

AGENDA

COMMITTEE OF THE WHOLE

**Meeting: 9:30 a.m., Wednesday, September 20, 2000
Glenn S. Dumke Conference Center**

Laurence K. Gould, Chair
Dee Dee Myers, Vice Chair
Roberta Achtenberg
William D. Campbell
Daniel N. Cartwright
Martha C. Fallgatter
Debra S. Farar
Bob Foster
Murray L. Galinson
Harold Goldwhite
Shailesh J. Mehta
Neel I. Murarka
Ralph R. Pesqueira
Frederick W. Pierce, IV
Ali C. Razi
Charles B. Reed, Chancellor
Anthony M. Vitti
Stanley T. Wang

Consent Items

Approval of Minutes of Meeting of March 15, 2000

Discussion Items

1. Litigation Report No. 12, *Information*

BRIEF

Information Item

Agenda Item 1
September 19-20, 2000

COMMITTEE OF THE WHOLE

Litigation Report No. 12

Presentation By

Christine Helwick
General Counsel

Summary

This is the biannual report on the status of significant litigation confronting the CSU, which is presented for information. "Significant" for purposes of this report is defined as litigation: (1) with the potential for a systemwide impact on the CSU; (2) which raises public policy issues of significant interest or concern; (3) brought by or against another public agency; or (4) which, for other reasons, has a high profile or is likely to generate widespread publicity. *New information since the date of the last report is printed in italics.*

The cases contained in this report have been selected from over 225 currently active litigation files.

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Agenda Item 1

September 19-20, 2000

Litigation Report No. 12

New Cases

Board of Trustees v. Dillingham Construction - San Francisco Superior Court

CSU filed this lawsuit against Dillingham Construction, contractor for the Humanities Building on the San Francisco campus, which has experienced leaks through the windows and walls as a result of the failure of the exterior insulation finish system. The case is in the initial pleading stage.

Deutsch v. Hulsey, et al. – United States District Court – San Diego

Stuart J. Deutsch, a former professor at Northeastern University applied for positions at CSU Northridge and San Marcos in 1997 and 1999 respectively. He did not get either job. He filed this lawsuit against the CSU, various CSU employees, an employment search consultant, Northeastern University, and its in-house counsel, claiming that he was denied both jobs because of a conspiracy to retaliate against him for having earlier filed claims of discrimination against Northeastern and its counsel. The case is in the initial pleadings stage. CSU has filed a motion to dismiss which is scheduled for hearing on August 28, 2000.

Donoho v. Trustees, et al. - Los Angeles County Superior Court

Sean Donoho, who is developmentally disabled, was employed, while still a minor, as a cafeteria dishwasher in the Forty-Niner Shops at CSU Long Beach as part of a transition program run by the Long Beach Unified School District. Donoho claims to have been the victim of a series of sexual molestations and attacks by a fellow cafeteria employee, and is suing the CSU, the Forty-Niner-Shops (a campus auxiliary), the Long Beach Unified School District and various individuals. The CSU is being defended and indemnified by the Forty-Niner Shops. The lawsuit is in the early discovery phase.

Fowler, et al. v. Martinez, et al.- Sacramento County Superior Court

This is a wrongful death action brought by the parents of Steven Lucas Fowler, who died of head injuries ten days after he was assaulted in a campus parking lot while attending a CSU Sacramento football game. The parents assert that CSUS failed to properly control alcohol consumption at the game. The UC Davis Medical Center is also accused of medical negligence. The CSU has filed a motion to have the case dismissed, which is scheduled for hearing on August 31, 2000.

Lander, et al. v. Sonoma State University, et al. – United States District Court – Oakland

Three Sonoma State students with disabilities filed this lawsuit alleging violations of the Americans With Disabilities Act and various other civil rights statutes, based on the alleged existence of multiple architectural barriers throughout the campus. The plaintiffs are represented by an attorney, whose law firm has gained publicity for similar ADA litigation in the

past against, among others, Clint Eastwood. The case is in the initial pleading stage. In an effort to minimize discovery and other litigation costs, the parties are cooperating to identify and address all undisputed architectural barriers.

Riley v. CSU San Bernardino – San Bernardino County Superior Court

Clinton Riley, a CSU San Bernardino student, was referred to Anthony Parrish, an employee in the campus accounting department, in connection with Riley's application for financial aid. Parrish solicited Riley to have sex in exchange for money. Riley reported Parrish's behavior to the campus police, who investigated and confirmed that the incident had occurred. Parrish was arrested, and has resigned his university employment. He was convicted of a criminal misdemeanor. Riley is now suing CSU and Parrish for damages for this incident. The lawsuit is in the discovery stage.

Seretan v. CSU et al. - Los Angeles County Superior Court

Glen Seretan, a Deputy Attorney General disappointed with a recent merit pay increase, filed a grievance against his employer. In connection with that effort, he sought records from the CSU under the Information Practices Act, which relate to his performance as the litigator on a CSU Northridge case in which he ultimately had to be removed and replaced by another lawyer. Those records were not provided, because they are protected by the attorney client and attorney work product privileges. Seretan has now filed this action, seeking an order from the court compelling the CSU to provide the documents he requested. The Attorney General's Office is providing a defense and indemnification to the CSU for any loss on this case. The case is in the early pleading stage. The judge has determined preliminarily that the records are privileged, but has requested that they be produced for her review before further rulings are made in the case.

Southern California Velodrome Association v. CSU, Dominguez Hills Foundation, et al.

CSU, Dominguez Hills leased the operation of its velodrome to its Foundation, which in turn granted an operating license for the facility to the Southern California Velodrome Association (SCVA). The University terminated the velodrome lease, and the Foundation in turn terminated the rights of SCVA for its operation. The SCVA filed this complaint for a preliminary injunction against the University and the Foundation from interfering with its use and possession of the velodrome. The Foundation has accepted the University's defense under the indemnity provisions in the lease. The case is in the early pleading stage, and a hearing on the preliminary injunction is scheduled to be heard on September 12, 2000.

The McClatchy Company dba The Fresno Bee v. California State University, et al. – Fresno County Superior Court

The Fresno Bee made a request under the Public Records Act for documents, which disclose the names of donors who have paid for luxury suites in CSU Fresno's new Save Mart Center. A significant portion of the cost of these suites is officially recognized as a charitable contribution by the IRS. The CSU refused to disclose the names of its donors on the grounds of protecting their interest in privacy. Records detailing all financing for the Save Mart Center, including the cost of the luxury suites, has been provided to the Fresno Bee. This lawsuit seeks an order requiring the CSU to

surrender the names of its donors. The case is scheduled for trial on August 31, 2000 and will be decided on legal briefs.

Construction Cases

Board of Trustees v. Blake Construction, et al. - San Diego County Superior Court

CSU filed this lawsuit against Blake Construction Company, the prime contractor, Richard Bundy & David Thompson, Inc., the architect, the stucco and window subcontractors, and the window manufacturer at the Chapultepec Residence Hall at San Diego State University, which has experienced significant water intrusion into some of the living units. This case is currently in the discovery phase. *Mediation is scheduled for September 25, 2000. The case has a trial date of February 9, 2001.*

Board of Trustees v. Perini Building Company – San Francisco County Superior Court

CSU filed this action against Perini Building Company, the design-build contractor on the Guest Center/Resident Apartments on the San Francisco campus, which has experienced significant leaks through the windows and walls as a result of the failure of the exterior insulation finish system. *Mediation is scheduled for August 31, 2000.*

Employment Cases

Ali v. California State University, Northridge, et al.- United States District Court - Los Angeles & Los Angeles County Superior Court

Amir Ali, a former campus architect with responsibility to oversee earthquake repairs at CSUN, filed two lawsuits claiming that the campus misused FEMA funds. His state court action was dismissed for failure to exhaust administrative remedies. His federal action, which alleges violation of the False Claims Act, *has been dismissed on stipulation because of a recent United States Supreme Court decision, which ruled that the States are not subject to claims brought under that Act.*

Brown v. California State University - Fresno County Superior Court

Horsford, et al. v. California State University - Fresno County Superior Court

Auwana Brown, a former employee in the CSU Fresno Police Department, filed a lawsuit claiming to have been sexually harassed by the former chief of police, Willie Shell. Daniel Horsford and five other employees or former employees in the CSU Fresno Police Department filed a separate lawsuit claiming that a variety of actions in the CSU Fresno Police Department while Shell was chief constituted reverse discrimination. The plaintiffs in the second action are white, Hispanic and Asian; Shell is black. Plaintiffs in both lawsuits are represented by the same attorney. Shell resigned his employment at CSU Fresno before either lawsuit was filed, and later pled no contest to felony charges of misconduct while he was chief of police at CSU Bakersfield before coming to Fresno. Brown was settled in December 1998. Discovery in Horsford is nearing completion. CSU filed motions for summary judgment against all six plaintiffs. Three were granted. The other three were granted in part, leaving significant but narrowed issues for trial. *The trial of this case began on May 16, 2000 and continued through August 11, 2000. The jury rendered a verdict for plaintiffs in the total amount of \$4.25 million. Plaintiffs will seek attorneys' fees and are also seeking various forms of injunctive relief. Post trial motions are being evaluated.*

McNeir v. CSU – San Francisco Superior Court & United States District Court – San Francisco
Plaintiff is a Lecturer in the Accounting and Management Departments who claimed reverse discrimination because he was not interviewed for a tenure-track position in the Hospitality Management Department. He filed in both state and federal courts. After a three-week trial in the state court, the jury awarded plaintiff \$2.75 million for discrimination and \$2.3 million for retaliation. By agreement of the parties, only the larger award was entered. The court subsequently reduced it to \$1.9 million. Plaintiff was also awarded \$315,000 in attorneys' fees. The university has appealed. *The federal court action is inactive, pending outcome of the state court proceedings.*

Rios v. Trustees, et al. – Santa Clara County Superior Court
Bartz v. Trustees – Santa Clara County Superior Court

Lidia La Garda Rios, director of the Office of Equal Opportunity at San Jose State University, was disappointed by a change in her reporting relationship as a result of organizational changes, and her failure to achieve certain high level positions in the department of Human Relations. She claims in this lawsuit to have been the victim of race, national origin and sex discrimination, a hostile work environment, sexual harassment and retaliation. The case is in the discovery phase. Rios has been non-retained.. *She has added a charge to her lawsuit that her termination was also the result of discrimination and retaliation. A court ordered mediation is scheduled in October 2000.*

Steve Bartz, director of Employee Relations at San Jose State University, was also disappointed when he was not appointed associate vice president for Human Resources, one of the positions to which Rios at one time aspired. The position was filled by a male Hispanic candidate, which Bartz claims in his lawsuit to have been reverse discrimination. *At the mandatory settlement conference preceding trial, this case was settled for \$351,000.*

Smith, et al. v. CSU San Bernardino, et al.; San Bernardino County Superior Court

Bob Smith and Robert Flint, the former coach and assistant coach of the CSU San Bernardino golf team filed suit when their appointments were not renewed after four years of service. Smith is 74. Flint is 72. They sued for age discrimination, wrongful termination, emotional distress, and defamation. The defamation charge was premised on comments made during the course of an investigation and self-report to the NCAA of, among other things, the two coaches' having provided cash rewards to members of the golf team in violation of NCAA rules.

The case was tried in November 1999. The jury found for the plaintiffs in the amount of \$1.2 million. CSU's post-trial motions resulted in a reduction of the award to \$120,000. *The case has settled for \$175,000, including attorneys' fees.*

Tillinghast v. Humboldt State University, et al. - United States District Court, San Francisco & Sacramento County Superior Court

Professor Tillinghast brought this action in Federal Court after he forfeited an offer for a lectureship in the Religion Department at Humboldt State University because he would not sign the loyalty oath required of all state employees by the California Constitution. He alleged that the oath interfered with

his religious beliefs in violation of the Religious Freedom Restoration Act. Professor Tillinghast subsequently filed a separate lawsuit in State court on these same issues.

On June 25, 1997, the United States Supreme Court invalidated the Religious Freedom Restoration Act on constitutional grounds. CSU then filed a motion for summary judgment in the Federal action, which was granted on September 4, 1997. Professor Tillinghast has not continued to press his state court claim.

Valero v. San Francisco State University, et al. - San Francisco Superior Court

Christina Valero, a former Administrative Office Coordinator in the Department of Administrative and Interdisciplinary Studies in the College of Education at SFSU, claimed that as a result of her efforts to prevent grade changes, forgery of faculty signatures and other unauthorized changes in student status by the former department chair, she became the victim of harassment, retaliation, sex discrimination, and an assault. The campus conducted a prompt investigation that concluded that the former chair had engaged in some, but not all, of the alleged improper conduct. He was provided a separate defense at CSU expense pursuant to a reservation of the right to disclaim responsibility for his conduct. *The case was settled in mediation in April of 2000 for \$135,000. The former department chair contributed \$5000 to this settlement amount.*

Personal Injury Cases

Mora v. State of California et al - Los Angeles County Superior Court

Timoteo Mora, a CSU Dominguez Hills student, received a significant electrical shock upon plugging in a microscope in his chemistry class in February of 1999. A campus investigation determined that the plug was faulty. Mora has filed this action to recover for his physical injuries. The university has confessed liability and the only remaining issue is the extent of Mora's injuries attributable to this incident. The case is in the early discovery phase. *Medical reports have been submitted. An initial mediation was held in August 2000. A continued session is scheduled for October.*

Viboolpanth v. CSU San Bernardino; San Bernardino County Superior Court

Kanokpun Viboolpanth, a CSU San Bernardino student, claims that the campus was negligent in not warning her about, and keeping her safe from, the high winds on the campus. As she left a classroom building in December 1998, she was allegedly swept off her feet and thrown into a concrete pillar causing severe head trauma. *The case is in the discovery phase.*

Student Cases

Bailey-Shimizu v. Brotherton, et al. – United States District Court, Los Angeles

Hernandez v. Brotherton, et al. – United States District Court – Los Angeles

Pamelalee Bailey-Shimizu, a disabled Native American student at CSU San Bernardino, filed this action alleging various civil rights violations because negative comments were made about her attire which included various symbols of her political and religious affiliation, at a mock counseling session. She earlier pursued an unsuccessful student grievance of this claim. *CSU's motion for summary judgment has been granted and the case has been dismissed.*

Phyllis Hernandez, a former graduate at CSU San Bernardino, claims to have been targeted and driven out of the psychology and counseling program because she is an outspoken woman of color. She is represented by the same lawyer. *CSU's motion to dismiss this case was granted. Hernandez was given an opportunity by the court to re-file some of her claims. She has not done so.*

Campos, et. al. v. San Francisco State University, et. al. - United States District Court, San Francisco
Elizabeth Campos, a disabled San Francisco State student, and STARS, an unincorporated association of 20 other disabled students at SFSU, filed this action alleging various civil rights violations and a denial of educational opportunity based on the alleged existence of multiple, although unspecified, architectural barriers throughout the campus. The plaintiffs sought to represent a class of disabled CSU students. The California Faculty Association is also named as a plaintiff in the action claiming injury on behalf of disabled SFSU faculty. The CFA, however, expressly did not seek certification of any class. The plaintiffs are collectively represented by Disability Rights Advocates, an organization that has gained some publicity in the past for pursuing similar litigation against other organizations involving these issues.

A class of mobility disabled and/or visually impaired students who have been denied access to university programs, services and/or activities due to the existence of physical barriers was certified. Following extensive mediation, a tentative settlement was reached in October of 1999, which, among other things, commits SFSU to \$5 million over seven years for various construction projects to improve campus access. The settlement has not been finalized, however, because of a dispute between the plaintiffs and their lawyers. *Settlement discussions are continuing.*

Doe, et al. v. Regents, et al. - San Francisco County Superior Court

This is a class action challenging the legal validity of the higher education components of Proposition 187. The case was filed against CSU, the University of California and the California Community Colleges. A preliminary injunction was entered on February 8, 1995, barring implementation of the new law before trial. On November 21, 1997, the court issued a tentative decision dismissing this lawsuit because of the unconstitutionality ruling in the companion federal court action described below, which rendered moot any need to reach the issues in the state court suit. With the entry of a final judgment barring enforcement of the law in the companion federal action, it is likely this case will be dismissed as moot. *Plaintiffs recently submitted an informal request for attorneys' fees and will file a formal motion if the issue is not resolved informally.*

Gregorio T., et al. v. Wilson, et al. - United States District Court, Los Angeles

This is one of several class actions filed in the Los Angeles Federal District Court challenging Proposition 187. The cases were consolidated before Judge Mariana Pfaelzer, who ruled in November of 1995, among other things, that the reporting requirements of the higher education components of Proposition 187 are unconstitutional. On November 14, 1997, Judge Pfaelzer ruled the balance of the claims was preempted by the Personal Responsibility and Work Opportunity (Welfare Reform) Act. Final judgment was entered in March of 1998. The state (not including the CSU or UC) filed an appeal. Following a mediation at the direction of the Governor, the parties participating in this appeal agreed on July 29, 1999, to dismiss the appeal and allow the lower court

ruling to stand (with some minor modifications). The plaintiffs' entitlement to attorneys' fees has yet to be resolved by the lower court.

Hollander v Munitz, et al. - Sonoma County Superior Court

Lynne Hollander, the widow of 1960s Free Speech activist Mario Savio, sought unsuccessfully in this lawsuit to halt a Sonoma State campus referendum on a proposed student fee increase. The complaint alleged unfair election practices and noncompliance with Trustee policy. A limited temporary restraining order was entered before the election; the court refused to halt the election but stayed implementation of the results pending a subsequent hearing. The referendum was thereafter defeated. Hence, a fee increase is not currently planned for the Sonoma campus, and the parties stipulated that the issue in the subsequently scheduled hearing had become moot. The plaintiff's counsel has nonetheless refused to dismiss this case and indicated his intent to amend the complaint to challenge fee election procedures systemwide.

Neal, et al. v. Board of Trustees of the CSU, et al. - United States District Court, Fresno

Members of the CSU Bakersfield wrestling team, both men and women, filed this lawsuit to enjoin the elimination of wrestling, or the placement of any cap on the male membership of the team, in order to comply with the Consent Decree in the Cal NOW litigation. The plaintiffs argued that both the Consent Decree and the federal regulations implementing Title IX are discriminatory.

In December of 1997, the court ruled that achieving proportionality in male and female participation in athletics is not a "safe harbor" against claims of (reverse) discrimination. The opinion acknowledged its inconsistency with five federal appellate opinions that have considered this same issue. It followed instead a lone Louisiana district court opinion.

In February 1999, the court granted plaintiffs' request for a preliminary injunction, stating that capping men's teams is a quota in violation of Title IX. CSU appealed. In December 1999, the Ninth Circuit Court of Appeals reversed the lower court, ruling that the capping of men's teams is not a violation of Title IX.

The plaintiffs filed and lost a petition for rehearing in the Ninth Circuit. The case has been returned to the trial court, where the plaintiffs argue a need for further discovery. CSU is preparing a motion to dismiss the case, which will be heard in early October 2000. Plaintiffs have expressed an intent to appeal to the United States Supreme Court.

Serviss, et al. v. Trustees, et al. - Humboldt County Superior Court

Board of Trustees v. Financial Pacific, et al. - Sacramento County Superior Court

Four Humboldt State students brought this class action on behalf of all students in campus housing during the 1996-97 academic year, for breach of contract and nuisance, because of construction noise and denial of access to amenities, such as the computer and weight rooms, during seismic correction work that was being performed on campus. Defense of the case was tendered to the insurance company for the contractor that named the CSU as an additional insured. After a two-week trial in August, 1999, the jury returned a verdict for the plaintiffs; the entire student class (approximately 1300 students) was awarded \$75 each, and subclass (of approximately 600 students) was also awarded

75% of the value of their dormitory contracts. The total value of jury award is approximately \$1.35 million. *Judgment was entered on July 12, 2000. A motion for a new trial has been filed, and if necessary, an appeal is planned.*

Subsequent to the jury award, the insurer attempted to deny coverage. A very recent California Supreme Court opinion substantially undermines their position. The insurance company has committed to fund an appeal, notwithstanding the coverage issues. *On June 1, 2000, CSU initiated a separate declaratory relief action against the insurance carrier, Financial Pacific, to resolve the coverage issues. That case is in the early pleading stage.*

Smallen v. Sacramento State, et al. – Sacramento Superior Court

Darren Smallen, who is white, claims that he was denied admission to the graduate program in Social Work at CSU, Sacramento, in violation of Prop. 209 and federal law, because the university secretly considered race in its admission decisions. *The case was submitted to non-binding arbitration in May 2000. No decision has yet been rendered.*

Other Cases

Board of Trustees v. Bello's Sporting Goods – San Luis Obispo Superior Court

This lawsuit seeks a permanent injunction to prevent Bello's Sporting goods, a store in San Luis Obispo, from engaging in further sales of clothing and other merchandise bearing the "Cal Poly" name. Bello's contends that it has a right to do so because: (1) it sold clothing with the "Cal Poly" name before CSU began doing so; and (2) CSU waived its rights by not filing suit earlier. In April 1999, the court denied CSU's request for a preliminary injunction.

The court subsequently granted CSU's request to amend its complaint to include claims against Bello's based upon state and federal trademark, unfair competition and anti-dilution laws. Bello's filed a cross complaint for damages against CSU and the Cal Poly Foundation. *After further motions, Bello's dropped its complaint for money damages, and is now seeking an injunction only to prevent the CSU from enforcing its trademark rights. The case is in the discovery stage and is set for trial on January 16, 2001.*

City of Marina v. CSU, et al. – Monterey County Superior Court

Fort Ord Reuse Authority v. CSU, et al. – Monterey County Superior Court

Plaintiffs in these two lawsuits are challenging the adequacy of the final environmental impact report prepared for CSU, Monterey Bay's Physical Master Plan. They allege that the city and FORA will suffer unmitigated adverse impacts if the plan is implemented and that the CSU improperly fails to recognize the jurisdiction of FORA over campus development that does not involve education or research. After settlement discussions failed, the court issued an intended decision in favor of the City of Marina and FORA. *The parties are now finalizing the details of the written order. An appeal is contemplated.*

Native American Heritage Commission, et al. v. Board of Trustees - Los Angeles County Superior Court

In this action the Native American Heritage Commission and 29 individuals claimed that a 22-acre site on the CSU Long Beach campus should not be developed because it is the location of the ancient Native American village of Puvungna and the only public land suitable as a customary place of worship for certain Native American religions. In 1995, the CSU's motion for summary judgment was granted. Plaintiffs appealed. In 1996, the California Court of Appeal overturned the trial court opinion, ruling that because it is a part of the state, the CSU lacks standing to challenge the constitutionality of the statute, which permitted the plaintiffs to file this suit. The CSU's petition to the California Supreme Court was denied. The parties are engaged in settlement discussions. Plaintiffs' counsel has not responded to a CSU proposal for many months. The trial court has not resumed its jurisdiction over the remaining claim. *The time has now run on the plaintiff's obligation to proceed in the trial court, and the case is subject to dismissal.*