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CLERK SUPERIOR COURT

5 Attorneys for Plaintiffs Patrick A. Lenhart
6 and Daniel Stuber, individually, and on
7 behalf of all others similarly situated

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN DIEGO

10 PATRICK A. LENHART and DANIEL STUBER,)
11 Plaintiffs,)

CASE NO:
37-2011-00096587-CU-BC-CTL

12 v.)
13 SAN DIEGO CITY EMPLOYEES')
14 RETIREMENT SYSTEM, and DOES 1-40,)
15 Defendants.)

CLASS ACTION COMPLAINT
FOR (1) BREACH OF CONTRACT,
(2) BREACH OF
CONSTITUTIONAL AND
FIDUCIARY DUTIES, AND (3)
WRIT OF MANDATE

16
17 THIS IS A CLASS ACTION LAWSUIT.

18 1. This is a class action lawsuit brought by the plaintiffs Patrick A. Lenhart and
19 Daniel Stuber ("plaintiffs"). Plaintiffs are all beneficiaries of a pension trust fund administered
20 by defendant San Diego City Employees' Retirement System ("SDCERS"). The plaintiffs bring
21 this suit on their own behalf and for all those others similarly situated. The definition of the class
22 is set forth in paragraphs 53 and 54 of this complaint.

23 2. This class action is brought pursuant to section 382 of the California Code of
24 Civil Procedure. The remedies and damages sought by the plaintiffs, both individually and on
25 behalf of the class, exceed the minimum jurisdictional limits of the Superior Court.

26 3. Venue is proper in San Diego because the defendants committed the wrongs
27 alleged in San Diego.

28 4. Defendant SDCERS is a public employees' retirement system operating under

1 section 17 of article XVI of the California Constitution, San Diego City Charter sections 141
2 through 149, and San Diego Municipal Code Section 24.0100, et seq. Pursuant to Charter
3 section 144, SDCERS is managed by its Board of Administration.

4 5. The true names or capacities, whether individual, corporate, associate, or
5 otherwise, of defendants DOES 1 to 40, inclusive, are unknown to plaintiffs, who therefore sue
6 said defendants by such fictitious names.

7 6. Plaintiffs are informed and believe and thereon allege that the defendants
8 designated herein as DOES are responsible in some manner for the events and happenings herein
9 referred to, and caused injury and damages proximately thereby to plaintiffs as herein alleged.
10 Plaintiffs will seek leave of court to amend this complaint to set forth the true names and
11 capacities of such named defendants when their identities become known to them.

12 7. Plaintiffs are informed and believe and thereon allege that each defendant named
13 in this action, including DOE defendants, at all relevant times, was the agent, ostensible agent,
14 servant, employee, representative, assistant, joint venturer, and/or co-conspirator of each of the
15 other defendants, and was at all times acting within the course and scope of his, her, or its
16 authority as agent, ostensible agent, servant, employee, representative, joint venturer, and/or
17 co-conspirator, and with the same authorization, consent, permission or ratification of each of the
18 other defendants.

19 **FACTUAL ALLEGATIONS**

20 **SDCERS Owes Plaintiffs Fiduciary Duties**

21 8. As the trustee of the plaintiffs' pensions, SDCERS owes each plaintiff fiduciary
22 duties. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1102; *Hittle v. Santa Barbara County*
23 *Employees Retirement Association* (*Hittle*) (1985) 39 Cal.3d 374, 392-393.)

24 9. "The retirement board of a public pension or retirement system [has] the sole and
25 exclusive fiduciary responsibility over the assets of the public pension or retirement system. The
26 retirement board . . . also ha[s] sole and exclusive responsibility to administer the system in a
27 manner that will assure prompt delivery of benefits and related services to the participants and
28 their beneficiaries. The assets of a public pension or retirement system are trust funds and [must]

1 be held for the exclusive purposes of providing benefits to participants in the pension or
2 retirement system and their beneficiaries and defraying reasonable expenses of administering the
3 system.” (Cal. Const., art. XVI, § 17, subd. (a), italics added.)

4 10. “The members of the retirement board of a public pension or retirement system
5 [must] discharge their duties with respect to the system with the care, skill, prudence, and
6 diligence under the circumstances then prevailing that a prudent person acting in a like capacity
7 and familiar with these matters would use in the conduct of an enterprise of a like character and
8 with like aims.” (Cal. Const., art. XVI, § 17, subd. (c).)

9 11. “A retirement board’s duty to its participants and their beneficiaries . . . take[s]
10 precedence over any other duty.” (Cal. Const., art. XVI, § 17, subd. (b).)

11 **SDCERS Does Not Owe Any Fiduciary Duty to the City of San Diego**

12 12. SDCERS does not owe any fiduciary duty to the City of San Diego (“City”).

13 **The City Established a Purchase of Service Credit Program**

14 13. A City employee’s pension is determined by multiplying (a) years of employment
15 (often referred to as “service credits”), (b) the highest compensation earned by the employee in
16 any one-year period, and (c) a retirement factor determined by ordinance.

17 14. In 1993 the City established the purchase of service credit program (“PSC”) to
18 allow employees to purchase service credits for periods of actual service or authorized leaves of
19 absence that were otherwise ineligible for service credits. Such categories of service eligible for
20 purchase were employment probationary periods, part-time service, military services, and
21 approved leaves of absence, among others.

22 15. In 1997 the City, by ordinance, expanded the PSC program to allow the purchase
23 of service credits for periods that were not actually worked, up to 5 years.

24 16. The City adopted and expanded the PSC program because, according a July 30,
25 2010 sworn declaration by the City’s Chief Operating Officer, Jay Goldstone, the City has a
26 “legitimate and overriding business interest in attracting and retaining qualified public employees
27 so as to maintain a qualified, cost-effective public work force[,]” and “[a]dopting and
28 maintaining pension benefits . . . achieve this goal by awarding competitive pension benefits to

1 experienced employees.”

2 17. The 1997 ordinance adopted by the City permitting employees to purchase up to
3 five years of service credit provided that “the cost [of such service] purchased . . . is the amount
4 the [SDCERS’] Board determines to be the employee and employer cost of that . . . service.”

5 18. When the City modified the PSC program in 1997, SDCERS’ actuary advised the
6 board that a two-tiered rate structure—15 percent of current annual compensation for general
7 member employees and 26 percent of current annual compensation for safety member
8 employees—would be sufficient to meet the requirement that the purchase price for service
9 credits paid by employees be equivalent to the sum of the employer and employee cost.

10 19. SDCERS and the City knew the PSC rate structure was imprecise, because the
11 actual cost of a year of service credit for a younger worker, decades from retirement, is far lower
12 than the actual cost of a year of service for an older employee closer to retirement. However,
13 SDCERS decided that charging all employees an “average price” would comply with its mandate
14 to administer the PSC program in a cost-neutral manner.

15 20. At its March 1997 meeting, the SDCERS’ board, which has a majority of
16 members appointed by the Mayor (City Charter, § 144), approved the rates for general and safety
17 members. City employees were then permitted to purchase service credits at the rates the board
18 established.

19 21. The City had actual knowledge of the rates set by SDCERS and made no
20 objection to those rates, or to SDCERS’ “average price” PSC rate structure. Indeed, SDCERS
21 board members appointed by the City voted in favor of such a structure.

22 22. In 2000 (safety and general members) and in 2002 (general members), the City
23 retroactively increased the retirement factor used to compute its employees’ pensions. This
24 caused an increase in the value, and therefore the cost, of a year of purchased service credit under
25 the PSC program. At a SDCERS board meeting in July 2002, SDCERS retirement administrator
26 commented that the current PSC rate structure might therefore be insufficient to fund a year of
27 purchased service credit.

28 23. In August 2002 the SDCERS board directed its actuary to evaluate whether the

1 PSC rate structure set in 1997 reflected the current cost of the benefit.

2 24. The actuary completed his study in August 2003 and recommended to the board
3 that the rates for a year of service credit be adjusted upwards to 27 percent of current annual
4 compensation for general member employees and 37 percent of current annual compensation for
5 safety member employees. As discussed below in paragraph 39, the actuary's calculation
6 regarding safety members was erroneous, because at 26 percent of current annual compensation,
7 safety members were already paying more than the full cost for their purchase of service credits
8 under the 1997 PSC rates. Before August 15, 2003, SDCERS had entered into 346 safety
9 member PSC contracts, and those beneficiaries had overpaid a total of \$293,616 for those years
10 of credit purchased.

11 25. At a meeting on August 15, 2003, the SDCERS board discussed the actuary's
12 study and recommendation, and voted to adopt the new PSC rates. However, SDCERS delayed
13 implementation of any increase in the rates for 60 days in order to notify its members of the rate
14 increase and allow employees to purchase service credits at existing rates before the increase
15 took effect.

16 26. After that meeting, SDCERS and the City notified all City employees that PSC
17 purchase applications received by SDCERS before November 1, 2003, would be priced
18 according to the old rates—15 percent current annual compensation for general member
19 employees and 26 percent current annual compensation for safety member employees. This
20 period, from August 15, 2003, through October 31, 2003, is referred to as "the window period."

21 **Any Shortfall Created by the Window Period Was Being Paid by the City in Its**

22 **Amortization of the Unfunded Accrued Actuarial Liability**

23 27. The employee pension trust fund administered by SDCERS is funded by a
24 combination of (a) employee contributions from employees, paid through a mandatory pay check
25 deduction, (b) annual employer contributions from the City, and (c) earnings on investments
26 from those annual contributions.

27 28. There are two components to the City's annual employer contribution: (a) a
28 "normal" contribution and (b) an additional contribution designed to amortize any unfunded

1 liability of the trust fund over a period not to exceed 15 years. (City Charter, § 143.) The City's
2 annual employer contributions are determined in annual actuarial valuations, which are provided
3 to the City.

4 29. Therefore, even if the 1997 PSC pricing did not pay the full cost of the service
5 credits purchased—which it in fact did in the case of safety members—the City would be
6 required to amortize any such deficiency and make such an amortization payment as a
7 component part of its annual employer contribution.

8 **The City's Knowledge of the Window Period by 2003**

9 30. The City was fully aware that the SDCERS's board's decision to delay
10 implementation of the PSC rate increase might cost the City. For example, the 2002 annual
11 actuarial valuation estimated that the PSC program increased the City's employer contribution
12 that year by more than \$5 million. SDCERS board member and Deputy City Auditor Terri
13 Webster, in e-mails dated July 16, 2003, and August 11, 2003, complained that the old PSC rates
14 had caused the retirement system to "incur[] an approximate \$56 million loss due to the under
15 funding of the [PSC] program." Webster also complained that "the [PSC] program has been
16 administered by the Board at a loss to . . . the City . . ." Webster's August 18, 2003 e-mail,
17 directed to fellow board member Ray Garnica, specifically criticized SDCERS' failure to
18 immediately increase the PSC rates after the SDCERS board had received their actuary's August
19 2003 report.

20 31. Despite its knowledge of the window period, the City actively publicized its
21 availability and accompanying cost savings to employees, because the rates charged for service
22 credits under the PSC program would be rising dramatically effective November 1, 2003.

23 32. On January 27, 2004, in a confidential memorandum (later publicly released by
24 the City) from the City's outside counsel at Luce, Forward, Hamilton & Scripps, LLP, the Mayor
25 and City Council were expressly advised that "City leaders have taken note of the fact that
26 SDCERS has apparently failed to collect the full cost from employees who elect to participate in
27 the 'purchase of service credits' benefit . . . which results in a significant actuarial loss . . . [of] as
28 much as \$180 million if initial estimates from the City are correct . . ."

1 **The City's First PSC Lawsuit**

2 33. In July 2005, SDCERS filed a declaratory relief action (*SDCERS v. City of San*
3 *Diego*, GIC 851286; consolidated with *SDCERS v. Aguirre, et al.*, GIC 841845).

4 34. In that 2005 litigation, the City alleged by cross-complaint that certain pension
5 benefits were "illegal." In that litigation, the City dubbed these "Contested Benefits."

6 35. The "Contested Benefits" included "[a]ny retirement benefit based on a Purchase
7 of Service Credit that was purchased by a member at a rate that was not actuarially neutral." The
8 City sought an order prohibiting SDCERS from paying any such Contested Benefits.

9 36. On October 16, 2006, SDCERS obtained an order granting its motion for
10 summary adjudication from The Honorable Jeffrey B. Barton expressly declaring that SDCERS
11 "may properly and legally pay all of the Contested Benefits" That order became final
12 without alteration in June 2011.

13 **The City's Second PSC Lawsuit**

14 37. On or about September 18, 2006, the City Attorney issued "Interim Report # 12,"
15 which concluded that the PSC purchases made during the window period were illegal.

16 38. As a result of that report, SDCERS asked its new actuary, which had replaced
17 SDCERS previous actuary, to study the PSC program since inception and report to the SDCERS
18 board whether the program had historically been administered in a cost neutral manner, i.e., had
19 SDCERS accurately charged employees an appropriate amount for the service credits purchased
20 under the PSC program.

21 39. The new actuary prepared a report dated August 14, 2007. In that report, he
22 concluded that the SDCERS board had, under the previous PSC pricing structure developed by
23 the prior actuary, charged an insufficient amount for the service credits purchased by general
24 members during the window period. However, that same report confirmed that the 2003 increase
25 in the safety member PSC rate to 37 percent of annual compensation caused safety members to
26 overpay by \$1,047,024 during the window period and \$1,637,409 thereafter. In other words,
27 SDCERS was told that it was not administering the PSC program for safety members in a cost
28 neutral manner *and was overcharging safety members.*

1 40. At meetings in October and November 2007, the SDCERS board, consisting only
2 of members appointed by the City, because employee board members had recused themselves,
3 considered whether any action should be taken as the result of the information provided by the
4 new actuary in his August 14, 2007 report.

5 41. Realizing that SDCERS had already been charging the City for any PSC-related
6 window period underfunding since 2003, as set forth in paragraphs 27-32, above, the SDCERS
7 board was implored by speakers at those meetings, including Ann Smith, an attorney for the
8 City's largest labor union, not to take any action. As these speakers explained, any underfunding
9 problem was already being cured because such a deficit was being amortized by the City's annual
10 employer contributions. Further, in light of the City's knowledge of the window period, any
11 action taken in 2007 by the SDCERS board might impair SDCERS' statute of limitations defense
12 if the City decided to file suit based upon action taken by the SDCERS board in 2007. (*Marin*
13 *Healthcare District v. Sutter Health* (2002) 103 Cal.App.4th 861, 879 [statutes of limitation
14 apply even to void contracts].)

15 42. On November 16, 2007, acting against the advice of speakers representing the
16 beneficiaries to whom SDCERS owed a fiduciary duty, the SDCERS board decided to charge the
17 City for the perceived shortfall caused by service credit purchased under the PSC program during
18 the window period. Based on information and belief, this decision by City-appointed trustees,
19 which was adverse to the interests of the trust fund's beneficiaries, was knowingly and
20 purposefully taken by City-appointed SDCERS board members to restart a statute of limitations
21 which had expired.

22 43. Four days later, on November 20, 2007, the City filed its *second* lawsuit
23 challenging the service credits purchased during the window period. (*City v. SDCERS*, San
24 Diego Superior Court Case No. 37-2007-00081912.)

25 44. Although SDCERS raised a statute of limitations defense, it was rejected because
26 the court held the City's suit was challenging the November 2007 decision to charge the City,
27 rather than its 2003 decision to open the window period.

28 45. In the City's second PSC lawsuit, SDCERS failed to raise either a plea in

1 abatement pursuant to Code of Civil Procedure section 430.10, subdivision (c), or the rule of
2 exclusive concurrent jurisdiction. Had SDCERS raised either of these defenses, the court in the
3 second case would have been required to stay the City's second PSC lawsuit until the City's first
4 PSC lawsuit had been resolved. (*People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20
5 Cal.App.4th 760, 770-771.)

6 46. Because (a) the order of abatement or enforcement of the judicial rule of exclusive
7 concurrent jurisdiction would have been mandatory, and (b) the judgment in the City's first PSC
8 lawsuit was favorable to the beneficiaries of the employee pension trust fund, SDCERS' failure
9 to raise either defense in the City's second PSC lawsuit was adverse to beneficiaries, including
10 the plaintiffs, because the City's second PSC lawsuit risked a decision adverse to those trust
11 beneficiaries.

12 47. In the City's second PSC lawsuit, SDCERS also failed to raise the doctrine of
13 unclean hands. In light of the City's conduct in encouraging its employees to purchase service
14 credits during the window period, SDCERS should have raised this defense and had it done so,
15 SDCERS would have prevailed in the City's second PSC lawsuit.

16 48. SDCERS' imprudent acts, which permitted the City's second PSC lawsuit to be
17 adjudicated on the merits, adversely affected the beneficiaries of the employee pension trust fund
18 because SDCERS lost that case.

19 49. On or about April 11, 2011, after SDCERS lost the City's second PSC lawsuit,
20 SDCERS offered to rescind or reform the PSC contracts entered into during the window period.
21 However, SDCERS refused to perform those contracts as written.

22 50. Between September 18, 2006 and July 1, 2010, despite its duty of full disclosure
23 (*Hittle, supra*, 39 Cal.3d 374), although SDCERS knew that the City was challenging PSC
24 service credits purchased during the window period, it failed to inform and adequately apprise
25 affected persons of this fact and the impact it could have on the amount of those employees'
26 pensions. Consequently, members of Sub-Class B, defined below in paragraph 52, made life-
27 altering decisions to retire based on incomplete knowledge.

28 51. Beginning on or about April 11, 2011, SDCERS began notifying plaintiffs and

1 safety members similarly situated that it would not perform the PSC contracts it had entered into
2 with the plaintiffs.

3 52. Although the Government Claims Act does not apply to the claims made in this
4 complaint (Gov. Code, §§ 905, subs. (c), (f)), plaintiffs have nevertheless complied by timely
5 filing claims which have been rejected by SDCERS.

6 **CLASS ACTION ALLEGATIONS**

7 53. The plaintiff class consists of two sub-classes:

8 Sub-Class A: "All SDCERS safety members or beneficiaries who have been
9 subject to SDCERS' unilateral dishonor of their PSC contracts."

10 Sub-Class B: "All SDCERS safety members or beneficiaries who retired or joined the
11 Deferred Retirement Option Plan from September 18, 2006 through July 1,
12 2010, who have been subject to SDCERS' dishonor of their PSC
13 contracts."

14 Sub-Class C: "All SDCERS safety members or beneficiaries who have ever
15 purchased any service credits under the PSC program."

16 54. All Sub-Class B members are also members of Sub-Class A, but not all Sub-Class
17 A members are members of Sub-Class B. All Sub-Class A and Sub-Class B members are also
18 members of Sub-Class C.

19 55. This action is brought and is maintained properly as a class action under Code of
20 Civil Procedure section 382 because:

21 (a) The questions and issues of law and fact raised herein are of a
22 common and general interest affecting the class;

23 (b) The plaintiff class is estimated to contain in excess of 400
24 individuals, and it is impractical to bring all members of the class
25 individually before the court;

26 (c) The questions of law or fact common to the class are substantially
27 similar and predominate over those questions that affect individual
28 members. These common questions include:

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- (i) What is the nature and extent of the duties that were owed by SDCERS (and the DOE defendants) to the members of the class?
- (ii) Did various acts and omissions of SDCERS (and the DOE defendants) breach fiduciary duties owed to the class?
- (iii) Were the acts and omissions of SDCERS (and the DOE defendants) below the standard of care required by the California Constitution (art. XVI, § 17(c))?
- (iv) Did SDCERS (and the DOE defendants) cause damages to members of the class?
- (v) What is the proper method of calculating damages caused by SDCERS (and the DOE defendants)?
- (vi) What are the appropriate remedies?
- (vii) Is the plaintiff class entitled to prejudgment interest?
- (viii) What are the proper in limine rulings and evidentiary rulings?
- (d) The claims of the representative plaintiffs are typical of those of the class;
- (e) The representative plaintiffs will fairly and adequately protect the interests of the class, have no interests which conflict with the class, and have retained attorneys experienced in the prosecution of class and multi-plaintiff litigation to represent the class herein;
- (f) The prosecution of separate actions by individual members of the class will create a risk of: (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for defendants; or (2) adjudications with respect to some individual members which would, as a practical matter, be dispositive of the interest of the

1 other members not parties to the adjudications; or (3) adjudications
2 which would substantially impair or impede the ability of
3 individual members to protect their interests;

4 (g) A plaintiff class action is superior to other available methods for
5 the fair and efficient adjudication of the claims presented in this
6 complaint, and will prevent the undue financial, administrative and
7 procedural burdens on the parties and on this Court which
8 individual litigations would impose.

9 56. Proof of a common or single practice or factual pattern, of which the named
10 plaintiffs' experiences are representative, will establish the right of each of the members of the
11 plaintiff classes to recover on the causes of actions herein alleged.

12 57. All of the plaintiffs were subject to a systematic course and pattern of practice and
13 were thereby treated by the defendants in a similar manner, as is specifically alleged elsewhere in
14 this complaint.

15 **FIRST CAUSE OF ACTION**

16 **BREACH OF CONTRACT**

17 **AGAINST SDCERS AND DOES 1-10**

18 58. Plaintiffs incorporate paragraphs 1-57 as if fully set forth here.

19 59. From 2003 through 2005, the plaintiffs and members of Sub-Class A and
20 defendants entered into identically-worded contracts for the purchase of service credits.

21 60. A copy of one of those identically-worded contracts is attached at Exhibit A and
22 incorporated herein by reference.

23 61. The members of Sub-Class A performed all of their obligations under those
24 contracts, including paying the full price calculated by SDCERS to purchase service credits
25 under those contracts.

26 62. Defendants breached these contracts by failing to perform them, without
27 justification.

28 63. As a result of defendants' breach, the members of Sub-Class A are entitled to the

1 benefit of the bargain of those contracts and have them enforced as written, and/or for
2 consequential damages.

3 **SECOND CAUSE OF ACTION**

4 **BREACH OF COMMON LAW AND CONSTITUTIONAL FIDUCIARY DUTIES**

5 **AGAINST SDCERS AND DOES 11-20**

6 64. Plaintiffs incorporate paragraphs 1-57 as if fully set forth here.

7 65. On November 16, 2007, defendants, including SDCERS, breached their common
8 law fiduciary duties to the plaintiffs by taking unnecessary action to affirm an existing actuarial
9 practice and thereby restarting the statute of limitations on the City's claim that service credits
10 purchased during the window period were unlawful.

11 66. On November 16, 2007, defendants, including SDCERS, breached their
12 constitutional, fiduciary duties to the plaintiffs under section 17 of article 16 of the California
13 Constitution by taking unnecessary action to affirm an existing actuarial practice and thereby
14 restarting the statute of limitations on the City's claim that service credits purchased during the
15 window period were unlawful.

16 67. As a result of these breaches, the plaintiffs have suffered damages when, on or
17 about April 11, 2011, SDCERS refused to perform the PSC contracts entered into with the
18 plaintiffs during the window period.

19 **THIRD CAUSE OF ACTION**

20 **BREACH OF COMMON LAW AND CONSTITUTIONAL FIDUCIARY DUTIES**

21 **AGAINST SDCERS AND DOES 21-31**

22 68. Plaintiffs incorporate paragraphs 1-57 as if fully set forth here.

23 69. Defendants, including SDCERS, breached their common law fiduciary duties to
24 the plaintiffs by failing to raise in the City's second PSC lawsuit:

25 (a) a plea in abatement pursuant to Code of Civil Procedure section 430.10,
26 subdivision (c);

27 (b) the rule of exclusive concurrent jurisdiction; and

28 (c) the defense of the City's unclean hands.

1 SDCERS' failure to raise these defenses in the City's second PSC lawsuit was adverse to its trust
2 beneficiaries, including the plaintiffs.

3 70. Defendants, including SDCERS, breached their constitutional, fiduciary duties to
4 the plaintiffs under section 17 of article 16 of the California Constitution by failing to raise, in
5 the City's second PSC lawsuit:

6 (a) a plea in abatement pursuant to Code of Civil Procedure section 430.10,
7 subdivision (c);

8 (b) the rule of exclusive concurrent jurisdiction; and

9 (c) the defense of the City's unclean hands.

10 SDCERS' failure to raise these defenses in the City's second PSC lawsuit was adverse to its trust
11 beneficiaries, including the plaintiffs.

12 71. As a result of these breaches, the plaintiffs have suffered damages when, on or
13 about April 11, 2011, SDCERS refused to perform the PSC contracts entered into during the
14 window period.

15 **FOURTH CAUSE OF ACTION**

16 **BREACH OF COMMON LAW AND CONSTITUTIONAL FIDUCIARY DUTIES**

17 **AGAINST SDCERS AND DOES 31-40**

18 72. Plaintiffs incorporate paragraphs 1-57 as if fully set forth here.

19 73. Defendants, including SDCERS, breached their common law fiduciary duty of full
20 disclosure by failing to inform and adequately apprise Sub-Class B plaintiffs of the City's
21 challenge to their service credits before the Sub-Class B plaintiffs made life-altering decisions to
22 retire based on incomplete knowledge.

23 74. Defendants, including SDCERS, breached their constitutional, fiduciary duty
24 (Cal. Const., art. XVI, § 17) by failing to inform and adequately apprise Sub-Class B plaintiffs of
25 the City's challenge to their service credits before Sub-Class B plaintiffs made life-altering
26 decisions to retire based on incomplete knowledge.

27 75. As a result of these breaches, the plaintiffs have suffered damages which accrued
28 when, on or about April 11, 2011, SDCERS refused to perform the PSC contracts entered into

1 with during the window period.

2 **FIFTH CAUSE OF ACTION**

3 **WRIT OF MANDATE**

4 **AGAINST SDCERS**

5 76. Plaintiffs incorporate paragraphs 1-57 as if fully set forth here.

6 77. SDCERS has, and continues to have, a mandatory obligation not to overcharge its
7 safety member beneficiaries for years of service purchased under the PSC program.

8 78. However, since 1993, SDCERS has been including the cost of service credits
9 made available for purchase by safety members the cost of the disability retirement plan (as
10 provided for in San Diego Municipal Code sections 24.0501 to 24.0515).

11 79. Because it is impossible for any person to take disability retirement for a year of
12 service credit purchased under the PSC program, SDCERS should never have included the cost
13 of disability retirement in the cost of a year of service credit purchased under the PSC program.
14 To do so has resulted in charging beneficiaries for something they never could have possibly
15 received—disability insurance for a period which had already expired.

16 80. Unless SDCERS is directed by the Court to cease its practice of charging safety
17 members purchasing service credits under the PSC program the cost of disability retirement, and
18 is further ordered to calculate and refund the amount it has charged the members of Sub-Class C
19 since 1993, SDCERS will do neither.

20 81. The plaintiffs have no plain, speedy, or adequate remedy at law.

21 82. Therefore, this Court should issue a peremptory writ of mandate directing
22 SDCERS to cease its practice of charging safety members purchasing service credits under the
23 PSC program the cost of disability retirement, and is further ordered to calculate and refund the
24 amount it has overcharged the members of Sub-Class C since 1993.

25 WHEREFORE, plaintiffs pray for judgment granting:

- 26 1. damages according to proof;
- 27 2. prejudgment interest;
- 28 3. a peremptory writ of mandate directing SDCERS to cease its practice of charging


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safety members purchasing service credits under the PSC program the cost of disability retirement, and is further ordered to calculate and refund the amount it has overcharged the members of Sub-Class C since 1993;

- 4. attorney fees;
- 5. costs of suit; and
- 6. such other and further relief as the court deems just and proper.

Dated: August 18, 2011

LAW OFFICE OF MICHAEL A. CONGER

By: 

Michael A. Conger
Attorney for Plaintiffs, both individually and on behalf of those similarly situated

Jury trial demanded.

EXHIBIT A

San Diego CERS Election to Purchase Service

DANIEL T STUBER

SSN: [REDACTED]

SAN DIEGO, CA [REDACTED]

Plan: Safety Police
Contract Number: 4
Service Type: 5 Year Purchase
Total Service: 4.0
Purchase Time: 09/10/2003 - 09/10/2003

PLEASE NOTE THAT YOUR PURCHASE MAY BE SUBJECT TO IRS SECTION 415 LIMITATIONS.

In accordance with Pension Regulations, you have the option to purchase and be granted credit for the above service. The total cost to purchase the above service, including interest is \$ 67,165.20.

With the election of a payment plan the payment amount may be billed as follows:

Original Principal:	\$ 67,165.20	Number Of Payments:	0
Reduction Amount:	0.00	Frequency:	Lump Sum PSC
Adj. Original Principal:	\$ 67,165.20	Interest Rate:	0.0 %
Adj. Original Principal:	\$ 67,165.20	Payment Amount:	\$ 67,165.20
Loan Interest:	0.00		
Total Cost:	\$ 67,165.20		

Please indicate below if you wish to purchase the designated service time and the type of payment method if accepted.


Yes, I do elect to purchase the designated retirement service.

Payment Method

- Lump Sum Payment: \$ 67,165.20
- Payment Plan - Check One:
 - Post-tax
 - Pre-tax
- Lump Sum Rollover - Check One:
 - SPSP
 - 401(K)
 - Qualified IRA
 - Deferred Comp (457)
- No, I do not wish to purchase the designated service time.
- I waive my option to meet with a Retirement Benefits Counselor regarding my purchase of service credits.

Purchase of service credits must be completed prior to termination from employment or entering the Deferred Retirement Option Plan (DROP). Pre-tax payment plans cannot be paid off early if you are entering DROP.

This contract will be deemed null and void after 04/21/2005. After 04/21/2005, a recalculation will be required.


Signature

02/16/2005
Date

San Diego CERS San Diego City Employee Retirement

DANIEL T STUBER

SSN: ██████████

Purchase Service Information

Plan: Safety Police Contract Number: 4 Service Type: 5 Year Purchase Service Credit: 4.00000 Purchase Time: 09/10/2003 - 09/10/2003	Refund Date: Refund Amount: Accrued Interest: \$ 0.00 Original Principal: \$ 67,165.20 Reduction Amount: \$ 0.00 Adj. Original Principal: \$ 67,165.20
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Purchase Service Factors

Contract Effective Date: 01/21/2005 Employee Contribution Rate: 0.26000 City Contribution Rate: Adjustment: Begin Waiting Period Age: Adjusted Contribution Rate:	Salary: \$ 2,483.92 Hours Worked: Purchase Years: 4.00 Weighted Wage: End Waiting Period Age: Adjusted Contribution Rate:
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Purchase Service Calculations

Employee Portion	Employer Portion
Bi-Weekly Salary: Contribution Rate: Bi-Weekly Contribution: Pay Periods in 1 year: Purchase Time: Total:	Bi-Weekly Salary: Contribution Rate: Bi-Weekly Contribution: Pay Periods in 1 year: Purchase Time: Total:
Adjusted Begin of Waiting Period	Adjusted End of Waiting Period
Bi-Weekly Salary: Contribution Rate: Bi-Weekly Contribution: Pay Periods in 1 year: Purchase Time: Total:	Bi-Weekly Salary: Contribution Rate: Bi-Weekly Contribution: Pay Periods in 1 year: Purchase Time: Total: