The case represents consolidated litigation relating to the City of San Diego's pension system. The action began with SDCERS' Verified Complaint for Declaratory Relief and Injunction filed on January 27, 2005. The operative pleadings in this matter include this initial filing by SDCERS, the City's Fifth Amended Cross Complaint ("5ACC"), SDCERS' Complaint for Declaratory Relief filed under GIC 851286, as well as the *Abdelnour* action and the Complaints in Intervention filed by the MEA, Local 145 and Local 127. The matter was bifurcated for trial into three phases following oral argument on Intervenors' Motion to Bifurcate on September 5, 2006. Phase one of the trial dealt with the following issues:

1. Whether the City is estopped as a matter of law from challenging the Managers Proposal I ("MP 1") benefits by the prior judgment in *Corbett* (*Corbett, et al. v. City Employees' Retirement System*, case number GIC 722449 (Trial exhibits 919, 920));

2. Whether the City's 5ACC presents an actual justiciable controversy between the City and necessary parties;

3. Whether the City can pursue a claim that SDCERS violated the debt limit laws;

4. Whether the City's argument the Managers Proposal I ("MP1") and Managers Proposal II ("MP 2") benefits are null and void is barred because of the *Gleason* litigation and settlement; and

5. Whether the 5ACC presents an actual justiciable controversy upon which the court can render a meaningful, concrete and specific decree.

At the outset of trial, the City volunteered to proceed and to take the burden of proof on all issues. This offer was rejected by Intervenors who desired to proceed first and take on the burden of proof on the special defenses. Intervenors proceeded first and have the burden of proof on all issues in phase one.

A request for a Statement of Decision was made be Intervenors and was granted by the court. The court now renders its Proposed Statement of Decision (Phase One) under Code of Civil Procedure section 632 and California Rules of Court, Rule 232. It is not required for the purposes of this Statement of Decision to address each argument advanced by the parties or comment on all the witnesses and evidence presented. The purpose of this Proposed Statement of Decision is to give notice of the decision as well as the relevant facts and law supporting the decision. (See, *California Judges Benchbook*; Trial Without Jury at § 2:32 p. 49.)

I. SUMMARY OF THE DECISION

In this section of the decision, the court provides a short summary of its lengthy decision on this dispute which involves complex factual issues and an analysis of technical areas of the law.

In the fifth amended cross-complaint, the City uses Government Code section 1090 and the debt limit provisions of the California Constitution and San Diego City Charter in an effort to undo retirement benefits granted city workers beginning ten years ago in 1996. The use of these legal theories in this manner represents a unique and creative application of the law in an effort to undo longstanding legislative benefits and, by so doing, improve the funded ratio of the City pension plan. The City first began this effort with the filing of the previous versions of the 5ACC in 2005.

This first phase of this trial deals with Intervenors' legal challenges to the effort by the City to undo the benefits. The Intervenors' challenges are largely based on previous inconsistent positions taken by the City during several significant intervening events and the decision by the City not to include the employees whose benefits are at stake as parties in the litigation. The original 1996 benefits have been renegotiated several times between the City and the City's employees represented by the labor groups as documented by various superseding Memorandum of Understandings ("MOUs"). In

addition, several lawsuits challenging aspects of what are now called MP 1 and MP 2 have settled, and have become judgments that are binding on the City and other parties to those lawsuits.

The City's longstanding approach of not challenging the benefits changed with the filing of the City's first cross-complaint in this litigation on July 8, 2005. The trial issues in phase one largely deal with the ability of the City to prosecute the alleged violations of law arising at the time the benefits were created, in light of the City's intervening actions, and inaction, before 2005. As a result, the issues in phase one do not deal with the underlying "legality" of the benefits, but rather the procedural impact of these past actions by the City which are not consistent with the City's legal position in the current litigation. Like any party before the court, the City's past inconsistent positions, or failures to act when there was a legal duty to do so, can impair the ability to proceed in the current litigation.

In 2000, the City settled the *Corbett* case which became a judgment following class action approval hearings and is binding on all parties to it. *Corbett* was a class action case by *all* participants in the City's pension plan challenging the method by which pension benefits were calculated because they did not include benefits the California Supreme Court had ordered Ventura County to include in pension benefit calculations. The lawyers representing the City and SDCERS in *Corbett* determined the City was exposed to a $743 million increase in pension obligations if the City lost the case, which would result in a $75 million dollar increase in the City's annual contribution to the pension.

To avoid this risk, the City settled the case by renegotiating retirement benefits with the retirees and employees and creating new retirement benefits for current city workers, retirees and beneficiaries. The retirement benefits negotiated in the *Corbett* settlement increased the City's annual contribution by $14.4 million and avoided the $75 million annual obligation the City would incur if the City lost the case. The *Corbett* benefits came four years after the MP 1 benefits the City complains of in this action were created, and covered *all* participants in the City's pension system. The City has not and cannot

challenge the *Corbett* judgment in this case. As a result, the court concludes the City cannot go back and undo the MP 1 benefits since those benefits were replaced by the City's creation of benefits for all pension participants in the *Corbett* judgment.

In mid-2004, the City settled *Gleason*, another class action case this time brought by *all* retirees who sued claiming the under funding of the pension allowed by SDCERS in the MP 1 and MP 2 transactions violated state law. The City in the current lawsuit alleges the MP 1 and MP 2 deals each represented a single transaction in which the City traded benefit increases with the employees in return for funding relief from SDCERS in violation of state law. However, in *Gleason*, the City failed to bring challenges to the MP 1 and MP 2 transactions into the lawsuit by the filing of a compulsory cross-complaint alleging the illegality of the transactions. In fact, the City did not challenge the legality of the transactions in *Gleason*, and the funding relief in the MP 1 and MP 2 transactions was eliminated by settlement of the case.

Well established California law requires the parties in litigation to bring all claims relating to the same transaction into the action litigating the legality of the transaction. This legal principle insures the finality of judgments since all the issues related to a transaction are resolved in the case and the parties are not faced with repeated lawsuits on the same transactions once the case is settled or judgment is entered.

The court concludes the failure of the City to challenge the MP 1 and MP 2 transactions in the *Gleason* case, when the City had a legal duty to do so, prohibits the City from litigating the issue now. However, the legal doctrine of res judicata preventing re-litigation of issues that should have been brought in a prior case only applies to the parties of the prior case or parties in privity. Thus, the bar to re-litigation of these issues created by the *Gleason* case only applies to retirees as of the date of the *Gleason* settlement in July of 2004.

Another issue raised by the Intervenors is the failure of the City to bring *all* of the employees and retirees whose benefits are at stake into the case. The court concludes the pension participants who face the risk of loss of benefits have individual due process rights to notice and must be granted the opportunity to be heard in an action which seeks to eliminate their retirement benefits.

The number of those necessary parties who should receive notice of this case is significantly reduced by three factors. First, the court's decision on *Corbett* eliminates the City's claims to set aside MP 1 benefits. Second, the courts ruling on *Gleason* eliminates the City's claims under MP 2 against retirees as of July of 2004. Finally, the City has indicated in verified responses to questions asked in the discovery phase of this case that they do not seek to set aside the 2.5% at age 55 retirement benefits for general members on a going forward basis. This decision reduces a major portion of the MP 2 claim for a large number of current general employees. The application of these three factors limits the pool of individuals who must receive notice of this case to a smaller more defined group of participants should the City seek to proceed in this limited fashion.

Finally, the *Gleason* settlement ended the contribution relief by SDCERS and thus the City's reliance on setting aside the benefits under the debt limit laws by suing SDCERS alone, is unavailing.

The legal principles the City uses to challenge the benefits in this action appear to be one of the few available mechanisms to do so under the remedies in the state court system. Despite the creative use of these principles and the excellent presentation of the case at trial by the City, previous inconsistent positions taken by the City before the filing of the cross-complaint raise significant obstacles to the City's current effort to undo the remaining pension benefits.

II. CHRONOLOGY OF EVENTS

In 1996, then City Manager Jack McGrory developed a plan to raise pension benefits while at the same time reducing the amount the City paid into the pension system to a level below the actuarially

required level. The plan arose because the City was faced with a need to renew expiring labor agreements with its employees at the same time the City's obligation to contribute to the pension plan increased by an unanticipated $25 million.

Mr. McGrory testified that fluctuations in the City's actuarial contribution to the pension system from year to year made budgeting the required contribution unpredictable and difficult. However, the City's proposals to reduce pension contributions made in the years before 1996 had been rejected by the SDCERS board. These past efforts had been made without a proposal for benefit improvements.

In 1996, the pension system had experienced several good years of investment return on the pension trust assets. The earnings exceeded the average assumed rate of return of eight percent (8%). At the time, all parties referred to these earnings over the average assumed rate of return as "surplus earnings." Mr. McGrory's plan took advantage of these alleged "surplus earnings" and used them to offset the increases in actuarial liability created by the award of retroactive benefits. The City and ultimately the employees and pension board chose to propose using these funds in this fashion rather than leave them in the fund to offset future investment performance in bad years.

The evidence was clear that with regard to both MP 1 and MP 2, the City was the moving force in creating, lobbying for and implementing the plan to increase retirement benefits while at the same time reducing contributions to a level below that actuarially required. The plan at each step was authorized by the City through its highest elected and management personnel. In both 1996 and 2002, the then city managers presented the proposal to couple benefit enhancements with reduced contributions to the City Council and Mayor before raising them with the employee union representatives or SDCERS.

In 1996, it had been many years since city employees had received an increase in retirement benefits and this was a high priority for the unions in negotiation with the City. The City was aware of

this priority. The testimony of numerous witnesses established several general rules concerning the negotiations between the City and its employee representatives under the Meyers-Milias-Brown Act ("MMBA").

First, the negotiations included a wide variety of issues that were all interrelated. All involved in the negotiations testified concerning the interrelationship of the factors. For example, the parties' positions on salary increases were affected by what was offered in retirement benefits or other areas. Each factor was considered in light of what was offered in other areas.

Second, both management and the employees used the old expiring MOU as the starting point for the new round of negotiations. The new MOU would then reflect the mix of old and new benefits produced by the negotiation process. In each case, the new MOU was approved by the employees in an election and was then adopted into the San Diego Municipal Code by the mayor and council. It was a new agreement and replaced the old MOU.

In May of 1996, Mr. McGrory made a presentation to the SDCERS board outlining Managers Proposal I ("MP 1")[1]. The Managers Proposal presented retirement benefit enhancements that the City was in the process of negotiating with its workers together with a proposal to reduce the City's contribution to the pension system to a level below the actuarial required rate. (Exhibit 56 and exhibit 276, pages 6-27.)

The union representatives involved in the MMBA negotiations were kept appraised of Mr. McGrory's effort at SDCERS. (Exhibit 87.) Concerns were raised at SDCERS concerning the propriety of allowing funding at the proposed reduced rate. (Exhibit 276 pages 75-90.) A number of meetings

[1] The court notes that the use of the terms "MP 1" and "MP 2" are capable of different interpretation based on different points in time and context. For example, as used by the parties in this action, the terms refer to both the employee retirement benefit increases by the City and the SDCERS contribution relief. As used in the Gleason litigation, the terms appear to have referred to the SDCERS contribution relief only.

ensued where the proposal was presented, discussed and approvals obtained by the City's outside fiduciary counsel Jones Day, along with SDCERS' fiduciary counsel and actuary. (See, Exhibits 57, 82b, 84, 85, 87, 164 and 276.) Legal advice was obtained which, in part, reflected that under the *Claypool* case, the Board could consider benefit improvements and expense to the employer as factors in the total circumstances surrounding the Managers Proposal. (*See*, *Claypool v. Wilson*, (1992) 4 Cal.App. 4th 646, 676; Exhibit 164 pages 3-6.)

The plan passed the SDCERS board on June 21, 1996. (Exhibit 276 at pg. 148.) Several of the SDCERS board members, including Webster, Torres, Wilkinson, Saathoff, voting in favor of the proposal were city employees whose retirement benefits were improved by the City's enactment of the new benefits.

The testimonial and documentary evidence established the City made the grant of enhanced pension benefits contingent on SDCERS approving the funding relief. (Exhibit 124.) After obtaining approval of the employees and SDCERS board, the mayor and council passed Ordinances 0-18392 and 0-18385, which implemented the increased benefits and the trial Deferred Retirement Option Plan ("DROP") program. Ordinances were passed to implement the MOUs with all the employee groups. (*See*, Exhibits 238, 1111, 1105, 1115, 1119, 1123, and 1130.)

In 1998, a new round of MOU negotiations took place between the City and its employee groups because the MP 1 MOU's were expiring. After going through the meet and confer process, new MOUs were adopted. (Exhibit 1116, 1120, 1124, and 1424.) No evidence was submitted that SDCERS was involved in any way in the negotiation of these MOUs and no evidence was received concerning any allegation of a Government Code section 1090 violation in the passage of these MOUs. In discovery responses, the City did not include the 1998 MOUs in the list of agreements it is challenging in this lawsuit. (Exhibit 1250, p. 4.)

On July 16, 1998, the *Corbett* class action lawsuit against the SDCERS board was filed. (Exhibit 919 and amended action at 920.) The City appeared in the case as a real party in interest. The litigation alleged SDCERS miscalculated the "final compensation" of city workers by excluding from the calculation additional items of compensation such as uniform allowances, vacation allotments, overtime and other benefits the court had required Ventura County to include in its calculation of "final compensation" for deputy sheriffs. These Ventura County benefits were based on the holding of the California Supreme Court in *Ventura County Deputy Sheriff's Assn. v. Board of Retirement of Ventura County Employees Retirement Assn.* (1997) 16 Cal.4th 483. The *Corbett* case was based on the exclusion of these Ventura County benefits from "final compensation" calculations at SDCERS and did not involve allegations of violation of Government Code section 1090 or a challenge to benefits enacted in 1997.

The issues raised by *Corbett* were significant for the City since it affected one of the three components upon which pensions were based. In calculating benefits, the City pension plan relied on three factors. These included the "retirement factor" which represented a percentage of the final compensation, such as 2.25% per year of service. (The "retirement factor" was the factor that received the most attention in the MOU negotiations with the employees.) The other two factors were the years of service and the "final compensation." Multiplying the years of service times the "retirement factor" gave the percentage amount of the "final compensation" the employee received annually in retirement. Anything which could drive up the "final compensation" factor increased the benefit and increased the amount the City should contribute into the pension system.

The City and SDCERS retained David Hopkins, Esq. to represent both entities in the *Corbett* litigation. The San Diego City Attorney's Office was also involved. Mr. Hopkins evaluated what the financial impact would be to the City if the plaintiffs won. The results of his research concerning the

potential downside cost of the litigation were presented to the council at the time the City was considering a possible settlement of the action.

In 2000, Mr. Hopkins and the Deputy City Attorney assigned to the case made a presentation to the City Council and presented the options. The power point used in the presentation is in evidence as Exhibit 923. They presented the results of the analysis and concluded the City faced a downside risk of $743 million if the plaintiffs prevailed in their claims for Ventura County benefits in the lawsuit. (Exhibit 923 page 3.) This would result in an annual increased cost of $75 million to the City and would lower the funded ratio of the pension plan to 68.4%. (*Ibid.*)

They also presented a proposed settlement of the litigation. Rather than increase the "final compensation" to reflect the Ventura County factors, they presented a proposed settlement that would increase the retirement benefits by giving options that focused on increasing "retirement factors" or a set percentage increase to existing benefits for current workers. For the retired, a net percentage increase to the retirement benefit they were receiving was proposed. In return, the employees would give up their right to Ventura County benefits as part of the calculation of "final compensation." This settlement would cost the City $14.4 million annually, as opposed to the $75 million annual cost that would be incurred if the City lost the case. (*Ibid.*). Under the settlement, the funded ratio of the plan would be at 83.7% which was just barely above the MP 1 trigger. (*Ibid.*)

The evidence established the City elected to deal with the *Corbett* challenge to the "final compensation" calculation by generally increasing the "retirement factor." This made sense since many of the MOUs for the employees were expiring in the next year. By settling the case in this way, the City avoided agreeing to increased Ventura County factors in the "final compensation" calculation in settling *Corbett* only to be faced with new demands from employees to increase the "retirement factor" in MOU

negotiations one year later. Thus, the testimony confirmed retirement benefits were increased in the *Corbett* settlement.

The settlement terms became a judgment of the court following class action approval hearings before Judge Robert E. May. (Exhibit 930.) In a preview of things to come, Mr. Gleason spoke out against the continued under-funding of the pension at this hearing. (Exhibit 2176, at pages 5-7.) New MOUs were created with all the employee groups to document the *Corbett* benefit increases. (Exhibits 1117, 1121, 1125, and 1423.) Because of the way the *Corbett* increases were structured, they constituted not only the choice of a new "retirement factor" or a ten percent (10%) increase in benefits over those in effect in 2000 for current employees, but also increased the existing benefits for the already retired by seven percent (7%). The settlement also affected the benefits for DROP participants, those who had purchased service credits, as well as disability pension recipients.

By 2002, the MOUs were again up for renewal. As a result of a declining market following 9-11 and the dot com market collapse, investment returns on the pension trust assets were at the lowest point in many years. The City was also facing increased revenue uncertainty because of State of California revenue withholds from the City.

As a result, in 2002 the City again elected to pursue a strategy of increasing employee retirement benefits while at the same time requesting funding relief from SDCERS. As in 1996, the City Manager received approval of the concept from the Mayor and Council prior to presenting it to the employees and pension board. This time the labor negotiation with the unions under the MMBA did not meet with initial success. On May 13, 2002, the City made its last best and final offers to each employee group. (Exhibits 272, 274, 311 and 282.)

The last best and final offer under the MMBA is essentially the final step in the negotiation process. It constitutes a take it or leave it offer by the public entity to the employees. If not accepted,

there are hearings before the City Council and then the City can impose terms on the employees. In each of these last best and final offers, the City made retirement benefit increases expressly contingent on funding relief from SDCERS. (*See*, Exhibit 273 page 2 para. 3, for language similar to that found in all the offers.) The proposal was accepted on these terms by the MEA and Locals 127 and 145. The contingent nature of the proposal was well known to union officials and it was made known to many of the members. (Exhibit 355.) The last best and final offer was apparently not accepted by the San Diego Police Officer's Association ("SDPOA") and terms were imposed by the City.

City Manager Uberaga designated Bruce Herring as the point person in presenting the MP 2 plan to the SDCERS Board. He made several presentations to the board in June and July of 2002. (Exhibit 276, page 179-197.) Concerns regarding the propriety of the proposal were raised by a number of board members including Mr. Vortman and Ms. Shipione. (Exhibits 65 and 276, pages 179-197.) The concerns covered a wide variety of issues including, but not limited to, whether the board members could approve such a proposal while fulfilling fiduciary duties, whether the pension would be adequately funded and the potential for indemnification of board members by the City from potential litigation exposure (*Id.*)

The City initially wanted the trigger lowered. Under MP 1, it had been set at 82.3%. Under MP 2, the City was proposing it be lowered to 75% while at the same time increasing the rate of contribution to the fund by .5% per year over what it had been under MP 1. However, the under funding would continue.

Although the evidence of the mechanism is not clear, it is apparent that the City was aware prior to the SDCERS meeting of July 11, 2002, that if the efforts to "sell" the 75% trigger reduction failed, an alternative motion would be made by a board member to keep the trigger at 82.3% while allowing the City a multi-year ramp up period to get to the actuarial funding level if the trigger were hit. On July 8,

2002, this proposal was outlined and approved by the City Council in closed session several days before the SDCERS board meeting. (Exhibit 277.)

In fact, the efforts to sell the trigger reduction failed and Mr. Saathoff, a pension board member and the Firefighter's Union President, made an alternative motion to keep the trigger where it was and allow the multi-year ramp up period. It was also subject to approvals from both the pension's actuary and fiduciary counsel. (Exhibit 66, at pg. 33 and 276, at p. 234.) Following this meeting, Mr. Uberraga phoned Ms. Italiano, the president of the MEA, and told her that the City had a deal with its employees and that the action by the pension board was within his authority. The MEA notified its members the new MOU was approved. (Exhibit 331.)

The City went ahead with the process under the MMBA of converting the agreements reached in collective bargaining to new MOUs and implementing provisions in the San Diego Municipal Code. On October 21, 2002, the City Council approved the MOUs with the MEA and Locals 127 and 145. (Exhibit 48.) They also approved union presidential leave benefits. (*Ibid*.)

On November 18, 2002, the City passed an ordinance agreeing to indemnify pension board members in the event they were sued as a result of their duties. (Exhibit 108.) On the same day, the City approved the proposed new funding plan with SDCERS. (Exhibit 109.) Ms. Shipione appeared at the City Council meeting in opposition to the proposal and argued the plan put the funding of the pension system at risk. (Exhibit 285, pages 3-6.) On December 6, 2002, the SDCERS president signed off on behalf of SDCERS on the under funding agreement with the City. (Exhibit 172.)

On January 13, 2003, the *Gleason 1* action was filed against SDCERS, the City and numerous pension board members. This class action complaint filed on behalf of retired workers alleged the funding relief granted in 1996 and 2002 violated the City Charter by allowing the City to contribute at less than the actuarially required level. (Exhibit 961.)

On May 15, 2003, *Gleason II* was filed against SDCERS which alleged the vote to approve under actuarial level funding in 2002 violated Government Code section 1090 and other provisions of California law as the agreement was approved by Board members financially interested in the transaction. (Exhibit 962.) The City was not a defendant in this action.

On June 2, 2003 the *Wiseman* action was filed alleging the practice of City officials appointing delegates to the pension board to serve in their Charter mandated seats was improper. All three cases were consolidated before Judge Patricia Cowett. The City was represented by Mr. Pestotnik from Luce Forward Hamilton & Scripps as well as the San Diego City Attorney's Office.

Settlement negotiations ensued and a proposed resolution was reached; the effect of which was to eliminate the funding relief provided the City by MP 1 and MP 2, and to require the City to contribute funds to the pension and pledge property as collateral for this obligation. (Exhibit 433.) All members of the class were given notice and an opportunity to make objections to the proposed settlement. (Exhibits 789, 790.)

Mr. Morris testified the *Gleason* settlement was intended to dispose of the entire under funding claim relevant to both past employees and current employees. (Exhibit 1176.) It was a non-opt out class action. Mr. Pestotnick confirmed the *Gleason* settlement eliminated the under funding provisions of MP 1 and MP 2. He also testified it did not deal with the benefits enacted by the City. Additionally, it did not entirely eliminate the risk of future litigation. (Exhibit 1224, page 3.) A tactical decision was made to keep the current employees out of the class since they would press for more benefits and impliedly impair the settlement efforts.

This prediction turned out to be accurate as later the *McGuigan* action was filed alleging under funding by current employees who were not included in the *Gleason* class. In response to the *McGuigan* case, the City initially took the position that MP 1 and 2 were eliminated by the *Gleason* settlement and

the plaintiffs' claims were barred by the principles of res judicata because the plaintiffs were in privity with Mr. Gleason. Interestingly, these exact arguments are now being made in this action by Intervenors and are opposed by the City. (Exhibit 1212.) The City's argument in *Gleason* must not have extricated them from the litigation as fairness hearings concerning a proposed settlement in *McGuigan* were ongoing during this trial. (Exhibit 1468.)

III. IS THE CITY ESTOPPED FROM SEEKING TO VOID THE MP 1 BENEFITS AS A MATTER OF LAW BY THE *CORBETT* JUDGMENT?

The *Corbett* judgment was entered on May 17, 2000. (Exhibit 930.) Intervenors challenge the City's ability to set aside the MP 1 benefits because of the intervening *Corbett* judgment. They contend that the MP 1 benefits no longer exist after *Corbett* since the *Corbett* benefits constituted a new retirement benefit for City employees. Thus, any effort now to have the MP 1 benefits declared void would render the *Corbett* judgment a nullity.

The City has stated it is not attempting a collateral attack on the *Corbett* judgment. The City has filed verified discovery responses in this action indicating that the "City is not challenging *Corbett* in this action." (Exhibits 779, page 58, and Exhibit 1260, page 63.) The City's position is that *Corbett* represents an incremental increase in MP 1 benefits and the court can set aside the underlying benefits and keep the *Corbett* increment intact to be applied to whatever benefits exist after this trial.

In general, the same rules apply to interpretation of a judgment as any other contract. (*Colvig v. RKO General, Inc.*, (1965) 232 Cal.App.2d 56, 65; Civ. Code, §1638.) The analysis begins with the terms of the *Corbett* judgment itself. The judgment indicates on page 5, lines 21-27 (all references are to bates number) that the plaintiffs will receive certain increased retirement benefits or disability retirement benefits in exchange for giving up claims concerning the definition of compensation. The judgment then sets forth the benefit increases for the different classes of employees and former employees, in many cases keyed off the dates of June 30, 2000-July 1, 2000.

In sections B and C of the judgment, the benefit changes for safety and general members employed on or after July 1, 2000 are set forth. The employees are given an option: they can accept a new "retirement factor," or a 10% increase in benefits calculated using the retirement factors in effect as of June 30, 2000. (Exhibit 930, pages 10 and 11.) The employees were required to pay an increased amount into the system to fund their share of the increased benefits. (*Id*.) Interestingly, the benefits in effect at the time of the *Corbett* judgment arose under the 1998 MOUs and not the 1996/1997 MOUs alleged to be part of MP 1. (*See*, footnote 2 below.)

Those already retired, disabled, deferred or beneficiaries as of July 1, 2000, were to receive a seven percent (7%) increase in their benefits. (Exhibit 930, page 8.) The retroactive portion (obviously calculated on their then-existing benefits) was to be paid in lump sum and then-future benefits would go forward increased 7% over what they were at the time of the judgment. Legislative members received a 10% increase in benefits calculated using the benefits in effect on June 30, 2000. (Exhibit 930, page 11.) The 7% and 10% increases were also applied to DROP accounts before and after July 1, 2000. (Exhibit 930, page 12.) The judgment would also affect past and future purchase of service credit since that was a component in determining the years of service portion of the retirement benefit calculation both before and after June 30/July 1, 2000.

The court's role is to determine the intention of the parties at the time the *Corbett* settlement was reached. As noted in *Sawyer v City of San Diego*, (1956) 138 C.A. 2d 652, 662:

> [A] contract entered into between a governmental body and an individual is to be construed by the same rules which apply to the construction of contracts between private persons, and in construing a contract, the primary object is to ascertain and give effect to the intention of the parties as it existed at the time of contracting. The intention of the parties must, in the first instance, be derived from the language of the contract.
> The words, phrases and sentences employed are to be construed in the light of the expressed objectives and fundamental purposes of the parties to the agreement. In M.F. Kemper…, it is held that the California cases uniformly refuse to apply special rules of law simply because a governmental body is a party to a contract." (Citations omitted.)

Sawyer sets forth several rules of importance to the analysis in this case. First, no special rules of interpretation apply because a governmental entity was a party to the settlement agreement and resulting judgment. Second, the intention of the parties is to be derived from the language of the agreement itself. Finally, the intention should be determined as it existed at the time of contracting.

As set forth in the *Corbett* judgment, the intention in settling the case was to resolve the claims relating to Ventura County factors in exchange for increased retirement benefits. (Exhibit 930 at page 5, lines 21-27.) The settlement either created a new percentage "retirement factor" (Exhibit 930, page 10 lines 13-14, and page 11, lines 8-10) or a percentage increase in benefits. (*Id*. at page 8, lines 8-19; page 10, lines 15-18; page 1111, lines 11-14; and page 12, lines 5-16.)

For current safety and general members, the option plainly states that if they choose the 10% option, the amount that percentage applies to is the "retirement calculation factor in effect on June 30, 2000." The *Corbett* settlement and judgment were entered in May of 2000 and it repeatedly refers to benefits in effect at that time. For current employees, these were the benefits based on the ordinances implementing the MOUs enacted in 1998. (Exhibits 1116, 1120, 1124 and 1422.) Other sections of the judgment apply a percentage increase to existing benefits.

The position of the City in this litigation is not supported by the evidence of the intent of the parties from the *Corbett* judgment itself. The judgment clearly uses the benefits in effect as of June 30, 2000, as the basis for the computation of the "new" *Corbett* benefits. If the City's interpretation of *Corbett* is correct, one would have to postulate that the parties agreed upon increases of 7% and 10% with no reference point. Taking the City's interpretation of *Corbett* to the extreme, the 7% and 10% increases would apply to zero since the underlying benefits are void. This clearly contradicts the evidence of the intention of the parties from the judgment itself, as well as the City's own witnesses who testified the case settled for an increase in retirement benefits.

The City's alternative position is that the *Corbett* settlement taken in the form of increments could be applied to whatever benefits resulted following proceedings before the City Council after this court declares the underlying benefits void. However, this position means the court must ignore those portions of the *Corbett* judgment which give current employees an option to take a new increased percentage "retirement factor" which is stated in terms of a new percentage and not a fractional increase of a percentage. Additionally, one would have to ignore the fact that the benefits for current workers are based on calculations referring to the June 30, 2000 date. There is no doubt what benefits were in effect as of June 30, 2000, at the time the *Corbett* judgment was entered.

While the 7% increase for the already retired does not specifically mention June 30, 2000, the judgment had to be based on the benefits the retired were already receiving at the time to make the judgment internally consistent and to accord with the surrounding circumstances. The past component of the settlement to the already retired was based on benefits existing as of the date of the judgment, and to conclude the future benefits were not, is not logical under the circumstances. Past employees, who were not still paying into the system, received a smaller increase in the judgment compared with current employees still paying into the system and, to be consistent, both would have to be based on the then current benefits.

Further, one would have to postulate that at the time the parties on all sides agreed to new *Corbett* benefits, they did so with no understanding of the cost and economic benefit of the new benefits. In other words, if the increases do not apply to and modify the benefits in existence as of June 30/July 1, 2000, what are they? What did the City give up and at what cost, and what did the employees receive? This conclusion is contradicted by Mr. Hopkin's power point which refers to exposure of $743 million based on current benefits. The proposed $14.4 million annual cost of the settlement referred to the

increase in costs of the new benefits over that of the old. These were the circumstances in existence in 2000.

The most reasonable interpretation of the judgment that accords with the wording of the judgment itself and the facts in existence in May of 2000 is that new retirement benefits were created in *Corbett*. These benefits are not subject to challenge in this litigation charging illegality in the enactment of benefits in a prior MOU in 1996/1997. To the extent such benefits survived the enactment of the 1998 MOU, they no longer existed after the Corbett judgment.

Thus, any claims based on pre-*Corbett* benefits have been merged in the *Corbett* judgment. (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1766, 1770.) The benefits in effect at the time of, and underlying, the *Corbett* judgment, including benefits funded under MP I, cannot now be set aside because doing so would invalidate the *Corbett* judgment. Accordingly, the City is estopped from pursuing claims which seek to invalidate such benefits. (*See Sawyer v. The City of San Diego* (1956) 138 Cal.App.2d 652, 662; *City of Coronado v. City of San Diego* (1941) 48 Cal.App.2d 160, 172.)

The City is estopped regardless of whether or not the parties raised issues in *Corbett* of the legality or validity of existing benefits or intended to litigate such issues. (*Spray, Gould & Bowers v. Associated Int. Ins. Co.* (1999) 71 Cal.App.4th 1260, 1267 (estoppel may arise from silence where there is a duty and an opportunity to speak).) Intervenors' special defense based on the *Corbett* judgment is sustained. Benefits enacted by the *Corbett* judgment cannot be nullified in this action.[2]

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[2] The 96-97 MP 1 MOUs were no longer in effect at the time of the Corbett judgment. They had been supplanted by the 1998 MOUs. The 96-97 MP 1 MOUs are the ones alleged to be tainted by the improper vote by interested Directors of SDCERS on contribution relief. The evidence at trial was entirely consistent with the case law which confirms that each new MOU is a new contract with terms and conditions negotiated in light of the others. (*Sonoma County Organization of Public Employees, et. al. v. County of Sonoma,* (1979) 23 Cal. 3d 296, 308-309.) These 1998 agreements were not listed in discovery responses as challenged in this litigation. (Exhibit 1250 p. 4.) Each MOU is a stand alone agreement under the MMBA. While terms from the old MOU can be incorporated in the new MOU, the contract between the parties then becomes the new MOU. The grant of benefits by the City to its' employees challenged by the City as part of MP 1 were no longer in effect (except for those who retired under MP 1) since the new 1998 MOUs were in effect by the time the Corbett judgment was entered. The City cites no authority for the proposition that the continuation of an earlier benefit from a previous MOU that is incorporated in a new MOU after a new round of the meet and confer process under the MMBA can be

IV. DOES THE 5ACC PRESENT A JUSTICIABLE CONTROVERSY BETWEEN THE CITY AND NECESSARY PARTIES?

The City's 5ACC sets forth causes of action against SDCERS to set aside benefits granted by the City to its workers through what are now called MP 1 and MP 2. Prior to trial, the City and SDCERS settled their differences regarding the allegations in the 5ACC and SDCERS agreed to be bound by whatever decision the court made on the City's challenge to the benefits. As a result, SDCERS took no role in phase one of the trial. By settling the claim in this fashion and not taking a role in defending benefits, SDCERS, cannot be said to be representing the absent parties as argued by the City in the Proposed Statement of Decision at pages 36-37. SDCERS played no role in this portion of the dispute and clearly is not representing absent parties by litigating to protect benefits.

Intervenors consist of the unions for three of the five City employee groups and the *Abdelnour* group of 194 current and former employees. The evidence at trial established that as of October 26, 2006, there were 17,638 beneficiaries of SDCERS. (Exhibit 1437.) The evidence established there are 5,327 retirees (including active DROP participants) and 1,068 beneficiaries who are receiving benefits through another in some fashion. There are approximately 8,997 active employees and 1,768 former employees who have left funds in the system but have not yet retired. (*Ibid*.)

The evidence and law established the unions represent only current employees under the MMBA. (Gov. Code, §§3501(d), 3505(a).) In addition, not all current employees are members of the unions even if they are in an employee group covered by union collective bargaining representation. There are also a couple hundred supervisory city employees who are not represented by the unions. The

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set aside based on a Gov. Code § 1090 violation affecting the earlier agreement but not the current one. Instead, the City argues the previous vote must go through a confirmation or ratification process like in the Stallings case described by Mr. McGrory. However, such a procedure is followed to save or validate the original contract. Here the contracts, (the 1996/97 MOUs) were fully executed and expired, and new ones were negotiated without any involvement of SDCERS or its interested directors. Thus, it does not appear consistent with the MMBA to set aside new current agreements enacted without a § 1090 violation because the previous lapsed MOUs had this alleged problem.

legislators are not represented by the unions and are not in the case. The Deputy City Attorneys have their own union and have not appeared in this action.

The San Diego Police Officer's Association ("SDPOA") has not intervened in this action and has filed its own action in federal court. The attorneys for the SDPOA have filed a Notice of Divestiture in this action listing over 1,500 names of individuals they contend are not before the court in this action. (Exhibit 1438.)

The evidence established that 194 individuals are before the court in the *Abdelnour* group, and for purposes of this argument, another approximate 8,000 individuals would be before the court through involvement of their unions. This is out of a total of 15,000 who would be affected by the court granting the City the ultimate relief sought under both MP 1 and MP 2. Even limiting the action to the post *Corbett* beneficiaries, there are still 2,706 who have retired since 2000 and are not represented except to the extent some may fall into the *Abdelnour* group.[3] (Exhibit 1437.) There are also the police and other unrepresented individuals who are affected. Thus, at best, even assuming for purposes of argument, that all current employees of the MEA, Locals 127 and 145 are before the court, there are over 4,000 individuals affected by this case who are not before this court and have not been given legal notice their individual retirement benefits are at risk in this litigation.

Code of Civil Procedure section 389 sets forth the statutory standard for determining the effect of absent necessary parties. It provides as follows:

> [A person] shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring . . . inconsistent obligations. (Civ. Proc. Code, § 389(a).)

The evidence established that the identity and location of SDCERS participants and beneficiaries are known. SDCERS keeps records of its retirees and beneficiaries and the City knows who and where its current employees are located. All beneficiaries are subject to notice. In both of the previous cases involving pension benefits (*Corbett* and *Gleason*), notices concerning the action were served on the current and/or former city employees giving them notice of the litigation and the opportunity to participate. (Exhibits 789, 790 and 1128.) Notice and an opportunity to be heard are the very hallmarks of due process.

The threshold determination then is whether the absent parties have an interest in the subject of the action. The interest that a current or former employee or retiree (or his/her beneficiary) has in a particular retirement benefit is an individual interest. (*See, Gibson v. City of San Diego* (1945) 25 Cal.2d 930, 937 (statutory pension provisions become part of contemplated compensation for services and thus a part of contract of employment itself).) Contractual vested pension rights in the MOUs inure to the individual employees and enjoy constitutional protection. Pension rights are part of compensation for services rendered, vest upon acceptance of employment, and are earned as the employee performs services. (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-53.) Thus, city employees, retirees and beneficiaries have individual due process interests in protecting their pension benefit rights.

The evidence has established that there are hundreds, if not thousands, of unrepresented SDCERS participants and beneficiaries who would be affected by a decision granting the relief sought by the City who are subject to service of process and should be joined as parties. The disposition of the City's claims to invalidate their benefits in their absence will, as a practical matter, impair their ability to protect any interest they may have or claim in current or future retirement benefits. Proceeding without

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[3] As noted below some number of the individuals who retired since 2000 would be part of the *Gleason 1* class and not subject to an action to set aside benefits as discussed in the *Gleason* section below. However, the evidence gives no precise indication of how many employees retired between the *Corbett* judgment and the *Gleason* settlement.

their participation will leave SDCERS and the City subject to the substantial risk of incurring multiple or inconsistent obligations as a result of the participants' claimed interests.

Under Code of Civil Procedure section 389(a), the court is duty-bound to order that the participants and beneficiaries be made parties as long as the City seeks relief which may impair their pension benefit rights. (*Tuller v. Superior Court* (1932) 215 Cal. 352, 355 (court's nondiscretionary duty arises once court identifies an absent necessary party.) When persons who are most likely to challenge a request for declaratory relief are not before the court, any opinion rendered is advisory and not within the courts function or jurisdiction. (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 860; *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1081.)

Although the issue has been raised before in the litigation, it was not until trial that the evidence of the numbers and scope of the unrepresented was clearly presented by the parties. The court may properly defer the decision until the relationships of the missing parties are established when the case is further advanced. (*Union Carbide Corp. v. Superior Court*, (1984) 36 Cal.3d 15, 22.)

There is also a significant issue as to whether the individual active union members in the MEA, Local 127 and Local 145 are before the court. Although Intervenors have the capacity to sue and be sued in their own name under Code of Civil Procedure section 369.5(a), the unions have standing, and have participated in this action, specifically to enforce their collective bargaining agreements with the City. (*See* Cal. Labor Code § 1126.) While employees in bargaining units represented by Intervenors are bound by the terms of the MOUs negotiated by their unions, the unions nonetheless cannot bargain away nor waive the employees' individual constitutional rights. (*Phillips v. State Personnel Board* (1986) 184 Cal.App.3d 651, 660, disapproved on another ground in *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1123, fn.8.) Contractual vested pension rights in the MOUs inure to the individual employees and enjoy constitutional protection. As noted above, pension

rights are part of compensation for services rendered, vest upon acceptance of employment, and are earned as the employee performs services. (*Kern, supra.*)

The appearance by the unions as plaintiffs in intervention is not the equivalent of appearance of their individual members as parties. Labor unions are separate legal entities from their members. [I]ndividual members of . . . unions are not in any true sense principals of the officers of the union or of its agents and employees so as to be bound personally by their acts under the strict application of the doctrine of respondeat superior." (*Marshall v. Int'l. Longshoremen's Union* (1962) 57 Cal.2d 781, 784.) "The member and the association are distinct. The union represents the common or group interests of its members, as distinguished from their personal or private interest." (*DeMille v. American Fed. of Radio Artists* (1947) 31 Cal.2d 139, 149.)

The City's agency theory does not cure the issue since a member of an unincorporated association does not consent to incur any obligation of the association by reason of joining or becoming a member. Even if liability for an obligation of the association were argued to extend to association members, before any liability may be assessed against a member of an unincorporated association, service of process on the individual in his or her individual capacity must be made. (*Barr v. United Methodist Church* (1979) 90 Cal.App.3d 259, 272-73, *cert. denied*, 444 U.S. 973, *reh. denied*, 444 U.S. 1049.) A judgment *in personam* may not be entered against one not a party to the action, and such a judgment is void. (*Fazzi v. Peters* (1968) 68 Cal.2d 590, 594.)

There are additional problems created by the nature of the relief sought by the City in this action which makes the unions inadequate representatives for all participants whose benefits may be affected. For example, the City seeks to set aside some benefits, but not others (*e.g.*, 2.5% at 55 for General Members on a "going forward basis" [Response No. 434, Exhibit 779-68, 1260-73]), making some participants, including some union members, adverse to others. The unions while representing the

collective bargaining agreement cannot adequately represent members who face different effects because of the tactical choices of the City in the litigation.

The City proposes several ways to attempt to cure the problem created by the failure to join the employees and retirees in this litigation. Most of the proposals the City offers relate to the application of Code of Civil Procedure section 389(b), an analysis the court does not get to if the affected individuals are known and subject to service of process. First, the City proposes the court tailor the requested relief so it only affects the litigants before the court. Alternatively, the City proposes the court give notice after the trial of the voiding of the individuals benefits and then giving them an opportunity to contest the result.

Under basic principles of due process, the notice and opportunity to be heard must occur before the definitive decision by the court, and not after it is made. In this case, the requested relief is broad and seeks outright voiding of the benefits at issue. It would be incongruous if the court were to hold that benefits were void, but not as to those who were not served in the case. There would certainly be a risk of inconsistent rulings if the non-joined then litigated the case repeatedly as the City and SDCERS attempt to make sense of an order which declared benefits void, but only applied it to certain classes of unnamed individuals who are union members. Additionally, based on the evidence submitted, the court is unable to fashion a comprehensible limited order as the City requests, because the names of the beneficiaries who are in the case under the assumptions the City requests have not been identified with the exception of the 194 *Abdelnour* plaintiffs.

SDCERS' participants are necessary parties. Intervenors have met their burden of proof under Code of Civil Procedure section 389(a) that individuals with substantial interests which may be impaired by invalidation of pension benefits sought by the City are not before the court. (*Silver v. Los Angeles County Metropolitan Transportation Authority* (2000) 79 Cal.App.4th 338, 350 (employees are

indispensable parties in action for writ of mandate and declaratory relief seeking rescission of public agency's payment of employees' share of Social Security contributions on the ground that such payment was an illegal gift of public funds, because agency might be subject to inconsistent judgments later in actions by employees who were not parties).) SDCERS' participants can be made parties; therefore, the court does not reach Code of Civil Procedure section 389(b). In the exercise of discretion, the court finds individual notice to participants whose benefits are at risk in the litigation is required by the principles of due process. (*Weil & Brown, Cal. Prac. Guide: Civil Procedure Before Trial* (The Rutter Group 2006) ¶2:192.) Whether the City chooses to proceed with service in light of the final application of this decision is discussed below.

V. CAN THE CITY PURSUE A CLAIM SDCERS VIOLATED THE DEBT LIMIT LAWS?

In paragraphs 24-27 of the 5ACC, the City sets out the duties of the SDCERS board to run the pension system. In paragraphs 30 and 31, the City alleges the debt limitations in the California Constitution and City Charter apply to SDCERS. In the first and second causes of action, the City alleges MP 1 and MP 2 violate the debt limit laws and prays for declaratory relief against SDCERS for these violations.

The evidence and the City Charter and California Constitution define the duties and responsibilities of SDCERS. It is the administrative body for the pension system created by the City. (Exhibit 1103.) SDCERS' responsibility is to administer the system and pay the benefits the City sets. It invests the pension assets and provides annual accountings. It does not set benefits and has no power to either set or rescind benefits. The power to create or modify benefits rests with the City. (Exhibit 1101, 1102.)

California Constitution, Article XVI, section 18, sets limitations on indebtedness or liability for each "county, city, town, township, board of education, or school district." San Diego City Charter section 99 sets limits on indebtedness or liability which the City of San Diego may incur. (Exhibit

1180-40-41.) Because SDCERS is a public retirement system [City's Fifth Amended Cross-Complaint ("5ACC"), Exhibit 796, para. 3] and is not a county, city, town, township, board of education, or school district and is not the City of San Diego [Exhibit 1103-3-4, Art. IX, sec. 141], these sections do not apply to SDCERS. As has been previously noted by this court, if one construes these provisions to conclude they are applicable to SDCERS because it is part of the City of San Diego to make the debt limits applicable to it, then the City is suing itself for relief. This does not constitute an appropriate justiciable controversy under the unique facts and circumstances of this case.

The benefits the City complains of in this action were created by the City and its employees in the MOU process described in detail above. SDCERS has no power to create these benefits, has no power to modify these benefits and has no power to rescind these benefits. What the City has proven is that the City entered into agreements with its employees to raise benefits on the condition that SDCERS grant contribution relief. The only portion of the transaction that involved an action that SDCERS had the power to implement was the agreement to allow the City to fund the pension plan at less than the actuarially required rate.

Under the City's theory, MP 1 and MP 2 were each a single multi-party transaction in which the City granted its employees new benefits in labor negotiations in exchange for agreement by the employees to provide their labor to the City. The employees also agreed to support the City's efforts to obtain contribution relief from SDCERS. SDCERS then granted the City contribution relief. The City has not sued the parties who signed the contracts (MOUs) granting the benefits which created the alleged debt limitation violation. Instead, the case is against SDCERS which did not sign the contracts, or create the benefits, and which has no power to rescind the benefits.

If any indebtedness in excess of the liability limits exists in this case, it is based on the obligation the City incurred to its employees to pay the benefits. The responsibility of SDCERS in the transaction

was to allow the under funding. Yet, the under funding allowed by SDCERS has already been set aside in the *Gleason* settlement. (Exhibit 433.) Therefore, the portion of the transaction that involves SDCERS and its alleged contribution to the debt has already been undone.

SDCERS does not stand in the shoes of the employees with control over the offending benefit contracts. Most of the authority cited by the City has the party who contracted with the entity and obtained the benefit subject to the court order abrogating the contract that offends the liability limitation. The cases are distinguishable because SDCERS does not stand as a substitute for the employees. The portion of both MP1 and MP 2 SDCERS had control over (contribution relief) has already been eliminated. Hence, any remedy the court could order against SDCERS based on its actions and within its power or control has already been implemented.

As a result, the City's claim in the 5ACC that SDCERS violated Constitutional Article XVI, section 18 and/or Charter section 99 does not give rise to a justiciable controversy since the real parties are not before the court or subject to the allegations in the causes of action. The only possible offending actions attributable to SDCERS have already been rescinded. (*Pettinger v. Home S & L Assn.* (1958) 166 Cal.App.2d 32.)

VI. ARE THE CITY'S EFFORTS TO DECLARE MP 2 VOID BARRED BY THE *GLEASON* SETTLEMENT AND LITIGATION?

A. Intervenors' special defense that the *Gleason* judgment bars the remaining causes of action in the City's 5ACC because the City did not file these causes of action as a compulsory cross-complaint in *Gleason.*

Intervenors allege that if the court ordered joined the absent, but necessary, participants from *Gleason I* in this action, the *Gleason* settlement and judgment would bar the City's claims against such individual participants in this action under the doctrine of res judicata because the City's claims in this action would have been the subject of a compulsory cross-complaint in *Gleason I.* According to this argument, the claims against all members of the *Gleason I* class (all retirees as of the date of settlement,

July 12, 2004) would be barred. Intervenors also attempt to apply this argument to all pension beneficiaries, even those who did not participate in *Gleason I,* without citing any authority for such a wide ranging application.

The City argues the former employees who were adverse parties in the *Gleason I* class are not parties to this action. Instead, the City's causes of action in the 5ACC are against SDCERS. The employees, including former employees, whose benefits are at risk, are the real and necessary parties. The City cannot, on the one hand, contend the individuals are not in the case and the defendant is SDCERS to avoid the compulsory cross complaint bar, while on the other hand, and seek relief which consists of the voiding of those very individuals' retirement benefits. The individuals whose benefits are at risk should be joined as parties to this action, if a viable claim could be stated against them. Once they appear, the compulsory cross-complaint issue arises from the prior *Gleason I* litigation.

A party against whom a complaint is filed and served must assert in a cross-complaint any related cause of action he or she has against the plaintiff at the time of filing the answer or be precluded from asserting the related cause of action in any other action against the plaintiff. (Code Civ. Proc., §426.30(a).) A related cause of action for purposes of the compulsory cross-complaint rule is one which arises out of the same transaction, occurrence, or series of transactions or occurrences. (Code Civ. Proc., §426.10.) The bar arising from the failure to assert a compulsory cross-complaint applies to related causes of action regardless of whether such causes of action were actually litigated or decided in a prior action between the parties. (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1156-1157.)

Gleason I included a plaintiff class of retirees and former employees whose pension benefits were funded under MP I and MP II, with SDCERS and the City as defendants. (Ex. 961.) The plaintiffs sought declaratory relief and damages based on allegations that, in adopting MP I and MP II, the City and SDCERS had violated various laws, breached their fiduciary duties, and rendered the pension plan

"actuarially unsound," thereby unconstitutionally impairing plaintiffs vested contractual rights.

The City's 5ACC alleges that MP I and MP II and all benefits funded in connection with them are illegal and void because certain SDCERS Board Members violated Government Code section 1090 when approving the MP I and MP II funding proposals and because the funding violates debt limit liability laws. In order to place the benefits in issue, the City's 5ACC is premised on allegations that MP I and MP II constituted a "single integrated transaction" with MOU's and legislation under which increased retirement benefits were traded for under funding the Retirement System and that, under Government Code section 1092, the resulting benefits are void *ab initio*.

The premise of the City's argument to reach the benefits is that the vote of the City Council to increase benefits is part of the same transaction as the vote of the pension board to allow the under funding. (*See*, 5ACC, paragraphs 34 and 42.). If they were not part of the same transaction, then the vote by the City Council to increase benefits would not be subject to the remedies under Government Code section 1092 since the allegations of financially interested decision makers in the 5ACC all relate to the SDCERS board and not the City Council. As noted in this decision, the City produced extensive evidence in phase one of the trial that shows the City's grant of benefits in MP 1 and MP 2 were contingent upon the grant of funding relief by the SDCERS board.

The Court finds, pursuant to the City's theory in this case and the evidence in this trial, that the claims to invalidate benefits arise out of the same transactions as were in issue in *Gleason I* and were, therefore, compulsory cross-claims in *Gleason I*. The City did not file a cross-complaint in *Gleason* to challenge the legality or validity of the pension benefits enacted as a part of the MP I and MP II funding agreements. The City elected not to challenge these benefits and instead asserted an affirmative defense that plaintiff class had received all payments and benefits to which its members were entitled and had not sustained any damage or harm cognizable under California law. (Exhibit 1434-4, ll. 4-7.)

The City's failure to assert a cross-complaint against the plaintiffs in *Gleason I* challenging the benefits bars litigation of such claims against those parties here. *Gleason* is res judicata as to those *Abdelnour* plaintiffs and all other participants who were members of the *Gleason I* plaintiffs' class. The stipulation between the City and SDCERS at the start of the trial further recognizes that the 5ACC is, in reality, a claim by the City against all of its employees and retirees. Because the City reaches the benefits as a legal matter only through its allegations that they constitute a "single transaction" with the MP I and MP II funding agreements and are, therefore, void *ab initio*, and/or that the benefits as a whole violate debt liability limits, the City is bound by the principles of res judicata and the claims against the *Gleason I* class members are barred as a matter of law. All issues which were or could have been litigated in *Gleason* were merged in the settlement and judgment and are conclusive as to this action. (Ex. 783; *Johnson v. American Airlines* (1984) 157 Cal.App.3d 427, 431 (court-approved settlement pursuant to final consent decree in federal class action binding on class members); Code Civ. Proc., § 1908 (parties to a proceeding cannot question the conclusiveness of the judgment as to any matters litigated or litigable).)

Accordingly, the court finds Intervenors' carried their burden of proof and established the *Gleason* judgment bars the remaining causes of action in the City's 5ACC against the members of the *Gleason I* class in their entirety. If the court were to order the joining of the members of the *Gleason I* class as necessary parties to this action, it would be an idle act, as the claims against them would be subject to dismissal as set forth herein. (Code Civ. Proc., § 1061). The court declines to extend this ruling to non-parties to the *Gleason I* settlement as requested by Intervenors.

B. Intervenors special defense that *Gleason II* bars the remaining causes of action in the 5ACC because the City was in privity with the plaintiff in *Gleason II*.

Intervenors argue the doctrine of res judicata applies as to MPII because the Government Code section 1090 claims were litigated in *Gleason II* the Mr. Gleason, a party Intervenors allege is in privity

with the City. Specifically, Intervenors argue that in *Gleason II*, plaintiff Gleason sued in his capacity as a resident of the City of San Diego to void MP2 based on a Government Code section 1090 theory. Intervenors cite *Gates v. Superior Court* (1986) 178 Cal.App.3d. 301, 307-308, for the proposition that claims seeking to vindicate a public right may not be re-litigated by other offended members of the public or parties with standing to sue. Gates was a taxpayer action against individual police officers to recover funds spent on allegedly illegal intelligence gathering. The court held the action was barred by the settlement of prior actions related to the same activities. Even though the new action sought a different remedy from the prior settled actions, the court held it was based on the same primary right violated, and that the parties were therefore in privity.

Under the proper circumstances, a judgment is res judicata and conclusive not only against parties to the judgment and their successors in interest by title, but also those who are in privity with the parties. (See, *Teitelbaum Furs, Inc. v. Dominion Ins. Co*. (1962) 58 Cal.2d 601; *Bernhard v. Bank of America Nat. Trust & Savings Ass'n* (1942) 19 Cal.2d 807; *Marie Y. v. General Star Indem. Co*. (2003) 110 Cal. App. 4th 928; *Rynsburger v. Dairymen's Fertilizer Co-op., Inc*. (1968) 266 Cal. App. 2d 269.) Privity can exist where there is such an identification in interest of one person with another as to represent the same legal rights. (See, *Zaragosa v. Craven* (1949) 33 Cal. 2d 315; *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal. App.4th 82; *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc*. (2002) 102 Cal. App. 4th 765.)

Application of due process principles to the concept of privity requires that for privity to exist, there must be both an identity or community of interest coupled with adequate representation between the plaintiffs in the succeeding action and the losing party in the first action. (See *Garcia v. Rehrig Intern., Inc*. (2002) 99 Cal. App.4th 869; *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n* (1998) 60 Cal. App.4th 1053; *Lewis v. County of Sacramento* (1990) 218 Cal. App. 3d 214.)

Moreover, the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication. (See *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal. App.4th 282; *Garcia v. Rehrig Intern., Inc., supra*; *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n, supra*; *Lewis v. County of Sacramento, supra*.) In the final analysis, the determination of privity depends upon the fairness of binding a party with the result obtained in earlier proceedings in which the party did not participate. (See *Rodgers v. Sargent Controls & Aerospace, supra*; *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal. App.4th 784; *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n, supra*.)

The *Zinzun* decision cited by the City is an unpublished decision, as are the majority of the cases that reference the *Gates* decision. However, *Gates* is distinguishable from this case. Because suits under Code of Civil Procedure section 526(a) are brought by taxpayers suing in a representative capacity, judgments in representative taxpayer actions are binding on all other taxpayers. (*Gates, supra*, at 307.) Contrary to the *Gates* action, *Gleason II* was filed against SDCERS only, alleging violations of Government Code section 1090, and was filed on behalf of Mr. Gleason as an individual under Government Code section 91003. He did not plead that he was acting on behalf of the taxpayers and the complaint and the settlement agreement do not refer to Code of Civil Procedure section 526(a). (See Exhibits 433 and 962.)

Current employees were not included in the class in *Gleason I*. The plaintiff class in *Gleason I* had no interest in rescinding benefits. In fact, their interest was the opposite. Mr. Gleason in *Gleason II* clearly had no interest in rescinding pension benefits as he was a benefit recipient and was suing to improve the funding of the pension plan. Thus, the court finds there was not sufficient identity of interest with Mr. Gleason as an individual in *Gleason II*, with the City in this action to reach a

conclusion Mr. Gleason represented the same legal rights as the City pursues in this action. Thus, *Gleason II* does not bar the City's claims against MP 2.

VII. DOES THE 5ACC PRESENTS AN ACTUAL AND JUSTICIABLE CONTROVERSY UPON WHICH THE COURT CAN RENDER A MEANINGFUL, CONCRETE AND SPECIFIC DECREE?

Intervenors have challenged the nature of the relief the City proposes in this action claiming it is not properly exercisable by the court under its equitable powers. They point out the City has asked for several different types of relief from the court at different times. The 5ACC seeks a judicial determination that MP 1 and MP 2 are illegal and void. (Exhibit 796 pages 27-28.) In discovery responses and in prior arguments to the court, the City has argued a special master should be appointed to determine the practical effects of rescinding the ordinances that created the "illegal" benefits. (Exhibit 1260 pages 53-58 and 61-63.) At trial, the City has asked the court to declare the benefits void, stay the matter for 90 days and refer the matter back to the City Council for further proceedings to resolve the outstanding claims. (See, trial transcript 10/31 page 32:6-24 and 35:26-36:4.) Finally, Intervenors also point out in discovery responses that the City has indicated it does not seek to set aside the 2.5% at 55 "retirement factor" granted general members under MP 2 on a going forward basis. (Exhibit 779 No. 434 and 1260 No. 434.) This is a large part of the MP 2 benefits.

For its part the City has cited the case law where Government Code section 1090 violations have been found and the remedy is a declaration the offending agreement is void. The contract is then either rescinded or sent back to the public entity for reconsideration with the entity taking appropriate action to remove the 1090 problem.

A declaratory judgment is intended to consist of an authoritative statement of legal relationships at issue between the parties to an actual controversy. The declaratory judgment "must decree, not suggest, what the parties may or may not do. [Citations.]" (*Selby Realty Co. v. City of San*

Buenaventura (1973) 10 Cal.3d 110, 117; Accord. *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170-171.) The declaratory judgment has the force and effect of a final judgment. (Cal. Civ. Proc. § 1060.) The rendering of advisory opinions falls outside the functions and jurisdiction of the court. (See *Younger v. Superior Court* (1978) 21 Cal.3d 102, 119-120.)

The City cites no authority for appointing a special master to do the fact finding and make decisions or recommendations. (An Evidence Code section 730 expert would be appointed before trial.) This is the duty of the court assuming adequate evidence to make the necessary findings is presented at trial. Declaring the benefits void, staying the case for 90 days and having the parties appear before the City Council raises the obvious question: What if the parties do not resolve their differences at the council? What will the court do when the stay expires? The City's proposal for a validating action will not solve the problem as issues concerning the refunding of the increased contributions to the pension plan instituted at the same time as the benefits needs to be taken into consideration. The evidence necessary to do such an analysis has not been provided to the court. However, these difficulties may be ameliorated by service and joinder of the remaining beneficiaries whose benefits are at risk in the litigation as discussed below.

The application of this decision to the facts and circumstances of the case does impact the City's claims in the 5ACC and makes the analysis somewhat different than as argued by the parties. The *Corbett* judgment removes MP 1 from the case. *Gleason 1* removes claims as to MP 2 against the settling class members from the case. The evidence before the court is that the City is not seeking to set aside the 2.5% at 55 benefits granted general city workers in MP 2 on a going forward basis. (Exhibit 779 No. 434 page 68 and Exhibit 1260 No 434.) Therefore, one would presume the remaining claim relates to the time period between July 2002 and the July 2005. The City did not amend this response or submit evidence of a different intention. Additionally, the changes to the safety worker benefits under

MP 2 were of less significance than was done in MP 1, or under *Corbett.* (*See*, for example, Local 145's MOU in 2000, Exhibit 112 at page 17, item A; and 2002 MOU for Local 145 at page 2 item 1).

Consequently, unless the City seeks to set aside the changes to the retirement benefits of safety workers under MP 2, or other aspects of MP 2 for general workers, it appears the majority of the remaining viable claims under the City's theories would be against the general members who retired between July of 2002 and July of 2005. (Current general employee members would not be affected since they will not obtain a calculation of their "retirement factor" until they retire and since the City is not challenging 2.5% at 55 on a going forward basis such a ruling would not affect them.)

Given that many of these individuals would have been in the *Gleason 1* class (i.e. retirees up to July 12, 2004); logic dictates there is a definable group of a reduced number of individuals who would be affected by such a ruling. Pursuing such claims would require a delay of this action while the relevant parties are served and given an opportunity to participate in the action. Since dismissal is not an appropriate remedy for a Code of Civ. Pro. Section 389(a) problem, joinder is the appropriate remedy.

VIII. CONCLUSION

The court makes the following findings based on the evidence submitted in phase one:

1. The Intervenors have carried their burden of proof to establish the City is estopped as a matter of law from challenging the MP 1 benefits by the prior judgment in *Corbett;*

2. The Intervenors have carried the burden of proof to establish the City is barred by the failure to file a compulsory cross-complaint in *Gleason 1* from contesting the benefits in the MP 2 transaction as to those beneficiaries who were class members in the *Gleason I* litigation (former employees, retirees and beneficiaries as of July 12, 2004). The City is not estopped from litigating against non *Gleason* class members by virtue of the *Gates* decision.

3. The Intervenors carried their burden of proof to establish the City cannot pursue a remedy against SDCERS for violation of the Constitutional or Charter debt limitations based on the allegations in the 5ACC;

4. Remaining necessary parties are not before the court and must be served prior to the City proceeding with the remaining relief possible following the application of this decision;

5. Given the effect of this ruling the court finds, without prejudice, that Intervenors have not carried their burden of establishing that the matter does not constitute a justicible controversy in that only a defined number of individuals' benefits are now at risk and they can appear and defend their interests and the court may be able to fashion appropriate relief following joinder and further proceedings.

The parties should confer following receipt of this decision to discuss the ramifications of this decision on phases two and three of the trial. If the City intends to pursue the remaining MP 2 claims against the remaining participants, then a delay of phases two and three would be in order to allow service on the effected participants and time to allow them to prepare to litigate the procedural and substantive issues on the merits.

In the event the City determines joinder is not worthwhile, trial on SDCERS mandatory cross-complaint will begin as scheduled on December 27, 2006.

It is so ordered.

Dated: December 14, 2006

JEFFREY B. BARTON

Jeffrey B. Barton
JUDGE OF THE SUPERIOR COURT