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Exempt from fees per Gov't code 6103
 To the benefit of the City of San Diego

9 Attorneys for Petitioner
 10 CITY OF SAN DIEGO

11 **SUPERIOR COURT OF CALIFORNIA**
 12 **COUNTY OF SAN DIEGO**

13 CITY OF SAN DIEGO,) Case No.
 14)
 15 Petitioner,) **VERIFIED PETITION FOR WRIT OF**
 16) **MANDATE**
 17 v.)
 18)
 19 SAN DIEGO CITY EMPLOYEES')
 20 RETIREMENT SYSTEM ("SDCERS"), by)
 21 and through its Board of Administration and)
 22 DOES 1-10,)
 23)
 24 Respondents.)
 25)
 26)
 27)
 28)

18 Petitioner, the City of San Diego ("City"), hereby petitions this Court for a writ of
 19 mandate pursuant to Code of Civil Procedure Section 1085 *et seq.* directed to Respondent, San
 20 Diego City Employee's Retirement System's Board, by and through its Board of Administration,
 21 and DOES 1 through 10 (collectively, "SDCERS"), inclusive. By this Verified Petition, and in
 22 support thereof, Petitioner alleges as follows:

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FIRST CAUSE OF ACTION

(WRIT OF MANDATE – VIOLATION OF CITY OF SAN DIEGO ORDINANCE O-18383 AND SAN DIEGO MUNICIPAL CODE SECTION 24.1312)

[Against All Parties]

1. Petitioner challenges the decision of the SDCERS to take no action to correct the \$146 million shortfall caused by the under pricing of purchase of service credits and to pass the \$146 million dollars on to the current and future taxpayers of the City of San Diego.

2. City is a municipal corporation with all municipal powers, functions, rights, privileges and immunities authorized by the Constitution and laws of the State of California. As a “charter city” under Article IX, of the California Constitution, the City has the power to make and enforce all ordinances and regulations with respect to municipal affairs. Charter provisions have the effect of legislative enactments and charter city ordinances and regulations regarding municipal affairs prevail over state laws covering the same issues.

3. The citizens of the City of San Diego are those individuals who reside within the geographic limits of the City.

4. SDCERS is a public employee retirement system established pursuant to Article IX, Section 141 of the Charter to provide retirement, disability, and death benefits to its members. Pursuant to Charter Section 144, SDCERS is managed by a Board of Administration (the "Board").

5. Petitioner is informed and believes and thereon alleges that DOES 1 through 10, inclusive, are respondents or real parties who should be named in this action, but who are presently unknown to the Petitioner.

6. This Court has jurisdiction to issue writs of mandate pursuant to Code of Civil Procedure sections 1085.5 *et seq.*, and to render judicial determinations, and is otherwise authorized to grant the relief prayed for herein.

7. SDCERS is governed by its plan document, which is the San Diego Municipal Code and any and all relevant ordinances and resolutions pertaining thereto.

1 8. In 1993, the City Council passed Ordinance Number O-17938, which created a
2 new section of the Municipal Code entitled “Purchase of Service Credit.” According to the
3 ordinance, the “Purpose and Intent” of the new section was to permit Members of the City
4 Retirement System to purchase service credit for a variety of periods of City and non-City
5 service. San Diego Municipal Ordinance O-17938 (July 12, 1993). The ordinance set forth
6 specific categories for which service credit could be purchased, such as: the six month
7 probationary period at the beginning of City employment; previous periods of City service; part-
8 time or hourly service; reinstatement after no-fault employee termination; repayment of
9 previously refunded member contributions; approved leaves of absences; service previously not
10 included in vesting requirement calculations; and military service. Notably, the ordinance did
11 not include a provision authorizing credits for periods of time without any underlying work
12 period or authorized leave of absence (i.e. “airtime” credits).

13 9. In 1997, the City Council passed ordinance O-18383. (A true and correct copy is
14 attached hereto as Exhibit “A”). Under the language set forth in San Diego City Council
15 ordinance O-18383, San Diego Municipal Code Section 24.1312 was amended to include the
16 provision that the “cost of service credit purchased pursuant to this section shall be the amount
17 determined by the Board to be the equivalent of the employee and employer cost of that service
18 credit.”

19 10. The original City Manager Proposal from Cathy Lexin, the then Labor Relations
20 Manager, to Larry Grissom, the then Retirement Administrator, dated July 23, 1996 with regard
21 to the purchase of service credits stated that “[e]mployees would pay into the retirement fund an
22 amount, including interest, equivalent to the employee and employer full cost of such service.”
23 (A true and correct copy is attached hereto as Exhibit “B”).

24 11. Therefore, in setting the purchase of service price, the SDCERS Board has a duty
25 to ensure that the purchase of service program is cost neutral. Specifically, San Diego Municipal
26 Code Ordinance O-18383 and the original City Manager’s Proposal so states. San Diego
27 Municipal Code Ordinance O-18383 states that the cost is to be set at an “amount determined by
28 the Board to be the equivalent to the employee and the employer cost of that service credit.”

1 12. Additionally, as fiduciaries, the SDCERS Board's has a duty to protect the
2 financial integrity of the trust as a whole. SDCERS' fiduciary responsibility runs to every
3 member of the plan, regardless of when that person became a member of the plan. Based on that
4 duty, SDCERS has a duty to ensure that unnecessary benefits and/or funds not authorized by the
5 law are not paid.

6 13. SDCERS also has a duty to the City and its members to ensure that they do not
7 create an unfunded actuarial liability. If SDCERS had followed the law, SDCERS unfunded
8 actuarial liability would have been reduced by \$146 million.

9 14. In August 2003, the SDCERS Board took action to increase the price of the
10 purchase of service benefit. Pricing was increased to "27% for General Members, 37% for
11 Safety Members and 50% for Legislative Members." However, the SDCERS board took
12 affirmative action to delay implementing the new cost-neutral price for 60 days and stated that
13 they would allow process all new applications for purchase of service credits during that 60 day
14 period at the lower non-cost neutral price. Thereafter, the staff at SDCERS sent a notification to
15 all city employees alerting them that PSC purchase application received by SDCERS prior to 1
16 November 2003 would be priced under the old methodology – 15 percent for general and
17 legislative members and 26 percent for safety members. A substantial amount of years were
18 purchased during this 60 day period.

19 15. On 14 August 2007, Cheiron notified SDCERS that SDCERS non-cost neutral
20 pricing of purchase of service accounted for \$146 million of the greater than \$1 billion unfunded
21 actuarial liability of SDCERS. (A true and correct copy of Cheiron's letter is attached hereto as
22 Exhibit "C").

23 16. On 16 November 2007 the SDCERS board, despite being informed by their
24 outside legal counsel that they had the legal right to correct the purchase of service pricing,
25 SDCERS voted affirmatively to take no action to correct the under pricing of service credits and
26 allow the pension service years sold below actual value to stand. In a closed session meeting,
27 SDCERS voted 8-0 to do nothing to correct the \$146 million shortfall created by the purchase of
28 service program. Additionally, the SDCERS stated that they affirmatively voted "to continue to

1 amortize the shortfall through the existing unfunded actuarial liability.” In other words,
2 SDCERS’ took affirmative action to charge the City the \$146 million shortfall caused by their
3 failure to price the purchase of service credits at a cost neutral price and now will require the City
4 to pay the difference over the next twenty years as part of the City’s twenty year plan to
5 eliminate the in excess of \$1B unfunded actuarial liability. Therefore, for the next twenty years,
6 the City of San Diego will be “picking up” the difference in the actual price paid by City
7 employees for their purchased service credits and the cost neutral price of those service credits –
8 which is \$146 million.

9 17. SDCERS’ affirmative decision to charge the taxpayers of the City of San Diego
10 usurps the City Council’s budgetary authority and is in clear violation of the City Charter.
11 SDCERS has no plan document separate and apart from the Municipal Code. The City Council,
12 as the legislative branch of the City’s government, is the only entity that can change the
13 Municipal Code. This power granted to the City Council is non-delegable. San Diego City
14 Charter Section 11.1 states:

15 Section 11.1: Legislative Power — Nondelegable

16 The same **prohibition against delegation of the legislative power** which is
17 imposed on the State Legislature by Article XI, Section 11a of the Constitution of
18 the State of California shall apply to the City Council of The City of San Diego,
19 so that its members shall not delegate legislative power or responsibility which
20 they were elected to exercise in the adoption of any ordinance or resolution which
raises or spends public monies, including but not limited to the City’s annual
budget ordinance or any part thereof, and the annual ordinance setting
compensation for City employees, or any ordinance or resolution setting public
policy. [emphasis added]

21 18. Despite SDCERS having only limited power to only administer the plan,
22 SDCERS has surplanted the City Council and has created benefits and plans without any City
23 authorization. Specifically, even though the Municipal Code states that the purchase of service
24 credits are to be cost-neutral to the City, SDCERS affirmatively voted to pass on to the taxpayers
25 of the City of San Diego the \$146 million shortfall caused by the Board artificially setting the
26 purchase of service credit price too low. Beyond the fact that this act is a breach of fiduciary
27 duty by the SDCERS’ board, SDCERS has taken action reserved to that of the City as they have
28

1 gone beyond administering the plan to now deciding what benefits are granted to members and
2 on what terms.

3 19. Petitioner has a beneficial interest in this matter by virtue of the facts set forth
4 above in that the City is now required to pay to SDCERS \$146 million, funds which could
5 otherwise be used for other legitimate municipal services.

6 20. Petitioner has no plain, speedy, or adequate remedy at law, in that unless this
7 Court grants the relief requested. No monetary damages or other legal remedy can adequately
8 compensate Petitioner for this harm.

9 21. Petitioner has exhausted its administrative remedies, if and to the extent that such
10 remedies existed. Petitioner submitted evidence to SDCERS and gave oral testimony to
11 SDCERS at a public hearing on this issue on 19 October 2007, raising the objections which form
12 the basis of this Petition.

13 **PRAYER FOR RELIEF**

14 Wherefore, Petitioner prays for relief as follows:

15 1. For a writ of mandate commanding SDCERS to:

16 (a) set aside its 16 November 7, 2007 action in full; and

17 (b) take no further action absent full compliance with San Diego Ordinance O-
18 18383 and San Diego Municipal Code Section 24.1312;

19 2. For costs of suit and attorneys' fees incurred herein; and

20 3. For such further relief as the Court deems just and proper.

21 Dated: November 20, 2007

MICHAEL J. AGUIRRE, City Attorney

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24 By _____

Michael J. Aguirre, City Attorney

Walter C. Chung, Deputy City Attorney

Attorneys for Petitioner CITY OF SAN DIEGO
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VERIFICATION

I, Walter C. Chung, declare that:

I am employed by the City of San Diego, Petitioner in this action, and am making this verification on behalf of the City of San Diego. I have read the foregoing Petition and am familiar with its contents. All facts alleged in the Petition are either true of my own knowledge, or I am informed and believe them to be true, and on that basis allege them to be true.

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

Executed this 20th day of November, 2007, at San Diego, California.

Declarant