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Case No. 7764-

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LOUISIANA MUNICIPAL POLICE EMPLOYEES RETIREMENT SYSTEM, derivatively on behalf of Simon Property Group, Inc., Plaintiff, v. MELVYN E. BERGSTEIN, LARRY C. GLASSCOCK, KAREN N. HORN, ALLAN HUBBARD, REUBEN S. LEIBOWITZ, DANIEL C. SMITH, J. ALBERT SMITH, JR., HERBERT SIMON, DAVID SIMON, RICHARD S. SOKOLOV, and LINDA WALKER BYNOE, Defendants, And SIMON PROPERTY GROUP, INC. Nominal Defendant.	C.A. No. ________________

VERIFIED DERIVATIVE COMPLAINT
FOR BREACH OF FIDUCIARY DUTIES

Plaintiff Louisiana Municipal Police Employees Retirement System ("LAMPERS" or "Plaintiff"), upon knowledge as to itself and its own actions, and upon information and belief as to all other matters, alleges as follows:

NATURE OF THE ACTION

1. Plaintiff asserts this action for breach of fiduciary duties derivatively on behalf of Simon Property Group, Inc. ("SPG or the "Company"), a Delaware corporation, against SPG's Board of Directors (the "Board"), including its Chief Executive Officer

("CEO") and Chairman of the Board, David Simon ("Simon"), for their unauthorized modification of the Company's 1998 Stock Incentive Plan ("1998 Plan"), and their issuance to Simon (and his acceptance thereof) of a "retention bonus" on July 6, 2011, with a grant-date valuation in excess of $120 million.

2. On July 6, 2011, the Company announced that the Board had caused the Company to enter into a new and very lucrative employment agreement with David Simon. Under this long-term employment package (the "Employment Package"), Simon will receive an annual salary of $1.25 million (which may be increased, but not decreased) plus a target bonus of 200% of this base salary. In addition to this base salary and annual bonus, Simon's Employment Package provided for a "Retention Award" of 1,000,000 "LTIP units" with a grant-date valuation of $120.3 million. Although the "LTIP units" vest in increments over time, they purport to vest automatically without regard to corporate performance. In other words, the Retention Award is not tied to the Company's performance and instead guarantees enormous payments to Simon simply if he stays employed by the Company throughout the vesting period.

3. That the Company would have to pay Simon, who has worked for SPG or its predecessor as a director or executive since 1993, in excess of $120 million to "incentivize" him to remain employed by the Company that bears his and his father's name, while simultaneously agreeing to an Employment Package that will guarantee him tens of millions of dollars more in salary alone, strains credulity. Simon's father co-founded the Company with his uncle, and as of July 2011, Simon and his father controlled over 36.5 million shares of SPG's outstanding stock and 31.5 million of the

outstanding units of Simon Property Group, L.P. (the operating partnership controlled by SPG). So Simon already was well-incentivized to stay employed by the Company without the need for any Retention Award. But beyond being wholly irrational, the Retention Award, in fact, was an unauthorized act by the SPG Board that exceeded the Board's authority under the 1998 Plan, and thus is *ultra vires*.

4. To explain, simultaneously with the announcement of the Employment Package, the Company announced that the Board had amended the terms of the 1998 Plan (the "July 6, 2011 Amendment") to allow for the issuance of "LTIP units" for reasons unrelated to corporate financial performance. The Retention Award, which consisted of 1 million "LTIP units" that purport to vest over time without regard to corporate performance, was possible *only* by virtue of this amendment.

5. The July 6, 2011 Amendment, however, was unauthorized and *ultra vires*. The 1998 Plan generally permits the Board to amend the Plan's terms without shareholder approval *unless shareholder approval is required by law, regulation or listing requirement*. Here, because the July 6, 2011 Amendment purported to eliminate the performance-based requirements for LTIP units, shareholder approval was required under the Internal Revenue Code, applicable regulations promulgated thereunder, and the listing requirements of the New York Stock Exchange (the "NYSE"), where SPG stock trades.

6. The 1998 Plan requires that compensation awards made thereunder be deductible as performance based under Section 162(m) of the Internal Revenue Code Rule, 26 U.S.C. § 162(m). Section 162(m), in turn, requires that in order for

compensation to qualify for favorable tax treatment, "the material terms under which the remuneration is to be paid, including the performance goals, [be] disclosed to shareholders and approved by a majority vote in a separate shareholder vote before the payment of such remuneration" 26 U.S.C. § 162(m)(4)(c)(ii). Because Section 162(m) requires shareholder approval for performance goals *before* payment based on those goals, it necessarily follows that Section 162(m) requires a separate shareholder vote on any changes to the "performance goals" under a previously-approved plan.

7. Because any change to the "performance goals" as set forth in the 1998 Plan would require shareholder approval under Section 162(m), the July 6, 2011 Amendment, which purported to change (and eliminate) the performance-based requirements for grants of LTIP units, required shareholder approval.

8. The regulations promulgated under Section 162(m) also make clear that shareholder approval is required for any change to the "material terms" of any performance goals established under a shareholder-approved plan. 26 C.F.R. § 1.162-27(e)(4) (Example 4). In fact, these regulations specifically provide that the mere continuation of employment *is not* a valid "performance goal," and as such any bonus paid simply for staying employed *would not qualify* for deductibility under Section 162(m). 26 C.F.R. § 1.162-27(e)(2)(i) ("A performance goal does not include the mere continued employment of the covered employee. Thus, a vesting provision based solely on continued employment would not constitute a performance goal.").

9. Finally, the listing rules of the NYSE require that all material revisions to equity-compensation plans be approved by a shareholder vote. Because the July 6, 2011

Amendment purported to modify the 1998 Plan so as to eliminate the performance-based requirements for grants of LTIP units, and thus materially increase the Board's ability to issue compensation under the Plan, the July 6, 2011 Amendment was a "material revision" that required shareholder approval.

10. The Board purported to adopt the July 6, 2011 Amendment without shareholder approval, and as a result the Amendment was unlawful. Because the July 6, 2011 Amendment was unlawful, the Retention Award issued pursuant to that amendment likewise was unlawful. Accordingly, the Board's adoption of the Employment Package that included the Retention Award was unauthorized and *ultra vires*.

JURISDICTION

11. This Court has jurisdiction over this action pursuant to 10 Del. C. § 341.

12. As directors of a Delaware corporations, the Individual Defendants have consented to the jurisdiction of this Court pursuant to 10 Del. C. § 3114.

13. This Court has jurisdiction over SPG pursuant to 10 Del. C. § 3111

PARTIES

14. Plaintiff LAMPERS is a Louisiana-based retirement system that provides retirement allowances and other benefits to full-time municipal police officers and employees in the State of Louisiana. LAMPERS owns shares of SPG and has been a shareholder at all times relevant to the claims asserted herein.

15. Nominal Defendant SPG is a Delaware corporation with its principal executive offices located at 225 W. Washington Street, Indianapolis, Indiana. SPG is a self-administered and self-managed real estate investment trust that, through its

subsidiary partnerships, is engaged in the ownership, development, management, leasing, acquisition, expansion and development of real estate properties. SPG is the largest mall owner in America. SPG is registered on the NYSE and traded under the ticker symbol SPG.

16. Defendant Melvyn E. Bergstein has been a director of the Company since 2001. He currently serves on the Audit and Compensation Committees of the Board.

17. Defendant Larry C. Glasscock has been a director of the Company since 2010. He currently serves on the Audit and Governance and Nominating Committees of the Board.

18. Defendant Karen N. Horn has been a director of the Company since 2004. She is the Chair of the Governance and Nominating Committee of the Board.

19. Defendant Allan Hubbard has been a director of the Company since 2009. He currently serves on the Compensation and Governance and Nominating Committees of the Board.

20. Defendant Reuben S. Leibowitz has been a director of the Company since 2005. Previously he was a director of Chelsea Property Group until it was acquired by the Company in 2004. He currently serves as Chair of the Compensation Committee of the Board. He is also a member of the Audit Committee of the Board.

21. Defendant David Simon was named Chairman of the Board in 2007. He has been CEO of the Company since 1995. He was President of the Company from 1993 to 1996. He has been a director since 1993. He is the son of Company co-founder Melvin Simon.

22. Defendant Herbert Simon has been Chairman Emeritus of the Board since 2007. He was Co-Chairman of the Board from 1995 to 2007, and CEO from 1993 to 1995. Herbert Simon has been a director of the Company since 1993.

23. Defendant Daniel C. Smith has been a director of the Company since 2009. He serves on the Compensation and Governance and Nominating Committees of the Board.

24. Defendant J. Albert Smith, Jr., has been a director of the Company since 1993. He is the "Lead Independent Director" and Chairs the Audit Committee of the Board.

25. Defendant Richard S. Sokolov has been a director, President, and Chief Operating Officer of the Company since 1996.

26. Defendant Linda Walker Bynoe was a director of the Company from 2003 until May 17, 2012.

27. The Defendants identified above in Paragraphs 15 through 25 shall be referred to herein as the "Individual Defendants."

SUBSTANTIVE ALLEGATIONS

I. BACKGROUND

A. The Employment Package

28. On July 6, 2011, the Compensation Committee of the Board (the "Compensation Committee") unanimously approved entering into a new long-term employment agreement with Simon. Pursuant to the employment agreement, Simon will

continue to serve as the Company's CEO, a member of the Board and, except under certain circumstances, Chairman of the Board, for a period of eight years (through 2019).

29. Simon's Employment Package is enormous. Under the new agreement, Simon will receive an annual salary of at least $1.25 million (which can be *increased*, but never *decreased*), plus an annual target bonus of 200% of Simon's base salary.

30. In addition to this annual salary and bonus, the Board awarded Simon a "Retention Award," which the Company described as follows:

> On July 6, 2011, in connection with the execution of the employment agreement, the committee granted David Simon a one-time retention award under the [1998 Stock Incentive Plan of Simon Property Group, L.P.] in the form of a new series of LTIP units. The 1,000,000 LTIP units that comprise the retention award share many of the characteristics of the LTIP units awarded in the company's annual LTIP programs as described below under 'Series 2011 LTIP Program,' other than the vesting conditions (described in the following paragraph) and the right of the retention award LTIP Units to receive regular distributions equivalent to 100% (rather than one-tenth) of those to which a unit of limited partnership in the operating partnership (an 'OP unit') is entitled.
>
> Generally, the retention award vests in one-third increments on the day prior to the sixth, seventh and eighth anniversaries of grant, subject to continued employment. However, if, prior to July 5, 2013, David Simon is terminated by us without 'cause' or due to 'disability,' or he resigns for 'good reason,' (as those terms are defined in his employment agreement) or if he dies, then one-half of the unvested LTIP units under the retention award will vest. If he is terminated under the foregoing circumstances by us on or after July 5, 2013 or if a 'change in control' (as defined in the retention award) occurs, then all of the unvested LTIP units under the retention award will vest.

Simon Property Group, Inc. Form 8-K, filed July 7, 2011.

31. The stated goal of the Retention Award was to "incentiviz[e] Mr. Simon to remain with the company for the full eight years of his employment agreement." Indeed, the Committee stated that the Employment Package's "primary objective" was to secure

"Mr. Simon's continued services as our Chief Executive Officer for a substantial period of time."

32. The Employment Package and Retention Award were not calculated with any consideration to the compensation packages of CEO's within the commercial real estate industry:

> The approval of the new employment arrangement was a business judgment made by the committee, with the input of other independent directors, based on their collective experience, the individual assessments of David Simon's past performance as our Chief Executive Officer and their conclusion that David Simon's continued service as Chief Executive Officer would best position the company to create long-term stockholder value. ***The decision was subjective and not determined by reference to any peer group or formula.***

(Emphasis supplied).

B. Criticism of the Package

1. The Immediate Reaction

33. The announcement of the Employment Package and Retention Award was met immediately with criticism. On July 10, 2011, *The New York Times* noted in an article titled "CEO's pay package hits brazen new high – and low," that Simon already "has a fat pay package" and that "top executives don't deserve extra bonuses just for showing up." The article further stated:

> Last year, for this good work, Mr. Simon was paid $7.1 million in salary, bonus and long-term incentives. An additional $17 million in equity was awarded, subject to the company's performance. This should be enough to keep Mr. Simon cheerfully coming to the office to sustain the legacy of what his relatives built and to keep doing his best on behalf of shareholders.
>
> *Certainly the board could have found a cheaper way to keep him. His surname is emblazoned on the company headquarters. And Mr. Simon's*

> *family controls more than 11 percent of the equity. That makes the prospect of his leaving Simon Property a conceivable, but not compelling, possibility.*
>
> Worse, the company was lax with the details of Mr. Simon's package. For example, if he is terminated without cause, or even if he resigns with "good reason," in less than two years, half the retention bonus shares vest immediately. In such an event after July 2013, they all vest. Simon Property's relocating the company offices by more than 35 miles is among the hardships that would constitute a good enough reason for Mr. Simon to pack up and collect his "retention" bonus.

(Emphasis supplied).

2. LAMPERS's § 220 Demand

34. LAMPERS was among the many shareholders dissatisfied with the Employment Package. On September 30, 2011, LAMPERS sent the Company a request pursuant to Section 220 of the Delaware General Corporation Law, 8 Del. C. § 220 (the "Demand"), to inspect certain books and records. LAMPERS initiated this Demand in an attempt to investigate the possibility that certain Individual Defendants breached their fiduciary duties in connection with the long-term awards provided to Simon under the Employment Package, including the $120 million Retention Award.

35. On October 10, 2011, the Company curtly refused the Demand, refusing to make available for inspection any documents requested by LAMPERS, and asserting that the Demand failed as being overly broad and insufficient to establish a proper purpose. In a letter responding to the Demand, the Company represented that directors have broad discretion to increase executive compensation in this manner and therefore LAMPERS failed to provide a "credible basis" to suspect wrongdoing by the Board.

3. <u>"Say-On-Pay" Vote</u>

36. As required by federal law, at the Company's annual meeting on May 17, 2012, SPG held an advisory vote on executive compensation (a "say-on-pay" vote) pursuant to which the Company's shareholders were permitted to vote to approve the Board's compensation practices.

37. In the weeks approaching the vote, the Board continued to be the subject of intense criticism regarding the Retention Award. On May 7, 2012, *The Indianapolis Business Journal* highlighted concerns from a report issued by Institutional Shareholder Services Inc., criticizing the lack of performance incentives and recommending shareholders to disapprove the Employment Package.

> 'The reason given by the compensation committee for the retention award is the board's confidence that Mr. Simon's leadership is necessary for the future success of the company,' ISS wrote. 'It follows that the future success of the company should be a condition for the significant payment that is required to secure his continued service.'

38. On May 21, 2012, the Company reported that shareholders had rejected approving the Company's egregious Employment Package by nearly 3-to-1; over 74% of the Company's shareholders voted to *disapprove* the Company's executive compensation practices.

39. Following the results of the negative "say-on-pay" vote, criticism of the Company's pay practices continued. On May 22, 2012 *Bloomberg BusinessWeek* reported:

> It's one of the most resounding say-on-pay rejections of the year and amounts to 'a shot across the bow' to Simon Property Group's directors, who set executive pay, said Brian Foley, a New York executive compensation expert.

> The vote 'strongly suggests that the sheer size and terms of David Simon's front-loaded 2011 retention package hit a raw nerve for many shareholders,' he said.
>
> * * * *
>
> The Institutional Shareholder Services recommendation against Simon Property Group's executive pay package specifically cited the pay to David Simon as objectionable.
>
> The long-term stock award to Simon 'contains termination provisions that create the potential for pay-for-failure, while it simultaneously guarantees outsized reward opportunities for another eight years,' ISS said.
>
> Simon's pay is 12 times higher than median compensation to his peer CEOs, the ISS report notes.

Pay for Simon Property Group's CEO is rejected in nonbinding vote, BLOOMBERG BUSINESSWEEK, KNIGHT RIDDER / TRIBUNE, May 22, 2012.

40. The SPG Board rejected the criticism, arguing that "David Simon has led the company to deliver some of the best returns in corporate America and it is critical to retain him." *Simon Property shareholders reject CEO pay plan*, BLOOMBERG BUSINESSWEEK, ASSOCIATED PRESS, May 22, 2012.

41. Shareholder "say-on -pay" rejections of executive compensation packages have been relatively rare. In 2011, approximately 3,000 companies held shareholder "say-on -pay" votes. More than 90% of companies received shareholder support of 70% or higher. Further, more than 70% received shareholder support of 90% or higher. The stockholders' rejection of the SPG's compensation practices in 2012 also was unique for the Company itself. At SPG's 2011 annual meeting, voting stockholders approved the prior executive compensation plan with 97.1% support.

42. Despite blistering public criticism, LAMPERS's 220 Demand, and negative the "say-on-pay" vote, the Board steadfastly has refused to make any adjustments to the Employment Package, including the Retention Award, to address these concerns.

II. THE "RETENTION AWARD" WAS *ULTRA VIRES* AND IMPROPER

43. The Retention Award provides Simon with a one-time grant of 1,000,000 LTIP units issued pursuant to the Company's 1998 Plan. The Company's Form 8-K announcing the Retention Award described the "one-time retention award under the Plan," which was defined as the "1998 Stock Incentive Plan of Simon Property Group, L.P."

44. Further, the Employment Agreement dated July 6, 2011 by and between Simon Property Group, Inc. and David Simon (filed as Exhibit 10.2 to the Company's July 6, 2012 Form 8-K), provides that "[o]n the Effective Date, the Executive shall be granted 1,000,000 LTIP Units pursuant to the 1998 Plan (the 'Retention LTIP Units'). The Retention LTIP Units shall be subject to the 1998 Plan …" The "1998 Plan," in turn, is defined in that agreement as "the Partnership's 1998 Stock Incentive Plan."

45. Until July 6, 2011 the 1998 Plan required that any performance units, including LTIP units, issued thereunder be tied specifically to corporate financial performance over a designated period.

46. The Retention Award, which has no performance-based vesting requirements, was made possible only by virtue of the July 6, 2011 Amendment to the 1998 Plan, which was announced contemporaneously with the Employment Package. As

discussed below, this amendment was unlawful and authorized. As a result, the Retention Award was *ultra vires*.

A. The 1998 Stock Incentive Plan

47. On September 24, 1998, shareholders of the Simon DeBartolo Group, Inc. voted to approve a merger with Corporate Property Reality Consultants to form SPG. As part of that transaction, the shareholders voted to approve the Company's 1998 Stock Incentive Program (the "1998 Plan").

48. On May 8, 2008 the stockholders of the Company approved amendments to the 1998 Plan, which among other changes extended the terms of the 1998 Plan to December 31, 2013.

49. The Company's stated "Purpose" for the 1998 Plan has remained substantively unchanged since 1998:

> The purpose of the 1998 Stock Plan is to provide for certain key personnel (as defined in Section 1.3) of Simon Property Group, L.P. (the "Partnership") and certain of its Affiliates (as defined in Section 1.6) ***an equity-based incentive to maintain and enhance the performance and profitability*** of the Partnership and Simon Property Group, Inc. (the "Company*")*. ***It is intended that awards granted under this Plan may provide performance-based compensation within the meaning of section 162(m) of the Internal Revenue Code of 1986, as amended and the regulations promulgated thereunder from time-to-time (the "Code"), to the extent applicable.***

(Emphasis supplied).

50. Section 1.4 of the 1998 Plan provided that "Awards may be made under the Plan in the form of (i) stock options … (ii) stock appreciation rights related to an option … (iii) stock appreciation rights not related to any option …, (iv) restricted stock awards and (v) performance units …" 1998 Plan, Sec. 1.4(a).

51. Prior to the July 6, 2011 Amendment, any performance units granted by the Company's Compensation Committee had to be tied to established "Performance Goals" over a designated "Performance Cycle":

> (b) Performance Units. Each performance unit under the Plan shall relate to a specified maximum number of shares of Common Stock or Partnership equity interests and shall be exchangeable, in whole or in part, for shares, Partnership equity interests exchangeable for shares of Common Stock, or cash (or such other form of consideration as may be determined by the Committee in its sole discretion equivalent in value thereto) in up to an amount equal to the fair market value of an equal number of unrestricted shares, at the end of a specified Performance Cycle on such terms as may be established by the Committee. ***The number of such shares or Partnership equity interests which may be deliverable pursuant to such performance unit shall be based upon the degree of attainment of Performance Goals over a Performance Cycle as may be established by the Committee.*** The Committee may provide for full or partial credit, prior to completion of such Performance Cycle or achievement of the degree of attainment of the Performance Goals specified in connection with such performance unit, in the event of the participant's death, disability, or such other circumstances, to the extent permitted by Code section 162(m), as the Committee may determine in its sole discretion to be fair and equitable to the participant or in the interest of the Partnership and its Affiliates.

1998 Plan, Sec. 3.3(b) (as of May 8, 2008) (emphasis supplied).

52. A "Performance Goal" could be established by the Compensation Committee, but had to be tied to specific financial metrics for corporate performance:

> The term "Performance Goals" means the performance goals established by the Committee with respect to the Company, the Partnership or any Affiliates, in the Committee's sole discretion. With respect to any participant who is a "covered employee" within the meaning of Code section 162(m), (i) the Performance Goals shall be in writing and shall be based on any one or any combination of the following business criteria: (A) earnings per share; (B) return on equity; (C) return on assets; (D) market value per share; (E) funds from operations; (F) return to stockholders (including dividends); (G) revenues; (H) market share; (I) cash flow; and (J) cost reduction goals; (ii) the Performance Goals with respect to those business criteria may be determined on a corporate,

> regional, departmental or divisional basis and may be expressed in absolute terms or by reference to an identified variable standard or by reference to comparative performance of an identified group of businesses; and (iii) awards shall be delivered only after it is certified, in writing, by the Committee that the Performance Goals as established by the Committee have been attained or otherwise satisfied within the Performance Cycle.

1998 Plan, Sec. 1.6 (f) (as of May 8, 2008)

53. Similarly, while the Compensation Committee retained discretion to establish a "Performance Cycle," the 1998 Plan required that the period defined be tied to corporate financial performance during that period:

> The term "Performance Cycle" means the period of time established by the Committee within which Performance Goals are required to be attained or satisfied.

1998 Plan, Sec. 1.6(e) (as of May 8, 2008).

54. Thus, under the 1998 Plan, as it existed prior to July 6, 2011, the grant of any "Performance Units" had to be tied to the satisfaction of specified criteria measuring the Company's financial performance over a pre-established period of time.

B. <u>Long-Term Incentive Performance Program</u>

55. Prior to 2010, the only forms of awards the Compensation Committee had granted under the 1998 Plan were stock options and restricted stock awards. On March 16, 2010, the Compensation Committee adopted the Long-Term Incentive Performance ("LTIP") Program, which for the first time made performance awards available to "Named Executive Officers." Awards under the LTIP Program take the form of long-term incentive performance units of limited partnership interests ("LTIP Units") granted pursuant to the 1998 Plan. The LTIP Program was created under the guidelines

of the 1998 Plan to "provide additional incentive [to executives] for them to promote the progress and success of the business of the Company..."

56. As explained in a Form 8-K filed with the Securities and Exchange Commission ("SEC") on March 19, 2010:

> Awards under the LTIP Program take the form of long-term incentive performance units of limited partnership interests ("LTIP Units") issued by Simon Property Group, L.P. (the "Operating Partnership"). Awarded LTIP Units will be forfeited, in whole or in part, depending upon the extent to which the Company's total stockholder return ("TSR") (representing the difference between a baseline value and valuation date based on price appreciation of the Company's common stock plus cumulative dividends without reinvestment or compounding), over the performance period exceeds the relative and absolute performance targets as described below. ***The purpose of the LTIP Program is to further align the interests of senior management with those of stockholders by reinforcing the Company's "pay-for-performance" structure that encourages the creation of stockholder value in excess of recognized benchmarks of performance.*** The LTIP Units awarded will be considered earned depending upon the extent to which the applicable TSR benchmarks are achieved during the performance period, and once earned will become the equivalent of units of limited partnership interest of the Operating Partnership ("Units"), but only after an additional two year service-based vesting requirement that begins after the end of the performance period. Units are exchangeable for shares of the Company's common stock on a one-for-one basis, or cash, as selected by the Company***. The LTIP Units, and any common shares for which they are exchangeable, will be awarded pursuant to the Company's stockholder-approved equity plan.***

(Emphasis supplied).

57. The LTIP Program required that the Company satisfy strict performance metrics prior to the issuance of any LTIP Units thereunder:

> The 2010 LTIP Programs use the same three performance measures to which the Company compares the TSR of its common stock using a baseline value of $79.80 per share (the closing sale price as reported by the NYSE for December 31, 2009) during the applicable performance period. The first relative performance measure, weighted at 60%, requires

> the Company's TSR to equal or exceed the overall performance of the MSCI US REIT Index. The second relative performance measure, weighted at 20%, requires the Company's TSR to equal or exceed the overall performance of the S&P 500 Index. The third performance measure, which is weighted at 20%, requires the Company's TSR, viewed on an absolute basis, to exceed a specified target TSR. To achieve a 100% payout of the award, the Company's TSR must exceed the performance of the MSCI US REIT Index by 3% or more, must exceed the performance of the S&P 500 by 2% or more on an annual basis and must be 12% per year or more. ***No awards will be earned if the Company's TSR lags performance of the MSCI US REIT Index by 1% or more and the performance of the S&P 500 by 2% or more and is less than 6.67% per year.***

(Emphasis supplied).

58. In fact, the Company repeatedly has represented that its compensation programs in general, and its LTIP program in particular, awarded *incentive-based* compensation that tied compensation awards to the satisfaction of *specific corporate financial metrics.* As discussed in the Company's 10-K filed with the SEC on February 25, 2011:

> Awarded LTIP units can be earned, in whole or in part, depending upon the extent to which our total stockholder return, or TSR (representing the difference between a baseline value and valuation date based on price appreciation of our common stock plus cumulative dividends we pay on our common stock without compounding), over the performance period exceeds the relative and absolute performance targets set by the committee. ***The LTIP units that are earned to the extent that applicable TSR benchmarks are achieved during the performance period become the equivalent of units, but only after an additional two year service-based vesting requirement that begins after the end of the performance period. LTIP units not earned are forfeited.*** Units are exchangeable for shares of the Company's common stock on a one-for-one basis, or cash, as selected by the Company.

(Emphasis supplied).

59. Likewise, in the Company's proxy statement filed on April 8, 2011, the SPG Board once again represented to shareholders that any grants of LTIP units would be tied to specific objective measures of corporate financial performance: "The committee also believes the LTIP program reinforces our 'pay-for-performance' philosophy by measuring the creation of stockholder value using absolute and relative benchmarks for performance."

C. The July 6, 2011 "Amendment"

60. On July 6, 2011, the very same day that the Compensation Committee announced Simon's Employment Package, SPG also filed with the SEC a disclosure on a Form 8-K announcing that the Board had amended the 1998 Plan. The Company described this amendment in very innocuous terms:

> On July 6, 2011, the Board of Directors of Simon Property Group, Inc., ("we", "us", or "the company"), acting as general partner of Simon Property Group, L.P., (the "Operating Partnership"), approved an amendment to the 1998 Stock Incentive Plan of Simon Property Group, L.P. (the "Plan"). As amended, the Plan permits the award of performance units subject to continuous service vesting requirements on such terms set by the Compensation Committee of the Board of Directors (the "committee").

61. While the Amendment contained very few words, the impact of the changes to the 1998 Plan was massive, effectively changing the Plan's entire purpose. As stated in a "WHEREAS" clause, the stated purpose of the July 6, 2011 Amendment was to ***eliminate any performance-based requirement*** for grants of Performance Units under the 1998 Plan:

> WHEREAS, the Board of Directors of the Company (the "Board"), as the general partner of the Partnership, has determined that it is in the Operating Partnership's best interest to amend Section 3.3(b) of the Plan

> to specify that awards of Performance Units may be made or on such terms and conditions established by the Committee: ***which need not include attainment of Performance Goals***; …

(Emphasis supplied).

62. The importance of this change can be seen by comparing the most recently amended and restated version of the 1998 Plan from May 8, 2008 with version of the 1998 Plan in effect following the adoption of the July 6, 2011 Amendment. Notably, in disclosing this amendment, the Company's Form 8-K represented that "the strikeovers represent deleted words, underlying represents additional words." The Company's Form 8-K, however, in fact did *not* highlight the amended language. The emphasis below, which shows the language added in the amendment, is supplied here:

> Performance Units. Each performance unit under the Plan shall relate to a specified maximum number of shares of Common Stock or Partnership equity interests and shall be exchangeable, in whole or in part, for shares, Partnership equity interests exchangeable for shares of Common Stock, or cash (or such other form of consideration equivalent in value thereto as may be determined by the Committee in its sole discretion) in up to an amount equal to the fair market value of an equal number of unrestricted shares, at the end of a specified period of time or Performance Cycle on such terms as may be established by the Committee. The number of such shares or Partnership equity interests which may be deliverable pursuant to such performance unit shall be based upon the degree of attainment of Performance Goals over a Performance Cycle **or the satisfaction of continuous service vesting requirements on such terms as may be established by the Committee.** The Committee may provide for full or partial credit, prior to full vesting of such performance unit, in the event of the participant's death, disability, or such other circumstances, to the extent permitted by Code section 162(m), if applicable, as the Committee may determine in its sole discretion to be fair and equitable to the participant or in the interest of the Partnership and its Affiliates.

63. In one fell swoop the Board: (1) eliminated the long standing requirement that executives satisfy specific criteria related to the Company's financial performance to

earn performance units; and (2) awarded Simon a Retention Award payable in 1,000,000 performance units, valued at $120 million, without any connection to the Company's financial performance during Simon's eight year employment contract.

D. <u>The "Amendment" Was Not Authorized</u>

64. The Board is not authorized to amend the 1998 Plan under these circumstances without stockholder approval. At the time of the July 6, 2011 Amendment, the 1998 Plan stated:

> Plan Amendments. The Partnership, by action of its General Partner, may, without approval of other partners in the Partnership, at any time and from time to time suspend, discontinue or amend the Plan in any respect whatsoever, except that no such amendment shall impair any rights under any award theretofore made under the Plan without the consent of the grantee of such award. ***Furthermore, the General Partner shall submit for stockholder approval any amendment*** (other than an amendment pursuant to the adjustment provisions of Section 1.6) ***required to be submitted for stockholder approval by law, regulation or applicable stock exchange requirements*** or that otherwise would: (i) increase the maximum number of shares of Common Stock that may be awarded in Section 1.5(a); (ii) extend the term of this Plan; or (iii) change the class of persons eligible to be participants. ***Any Plan amendment shall be obtained in such a manner and to such a degree as is required by applicable law or regulation***.

(Emphasis supplied).

65. As discussed below, because the July 6, 2011 Amendment fundamentally changed the terms under which Performance Units could be granted, substantially increasing the Board's ability to grant LTIP Units and eliminating any requirement that grants of Performance Units be subject to or constrained by corporate performance *at all*, shareholder approval was required by the Internal Revenue Code, applicable Treasury Regulations, and the NYSE listing standards.

66. Because the Board failed to obtain shareholder approval of the July 6, 2011 Amendment, the Amendment is void as a matter of law.

1. <u>Shareholder Approval Was Required By Section 162(m)</u>

67. The 1998 Plan, both as of July 6, 2011 and today, provides that "[i]t is intended that awards granted under this Plan may provide performance-based compensation within the meaning of section 162(m) of the Internal Revenue Code of 1986…"

68. Section 162 of the Internal Revenue Code, 26 U.S.C. § 162 (2000), generally allows a company to deduct "a reasonable allowance" for employee compensation. For a company's CEO and four highest paid officers, however, Section 162(m) provides that annual compensation in excess of $1 million is not tax deductible unless the compensation is incentive-based and tied to specific performance goals, and meets the specific qualifications set by 162(m)(4)(C)(i)-(iii):

> (C) Other performance-based compensation.--The term "applicable employee remuneration" shall not include any remuneration payable solely on account of the attainment of one or more performance goals, but only if—
>
> (i) the performance goals are determined by a compensation committee of the board of directors of the taxpayer which is comprised solely of 2 or more outside directors;
>
> (ii) the material terms under which the remuneration is to be paid, including the performance goals, are disclosed to shareholders and approved by a majority of the vote in a separate shareholder vote before the payment of such remuneration; and
>
> (iii) before any payment of such remuneration, the compensation committee referred to in clause (i) certifies that the performance goals and any other material terms were in fact satisfied.

69. Because Section 162(m) specifically requires a "separate shareholder vote" for the approval of any "material terms" of a compensation award, "including the performance goals," *before* the payment of any compensation, an amendment to a shareholder-approved plan that would effect a material change to the previously disclosed performance goals would itself require a "separate shareholder vote" prior to payment of any compensation based on that amendment.

70. In order to qualify for favorable tax treatment under Section 162(m), any change to the 1998 Plan that would alter material terms of the "performance goals" as disclosed to and approved by the shareholders would require a separate shareholder vote to approve the amendment.

71. Here, the July 6, 2011 Amendment materially changed the "performance goals" described in the 1998 Plan (specifically by *eliminating* the performance-based requirement for Performance Units entirely), and as such Section 162(m) required shareholder approval of that change prior to the distribution of any compensation thereunder.

72. Because Section 162(m) required a separate shareholder vote on the July 6, 2011 Amendment, the amendment was not authorized to be unilaterally effected by the Board under Section 5.1(a) of the 1998 Plan.

73. Because the July 6, 2011 Amendment was effected without stockholder approval, the entire Retention Award is non-deductible under 162(m)(C)(ii) and unauthorized under the 1998 Plan.

2. <u>Shareholder Approval Was Required By Applicable Treasury Regulations</u>

74. Treasury Regulation 1.162-27, 26 C.F.R. § 1.162-27, sets forth the IRS's regulations for "certain employee remuneration in excess of $1,000,000" for purposes of Section 162(m). Subsection (e)(4) of the regulation provides as follows:

> (4) Shareholder approval requirement--(i) General rule. ***The material terms of the performance goal under which the compensation is to be paid must be disclosed to and subsequently approved by the shareholders of the publicly held corporation before the compensation is paid.*** The requirements of this paragraph (e)(4) are not satisfied if the compensation would be paid regardless of whether the material terms are approved by shareholders. The material terms include the employees eligible to receive compensation; a description of the business criteria on which the performance goal is based; and either the maximum amount of compensation that could be paid to any employee or the formula used to calculate the amount of compensation to be paid to the employee if the performance goal is attained (except that, in the case of a formula based, in whole or in part, on a percentage of salary or base pay, the maximum dollar amount of compensation that could be paid to the employee must be disclosed).
>
> …
>
> (vi) Frequency of disclosure. ***Once the material terms of a performance goal are disclosed to and approved by shareholders, no additional disclosure or approval is required unless the compensation committee changes the material terms of the performance goal.*** If, however, the compensation committee has authority to change the targets under a performance goal after shareholder approval of the goal, material terms of the performance goal must be disclosed to and reapproved by shareholders no later than the first shareholder meeting that occurs in the fifth year following the year in which shareholders previously approved the performance goal.
>
> (vii) Shareholder vote. For purposes of this paragraph (e)(4), the material terms of a performance goal are approved by shareholders if, in a separate vote, a majority of the votes cast on the issue (including abstentions to the extent abstentions are counted as voting under applicable state law) are cast in favor of approval.

(Emphasis supplied).

75. Thus, the Treasury Regulations make clear that any "material change" in the performance goals established under a qualified plan itself must be submitted for a separate shareholder vote. Indeed, a specific example provided in the regulations explains that separate shareholder approval is required for any amendment to a plan that would increase the benefits payable under a previously-approved plan:

> **Example 4.** The same facts as in Example 3, except that prior to the beginning of the second 3–year period, the compensation committee determines that different targets will be set under the plan for that period with regard to all three of the performance criteria (i.e., earnings per share, reductions in costs, and increases in sales). In addition, the compensation committee raises the maximum dollar amount that can be paid under the plan for a 3–year period to $2,000,000. ***The increase in the maximum dollar amount of compensation under the plan is a changed material term. Thus, to satisfy the requirements of this paragraph (e)(4), Corporation Y must disclose to and obtain approval by the shareholders of the plan as amended.***

(Emphasis supplied).

76. The July 6, 2011 Amendment would increase the benefits payable under the 1998 Plan by fundamentally significantly lowering the circumstances under which benefits could be paid. Because the elimination of the performance-based requirement for the issuance of Performance Units is a material change, a separate shareholder vote was required by Regulation 1.162-27(e)(4).

77. There also cannot be any doubt that the change effected by the July 6, 2011 Amendment was "material." The specific purpose of the amendment was to authorize the Board to issue Performance Unit grants similar to that provided in the Retention Award – *i.e.*, vesting periods with no tie to corporate performance. Yet under Regulation 1.162-27(e), mere continued employment *cannot* qualify as a legitimate

"performance goal" for purposes of Section 162(m): "A performance goal does not include the mere continued employment of the covered employee. Thus, a vesting provision based solely on continued employment would not constitute a performance goal." 26 C.F.R. § 1.162-27(e)(2)(i).

3. Shareholder Approval Was Required By NYSE Listing Standards

78. The NYSE's listing standards require that "(s)hareholders must be given the opportunity to vote on all equity-compensation plans ***and material revisions thereto***[.]" NYSE Listing Rule 303A.08 (emphasis supplied).[1]

79. The importance of this requirement is explained by the NYSE Listed Company Manual:

> Equity-compensation plans can help align shareholder and management interests, and equity-based awards are often very important components of employee compensation. To provide checks and balances on the potential dilution resulting from the process of earmarking shares to be used for equity-based awards, the Exchange requires that all equity-compensation plans, and any material revisions to the terms of such plans, be subject to shareholder approval…

80. Under NYSE Rule 303A.08, an equity-compensation plan is defined as:

> … a plan or other arrangement that provides for the delivery of equity securities (either newly issued or treasury shares) of the listed company to any employee, director or other service provider as compensation for services. Even a compensatory grant of options or other equity securities that is not made under a plan is, nonetheless, an "equity-compensation plan" for these purposes.

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[1] NYSE Listing Rule 303A.08 identifies certain circumstances that may involve amendments to compensation plans that do not require shareholder approval. These exceptions do not apply here.

81. The 1998 Plan is an equity-compensation plan as defined by 303A.08 because it provides equity payments in the form of LTIP Units to "Named Executives," including Simon.

82. NYSE Listing Rule 303A.08 provides that a "material revision" to an equity-compensation plan includes, *inter alia*, "[a]n expansion of the types of awards available under the plan."

83. The NYSE also provides, in question and answer format, a list of changes to compensation plans that would be considered "material":

> **C-1. What is considered a material revision to an equity compensation plan?**
>
> Below are some examples of material revisions to an equity compensation plan:
> • ***An expansion of the types of awards available under the plan;***
> • A material increase in the number of shares available under the plan;
> • A material expansion of the classes of persons eligible under the plan;
> • A material extension of the term of the plan;
> • A material change in the method of determining the strike price of options;
> • A deletion or limitation of any provision prohibiting repricing.
>
> **C-2. If a revision does not fall into one of the listed examples, how do you determine if it is a "material revision" under the rule?**
>
> If the revision would have the effect of materially increasing the potential dilution of shareholders over the lifetime of the plan, it is considered material. Also, if the revision has an effect similar to one of the listed examples, it is considered material.

NYSE Frequently asked questions on Executive Compensation Plans (as of March 29, 2007) *available at* http://www.nyse.com/pdfs/equitycompfaqs.pdf (emphasis supplied).

84. The July 6, 2011 Amendment expanded the "types of awards available under the plan" by broadening (in fact, eliminating) the criteria that allow an executive to

receive LTIP Units. This is illustrated by the fact that prior to the July 6, 2011 Amendment, the Retention Award would not have been allowed or available under the 1998 Plan because the Retention Award is not performance based.

85. Additionally, the Amendment's removal of the performance based component was material because it eliminated the tax deductibility of the Retention Award pursuant to Internal Revenue Code Rule 26 U.S.C.A. § 162(m).

86. Further, it is clear from the Final Rule Text of 303A.08 that "materiality" is not confined to these specific categories, but meant to ensure shareholders vote to approve changes before an "expansion" of available awards is made available under an equity-compensation plan. Because the July 6, 2011 Amendment expands the availability of awards available to executives, it is material.

87. The July 6, 2011 Amendment was a material revision to the 1998 Plan adopted without shareholder approval. As a result, the July 6, 2011 Amendment to the 1998 Plan and the Retention Award are both unauthorized and *ultra vires*.

E. Because The July 6, 2011 Amendment Was Not Authorized, The Retention Award Was *Ultra Vires*

88. As explained above, the July 6, 2011 Amendment required shareholder approval under Section 162(m), Treasury Regulation 1.162-27, and NYSE Listing 303A.08.

89. Because shareholder approval was required, the Board lacked the authority to implement the July 6, 2011 Amendment under Section 5.2 of the 1998 Plan.

90. Because the SPG Board purported to effect the amendment without shareholder approval, the July 6, 2011 Amendment was invalid as a matter of law.

91. Because the July 6, 2011 Amendment was invalid, the terms of the 1998 Plan as they existed prior to July 6, 2011, remained in effect at the time the Board authorized the Retention Award.

92. Because the 1998 Plan, as it existed prior to July 6, 2011, prohibited the granting of any Performance Unit that was not tied to the achievement of a specific Performance Goal over a designated Performance Cycle, the Board lacked the authority under the 1998 Plan to issue any award of any Performance Unit, including any LTIP Unit, that would vest over time without regard to corporate performance.

93. Because the Retention Award purports to vest LTIP units over time without regard to corporate performance, the Retention Award violated the terms of the 1998 Plan as it existed prior to July 6, 2011, and as such is invalid and *ultra vires.*

III. DERIVATIVE ALLEGATIONS

94. LAMPERS brings this action derivatively to redress injuries suffered by the Company as a direct result of the breaches of fiduciary duty by the Board.

95. LAMPERS has owned SPG stock continuously during the time of the wrongful course of conduct by the Board alleged herein and continues to hold SPG stock.

96. LAMPERS will adequately and fairly represent the interests of SPG and its shareholders in enforcing and prosecuting its rights and has retained counsel competent and experienced in shareholder derivative litigation.

97. LAMPERS has not made a demand on the Board to bring suit asserting the claims set forth herein because pre-suit demand was excused as a matter of law.

98. As of the date of the filing of this Action, the Board consists of the following 10 directors: Melvyn E. Bergstein, Larry C. Glasscock, Karen N. Horn, Allan Hubbard, Reuben S. Leibowitz, Daniel C. Smith, J. Albert Smith, Jr., Herbert Simon, David Simon, and Richard S. Sokolov (the "Current Board").

99. Each member of the Current Board voted to approve the July 6, 2011 Amendment and the Employment Agreement, including the Retention Award.

100. The decision to adopt the July 6, 2011 Amendment to the 1998 Plan was unauthorized under Section 5.2 of the 1998 Plan, and as such the July 6, 2011 Amendment was not the product of the valid exercise of business judgment.

101. The Retention Award violated the terms of the 1998 Plan as it existed as of July 6, 2011, and as such the Retention Award was not the product of the valid exercise of business judgment.

102. Because the transactions challenged herein that form the bases for the claims asserted herein were not the product of the valid exercise of business judgment, presuit demand was excused as a matter of law.

CAUSES OF ACTION

COUNT I
Breach of Fiduciary Duty Against the SPG Board For Enacting Illegal Amendment and Illegal Retention Payment (Derivatively Against All Defendants)

103. LAMPERS realleges the preceding paragraphs as set forth above and incorporates them herein by reference.

104. The Individual Defendants, as directors of SPG, are fiduciaries of the Company and its shareholders. As such, they owe the Company the highest duties of good faith, fair dealing, due care, candor and loyalty.

105. The Individual Defendants breached their fiduciary duties by adopting the July 6, 2011 Amendment in violation of the 1998 Plan.

106. The Individual Defendants breached their fiduciary duties by approving the Employment Package, which included the Retention Award that violated the terms of the 1998 Plan.

107. In contemplating, planning, and/or effecting the foregoing conduct, the members of the Board did not act in good faith toward the Company, exceeded their authority as provided under Section 5.2 of the 1998 Plan and Delaware law, and breached their fiduciary duties.

108. As a result of these actions of the Board, the Company has been and will be damaged.

109. LAMPERS and the Company have no adequate remedy at law.

COUNT II
Breach of Fiduciary Duty Against David Simon For Accepting The Illegal Employment Package Which Included The Retention Payment (Derivatively against Simon)

110. LAMPERS realleges the preceding paragraphs as set forth above and incorporates them herein by reference.

111. Simon, as CEO, is a fiduciary of the Company and its shareholders. As such, Simon owes the Company the highest duties of good faith, fair dealing, due care, candor and loyalty.

112. Simon, as Chairman of the Board, is a fiduciary of the Company and its shareholders. As such, Simon owes the Company the highest duties of good faith, fair dealing, due care, candor and loyalty.

113. Simon breached his fiduciary duties by accepting the Employment Package which included the Retention Award.

114. In contemplating, planning, and/or effecting the foregoing conduct, David Simon did not act in good faith toward the Company and breached his fiduciary duties.

115. As a result of these actions of Simon, the Company has been and will be damaged.

116. LAMPERS and the Company have no adequate remedy at law.

WHEREFORE, LAMPERS prays for judgment as follows:

(a) A declaration that that the July 6, 2011 Amendment was improper;

(b) A declaration that the Retention Award of 1,000,000 LTIP Units was *ultra vires*;

(c) Rescission of the Employment Agreement;

(d) Cancellation of any and all LTIP Units issued or reserved for issuance under the Employment Package;

(e) Cancellation of any and all LTIP Units issued or reserved for issuance by the Company that would purport to vest for any reason other than the satisfaction of Performance Goals within a Performance Cycle, as required under the 1998 Plan;

(f) An award for Plaintiff's costs and expenses incurred in this action, including, but not limited to, experts' and attorneys' fees; and

(g) Such other and further relief as may be just and proper.

DATED: August 8, 2012

GRANT & EISENHOFER P.A.

/s/ Michael J. Barry

____

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