remove  
12 employees from Social Security and Medicare in exchange for additional benefits to be provided  
13 by employees to the City. As the memo explains, in order to opt out of Social Security and  
14 Medicare, the City had to agree to provide "another pension plan to supplement your regular  
15 City retirement program."

16 At page 2, paragraph 3, of the memo, entitled "Entry Date," it states that all existing  
17 employees "will be enrolled in the Plan as of January 8, 1982." All future employees "will join  
18 the Plan immediately *on their date of employment.*" (Italics added.) "Vesting" is covered at  
19 pages 3 and 4, paragraph 9 of the memo. The Plan provides that benefits were 100% vested after  
20 5 years of service.

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23 and answers. "Following are the most common questions asked concerning how withdrawal  
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25 five categories [including] . . . 4) Medicare Hospital Insurance [and] 5) Medicare Medical  
26 Insurance. Question # 22 (page SDPOA 0402) asked: "What will the City provide for hospital  
27 insurance?" The Answer: "The retired employees will be included in the City health plans. The  
28 City will pay for the retired employee's health insurance. These costs will not be paid out of the

1 Supplemental Pension Plan.” Question # 24 (page SDPOA 0403) asked: “What will the City  
2 provide for medical insurance?” The Answer: “Retired employees will be included in the City  
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4 Supplemental Pension Plan.” Relying on the City’s promise, City employees approved the  
5 City’s withdrawal from the Social Security system and are no longer part of that system.

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19 No. O-16449.) The Retiree Health Benefit has always been codified among the City’s retirement  
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5 1980. In 1986, pursuant to Charter section 143.1, before Ordinance No. O-16679 became  
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25 2002 modifications to the Retiree Health Benefit became effective, the City conducted a Charter  
26 section 143.1 vote, which passed 2,193 in favor and 35 against the proposed modifications.

27 [B]oth the federal and state contract clauses protect the vested pension rights of public  
28 officers and employees from unreasonable impairment.” (*California Ass’n of Professional*

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

12 Prior to retirement:

13 “[a]n employee's vested contractual pension rights may be modified . . .  
14 for the purpose of keeping a pension system flexible to permit adjustments  
15 in accord with changing conditions and at the same time maintain the  
16 integrity of the system. [Citations.] Such modifications must be  
17 reasonable, and it is for the courts to determine upon the facts of each case  
18 what constitutes a permissible change. To be sustained as reasonable,  
19 alterations of employees' pension rights must bear some material relation  
20 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.)

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

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

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

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

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

1 with a circle around the heading “Current Employees,” the word “Bad,” and an arrow pointing to  
2 the adverse evidence. (See Doc. No. 704, p. 77;<sup>17</sup> RT, April 23, 2007, p. 66:6-19.)

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

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

27 \_\_\_\_\_  
28 <sup>17</sup> 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.

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

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

11 **SPECIAL INTERROGATORY NO. 9:**

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

15 **RESPONSE SPECIAL TO INTERROGATORY NO. 9:**

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

23 **SPECIAL INTERROGATORY NO. 10:**

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

26 **RESPONSE SPECIAL TO INTERROGATORY NO. 10:**

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

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

6 **SPECIAL INTERROGATORY NO. 11:**

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

9 **RESPONSE SPECIAL TO INTERROGATORY NO. 11**

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

13 **SPECIAL INTERROGATORY NO. 12**

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

16 **RESPONSE SPECIAL TO INTERROGATORY NO. 12**

17 **1. 2005 Labor Negotiations**

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

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



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

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

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19  
20 <sup>18</sup> San Diego City Charter section 143 requires the City and employees to make  
21 “substantially equal” contributions to fund employee pensions. Historically, the SDPOA had  
22 been able to negotiate contracts with the City in which the City paid, or “picked up,” most of  
23 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.

24 <sup>19</sup> The City’s DROP program, adopted in 1997, allows an employee, otherwise  
25 qualified to retire and begin drawing a pension, to enter DROP and continue working for up to  
26 five years. During that period, however, the employer no longer earns additional years of  
27 retirement service credit, and no further pension contributions are made either by the City or by  
28 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.

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

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

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

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

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

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

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

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

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

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

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

1 SDPOA] alleges *without citation to authority* that retiree health was offered at  
2 employment and therefore vested immediately.” (*Id.*, p. 40:16-17.) Relying entirely on  
3 cases cited by the City, the Court stated: “[h]ere, [the SDPOA] has not directed the Court  
4 to any authority standing for the proposition that retiree health benefits are vested rights  
5 subject to constitutional protection under either the Contracts or Takings Clause.” (*Id.*, p.  
6 41: 4-6.) “Accordingly, given the absence of authority to the contrary, Plaintiff’s Second  
7 and Third Claims under the Contracts and Takings Clauses premised on the modification  
8 of retiree health benefits fail.” (*Id.*, at p. 41:6-8.) “In total, Plaintiff has not created an  
9 issue of triable fact as to whether the imposition of the LBFO and associated takeaways  
10 affected constitutionally protected benefits. Because the evidence and argument  
11 submitted by the parties demonstrate that none of the takeaways affected protected  
12 pension benefits, but instead affected employment rights, these claims fail.” (*Id.*, at p.  
13 41:9-15.)

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

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

22 **4. *McGuigan v. City of San Diego***

23 This litigation arose out of the underfunding of the City of San Diego’s employee  
24 pension plan. McGuigan filed a representative declaratory relief action on June 28, 2005,  
25 on behalf of all beneficiaries of SDCERS. McGuigan alleged that from 1996 through  
26 2005, the City paid less in employer contributions to SDCERS than the actuarially-  
27 determined amount that was required to be paid under the San Diego City Charter and  
28 Municipal Code. McGuigan sought: (1) judicial determinations that (a) the City had

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

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

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

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26  
27 <sup>20</sup> CPK, which represented approximately 1,600 SDPOA members individually,  
28 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.

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

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

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

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

22 On February 9, 2007, CPK —as counsel for the unsuccessful objectors—sought  
23 more than \$340,000 in attorney fees and costs. In that motion, CPK argued that  
24 “[s]uccessful litigants are entitled to attorney fees under [Code of Civil Procedure section]  
25 1021.5.”

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26 <sup>21</sup> JDTP attorney Christopher Nissen would later falsely declare in the Court of  
27 Appeal that he did not appear because he was stuck in traffic. However, Mr. Nissen told Jeff  
28 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.

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

##### 8 **5. CPK and JDTP Merger**

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

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

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

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

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

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

12 After Mr. Petersen was terminated, nasty contested disputes arose throughout  
13 Southern California courts in which JDTP and Mr. Petersen fought over clients.  
14 Although JDTP had no fee agreements in any of the cases,<sup>22</sup> it successfully took the  
15 position—contested by Mr. Petersen—that it was the rightful attorney of record because it  
16 had acquired CPK and merged with it. Petersen filed a declaration acknowledging JDTP  
17 characterized its acquisition of CPK as a “merger.”

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

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

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

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27  
28 <sup>22</sup> On March 19, 2008, JDTP proposed a legal representation agreement to the  
SDPOA. However, the SDPOA never agreed to or signed it.



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

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

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

9 **8. *State Court Actions***

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

16 **Liability**

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

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

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

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

8 **1. *Maintaining Objectively Meritless and Costly Litigation***

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

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

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

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

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

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

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

20 In 1982, the City desired to withdraw from the Social Security System. In order to  
21 successfully withdraw from the Social Security System, City employees were required to  
22 approve the withdrawal. In order to induce its employees to vote in favor of the City’s  
23 withdrawal from the Social Security system, the City offered its employees lifetime  
24 retiree health insurance (the “Retiree Health Benefit”).

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

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

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

11 In the attachment to the memo, entitled "WHAT HAPPENS IF WE PULL OUT  
12 OF SOCIAL SECURITY," beginning at Bate-stamp # SDPOA 0399, the City provided  
13 questions and answers. "Following are the most common questions asked concerning how  
14 withdrawal from Social Security will affect City employees. The questions and answers  
15 are divided into five categories [including] . . . 4) Medicare Hospital Insurance [and] 5)  
16 Medicare Medical Insurance. Question # 22 (page SDPOA 0402) asked: "What will the  
17 City provide for hospital insurance?" The Answer: "The retired employees will be  
18 included in the City health plans. The City will pay for the retired employee's health  
19 insurance. These costs will not be paid out of the Supplemental Pension Plan." Question  
20 # 24 (page SDPOA 0403) asked: "What will the City provide for medical insurance?"  
21 The Answer: "Retired employees will be included in the City health plans. The City will  
22 pay the premiums. The cost of the premiums will not come from the Supplemental  
23 Pension Plan." Relying on the City's promise, City employees approved the City's  
24 withdrawal from the Social Security system and are no longer part of that system.

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

1           “Resolution R-255610, adopted January 4, 1982, effective January 1, 1982, set the  
2 parameters of the [Retiree] Health Benefit.” (City Attorney Opinion No. 2007-04, p. 2.)  
3 “Certain benefits were ‘provided to employees in lieu of Social Security participation.’”  
4 (*Ibid.*) “In addition, it was the City Council’s intent ‘to provide such coverage as a  
5 permanent benefit to eligible retirees.’” (*Ibid.*) “The City Manager was authorized to  
6 establish a City-sponsored Group Health Insurance Plan for eligible retirees, providing  
7 the same choice of program coverage as offered to active employees of the City.” (*Ibid.*)  
8 “On June 1, 1982, Ordinance No. O-15758, codified the [Retiree] Health Benefit.” (*Ibid.*)  
9 “In 1985 . . . Police and Fire Safety Members on the active payroll on or after June 30,  
10 1985 were added.” (*Id.*, at p. 3; Ordinance No. O-16449.) The Retiree Health Benefit has  
11 always been codified among the City’s retirement ordinances.

12           Charter section 143.1 provides, in relevant part: “No ordinance amending the  
13 retirement system which affects the benefits of any employee under such retirement  
14 system shall be adopted without the approval of a majority vote of the members of said  
15 system.” In 1985, before Ordinance No. O-16649 became effective, “a vote of the  
16 retirement system membership [was conducted], as required by Charter section 143.1[.]”  
17 (Ordinance No. O-16449.) “[S]aid vote was conducted and the ballots tallied on June 3,  
18 1985[,] with a vote of 2,885-yes, 904-no, and 12-void[.]” (*Ibid.*)

19           “On September 30, 1985, Ordinance No. O-16510 provided [that] . . . it was the  
20 City’s responsibility to provide [funds to pay for the Retiree Health Benefit] from the  
21 General Fund . . . .” (City Attorney Opinion No. 2007-04, p. 3.) In 1986 the City  
22 adopted Ordinance No. O-16679 as part of the settlement of a class action lawsuit (the  
23 *Andrews* class action), and made the Retiree Health Benefit retroactive to all police  
24 officers on active City payroll as of October 6, 1980. In 1986, pursuant to Charter section  
25 143.1, before Ordinance No. O-16679 became effective, “the matter was submitted to a  
26 vote of the active members of the System and approved by a vote of 2,630-Yes as  
27 opposed to 213-No[.]” (Ordinance No. O-16679.)

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

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

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

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

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

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

8 Prior to retirement:

9 “[a]n employee's vested contractual pension rights may be modified  
10 . . . for the purpose of keeping a pension system flexible to permit  
11 adjustments in accord with changing conditions and at the same time  
12 maintain the integrity of the system. [Citations.] Such modifications  
13 must be reasonable, and it is for the courts to determine upon the  
14 facts of each case what constitutes a permissible change. To be  
15 sustained as reasonable, alterations of employees' pension rights  
16 must bear some material relation to the theory of a pension system  
17 and its successful operation, *and changes in a pension plan which*  
18 *result in disadvantage to employees should be accompanied by*  
19 *comparable new advantages.’ ” (Betts at p. 864, italics in original;*  
20 *accord, Maffei v. Sacramento County Employees Retirement System*  
21 *(2002) 103 Cal.App.4th 993, 999-1000; Board of Administration v.*  
22 *Wilson (1997) 52 Cal.App.4th 1109, 1132-1133; Valdes v. Cory*  
23 *(1983) 139 Cal.App.3d 773, 783-784.)*

17 (See *Pasadena Police Officers Association v. City of Pasadena* (1983) 147 Cal.App.3d  
18 695; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210  
19 Cal.App.3d 1095, and the authorities cited in each of these cases.)

20 On May 18, 2007, the District Court ruled against plaintiff in *San Diego Police*  
21 *Officers’ Association v. Aguirre, et al.*, Case No. 05-cv-1581: “In the TAC, [the SDPOA]  
22 allege[d] that the City’s imposition of the LBFO improperly adjusted eligibility  
23 qualifications for retiree health benefits for current employees in violation of its  
24 constitutional rights. (See, e.g., TAC ¶ 33.)” (Order, Doc. No. 737, filed May 18, 2007  
25 in Case No. 05-cv-1581, p. 40:14-14.) In ruling against the SDPOA, Judge Huff stated:  
26 “[The SDPOA] alleges *without citation to authority* that retiree health was offered at  
27 employment and therefore vested immediately.” (*Id.*, p. 40:16-17, italics added.) Relying  
28

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

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

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



1 (See Doc. No. 704, p. 77;<sup>23</sup> RT, April 23, 2007, p. 66:6-19.)

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

7 In light of the defendants' negligence at the trial court, and their appellate  
8 concession, the United States Court of Appeals issued an adverse published opinion on  
9 June 10, 2009. (*San Diego Police Officers' Association v. San Diego City Employees'*  
10 *Retirement System* ("SDPOA") (2009) 568 F.2d 725.) In that opinion, the court cited  
11 *Thorning v. Hollister Sch. Dist.* (1992) 11 Cal.App.4th 1598, *Cal. League of City*  
12 *Employee Ass'ns v. Palos Verde Library Dist.* (1978), and *San Bernadino Pub.*  
13 *Employees Ass'n v. City of Fontana* (1998) 67 Cal.App.4th 1215 and explained that if  
14 retiree health benefits had been "expressly granted to [employees] by an official  
15 declaration of policy during [the employees'] term of public office," those retiree health  
16 benefits would be vested, "fundamental and could not be unilaterally terminated."  
17 (SDPOA at pp. 739-740.) However, if the employee benefit at issue were merely  
18 "provided for by MOUs between the city and its bargaining groups [the benefits] could  
19 not have become permanently and irrevocably vested as a matter of contract law, because  
20 the benefits were earned on a year-to-year basis under previous MOU's that expired  
21 under their own terms . . . ." (SDPOA at p. 740.) Thus, because the defendant lawyers  
22 failed to present evidence (e.g., the Ray Blair memo and numerous ordinances and  
23 Charter section 143.1 votes) establishing retiree health benefits had been expressly  
24 granted to employees by an multiple official declarations of policy during the employees'  
25 term of public office, those retiree health benefits would be vested and the City's July  
26 2009 \$142 million to \$152 million reduction of the plaintiff class' Retiree Health Benefit

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27  
28 <sup>23</sup> 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.

1 would not have been permitted.

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

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

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

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

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

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

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

24 On numerous occasions JDTP (and its predecessor CPK) falsely characterized the  
25 nature of adverse rulings. Even when summary judgment was granted against it, JDTP  
26 characterized the ruling as the Court “not[ing] that [the claims] raised important issues of  
27 state law and policy.” When JDTP failed to appear at the fairness hearing in *McGuigan*,  
28

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

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

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

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

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

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

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

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28 <sup>24</sup> The agreement with its predecessor firm, CPK, expressly excluded litigation.

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

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

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

12  
13 **9. *Failing to Apprise the Client of Malpractice by Mr. Petersen  
During His Representation of the SDPOA***

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

18 "The nature of an attorney's function is such that an attorney is the only  
19 professional who may have a duty to advise a client that a malpractice action against  
20 another professional may provide a solution to the client's problems." (*Lewis v. Purvin*  
21 (1989) 208 Cal.App.3d 1208, 1217.) Moreover, two of the "four circumstances in which  
22 nondisclosure or concealment may constitute actionable fraud" apply: "(1) . . . the  
23 defendant is in a fiduciary relationship with the plaintiff [and] . . . (4) . . . The  
24 defendant makes partial representations but also suppresses some material facts . . . ."  
25 (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.) "The rule has long been  
26 settled in this state that although one may be under no duty to speak as to a matter, 'if he  
27 undertakes to do so, . . . he is bound not only to state truly what he tells but also not to  
28 suppress or conceal any facts . . . . If he speaks at all he must make a full and fair

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

2 **SPECIAL INTERROGATORY NO. 13:**

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

6 **RESPONSE SPECIAL TO INTERROGATORY NO. 13:**

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

9 **SPECIAL INTERROGATORY NO. 14:**

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

13 **RESPONSE SPECIAL TO INTERROGATORY NO. 14:**

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

16 **SPECIAL INTERROGATORY NO. 15:**

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

19 **RESPONSE SPECIAL TO INTERROGATORY NO. 15:**

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

21 **SPECIAL INTERROGATORY NO. 16:**

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

24 **RESPONSE SPECIAL TO INTERROGATORY NO. 16:**

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

27 **SPECIAL INTERROGATORY NO. 17:**

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

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

3 **RESPONSE SPECIAL TO INTERROGATORY NO. 17:**

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

7 **SPECIAL INTERROGATORY NO. 18:**

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

10 **RESPONSE SPECIAL TO INTERROGATORY NO. 18:**

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

13 **SPECIAL INTERROGATORY NO. 19:**

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

16 **RESPONSE SPECIAL TO INTERROGATORY NO. 19:**

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

19 **SPECIAL INTERROGATORY NO. 20:**

20 State all FACTS that RELATE TO YOUR allegation in paragraph 11(g) of the  
21 COMPLAINT that JACKSON DEMARCO failed to “inform the SDPOA of Petersen’s  
22 malpractice.”

23 **RESPONSE SPECIAL TO INTERROGATORY NO. 20:**

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

28 “The nature of an attorney’s function is such that an attorney is the only

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

12 **SPECIAL INTERROGATORY NO. 21:**

13 IDENTIFY all instances of Petersen’s malpractice of which JACKSON DEMARCO  
14 failed to inform YOU.

15 **RESPONSE SPECIAL TO INTERROGATORY NO. 21:**

16 **1. 2005 Labor Negotiations**

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

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

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

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

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19  
20 <sup>25</sup> San Diego City Charter section 143 requires the City and employees to make  
21 “substantially equal” contributions to fund employee pensions. Historically, the SDPOA had  
22 been able to negotiate contracts with the City in which the City paid, or “picked up,” most of  
23 SDPOA members’ required *employee* contributions. Current City Attorney Jan Goldsmith has  
24 opined that the City’s past practice of paying employee contributions on behalf of employees  
25 violates the “substantially equal” clause of Charter section 143.

26 <sup>26</sup> The City’s DROP program, adopted in 1997, allows an employee, otherwise  
27 qualified to retire and begin drawing a pension, to enter DROP and continue working for up to  
28 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.



1 review and analysis of issues to be pursued.

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

3 Without providing the SDPOA with any written evaluation or analysis, Mr.  
4 Petersen convinced the SDPOA to authorize litigation against the City, the City Attorney,  
5 numerous council members, and numerous City staffers. CPK also named the San Diego  
6 City Employees' Retirement System ("SDCERS"), even though it had absolutely no role  
7 in the 2005 SDPOA labor negotiations. The lawsuit was filed in federal court on August  
8 9, 2005 and assigned to The Honorable Marilyn Huff. The complaint stated claims for  
9 violations of the First Amendment, violation of public policy, four section 1983 claims,  
10 breach of contract, conversion, fraud, violation of the MMBA, breach of fiduciary duty,  
11 breach of trust, conversion of trust, and declaratory relief.

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

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

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

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

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

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

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

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

1 employment and therefore vested immediately.” (*Id.*, p. 40:16-17.) Relying entirely on  
2 cases cited by the City, the Court stated: “[h]ere, [the SDPOA] has not directed the Court  
3 to any authority standing for the proposition that retiree health benefits are vested rights  
4 subject to constitutional protection under either the Contracts or Takings Clause.” (*Id.*, p.  
5 41: 4-6.) “Accordingly, given the absence of authority to the contrary, Plaintiff’s Second  
6 and Third Claims under the Contracts and Takings Clauses premised on the modification  
7 of retiree health benefits fail.” (*Id.*, at p. 41:6-8.) “In total, Plaintiff has not created an  
8 issue of triable fact as to whether the imposition of the LBFO and associated takeaways  
9 affected constitutionally protected benefits. Because the evidence and argument  
10 submitted by the parties demonstrate that none of the takeaways affected protected  
11 pension benefits, but instead affected employment rights, these claims fail.” (*Id.*, at p.  
12 41:9-15.)

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

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

21 **4. *McGuigan v. City of San Diego***

22 This litigation arose out of the underfunding of the City of San Diego’s employee  
23 pension plan. McGuigan filed a representative declaratory relief action on June 28, 2005,  
24 on behalf of all beneficiaries of SDCERS. McGuigan alleged that from 1996 through  
25 2005, the City paid less in employer contributions to SDCERS than the actuarially-  
26 determined amount that was required to be paid under the San Diego City Charter and  
27 Municipal Code. McGuigan sought: (1) judicial determinations that (a) the City had  
28 violated City Charter section 143 and former San Diego Municipal Code section 24.0801

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

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

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

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

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26  
27 <sup>27</sup> CPK, which represented approximately 1,600 SDPOA members individually,  
28 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.

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

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

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

14 “The settlement entered yesterday [sic] in *McGuigan* does the following  
15 which *actually helps the SDPOA and its Members*: (1) its [sic] incorporates  
16 word-for-word, almost two-pages [sic] of written changes proposed directly  
17 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.”

18 On February 9, 2007, CPK —as counsel for the unsuccessful objectors—sought  
19 more than \$340,000 in attorney fees and costs. In that motion, CPK argued that  
20 “[s]uccessful litigants are entitled to attorney fees under [Code of Civil Procedure section]  
21 1021.5.”

22 That same day, despite (1) informing class counsel on December 6, 2006, that the  
23

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24 <sup>28</sup> JDTP attorney Christopher Nissen would later falsely declare in the Court of  
25 Appeal that he did not appear because he was stuck in traffic. However, Mr. Nissen told Jeff  
26 Jordon, a member of the SDPOA Board, that he never attempted to attend the hearing because  
27 Mr. Petersen asked him to cover it at the last minute the morning of the hearing and Mr. Nissen  
28 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.

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

### 7 **5. CPK and JDTP Merger**

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

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

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

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

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

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

11 After Mr. Petersen was terminated, nasty contested disputes arose throughout  
12 Southern California courts in which JDTP and Mr. Petersen fought over clients.  
13 Although JDTP had no fee agreements in any of the cases,<sup>29</sup> it successfully took the  
14 position—contested by Mr. Petersen—that it was the rightful attorney of record because it  
15 had acquired CPK and merged with it. Petersen filed a declaration acknowledging JDTP  
16 characterized its acquisition of CPK as a “merger.”

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

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

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

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28 <sup>29</sup> On March 19, 2008, JDTP proposed a legal representation agreement to the  
SDPOA. However, the SDPOA never agreed to or signed it.

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

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

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

8 **8. *State Court Actions***

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

15 **Liability**

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

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



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

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

7 **1. *Maintaining Objectively Meritless and Costly Litigation***

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

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

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

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

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

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

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

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

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

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

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

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

10 In the attachment to the memo, entitled "WHAT HAPPENS IF WE PULL OUT  
11 OF SOCIAL SECURITY," beginning at Bate-stamp # SDPOA 0399, the City provided  
12 questions and answers. "Following are the most common questions asked concerning how  
13 withdrawal from Social Security will affect City employees. The questions and answers  
14 are divided into five categories [including] . . . 4) Medicare Hospital Insurance [and] 5)  
15 Medicare Medical Insurance. Question # 22 (page SDPOA 0402) asked: "What will the  
16 City provide for hospital insurance?" The Answer: "The retired employees will be  
17 included in the City health plans. The City will pay for the retired employee's health  
18 insurance. These costs will not be paid out of the Supplemental Pension Plan." Question  
19 # 24 (page SDPOA 0403) asked: "What will the City provide for medical insurance?"  
20 The Answer: "Retired employees will be included in the City health plans. The City will  
21 pay the premiums. The cost of the premiums will not come from the Supplemental  
22 Pension Plan." Relying on the City's promise, City employees approved the City's  
23 withdrawal from the Social Security system and are no longer part of that system.

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

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

1 parameters of the [Retiree] Health Benefit .” (City Attorney Opinion No. 2007-04, p. 2.)  
2 “Certain benefits were ‘provided to employees in lieu of Social Security participation.’”  
3 (*Ibid.*) “In addition, it was the City Council’s intent ‘to provide such coverage as a  
4 permanent benefit to eligible retirees.’” (*Ibid.*) “The City Manager was authorized to  
5 establish a City-sponsored Group Health Insurance Plan for eligible retirees, providing  
6 the same choice of program coverage as offered to active employees of the City.” (*Ibid.*)  
7 “On June 1, 1982, Ordinance No. O-15758, codified the [Retiree] Health Benefit.” (*Ibid.*)  
8 “In 1985 . . . Police and Fire Safety Members on the active payroll on or after June 30,  
9 1985 were added.” (*Id.*, at p. 3; Ordinance No. O-16449.) The Retiree Health Benefit has  
10 always been codified among the City’s retirement ordinances.

11 Charter section 143.1 provides, in relevant part: “No ordinance amending the  
12 retirement system which affects the benefits of any employee under such retirement  
13 system shall be adopted without the approval of a majority vote of the members of said  
14 system.” In 1985, before Ordinance No. O-16649 became effective, “a vote of the  
15 retirement system membership [was conducted], as required by Charter section 143.1[.]”  
16 (Ordinance No. O-16449.) “[S]aid vote was conducted and the ballots tallied on June 3,  
17 1985[,] with a vote of 2,885-yes, 904-no, and 12-void[.]” (*Ibid.*)

18 “On September 30, 1985, Ordinance No. O-16510 provided [that] . . . it was the  
19 City’s responsibility to provide [funds to pay for the Retiree Health Benefit] from the  
20 General Fund . . . .” (City Attorney Opinion No. 2007-04, p. 3.) In 1986 the City  
21 adopted Ordinance No. O-16679 as part of the settlement of a class action lawsuit (the  
22 *Andrews* class action), and made the Retiree Health Benefit retroactive to all police  
23 officers on active City payroll as of October 6, 1980. In 1986, pursuant to Charter section  
24 143.1, before Ordinance No. O-16679 became effective, “the matter was submitted to a  
25 vote of the active members of the System and approved by a vote of 2,630-Yes as  
26 opposed to 213-No[.]” (Ordinance No. O-16679.)

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

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

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

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

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

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

7 Prior to retirement:

8 “[a]n employee's vested contractual pension rights may be modified  
9 . . . for the purpose of keeping a pension system flexible to permit  
10 adjustments in accord with changing conditions and at the same time  
11 maintain the integrity of the system. [Citations.] Such modifications  
12 must be reasonable, and it is for the courts to determine upon the  
13 facts of each case what constitutes a permissible change. To be  
14 sustained as reasonable, alterations of employees' pension rights  
15 must bear some material relation to the theory of a pension system  
16 and its successful operation, *and changes in a pension plan which*  
17 *result in disadvantage to employees should be accompanied by*  
18 *comparable new advantages.’ ” (Betts at p. 864, italics in original;  
19 accord, *Maffei v. Sacramento County Employees Retirement System*  
20 (2002) 103 Cal.App.4th 993, 999-1000; *Board of Administration v.*  
21 *Wilson* (1997) 52 Cal.App.4th 1109, 1132-1133; *Valdes v. Cory*  
22 (1983) 139 Cal.App.3d 773, 783-784.)*

23 (See *Pasadena Police Officers Association v. City of Pasadena* (1983) 147 Cal.App.3d  
24 695; *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210  
25 Cal.App.3d 1095, and the authorities cited in each of these cases.)

26 On May 18, 2007, the District Court ruled against plaintiff in *San Diego Police*  
27 *Officers’ Association v. Aguirre, et al.*, Case No. 05-cv-1581: “In the TAC, [the SDPOA]  
28 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

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

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

17 Instead of providing the court with available evidence or legal citation *supporting*  
18 their clients’ position regarding retiree health, the defendants instead submitted *adverse*  
19 evidence. *First*, the only evidence cited by defendants in opposition to the City’s motion  
20 to summarily adjudicate the retiree health issue in the City’s favor was the “City of San  
21 Diego and POA Labor Negotiations Minutes dated March 30, 2005.” (Doc. No. 613, p.  
22 19:27.) However, those minutes supported the City’s position and not the SDPOA’s  
23 position on the issue of whether retiree health benefits were vested. *Second*, defendants  
24 also lodged an additional non-supportive document indicating that retiree health was not  
25 vested. Astoundingly, the non-supportive material was highlighted *by defendants* for the  
26 Court. Specifically, Mr. Nissen filed the exhibit with a circle around the heading  
27 “Current Employees,” the word “Bad,” and an arrow pointing to the adverse evidence.  
28

1 (See Doc. No. 704, p. 77;<sup>30</sup> RT, April 23, 2007, p. 66:6-19.)

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

7 In light of the defendants' negligence at the trial court, and their appellate  
8 concession, the United States Court of Appeals issued an adverse published opinion on  
9 June 10, 2009. (*San Diego Police Officers' Association v. San Diego City Employees'*  
10 *Retirement System* ("SDPOA") (2009) 568 F.2d 725.) In that opinion, the court cited  
11 *Thorning v. Hollister Sch. Dist.* (1992) 11 Cal.App.4th 1598, *Cal. League of City*  
12 *Employee Ass'ns v. Palos Verde Library Dist.* (1978), and *San Bernadino Pub.*  
13 *Employees Ass'n v. City of Fontana* (1998) 67 Cal.App.4th 1215 and explained that if  
14 retiree health benefits had been "expressly granted to [employees] by an official  
15 declaration of policy during [the employees'] term of public office," those retiree health  
16 benefits would be vested, "fundamental and could not be unilaterally terminated."  
17 (*SDPOA* at pp. 739-740.) However, if the employee benefit at issue were merely  
18 "provided for by MOUs between the city and its bargaining groups [the benefits] could  
19 not have become permanently and irrevocably vested as a matter of contract law, because  
20 the benefits were earned on a year-to-year basis under previous MOU's that expired  
21 under their own terms . . . ." (*SDPOA* at p. 740.) Thus, because the defendant lawyers  
22 failed to present evidence (e.g., the Ray Blair memo and numerous ordinances and  
23 Charter section 143.1 votes) establishing retiree health benefits had been expressly  
24 granted to employees by an multiple official declarations of policy during the employees'  
25 term of public office, those retiree health benefits would be vested and the City's July  
26 2009 \$142 million to \$152 million reduction of the plaintiff class' Retiree Health Benefit

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27  
28 <sup>30</sup> 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.



1 would not have been permitted.

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

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

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

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

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

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

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

24 On numerous occasions JDTP (and its predecessor CPK) falsely characterized the  
25 nature of adverse rulings. Even when summary judgment was granted against it, JDTP  
26 characterized the ruling as the Court “not[ing] that [the claims] raised important issues of  
27 state law and policy.” When JDTP failed to appear at the fairness hearing in *McGuigan*,  
28

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

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

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

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

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

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

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

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<sup>31</sup> The agreement with its predecessor firm, CPK, expressly excluded litigation.

1 lied to its client about the outcome.

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

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

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

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

17 "The nature of an attorney's function is such that an attorney is the only  
18 professional who may have a duty to advise a client that a malpractice action against  
19 another professional may provide a solution to the client's problems." (*Lewis v. Purvin*  
20 (1989) 208 Cal.App.3d 1208, 1217.) Moreover, two of the "four circumstances in which  
21 nondisclosure or concealment may constitute actionable fraud" apply: "(1) . . . the  
22 defendant is in a fiduciary relationship with the plaintiff [and] . . . (4) . . . The  
23 defendant makes partial representations but also suppresses some material facts . . . ."  
24 (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.) "The rule has long been  
25 settled in this state that although one may be under no duty to speak as to a matter, 'if he  
26 undertakes to do so, . . . he is bound not only to state truly what he tells but also not to  
27 suppress or conceal any facts . . . . If he speaks at all he must make a full and fair  
28 disclosure.'" (*Marketing West, Inc. v. Wassermann* (1993) 5 Cal.4th 1082, 1093.)

1 **SPECIAL INTERROGATORY NO. 22:**

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

5 **RESPONSE SPECIAL TO INTERROGATORY NO. 22:**

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

8 **SPECIAL INTERROGATORY NO. 23:**

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

12 **RESPONSE SPECIAL TO INTERROGATORY NO. 23:**

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

17 **SPECIAL INTERROGATORY NO. 24:**

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

21 **RESPONSE SPECIAL TO INTERROGATORY NO. 24:**

22 Because no such reports were provided on a regular basis.

23 **SPECIAL INTERROGATORY NO. 25:**

24 IDENTIFY all “material developments in the litigation” of which JACKSON  
25 DEMARCO failed to apprise YOU, as alleged in paragraph 11(i) of the COMPLAINT.

26 **RESPONSE SPECIAL TO INTERROGATORY NO. 25:**

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

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

3 **SPECIAL INTERROGATORY NO. 26:**

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

7 **RESPONSE SPECIAL TO INTERROGATORY NO. 26:**

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

11 **SPECIAL INTERROGATORY NO. 27:**

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

14 **RESPONSE SPECIAL TO INTERROGATORY NO. 27:**

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

20 **SPECIAL INTERROGATORY NO. 28**

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

23 **RESPONSE SPECIAL TO INTERROGATORY NO. 28**

24 Gregory Glenn Petersen, Chris Nissen.

25 **SPECIAL INTERROGATORY NO. 29**

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

1 **RESPONSE SPECIAL TO INTERROGATORY NO. 29**

2 Brian Marvel and Jeff Jordon.

3 **SPECIAL INTERROGATORY NO. 30:**

4 IDENTIFY all damages being sought by YOU in this case.

5 **RESPONSE SPECIAL TO INTERROGATORY NO. 30:**

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

7 **SPECIAL INTERROGATORY NO. 31:**

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

9 **RESPONSE SPECIAL TO INTERROGATORY NO. 31:**

10 Adding up the amount the SDPOA paid to the defendants.

11

12 Dated: June 17, 2010

**LAW OFFICE OF MICHAEL A. CONGER**

13

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By: \_\_\_\_\_  
Michael A. Conger  
Attorney for Plaintiff

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