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7 BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

8 In the Matter of the Appeal Regarding) CASE NO. 2014-1087
9 Membership Exclusion of Foundation)
Employees by:) OAH NO. 2015030359
10 SANTA CLARA COUNTY HEALTH)
AUTHORITY,) NOTICE OF MOTION AND
11) MOTION FOR LEAVE TO
Respondent,) INTRODUCE EVIDENCE NOT
12) CONTAINED IN THE
and) ADMINISTRATIVE RECORD
13 KATHLEEN KING,)
14 Respondent.)
15)
16)

17 CalPERS hereby respectfully moves for the Board of Administration to admit
18 and consider additional evidence that is not contained in the administrative record.

19 This motion is made pursuant to Government Code sections 20120 and 11517,
20 and the Board of Administration Procedure for Full Hearings Before the Board (Full
21 Board Rules) sections III(D) and III(E).

22 This motion is based on this notice of motion, on the points and authorities
23 included herein, and on the attached declaration of Lisa Marie Hammond.

1 The additional evidence that CalPERS wishes to produce is the following: A
2 Verified Petition for Writ of Mandate and Complaint for Injunctive Relief and
3 Declaratory Relief; Request for Alternative Writ (Verified Petition). This document was
4 verified and signed under the penalty of perjury by Respondent Kathleen King on May
5 15, 2013, and filed with the Superior Court in the County of Santa Clara.

6 This evidence was not produced at the administrative hearing because it was
7 not discovered, and until certain claims were made by respondents at the hearing and
8 in written arguments to this Board, not relevant.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. THE BOARD HAS THE INHERENT AND STATUTORY AUTHORITY TO**
11 **CONSIDER NEWLY DISCOVERED DOCUMENTARY EVIDENCE.**

12 Government Code section 20120 vests management and control of this system
13 with the Board. Government Code section 11517, subdivision (c)(2)(E) allows for the
14 Board to conduct Full Board Hearings with or without taking additional evidence.
15 Section III(D) of the Full Board Rules not only permits the consideration of newly
16 discovered documentary evidence, but requires it in the interest of achieving a just
17 result if the conditions of section III(E) have been met.

18 The statutory framework and policies adopted by the Board to conduct Full
19 Board Hearings permit the introduction of additional evidence that is not contained in
20 the administrative record when certain conditions are met. As discussed more fully
21 below, each prerequisite has been met and the nature of the evidence offered is
22 relevant and compelling in assisting the Board to achieve a just result in this case.

23 //

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1 **II. IN THE INTEREST OF ACHIEVING A JUST RESULT, THE BOARD SHOULD**
2 **CONSIDER THE NEWLY DISCOVERED EVIDENCE.**

3 Section III(D) of the Full Board Rules concerns the *Scope of Review*. It states:

4 ...[t]he interest of achieving a just result may require the
5 consideration of newly discovered documentary evidence
6 which could not, with reasonable diligence, have been
7 discovered and produced at the hearing, and which is
8 therefore not part of the Administrative Record.

9 The proffered evidence demonstrates that Respondent Kathleen King
10 (Respondent King) has simultaneously taken inconsistent positions on issues directly
11 relevant to the issues in this case and contradicts the “innocent participant” platform
12 that Respondent King has adopted for the purpose of these proceedings.

13 Until we discovered the Verified Petition, there was no indication and no basis
14 for CalPERS to argue that Respondents’ “innocent participant” arguments were
15 disingenuous. However, after discovery, it is clear that Respondent King and
16 Respondent Santa Clara County Health Authority (Respondent Authority) have
17 consciously undertaken to mislead CalPERS’ staff, the Administrative Law Judge, and
18 this Board. The Board should not ignore Respondent King’s inconsistent positions in
19 the Verified Petition that are directly relevant to her claims in this appeal and are a
20 matter of public record.

21 Here is a brief example of how the Verified Petition directly refutes various
22 positions now taken by Respondents:

23 The Verified Petition, a document filed in Superior Court and signed by
24 Respondent King as Executive Director of the Santa Clara County Health Foundation
25 (Foundation) and under the penalty of perjury, contains the following:

- Paragraph 10 – “The Foundation is a private, nonprofit corporation... completely independent of the [Authority] and does not perform any public functions.”

- 1 • Paragraph 12 – “The Foundation does not receive any funds or other
2 financial support from the [Authority]. In fact, the Foundation pays the
3 [Authority] for providing administrative services, such as lease of office
4 space and computer systems, pursuant to the parties’ Administrative
5 Services Agreement...”
- 6 • Paragraph 15 – “The Foundation and [Authority] are entirely separate
7 and independent agencies, and **the relationship between the
8 Foundation and the [Authority] is purely contractual.** As stated in the
9 ASA, ‘[Authority] and the Foundation are separate and independent
10 entities... **Neither [Authority] nor the Foundation, nor the employees,
11 servants, agents or representatives of either, shall be considered
12 the employee, servant agent or representative of the other.’”
13 (Emphasis added.)**
- 14 • Paragraph 16 – “The CEO of the [Authority] has made statements to
15 [Respondent King] that the Foundation does not report to the [Authority]
16 and the [Authority] should not take on any supervisory role with regard to
17 the Foundation.”
- 18 • Paragraph 17 – “...all Foundation employees operate under the
19 understanding that the Foundation is a private entity.”

20 Respondent King’s Argument to the Board in this matter (where she is seeking
21 to be deemed an employee of the Authority for the sole purpose of obtaining benefits
22 from CalPERS) states, “King argued that, as an innocent participant, the facts here cry
23 out for a finding that these two entities were joint employers.” And, “It must be
24 emphasized that Respondent King – and her fellow Foundation employees – were
25 innocent parties in their participation.” Respondent King’s argument goes on to state
that “[u]nless there is evidence of a contrivance in order to gain coverage to which
participants otherwise would not be entitled, Respondent King urges that, under these
peculiar circumstances, King should be considered an employee of the Authority by
applying the doctrine of ‘joint employer’.” Respondent King’s argument to the Board is
in direct conflict with the sworn petition she filed in Superior Court. Although no
contrivance need be shown for the Board to adopt the Proposed Decision, this
evidence actually does demonstrate a contrivance.

1 Respondent Authority's Argument to the Board in this matter reiterates and
2 doubles down on the "innocence" position: "This is not a case where a public entity
3 attempted to enroll persons in CalPERS as a subterfuge to gain benefits to which the
4 workers were not entitled or to defraud CalPERS in any way." Until the Verified Petition
5 was discovered, CalPERS had no way to measure the veracity of this position. As the
6 Verified Petition shows, the only reason Respondent King now claims to be an
7 employee of Respondent Authority is to obtain benefits from CalPERS. The Verified
8 Petition should be considered by the Board in the interest of reaching a just result in
9 this matter.

10 **III. ALL NECESSARY CONDITIONS FOR THE ADMISSION OF THE VERIFIED
11 PETITION INTO EVIDENCE HAVE BEEN MET.**

12 Pursuant to the Full Board Rules section III.E.3, the following three conditions
13 must be satisfied.

14 **a) Show good cause why the evidence could not, with reasonable
15 diligence, have been discovered and produced at the hearing.**

16 The issue in this case was whether CalPERS correctly determined that
17 Respondent King is an employee of the Foundation and that Respondent Authority
18 incorrectly reported Respondent King as an employee for purposes of CalPERS
19 membership. CalPERS had no indication, based on the audit findings and
20 Respondents' appeals, that there was an "innocent parties" affirmative defense as no
21 such theory has legal merit. CalPERS, in preparing for the administrative hearing,
22 could not have foreseen such a position being taken when the law clearly establishes
23 that the Common Law Employment Test is controlling.

24 Additionally, as Lisa Marie Hammond, CalPERS Senior Staff Counsel, indicates
25 in the accompanying declaration, she found the Verified Petition as an attachment to
an online news article titled "Health Foundation Sues County". Until there was cause to

1 look beyond the employment relationship and controlling documents of the Foundation
2 and Respondent Authority, there was no reason to search for potentially relevant
3 information. It was Respondents' "innocent party" pleas that prompted further research.

4 Good cause exists as there are legitimate and reasonable explanations why the
5 Verified Petition was not discovered until very recently. The requirement of this first
6 condition has been met.

7 **b) Show the relevance of the evidence offered.**

8 As discussed in detail above, the Verified Petition is exceptionally relevant to
9 Respondents' appeal. The document demonstrates two diametrically opposed
10 positions taken by Respondent King with respect to the very issues on appeal. The
11 requirement that the newly discovered evidence be relevant has been met.

12 **c) Show that the evidence is otherwise admissible under the evidentiary
13 rules of the Administrative Procedure Act.**

14 Administrative hearings are conducted pursuant to the Administrative Procedure
15 Act (APA). The APA (Government Code section 11513(c)) states in part that "Any
16 relevant evidence shall be admitted if it is the sort of evidence on which responsible
17 persons are accustomed to rely in the conduct of serious affairs, regardless of the
18 existence of any common law or statutory rule which might make improper the
19 admission of the evidence over objection in civil actions." Additionally, Permissive
20 Judicial notice (here "Administrative notice") may be taken under Evidence Code sec.
21 452 for subdivision (d) (Records of (1) any court of this state or (2) any court of record
22 of the United States and of any state of the United States) and subdivision (h) (Facts
23 and propositions that are not reasonably subject to dispute and are capable of
24 immediate and accurate determination by resort to sources of reasonably indisputable
25 accuracy).

1 It is indisputable that had this document been introduced at the administrative
2 hearing, it would have been admissible evidence. The requirement that the proffered
3 evidence is otherwise admissible under the APA has been met.

4 **IV. THE TIMING REQUIREMENT CONTAINED IN FULL BOARD RULES III.E.2
5 HAS BEEN SUBSTANTIALLY COMPLIED WITH.**

6 Full Board Rule III.E.2 requires that a request to admit newly discovered
7 evidence be made prior to the due date for written arguments. Written arguments were
8 due to be submitted by April 8, 2016. This motion is submitted on just the third
9 business day after the due date. Compliance with this rule was impossible since the
10 evidence was not discovered until after the deadline had passed. Additionally, the
11 motion was filed on the very next day after discovery.

12 Respondents will not be prejudiced by a three day delay in receiving this motion
13 as they have been fully aware of the existence of the Verified Petition for three years.
14 Because there is no prejudice to Respondents, staff respectfully requests that
15 substantial compliance with Rule III.E.2 permit the admission of the Verified Petition.

16 **V. CONCLUSION**

17 There are good reasons for having a rule that limits Full Board Hearings to the
18 Administrative Record. There are also good reasons for having an exception to the
19 rule. This case is one of those exceptions. The type of evidence sought to be
20 introduced by CalPERS was not, at the time of the administrative hearing, necessarily
21 relevant. However, because of arguments made by Respondents to the Board, the
22 sworn statements of Respondent King that are contained in the Verified Petition are
23 now highly probative of the parties' intent with respect to the issues in this appeal.
24 Additionally, the Verified Petition calls into question the veracity of Respondent King's
25 testimony as to the relationship between the Foundation and Respondent Authority.

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- 4. The internet search resulted in multiple "Investigative Reports" located on the San Jose Inside website at www.sanjoseinside.com.
- 5. The May 16, 2013 "Investigative Report" on the San Jose Inside website titled "Health Foundation Sues County" contained a link to the Santa Clara Family Health Foundation's Verified Petition for Writ of Mandate (CCP § 1085) and Complaint for (1) Injunctive Relief and (2) Declaratory Relief; Request for Alternative Writ. A true and correct copy is attached as Exhibit A.
- 6. On April 12, 2016, our office contacted a courier service to obtain a "clean" copy of the filing from the Santa Clara County Superior Court. At the time this declaration was executed, our office had not yet received the "clean" copy but will supplement this declaration as soon as it is received.

I declare under penalty of perjury, pursuant to the laws of the State of California, that the foregoing is true and correct. Executed at Sacramento, California.

Dated: April 13, 2015


LISA MARIE HAMMOND
Senior Staff Attorney
California Public Employees'
Retirement System

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Exhibit A

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SANTA CLARA FAMILY HEALTH FOUNDATION, INC.

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 FOR THE COUNTY OF SANTA CLARA

10 SANTA CLARA FAMILY HEALTH
FOUNDATION, INC., a California nonprofit
11 corporation,

12 Petitioner and Plaintiff,

13 vs.

14 SANTA CLARA COUNTY HEALTH
AUTHORITY, dba SANTA CLARA FAMILY
15 HEALTH PLAN, a public agency, and DOES 1
through 25, inclusive,

16 Respondents and Defendants.

17
18 METRO PUBLISHING, INC., dba METRO
NEWSPAPERS, a California corporation, and
19 ROES 26 through 100, Inclusive,

20 Real Parties In Interest.

Case No. **113CV246316**

**VERIFIED PETITION FOR WRIT OF
MANDATE (CCP § 1085) AND
COMPLAINT FOR (1) INJUNCTIVE
RELIEF AND (2) DECLARATORY
RELIEF; REQUEST FOR ALTERNATIVE
WRIT**

IMMEDIATE STAY REQUESTED

21
22 Petitioner and Plaintiff SANTA CLARA FAMILY HEALTH FOUNDATION, INC.

23 (“Petitioner” or “Foundation”) hereby alleges as follows:

24 INTRODUCTION

25 1. This case concerns a wrongful determination made by Defendant and Respondent
26 SANTA CLARA COUNTY HEALTH AUTHORITY, doing business as the SANTA CLARA
27 FAMILY HEALTH PLAN, (“SCFHP”), that it must produce certain documents in its possession
28 that have been requested by Real Party in Interest METRO PUBLISHING, INC, doing business as

copy

SanJoseInside.com

S. Smith
Clerk

1 METRO NEWSPAPERS ("Metro") pursuant to the Public Records Act ("PRA") (Gov. Code §
2 6250 *et. seq.*) (the "Request"), which relate *solely* to the Foundation, a *private*, nonprofit
3 corporation, and its employees in their capacity as such. The requested documents in no way
4 relate to the SCFHP and/or the conduct of the public's business. Indeed, the *only* reason the
5 requested records are in the SCFHP's possession is because the Foundation shares - pursuant to an
6 Administrative Services Agreement and lease agreement - office space and computers with the
7 SCFHP.

8 2. By this action, the Foundation seeks a writ of mandate and/or a preliminary and
9 permanent injunction ordering the City to refrain from producing any documents to Metro
10 pursuant to the Request, as the Foundation is not subject to the Act and the requested documents
11 are not public records. In order to preserve the status quo, the Foundation requests that the Court
12 immediately issue an alternative writ and immediate stay and/or temporary restraining order
13 ("TRO") enjoining the SCFHP from producing any documents pursuant to Metro's Request, at
14 least until such time that the Court may hear arguments on the merits of this Petition/Complaint.
15 As such, in addition to a writ of mandate, the Foundation seeks the issuance of an immediate stay.

16 3. The Foundation will suffer irreparable harm if the Court does not grant immediate
17 relief by granting the Foundation's *ex parte* application for an alternative writ of mandate/TRO, as
18 once these records have been produced to Metro, they will presumably be disclosed to the public,
19 which is a bell that cannot be "unrung." No monetary amount will compensate the Foundation for
20 the violation of its privacy rights that is sure to occur if the Foundation is not granted immediate
21 relief. By contrast, neither the SCFHP nor Metro will suffer any harm from a potentially minor
22 delay in the production of the requested documents in the event the Court ultimately determines, at
23 a hearing on the merits, that the requested documents should be produced.

24 THE PARTIES

25 4. Plaintiff and Petitioner Foundation is, and at all times mentioned herein was, a
26 California nonprofit corporation, operating pursuant to Internal Revenue Code section 501(c)(3).
27 The Foundation is beneficially interested in the subject of this Petition because if the writ of
28 mandate is not granted, the Foundation's privacy rights will be violated and as a result, the

1 Foundation and its members will be harmed. The Foundation has standing to bring this "reverse
2 Public Records Act" claim pursuant to *Marken v. Santa Monica-Malibu Unified School Dist.*
3 (2012) 202 Cal. App. 4th 1250, 1264-1265.)

4 5. Defendant and Respondent SCFHP is, and at all times mentioned herein was, a
5 public agency located entirely within Santa Clara County.

6 6. Real Party in Interest Metro is, and at all times mentioned herein was, a California
7 corporation that operates a weekly newspaper in the San Francisco Bay Area. Its principle place
8 of business is located at 550 S. First St., San Jose, CA 95113.

9 7. The Foundation is ignorant of the true names and capacities of
10 Respondents/Defendants sued herein as Does 1 through 25 and therefore sues those
11 Respondents/Defendants by such fictitious names. The Foundation is informed and believes and
12 thereon alleges that each of the fictitiously-named Respondents/Defendants is in some manner
13 responsible or liable for the events and happenings referred to herein, and that each such
14 fictitiously named Respondent/Defendant caused injury and damage to the Foundation as alleged
15 in this Petition. The Foundation will seek leave of Court to amend this Petition to allege the true
16 names and capacities of such fictitiously-named Respondents/Defendants when the same are
17 ascertained.

18 8. The Foundation is ignorant of the true names and capacities of Real Parties in
19 Interest sued herein as Roes 26 through 100 and therefore sues those Real Parties in Interest by
20 such fictitious names. The Foundation is informed and believes and thereon alleges that each of
21 the fictitiously-named Real Parties in Interest is in some manner responsible or liable for the
22 events and happenings referred to herein, and that each such fictitiously named Real Parties in
23 Interest caused injury and damage to the Foundation as alleged in this Petition. The Foundation
24 will seek leave of Court to amend this Petition to allege the true names and capacities of such
25 fictitiously-named Real Parties in Interest when the same are ascertained.

26 **JURISDICTION AND VENUE**

27 9. This Court has jurisdiction over this proceeding pursuant to California Code of
28 Civil Procedure sections 1085, 1086, 1094.5, 1060 and 526 *et seq.* Venue in this Court is proper

1 pursuant to Code of Civil Procedure section 394 and Government Code section 6259 in that
2 Respondent and the relevant records subject to the PRA request at issue are located within the
3 County of Santa Clara.

4 GENERAL ALLEGATIONS

5 10. The Foundation is a private, nonprofit corporation organized pursuant to section
6 501(c)(3) of the Internal Revenue Code. The Foundation is completely independent of the SCFHP
7 and does not perform any public functions. The SCFHP has no power to appoint any members of
8 the Foundation's Board of Directors, and the only member of the Foundation's Board of Directors
9 who also serves on the SCFHP's Board of Directors was *directly appointed by the Foundation's*
10 *Board of Directors* – not appointed in any way by the SCFHP's Board of Directors onto the
11 Foundation's Board of Directions. No member of County of Santa Clara's Board of Supervisors
12 serves on the Foundation Board.

13 11. The exception to the general rule that private corporations are not subject to the
14 PRA is contained in Government Code section 54952, which states that the PRA is applicable to
15 private corporations, which requires the Foundation's Board of Directors to either (i) be created by
16 the SCFHP "in order to exercise authority that may lawfully be delegated by" the SCFHP, or; (ii)
17 receive funds from the SCFHP, and contain a full voting member who was appointed to the
18 Foundation's Board of Directors by the SCFHP and is a member of the SCFHP's Board of
19 Directors. (*See*, Gov. Code § 5492(c)(1).) Neither of these conditions are met here.

20 12. The Foundation does not receive any funds or other financial support from the
21 SCFHP. In fact, the Foundation pays the SCFHP for providing administrative services, such as
22 lease of office space and computer systems, pursuant to the parties' Administrative Services
23 Agreement ("ASA") executed on June 1, 2002. The ASA is attached hereto as Exhibit "A".

24 13. The SCFHP does not delegate any of its public functions or authority to the
25 Foundation. The Foundation's primary function is fundraising, and as such, the Foundation does
26 not spend any taxpayer funds nor does the Foundation determine or decide where any taxpayer
27 funds are spent. The Foundation does not have any authority over the expenditure of SCFHP
28 funds. The Foundation raises funds from private and non-SCFHP public sources (*e.g.*, First 5) for

1 various health care causes throughout the Santa Clara area, and in fact, the Foundation raises funds
2 for the benefit of the SCFHP as part of a public-private partnership.

3 14. The Foundation does not operate any public facilities nor provide any public
4 services, nor does it have the authority to do so. The Foundation does not provide health care
5 services of any kind.

6 15. The Foundation and the SCFHP are entirely separate and independent agencies,
7 and the relationship between the Foundation and the SCFHP is purely contractual. As stated in the
8 ASA, "SCFHP and the Foundation are separate and independent entities. The relationship
9 between SCFHP and PN [sic] is purely contractual. Neither SCFHP nor the Foundation, nor the
10 employees, servants, agents or representatives of either, shall be considered the employee, servant
11 agent or representative of the other." (Ex. "A", p. 1)

12 16. The CEO of the SCFHP has made statements to the Executive Director of the
13 Foundation that the Foundation does not report to the SCFHP and the SCFHP should not take on
14 any supervisory role with regard to the Foundation.

15 17. The Foundation is informed and believes, and alleges on that basis, that at no time
16 has any Foundation employee been told by anyone that the Foundation is subject to public
17 disclosure statutes such as the PRA or the Brown Act, and the Foundation is also informed and
18 believes, and alleges on that basis, that all Foundation employees operate under the understanding
19 that the Foundation is a private entity. Furthermore, the Foundation is informed and believes, and
20 alleges on that basis, that third parties dealing with the Foundation, including donors and potential
21 donors, operate under the understanding that the Foundation is a private entity not subject to
22 public disclosure statutes such as the PRA or the Brown Act.

23 **THE PUBLIC RECORDS REQUEST**

24 18. On or about April 16, 2013, the Foundation received an email from the Metro
25 requesting various Foundation documents pursuant to the PRA. (See, Exhibit "B") This email
26 contains a number of factually inaccurate statements and legally invalid claims.

27 19. On or about April 17, 2013, the SCFHP received a letter from the Metro requesting
28 various items from the SCFHP that related to the Foundation's agendas, meeting minutes, financial

1 statements, electronic communications, personnel documents, and related documents which were
2 contained on the SCFHP's servers (the "Request"), which is attached hereto as Exhibit "C".
3 Foundation records are contained on the SCFHP's computer systems/servers as a result of the ASA,
4 pursuant to which the Foundation pays the SCFHP to use its computer systems. The purpose of
5 this Petition/Complaint is to prevent the SCFHP from producing documents pursuant to this
6 Request.

7 20. On April 19, 2013, the Foundation advised the SCFHP that it was evaluating
8 Metro's Request with its legal counsel. (See, Exhibit "D", April 19, 2013 Email from Kathleen
9 King to Elizabeth Darrow). The Foundation requested that the SCFHP attorneys be made available
10 to discuss the matter with the Foundation's attorneys given the Foundation's substantial concerns
11 relating to any production of any Foundation documents by the SCFHP. (*Id.*)

12 21. On or about April 24, 2013, the Foundation was informed that Metro had requested
13 documents from the SCFHP that belonged to the Foundation but were potentially on the SCFHP's
14 servers. Once again, the Foundation attempted to contact the SCFHP to discuss the situation.

15 22. On or about April 26, 2013, the Foundation sent a letter to Metro, which stated that
16 the Foundation would not release any records pursuant to the PRA because the Foundation, as a
17 private, nonprofit corporation, is not subject to the PRA. The Foundation also advised the SCFHP
18 of this position. (See, Exhibit "E", Email to SCFHP attaching April 26, 2013 Letter from Dana
19 Ditmore to Dan Pulcrano).

20 23. On or about May 8, 2013, the SCFHP allowed the Foundation to review the
21 documents purportedly responsive to the Metro's Request. After review of these documents, the
22 Foundation determined that the documents contain confidential and proprietary information
23 relating to the Foundation's private activities.

24 24. Release and/or publication of these documents would cause immediate and
25 irreparable harm to the Foundation's ability to conduct its private affairs because the
26 communications contained in the documents were taking place with the expectation by all
27 participants that the Foundation's emails were private. Production of these documents will also
28 reveal valuable trade secrets and fundraising strategies unique to the Foundation. Not only does the

1 public have no interest in this information, but disclosure of this information would actually harm
2 the public by impeding the Foundation's ability to raise money that benefit SCFHP and other
3 initiatives, which benefit the public.

4 25. Disclosure of the Foundation's documents will also disclose communications from
5 third parties who communicated with the Foundation with the understanding that the Foundation is
6 a private corporation and not subject to disclosure pursuant to the Public Records Act. Disclosure
7 of these documents will not only harm these third parties by violating their privacy rights, but will
8 create a "chilling effect" on future communications between the Foundation and potential donors,
9 again impeding future fundraising efforts, which ultimately benefit the public.

10 26. On May 10, 2013, the Foundation advised the SCFHP of its concerns regarding the
11 release of any documents held by the SCFHP that were the Foundation's private, confidential
12 communications. Specifically, the Foundation requested that the SCFHP refrain from producing
13 any of the Foundation's documents in response to Metro's Request. (See, Exhibit "F", Letter from
14 Dana Ditmore to Plan's Board of Directors)

15 27. On May 10, 2013, after it had received the above-referenced correspondence from
16 the Foundation raising the Foundation's substantial concerns relating to the pending disclosure of
17 the Foundation's private documents, the SCFHP advised the Foundation that it planned to release
18 documents that it alleges are responsive to Metro's Request by May 15, 2013.

19 28. On May 13, 2013, the Foundation held an emergency meeting of its Board of
20 Directors and approved the initiation of legal action against the SCFHP in order to prevent the
21 disclosure of the Foundation's private records and communications.

22 29. Not all documents in the possession of a public agency are public records subject to
23 production pursuant to the PRA. *The sole reason the SCFHP is in possession of the documents*
24 *requested by Metro is due to the ASA*, and as a result, the Foundation emails and other records are
25 located in the SCFHP's offices and on SCFHP's servers. None of the documents requested can be
26 accurately categorized as public records, even if they are in the possession of a public agency,
27 because the requested records do not relate to the conduct of the public's business, but instead
28 entirely relate to the conduct of a *private*, nonprofit corporation.

1 30. Documents that are in the possession of former members of the Foundation's Board
2 of Directors that are also public employees are also not considered public records, because public
3 records must relate to that public employee's official duty. The Foundation's records do not relate
4 to any public employee's official duties.

5 31. Due to the fact that the documents requested by Metro in no way relate to the
6 conduct of the public's business, but instead, relate entirely to the conduct of a *private* nonprofit
7 corporation's business, the public has no interest in the disclosure of the requested documents. As
8 a result, the Foundation's privacy interests in preventing disclosure greatly outweigh this
9 nonexistent public benefit.

10 **FIRST CAUSE OF ACTION**

11 **(Petition for Writ of Mandate Under Code of Civil Procedure section 1085)**

12 32. The Foundation hereby incorporates by reference paragraphs 1 through 31 of this
13 Petition/Complaint as though fully set forth herein.

14 33. Pursuant to Government Code sections 6252 and 54952, the PRA does not apply to
15 the Foundation, and despite SCFHP and Metro's arguments to the contrary, the requested
16 documents are not "public records," as that term is defined by the PRA.

17 34. The SCFHP has a ministerial, non-discretionary duty to comply with the Public
18 Records Act. Thus, the SCFHP has a ministerial, non-discretionary duty to reject Metro's
19 Request. The SCFHP's determination that it must produce the Foundation's private documents
20 pursuant the Metro's Request, is contrary to law and therefore arbitrary and capricious.

21 35. The Foundation has no adequate remedy at law. The only adequate remedy is to
22 restrain the SCFHP from producing documents responsive the Metro's request, because once the
23 contested documents are made public, the Foundation's privacy rights have been irreparably
24 harmed and the Foundation cannot be made whole. No remedy at law will put the Foundation
25 back in the same position it was in before the requested documents were produced, because once
26 the contents of these documents are known, that bell cannot be unring. Moreover, even if the
27 Foundation could be made whole for a violation of its privacy rights by a monetary amount, such
28 an amount would be almost impossible to determine.

1 36. The Foundation is beneficially interested in the outcome of this action because its
2 privacy rights will be violated if the Court refuses to issue the writ of mandate requested by this
3 Petition. Indeed, the Foundation's privacy rights will be irreparably harmed if the City is not
4 forced to uphold its ministerial duties.

5 37. The Foundation has exhausted its administrative remedies by asking the SCFHP to
6 reconsider, but counsel for SCFHP has nonetheless indicated that absent a Court order, it intends
7 to imminently produce the Foundation's records that are in its possession, pursuant to Metro's
8 Request. Indeed, the SCFHP has indicated the records will be produced by May 15, 2013,
9 emphasizing the need for the issuance of an alternative writ and immediate stay.

10 **SECOND CAUSE OF ACTION**

11 **(Injunctive Relief)**

12 38. The Foundation hereby incorporates by this reference each and every allegation
13 contained in Paragraphs 1 through 37, inclusive, of this Petition/Complaint, as if set forth herein.

14 39. The Foundation requests the Court to enjoin the SCFHP from taking action directly
15 in conflict with the Public Records Act, and enjoining Metro from requesting the Foundation's
16 records from the SCFHP.

17 40. The Foundation has no adequate remedy at law. If Metro obtains copies of the
18 documents it has requested from the SCFHP, the entire action will be mooted, as Metro will have
19 seen the documents, and the knowledge Metro gleans from these documents cannot be undone.
20 No amount of monetary compensation will make the Foundation "whole" for this breach of their
21 privacy rights.

22 41. The Foundation's right to privacy will be irreparably harmed if Metro is permitted
23 to examine the requested documents, as the Foundation cannot ever be put in the same position it
24 was in before the documents were disclosed, particularly if Metro publishes these documents. The
25 Foundation is informed and believes, and alleges on that basis that Metro intends to publish
26 portions in its newspaper if the requested documents of the Court does not enjoin the SCFHP from
27 disclosing these documents.

28 42. Not only will the Foundation be irreparably harmed, but a number of third parties

1 as well as the general public will also be harmed. Disclosure of the Foundation's documents will
2 also disclose communications from third parties who communicated with the Foundation with the
3 understanding that the Foundation is a private corporation and not subject to disclosure pursuant to
4 the Public Records Act. Disclosure of these documents will not only harm these third parties by
5 violating their privacy rights, but will create a "chilling effect" on future communications between
6 the Foundation and potential donors, again impeding future fundraising efforts, which benefit
7 SCFHP and other initiatives, and therefore benefit the public.

8 **THIRD CAUSE OF ACTION**

9 **(Declaratory Relief)**

10 43. The Foundation hereby incorporates by this reference each and every allegation
11 contained in Paragraphs 1 through 42 inclusive, of this Complaint, as if set forth herein.

12 44. An actual controversy has arisen and now exists between, on the one hand, the
13 Foundation, and, on the other hand, the SCFHP, in that the Foundation contends, and the SCFHP
14 denies, as follows:

15 (a) That the Foundation is not a "local agency" subject to the Public Records Act,
16 pursuant to Government Code sections 6252 and 54952;

17 (b) That the records requested in Metro's Public Records Act request are not public
18 records subject to disclosure under the Public Records Act;

19 (c) That the SCFHP is not required to produce any records pursuant to Metro's
20 Request;

21 (d) That if the SCFHP produces documents to Metro concerning the Foundation, the
22 SCFHP will unlawfully violate the Foundation's right to privacy.

23 45. The Foundation desires a judicial determination that the propositions set forth in
24 the above Paragraph 44, subparagraphs (a) through (d), are true and correct. Such a determination
25 is necessary and appropriate at this time in order for the parties' matters.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, the Foundation prays for judgment as follows:

28 1. That the Court issue a writ of mandate against the SCFHP, ordering it to fulfill its

1 non-discretionary, ministerial duties to comply with the Public Records Act and reject Metro's
2 Public Records Act request;

3 2. That the Court issue an alternative writ of mandate and immediate temporary stay
4 order preventing the SCFHP from producing any documents pursuant to Metro's Request;

5 3. That the Court issue an injunction prohibiting the SCFHP from producing
6 documents pursuant to Metro's Request and prohibiting Metro from requesting Foundation
7 records from any entity pursuant to the Public Records Act;

8 4. That the Court award Foundation its reasonable attorneys' fees for prosecuting this
9 action, pursuant to Government Code sections 800 and 6259, and Code of Civil Procedure section
10 1717, and/or under any other applicable statutory or common law doctrines;

11 5. That the Court award the Foundation its costs for prosecuting this action; and

12 6. For any such other and further relief as this Court deems proper.

13
14 Dated: May 15, 2013

RUTAN & TUCKER, LLP
ASH PIRAYOU
ALAN B. FENSTERMACHER

15
16 By: 

17 Alan B. Fenstermacher
18 Attorneys for Petitioner and Plaintiff
19 SANTA CLARA FAMILY HEALTH
20 FOUNDATION, INC.
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VERIFICATION

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STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

I have read the foregoing **VERIFIED PETITION FOR WRIT OF MANDATE (CCP § 1085) AND COMPLAINT FOR (1) INJUNCTIVE RELIEF AND (2) DECLARATORY RELIEF; REQUEST FOR ALTERNATIVE WRIT** and know its contents.

I am the Executive Director of the Santa Clara Family Health Foundation, a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on May 15, 2013, at Saratoga, California.

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

SANTA CLARA FAMILY HEALTH
FOUNDATION, INC.

By: Kathleen King
Kathleen King, Executive Director