

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) resolves the claims asserted by Petitioner the City of San Diego (“City”) against Respondent San Diego City Employees’ Retirement System (“SDCERS”) as well as the claims of Intervenors the San Diego Municipal Employees’ Association, AFSCME, Local 127, AFL-CIO, the San Diego Police Officers’ Association and San Diego City Firefighters, Local 145, IAFF, AFL-CIO (collectively, the “Parties”) regarding the City’s Petition for Writ of Mandate (“Petition”) in the lawsuit entitled *City of San Diego v. San Diego City Employees’ Retirement System*, San Diego County Superior Court Case No. 37-2010-00091207-CU-WM-CTL (the “City Contribution Lawsuit”).

RECITALS

1. The City and all of its labor unions agreed in June 2013 to a five year freeze on so-called pensionable pay, as that term is described in Proposition B, approved by the voters in June, 2012. The City estimates that such a freeze will result in a substantial reduction in the City’s annual contributions to the pension plan. In light of this freeze, the City Council has decided that it does not want to further increase the burden on employees thereby risking loss of valued employees, including those in public safety. Based thereon, it is the City Council’s desire as a policy matter to settle the City Contribution Lawsuit on the terms set forth in this Agreement. The City Attorney recommends the terms of this Agreement as a legal method of implementing the City Council’s policy. Intervenor Unions, for their part, have decided to enter into this settlement because it leaves SDCERS’ method of allocating actuarial losses unchanged and imposes no new economic burdens on employees, and they do so without regard to any other agreements they have made with the City.

2. San Diego City Charter, Article IX, section 143 (Section 143) provides, in part, “The City shall contribute annually an amount substantially equal to that required of the

employees for normal retirement allowances, as certified by the actuary, but shall not be required to contribute in excess of that amount, except in the case of financial liabilities accruing under any new retirement plan or revised retirement plan because of past service of the employees.”

3. On May 3, 2010, the City filed the Petition alleging that SDCERS’ continuing allocation of investment gains and losses and other actuarial gains and losses to the City, which are included in the unfunded actuarial accrued liability (“UAAL”), violates section 143 of the City Charter. Specifically, the City challenged the exclusion by SDCERS of 100% of the UAAL from the “substantially equal” contribution determination described in Section 143.

4. On November 19, 2010, the trial court in the City Contribution Lawsuit granted the motion of several unions representing employees of the City to intervene in the action. Subsequently, AFSCME, Local 127, AFL-CIO, the San Diego Municipal Employees Association, the San Diego Police Officers Association and the San Diego City Firefighters, Local 145, IAFF, AFL-CIO (the “Intervenors”) filed complaints in intervention in the City Contribution Lawsuit that are supportive of SDCERS’ position and which have also raised numerous additional defenses.

5. Throughout the litigation, SDCERS and the Intervenors have disputed the City’s interpretation of section 143 alleged in the Petition and as asserted by the City in the City Contribution Lawsuit. SDCERS and the Intervenors contend, *inter alia*, that the language of section 143, SDCERS’ longstanding practice of allocating the UAAL to the City, the plenary authority of SDCERS’ Board of Administration to determine contribution rates, the doctrines of res judicata and collateral estoppel and the practical consequences of the City’s proposed interpretation support their position. SDCERS and the Intervenors have set forth the bases for their position in filings made in the defense of the City Contribution Lawsuit, including but not

limited to SDCERS' demurrer to the City's Petition, oppositions to the City's motion for judgment on the pleadings, oppositions to the City's motion for summary judgment and trial briefs.

6. Since the case commenced, the Parties have conducted substantial factual and expert discovery in the City Contribution Lawsuit. Trial was scheduled to proceed in this matter on July 9, 2013.

7. Proposition B specifically authorizes settlement of the City Contribution Lawsuit so long as the settlement is approved by six affirmative votes of the City Council and by the Court as a good faith settlement. Thus, this Agreement, upon such approval, complies with the City Charter regardless of which individual Party or Parties' interpretation of the City Charter is correct. The Parties believe it is in the best interests of the City, Intervenors, and SDCERS to settle the City Contribution Lawsuit to avoid the uncertainty, expense, burden, and inconvenience of further litigation, and the potential delay that would result from the appeal of any Court ruling.

8. The City enters into this Agreement based upon the recommendation of the City Attorney and review and approval by the City Council, consistent with the requirements of Proposition B (Charter section 141.2), and warrants that it has the authority to do so.

9. SDCERS enters into this Agreement based upon the recommendation of its independent fiduciary counsel, independent litigation counsel in the City Contribution Lawsuit and review and approval by SDCERS's Board of Administration, and warrants that it has the authority to do so. SDCERS does not oppose the City's election to pursue settlement consistent with Proposition B, but SDCERS does not concede its validity, necessity, or applicability to this Agreement.

The Intervenor enters into this Agreement based upon the recommendation of their counsel and the approval of each Intervenor's authorized representatives. The Intervenor does not oppose the City's election to pursue settlement consistent with Proposition B, but the Intervenor does not concede its validity, necessity or applicability to this Agreement.

AGREEMENT

Based upon the facts set forth in the Recitals, the Parties hereby agree to settle the City Contribution Lawsuit on the following terms and conditions, subject to and contingent upon the approval of the Court as a good faith settlement.

10. SDCERS may continue its allocation of 100% of the UAAL to the City and exclusion of UAAL from the "substantially equal" contribution determination described in Section 143.

11. The City shall accept all of SDCERS's prior allocations of UAAL to the City, including, without limitation, investment and other experience gains or losses, which were raised or could have been raised in the City Contribution Lawsuit, but excluding any portion of the UAAL arising from underpricing of purchase of service credits as addressed in *City of San Diego v. San Diego Employees' Retirement System* (2010) 186 Cal. App. 4th 69.

12. The City Council shall adopt an ordinance in the form set forth in Exhibit A to this Agreement (the "Ordinance"). The Parties agree that the ordinance may be amended, repealed, revoked and/or revised by City at any time subject to the limitations set forth in Paragraph 13 of this Agreement and that the adoption of this Ordinance does not by itself create any new vested right. This Agreement is not to be interpreted that SDCERS or the Intervenor agree that the adoption, amendment, revision, repeal, or revocation of the Ordinance empowers the City in any way to alter SDCERS' allocations.

13. The City agrees that any amendment, revision, repeal or revocation of this Ordinance may seek to affect only the allocation of experience gains or losses occurring after the most recent annual actuarial valuation date preceding the effective date of any such amendment, repeal, revocation or revision, including investment and other experience gains or losses occurring only after such most recent valuation date. The City further agrees that any such amendment, revocation, repeal or revision is subject to the meet and confer obligations of the Meyers-Milias-Brown Act, and in such event, no party waives any contention regarding the vested nature of the employee rights involved, the validity of Charter section 141.2 or the applicability of Charter sections 141.2, 143 or 143.1 or any other legal principle or argument potentially applicable to the allocation of experience gains or losses occurring after the most recent annual actuarial valuation date preceding the effective date of any such amendment, repeal, revocation or revision, including investment and other experience gains or losses occurring only after such most recent valuation date.

14. The Parties shall obtain the Court's approval of this Settlement Agreement as a good faith settlement.

15. The Parties agree that this Agreement is contingent upon the Court's entry of a good faith settlement determination and judgment incorporating the terms of and approving the Agreement.

16. If this Agreement is not determined to be in good faith and approved in all respects, all Parties retain all rights and defenses they possessed prior to this Agreement in connection with the City Contribution Lawsuit.

17. Within five days of the Court's approval of this Agreement as a good faith settlement, the City's Petition shall be dismissed with prejudice.

18. The effect of the dismissal with prejudice shall preclude the filing or re-filing of any lawsuit by any Party disputing the Board's allocation of all experience gains or losses occurring on or before the most recent annual valuation preceding the effective date of any amendment, revision, repeal or revocation of the Ordinance, including any investment gains or losses occurring on or before the most recent annual valuation date preceding the effective date of any amendment, revision, repeal or revocation of the Ordinance. The effect of dismissal with prejudice shall not preclude any Party from raising any argument or contention raised or that could have been raised in the City Contribution Lawsuit as to the allocation of all experience gains or losses occurring after the most recent annual valuation preceding the effective date of any amendment, revision, repeal or revocation of the Ordinance, including any investment gains or losses occurring only after such most recent valuation date.

19. This Agreement shall not affect the manner in which SDCERS' attorney's fees and costs are presently funded. Each Intervenor and the City may file motions seeking an award of attorney's fees under C. C. P. section 1021.5. The City does not, however, concede any Intervenor's entitlement to a fee award and will oppose any such motion. Likewise, Intervenor do not concede the City's entitlement to a fee award and will oppose any such motion on any and all grounds available with one exception. While Intervenor retain their rights to argue that the City is not entitled to a fee award, Intervenor waive the right to argue that the City, as a public entity, is precluded by C. C. P. section 1021.5 from claiming attorney's fees against them as private parties. On or before January 15, 2014, each Intervenor will inform the City in writing of its intent to file or not to file a Motion under this paragraph. If no Intervenor intends to file such a motion, all parties will incur their own attorney's fees and costs. If any Intervenor states its intent to do so, the City and that/those Intervenor(s) will contact the Court to schedule a hearing

date subject to the Court's calendar but on a date after May 1, 2014, and to set a briefing schedule in relation to the hearing date for filing and service of the City's and Intervenor(s)' cross motions, opposition and reply briefs. The City's cross motion(s) may only be filed against an Intervenor who has stated its intent to file such a motion and does so. Pursuant to California Rules of Court Rule 3.1702(b)(2), the City and Intervenors hereby agree that the time limit for filing a fee motion which is set forth in Rule 3.1702(b)(1) is waived such that any motions for attorney fees filed in accordance with this Settlement Agreement will be timely.

20. The Parties to this Agreement represent and warrant that they have had a full and fair opportunity to discuss the effect and terms of this Agreement with their legal counsel. All counsel to the Parties have recommended and approved the terms of this Agreement.

21. The Parties further represent and warrant that they have carefully read this Agreement and have executed this Agreement freely and voluntarily.

22. The Parties agree that all of the recitals herein, including but not limited to the recitals in paragraph one, *supra*, are conclusively presumed true under Evidence Code section 622.

23. The Parties enter into this Agreement in good faith after an evaluation of the facts and circumstances of the City Contribution Lawsuit, legal arguments, potential trial outcomes, and the interests of all Parties and their constituents.

24. Nothing in this Agreement shall be construed as an admission of any violation of law or of any liability to the other Party or any third party and any and all drafts, communication and discussions relating thereto, shall not be construed as or deemed to be evidence of an admission or concession by any Party, and shall not be offered or received in evidence or

requested in discovery in the City Contribution Lawsuit or any other action or proceeding as evidence of such an admission or concession.

25. This Agreement constitutes the entire agreement among the Parties and supersedes all other agreements, understandings, representations, and negotiations, oral or written, between or among any of the Parties and their counsel relating to the settlement of the City Contribution Lawsuit.

26. This Agreement is the product of negotiation and preparation by and among each Party and its attorneys. The Parties acknowledge that this Agreement shall not be deemed prepared or drafted by one party or another and should be construed accordingly.

27. In the event any one or more of the provisions of this Agreement shall for any reason be found invalid, illegal, or unenforceable, such determination shall not affect any other provision unless the effect of such determination deprives any of the Parties of material benefits under this Agreement. In that event, unless the Parties reach a further agreement to revise the Agreement within 30 days of notice of the determination of invalidity, illegality, or unenforceability, then the entire Agreement shall be deemed invalid and unenforceable and automatically rescinded.

28. The Parties consent to jurisdiction of the courts of the State of California to resolve any dispute regarding this Agreement. This Agreement shall be governed by the laws of the State of California.

29. No breach of any provision of this Agreement can be waived unless such waiver is in writing. Waiver of any breach of any provision of this Agreement shall not be deemed to be a waiver of any other breach of the same or other provision of this Agreement.

30. Each undersigned representative of the Parties to this Agreement certifies that he/she is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind such Party to it.

31. This Agreement may be executed in any number of counterparts and will be binding when it has been executed by the last party. A copy or facsimile signature shall have the same force and effect as an original signature.

IN WITNESS WHEREOF, each of the undersigned has executed this Agreement as of the dates appearing below.

DATED: 11-25-13

SAN DIEGO CITY EMPLOYEES'
RETIREMENT SYSTEM

By: 
Edward W. Kitrosser, President
Board of Administration

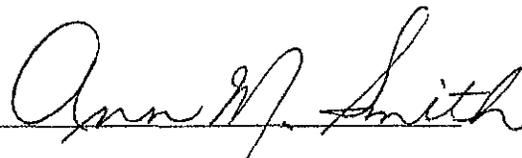
DATED: 11-21-13

CITY OF SAN DIEGO

By: 
STACEY LOMEDICO
ASST. CHIEF OPERATING OFFICER

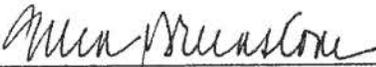
DATED: 11-21-13

SAN DIEGO MUNICIPAL EMPLOYEES'
ASSOCIATION

By: 

DATED: 11-21-13

AFSCME, LOCAL 127, AFL-CIO

By: 
Ellen Greenstone

DATED: 11-21-13

SAN DIEGO POLICE OFFICERS'
ASSOCIATION

By: 
Michael Conger

DATED: 11/21/13

SAN DIEGO CITY FIREFIGHTERS,
LOCAL 145, IAFF, AFL-CIO

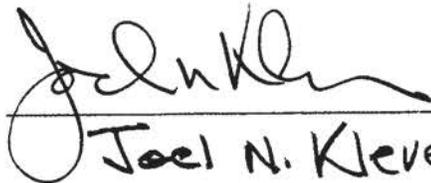
By: 
Joel N. Klevens

Exhibit “A”

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 4,
DIVISION 8 OF THE SAN DIEGO MUNICIPAL CODE BY
AMENDING SECTION 24.0801 RELATING TO THE CITY
EMPLOYEES' RETIREMENT SYSTEM.

WHEREAS, the City and all of its labor unions agreed in June 2013 to a five year freeze on so-called pensionable pay, as that term is described in Proposition B, approved by the voters in June, 2012. The City estimates that such a freeze will result in a substantial reduction in the City's annual contributions to the pension plan. In light of this freeze, the City Council has decided that it does not want to further increase the burden on employees thereby risking loss of valued employees, including those in public safety. Based thereon, it is the City Council's desire as a policy matter to settle *City of San Diego v. San Diego City Employees' Retirement System*, San Diego County Superior Court Case No. 37-2010-00091207-CU-WM-CTL (the "City Contribution Lawsuit.")

WHEREAS, San Diego City Charter, Article IX, section 143 (Section 143) provides, in part, "The City shall contribute annually an amount substantially equal to that required of the employees for normal retirement allowances, as certified by the actuary, but shall not be required to contribute in excess of that amount, except in the case of financial liabilities accruing under any new retirement plan or revised retirement plan because of past service of the employees."

WHEREAS, San Diego City Charter, Article IX, section 141.2 (Section 141.2), added by Proposition B passed by the voters on June 5, 2012, provides in part: "For officers and employees who have the legal right to remain in the established Defined Benefit Pension Plan, the City shall contribute annually an amount substantially equal to that required of the employee for a normal retirement allowance, as certified by the Actuary established in Charter Section 142,

but shall not contribute in excess of that amount, except in the case of financial liabilities accruing under any new retirement plan or revised retirement plan because of past service of the employee.”

WHEREAS, Section 141.2 further provides: “The City shall not pay, cap the employee contribution rate, or otherwise compensate for any portion of a contribution to the Retirement System by a City Officer or employee.”

WHEREAS, Section 141.2 further provides: “To the fullest extent permissible by law, in calculating annual contributions for the City and City employees, the Retirement Board shall divide equally between those two parties all costs except those costs explicitly and exclusively reserved to the City in this Section and Section 143. “

WHEREAS, Section 141.2 further provides: “Contributions shall also be governed by Section 143 of this Article. In the event of a conflict between this Section and Section 143, this Section shall prevail. This section is not intended to interfere with vested defined rights of any retiree receiving benefits from the Defined Benefit Retirement System or of any employee enrolled in the Defined Benefit Retirement System as of the effective date of this section.”

WHEREAS, Section 141.2 finally provides: “Nothing contained in this Section shall preclude the City from entering into a settlement of City of San Diego v. San Diego City Employees’ Retirement System Case No. #37-2010-00091207-CU-WM-CTL to define responsibilities of the City and employees for unfunded liabilities of the Retirement System even if the settlement includes terms that might otherwise conflict with the above restrictions, as long as the settlement is approved by the court as a good faith settlement and approved by a two-thirds vote of the City Council.”

WHEREAS, on May 3, 2010 the City filed the Petition that initiated the City Contribution Lawsuit alleging that the San Diego City Employees' Retirement System's ("SDCERS") continuing allocation of investment gains and losses and other actuarial gains and losses to the City, which are included in the Unfunded Actuarial Accrued Liability ("UAAL," also referred to as UAL), violates section 143 of the City Charter. Specifically, the City challenged the exclusion by SDCERS of 100% of the UAAL from the "substantially equal" contribution determination described in Section 143.

WHEREAS, throughout the litigation, SDCERS has disputed the City's interpretation of Section 143 alleged in the Petition and as asserted by the City in the City Contribution Lawsuit. SDCERS contends, *inter alia*, that the language of Section 143, SDCERS' longstanding practice of allocating UAAL to the City, the plenary authority of SDCERS' Board of Administration to determine contribution rates, and the practical consequences of the City's proposed interpretation support its position.

WHEREAS, on November 19, 2010, the trial court in the City Contribution Lawsuit granted the motion of several unions representing employees of the City to intervene in the action. Subsequently, AFSCME, Local 127, AFL-CIO, the San Diego Municipal Employees Association, the San Diego Police Officers Association and the San Diego City Firefighters, Local 145, IAFF, AFL-CIO (the "Intervenors") filed complaints in intervention in the City Contribution Lawsuit that are supportive of SDCERS' position and which also raised numerous affirmative defenses.

WHEREAS, the City, SDCERS, and Intervenors ("Parties") have entered into a settlement of the City Contribution Lawsuit ("Settlement Agreement") providing, in pertinent part, that (i) SDCERS may continue its allocation of 100% of the UAAL to the City; (ii) the City

agrees to accept all prior allocations by SDCERS of UAAL, including, without limitation, investment and other experience gains or losses occurring prior to the settlement date of the City Contribution Lawsuit, which were raised or could have been raised in the City Contribution Lawsuit, but excluding any portion of the UAAL arising from underpricing of purchase of service credits as addressed in *City of San Diego v. San Diego Employees' Retirement System* (2010) 186 Cal. App. 4th 69; (iii) the City is adopting this Ordinance accepting SDCERS's continuing allocation of 100% of the UAAL to the City; (iv) the City agrees that any amendment, revision, repeal or revocation of this Ordinance may affect only the allocation of experience gains or losses occurring after the most recent annual actuarial valuation date preceding the effective date of any such amendment, revocation, repeal or revision, including investment and other experience gains or losses occurring only after such most recent valuation date; (v) the City agrees that any such amendment, revocation, repeal or revision of this Ordinance is subject to the meet and confer obligations of the Meyers-Milias-Brown Act, and in such event, no Party waives any contention regarding the vested nature of the employee rights involved, the validity of Charter section 141.2 or the applicability of Charter sections 141.2, 143 or 143.1 or any other legal principle or argument potentially applicable to the allocation of experience gains or losses occurring after the most recent annual actuarial valuation date preceding the effective date of any such amendment, revocation, repeal or revision, including investment or other experience gains or losses occurring only after such most recent valuation date; and (vi) the Parties have agreed that this Ordinance may at any time be amended, repealed, revoked or revised subject to the limitations set forth in the Settlement Agreement, and that the adoption of this Ordinance does not by itself create any new vested right.

WHEREAS, Charter Section 141.2 specifically authorizes settlement of the City Contribution Lawsuit so long as the settlement is approved by six affirmative votes of the City Council and by the Court as a good faith settlement. Thus, upon such approval, this Ordinance complies with the City Charter regardless of which Parties' interpretation of the City Charter is correct.

WHEREAS, the City Council, pursuant to Section 141.2, by a two-thirds vote of its members, authorized a settlement of the City Contribution Lawsuit on the above-stated terms, and the Court has approved the settlement as a good faith settlement;

WHEREAS, San Diego Municipal Code ("Municipal Code") section 24.0801 pertains to the City's employer contributions to SDCERS and may be amended in accordance with the settlement of the City Contribution Lawsuit.

WHEREAS, the SDCERS Board has approved the wording of this Ordinance, and the City Attorney's Office has recommended it to the City Council;

NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 2, Article 4, Division 8, of the San Diego Municipal Code be amended by adding the following provision to section 24.0801:

Article 4: City Employees' Retirement System

Division 8: City's Contribution

§24.0801 City's Contribution

[No change in text.]

All net investment and other actuarial experience gains and losses of the City's Defined Benefit Pension plan shall be included in the calculation of the unfunded actuarial accrued liability (UAAL) and included in the amortized portion of the City's employer contribution to SDCERS.

Section 2. That this ordinance does not require the City to accept any portion of the UAAL arising from underpricing of purchase of service credits as addressed in *City of San Diego v. SDCERS* (2010) 186 Cal. App. 4th 69.

Section 3. That this ordinance may at any time be amended, repealed, revoked or revised subject to the limitations set forth in the Settlement Agreement, and that this Ordinance by itself does not create any vested right.

Section 4. That a full reading of this ordinance is dispensed with prior to its passage, a written or printed copy having been made available to the City Council and the public prior to the day of its passage.

Section 5. That this ordinance shall take effect and be in force on the thirtieth day from and after its final passage.

APPROVED: JAN I. GOLDSMITH, City Attorney

By _____
William Gersten
Deputy City Attorney

WG:ccm
XX/XX/2013
Or.Dept:SDCERS

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of _____.

ELIZABETH S. MALAND
City Clerk

By _____
Deputy City Clerk

Approved: _____
(date)

_____, Mayor

Vetoed: _____
(date)

_____, Mayor