

1 Mark Renner, SBN 121008  
2 Christopher E. Platten, SBN 111971  
3 Wylie, McBride, Platten & Renner  
4 2125 Canoas Garden Avenue Suite 120  
5 San Jose, CA 95125  
6 Telephone: 408.979.2920  
7 Facsimile: 408.979.2934  
8 mrenner@wmpirlaw.com

9 Attorney for Plaintiffs

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Event: Verdict, Case of the Superior Court  
Case No. 112CV219748

Deputy Clerk

L. TALAMON

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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA  
Unlimited Jurisdiction

112CV219748

PAUL MULHOLAND, JAMES UNLAND, and  
MARY FOLLENWEIDER,

Plaintiffs,

vs.

RUSSELL CROSBY, MIKE MOEHLE, each in  
his capacity as a fiduciary of the San Jose  
Federated City Employees Retirement System  
and of the City of San Jose Police and Fire  
Retirement Plan, CITY OF SAN JOSE, a  
municipal entity, and Does 1 through 10,

Defendants.

THE BOARD OF DIRECTORS OF THE SAN  
JOSE POLICE AND FIRE RETIREMENT  
BOARD, and THE BOARD OF DIRECTORS  
OF THE CITY OF SAN JOSE FEDERATED  
CITY EMPLOYERS' RETIREMENT  
SYSTEM,

Necessary Parties in Interest

Case No.

COMPLAINT FOR BREACH OF  
FIDUCIARY DUTY

INTRODUCTION

This action is brought by three participant-beneficiaries of two public employee retirement plans administered by the City of San Jose. Under the law, the Plans' administrators are required to act as fiduciaries by restricting any plan expenditures to those made for defraying reasonable expenses of administering the Plans. In June 2011, certain administrators of these plans directed an

1 actuarial firm to produce reports regarding future plan costs which they knew were based on  
2 outdated erroneous data. Because they directed the actuarial firm to rely on inaccurate assumptions  
3 and data, there was no legitimate plan-related purpose for the reports. Instead, the reports were  
4 commissioned to support extraneous political objectives. Using Plan assets to pay for such activities  
5 constitutes a breach of fiduciary duty. The Plans must therefore be made whole by this court by (1)  
6 ordering the breaching parties to repay the Plans and (2) enjoining the Plan administrators from  
7 engaging in similar conduct in the future.

## 8 PARTIES

9 1. Plaintiff Paul Mulholland is a retired San Jose Firefighter and a beneficiary of the  
10 San Jose Police and Fire Retirement Plan. Said Plaintiff currently draws a monthly pension benefit  
11 from said Plan. He has a beneficial interest in this lawsuit in that, as a beneficiary of said Plan, he is  
12 entitled to have any fiduciary of the Plan carry out his or her fiduciary duties in a manner consistent  
13 with that of a fiduciary and to restrict the expenditure of Plan assets solely to those matters that are  
14 in the interests of the Plan's beneficiaries.

15 2. Plaintiff James Unland is a beneficiary of the San Jose Police and Fire Retirement  
16 Plan and is fully vested in said Plan for all pension credits he has previously earned under the Plan.  
17 He has a beneficial interest in this lawsuit in that, as a beneficiary of said Plan, he is entitled to have  
18 any fiduciary of the Plan carry out his or her fiduciary duties in a manner consistent with that of a  
19 fiduciary and to restrict the expenditure of Plan assets solely to those matters that are in the interests  
20 of the Plan's beneficiaries.

21 3. Plaintiff Mary Follenweider is a beneficiary of the City of San Jose Federated City  
22 Employees Retirement System and is fully vested in those retirement benefits for which she has  
23 earned service credits under said Plan. She has a beneficial interest in this lawsuit in that, as a  
24 beneficiary of said Plan, she is entitled to have any fiduciary of the Plan carry out his or her  
25 fiduciary duties in a manner consistent with that of a fiduciary and to restrict the expenditure of Plan  
26 assets solely to those matters that are in the interests of the Plan's beneficiaries.

27 4. Defendant Russell Crosby is and was at all times relevant herein an employee of  
28 Defendant City and the Director of both of the above-mentioned Plans. Defendant Crosby held

1 discretionary authority to authorize Plan expenditures for services rendered to the Plan such as those  
2 further described below, and as such, at all times relevant herein was acting as a fiduciary of the  
3 respective Plans.

4 5. Defendant Michael Moehle was at all times relevant an employee of the City of San  
5 Jose acting in the capacity of an actuary for the above-described Plans. Defendant Moehle possessed  
6 discretionary to provide directives to the Plans' service providers which affect those service  
7 providers' judgment regarding Plan assets, and as such, at all times relevant herein, acted in a  
8 fiduciary capacity.

9 6. Defendant City of San Jose is a municipal entity and a charter city as that term is  
10 defined by Article XI, Section 5 of the California Constitution. At all times mentioned herein, said  
11 Defendant acted in a fiduciary capacity with respect to management of the above-described Plans in  
12 that it caused the Plans to expend Plan funds in the manner further described below.

13 7. Defendant Does 1 through 10 were at all times relevant herein employees, agents, or  
14 individuals acting on behalf of Defendant City and at the behest of the expressly named Defendants  
15 or at the behest of one or more of the other Doe Defendants as more fully described below. Plaintiffs  
16 are informed and believe that said Does 1 through 10 participated in the conduct described below,  
17 but their present identity is unknown to Plaintiffs. Plaintiffs will amend this complaint naming such  
18 Doe Defendants when their identities become known.

19 8. The San Jose Police and Fire Retirement Board is joined herein as a necessary party.  
20 Said Board is and was ultimately responsible for the administration of the San Jose Police and Fire  
21 Retirement Plan and all expenditures made by the Plan. The Board functions in a fiduciary capacity  
22 of said Plan, as authorized in 1992 by California voters through the enactment of Proposition 162,  
23 now set forth in Article XVI Section 17 of the California Constitution. In that fiduciary capacity, the  
24 Board is a party necessary to this action because it ratified, knowingly or unknowingly, the Plan  
25 expenditures further described below.

26 9. The Board of Directors of the City of San Jose Federated City Employees Retirement  
27 System is joined herein as a necessary party. Said Board is and was ultimately responsible for  
28 administration of the City of San Jose Federated Employees Retirement System and all expenditures

1 made by that system. The Board functions in a fiduciary capacity as authorized in 1992 by  
2 California voters through the enactment of Proposition 162, now set forth in under Article XVI  
3 Section 17 of the California Constitution. It is a party necessary to this action because it ratified,  
4 knowingly or unknowingly, the Plan expenditures further described below.

#### 5 OPERATIVE FACTS

6 10. In carrying out its obligation to administer the above-described retirement Plans, the  
7 respective Boards of Directors of the Plans perform yearly "valuations" of Plan assets by engaging  
8 an actuarial firm. It is and has been the charge of such actuarial firm to quantify the amount of the  
9 Plans' assets, to calculate the rates of return on investments, to review the relevant actuarial factors  
10 regarding participation rates and life expectancies, and to consider all other factors necessary to  
11 formulate a well-founded professional judgment as to the total value of the Plans' assets. Such plan  
12 valuation is then used by the actuarial firm to calculate what monetary contributions will be  
13 necessary going forward in order to soundly manage the Plans and allow the Plans to meet their  
14 obligations to pay the benefits due to the beneficiaries.

15 11. In August 2010, the Board of Administration of the Federated City Employees  
16 Retirement System entered into an agreement with an actuarial firm known as Cheiron, Inc., who is  
17 not a party to this action, to perform actuarial services for said Plans, including yearly valuation  
18 reports as described above. Part of said agreement included a "Scope of Services" provision which  
19 described the actuarial services to be performed for the Plan by Cheiron. That scope described a  
20 regular schedule of yearly valuation reports that would be used to calculate any changes in  
21 contribution rates that might be necessary for each Plan year through the year 2013. Neither the  
22 "Scope of Services" provision nor any other provision in said agreements between the Plans and  
23 Cheiron called for any valuation services to be performed by Cheiron in addition to the regular  
24 annual valuations.

25 12. In May 2011, the Board of Administration of the San Jose Police and Fire Retirement  
26 Board entered into an agreement with Cheiron to perform actuarial services for said Plans, including  
27 yearly valuation reports as described above. Part of said agreement included a "Scope of Services"  
28 provision which described the actuarial services to be performed for the Plan by Cheiron. That scope

1 described a regular schedule of yearly valuation reports that would be used to calculate any changes  
2 in contribution rates that might be necessary for each Plan year through the year 2014. Neither the  
3 “Scope of Services” provision nor any other provision in said agreements between the Plans and  
4 Cheiron called for any valuation services to be performed by Cheiron in addition to the regular  
5 annual valuations.

6 13. On or about June 30, 2011, Defendants Moehle, Crosby, City of San Jose and Does 1  
7 through 10, contacted Cheiron for the purpose of engaging Cheiron’s services to perform a special  
8 report separate from the regular yearly valuation report, whose purpose was described as “for  
9 budgetary reasons.” Said request was for Cheiron to produce a projection of what monetary  
10 contributions would be necessary for the Plans to be prudently managed over the next five fiscal  
11 years.

12 14. Said Defendants provided to Cheiron certain factual assumptions and directives  
13 which it required Cheiron to use in performing this unscheduled report. Those factual assumptions  
14 included a directive to use data from the Plans’ 2010 annual valuation reports produced by another  
15 Plan actuary even though, due to various events described further below, that data was known by  
16 each of the defendants to be markedly out of date. Said Defendants further instructed Cheiron to  
17 assume that the City had undergone a 4.25% overall growth in gross payroll over the preceding Plan  
18 year (since June 2010), even though said Defendants knew that the City’s overall payroll costs over  
19 that Plan year had significantly *decreased*. Said Defendants also instructed Cheiron to assume that  
20 the Plans had experienced no asset gains since June 2010 even though said Defendants knew that  
21 income from both Plans’ investments over the preceding 12 months had provided a rate of return to  
22 not of zero, but instead well in excess of 10%.

23 15. In the time period following the Plans’ fiscal year 2010 (the year which said  
24 Defendants required Cheiron to use as data for the report), relevant City retirement data for these  
25 Plans changed dramatically because (1) the City implemented layoffs of employees in  
26 unprecedented numbers, including the layoff of 66 police officers, shrinking the pool of vested  
27 participants in both Plans and thus lowering pension costs; and (2) City employees suffered a City-  
28 wide 10% pay cut, thus reducing the amount of pension liability accruing under the relevant plans

1 by a commensurate amount. The downward pressure these events exerted on pension costs was  
2 well-known to said Defendants, as even Defendants Crosby and Moehle had been subject to the 10%  
3 pay cut. Nevertheless, said Defendants required Cheiron to use the data from the prior fiscal year  
4 that did not take into account any of these events.

5 16. On June 30, 2011 Defendants Moehle, the City, and Does 1 through 10 sent an e-mail  
6 to Cheiron setting forth "rules to follow" in producing the above-described reports. An accurate  
7 copy of that e-mail is attached hereto as Exhibit 1. The e-mail in effect required Cheiron to *not*  
8 exercise its independent expertise and *not* seek out the most accurate information for the anticipated  
9 report. The e-mail in effect directed Cheiron to disregard the dramatically different employment  
10 conditions that were in effect over the preceding twelve months that were directly relevant to  
11 accurately determining future pension costs.

12 17. Based on the above-described misinformation and false data it was instructed to use,  
13 on July 20, 2011, Cheiron delivered to the City the future pension cost report. An accurate copy of  
14 that report is attached hereto as Exhibit 2.

15 18. As fiduciaries of the Plans, said Defendants owed an unwavering duty of complete  
16 loyalty to the beneficiaries of the Plans to the exclusion of the interests of all other parties. When  
17 engaged in the above-described events, said Defendants breached that duty by consciously providing  
18 Cheiron with inaccurate data which knowingly would produce inaccurate projections of what future  
19 contributions would be required to fund plan benefits. Rather than causing the Plans to be  
20 administered for the sole and exclusive benefit of the beneficiaries by obtaining the most accurate  
21 information, said Defendants instead caused Cheiron's services to be used for the purpose of  
22 attempting to justify various pension cost projections that had been put forth by City officials over  
23 the preceding months. Said Defendants further knew that when they required Cheiron to use the  
24 above-described assumptions and directives regarding the state of the Plans and their participants,  
25 that such assumptions had no basis in fact and were objectively and demonstrably false. Said  
26 Defendants further knew that any report so based on false assumptions would serve no legitimate  
27 purpose in managing the Plans' assets and accurately ascertaining the future Plan costs, and as such,  
28 was commissioned in breach of said Defendants' fiduciary duties.



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5. Such other and further relief as the court deems just and proper.

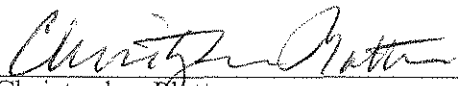
Dated: March 1, 2012

WYLIE, McBRIDE, PLATTEN & RENNER

By:

  
Mark Renner

By:

  
Christopher Platten  
Attorney for Plaintiffs

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**From:** Moehle, Michael [mailto:michael.moehle@sanjoseca.gov]

**Sent:** Thursday, June 30, 2011 11:44 AM

**To:** Gene Kalwarski; Bill Hallmark; Anne Harper

**Subject:** 5-Year budget projections

Gene

Russell has requested that Cheiron prepare a 5-year projections (ending with City contributions for the 2015-2016 fiscal year) of City contributions for all 4 plans:

1. Federated Pension
2. Federated OPEB
3. P&F Pension
4. P&F OPEB
5. Totals for all 4 plans

Rules to follow in preparing the projections:

1. All projections should be based on the June 30, 2010 valuations/data/assumptions/methods, including payroll growth assumptions
2. The Federated pension projection should include the Option 2 discount rate phase in the Board adopted in November 2010
3. The P&F pension projection should assume that the discount rate is changed to 7.50% effective with the June 30, 2011 valuation
4. OPEB contributions should be assumed to continue to be subject to the 5-year phase in restrictions in the MOU's. Assume that if the maximum contributions are reached, that those maximums remain in effect.

In addition, we also need a 20-year projection of pension only City contributions for Federated and P&F.

Ideally you would prepare your own estimates for P&F, but in the interest of time you can rely on Segal's valuations (including their estimate of the cost impact of going to 7.5% for pensions which we can provide).

My understanding is that you have already prepared similar estimates for Federated in your presentations to the Board and that you may already have a working model for P&F that you presented to the Board as part of the RFP process for that plan. You can use your own judgement as to whether you want to refine any previous work you have prepared.

After you discuss internally, can you let me know when you expect to finish the projections?

Thanks

Mike

Michael Moehle  
Retirement Investment Officer  
City of San Jose  
Department of Retirement Services  
408-794-1042

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**EXHIBIT**



July 20, 2011

VIA ELECTRONIC MAIL

Mr. Russell Crosby
Director of Retirement Services
Federated City Employees' Retirement System
1737 North 1st Street, Suite 580
San Jose, CA 95112

Re: 5-Year Budget Projections

Dear Russell:

As requested for purposes of City budget projections, we projected the contributions expected to be required of the City of San Jose to the City of San Jose Federated Employees' Retirement System (Federated Pension), the Federated Retiree Health Care Plan (Federated OPEB), the Police and Fire Department Retirement Plan (Police & Fire Pension) and the Police and Fire Department Medical and Dental Insurance Plan (Police & Fire OPEB) for the next five years. The table below summarizes the projected contributions assuming City contributions are made throughout the fiscal year.

Table with 6 columns: FYE, Federated Pension, Federated OPEB, Police & Fire Pension, Police & Fire OPEB, Total. Rows for years 2012-2016.

These projections are based on the June 30, 2010 actuarial valuations for the Plans, and assume that all assumptions, including payroll growth assumptions, in those valuations are met in the future except as specifically noted. Please refer to those reports for a description of the plan provisions, a summary of the data, and a summary of the methods and assumptions used in each of the valuations.

For the Federated Plans, we assume that the discount rate and wage growth assumptions are reduced to 7.75% and 3.83% respectively as of June 30, 2011 as adopted by the Board in conjunction with the June 30, 2010 actuarial valuation. For the Police and Fire Plans, we assumed the discount rate is reduced to 7.5% effective with the June 30, 2011 actuarial valuation per your instructions, but the payroll growth assumption remains at 4.25%.



Mr. Russell Crosby  
July 20, 2011  
Page 2

The June 30, 2010 actuarial valuations for the Police and Fire Pension and OPEB Plans were performed by the Segal Company. We relied on the results of these valuations as reported by Segal and their November 24, 2010 letter illustrating the impact of different discount rates on the contribution rates for the Police and Fire Pension Plans. We note that Segal illustrated the contribution for 2011-12 based on projected payroll for 2010-11. These projections use Segal's projected payroll for 2011-12 as the basis for the projection. In addition, the MOUs for the Police and Fire OPEB Plans indicate that if the City's contribution rate is greater than 11% of pay after the phase-in period, the parties should meet and confer. Consequently, for these projections, the City's contribution rate to the Police OPEB Plan was limited to a maximum of 11% of pay after the phase-in period. The Fire OPEB Plan just reaches the end of the phase-in period in the last year of the projection.

These projections are highly dependent on the projected payroll for each of the Plans. The table below summarizes the projected payroll on which these projections were based.

<b>City of San Jose Projected Payroll</b>			
<b>FYE</b>	<b>Federated</b>	<b>Police &amp; Fire</b>	<b>Total</b>
2012	318,579,000	261,728,000	580,307,000
2013	330,781,000	272,852,000	603,633,000
2014	343,450,000	284,448,000	627,898,000
2015	356,604,000	296,537,000	653,141,000
2016	370,262,000	309,140,000	679,402,000

Also as requested, we have attached 20-year projections of payroll and City pension contributions.

We hereby certify that, to the best of our knowledge, this report and its contents, which are work products of Cheiron, Inc., are complete and accurate and have been prepared in accordance with generally recognized and accepted actuarial principles and practices which are consistent with the Code of Professional Conduct and applicable Actuarial Standards of Practice set out by the Actuarial Standards Board. Furthermore, as credentialed actuaries, we meet the Qualification Standards of the American Academy of Actuaries to render the opinion contained in this report. This report does not address any contractual or legal issues. We are not attorneys and our firm does not provide any legal services or advice.

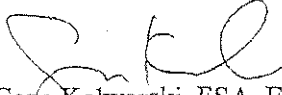
Mr. Russell Crosby

July 20, 2011

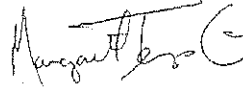
Page 3

These projections were prepared exclusively for the City of San Jose for the purpose of budget projections. These projections are not intended to benefit any third party. If you have any questions about this analysis, please let us know.

Sincerely,  
Cheiron



Gene Kalwarski, FSA, EA, MAAA  
Principal Consulting Actuary



Margaret Tempkin, FSA, EA, MAAA  
Consulting Actuary

cc: Mike Moehle  
Carmen Racy-Choy  
Ken Kent  
Anne Harper  
David Holland

**CITY OF SAN JOSE  
20-YEAR PROJECTED PENSION CONTRIBUTIONS**

<b>City of San Jose Projected Payroll</b>			
<b>FYE</b>	<b>Federated</b>	<b>Police &amp; Fire</b>	<b>Total</b>
2012	318,579,000	261,728,000	580,307,000
2013	330,781,000	272,852,000	603,633,000
2014	343,450,000	284,448,000	627,898,000
2015	356,604,000	296,537,000	653,141,000
2016	370,262,000	309,140,000	679,402,000
2017	384,443,000	322,278,000	706,721,000
2018	399,167,000	335,975,000	735,142,000
2019	414,455,000	350,254,000	764,709,000
2020	430,328,000	365,140,000	795,468,000
2021	446,810,000	380,658,000	827,468,000
2022	463,923,000	396,836,000	860,759,000
2023	481,691,000	413,702,000	895,393,000
2024	500,140,000	431,284,000	931,424,000
2025	519,295,000	449,614,000	968,909,000
2026	539,184,000	468,723,000	1,007,907,000
2027	559,835,000	488,643,000	1,048,478,000
2028	581,277,000	509,411,000	1,090,688,000
2029	603,540,000	531,061,000	1,134,601,000
2030	626,655,000	553,631,000	1,180,286,000
2031	650,656,000	577,160,000	1,227,816,000

**CITY OF SAN JOSE  
20-YEAR PROJECTED PENSION CONTRIBUTIONS**

City of San Jose Projected City Pension Contributions			
FYE	Federated	Police & Fire	Total
2012	90,291,000	132,016,000	222,307,000
2013	108,724,000	166,443,000	275,167,000
2014	123,362,000	192,601,000	315,963,000
2015	134,287,000	211,211,000	345,498,000
2016	138,127,000	218,350,000	356,477,000
2017	143,058,000	227,476,000	370,534,000
2018	148,242,000	237,131,000	385,373,000
2019	153,622,000	247,728,000	401,350,000
2020	159,197,000	258,300,000	417,497,000
2021	164,976,000	269,282,000	434,258,000
2022	170,965,000	280,727,000	451,692,000
2023	177,172,000	278,480,000	455,652,000
2024	183,605,000	289,086,000	472,691,000
2025	190,272,000	313,636,000	503,908,000
2026	197,182,000	327,993,000	525,175,000
2027	204,343,000	278,103,000	482,446,000
2028	211,766,000	241,362,000	453,128,000
2029	219,458,000	196,290,000	415,748,000
2030	227,431,000	164,793,000	392,224,000
2031	235,694,000	149,288,000	384,982,000