CONFIDENTIAL

CITY OF SAN DIEGO CITY COUNCIL

CLOSED SESSION PROCEEDING

PARTIAL TRANSCRIPT

AUGUST 2, 2005

SAN DIEGO, CALIFORNIA

REPORTED BY CSR NO. 12478

PARTIAL TRANSCRIPT OF CLOSED SESSION PROCEEDINGS, commencing at the hour of 5:24 p.m., on Tuesday, August 2, 2005, at 202 C Street, 12th Floor, San Diego, California, before Keren M. Guevara, Certified Shorthand Reporter in and for the State of California.

APPEARANCES:

DEPUTY MAYOR TONI ATKINS
SAN DIEGO CITY COUNCIL:
DISTRICT 1: SCOTT PETERS
DISTRICT 2: (Vacant)
DISTRICT 3: TONI ATKINS
DISTRICT 4: TONY YOUNG
DISTRICT 5: BRIAN MAIENSCHEIN
DISTRICT 6: DONNA FRYE
DISTRICT 7: JIM MADAFFER
DISTRICT 8: (Vacant)

ASSISTANT CITY LESLIE GIRARD
CITY ATTORNEY DON MCGRATH
CITY MANAGER LAMONT EWELL

CHIP FLAHERTY
DAVID KLEINFELD

AUGUST 2, 2005, 5:24 P.M., SAN DIEGO, CALIFORNIA

MS. ATKINS: I'm going to go ahead and call the Closed Session meeting to order.

And for the record, we have District 1, District 4, District 3, District 5, 6, and 7 are all here.

And Mr. Girard, can you lead in telling us who else is here?

MR. GIRARD: Yes. Assistant City Attorney, Les Girard.

MR. MCGRATH: Assistant City Attorney, Don McGrath.

MR. FLAGHERTY: Assistant City Attorney, Chip Flagherty.

MR. KLEINFELD: David Kleinfeld, of Heller Ehrman.

MS. ATKINS: Okay. Thank you very much.

Mr. McGrath, I think, for the record, we're going to hold over Item No. 1, Brown Field Aviation, and No. 7, California State University of Board Of Trustees. And we're going to start with Item No. 2.

Go ahead, Mr. McGrath.

MR. MCGRATH: I will be as brief as I can.

And I would say to you, as I've said it off

the record before some of you came in, Item No. 2 and Item No. 6 I would merge my discussion.

This is last week's agenda.

MR. GIRARD: It's the same.

MR. MCGRATH: What's the SDCERS lawsuit number, Les?

MR. GIRARD: 2 and 6.

MR. MCGRATH: 2 and 6. I apologize.

What happened – and Mr. Peters, I heard your comments. I was listening to the television, even though I wasn't in the room.

MR. PETERS: We missed you.

MR. MCGRATH: I know. I would have loved to have been there.

When you were gone on your recess, we determined that the three-year statute on 1090 would run on the Sunday before we filed this lawsuit. Accordingly, we filed. We do not believe, as you said in there, that we can wait for Bonnie Dumanis.

(Mr. Ewell enters the closed session room.)

MR. MCGRATH: We think the statute is three years from the date of the event. Ergo, we moved as we did. We did not serve. We still haven't served. So that's what happened on that lawsuit.

MR. PETERS: And Grissom?

MR. MCGRATH: After that, we came to you and told you what we had done. After that, our opponents demurred, and just so you kind of get a little flavor of how much fun these people are – excuse me, I wouldn't do this to you. Would you not? Come on.

MS. ATKINS: You guys, stop.

MR. EWELL: He's complementing you.

MS. ATKINS: Look, please, let's all pay attention, and let's hear Mr. McGrath.

Go ahead, sir.

MR. MCGRATH: A demurrer is a simple motion, normally. This is what they filed. They had to get permission from the Court. That is what I'm facing on the 23rd with these people.

Tomorrow morning – or last week, SDCERS decided to file it's own lawsuit, which is exactly the same as our cross-complaint in the case against Aguirre and the City, SDCERS. I don't know why they did it. Most of you seem to know more than I know because somehow everybody talks to everybody, but apparently, that's what they decided to do.

They now have a judge named Wickersham, and tomorrow morning all four unions are coming in in front of Judge Wickersham to intervene.

I haven't even talk to you about the lawsuit,

let alone be retained or whatever we do on that. I'm not sure what I'm going to do tomorrow morning. I just may not go and then somebody can figure it out later. I don't know. But that's where I am.

What I would make -- what I would suggest, if you would let me, is that the judge I have presently, who is Judge Barton -- and that's the low number rule and should be the judge for the case, but somehow the court is not picking it up that way -- has been very good. Judge Wickersham is a nice man, but I don't know why we have to fight the same lawsuit over again in his court.

My position would be to consolidate, move to consolidate both actions, and send them to Judge Barton for trial. Now, that's basically it.

It's our opinion -- and I just said something to Mr. Young that I've never said to you, but here's why I was hired. I'll tell you why I was hired. Every lawsuit is the same. 30 years of this, it's all the same. You file, you scream and yell, you scare each other, somebody thinks they're going to lose, and you settle.

I've enlisted Judge Larry Irving, who is probably the finest settlement judge in the world. I mean, literally, he's doing Enron. And he's consented

to represent or to mediate our case for the City free of charge.

He is at the end of my rainbow. I would have expected to be with Mr. Aguirre for about a year. As it's going, I think I'll be here longer. But at some point, the unions are going to say, Gee, we might lose some benefits. And you all say, Gee, well, maybe we should pay some more, maybe through taxes or Lamont is going tax leases or whatever. I hope we don't sell real estate, but whatever you decided to do, we're all going go in front of somebody like Larry Irvine some day, and that's where I'm coming.

At present, I'm over -- I'm undermanned. That's why I've asked to hire Heller Ehrman to help me. And I'm asking you again.

We put the receiver at the end of our cross complain. It's a thing we should do, and I'll tell you why.

Somehow the board has lost the control of their rudder. They have within their walls bad people, people would have committed legal malpractice, accounting malpractice, brokerage malpractice, and actuarial malpractice.

How much is that worth? I don't know. Could be worth as much as a hundred million dollars, but

within those walls are the facts.

I can't get in there. They won't let me in. They won't let Aguirre in. That's the lawsuit that they filed, the main lawsuit.

So as the time is going, the statute is running on those statutes, if it hasn't already run. That's the second reason I asked to hire Heller, and that's under -- what would that be Les, 6?

MS. ATKINS: 2.

MR. GIRARD: No, your Honor. This is the anticipated litigation, which is Tab 8.

MS. ATKINS: Oh, we're back to the book that you provided us to last week.

MR. MCGRATH: Yeah.

MS. ATKINS: Okay. Okay. Got it. I'm sorry.

MR. MCGRATH: It would be under Tab 6 today, wouldn't it?

MR. GIRARD: No. I'm sorry, Your Honor. Let me -- let me clarify. The cross-complaint is number -- Closed Session Item No. 2.

The new lawsuit that Mr. McGrath has referred to by the CERS board challenging the legality or raising the issue of the benefits is under tabs -- Closed Session Item No. 6.

The initiation of litigation which Mr. McGrath

has referred to against various professionals is listed under Closed Session Item No. 8, and that you would be authorizing of initiation or at least a report back on initiating litigation against the professionals that Mr. McGrath has mentioned.

So there are three items that were kind of discussing in here. Closed Session Item No. 2, Closed Session Item No. 6, and Closed Session Item No. 8. In the booklet that Mr. McGrath provided you last week there are various reports.

And if you look at tabs -- Tab 2 is a report on the prospects for litigation against Gabriel Rodder and Smith.

Tab 1 is the prospects for litigation against Callan & Associates. This is in the booklet provided by Mr. McGrath last week. And I think that covers it.

MR. MCGRATH: And the receivership, then, we'll get onto that later on. That would be No. 4.

And I've done a more commonsensical memo on that, which I have sent via e-mail and asked you to insert in your notebooks. So that's where I'm coming from.

And I'm not capable of handling this litigation alone. The office just doesn't have that type of man -- horsepower -- excuse me, people power.

1 Pretty simple. But, I don't have the wherewithal to
2 hire Heller. I need to come to you.
3 Should we have ever filed the cross-complaint
4 without your permission? It would have been nice to
5 wait for you to come back, but I was scared to death
6 we'd run that statute, and that's why I did it. No
7 other reason.
8 MR. GIRARD: Your Honor, if I might just
9 suggest perhaps an order of potential motions here for
10 you because Mr. McGrath has identified a lot of issues
11 that he needs your guidance on.
12 No. 1, I would point out that the issue of the
13 legality of the benefits is absolutely joined now
14 between the parties. And we would recommend strongly
15 that you permit our office to proceed in the
16 cross-complaint and defend against the new complaint
17 using these offices of Heller Ehrman to assist
18 Mr. McGrath in that effort.
19 That will result in a decision on the legality
20 of these benefits one way or the other, which I think
21 everybody needs. So that would be one motion.
22 Another potential motion to be to authorize –
23 MS. FRYE: Mr. Girard. I'm sorry. If I
24 can –
25 MS. ATKINS: Yes.

1 MS. FRYE: Just to keep things simple.
2 MS. ATKINS: Ms. Frye. Go ahead.
3 MS. FRYE: If you don't mind because I like
4 simple. I would move the motion, if you can just say it
5 again. I would appreciate it.
6 MR. GIRARD: A potential motion would be to
7 authorize the prosecution – the service and prosecution
8 of the cross-complaint and a defense in the new action
9 brought by the retirement board, which is Closed Session
10 Item No. 6, and to retain Heller Ehrman to assist in
11 that effort in an amount not to exceed – Mr. Kleinfeld,
12 did you – I forgot if you proposed a budget for this,
13 or was it an all inclusive budged?
14 MR. KLEINFELD: It was an all inclusive
15 budget. I think it is behind – at least – I don't
16 know what book you have in front of you today. It was,
17 I believe, Item 4 on the –
18 MR. GIRARD: Let me suggest that actually the
19 budget item would have to come before you in Open
20 Session anyway. I believe Mr. Kleinfeld had noted a
21 potential budget of half a million dollars for all
22 services presently.
23 So this motion would be merely to prosecute
24 the cross-complaint and defend against the new action
25 and retain Heller Ehrman for that purpose. And we'll

1 bring forward the budgetary item for consideration in
2 Open Session.
3 MS. ATKINS: Okay.
4 MS. FRYE: And I would move that.
5 MS. ATKINS: And for clarification –
6 MR. PETERS: I have a question. I have
7 questions.
8 MS. ATKINS: Okay. You have questions.
9 Ms. Frye has a motion.
10 Let me just make sure. You said that is
11 Item 6 on today's Closed Session docket?
12 MR. GIRARD: It would actually encompass part
13 of Item 2, Your Honor, which would be the prosecution of
14 the cross-complaint and a defense in Item No. 6 in the
15 action bought by CERS.
16 MS. ATKINS: Okay. For purposes of
17 discussion, I'll second the motion.
18 Go ahead, Mr. Peters.
19 MR. PETERS: Okay. So we had a little bit of
20 a decision on this before, but there's – Sections 1, 2
21 and 3 of the complaint had to do with the action which
22 we approved last time, which was who's their counsel.
23 We want to find that out. We agreed last time.
24 But 2 and 3 had to do with the validity of
25 MP-1 and the validity of MP-3. And then the rest of it

1 had to do with suing individuals for damages. We got
2 rid of the damages.
3 MR. MCGRATH: I'm sorry. I didn't bring you
4 up to date.
5 MR. PETERS: Okay.
6 MR. MCGRATH: That issue, I meant to tell you,
7 is really moot because we have been – even though we
8 never served, these people have come in and asked for
9 permission to demur, and they are demurring. One law
10 firm on behalf of those named individuals as the SDCERS
11 board.
12 MR. PETERS: Okay.
13 MR. MCGRATH: So that I think your fears
14 should be – should go away on that issue.
15 MR. PETERS: All right. So I'm willing to
16 support Ms. Frye as to the declaratory relief on the
17 validity of the benefits.
18 Is that what you're suggesting?
19 Is that what your motion was?
20 MR. GIRARD: Correct. I just suggested a
21 potential motion would be to pursue the cross-complaint.
22 You can debate it and modify it as you deem appropriate.
23 MR. PETERS: I can support the declaratory
24 relief parts, but I can't support the rest of it at this
25 point.

1 I don't know what I have in front of me, Les.
2 I just can't, but I remember – I only have the first
3 couple of pages.
4 And I guess while you're looking for that,
5 too, we also want to clarify that I'm concerned about
6 the – I mentioned this last time, and I don't think
7 Mike Aguirre had any problem with it, but I'm concerned
8 about the risk of us being accused of bad faith
9 bargaining if the City Council adopts the position that
10 the benefits are that we just negotiated are illegal.
11 And I think we should plead that it's the City Attorney
12 that takes that position, not the City Council.
13 MS. FRYE: Could I just get a clarification?
14 MS. ATKINS: Yes, Ms. Frye.
15 MS. FRYE: Thank you.
16 That the benefits that we just approved –
17 which benefits are you talking about? In 2002 or the
18 ones most recently?
19 MR. PETERS: I'm talking about 2002 and 2005.
20 MS. FRYE: 2005?
21 MR. PETERS: Yeah.
22 I don't think it's that hard of an issue,
23 Ms. Frye. I just don't want anyone to be pleading that
24 the City Council believes that benefits are illegal
25 because I don't think that's – I don't think that's

1 appropriate. I couldn't support that.
2 MS. ATKINS: But you will –
3 MR. PETERS: I'm willing to authorize the City
4 Attorney to state that he believes it and to prosecute
5 the action on that basis, which would result in – it
6 would have the same result.
7 MS. FRYE: So what is the difference in part
8 of my motion? I mean –
9 MR. MCGRATH: It is changing the name of the
10 cross-defendant. Taking the City out and putting
11 Aguirre in, with your blessing.
12 We've tried researchwise to come up with a way
13 to have attorney be – City Attorney be – it's called
14 ex rel. We're not terribly – we have not been
15 successful in giving him a title that would make him
16 equal to you as the City Council, but if you authorize
17 that, it might work.
18 MR. PETERS: See, the thing is that they've
19 pled in their action as Aguirre. So I think it should
20 be okay. Right?
21 MR. MCGRATH: And he's there, and so are you.
22 I could understand you're saying to us, We
23 don't want to be a plaintiff or a defendant in their
24 lawsuit. Maybe you'll have to be a defendant, but you
25 don't want to prosecute setting aside the benefits which

1 you – you have – you might have created in prior
2 years. That's your point.
3 MR. PETERS: Right.
4 MR. MCGRATH: And I think it's well taken. I
5 could go along with that, if it's legal to let
6 Mike Aguirre, City Attorney of San Diego – you know,
7 and then we do a resolution authorizing him to bring
8 that action. He would be that party in the
9 cross-complaint. Then we would merge the SDCERS case.
10 I don't know what the end result may look
11 like, but either way, the issue is coming up, and you're
12 not a plaintiff trying to set aside benefits you might
13 have created, and I think Scott is legally correct.
14 That doesn't look good, and it probably isn't good.
15 MS. ATKINS: Okay. Ms. Frye, are you –
16 MS. FRYE: I'm just going to keep listening
17 until everyone is done talking. That's why I wanted to
18 start with one motion and try and keep it simply because
19 nothing is simple here anymore.
20 MS. ATKINS: And I'm going to go to Mr. Young,
21 but let me just clarify, since I seconded a motion, I
22 concur with Mr. Peters on that. I don't want to take a
23 position where – I am in agreement because I don't want
24 to – I don't want to be accused of bad faith bargaining
25 either. I want the declaratory relief. I don't want

Legal?

1 to – you know, but I just – so I may have to – I
2 seconded the motion, but –
3 MS. FRYE: We can work on this.
4 MR. PETERS: I think that those people who
5 want the issue litigated have been helped a lot by the
6 fact that CERS has filed this complaint because now it's
7 joined. I think it takes away a lot of issues. I just
8 don't want us to be pleading that the City Council
9 believes that's these benefits are illegal, because I
10 think then that could expose the City to a problem we
11 don't need now, especially since they filled this
12 action.
13 Do you have a copy of the complaint,
14 Mr. Girard?
15 MR. MCGRATH: I have it.
16 MR. PETERS: Because my other comment had to
17 do with the –
18 MR. MCGRATH: The rest of it.
19 Do you want my copy, or do you want me to read
20 you the headings?
21 MR. PETERS: I have the headings. I just
22 don't have the rest. For some reason I have the first
23 four pages in my binder.
24 MR. GIRARD: It is actually copy of the first
25 amended cross-complaint.

1 MR. MCGRATH: No, second amended.
2 MR. PETERS: I don't have that.
3 MR. MCGRATH: The second amended
4 cross-complaint, 1 is dec relief.
5 2 is dec relief.
6 3 is dec relief.
7 4 is dec relief, to which I understand you
8 don't object.
9 5 is breach of the trust.
10 6 is breach of fiduciary duty.
11 And this is mostly pled against the Sathoffs
12 and the people that really got us into this. This is --
13 they're defendants in those actions. Nobody to do with
14 the present board.
15 7, fraud and negligence.
16 8, fraud, intentional misrepresentation.
17 9, fraud and concealment.
18 10, negligence.
19 11, conspiracy.
20 12, writ of mandate.
21 And this is the way we get our result is we
22 ask the SDCERS board to restate the benefits, and then
23 instruct the City Auditor to go ahead and pay them.
24 It's just the methodology that we selected.
25 I can tell you most of this will probably be

1 butchered over the next few months, but that's what
2 we've pled.
3 MR. PETERS: Well, I just -- my own personal
4 view -- and I'm interested in hearing everyone else's --
5 is I'm not interested in spending City money on the
6 fraud and intentional concealment and all that stuff. I
7 just don't think that that's important to us.
8 I think what we need is a resolution of
9 whether the benefits are legal. And I'm just not
10 interested in the rest of it.
11 MR. MCGRATH: Let me just say one thing to
12 help you. It would be easy for you to tell me to drop
13 the cross-complaint. I can't because that's where my
14 statute is stopped. That's how I pled -- why I pled
15 when you were gone.
16 If I dropped the cross-complaint, I could blow
17 the statute, which gives us the leverage to say maybe
18 under 1090, 1092 we could void those benefits to just
19 say forget about the complaint.
20 Let's go with the new lawsuit and be
21 defendants. I don't want to agree to that, if you
22 understand.
23 MR. PETERS: Can you get a tolling agreement
24 on those?
25 MR. MCGRATH: A what?

1 MR. PETERS: A tolling agreement.
2 MR. YOUNG: What's that?
3 MR. MCGRATH: I doubt it, not with these
4 people. There's no -- there's hate.
5 MS. ATKINS: Explain for --
6 MR. PETERS: The idea is that I think what
7 Mr. -- and I don't know the merits of this --
8 Mr. McGrath is saying, you only have so much time to
9 bring a claim for damage to recover from people.
10 What he's saying is that the day he filed was
11 at or near the last day he had to bring damages against
12 these people to go after their personal assets to get
13 money from them. And he saying that if we dismiss it,
14 we won't be able to reinstate it so that it's timely.
15 MR. MCGRATH: No. It's not my goal to get
16 their personal assets. My goal is to set aside the
17 benefits under 1092, which says anything illegally
18 constituted can be set aside civilly. And that's a
19 three-year statute. That's what I'm trying to do.
20 Yes, there are some arguments that these
21 people personally could be liable for damage. It's not
22 my main goal.
23 MR. PETERS: So are you -- when you're talking
24 about your dismissing damage claims against all the
25 board members --

1 MR. MCGRATH: Present.
2 MR. PETERS: -- present board members, you
3 still have damage claims against --
4 MR. MCGRATH: Sathoff and the others.
5 MR. PETERS: Yeah. See, for me, I don't know
6 how much money we can recover from Ron Sathoff. He's
7 going to protect his house. He's probably got a car.
8 It's not worth it for me to do that.
9 To the extent that Mr. McGrath wants
10 declaratory relief or wants to use those as a way to
11 invalidate the benefits, I think that that can be done
12 through declaratory relief.
13 You say that these people committed fraud, and
14 therefore -- so I'm not -- I'm not sure. Maybe you
15 could explain why we have to do that if we -- I don't
16 want to go personally after these people's personal
17 assets.
18 MR. MAIENSCHEIN: On this point -- do you mind
19 if I interject on this point?
20 MS. ATKINS: Go ahead. And then I want to get
21 to Mr. Young.
22 MR. YOUNG: No. That's okay.
23 MS. ATKINS: Okay. Go ahead, Mr. Maienschein.
24 MR. MAIENSCHEIN: Thank you.
25 Don, if I understood your response to

1 Mr. Peters, was that if you -- if you could get the
2 statute tolled -- I mean, the reason you sort of filed
3 this while the Council was on leg recess was to protect
4 the statute, correct?
5 MR. MCGRATH: Yes, sir.
6 MR. MAIENSCHEIN: And so if you could get a
7 tolling agreement, would you be willing -- I mean, in
8 other words, would you be willing to write a letter to
9 say that in the exchange -- you know, I will dismiss
10 this cross-complaint in exchange for a tolling agreement
11 to protect the statute?
12 MR. MCGRATH: See, I don't think Sathoff and
13 those people could answer that letter because they're
14 under criminal indictment, so it wouldn't do any good.
15 I could do -- if that is the only way to get
16 your vote -- what Scott asked -- and get rid of the
17 personal damages against them, plead the dec relief as
18 we've pled, and retweak the thing so it would be an
19 attempt to avoid, if you wanted MP-3.
20 I think in this room I would say MP-1 is
21 probably dead because of statute, but we're just trying.
22 It's our job.
23 So if you said to me, we don't want you suing
24 Sathoff and those other people for dollars damages. We
25 only want you to bring them for purpose of your dec

1 relief, which is a declaration that MP-1 and MP-2 are
2 void, I would follow your instructions.
3 MR. MAIENSCHEIN: But I'm not sure I
4 understand your response, though, on the tolling.
5 You don't think -- why don't you think we
6 could get a tolling agreement from the other side?
7 MR. MCGRATH: I think the other side is not
8 the pension board. They can't control this. It's all
9 the people who are being sued. Sathoff, the dirty sixes
10 we call them, and they're not going to give me a tolling
11 agreement because their criminal lawyers wouldn't let
12 me.
13 And there's also an argument, and I'll tell
14 you up front, I know the argument, that the statute may
15 have run years ago. It may be a one-year statute. I
16 don't know. I mean, you know, it's too risky.
17 On some of the professionals, when we get to
18 that subject, yeah, maybe they'd give me a tolling
19 agreement because it's kind of normal, but I don't want
20 to -- even want to bother asking these people who are
21 indicted.
22 MR. MAIENSCHEIN: Thank you.
Thank you, Madam Chair.
MR. PETERS: Can I just follow up.
25 MS. ATKINS: Thank you, Mr. Young. You're so

1 courteous.
2 MR. PETERS: Just so you understand. The
3 breach of trust, for instance, the fifth cause of action
4 against Grissom, Chapin, Sathoff, and Lexin, and so
5 forth, seems to be pled -- this is paragraph 80 -- As a
6 direct and proximate result of the actions, the City
7 suffered substantial loss of injury in the amount
8 according to prove at trial.
9 So that's just my concern is that it looks
10 like these are all pled as a way to validate the
11 benefit, and it would just be cleaner to rely on the
12 general allegations of invalidity rather than go into
13 personal assets.
14 MR. MCGRATH: It could be done.
15 MR. PETERS: Okay. So with those
16 clarifications that's acceptable.
17 We're going to talk about the budget later
18 because I had questions about that, but I'm okay with
19 Ms. Frye's motions, if those clarifications are
20 acceptable to her.
21 MS. ATKINS: Okay. Other comments, Mr. Young.
22 MR. YOUNG: Just really quick, so I can make
23 sure I'm clear, the purpose of the complaint, the
24 cross-complaint, is really to determine if MP-1 and -2
25 are legal? Is that really what the purpose is, Don?

1 MR. MCGRATH: I apologize. I'm trying to
2 catch a note from --
3 MR. YOUNG: That's all right.
4 Is that the purpose? The purpose of the
5 cross-complain is to determine if MP-1, MP-2 are legal?
6 That's really the -- that's what we're really trying to
7 get at?
8 MR. MCGRATH: Yes, sir.
9 MR. YOUNG: Now, isn't there another --
10 there's another complaint out there that was filed that
11 has asked for the exact same thing.
12 MR. MCGRATH: That's correct. That was filed
13 last week entitled SDCERS plaintiff versus the City of
14 San Diego, in a separate cause of action assigned to
15 Judge Wickersham.
16 MR. YOUNG: Okay. You don't believe that that
17 will come to the same end? Would we get the same --
18 different ruling?
19 Is it a different way of -- I mean, we have to
20 have two complaints for this?
21 MR. MCGRATH: No. I would move to consolidate
22 those two. And if Scott's motion carries, I would do it
23 on dec relief on the cross-complaint in this case. I'd
24 put them together.
25 One of the reasons I wanted to do that is I

1 have a judge that's a good judge. The judge they ended
2 up with is a nice man, but he's older than I am, and
3 that's older than dirt.
4 MR. PETERS: That's true.
5 MR. MCGRATH: To be honest with you.
6 MS. ATKINS: Typing.
7 But as a matter of correction, though, I think
8 it's Ms. Frye's motion, Mr. McGrath.
9 MR. YOUNG: Yeah.
10 MS. ATKINS: Go ahead, Mr. --
11 MR. MCGRATH: He just wanted to amend it to
12 get rid of the damages.
13 MR. YOUNG: So the reason why we're just not
14 allowing that suit to go through and we're not filing
15 the suit is because you don't like the judge?
16 You don't think the judge would give us a fair
17 ruling? Is that what you're saying?
18 MR. MCGRATH: Kind of.
19 MR. YOUNG: So that's why you're asking us to
20 make this decision.
21 MR. MCGRATH: That's a reason. The second is
22 that when I pled in the cross-complaint. I pled timely
23 enough to stop the statute on the 1090, which would void
24 MP-1 and MP-2.
25 I think their lawsuit against us is after that

1 fact, and we may not be able to get that relief. It's
2 serious stuff. So what I do is smash them together,
3 hopefully get the judge I like, and we're on our way.
4 MR. YOUNG: Okay. And then the question is to
5 the -- to my colleagues. And then, I wasn't here for
6 those two decisions, but I mean, is that what you want
7 to do? We want to file to find out if the decision that
8 you actually made were legal? That's what you want to
9 do?
10 MS. FRYE: If I may.
11 MR. YOUNG: Sure.
12 MS. FRYE: First of all, I don't think any of
13 us were here in 1996.
14 MR. YOUNG: Right.
15 MS. FRYE: I could be wrong, but I don't
16 remember any of us being on the Council and voting.
17 Second of all, yes, if, in fact, the
18 information that the City Council members were given --
19 and remember, a lot of this, you know, like I said, you
20 were here, but you weren't here, you know, actually in
21 the Closed Session -- yeah, it would be nice to know.
22 MR. YOUNG: But the thing is, you're going to
23 get that information anyway. I mean, it's already been
24 filed though on your behalf.
25 MS. FRYE: Again, I'm not the attorney, but --

1 MR. YOUNG: I'm sorry. Donna, I just want to
2 say this, I'm trying to take away the legal maneuvering
3 and just kind of discuss this on a --
4 MS. FRYE: I would prefer to have Mr. McGrath
5 have the control. Plus, I think that the issue that
6 he's raising is because of the timing of when certain
7 actions were filed that it's necessary that he just keep
8 his action moving forward because of the three-year
9 statute -- potential statute of limitations. That's --
10 that makes sense to me.
11 I don't want to rely on the CERS board any
12 more than I have to, and quite frankly, I can't rely on
13 them at all right now in order to do what I think is in
14 the best interests of the City.
15 The other thing that could happen is they
16 could drop that lawsuit at any time. There is no --
17 there is nothing that requires them to move forward. In
18 other words, we have absolutely no control over it.
19 If Mr. McGrath does it, at least we have -- at
20 least we have some level of control. And I'm tired of
21 giving up the little bit of control we do have.
22 So that's why I think it's really important
23 that we let them follow the legal strategy they think is
24 best on this particular instance. I just feel
25 comfortable with it, and I can -- we can figure out the

1 motions, if you want to amend it afterwards, to make
2 Mr. Peter's --
3 MR. PETERS: I'll say it again.
4 MS. ATKINS: Okay. Thank you.
5 MR. YOUNG: Just one more question about the
6 new complaint.
7 There's a new complaint that you mentioned.
8 What exactly is that, or --
9 MR. MCGRATH: The one that they filed --
10 SDCERS filed against the City?
11 MR. YOUNG: Yeah.
12 MR. MCGRATH: That's entitled Complaint for
13 Dec Relief, and it's basically -- a dec relief says, you
14 say I say who's right. That's kind of what you do.
15 You're throwing up your hands saying, Judge,
16 tell me what -- and they give you our side and their
17 side. Of course, their side is they want it to be okay
18 and we don't.
19 But it's the same exact thing that we've
20 already pled in the cross-complaint. I don't know why
21 they did it. I've read their minutes. I don't know why
22 they do anything over there. It may be because they
23 didn't like the rulings they're getting from this other
24 judge. They figure you won't okay my cross-complaint
25 because I didn't ask your permission or something.

1 You know, they know more about us than we know
2 about them and visa versa. I don't know what they're up
3 to, but that could be. They may think, Ah-ha, the
4 Council is going to tell this dope to drop that lawsuit.
5 Then I blow the statute on the 1090. And I have to play
6 it their way with their judge, and that's -- I hope not
7 to have to ever do that.
8 MR. YOUNG: Okay. That makes sense.
9 Just a couple other questions. In plain
10 English, other than the fact, you know, of what we just
11 talked about, what are the other basic elements from --
12 not from a legal description, but what are the other
13 basic elements of this cross-complaint?
14 MR. MCGRATH: Well, as it's pled now or the
15 way Scott would like it pled?
16 MR. YOUNG: Well, I understand what Scott -- I
17 know what his amendments were, and I understand what his
18 discussions were.
19 MR. MCGRATH: Okay. A dec relief is merely, I
20 say it's legal. You say it's not.
21 Our side of it is, the prior Council on MP-1
22 gave away benefits with no funding. That's pretty
23 serious, and we say the same on 2002.
24 And that's what those people have been
25 indicted for. Under 1090 that's a criminal action. If

1 that's correct, then those things could be voided.
2 I'll tell you, the unions will tell you that's
3 wrong, and I'm crazy and everything else, but that's
4 what the unions are there for, to protect their side.
5 MR. YOUNG: Is that a part of the complaint,
6 the part where it could be voided?
7 MR. MCGRATH: Yes.
8 MR. YOUNG: That's it's voided?
9 MR. MCGRATH: Yes. It's in the -- it's in the
10 first part where you tell your facts. It says at
11 page 9, Manager's Proposal 1, and then I explain what
12 happened there.
13 And then Manager's Proposal 2 at page 11, and
14 then what I do is incorporate that whole part, and I
15 say, cross-complainants incorporate by reference and
16 realize paragraphs 1 through 61, and I plead for Dec
17 Relief 1.
18 Dec Relief 2, I incorporate all that or dec
19 relief under the cause of action. That's the way we do
20 it.
21 MR. YOUNG: And I guess the question to my
22 colleagues would be, you know, I guess there is a
23 question in my mind. Okay. It could have been an
24 illegal act. I don't know. I don't know if these
25 were -- it was made under illegal basis, but you know,

1 there are certain benefits that these individuals who
2 have retired, who have made their -- you know, their
3 plans, their life-long plans, and now all of a sudden
4 we're saying that you can't have them anymore. And
5 that's -- I think that's an ethical question that we
6 also have to determine.
7 Yes, this is a means to figure out if we can
8 get rid of benefits because it's -- you know, it's a
9 burden to us. It's making us make tough budgetary
10 decisions. It's difficult decisions that we have to
11 make because of our fiscal situation.
12 But we also have to consider those retirees
13 who are on fixed incomes, and so that's the other side
14 of this. And so I'm not -- you know, I'm not really
15 sure where to go with that.
16 MR. MCGRATH: Well, I could just tell you that
17 we've analyzed it upside down. I mean, that's all I've
18 been doing since I've been here.
19 There's not going to be enough money for the
20 people that -- Mr. Flagherty's age, the young man behind
21 me, who is a deputy. There will be enough money in the
22 next, say, 12, 15, 20 years to pay for them ever. I
23 don't know what a Court will do.
24 I'm going to tell you my legal opinion, my not
25 legal -- my street law opinion is a judge is going to be

1 hard pressed to hurt somebody that's already out there.
2 The whole thing is going to go in a big room just like
3 this with the unions yelling, and we're going to
4 renegotiate the whole darn thing.
5 You want a bet? I can't bet, but you would
6 say that's about a 60, 70 percent chance at some point
7 that could happen.
8 MR. YOUNG: So it could be a finding that they
9 were -- it was determined illegal, but the benefits
10 still stay, or --
11 MR. MCGRATH: Could be. Could be any way you
12 want it. I'm talking about --
13 MR. YOUNG: I mean, a judge could do that,
14 right?
15 MR. MCGRATH: He could do it.
16 MR. YOUNG: Or she could make that decision.
17 MR. MCGRATH: But I'm thinking you'll settle
18 it. I think you'll come up with an idea with Lamont
19 taxing this or that. You know, raising -- I don't know
20 how you raise taxes, whatever you do.
21 There will someday be enough money to pay a
22 logical, legal pension benefit to everybody -- not me
23 and not Lamont because we cut ourselves out -- but to
24 people who are coming through the ranks.
25 That's the hardest argument we have with

1 police officers and such. They don't get it. "We're
2 entitled to retroactive." Sure we are. There's no
3 money. How you going to get it? Where you going to get
4 it?
5 So we do it through litigation and we kind of
6 squeeze everybody until somebody budges, and then we
7 give. We take. We give. We take. That's where I'm
8 hoping we'll go. Otherwise, I wouldn't have come back
9 out of retirement.
10 MR. YOUNG: I understand.
11 MR. GIRARD: Your Honor? Yes, a quick follow
12 to what Mr. McGrath thought and just follows from
13 Mr. Peter's comment about unfair labor practices.
14 The determination – in our opinion, based
15 upon the research we've done, the determination whether
16 or not the benefits are legal or illegal doesn't
17 necessarily lead to a conclusion that there's been bad
18 faith bargaining. The law – the law generally says
19 that if a benefit – benefits can be taken away,
20 provided that something of similar or equal value is
21 given.
22 So when all of this is said and done, if the
23 Court finds that the benefits are illegal, they're
24 illegal.
25 The question of whether you're bargaining in

1 good faith or dealing with your employees or retirees in
2 good faith will depend upon what you do in light of that
3 declaration. And so I think Mr. McGrath is correct. A
4 determination is either on it's way or gets made, and
5 then everybody goes in a room and figures out how to
6 deal with the situation.
7 So I think that's far enough down the road,
8 and what you really need – and I know the City Attorney
9 would say that the funding for these benefits is
10 probably the single biggest component of the unfunded
11 liability. And so he would urge that you at least start
12 down the road to try to get a decision on whether these
13 are valid or not. And then – and then, hopefully,
14 people will come to the table, and we'll figure out a
15 way to solve it.
16 MS. ATKINS: Mr. Peters.
17 MR. PETERS: All right. I just want to say,
18 to follow on Mr. Young, and I hate to take too much
19 time, but it's a pretty significant thing we're doing
20 here.
21 I don't want – the reason I said I wanted it
22 to be the name of the City Attorney is I don't want my
name on anything that says that I think these benefits
24 are illegal. I don't think they're illegal. So I
25 just – I just don't want to be pleading that I think I

1 voted on something illegal. I don't think it was
2 illegal.
3 And I'm also – you know, just for the record,
4 I think that the legal theory is novel that because you
5 don't have a funding source it's illegal. Now, I
6 understand that there's – a lot research has gone into
7 it, but if I hire a roofer who fixes my roof, and I
8 can't say, you know, "When I made the contract with you
9 I didn't have the money to pay for it, so it was
10 illegal."
11 And so I think it's a challenge, but let me
12 just say that I think that it's also – it's a very real
13 thing that people are out there in the public, you know,
14 giving tremendous credence to this Third Interim Report.
15 We've got to know the answer.
16 So I think it was a blessing that the
17 Retirement Board sued the City, and said they wanted
18 declaratory relief. So let's find the answer.
19 But let me say where I differ a little bit is
20 I want the answer. I don't want to do – I don't want
21 to do a year litigation and spend half a million
22 dollars, which could be a million dollars doing a bunch
23 of depositions just to delay the answer.
24 My goal would be that we actual try to get to
25 the Court pretty soon, and get a ruling because I want

1 the answer.
2 And I don't see this – you know, I know, you
3 know in previous lives that sometimes litigation was a
4 tool to get you to the table, and there's always that
5 part of it. But you know, I want it talk about things
6 like stipulating to interventions, stipulating to facts.
7 I don't want, you know, Dave here to be
8 spending a lot of money doing depositions that, Is this
9 document true and accurate, when a lot of that stuff
10 should be agreed to. It's public money we'll be
11 spending on both sides.
12 So, just, you know, although I would love to
13 see a resolution where we sat down and talked, I don't
14 want the litigation to be used as some sort of hammer to
15 get us to the table. I really would like to see a
16 resolution of it because it's out there, and the public
17 has a legitimate question about whether these things are
18 legal. I think we should answer the question.
19 So, you know, that's why, you know, my motion
20 is to do this in the least mean way we can, which is to
21 just do the declaratory relief, but to get on the
22 problem, answer – answer the question that CERS has now
23 put to us to say that it's the City Attorney who has
24 declared that this is an illegal benefit, but at least
25 not to necessarily say that the City Council says one

way or the another because Ms. Frye and I may have a different opinion about that, but not to say it all.

And when we talk about the budget, I think we ought to be talking about things like how to make it go more smoothly and more cheaply so we can get a resolution of this. And I would like – I would like to get to the answer. I'd like to do it soon.

MS. ATKINS: Okay. Ms. Frye, in terms of your motion, since I seconded it, can we just get some clarification.

MS. FRYE: Yeah. Let's see if we can work with Mr. Girard and Mr. McGrath and have them assist me in putting together a motion and seeing if that works.

MR. MCGRATH: I'm incompetent. I'm a litigator. That's his job.

MR. GIRARD: Well, let me start with what the motion was, and then what we need to do is clarify what Mr. Peters would like to amend to that motion, and then see if you agree.

MS. FRYE: Sure.

MR. GIRARD: The motion was to prosecute the cross-complaint, to defendant the companion action, the new case, and retain Heller Ehrman for purpose.

MS. FRYE: Right.

MR. GIRARD: And then Mr. Peters requested

that the cross-complaint be generalized, be trimmed down such that the action reflects a dispute by the City Attorney with respect to these issues, and we – and it's merely declaratory relief only, and we're not seeking damages or penalty against named individuals.

Mr. McGrath is that –

MR. MCGRATH: Yes. To be safe, I'd like a resolution from the Council which authorizes the City Attorney to do it.

MR. PETERS: Okay.

MR. GIRARD: But that would be the motion if the maker of the motion is okay with that.

MS. FRYE: Is that –

MR. PETERS: Sorry, just to confirm.

MS. FRYE: – what you're wanting?

MR. PETERS: Also, we decided at the last meeting that the issue of receiver is coming back to us after the hearing on the demurrer. And so to the extent that that's – I don't want that necessarily taken out of the cross-complaint, but we're not taking an action on that today.

MR. GIRARD: Well, let's deal with that separately, if we may. This is solely on the issue of the validity of the benefit.

MR. PETERS: Just so you know, the reason I'm

saying that is that one of the remedies pled for is the receiver. And we've decided already to put that off until after the demurer. We learned that.

MR. GIRARD: And for the record, Your Honor, the other thing was previously you authorized the City Attorney to pursue the question in the cross-complaint about who's the lawyer for the CERS board.

That's in the cross-complaint, and the City Attorney will proceed with that issue, based upon your prior direction. That was either last week or the week before.

MS. ATKINS: Okay. So let me just make sure, Ms. Frye, are you okay with the motion as stated?

MS. FRYE: Yes.

MS. ATKINS: As am I, the seconder of the motion.

Mr. Maienschein and then Mr. Madaffer.

MR. MAIENSCHEIN: Thank you.

Les, did I hear you also include Mr. Peters' point about taking the names of the Council off?

MR. GIRARD: That was included in the comment that it would be trimmed to make clear that the dispute is between the City Attorney with respect to this, which would involve amending the caption, I assume, Mr. McGrath.

MR. MCGRATH: Yeah. God bless us all.

MR. MAIENSCHEIN: And then, secondly, I didn't hear a cost. We haven't gotten to that yet.

Thank you.

MS. ATKINS: Mr. Madaffer.

MR. MADAFFER: I've been listening to all this, and I'm just curious.

Today, sitting in the City Council meeting, I found out that the City Attorney released at 12 o'clock noon to the public and members of the media the Kroll documents that were subject to the attorney-client privilege waiver discussion last night.

While on the surface that might make sense, I thought – and I've asked to get a copy of the tape – I thought I heard the City Attorney say yesterday, perhaps it was Mr. Girard, that made a statement on the record that seemed to indicate that it might not necessarily make sense that those documents be released to the media, since there was an ongoing investigation.

MS. ATKINS: Mr. – can I just ask, is this related to this item?

MR. MADAFFER: Yeah. I'm getting to it.

MS. ATKINS: Okay.

MR. MADAFFER: I'm so sorry. I've just been sitting here listening. I appreciate that.

So that being said, I'm not going to vote for this today sitting in here because as much as I support the spirit of it and I think you've got some good compromise going on, I'm really all of a sudden just kind of not really trusting anything that's being said.

I mean, I know that part of this includes a resolution with respect to receivership, and I still have a lot of unanswered questions on that, more questions since I got the binder. So I'm just really not confident that what I'm voting on is what I'm getting.

MR. MCGRATH: Well, I think you've known me for a number of years, and I'm going to give you what you ask for.

MR. MADAFFER: I trust you.

MS. ATKINS: Thank you.

So we have a motion and a second.

I'd like to -- no further comments?

Call for any question.

And all those in favor say "Aye."

MR. PETERS, MR. YOUNG, MS. ATKINS, MR. MAIENSCHEIN, MS. FRYE: Aye.

MS. ATKINS: Opposed.

MR. MADAFFER: No.

MS. ATKINS: Passes 5-1 with District 7 in

opposition.

* * *

(Whereupon the discussion on this subject was adjourned at 6:09 p.m.)

REPORTER'S CERTIFICATE

COUNTY OF SAN DIEGO)
STATE OF CALIFORNIA)

I, Keren M. Guevara, Certified Shorthand Reporter licensed in the State of California, License No. 12478, Registered Professional Reporter, hereby certify that the deponent was by me first duly sworn and the foregoing testimony was reported by me and was thereafter transcribed with Computer-Aided Transcription; that the foregoing is a full, complete, and true record of said proceeding.

I further certify that I am not of counsel or attorney for either or any of the parties in the foregoing proceeding and caption named or in any way interested in the outcome of the cause in said caption.

In witness whereof, I have hereunto set my hand this day:

_____

KEREN M. GUEVARA, CSR, RPR

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