ATTACHMENT TO UNFAIR PRACTICE CHARGE

Introduction and Summary of Charge

This is a charge alleging an outright refusal to meet and confer, as well as refusal to provide information, and, lastly, bad faith bargaining under PERB's totality of the circumstances test. The University of California ("UC" or "the University") has been engaged in coordinated negotiations with UPTE, CUE and AFSCME ("the Unions") on pension issues, stemming from a request by the University to open mid-contract negotiations. During the course of these negotiations, the University's violations include the following types of conduct, each of which is more fully described in later sections of this charge:

(1) Outright (*Per Se*) Refusal to Bargain: UC has acknowledged, orally and in writing over the course of many months, that the University's proposal to restart employee and employer contributions to its defined benefit pension plan (the "University of California Retirement Plan" or "UCRP") is a proper subject matter for negotiations, and that the University is engaging in such negotiations. However, by letter dated November 17, 2006, the University suddenly contradicted all of these previous statements and asserted for the first time that it has the right to make such negative changes unilaterally, without bargaining, and the University suddenly asserted a blanket refusal to bargain over any aspect of restarting employee and employer contributions other than one single aspect (eliminating employee contributions to a defined contribution plan that is not part of the UCRP (the "DC Plan"), by diverting those contributions to the UCRP).

(2) Refusal to Provide Necessary and Relevant Information: Early in the negotiations, the Unions have made three sets of coordinated requests for information necessary and relevant to the Unions' ability to engage in these negotiations.[1] UC has refused to provide the vast majority of the information requested. In the above-referenced November 17 letter and subsequent correspondence, UC asserts that, in light of its new position that UCRP contributions are outside the scope of bargaining, it is denying the Unions' requests because it believes these requests relate only to the supposedly "out of bounds" subject. UC is wrong in two ways, each of which, even alone, is sufficient to support a violation of HEERA. First, the University is wrong in asserting that restarting employee and employer contributions is outside the scope of negotiations. Second, even under the University's new theory (asserted for the first time on November 17), in which only the DC Plan aspects of the University's proposed changes are subject to bargaining, the University would still have the duty to provide the requested information, because that requested information is relevant and necessary to both subjects.

(3) Bad Faith Bargaining Under the Totality of the Circumstances: While the first two categories

[1] In some of these information requests, the Unions reiterated requests they had first made many months earlier, in anticipation of the likelihood that the University would request mid-contract pension bargaining, and which the University had failed to provide.

summarized above constitutes *per se* violations of HEERA, they also, in combination with other conduct, show bad faith under the totality of the circumstances test. Among this other conduct is the University's failure and refusal to properly sunshine its opening proposal (as set forth in case numbers SF-CE-814-H, SF-CE-815-H, SF-CE-816-H, SF-CE-817-H, SF-CE-818-H, SF-CE-819-H, SF-CE-820-H, and SF-CE-822-H), as well as the University's false statements and inconsistent, regressive approach to these negotiations.

Detailed Description of Allegations

I. Refusal to Bargain

Via three identical letters dated July 17, 2006, UC requested to open mid–contract negotiations with all three of the Unions over "***changes to the UCRP*** that affect your bargaining unit members," including "***the need for the University and employees to begin contributions to the UCRP***." (See, e.g., Exhibit 1). In those letters, UC specifically indicated that, while the parties had informally discussed such matters in the past, UC wanted to formally "begin the meet and confer process" over such changes. The Unions responded that they were willing to meet and confer and attempt to reach some sort of agreement. (See, e.g., Exhibit 2).

The University's July 17 letters requesting to meet and confer were neither the first nor the last statements by the University regarding the fact that its proposed restart of contributions to UCRP was subject to bargaining and that it was seeking to bargain those proposed changes. Rather, the University's statements came in the midst of a more than year-long period in which the University many times acknowledged that it could not unilaterally restart contributions without bargaining.

The first such statements occurred during 2005, as part of bargaining for the parties' contracts. During those negotiations, the University and the Unions all knew that a restart of employee and employer contributions would very likely be proposed by the University at a later time. None of the parties, at that time, was prepared to actually negotiate the changes, particularly because the University did not at that time have a proposal to make. The Union representatives, for their part, were clear that they would not give UC free reign to make such negative retirement changes during the contract, but that UC could request mid-contract negotiations if it wished. The University representatives committed to the fact that they would have to negotiate such proposals if and when they wished to make them. The parties' contracts reflect this understanding in that each of those contracts require the University to meet and confer regarding any "alterations proposed by the University which reduce the UCRS ***retirement*** benefits of bargaining unit employees." See Exhibit 3, Section A(1).[2]

[2] Notably, this language permits UC to make, without bargaining, positive or neutral changes regarding retirement, as well as negative changes to ***health*** benefits (such as increases in employee contributions for health benefits), but not negative changes regarding ***retirement*** benefits such as restarting employee contributions toward retirement.

Remarkably, UC now apparently claims that reinstituting or increasing employee

The UPTE and CUE contracts were agreed upon in late 2005 (more than six months later than the AFSCME contract), by which time it had become clear that UC would likely be asking to negotiate retirement contributions in the next year. Accordingly, the parties even went so far as to supplement the benefits article of these contracts (Exhibit 3) with specific side letters regarding such projected bargaining (Exhibits 4 and 5). In one side letter, the University committed that there would be no restart of contributions until at least July 1, 2007, and that the University looked forward to meeting and conferring over changes UC might propose to take effect after July 1, 2007. (Exhibit 4). In a second side letter, the parties committed to the process that would be followed in the event that the University in fact wished to open mid-contract negotiations. (Exhibit 5). While the University now suddenly claims that restarting contributions is not a "negotiable issue" within the meaning of the contract, that is entirely contrary to the parties' discussions at the time, in which restarting employee contributions was considered to be within the category of "alterations proposed by the University which reduce the UCRS ***retirement*** benefits of bargaining unit employees," as identified in all of the contracts, as well as in the side letters to the CUE and UPTE contracts. (See Exh. 3, §A(1) and see Exh. 5).

While UC claims that this contract language somehow constitutes a waiver permitting the University unilaterally to deduct whatever amount of money it chooses from employee wages and divert that money into employee contributions to the UCRP, such a claim is directly contrary to the facts and the law. Factually, as discussed above, the contract language was specifically set up, and the parties specifically discussed, the fact that there would be the duty to meet and confer during the contract with respect to any negative retirement change. Legally, UC ignores the stringent requirements that it would have to meet to show a waiver. Any waiver of a right to bargain must be "clear and unmistakable." Long Beach Community College District (2003) PERB Decision Number 1568, page 14. This standard "is a high one and mandated by the Board's previous findings that there is a strong public policy against finding waivers based on inferences." Id. Thus, "waiver of an exclusive representative's right to bargain will never be lightly inferred." Id. And, importantly, "[i]n cases where the alleged waiver is exceptional in breadth or severity, the 'clear and unmistakable' standard must be stringently applied." Id. That is certainly the case here, where the waiver asserted by the University is extraordinarily broad – UC claims the right to deduct as much money as it wishes from employee wages and direct that money toward employee pension contributions, without meeting and conferring. Certainly, PERB law requires a very strong showing of waiver to permit complete discretion to

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contributions toward retirement does not constitute a change in employees' retirement benefits, because the ultimate payout formula at retirement is not affected. This reasoning, aside from being completely contrary to the parties' discussions during contract negotiations, would hurt UC even more, as under this reasoning increases in employee contributions to the UCRP constitute deductions from compensation – a change that UC would not even be permitted to propose in mid-contract, absent the Unions' consent. Under UC's original theory, which it adhered to until November 17, 2006, changes in retirement contributions constitute a retirement change which the University is permitted to propose in mid-contract, subject to the meet and confer requirement found in Section A(1) of the benefits article of the contracts (Exhibit 3).

deduct unlimited amounts of money from employee wages. In this case, UC's sudden, new interpretation of the contract language is completely contrary to the parties' intent and the meaning of the language, and, in any event, could not possibly come close to meeting PERB's standard for demonstrating a waiver.[3]

In early 2006, relatively soon after the parties' contracts took effect, UC and the unions had several informal meetings at which the University gave the Unions a "heads-up" that it would in fact be proposing changes effective July 1, 2007, that those changes would involve restarting employee and employer contributions to the UCRP, and that the University would soon be asking for formal negotiations over its proposal to implement such changes.

Meanwhile, throughout virtually all of 2006, at Regents meetings and in other public statements and public documents, the University over and over again reiterated that it would be engaging in collective bargaining with the Unions over restarting employee and employer contributions. For instance, a Regents Discussion Item related to the Regents meeting of July 19, 2006 stated as follows:

> **The issues of phasing in employer and employee contributions (when they begin, at what rate of increase they occur, and over what period of time), as well as the availability of funding to support the employer-paid contributions, are the subject of collective bargaining negotiations.**

(Exhibit 6, page 3; see also Exhibit 7, p. 11 (repeating same language in minutes of meeting)).

Similarly, in a letter to the University community dated March 8, 2006, the University wrote that "For represented employees, reinstatement of contributions to the UCRP is subject to collective bargaining." (Exhibit 8, seventh paragraph). Shortly thereafter, in a news release posted on the University's web site on March 17, 2006, the University wrote that: "For represented employees, the reinstatement of contributions to the UCRP is subject to the collective bargaining process." (Exhibit 9, page 1). And, in a news release posted on the University's web site on June 20, 2006, the University again stated that "Starting contributions to UCRP for represented employees will be subject to collective bargaining." (Exhibit 10, page 2). The same language also appears in another UC-drafted news release (date uncertain) relating to the Regents' May 2006 meeting. (Exhibit 11, page 2).

The University included similar language in a letter to the University community dated

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[3] See also Long Beach Community College District, supra, pages 17-18 (Board finds that no waiver can be found where factual dispute exists as to meaning of contract language at issue, citing to the Board's San Marcos decision finding that, where there is `substantial, reasonable disagreement` over the reach of a no-picketing clause, that clause must be interpreted not to extend to non-disruptive informational picketing, because otherwise PERB would be inferring a broad waiver of a fundamental right where the meaning of the contract was reasonably disputed.).

May 1, 2006. (Exhibit 12). Indeed, essentially every University document on the subject of restarting contributions contained a similar cautionary admonition, often in bold type. For instance, Exhibit 13 (a March 2006 Fact Sheet) describes the reasons why the University believes that a restart of contributions would be necessary, and then states in bold type at the bottom of the page:

> **For represented employees, the changes being contemplated will be subject to collective bargaining with their respective union.**

(Exhibit 13, final paragraph).

In its endless string of acknowledgments that any restart of UCRP contributions would be subject to negotiations with the Unions, the University left no ambiguity concerning the matter. For instance, in a flyer that the University drafted and widely circulated in May 2006, the University wrote:

Claim: UC plans to impose contributions to the UCRP without negotiating with the unions.

ANSWER: This is absolutely a false claim. UC will bargain the restart of contributions with unions for all represented employees.

(Exhibit 14, fifth paragraph).

In a somewhat similar flyer generated and posted by the University, UC wrote:

Q: Is UC required to bargain with unions regarding the contributions to be made by represented employees?

A: Yes, contributions made to the UCRP by employees in collective bargaining units are subject to bargaining, and UC will negotiate in good faith with the unions that represent UC employees on this issue.

(Exhibit 15, first page, second to last item).

Moreover, those of the above statements that come from the University's web site are still posted there as of today's date, including the "welcome page" in the portion of the University's web site entitled "The Future of the UC Retirement Plan." (Exhibit 16). This welcome page reiterates that the University plans to restart contributions to the UCRP, and, in a separate box at the bottom of the second page, reiterates that "For represented employees, the changes being contemplated will be subject to collective bargaining with their respective union."

Bargaining commenced on October 25, 2006. At that first bargaining session, the University made a powerpoint presentation that largely concerned the reasons why the University believes that a restart of contributions is needed, as well as when and in what way the University believes the restart of contributions is needed. Thus, the University's own conduct

further confirmed what the parties already knew very well – issues concerning the University's proposed restart of contributions are at the core of the parties' current mid-contract negotiations.

Also on October 25, UC passed to the Union the University's identical opening proposals for each of the bargaining units at issue. (Exhibit 18). In Part A of its opening proposals, UC proposed to restart mandatory employee contributions to the UCRP effective July 1, 2007, and the University proposed the initial formula for determining the amount of such contributions – under UC's proposal, employees' contributions would be equivalent to the amount that employees had been required to contribute to their DC (defined contribution) Plan, and all such mandatory defined contributions would be redirected away from the DC Plan into the UCRP. (Exhibit 18). Then, in Part B of its opening proposal, UC proposed that it would have complete discretion to change the formula for employee contributions in future years, without bargaining. (Exhibit 18).

Meanwhile, even after the start of bargaining, the University continued its torrent of public statements acknowledging that its proposal to restart employee and employer contributions was subject to bargaining. For instance, in a web site summary dated November 15, 2006 (just two days before the University's sudden reversal in position, which is discussed below), the University stated: "The contribution restart on July 1, 2007 is subject to the availability of funding, the budget process and collective bargaining for represented employees." (Exhibit 17, page 1, third para.).

By letter dated November 17, 2006 (Exhibit 19), the University reversed itself 180 degrees by suddenly claiming that (i) the parties' contracts constitute a waiver of the right to bargain over the University's proposal to restart contributions to the UCRP, and (ii) "Even if no contract were in effect, these decisions by The Regents [concerning restarting contributions to the UCRP], acting in their fiduciary capacity with respect to the UCRP, would not be subject to bargaining under HEERA." (Exhibit 1, pages 1-2). The University's letter for the first time greatly narrowed the issue that it was willing to bargain, so that it was refusing to bargain about anything other than the DC Plan aspect of its proposal.

As an initial matter, UC is incorrect in its position that retirement contributions do not constitute a mandatory subject of bargaining under HEERA. See, e.g., Clovis Unified School District (2002) PERB Decision Number 1504, pages 17-18 & fn 13 ("Social Security and PERS benefits both require employer and employee contributions to the applicable funds and so embody both deferred wages and a reduction of employees' wages . . . where deductions from wages are applied to annuities, savings bonds, or other programs designed to enhance the employee's current or future economic status, they become an integral part of the compensation structure and are no less a matter of employee-employer concern than is the basic wage rate.") (citations omitted); Oakland Unified School District (1982) PERB Decision Number 236, page 9 ("The District's payment into the employees TSA [tax-sheltered annuity] fund represents a fixed 8 percent of the employees' salary and, as such, is part and parcel of the employees' wages. This TSA contribution is of equal concern to both management and employees whose interests are appropriately represented at the negotiating table. Furthermore, there is nothing in the record to support a finding that the District's freedom to exercise those managerial prerogatives

(including matters of fundamental policy) essential to the achievement of its mission would be significantly abridged by a requirement that it negotiate a change in its practice and policy with respect to the TSA.").

Nor is UC correct in its assertion that the parties' contracts contain a waiver the right to bargain over restarting contributions to the UCRP, and that only the reduction in DC Plan contributions is subject to bargaining. As discussed above, the parties had specific discussions during bargaining about the fact that the University would be proposing such changes, and that these negative changes would be subject to bargaining. And even after bargaining closed, the University acknowledged time and time again that restarting contributions to the UCRP was the subject of bargaining – in none of those instances, did the University even remotely suggest that it considered the only bargainable matter to be reducing DC Plan contributions. To the contrary, because the ***DC Plan is not part of the UCRP, all the references to restarting contributions to the UCRP*** clearly could not possibly refer only to a ***reduction in contributions to the DC Plan, when it is not even part of the UCRP***. Yet, that is what the University now claims.

Without fully reiterating the context of each and every one of the above-discussed instances since the close of the parties' last contract bargaining in which the University has stated exactly the opposite of its current position, the following summarizes the University's unequivocal admissions:

* **"The issues of phasing in employer and employee contributions (when they begin, at what rate of increase they occur, and over what period of time), as well as the availability of funding to support the employer-paid contributions, are the subject of collective bargaining negotiations"** (Exhibit 6, page 3; see also Exhibit 7, p. 11).

* "For represented employees, **reinstatement of contributions to the UCRP is subject to collective bargaining.**" (Exhibit 8, seventh paragraph).

* "For represented employees, **the reinstatement of contributions to the UCRP is subject to the collective bargaining process**." (Exhibit 9, page 1).

* "**Starting contributions to UCRP for represented employees will be subject to collective bargaining**." (Exhibit 10, page 2; see also Exhibit 11, page 2).

* For represented employees**, the changes being contemplated will be subject to collective bargaining with their respective union.** (Exhibit 13, final paragraph; see also Exhibit 16, at the end of the second page).

* **Claim: UC plans to impose contributions to the UCRP without negotiating with the unions. ANSWER: *THIS IS ABSOLUTELY A FALSE CLAIM.* UC will bargain the restart of contributions with unions for all represented employees.** (Exhibit 14, fifth paragraph).

* **Q: Is UC required to bargain with unions regarding the contributions to be made by represented employees?**

A: Yes, contributions made to the UCRP by employees in collective bargaining units are subject to bargaining, and UC will negotiate in good faith with the unions that represent UC employees on this issue. (Exhibit 15, first page, second to last item).

Similarly, it is important to remember that UC requested to open mid–contract negotiations with all three of the Unions over "***changes to the UCRP*** that affect your bargaining unit members," including "***the need for the University and employees to begin contributions to the UCRP***." (See Exhibit 1). Again, the DC Plan is not part of the UCRP, so it is totally disingenuous for UC to now claim that these letters opening mid-contract negotiations somehow related only to the portion of UC's proposal involving the DC Plan.

The University's initial proposal during collective bargaining, made on October 25, 2006, was yet another acknowledgment that restarting UCRP contributions is within the scope of bargaining. Indeed, if the University truly believed that only DC Plan changes were bargainable, then why would the University have included language in Part A regarding mandatory employee contributions to the UCRP, and why would the University have included Part B (a waiver of the future right to bargain over changes to UCRP contributions) at all? (See Exhibit 18). Why would an employer ask for a right that it believes it already has?

Clearly, the University's ill-conceived refusal to bargain, set forth in its letter of November 17, 2006 (Exhibit 19), represents little more than a hasty, post-hoc, tactical effort to short-circuit bargaining and avoid providing information requested by the Unions.

Even after the Unions protested this refusal to bargain and asked the University to reconsider (see Exhibit 20), the University declined to do so, leaving the Unions little choice but to file this charge. Indeed, the University's refusal to bargain has completely torpedoed the parties' efforts at negotiating, just after those negotiations began. For instance, almost every time the Union requests information or makes a proposal, the University responds that the Union's information requests and proposals are not subject to bargaining. See also infra (discussion of University's refusal to provide information). Bargaining has yet to even get off the ground, because the University has improperly ruled as "out of bounds" the core issues at stake.

Thus, UC has clearly and unequivocally violated HEERA via its unequivocal statement that UCRP contributions are outside the scope of bargaining and its concomitant refusal to engage in the negotiation process regarding the core issues pertaining to a restart of UCRP contributions. See, e.g., Mt. Diablo Unified School District (1983) PERB decision number 373, pages 23-24 (even though the employer was willing to discuss all of the union proposals, employer engaged in illegal refusal to bargain when, at negotiation meetings, the employer improperly identified particular union proposals as "too early," "too late," "outside the scope of representation," or as having been waived by the Union); Oakland Unified School District (1982) PERB Decision Number 236, pages 13 and 18 (employer's refusal to negotiate over deferral of retirement contribution "has a direct adverse impact on the employees by denying

them the opportunity to have their interests represented by their exclusive representative," and "constituted a *per se* refusal to bargain over a matter clearly within the scope of representation").

II. Refusal to Provide Information

As discussed above, the major underlying premise of the University's refusal to provide information has been its decision to artificially limit the scope of negotiations solely to the DC Plan, thereby refusing to bargain over restarting UCRP contributions. See Exhibit 19 (UC's letter of November 17, 2006, explaining its new position that "information identified in [the Unions'] October 9, 2006 letter and prior requests for similar information" is outside of the scope of bargaining); see also Exhibit 30 (UC response to later information requests, refusing to provide information on the same ground as set forth in the University's letter of November 17). The Unions thus incorporate by reference the analysis set forth in Part I above, showing the major deficiencies in the University's sudden new position.

However, it is also important to realize that, even were the University somehow correct in asserting the artificial limit that it attempts to place upon the scope of issues that are subject to bargaining, all of the information requested by the Unions would still be entirely necessary and relevant. Specifically, assuming solely for the sake of argument that the parties were bargaining only UC's proposal to eliminate mandatory employee contributions to the DC Plan, it would still be important for the Unions to request information pertaining to UC's stated reasons/rationales for that proposal. The University has provided only a single rationale: certain actuarial projections done by UC actuaries project that the funded status of the UCRP will go below 100% at some point in the next few years, and the University wishes to address this potential decrease in funded status by redirecting contributions away from the DC Plan and into the UCRP.

Thus, in order to bargain intelligently regarding the DC Plan aspect of UC's proposals, the Union would still need the information necessary to bargain the UCRP contribution proposal, because the stated rationale for the DC Plan proposal is 100% premised upon the University's reasoning related to its UCRP contribution proposals.

The Unions proceed below to go through each of the Unions' three sets of information requests, showing the relevance of the requested information and the University's failure and refusal to provide such information.

A. Request for Information Number One (Dated October 9, 2006):

The Unions' first information request (RFI #1), dated October 9, 2006, is attached hereto as Exhibit 21, and the Unions' attachments to RFI #1 are provided as Exhibit 22. The University's response is attached hereto as Exhibit 23, and the Union's reply to that response is attached hereto as Exhibit 24. The following are the portions of this request that have not been answered, or in some cases have been only partially answered:

Items A-M

No information has been provided by the University regarding these items.

Items A-M concern the transfer of substantial assets and liabilities out of the UCRP as part of the fact that employees at Los Alamos National Laboratory and Lawrence Livermore National Laboratory ("the energy labs") are being transferred from having UC as their employer to having a private sector entity as their employer, and the majority of these employees are choosing to transfer their vested benefits out of the UCRP.

UC has stated, over and over, that the need for employee contributions to the UCRP, and therefore the need for ending employee contributions to the DC Plan, is driven by the changing funded status of the Plan.

The magnitude of the transfers of Plan assets for certain energy lab employees – well over a billion dollars just at the first lab alone – directly impacts the funded status of the Plan. UC has remarked publicly on the lack of precedent regarding actuarial and accounting methodology to be used in such a transfer. UC has also remarked publicly that there is disagreement between UC and the DOE/NNSA on various issues relating to the pension transitions at the energy labs, for example, in the areas of the DOE's ongoing responsibility to the UCRP and the issue of how the "surplus" in the Fund may be divided among the entities – matters that directly impact the funded status of the Plan, and thus the need for contributions to the Plan and the need for ending employee contributions to the DC Plan. Items A-M address these issues.

Indeed, if there was any doubt about the crucial relevance of the energy lab transitions, that doubt would have been dispelled at the November 2006 Regents meeting, in which UC's actuaries made their annual report regarding the UCRP. In that report, the Actuaries specifically identify the fact that there is approximately $1.4 billion in assets at issue in the transition at the first energy lab alone (no estimates have been done yet regarding the second energy lab), and that the actual amount of assets to be transferred out will be a subject of negotiation, because the new entity running the laboratory will inevitably come up with different numbers. (See Exhibit 25, discussion beginning on the bottom of page 4 and continuing onto page 5). As the actuaries point out, none of these transfers have yet been taken into account in establishing the funded status level of the UCRP.[4] Thus, the substantial relevance that UC's own actuaries see in the energy lab transitions confirms what the Unions have been saying to UC – the Unions are entitled to underlying information regarding the energy lab transitions and the transfer of assets related thereto, so that the Unions and their actuaries can assess the funded status of the UCRP, the need for a restart of contributions, the amount of such contributions, the timing of such contributions, and whether such funds should come from employee DC Plan contributions, from the employer, from the State, or from some other source.

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[4] Even though the final amount of assets to be transferred has not yet been determined, the Regents have already authorized the transfer of millions of dollars each month, on an interim basis.

Item N

Item N reiterates an earlier request that the Unions had made (prior to the start of bargaining), in which the Unions sought information regarding the wage assumptions used by the University's actuaries in their actuarial projections. While UC had responded in a very general way to the previous request, Item N asked detailed follow-up questions, asking how the salary assumptions were calculated, how such assumptions were used in the actuarial valuation, how those assumptions compared to actual average salary increases for the past 20 years, and how those averages were calculated.

Assumptions regarding wage increases – by how much employees' wages (and thus their retirement benefits under the retirement formula) will go up in the future -- are one of the crucial assumptions that determine the outcome and accuracy of actuarial pension plan projections. Thus, there is no question that this information is necessary so that the Unions and their actuaries can assess the funded status of the UCRP, the need for a restart of contributions, the amount of such contributions, the timing of such contributions, and whether such funds should come from employee DC Plan contributions, from the employer, from the State, or from some other source.

Furthermore, the extent to which the information shows that the wage increases in question go more to bargaining unit members on the one hand or unrepresented employees who are also participants in the UCRP on the other hand necessarily affects issues pertaining to appropriate UCRP cost-sharing between the employer and bargaining unit employees, as well as the relative value that bargain unit members place upon the UCRP and the DC Plan.

Yet, UC has failed and refused to answer this request. UC recently claimed for the first time that the information is the "proprietary" property of UC's actuary. (Ex. 36, top of page 2). UC offers neither legal support nor factual support for its completely novel and new claim that the actuarial calculations done for a public pension plan can become "proprietary" information of the actuary (and therefore not subject to HEERA's duty to provide information) merely because the public pension plan has hired a private sector actuary to perform the calculations. There is no precedent supporting this position. Moreover, UC ignores the fact that part of the Unions' request did not ask for calculations performed by Segal, but rather asked for basic information, for instance: "What is the average annual system-wide percent salary increase figure for each of the past 20 years?" Even for those parts of the request that relate to Segal's calculations, the Unions have a right, at the very least, to a basic explanation of what Segal has done. If Segal and UC were to at least provide a basic explanation of the numbers used and the basis for those numbers, as well as what algorithms or calculations are being withheld based upon a so-called "proprietary right" (and the basis for that proprietary claim), the Unions could at least have a basis for discussion with the University – so far, however, there has been no explanation of the numbers used or their basis and no explanation of the proprietary right that is claimed.

Item O

In Item O, the Unions requested dates, locations, agendas, minutes, actions taken, people

in attendance, and documents received at meetings of the Regents Retirement Benefits Task Force, a group whose mission is intricately linked to all of the changes being bargained, both the UCRP aspects and the DC Plan aspects. The University provided only the dates of meetings, claiming that the other requested items are subject to the attorney-client privilege or a negotiations privilege.

In response to this claim of privilege, the Unions wrote back to UC as follows:

> First, in order to establish whether the attorney-client privilege in fact applies to some or all of the documents pertaining to the Task Force and its meetings both before and after March 10, 2006, there are a number of relevant questions that we have:
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> 1. Please provide a complete list of the people in attendance at each meeting of the Task Force.
>
> 2. Please provide a privilege log for each document we requested that you claim is protected by the attorney-client privilege. In this privilege log, please provide the name and general description of the document, the date of the document, the author of the document, all recipients of the document at any time since it was authored (including any indirect recipients), and your explanation of why the privilege applies.
>
> Similarly, in order to establish whether some or all documents pertaining to the Task Force are privileged based upon a collective bargaining privilege, please provide a privilege log for each document we requested that you claim is protected by such a privilege. In this log, please provide the name and general description of the document, the date of the document, the author of the document, all recipients of the document at any time since it was authored (including any indirect recipients), and your explanation of why the privilege applies.
>
> Please note that the privileges you have identified could not possibly protect from disclosure the location of meetings or the names and titles of those in attendance at the meetings, so please provide that information for each meeting of the Task Force.
>
> Finally, it is highly unlikely that all the documents relating to the Task Force are 100% privileged, and we ask that you provide redacted copies of all documents, leaving intact those parts that you do not claim are privileged. As one easy example, while it is highly unlikely that either of these privileges could protect agendas, if you claim that any part of the agendas are privileged, please nevertheless provide redacted copies of those agendas (and make sure to include them on your privilege logs).

(Exhibit 24, pages 2-3).

The University has, however, steadfastly refused to provide any of the requested information. (Ex. 36, page 2).

B. Request for Information Number Two (Dated October 25, 2006):

The Unions' second information request (RFI #2), dated October 25, 2006, is attached hereto as Exhibit 26. The University's response is attached hereto as Exhibit 27, and the Union's reply to that response is attached hereto as Exhibit 28. The following are the portions of this request that have not been answered, or in some cases have been only partially answered:

Item I(B) – UCRP Governance[5]

The Unions' requests for information relating to the governance of the UCRP are extremely relevant and necessary for bargaining. To begin with, UC is proposing that the Unions accept management's positions regarding the needs of the plan, without independent analysis by the Unions' actuary. The Unions cannot consider such a proposal without a better understanding of how such pension decisions are made, and the Unions need to address this by understanding better the governance of the UCRP, and by developing proposals relating to the governance of the UCRP. (See, e.g., Exhibit 35).

Furthermore, UC has claimed repeatedly that it is changes in the funded status of the UCRP that are driving the need to restart pension contributions. The governance of the UCRP impacts its funded status in numerous ways – for example, through the adoption of actuarial assumptions used in determining the funded status of the plan, the making of policy decisions on such issues as contributions, investment management, the allocation of funds among investment types, and the creation and oversight of conflict of interest policies.

Item I(B) asks what "official action" of the Regents created the "Retirement Benefits Task Force" whose name was later changed to the "Advisory Group on Retirement Benefits," and specifically asks the University to provide the agenda item, meeting minutes, action item and any other documentation of these actions. Although the University's Public Records office claims that it has responded under the Public Records Act, its response does not answer the question at all. As the Unions explained in their response letter (Exhibit 28), UC's Public Records office provided minutes of two Regents meetings in which the committee was mentioned in passing, but did not provide any dates, agendas, minutes, action items, documentation or other information showing when or how the group was first created and when or how the group was changed.

Items II(A)-II(F) – Retiree Medical

The Unions' questions regarding retiree medical coverage are relevant and necessary for

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[5] The University has completely denied that any of the Unions' requests pertaining to governance of the UCRP are relevant under HEERA. However, the University has provided some of the requested information pursuant to the California Public Records Act, and the Unions accordingly limit their charge to only that information which has not been provided.

multiple reasons. First, these information requests relate to the employer's overall resources available and other potential costs that the employer may have competing for its resources. Therefore, the information requests are relevant to the crucial issue of the allocation of any future UCRP contributions as between employer contributions and employee contributions.

The Unions' retiree medical information requests also relate to bargaining unit members' total present and deferred compensation, including deferred benefits, of which retirement payments and retiree medical coverage are parts. UC has stated that it plans to "rebalance" total remuneration, with such "rebalancing" achieved, in part, via reductions in retiree medical and other benefits as a component of total compensation. The Unions need to understand the impact of UC's plans regarding retiree medical on bargaining at members' total compensation, in order to evaluate proposals on retirement contributions in the context of UC's total remuneration "rebalancing" plans. Indeed, the University has itself tied its own pension proposals to wages and total compensation by proposing a small wage increase for certain employees that would partially offset those employees' restarted UCRP contributions. See Exhibit 34 (UC Proposal #2).

The Unions' questions regarding the identification of funding streams for retiree medical, as well as the segregation of funds for retiree medical uses, also relate directly to how secure the retiree medical benefit is now and in the future. In order to evaluate proposals on retirement issues in the context of UC's plans to rebalance total remuneration, the Unions need to evaluate how secure the retiree medical benefit is, as well as to develop and evaluate proposals regarding the funding and security of the retiree medical benefit in the context of bargaining on the pension component of total remuneration.

Finally, the Unions have noted that the Pension Protection Act of 2006 permits the transfer of pension plan assets for use for retiree medical under certain conditions. The Unions need information from UC in order to know if or under what circumstances UC plans to use UCRP assets for retiree medical, as this impacts the funded status of the Plan and the need for contributions in the future. The Unions need to know if future UCRP contributions will ultimately contribute to the funding of retiree medical, not just the UCRP itself. The Unions also need the information in order to evaluate whether they wish to develop their own proposals on the issue of the use of pension assets for retiree medical.

UC has completely failed and refused to respond to these requests.

Items III(A)(3)-(5) and III(B)(1)-(4) – Plan Funding

The Unions' requests for information regarding UCRP funding are relevant and necessary for bargaining on UCRP and DC Plan contributions for the obvious reason that UC has stated, over and over, that the need for its proposals relating to contributions is driven by the changing funded status of the UCRP. Accordingly, the Unions need information on the sources and uses of Plan funds, past, present and future, to better understand the changing funded status of the UCRP and so that the Unions and their actuaries can assess the funded status of the UCRP, the need for a restart of contributions, the amount of such contributions, the timing of such

contributions, and whether such funds should come from employee DC Plan contributions, from the employer, from the State, or from some other source

The Unions also need this information in order to evaluate UC's total funds available. UC has made historic information particularly relevant to these negotiations because, as indicated in UC's initial pension bargaining proposal, as well as in total compensation studies performed by Mercer on behalf of UC, and in UC's budget discussions, UC is proposing a major shift away from the historic pattern of employee and employer contributions. In bargaining about contributions, UCRP plan funding is also quite relevant because contributions can be tied to particular "triggers" or "thresholds" of plan funding status.

UC has failed to respond to these requests, asserting that they are outside the scope of bargaining under HEERA. Although UC's Public Records office emailed the Unions that it had considered the requests under the Public Records Act and was unable to find any documents responsive to Items III(A)(3)-(5) and III(B)(1)-(2), this response merely highlights why it is often not sufficient for UC to comply under the Public Records Act while refusing to answer under HEERA. While complying under the Public Records Act can sometimes be sufficient in those instances where a union is only seeking documents, in this case the Unions' requests specifically sought information, asking questions about use of monies, including calculations. Thus, the response by the Public Records office that there are presently no responsive *documents* does not adequately fulfill the University's duty to provide the *information* requested. See Exhibit 28 (Union response explaining inadequacy of Public Records office response to satisfy HEERA requirements.). Furthermore, the Public Records office did not even claim that it had searched for any documents responsive to items III(B)(3)-(4). Id.

Items IV(A)-IV(E) – Transitions at Energy Labs

Items IV(A) through IV(E), much like the related requests made by the Unions in Items A-M of RFI #1, concern the transfer of substantial assets and liabilities out of the UCRP as part of the fact that employees at Los Alamos National Laboratory and Lawrence Livermore National Laboratory ("the energy labs") are being transferred from having UC as their employer to having a private sector entity as their employer, and the majority of these employees are choosing to transfer their vested benefits out of the UCRP.

As discussed above, UC has stated, over and over, that the need for employee contributions to the UCRP, and therefore the need for ending employee contributions to the DC Plan, is driven by the changing funded status of the Plan.

The magnitude of the transfers of Plan assets for certain energy lab employees – well over a billion dollars just at the first lab alone – directly impacts the funded status of the Plan. UC has remarked publicly on the lack of precedent regarding actuarial and accounting methodology to be used in such a transfer. UC has also remarked publicly that there is disagreement between UC and the DOE/NNSA on various issues relating to the pension transitions at the energy labs, for example, in the areas of the DOE's ongoing responsibility to

the UCRP and the issue of how the "surplus" in the Fund may be divided among the entities – matters that directly impact the funded status of the Plan, and thus the need for contributions to the Plan and the need for ending employee contributions to the DC Plan. Items I(A)-I(E) address these issues.

Indeed, if there was any doubt about the crucial relevance of the energy lab transitions, that doubt would have been dispelled at the November 2006 Regents meeting, in which UC's actuaries made their annual report regarding the UCRP. In that report, the Actuaries specifically identify the fact that there is approximately $1.4 billion in assets at issue in the transition at the first energy lab alone (no estimates have been done yet regarding the second energy lab), and that the actual amount of assets to be transferred out will be a subject of negotiation, because the new entity running the laboratory will inevitably come up with different numbers. (See Exhibit 25, discussion beginning on the bottom of page 4 and continuing onto page 5). As the actuaries point out, none of these transfers have yet been taken into account in establishing the funded status level of the UCRP. Thus, the substantial relevance that UC's own actuaries see in the energy lab transitions confirms what the Unions have been saying to UC – the Unions are entitled to underlying information regarding the energy lab transitions and the transfer of assets related thereto, so that the Unions and their actuaries can assess the funded status of the UCRP, the need for a restart of contributions, the amount of such contributions, the timing of such contributions, and whether such funds should come from employee DCP contributions, from the employer, from the State, or from some other source.

UC has completely failed and refused to respond to these requests.

<u>Items V(B) - V(D) and V(G) - V(J) – Actuarial Information</u>

UC provided item V(A), and has said that it is "looking into" items V(E) and (F), so the Unions do not file any charge at this time based upon those items. However, the University has completely failed and refused to provide items V(B) through V(D) and V(G) through V(J).

In light of the University's repeated statements that the actuarially-projected funded status of the UCRP is the rationale for UC's proposals relating to UCRP and DC Plan contributions, the actuarial information sought by the Unions is particularly crucial so that the Unions and their actuaries can assess the funded status of the UCRP, the need for a restart of contributions, the amount of such contributions, the timing of such contributions, and whether such funds should come from employee DC Plan contributions, from the employer, from the State, or from some other source. As just one example, the use of out-of-date or inaccurate actuarial assumptions may impact the actuarial calculation of the funded status of the UCRP, and thereby impact the need for contributions to the UCRP. The Unions' use of actuaries to provide independent analysis is well established in collective bargaining, and bargaining is completely thwarted by the University's refusal to provide information needed to test the validity of the University's analysis.

More generally, a full understanding of the funded status of the UCRP is vital for the

Unions, given that UC has repeatedly claimed that changes in the funded status of the UCRP are driving the need to restart pension contributions. In bargaining about contributions, actuarial information is also quite relevant because contributions can be tied to particular "triggers" or "thresholds" of plan funding status.

Items VI(A) through VI(I) – Appendix E to the UCRP

The University has stated that it is "in the process of reviewing" these requests. Accordingly, the Unions do not at this time include these requests in the instant charge. The Unions will amend the charge, if necessary, should the University in the future refuses this or other requests that are currently under review.

Items VII(A)(1)-(11), (B)(1)-(3), (C)(1)-(2) and (D) – UCRP Performance and Management

The Unions' information requests about the management and performance of the UCRP's investments are quite significant for bargaining on pension contributions. UC has stated repeatedly that the need for its proposals relating to UCRP and DC Plan contributions is driven by the performance of the UCRP. Thus, questions relating to the performance of UCRP investments are directly relevant to the issues being bargained – as noted above, the Unions and their actuaries need to assess the projected future funded status of the UCRP, the need for a restart of contributions, the amount of such contributions, the timing of such contributions, and whether such funds should come from employee DC Plan contributions, from the employer, from the State, or from some other source.

In bargaining about contributions, UCRP investment performance is also quite relevant because contributions can be tied to particular "triggers" or "thresholds" of fund performance or of plan funded status.

Items VIII(A) - VIII(D) – Plan Design Changes

The Unions' requests regarding potential plan design changes that the University may be considering are extremely relevant. There can be no question that employees' willingness to make contributions to the UCRP could be dependent upon what benefits they are likely to get in return. The requested information is also significant because contributions can be linked to potential plan design changes that employees want to see happen, but in order to craft those sorts of proposals, the Unions would need the requested information concerning what plan design changes might already be under consideration or in the works. Lastly, the requested information also relates to UC's elimination of contributions to the DC Plan, a separate part of the overall UC Retirement System. In order to evaluate that in its total context, the Unions need information about where the overall Retirement System (including, principally, the UCRP) is headed.

Items IX(B)-IX(D) – Total Compensation and Total Resources Available

The Unions' requests regarding employees' total compensation and the University's total resources available are crucially important to bargain over pension contributions. UC has stated

that it plans to "rebalance" total remuneration, with such "rebalancing" achieved, in part, via reductions in retiree medical and other benefits as a component of total compensation, while increasing wages. The Unions need to understand the impact of UC's plans regarding bargaining unit members' total compensation, in order to evaluate proposals on retirement contributions in the context of UC's total remuneration "rebalancing" plans. Indeed, the University has itself tied its own pension proposals to wages and total compensation in multiple ways: (i) UC has proposed a small wage increase for certain employees that would partially offset those employees' restarted UCRP contributions. See Exhibit 34 (UC Proposal #2); and (ii) UC's own presentations at bargaining have repeatedly talked about the University's proposals in the context of total compensation. See, e.g., Exhibit 29 (page from UC powerpoint presentation made during bargaining).

Items X(A) - X(D) – Vesting, Turnover, Recruitment and Retention

The Unions' requests under this item relate to crucial actuarial assumptions, and information regarding these assumptions is needed to evaluate UC's claims regarding the funded status of the plan. This information is necessary and relevant not only because vesting assumptions constitute a crucial component of all actuarial projections, but also because actual vesting statistics show the value of the benefit to the unit in question. For instance, if a particular unit experiences very high turnover, then taking money away from the DC Plan (a plan that has immediate vesting), and diverting the money into the UCRP (which requires five years of service to vest) could be a particularly bad deal for that unit. Obviously, the Unions representing all of the units desperately need this information in order to assess their bargaining positions.

Item X(B) constitutes further follow up on a previous information request. Specifically, in the previous request, the Unions had requested information regarding the percent of employees in the clerical unit, hired since 1990, who worked at the University long enough to eventually vest in the UCRP. The University responded that it could extract this information, potentially with a cost involved, if the Unions wished. (See Ex. 22, 7th Document, answer to item 12). In Item X(B), the Unions asked for the estimated cost of producing information and the name and phone number of the person to contact. The University has now changed its position and disclaims the ability to retrieve that information. Yet, even under the University's new position, it has said the information is available going back to 2004 (rather than going back to 1990 as the Unions requested), but the University has not provided even the information that it still admits is available.

Furthermore, Items X(C) and (D) seek information regarding the effect of employees' total compensation on recruitment and retention. UC has stated that it plans to "rebalance" total remuneration, with such "rebalancing" achieved, in part, via reductions in retiree medical and other benefits as a component of total compensation, while increasing wages. The Unions need to understand the impact of UC's plans regarding bargaining unit members' total compensation, in order to evaluate proposals on retirement contributions in the context of UC's total remuneration "rebalancing" plans. Indeed, the University has itself tied its own pension proposals to wages and total compensation in multiple ways: (i) UC has proposed a small wage

increase for certain employees that would partially offset those employees' restarted UCRP contributions. See Exhibit 34 (UC Proposal #2); and (ii) UC's own presentations at bargaining have repeatedly talked about the University's proposals in the context of total compensation. See, e.g., Exhibit 29 (page from UC powerpoint presentation made during bargaining).

C. Request for Information Number Three (Dated November 9, 2006):

The Unions' third information request (RFI #3), dated November 9, 2006, is attached hereto as Exhibit 30. The University's response is attached hereto as Exhibit 31, and the Union's reply to that response is attached hereto as Exhibit 32.

The University has refused to provide any of the requested information in RFI #3 (other than Items I(B) and (C)), on the ground that it is refusing to bargain over restarting employee pension contributions. Indeed, as the University wrote in its response to this information request:

> **In Howard Pripas's letter of November 17, 2006, he explained that The Regents' decision to restart contributions to the UCRP is not subject to bargaining under HEERA**
>
> **....**
>
> **For the reasons previously stated, none of this information is relevant or necessary for these negotiations.**

(Ex. 31).[6]

The Unions incorporate by reference their arguments at pages 2-8 above concerning the illegality of the University's refusal to bargain about restarting employee contributions.

Moreover, the data requested in RFI#3 is crucial data. As the Unions have explained to the University on numerous occasions, UC has failed to conduct two crucial actuarial studies. First, even though the UCRP Plan Document itself requires an updated Actuarial Experience Study (investigation of actuarial assumptions) at least every three years and the Plan Document prohibits changes from being made without such a study (see Exhibit 33, Section 12.01), it has been longer than three years since the last study, and UC is nevertheless proposing changes based upon an outdated set of assumptions. Since UC has failed and refused to comply with its own plan by updating actuarial assumptions, the Unions have asked their actuary to conduct the required study needed to update actuarial assumptions. RFI#3 contains the information that the Unions' actuary has determined is needed for that study, yet UC has refused to provide the

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[6] UC's letter claims to be providing item I(A), but in reality is providing Item I(B). Similarly, while the University's letter claims to be providing both Items I(C) and I(D), in reality it only provided Item I(C). The Unions have pointed this out to the University, to no avail.

information, leading the Unions to have no ability whatsoever to independently examine the funded status of UCRP.

Second, even though UC's own actuaries recommend Asset-Liability Modeling as the "best practice" in industry, UC has not agreed to pay its actuaries to conduct Asset-Liability Modeling for the UCRP. Once again, the Unions are left in the position of having to ask their own actuary to perform the study. RFI#3 contains information that the Unions' actuary has determined is necessary to conduct that study. UC's refusal to provide the crucial information requested in this information request makes a mockery of bargaining. Even though the University's own stated rationale for all of its proposals relates to actuarial projections regarding the funded status of the UCRP, UC refuses to provide the information that the Unions' actuary has determined he needs in order to evaluate the University's proposal and perform his own projections and studies (including the aforementioned studies required by the Plan itself and recommended by the University's own actuaries, which the University has declined to perform).

The Unions need the information to evaluate UC's proposals, and develop the Unions' proposals. UC has stated, over and over, that the need for contributions to the UCRP is driven by the changing funded status of the Plan. The use of out-of-date or inaccurate actuarial assumptions may impact the actuarial calculation of the funded status of the Plan, and thereby impact the need for contributions to the Plan. The Unions' development and consideration of proposals that include triggers or thresholds tied to actuarial values are dependent on having a full understanding of, and confidence in, actuarial information about the Plan. Unions' use of actuaries to provide independent analysis is well established in collective bargaining, and the bargaining process is stalled because UC is not providing information needed to test the validity of the University's analysis

III. Bad Faith Bargaining Under the Totality of the Circumstances

Parts I and II of this charge alleged conduct which constitutes *per se* violations of HEERA. The same conduct is also evidence of bad faith bargaining under the totality of the circumstances test. In addition to the conduct which constitutes *per se* violations, there is other conduct that also demonstrates bad faith under this test:

First, UC has engaged in serious misrepresentation and taken a regressive approach to these negotiations. As discussed above at pages 2-8, UC for many months took one position regarding what was being bargain, and then suddenly adopted a new position. When that misrepresentation goes to the core of bargaining – what issues are at stake – it is particularly egregious evidence of bad faith.

Second, an employer's failure to comply with public notice requirements constitute evidence of bad faith bargaining that may be considered within the totality of the circumstances. South San Francisco Classroom Teachers Association (1990) PERB Decision Number 830, page 3; Oakland Unified School District (1983) PERB Decision Number 326, page 40.

In this case, the employer's failure to comply with HEERA's public notice provisions, as

alleged in case numbers SF-CE-814-H, SF-CE-815-H, SF-CE-816-H, SF-CE-817-H, SF-CE-818-H, SF-CE-819-H, SF-CE-820-H, and SF-CE-822-H, is particularly egregious evidence of bad faith. As set forth in those charges (which are incorporated herein by reference), the University knew about its obligation, even acknowledging that obligation to the Union, but nevertheless was in such a hurry to get through negotiations that it willfully ignored the obligation. In fact, it was the same rush to impasse that not only gave rise to the University's blatant public notice violation, but also gave rise to the University's refusal to provide information and, specifically, the University's sudden change in position regarding the scope of bargaining – a post-hoc tactical maneuver clearly designed by the University to short-circuit bargaining and avoid the University's legal duty to provide information as part of bargaining. See supra pages 2-20.

Remedy

UC must be ordered to remedy, and cease and desist from, all of its bad faith conduct, so that the obstacles to a real meet and confer process are torn down and the parties can at last begin meaningful negotiations.