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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SAN DIEGO**

12 LAURIE AGNEW, RAYMOND K. BALAI,) CASE NO.: 37-2013-00077705-CU-DE-CTL
13 GAYLE BATES, STEVEN BEHRENDT,)
14 BRIAN R. BLAGG, DANIEL W. BOLDT,)
15 DONALD P. BRACKROG, FRANCIS)
16 BRADLEY, ROBERT R. BRESSLER,) COMPLAINT FOR BREACH OF
17 SCOTT BROWN, SILVIA BROWN,) CONSTITUTIONAL AND FIDUCIARY
18 DEBORAH W. BURGER, RANDY P.) DUTIES AND WRIT OF MANDATE
19 BURGESS, MARK ANDREW)
20 CARLSON, JEFFERY S. CARTER, JAMIE)
21 CHAPMAN, CORY CHESEBROUGH,)
22 NANCY CLAPP, JAMES R. CLIFT,)
23 DENISE F. DAILEY, ROBERT W. DARE,)
24 DARBY DARROW, PATRICK RYAN)
25 DERNING, MATTHEW DOYLE, BRETT)
26 DUDLEY, DARRYL L. EMERSON,)
27 CHRISTINE M. FARMER, JEFFREY M.)
28 FELLOWS, SR., THOMAS E.)
FERNANDEZ, JAMES J. FIERO, ERNEST)
D. FLORES, JAMES M. FORD, IVAN)
GARCIA, JAMES P. GAVIN, JR.,)
ADOLPHO GONZALES, RICHARD J.)
GOULET, MICHAEL J. GRUBB, MANUEL)
E. GUADERRAMA, MICHELLE)
HANSEN-GARCIA, MARK HANTEN,)
CORINNE HARD, DANIEL C. HATTLER,)
ERNEST C. HERBERT, JR., KENNETH P.)
HODGES, FRANK J. HOERMAN, DAVID)
HOFFMAN, JOHN P. HOWARD, JAY M.)
JACOB, THOMAS J. JACQUES,)
DAVID E. JENNINGS, SCOTT)
JOHNSTON, MONICA KAISER,)
BRIAN KEATON, WILLIAM L.)
KELLNER, GEOFFREY S. KING,)
CHRISTOPHER J. KIRCHHOFER,)
MICHAEL D. KRATTLI, MICHAEL)
KROESCH, DARRELL KYLER, NANCY)
KULINSKI, BROOKE P. LAWSON,)

1 JEROME M. LERUD, TIMOTHY M.
2 LONG, STEVEN R. MALCOLM, BRIAN R.
3 MARVEL, JON MCDONALD, KIM
4 MCELROY, SHARON MCFALLS,
5 CHERYL A. MEYERS, MARK MICHEL,
6 JERALD E. MILLS, DAVID MITCHELL,
7 WILLIAM E. MORRIS, CINDY L.
8 MUNOZ, WILLIAM PATRICK
9 MURPHY, YOLANDA B. NERIO,
10 GORDON NIKKOLA, PAUL D. O'BRIEN,
11 PAMELA G. PAXTON, PERRY PEAKE,
12 BRODERICK PERKINS, JODIE PIERCE,
13 COLLEEN QUENTIN-KING, STEVEN F.
14 REICHERT, JAMES RENWICK,
15 ANTHONY L. ROBLES, MANUEL
16 RODRIGUEZ, PAUL L. RODRIGUEZ,
17 DANIEL ROMAN, STEPHANIE ROSE,
18 JEFFREY SALINAS, CHRISTOPHER M.
19 SAROT, JAMES SCHORR, DOUGLAS
20 SCHULTE, JAN L. SHUTTLEWORTH,
21 STACY SILVERWOOD, WILLIAM
22 SNYDER, JEFFREY W. STEELE, MARK
23 SULLIVAN, DONALD SWANSON, ROY
24 JOHN TARAMASCO, JR., TIMOTHY
25 TREAHY, ROBERT TRUDERUNG,
26 MARK A. VAN ABEL, DAN VEGA,
27 MAX G. VERDUZCO, THEODORE O.
28 VISSER, MARK WATERS, KERIN
GRACE WATTS, SEDONIA
WEATHERSBY, ELIZABETH D. WEBER,
DIANE WENDELL, GARY A. WHIPPLE,
PATRICIA L. WHITE, and DANA
ZIEGLER

Plaintiffs,

v.

SAN DIEGO CITY EMPLOYEES'
RETIREMENT SYSTEM, and DOES 1-40,

Defendants.

1. Each plaintiff is a current or former employee of the City of San Diego ("City"), and a beneficiary of a pension trust fund administered by defendant San Diego City Employees' Retirement System ("SDCERS").

2. Venue is proper in San Diego because the defendants committed the wrongs

1 alleged in San Diego.

2 3. Defendant SDCERS is a public employees' retirement system operating under
3 section 17 of article XVI of the California Constitution, San Diego City Charter sections 141
4 through 149, and San Diego Municipal Code Section 24.0100, et seq. Pursuant to Charter
5 section 144, SDCERS is managed by its Board of Administration.

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

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

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

21 **FACTUAL ALLEGATIONS**

22 **SDCERS Owes Plaintiffs Fiduciary Duties**

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

26 8. "The retirement board of a public pension or retirement system [has] the sole and
27 exclusive fiduciary responsibility over the assets of the public pension or retirement system. The
28 retirement board . . . also ha[s] sole and exclusive responsibility to administer the system in a

1 manner that will assure prompt delivery of benefits and related services to the participants and
2 their beneficiaries. The assets of a public pension or retirement system are trust funds and [must]
3 be held for the exclusive purposes of providing benefits to participants in the pension or
4 retirement system and their beneficiaries and defraying reasonable expenses of administering the
5 system.” (Cal. Const., art. XVI, § 17, subd. (a), italics added.)

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

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

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

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

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

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

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

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

26 15. The City adopted and expanded the PSC program because, according a July 30,
27 2010 sworn declaration by the City’s Chief Operating Officer, Jay Goldstone, the City has a
28 “legitimate and overriding business interest in attracting and retaining qualified public employees

1 so as to maintain a qualified, cost-effective public work force[.]” and “[a]dopting and
2 maintaining pension benefits . . . achieve this goal by awarding competitive pension benefits to
3 experienced employees.”

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

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

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

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

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

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

1 purchased service credit.

2 22. In August 2002 the SDCERS board directed its actuary to evaluate whether the
3 PSC rate structure set in 1997 reflected the current cost of the benefit.

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

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

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

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

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

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

1 27. There are two components to the City's annual employer contribution: (a) a
2 "normal" contribution and (b) an additional contribution designed to amortize any unfunded
3 liability of the trust fund over a period not to exceed 15 years. (City Charter, § 143.) The City's
4 annual employer contributions are determined in annual actuarial valuations, which are provided
5 to the City.

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

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

11 29. The City was fully aware that the SDCERS's board's decision to delay
12 implementation of the PSC rate increase might cost the City. For example, the 2002 annual
13 actuarial valuation estimated that the PSC program increased the City's employer contribution
14 that year by more than \$5 million. SDCERS board member and Deputy City Auditor Terri
15 Webster, in e-mails dated July 16, 2003, and August 11, 2003, complained that the old PSC rates
16 had caused the retirement system to "incur[] an approximate \$56 million loss due to the under
17 funding of the [PSC] program." Webster also complained that "the [PSC] program has been
18 administered by the Board at a loss to . . . the City . . ." Webster's August 18, 2003 e-mail,
19 directed to fellow board member Ray Garnica, specifically criticized SDCERS' failure to
20 immediately increase the PSC rates after the SDCERS board had received their actuary's August
21 2003 report.

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

25 31. On January 27, 2004, in a confidential memorandum (later publicly released by
26 the City) from the City's outside counsel at Luce, Forward, Hamilton & Scripps, LLP, the Mayor
27 and City Council were expressly advised that "City leaders have taken note of the fact that
28 SDCERS has apparently failed to collect the full cost from employees who elect to participate in

1 the 'purchase of service credits' benefit . . . which results in a significant actuarial loss . . . [of] as
2 much as \$180 million if initial estimates from the City are correct"

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

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

6 33. In that 2005 litigation, the City alleged by cross-complaint that certain pension
7 benefits were "illegal." In that litigation, the City dubbed these "Contested Benefits."

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

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

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

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

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

23 38. The new actuary prepared a report dated August 14, 2007. In that report, he
24 concluded that the SDCERS board had, under the previous PSC pricing structure developed by
25 the prior actuary, charged an insufficient amount for the service credits purchased by general
26 members during the window period. However, that same report confirmed that the 2003 increase
27 in the safety member PSC rate to 37 percent of annual compensation caused safety members to
28 overpay by \$1,047,024 during the window period and \$1,637,409 thereafter. In other words,

1 SDCERS was told that it was not administering the PSC program for safety members in a cost
2 neutral manner *and was overcharging safety members.*

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

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

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

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

27 43. In that case, SDCERS filed a demurrer on the ground that the City Attorney had
28 failed to obtain the authority of his client (the City) to file suit, and that the City Charter required

1 this authority with at least five affirmative votes of members of the City Council. (City Charter
2 sections 40, 270(c).) Although the trial court initially ruled that SDCERS' demurrer should be
3 sustained, SDCERS dropped this issue and allowed the City's lawsuit to proceed to the detriment
4 of SDCERS' beneficiaries, such as the plaintiffs, to whom SDCERS owed constitutional and
5 fiduciary duties.

6 44. Although SDCERS raised a statute of limitations defense, it was rejected because
7 SDCERS failed to present relevant and readily-available evidence. The court held the City's suit
8 was challenging the November 2007 decision to charge the City, rather than its 2003 decision to
9 open the window period.

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

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

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

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

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

4 50. Between September 18, 2006 and July 1, 2010, despite its duty of full disclosure
5 (*Hittle, supra*, 39 Cal.3d 374), although SDCERS knew that the City was challenging PSC
6 service credits purchased during the window period, it failed to inform and adequately apprise
7 affected persons of this fact and the impact it could have on the amount of those employees’
8 pensions. Consequently, some members of SDCERS made life-altering decisions to retire based
9 on incomplete knowledge.

10 51. Beginning on or about April 11, 2011, SDCERS began notifying plaintiffs and
11 safety members similarly situated that it would not perform the PSC contracts it had entered into
12 with the plaintiffs.

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

16 **FIRST CAUSE OF ACTION**

17 **BREACH OF CONTRACT**

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

19 53. Plaintiffs incorporate paragraphs 1-52 as if fully set forth here.

20 54. From 2003 through 2005, the plaintiffs entered into identically-worded contracts
21 for the purchase of service credits.

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

24 56. The plaintiffs performed all of their obligations under those contracts, including
25 paying the full price calculated by SDCERS to purchase service credits under those contracts.

26 57. Unlike other contracts SDCERS entered into during the window period, the
27 plaintiffs paid more for these contracts than required to make them cost neutral to the City.

28 58. Defendants breached these contracts by failing to perform them, without

1 justification.

2 59. As a result of defendants' breach, the plaintiffs are entitled to the benefit of the
3 bargain of those contracts and have them enforced as written, and/or for consequential damages.

4
5 **SECOND CAUSE OF ACTION**

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

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

8 60. Plaintiffs incorporate paragraphs 1-52 as if fully set forth here.

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

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

18 63. SDCERS' actions in breach of its fiduciary duty and duty of loyalty constituted a
19 breach of trust entitling Plaintiffs to an order setting aside SDCERS' acts in accordance with
20 Probate Code section 16420, subdivision (a)(6) and common law, and/or for the payment of
21 money by SDCERS in accordance with Probate Code section 16420, subdivision (a)(3) and
22 common law. Additionally, as a result of these common law and constitutional-based breaches
23 of fiduciary duty, Plaintiffs have suffered economic damages compensable under Civil Code
24 section 3333.

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27 ///

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1 **THIRD CAUSE OF ACTION**

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

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

4 64. Plaintiffs incorporate paragraphs 1-52 as if fully set forth here.

5 65. Defendants, including SDCERS, breached their common law fiduciary duties to
6 the plaintiffs by failing to pursue the City Attorney's lack of authority to file and prosecute the
7 City's second PSC lawsuit, and by failing to raise in the City's second PSC lawsuit:

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

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

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

12 SDCERS' failure to raise these defenses in the City's second PSC lawsuit was adverse to its trust
13 beneficiaries, including the plaintiffs. Additionally, SDCERS failed to present compelling and
14 available evidence supporting its statute of limitations defense.

15 66. Defendants, including SDCERS, breached their constitutional, fiduciary duties to
16 the plaintiffs by failing to pursue the City Attorney's lack of authority to file and prosecute the
17 City's second PSC lawsuit, and by failing to raise in the City's second PSC lawsuit:

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

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

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

22 SDCERS' failure to raise these defenses in the City's second PSC lawsuit was adverse to its trust
23 beneficiaries, including the plaintiffs. Additionally, SDCERS failed to present compelling and
24 available evidence supporting its statute of limitations defense.

25 67. SDCERS' actions in breach of its fiduciary duty and duty of loyalty constituted a
26 breach of trust entitling Plaintiffs to an order setting aside SDCERS' acts in accordance with
27 Probate Code section 16420, subdivision (a)(6) and common law, and/or for the payment of
28 money by SDCERS in accordance with Probate Code section 16420, subdivision (a)(3) and

1 common law. Additionally, as a result of these common law and constitutional-based breaches
2 of fiduciary duty, Plaintiffs have suffered economic damages compensable under Civil Code
3 section 3333.

4
5 **FOURTH CAUSE OF ACTION**

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

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

8 68. Plaintiffs incorporate paragraphs 1-52 as if fully set forth here.

9 69. Defendants, including SDCERS, breached their common law fiduciary duty of full
10 disclosure by failing to inform and adequately apprise plaintiffs of the City's challenge to their
11 service credits before certain plaintiffs made life-altering decisions to retire based on incomplete
12 knowledge.

13 70. Defendants, including SDCERS, breached their constitutional, fiduciary duty
14 (Cal. Const., art. XVI, § 17) by failing to inform and adequately these plaintiffs of the City's
15 challenge to their service credits before they made life-altering decisions to retire based on
16 incomplete knowledge.

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

20
21 **FIFTH CAUSE OF ACTION**

22 **WRIT OF MANDATE**

23 **AGAINST SDCERS**

24 72. Plaintiffs incorporate paragraphs 1-52 as if fully set forth here.

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

27 74. However, since 1993, SDCERS has been including the cost of service credits
28 made available for purchase by safety members the cost of the disability retirement plan (as

1 provided for in San Diego Municipal Code sections 24.0501 to 24.0515).

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

7 76. Unless SDCERS is directed by the Court to cease its practice of charging safety
8 members purchasing service credits under the PSC program the cost of disability retirement, and
9 is further ordered to calculate and refund the amount it has charged the affected members,
10 including plaintiffs, since 1993, SDCERS will do neither.

11 77. The plaintiffs have no plain, speedy, or adequate remedy at law.

12 78. Therefore, this Court should issue a peremptory writ of mandate directing
13 SDCERS to cease its practice of charging safety members purchasing service credits under the
14 PSC program the cost of disability retirement, and is further ordered to calculate and refund the
15 amount it has overcharged affected members, including plaintiffs, since 1993.

16 WHEREFORE, plaintiffs pray for judgment as follows:


- 17 1. for damages according to proof;
- 18 2. for payment of money by SDCERS in accordance with Probate Code section
19 16420, subdivision (a)(3) and common law;
- 20 3. for an order setting SDCERS' acts in accordance with Probate Code section
21 16420, subdivision (a)(6) and common law;
- 22 4. a peremptory writ of mandate directing SDCERS to cease its practice of charging
23 safety members purchasing service credits under the PSC program the cost of
24 disability retirement, and is further ordered to calculate and refund the amount it
25 has overcharged affected members, including plaintiffs, since 1993;
- 26 5. for prejudgment interest;
- 27 6. for attorney fees;
- 28 7. for costs of suit; and

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8. for such other and further relief as the court deems just and proper.

Dated: November 26, 2013

LAW OFFICE OF MICHAEL A. CONGER

By: 
Michael A. Conger
Attorney for Plaintiffs

Jury trial demanded.

EXHIBIT A

Run Date : 02/16/2005
Run Time : 11:08 AM

San Diego CERS Election to Purchase Service

User Id : Shirley Cunningham,
Page 1

[REDACTED]
[REDACTED]
SAN DIEGO, CA [REDACTED]

SSN: [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 416 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.

[REDACTED]
Signature

02/16/2005
Date

Run Date : 02/18/2005
 Run Time : 11:08 AM

San Diego CERS San Diego City Employee Retirement

User Id : Shirley Cunningham,
 Page 1

SSN: [REDACTED]

Purchase Service Information

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

Purchase Service Factors

Contract Effective Date: 01/21/2005	Salary: \$ 2,483.92	
Employee Contribution Rate: 0.28000	Hours Worked:	
City Contribution Rate:	Purchase Years: 4.00	
	Weighted Wage:	
Adjustment:		
Begin Waiting Period Age:	End Waiting Period Age:	
Adjusted Contribution Rate:	Adjusted Contribution Rate:	

Purchase Service Calculations

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