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11 Attorneys for California Public Employees'
12 Retirement System

13 UNITED STATES BANKRUPTCY COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15 RIVERSIDE DIVISION

16 In re
17 CITY OF SAN BERNARDINO, CALIFORNIA,
18 Debtor.

Case No. 6:12-bk-28006 MJ

Chapter 9

CALPERS' MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF ITS
MOTION FOR RELIEF FROM STAY

Date: December 21, 2012
Time: 10:00 a.m.
Place: United States Bankruptcy Court
3420 Twelfth Street
Courtroom 301
Riverside, CA 92501

19
20 The California Public Employees' Retirement System ("CalPERS"), by and through its
21 undersigned attorneys, hereby files this Memorandum of Points and Authorities in Support of its
22 Motion for Relief from Stay pursuant to sections 362(d)(1) and 922 of the Bankruptcy Code to allow
23 CalPERS to pursue certain rights and remedies available to CalPERS as a result of the failure of the
24 City of San Bernardino (the "City") to comply with applicable California law.

25 **I. Introduction**

26 By its own admission, the City has failed to make required postpetition contributions to
27 CalPERS. The City admits that it has not paid to CalPERS any of the employer portion of its
28 contributions during its bankruptcy case. *See Press Release dated October 29, 2012, Declaration of*

1 Michael B. Lubic (“Lubic Decl.”), Exhibit “3.” Further, in its pendency plan adopted on November
2 26, 2012, the City has stated that it does not plan to pay CalPERS the employer portion of its
3 contributions for the duration of this fiscal year. *See Pendency Plan*, Lubic Decl., Exhibit “1.”

4 The City’s failure to make these contributions is a violation of state law. Among other laws,
5 (1) the Public Employees’ Retirement Law (CAL. GOV. CODE, § 20000 *et seq.*) (the “PERL”) requires
6 that municipalities make payments to CalPERS as and when due and (2) the California Labor Code
7 requires that employers, including municipalities, make payments to a pension fund if required to do
8 so by agreement with its employees.

9 Pursuant to both the “police power” exception to the automatic stay and section 903 of the
10 Bankruptcy Code, CalPERS, as an arm of the State of California, is empowered to take action against
11 the City as a result of the City’s violation of California law without first obtaining relief from the
12 automatic stay. Nevertheless, out of an abundance of caution, CalPERS files this motion because,
13 even if the police power exception and section 903 do not otherwise apply, cause exists to grant
14 CalPERS relief from the automatic stay.¹

15 Accordingly, for the reasons set forth in more detail below, CalPERS respectfully requests
16 that the Court grant it relief from the automatic stay to exercise certain rights and remedies available
17 to CalPERS under applicable law. Specifically, CalPERS seeks relief from stay to commence and
18 prosecute an action against the City to collect the “deferred” payments and all related relief including,
19 without limitation, seeking a writ of mandamus to compel the payment of pension contributions or
20 seeking the appointment of a receiver. At this time, CalPERS is not seeking relief from stay to
21 terminate its relationship with the City but fully reserves all of its rights to do so at a future time.

26 ¹ Because any action that CalPERS may take is not subject to the automatic stay pursuant to the
27 police power exception provided by section 362(b)(4) and section 903 of the Bankruptcy Code,
28 CalPERS reserves the right to commence necessary enforcement action in state court without first
obtaining relief from the automatic stay.

II. Background

CalPERS is an “arm of the state,”² and as such enjoys the sovereign rights of the State of California. Under the PERL, the State of California established a retirement system for certain state and local government employees. *City of Oakland v. Pub. Emps. Ret. Sys.*, 95 Cal. App. 4th 29, 33 (2002). The purpose of the PERL is to “effect economy and efficiency in the public service” by providing a pension plan to pay retirement compensation and death benefits. CAL. GOV. CODE § 20001. The California Legislature established CalPERS in 1931, and the system became operational in 1932 when it began providing retirement benefits to California State employees. *California Public Employees’ Retirement System, Office of Public Affairs, Facts at a Glance: General* (2012).³ CalPERS provides pension fund and healthcare services for approximately 1.6 million California public employees, retirees, and their families. *Id.* A “state employee generally becomes a member of the Public Employees’ Retirement System ... ‘upon his or her entry into employment.’” *Cal. Ass’n of Prof’l Scientists v. Schwarzenegger*, 137 Cal. App. 4th 371, 376 (2006) (citations omitted). Local government employers may enter into a relationship with CalPERS to provide pension and retirement benefits to their employees.

Pursuant to collective bargaining agreements and other contracts with its employees, the City has agreed to provide certain pension benefits to its employees. To provide those benefits, the City agreed to enter the CalPERS system as contemplated by the PERL. To provide the contractual benefits promised to its employees, the City is required, by the terms of its agreements with its employees and CalPERS and by applicable state law, to make periodic payments to CalPERS. Despite these statutory and contractual obligations, the City has failed to make full payments owed to CalPERS since the filing of its bankruptcy case. According to the City’s most recent cash flow

² See, e.g., *CalPERS v. Moody’s Corp.*, Nos. C09-03628 SI, C09-03629 JCS, 2009 WL 3809816 at *6 (N.D. Cal. Nov. 10, 2009) (citing cases). In fact, the State of California agrees with this conclusion. See also Brief filed by California State Attorney General’s Office in *Kaplan v. CalPERS*, 1999 WL 33623292, No. 99-15295 (9th Cir. Aug. 12, 1999) at 8 n.2 (“The California Public Employees’ Retirement System is an arm of the State.”); accord *Kaplan v. CalPERS*, 221 F.3d 1348 (9th Cir. 2000) (unpublished) (holding Eleventh Amendment barred suit against CalPERS under the ADEA).

³ Available at <http://www.calpers.ca.gov/eip-docs/about/facts/general.pdf>.

1 statement⁴, as of October 29, 2012, the City has failed to pay CalPERS a total of \$5,106,107 since the
2 filing of this bankruptcy case. *See City of San Bernardino's Cash Flow Position – Report on*
3 *Selected Analytics dated October 29, 2012*, Lubic Decl., Exhibit “2.” The obligations of the City to
4 CalPERS continue to accrue at the rate of approximately \$1.7 million per month, assuming that the
5 City continues to pay the employees portion of the required contributions.

6 III. Argument

7 A. The City's Failure to Pay CalPERS Violates California Law.

8 1. The City Has Violated Provisions of the PERL.

9 The PERL expressly states as follows:

10 Notwithstanding any other provision of law, neither the state, any
11 school employer, nor any contracting agency shall fail or refuse to pay
12 the employers' contribution required by this chapter or to pay the
13 employers' contributions required by this chapter within the applicable
14 time limitations.

15 Cal. Gov. Code § 28031.

16 Based on this provision, the City's obligation to timely make its payments to CalPERS is not
17 a mere contractual obligation; it is an obligation mandated by statute. This statutory provision goes
18 to the very heart of CalPERS' mission. If participants in the CalPERS system fail to timely make
19 payments, then CalPERS will be unable to provide an actuarially sound retirement system. This was
20 explained by the court in the case of *Bd. of Admin. v. Wilson*, 61 Cal. Rptr. 2d 207 (Cal. 3d Dist. Ct.
21 App. 1997) [hereinafter *Wilson*].

22 In *Wilson*, the court explained that CalPERS plans are pre-funded, which means that the plans
23 depend on an orderly schedule of contributions well in advance of benefit requirements instead of
24 allocating money at or near the time that benefits actually become due. *Id.* at 228. The *Wilson* court
25 ultimately held that the rights of the participants in the plan would be materially impaired if
26 contributions were delayed for six to twelve months because allowing payments to be made “in

27 ⁴ Since the commencement of its bankruptcy case on August 1, 2012, the City has posted cash flow
28 position reports on its website on an irregular basis. The reports posted as of the date of this Motion
are dated September 4, September 17, September 26, October 3, October 8 and October 29. No
report has been posted from October 29 through the date of this Motion.

1 arrears” would undermine the actuarial soundness of the pension plan. *Id.* In reaching this
2 conclusion, the court made the following findings:

3 In the determination of the value of the employer contribution, it is
4 necessary to make an assumption as to when the contribution will be
5 made. This is because investment earnings are assumed to begin
6 accruing when the contribution is made. When contributions are
7 delayed beyond the date assumed, the plan falls out of actuarial balance
8 and actuarial soundness is endangered. . . .

9 The importance of timing stems from the fact that a large portion of a
10 member’s benefit is funded by the investment earnings which are
11 generated by plan contributions. When monies are contributed later
12 than expected, reduced earnings result – thus creating a shortfall. This
13 impairs benefit security and causes a portion of the total current
14 employment cost of plan members to be shifted into the future.

15 *Id.*

16 Thus, the City’s statutory obligation to make its payments to CalPERS on a timely basis is a
17 critical component of the entire CalPERS system.

18 **2. The City Has Violated the California Labor Code.**

19 Moreover, the California Labor Code requires that all employers, including municipalities,
20 make required contributions to pension plans on behalf of their employees (regardless of whether that
21 plan is administered by CalPERS or some other plan administrator). Specifically, the California
22 Labor Code provides as follows:

23 Whenever an employer has agreed with any employee to make
24 payments to a health or welfare fund, pension fund or vacation plan,
25 or other similar plan for the benefit of the employees, or a
26 negotiated industrial promotion fund, or has entered into a
27 collective bargaining agreement providing for these payments, it
28 shall be unlawful for that employer willfully or with intent to
defraud to fail to make the payments required by the terms of that
agreement.

Cal. Labor Code § 227.1

This provision of the California Labor Code reflects the public policy adopted by the State of
California to ensure that employees receive all compensation to which they are entitled. California
state courts have previously recognized that payments to pension funds constitute wages, *see Dunlop*
v. Tremayne, 62 Cal. 2d 427, 431 (1965). Moreover, California courts have long stated that prompt

1 payment of wages is the public policy of the State. *See Ex parte Trombley*, 31 Cal.2d 801, 809-10
2 (1948) (holding that wages may be preferred over other debts because they “are not ordinary debts . .
3 . because of the economic position of the average worker and, in particular, his dependence on wages
4 for the necessities of life for himself and his family, it is essential to the public welfare that he receive
5 his pay when it is due.”); *see also Smith v. Superior Court*, 39 Cal. 4th 77 (2006) (stating that public
6 policy favors “full and prompt payment of an employee’s earned wages. . .”).

7 Accordingly, by failing to make payments to CalPERS, the City is effectively failing to pay
8 its employees the full wages to which they are entitled in violation of the long-standing public policy
9 adopted by the State of California as reflected in the California Labor Code.

10 **3. The City Has Violated the California Constitution.**

11 Finally, the City’s actions violate applicable provisions of the California Constitution.
12 Specifically, the California Constitution provides that the CalPERS Board “shall [] have sole and
13 exclusive responsibility to administer the system in a manner that will assure prompt delivery of
14 benefits and related services to the participants and their beneficiaries” and “consistent with the
15 exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to provide for
16 actuarial services in order to assure the competency of the assets of the public pension or retirement
17 system.” Cal. Const. Art. XVI, § 17(a) and (e).

18 The history of this constitutional provision was explained by the court in *Wilson*. The
19 provision was added to the California Constitution as a result of Proposition 162 which was adopted
20 by voters in 1992. *Wilson*, 61 Cal. Rptr. 2d at 216. According to the statement of “Findings and
21 Declaration” contained in Proposition 162, “Politicians [had] undermined the dignity and security of
22 all citizens who depend on pension benefits . . .by repeatedly raiding their pension funds To
23 protect the financial security of retired Californians, politicians must be prevented from meddling in
24 or looting pension funds.” *Id.* The statement of “Purpose and Intent” contained in Proposition 162
25 stated that the purpose of Proposition 162 was “to prohibit the Governor or any executive or
26 legislative body of any political subdivision of this state from tampering with public pension funds.”
27 *Id.*

1 By “deferring” payments to CalPERS, the City is “tampering with public pension funds” in
2 the manner that Proposition 162 was designed to prevent. As explained by the court in *Valdes v.*
3 *Cory*, 189 Cal. Rptr. 212, 224 (Cal. 3d Dist. Ct. App. 1983), a failure to make pension contributions
4 is no different than taking funds in the CalPERS’ and diverting them to another purpose. In addition,
5 by asserting that it intends to “defer” making the statutorily required contributions to CalPERS, the
6 City has effectively usurped the authority exclusively vested in CalPERS by the California
7 Constitution to determine what payments are actuarially required to maintain the soundness of the
8 system.

9 **B. The Automatic Stay Does Not Apply To CalPERS.**

10 Because CalPERS is an arm of the State of California, CalPERS may exercise its rights to
11 compel the City’s compliance with applicable law without first seeking relief from the automatic stay
12 because of both the “police power” exception to the automatic stay and section 903 of the Bankruptcy
13 Code.

14 The “police power” exception to the automatic stay is provided by section 362(b)(4) which
15 provides that an action by a governmental unit in the exercise of its police and regulatory power is
16 not subject to the stay imposed by subsections (1), (2), (3) or (6) of section 362(a). As stated by one
17 court, “[I]itigation by governmental units to enforce federal and state labor laws uniformly has been
18 excepted from the stay under § 362(b)(4).” *In re Ngan Gung Rest., Inc.*, 183 B.R. 689, 691
19 (S.D.N.Y. 1995) (citing cases). For instance, in the case of *In re Chateaugay Corp.*, the court held that
20 the decision of the Pension Benefit Guaranty Corporation to reinstate a pension plan (which resulted
21 in the debtor having to renew its contributions to the pension plan) was subject to the police power
22 exception. *In re Chateaugay Corp.*, 87 B.R. 779, 803-804 (S.D.N.Y. 1988).⁵ Accordingly, the
23 automatic stay imposed by subsections (1), (2), (3) or (6) of section 362(a) are inapplicable to
24 CalPERS pursuant to the police power exception of section 362(b)(4).

25
26 ⁵ On appeal, the Second Circuit Court of Appeals overturned the *Chateaugay* decision on the grounds
27 that the PBGC’s reinstatement decision was arbitrary and capricious. *Pension Benefit Guaranty*
28 *Corporation v. LTV Corp.*, 875 F. 2d 1008 (2d Cir. 1989). On further appeal, the Supreme Court
overturned the decision of the Second Circuit and determined that the PBGC’s reinstatement decision
was not arbitrary and capricious. *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633
(1990).

1 Similarly, under section 903, the fact that a municipality files for protection under chapter 9,
2 “does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of
3 or in such state in the exercise of the political or governmental powers of such municipality,
4 including expenditures for such exercise” 11 U.S.C. § 903. Based on this section, the City
5 cannot avoid its statutory obligations to CalPERS, and CalPERS, as an arm of the state, may take any
6 actions necessary to force the City’s compliance with those obligations.

7 At the present time, however, it is not necessary for the Court to address the scope of section
8 903 or the police power exception to the automatic stay. For the reasons set forth below, CalPERS is
9 entitled to relief from the automatic stay even if the police power exception and section 903 are not
10 applicable. CalPERS, however, reserves the right to assert that any action it may take against the
11 City is not subject to the automatic stay because of the police power exception of section 362(b)(4)
12 and the provisions of section 903.

13 **C. To The Extent The Automatic Stay Applies, CalPERS Is Entitled to Relief.**

14 Under section 362(d)(1), a party is entitled to relief from the automatic stay for “cause.”
15 This stay relief provision applies not only to the stay imposed by section 362 but also to the stay
16 imposed by section 922. *See* 11 U.S.C. § 922(b) (stating that the stay relief provisions of section
17 362(d) also apply to section 362). Whether cause exists to grant relief from the automatic stay is
18 determined on a case-by-case basis. *In re Tucson Estates, Inc.*, 912 F.2d 1162 (9th Cir. 1990).

19 **1. Cause Exists Because The City Has Failed To Comply With Applicable**
20 **State Law.**

21 In this case, the City’s ongoing failure to comply with applicable law constitutes sufficient
22 cause to grant CalPERS relief from the automatic stay. Pursuant to 28 U.S.C. § 959(b), a debtor is
23 required to comply with applicable law while in bankruptcy. The Ninth Circuit Court of Appeals has
24 stated that 28 U.S.C. § 959(b) is an important consideration for courts when evaluating whether cause
25 exists to provide relief from the automatic stay. Specifically, the Ninth Circuit has stated as follows:

26 [T]he relevant case law demonstrates that section 959(b) operates as a
27 weighty policy consideration that will in many circumstances **require** a
28 bankruptcy court to grant relief from the automatic stay, if it is
requested, so that a state may enforce its laws.

1 *Hillis Motors, Inc. v. Hawaii Automobile Dealers' Association*, 997 F.2d 581, 592 (9th Cir. 1993)
2 (emphasis added).

3 In this case, CalPERS seeks relief from the automatic stay so that it can seek the enforcement
4 of the laws of the State of California. As discussed above, the City is required by statute to make
5 payments to CalPERS, and pursuant to the California Constitution, CalPERS has exclusive authority
6 to determine what payments are required to maintain the actuarial soundness of the system.
7 According to *Hillis Motors*, this is precisely the type of circumstance that typically requires relief
8 from the automatic stay. This is especially true in the chapter 9 context. If this were a chapter 11
9 case, this Court could itself issue some type of injunction or other order to compel a debtor to comply
10 with applicable law. In the chapter 9 context, however, section 904 prevents the Court from
11 interfering with the City's governmental powers. Accordingly, granting CalPERS relief from the
12 automatic stay is the *only* way to allow CalPERS to take action to compel the City to comply with the
13 law. The City should not be allowed to use the bankruptcy process to avoid complying with
14 applicable law. Accordingly, cause exists to grant CalPERS relief from the automatic stay.

15
16 **2. Cause Exists To Grant CalPERS Relief From The Automatic Stay**
17 **Because The City Has Failed To Pay Postpetition Administrative**
18 **Expenses.**

19 The pension contributions that the City has failed to make to CalPERS constitute a portion of
20 the wages that the City contractually agreed to provide to its employees. According to the court in
21 *Valdes*, “[a] public employee’s pension constitutes an element of compensation, *and a vested*
22 *contractual right to pension benefits accrues upon acceptance of employment.”* *Valdes*, 189 Cal.
23 Rptr. at 224 (emphasis added). In addition, as explained above, the California Labor Code expressly
24 requires that employers fully compensate their employees by making all required pension
25 contributions.

26 The compensation owed to the City’s employees is entitled to priority as an administrative
27 expense under section 503 of the Bankruptcy Code. As explained in *Nat’l Labor Relations Board v.*
28 *Bildisco*, 465 U.S. 513, 531 (1984), an employee is entitled to compensation for the value of the
services provided by the employee after the bankruptcy case is filed, even if the applicable

1 employment contract is ultimately rejected. As further explained by the Ninth Circuit Court of
2 Appeals, “no better measure appears” for determining the value of an employee’s services than the
3 compensation to which the employee is entitled under the applicable contract. *In re Tucson Yellow*
4 *Cab Co., Inc., v. Teamsters Local No. 310*, 789 F.2d 701, 704 (1986). In *Tucson Yellow Cab*, the
5 Ninth Circuit held that severance payments owed to employees constituted administrative expenses.
6 The court first concluded that the severance payments constituted a portion of the employee’s wages.
7 *Id.* The court then stated: “[The employees] continued to work in the reasonable belief that their
8 wages had been unchanged. . . . The work’s fair value includes severance pay.” *Id.* at 705.

9 The *Tucson Yellow Cab* decision was later addressed by the Bankruptcy Appellate Panel for
10 the Ninth Circuit in the case of *In re World Sales, Inc.*, 183 B.R. 872 (9th Cir. B.A.P.). In *World*
11 *Sales*, the Bankruptcy Appellate Panel held that the full amount of the monthly contribution to an
12 employee’s health plan constituted an administrative expense, even though the employee did not
13 work a full month, because the applicable collective bargaining agreement required the
14 debtor/employer to make a full monthly contribution for the benefit of any employee that worked at
15 least one day in the month. *Id.* at 876. In its decision, the Bankruptcy Appellate Panel discussed the
16 Ninth Circuit’s earlier decision in *Tucson Yellow Cab* and stated as follows:

17
18 We think *Tucson Yellow Cab* instructive in this situation. In that case,
19 the Ninth Circuit held that while termination of the drivers without full
20 notice clearly did not benefit the estate, nevertheless, the drivers’ post-
21 petition employment under the contract constituted a benefit to the
22 estate for which it became liable, and that compensation for the benefit
23 should be afforded administrative priority.

24 The teaching of *Tucson Yellow Cab*, then, is that we must look not only
25 to the benefit to the estate, but also to the consideration due the creditor
26 for providing such benefit. . . . Where the performance for which such
27 compensation is due accrues post-petition, the payment owing by the
28 estate must be afforded administrative priority.

In re World Sales, Inc., 183 B.R. at 876-77.

The rule of *Tucson Yellow Cab* is equally applicable in this case. The City’s
employees are continuing to provide services for the City. Just as in *Tucson Yellow Cab*, the
employees are providing those services in the reasonable belief that their benefits have not yet

1 changed. Indeed, the City issued a press release on October 29, 2012 in which it stated that “[n]o
2 CalPERS benefits, for current or retired employees, have been impacted at this point. Preserving the
3 retirement benefits of its employees is a priority for the City and one that the City hopes to protect.”
4 *See City of San Bernardino 10/29/2012 Press Release*, Lubic Decl., Exhibit “3”.

5 Thus, at the same time that the City is telling its employees that it intends to continue
6 providing them their current benefits, it has failed to make the contributions to CalPERS that must be
7 made in order for those pension benefits to be provided. By failing to timely make the required
8 contributions, the City is undermining the actuarial soundness of the pension plan and threatening its
9 employees’ ability to obtain their vested contractual right to pension benefits. The *Tucson Yellow Cab*
10 decision makes clear that the City cannot lure its employees to work based on false promises.
11 Instead, the City must pay the employees all compensation earned, which includes the pension
12 contributions that the City is obligated to make to CalPERS. Under *Bildisco* and *Tucson Yellow Cab*,
13 those pension contributions constitute administrative expenses.

14 Because the City has failed to pay these administrative expenses, cause exists to grant
15 CalPERS relief from the automatic stay. If this were a chapter 11 case, the Court could compel the
16 City to pay these administrative expenses. That is not an option in this case due to section 904 of the
17 Bankruptcy Code. Thus, if the Court feels that it is appropriate that the City pay its postpetition
18 administrative expenses, short of dismissing the case the only thing it can do is to grant CalPERS
19 relief from the automatic stay so that CalPERS can obtain appropriate relief from a state court that
20 *can* compel payment of the amounts owed to CalPERS.

21 **IV. Conclusion**

22 For the foregoing reasons, CalPERS respectfully requests that the Court grant CalPERS relief
23 from the automatic stay imposed by sections 362(a) and 922 to allow CALPERS to commence and
24 prosecute an action against the City to collect the “deferred” payments and all related relief including,
25 without limitation, seeking a writ of mandamus to compel the payment of pension contributions or
26 seeking the appointment of a receiver. Attached hereto as Exhibit “1” is a draft of the collection
27
28

1 complaint CalPERS is seeking relief to file; CalPERS intends to file a complaint in substantially this
2 form, updated to reflect the most recent information available at the time of filing.

3
4 Respectfully submitted,

5 Michael J. Gearin
6 Michael B. Lubic
7 Brett D. Bissett
8 K&L GATES LLP

9 Dated: November 27, 2012

10 By: /s/ Michael B. Lubic

11 Michael B. Lubic
12 Attorneys for California Public Employees'
13 Retirement System
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EXHIBIT 1

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Attorneys for California Public Employees'
Retirement System

SUPERIOR COURT OF THE STATE OF CALIFORNIA

BOARD OF ADMINISTRATION,
CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Plaintiff,

vs.

CITY OF SAN BERNARDINO, CALIFORNIA,
and DOES 1 through 25, inclusive,

Defendants.

Case No.

**CALPERS' COMPLAINT ON COMMON
COUNTS:**

- 1) ACCOUNT STATED; AND**
- 2) OPEN BOOK ACCOUNT**

**[EXEMPT FROM FILING FEES (GOV.
CODE § 6103)]**

[Amount Demanded Exceeds \$25,000]

NOW COMES BOARD OF ADMINISTRATION, CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM ("CalPERS"), and for its complaint against Defendants, and each of them,
hereby alleges and avers as follows:

PARTIES

1. Plaintiff, Board of Administration, CalPERS, is charged with and responsible for the
administration of the California Public Employees' Retirement System, and is authorized to bring this
action on its behalf.

2. CalPERS is informed and believes and thereon alleges that defendant CITY OF SAN
BERNARDINO (the "City") is a charter city within the State of California, and was so at all relevant

1 times mentioned herein, with its principal place of business in the City of San Bernardino, County of
2 San Bernardino.

3 3. CalPERS is ignorant of the true names and capacities of Defendants sued herein as
4 Does 1 through 25, inclusive, and therefore sues these Defendants by such fictitious names. CalPERS
5 will amend this Complaint to allege their true capacities when ascertained. CalPERS is informed and
6 believes and thereon alleges that each of the fictitiously named Defendants is responsible in some
7 manner for the occurrences herein alleged.

8 4. CalPERS is headquartered in the City and County of Sacramento, California, and all
9 retirement contributions from participating public agencies are received and processed at its
10 Sacramento headquarters.

11 5. CalPERS administers retirement and health benefits of its members, including
12 employees and retirees of contracting public agencies that participate in the CalPERS system.

13 **REQUIRED RETIREMENT BENEFITS CONTRIBUTIONS**

14 6. The provisions for local public agencies that participate in the CalPERS system are set
15 forth in the Public Employees' Retirement Law, Gov. Code Section 20000 *et seq.* (the "PERL").
16 These provisions are supplemented by pertinent Regulations adopted by CalPERS and set forth in
17 Chapter 2 of Division 1 of title 2 of the California Code of Regulations.

18 7. Government Code section 20460 provides in pertinent part, "Any public agency may
19 participate in and make all or part of its employees members of this system by contract entered into
20 between its governing body and the board..."

21 8. Any public agency, like the City, may participate in this retirement system by
22 contracting with the CalPERS Board of Administration ("CalPERS Board") under Government Code
23 § 20460. This "contract" is not of the same character as a commercial contract, but rather constitutes
24 a statutory election into a system of deferred compensation.

25 9. By contract ratified on or about February 6, 1945, the City elected to participate in and
26 join the CalPERS system and agreed to be bound by the statutory provisions of the PERL including,
27 without limitation, Government Code sections 20460, 20500, and 20506. A true and correct copy of
28

1 the 1945 contract and the subsequent amendments to the contract (the “Contract”) are attached
2 collectively hereto as “Exhibit A”.

3 10. Government Code section 20500 provides in pertinent part: “The contract may include
4 any provision consistent with this part and necessary in the administration of this system as it affects
5 the public agency and its employees....”

6 11. Government Code section 20506 provides in pertinent part: “Any contract heretofore
7 or hereafter entered into shall subject the contracting agency and its employees to all provisions of
8 this part and all amendments thereto applicable to members, local miscellaneous members, or local
9 safety members....”

10 12. Government Code section 20831 provides: “Notwithstanding any other provision of
11 law, neither the state, any school employer, nor any contracting agency shall fail or refuse to pay the
12 employers' contribution required by this chapter or to pay the employers' contributions required by
13 this chapter within the applicable time limitations.”

14 13. California Code of Regulations tit. 2 §565 provides: “Member and employer
15 contributions shall be received in the System's Sacramento office on or before 15 calendar days
16 following the last day of the pay period to which they refer.”

17 14. Government Code section 20537 provides in pertinent part: “The [CalPERS Board]
18 may charge interest on the amount of any payment due and unpaid by a contracting agency until
19 payment is received. Interest shall be charged at the actuarial interest rate....”

20 15. California Code of Regulations tit. 2 §565.2 provides in pertinent part: "(a) If within a
21 fiscal year an employer fails to pay at least 90% of the member and employer contributions due
22 within the prescribed time set forth in Section 565, CalPERS may bill the employer for the total
23 amount then due. If an employer fails to pay the billed amount within 30 calendar days of the bill,
24 interest shall be charged upon the amount due from the original due date until received by CalPERS.”

25 16. Government Code section 20572(b) provides: “Notwithstanding Section 20537, if a
26 contracting agency fails to remit the contributions when due, the agency may be assessed interest at
27 an annual rate of 10 percent and the costs of collection, including reasonable legal fees, when
28 necessary to collect the amounts due. In the case of repeated delinquencies, the contracting agency

1 may be assessed a penalty of 10 percent of the delinquent amount. That penalty may be assessed
2 once during each 30-day period that the amount remains unpaid.”

3 **BANKRUPTCY AND FAILURE TO MAKE REQUIRED PAYMENTS**

4 17. On August 1, 2012, the City filed a voluntary petition for bankruptcy protection under
5 chapter 9 of the United States Bankruptcy Code. The case was filed in the United States Bankruptcy
6 Court for the Central District of California, Riverside Division (the “Bankruptcy Court”) and is
7 currently pending as Case No. 6:12-bk-28006.

8 18. On or about [October 29, 2012], the City released a document entitled “City of San
9 Bernardino’s Cash Flow Position- Report on Selected Analysis,” that acknowledges that the City has
10 not paid to CalPERS its required retirement pension benefits contribution for the employer portion
11 for [six] pay periods since August 1, 2012 with a total amount of \$[5,087,675] outstanding. In
12 addition, the document acknowledges that the City has not paid CalPERS \$865,432 for the pay period
13 ended July 31, 2012. A true and correct copy of the October 29, 2012 report is attached hereto as
14 “Exhibit B”.

15 19. As of _____, 2012, the City has admitted that it has not paid in full its agreed-upon
16 retirement pension benefits contribution to CalPERS based on the reported payroll in violation of
17 Government Code section 20831.

18 20. The City has admitted that the amount outstanding for the employer portion of the
19 City’s retirement pension benefits is no less than \$[5,087,675].

20 21. Pursuant to Government Code sections 20460, 20500, 20506 and 20831, as well as
21 California Code of Regulations tit. 2 §565, the City must make timely and full payment of invoices
22 for retirement pension benefits as billed.

23 22. If payments are not timely made, Government Code sections 20537 and 20572
24 authorize CalPERS to collect interest and penalties on the late amounts.

25 23. On or about November 27, 2012, CalPERS moved the Bankruptcy Court for relief
26 from the automatic stay pursuant to 11 U.S.C. § 362 to allow it to, among other things, bring this
27 action.

1 24. On or about December 21, 2012, the Bankruptcy Court granted the motion. A true
2 and correct copy of the order is attached hereto as "Exhibit C".

3 25. [THE BANKRUPTCY COURT ORDER SPECIFICALLY GRANTED CALPERS
4 THE RIGHT TO PURSUE THIS CLAIM].

5 **DEMAND FOR PAYMENT**

6 26. [DEMAND MADE BY CALPERS]

7 27. The City has admitted as of _____, 2012, the City owed CalPERS \$ ____ for the
8 employer portion of the pension contributions plus interest and penalties owed on all past-due
9 premiums.

10 28. In addition to the contributions the City has failed to make, the City owes CalPERS
11 interest, penalty interest, penalties and fees, costs, and expenses of collection.

12 29. The most recent statement of account provided to the City by CalPERS is attached
13 hereto as "Exhibit D". Pursuant to this accounting, the City owed CalPERS \$ ____ as of _____,
14 2012.

15
16 **FIRST CAUSE OF ACTION**
(Account Stated Against All Defendants)

17
18 30. CalPERS refers to and realleges all of the above paragraphs and by this reference
19 incorporates those paragraphs as though fully set forth at length.

20 31. As of [October 29, 2012], there was an account stated by and between CalPERS and
21 the City wherein and whereby an arrearage of \$[5,953,107] for retirement benefits was found to be
22 past due to CalPERS, which defendants, each of them, agreed and promised to pay, and that no part
23 of said sum has been paid although a demand has been made. This amount is undisputed by the
24 City.

25
26 **SECOND CAUSE OF ACTION**
(Open Book Account Against All Defendants)

27 32. CalPERS refers to and realleges all of the above paragraphs and by this reference
28 incorporates those paragraphs as though fully set forth at length.

1 33. Within four years last past, the City became indebted to CalPERS on an open book
2 account for money due in the sum of \$[5,953,107], plus interest, penalties, and costs of allocation for
3 administration of retirement benefits provided by CalPERS by the City's election and for which the
4 City agreed to pay.

5 34. Neither the whole nor any part of the \$[5,953,107] has been paid although a demand
6 therefor has been made, and there is now due, owing, and unpaid no less than \$[5,953,107], plus
7 interest, penalties, and costs of collection.

8 **PRAYER**

9 **WHEREFORE**, CalPERS prays for judgment as follows on all causes of action:

10 1. For damages in the amount of \$[5,953,107], together with interest, costs, and penalties
11 as provided by statute;

12 2. For an order declaring CalPERS to be entitled to recover possession of the amount of
13 \$[5,953,107] plus interest, costs, and penalties as provided by statute;

14 3. For an order compelling the City to convey to CalPERS the amount of \$[5,953,107]
15 plus interest, costs and penalties as provided by statute;

16 4. For applicable special damages, subject to proof;

17 5. For CalPERS' attorneys' fees, costs and related expenses incurred in this action; and

18 6. For such other relief as the Court may deem just and proper.

19
20 K&L GATES LLP

21
22 Dated: November 27, 2012

23 By: _____

24 John L. Boos
25 Michael B. Lubic
26 Kevin S. Asfour
27 Brett D. Bissett

28 Attorneys for California Public Employees'
Retirement System

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: **10100 Santa Monica Blvd., 7th Floor, Los Angeles, CA 90067**

A true and correct copy of the foregoing document entitled (*specify*): CALPERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR RELIEF FROM STAY will be served or was served (**a**) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (**b**) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 11/27/12, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- Jerrold Abeles abeles.jerry@arentfox.com, labarreda.vivian@arentfox.com
- Franklin C Adams franklin.adams@bbklaw.com, arthur.johnston@bbklaw.com;lisa.spencer@bbklaw.com;bknotices@bbklaw.com
- Joseph M Adams jadams@lawjma.com
- Andrew K Alper aalper@frandzel.com, efiling@frandzel.com;ekidder@frandzel.com
- Thomas V Askounis taskounis@askounisdarcy.com
- Anthony Bisconti tbisconti@bmkattorneys.com
- Jeffrey E Bjork jbjork@sidley.com
- Sarah C Boone sboone@marshackhays.com, ecfmarshackhays@gmail.com
- J Scott Bovitz bovitz@bovitz-spitzer.com
- Jeffrey W Broker jbroker@brokerlaw.biz
- Deana M Brown dbrown@milbank.com
- Michael J Bujold Michael.J.Bujold@usdoj.gov
- Christopher H Conti chc@sdlaborlaw.com, sak@sdlaborlaw.com
- Christina M Craige ccraige@sidley.com
- Alex Darcy adarcy@askounisdarcy.com
- Susan S Davis sdavis@coxcastle.com
- Robert H Dewberry robert.dewberry@dewlaw.net
- Todd J Dressel dressel@chapman.com, lubecki@chapman.com
- Chrysta L Elliott elliottc@ballardspahr.com, manthiek@ballardspahr.com
- Scott Ewing contact@omnimgt.com, sewing@omnimgt.com

- 1 • Paul R. Glassman pglassman@sycr.com
- 2 • David M Goodrich dgoodrich@marshackhays.com, ecfmarshackhays@gmail.com
- 3 • Everett L Green everett.l.green@usdoj.gov
- 4 • Chad V Haes chaes@marshackhays.com, ecfmarshackhays@gmail.com
- 5 • James A Hayes jhayes@cwlawyers.com
- 6 • M Jonathan Hayes jhayes@hayesbklaw.com,
7 roksana@hayesbklaw.com;carolyn@hayesbklaw.com;elizabeth@hayesbklaw.com
- 8 • D Edward Hays ehays@marshackhays.com, ecfmarshackhays@gmail.com
- 9 • Eric M Heller eric.m.heller@irsconsult.treas.gov
- 10 • Bonnie M Holcomb bonnie.holcomb@doj.ca.gov
- 11 • Whitman L Holt wholt@ktbslaw.com
- 12 • Michelle C Hribar mch@sdlaborlaw.com
- 13 • Steven J Katzman SKatzman@bmkattorneys.com
- 14 • Jane Kespradit jane.kespradit@limruger.com, amy.lee@limruger.com
- 15 • Mette H Kurth kurth.mette@arentfox.com
- 16 • Michael B Lubic michael.lubic@klgates.com, jonathan.randolph@klgates.com
- 17 • Richard A Marshack rmarshack@marshackhays.com,
lbergini@marshackhays.com;ecfmarshackhays@gmail.com
- 18 • Gregory A Martin gmartin@winston.com
- 19 • David J Mccarty dmccarty@sheppardmullin.com, pibsen@sheppardmullin.com
- 20 • Reed M Mercado rmercado@sheppardmullin.com
- 21 • Aron M Oliner roliner@duanemorris.com
- 22 • Scott H Olson solson@seyfarth.com
- 23 • Dean G Rallis drallis@sulmeyerlaw.com
- 24 • Christopher O Rivas crivas@reedsmith.com
- 25 • Kenneth N Russak krussak@frandzel.com, efiling@frandzel.com;dmoore@frandzel.com
- 26 • Gregory M Salvato gsalvato@salvatolawoffices.com, calendar@salvatolawoffices.com
- 27 • Mark C Schnitzer mschnitzer@rhlaw.com, mschnitzer@verizon.net
- 28 • Diane S Shaw diane.shaw@doj.ca.gov

- 1 • Jason D Strabo jstrabo@mwe.com, apolin@mwe.com
- 2 • Matthew J Troy matthew.troy@usdoj.gov
- 3 • United States Trustee (RS) ustpreion16.rs.ecf@usdoj.gov
- 4 • Anne A Uyeda auyeda@bmkattorneys.com
- 5 • Annie Verdries verdries@lbbslaw.com
- 6 • Brian D Wesley brian.wesley@doj.ca.gov
- 7 • Kirsten A Roe Worley kworley@wthf.com, bcordova@wthf.com

8
9 ***SEE NEF FOR CONFIRMATION OF ELECTRONIC TRANSMISSION TO THE U.S. TRUSTEE AND ANY TRUSTEE IN THIS CASE, AND TO ANY ATTORNEYS WHO RECEIVE SERVICE BY NEF***

10 **2. SERVED BY UNITED STATES MAIL:**

11 On (*date*) 11/27/12, I served the following persons and/or entities at the last known addresses in this
12 bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in
13 the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here
14 constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document
15 is filed.

14 Bryan C Altman
15 The Altman Law Group
16 6300 Wilshire Blvd Ste 980
17 Los Angeles, CA 90048

16 Roger Jon Diamond
17 2115 Main Street
18 Santa Monica, CA 90405

18 Dale K Galipo
19 21800 Burbank Blvd Ste 310
20 Woodland Hills, CA 91367

20 Susan Millslagle
21 10045 Jonathan Ave
22 Cherry Valley, CA 92223

22 Jon Schlueter
23 108 Orange St Ste 8
24 Redlands, CA 92373

24 Neil S Steiner
25 433 N Camden Drive Ste 730
26 Beverly Hills, CA 90210

1 **[LIST OF CREDITORS HOLDING 20 LARGEST UNSECURED CLAIMS]**

2 2006 City of San Bernardino Taxable Pension
3 Obligation Bonds, 2005, Series A
4 Wells Fargo Bank, NA Corporate Trust Services
5 Special Accounts Group, MAC N9311-115
6 625 Marquette Avenue
7 Minneapolis, MN 55479

8 Kohl's Corporate Offices
9 N56 W17000 Ridgewood Drive
10 Menomonee Falls, Wisconsin 53051

11 US Bank, NA, Trustee
12 633 West 5th Street, 24th Floor
13 Los Angeles, CA 90071

14 California Infrastructure Bank and Economic
15 Development Bank (CIEDB)
16 1001 "I" Street, 19th Floor
17 Sacramento, CA 95814

18 Comerica Leasing Corporation
19 611 Anton Blvd.
20 Costa Mesa, CA 92626

21 New World Systems Corporation
22 888 W. Big Beaver Road #600
23 Troy, MI 48084

24 MARQUETTE BANK
25 10000 W. 151st Street
26 Orland Park, Illinois 60462

27 Bank of America
28 c/o Western Alliance Equipment Finance Inc.
1400 East Washington, Suite 1400
Phoenix, AZ 85004

Public Agency Retirement Services
P.O. Box 12919
Newport Beach, CA 92658-2919

U.S. Bank, N.A., Trustee
633 West 5th Street, 24th Floor
Los Angeles, CA 90071

American Traffic Systems
Michael Bolton, COO
American Traffic Solutions Inc.
7581 E. Gray Road
Scottsdale, AZ 85260

SUN TRUST EQUIPMENT FINANCE & LEASING CORPORATION
P.O. BOX 79194

- 1 BALTIMORE, CA 21279-0191
- 2 SAN BERNARDINO CITY PROFESSIONAL FIREFIGHTERS LOCAL 891
- 3 P.O. BOX 2703
San Bernardino, CA 92406
- 4 Tim Burgess
- 5 1625 Iowa Avenue
Riverside, CA 92507
- 6 603384 - AECOM USA INC.
- 7 1178 PAYSPHERE CIR
CHICAGO, IL 60674
- 8 1458- CELPLAN TECHNOLOGIES INC
- 9 1897 PRESTON WHITE DRIVE
RESTON, VA 20191
- 10 614238 - NIKOLA CONSTRUCTION CORPORATION
- 11 18012 COWAN 290
IRVINE, CA 92614
- 12 SAN BERNARDINO COUNTY SOLID WASTE
- 13 825 E. 3RD STREET, #207
SAN BERNARDINO, CA 92415-0017

14 **3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL**
15 (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (date)
16 11/27/12, I served the following persons and/or entities by personal delivery, overnight mail service, or
17 (for those who consented in writing to such service method), by facsimile transmission and/or email as follows.
18 Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be
19 completed no later than 24 hours after the document is filed.

17 Overnight Mail

18 The Hon. Meredith A. Jury
19 United States Bankruptcy Court
20 3420 Twelfth Street
Suite 325 / Courtroom 301
Riverside, CA 92501-3819

21 I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

22 11/27/12

Brett Bissett

/s/ Brett Bissett

23 *Date*

Printed Name

Signature

- 24
- 25
- 26
- 27
- 28