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CLERK OF THE SUPERIOR COURT
COUNTY OF STANISLAUS

BY _____

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF STANISLAUS

12 MICHAEL R. O'NEAL, RHONDA BIESEMEIER,
13 and DENNIS J. NASRAWI,

14 Plaintiffs,

15 v.

16 STANISLAUS COUNTY EMPLOYEES'
17 RETIREMENT ASSOCIATION, and DOES 1-30,

18 Defendants.

CASE NO: 683548

COMPLAINT FOR BREACH OF
FIDUCIARY AND
CONSTITUTIONAL DUTIES

BY FAX

WILLIAM A. NEURICH
This case has been assigned to Judge _____
Department of _____, for all purposes including Trial.

19 FIRST CAUSE OF ACTION

20 BREACH OF COMMON LAW AND CONSTITUTIONAL FIDUCIARY DUTIES

21 AGAINST StanCERA AND DOES 1-30

22 1. The plaintiffs in this action are former employees of the County of Stanislaus
23 ("the County") who have acquired vested contractual rights to receive pension and related
24 benefits from defendant Stanislaus County Employees Retirement Association ("StanCERA").
25 Each of the plaintiffs is a member of StanCERA, and a participant and a beneficiary of that
26 pension trust fund.

27 2. Defendant StanCERA is a public employees retirement system operating under
28 section 17 of article XVI of the California Constitution and the County Employees Retirement
Law of 1937 (Gov. Code, § 31450 et seq.). StanCERA administers the retirement benefits for

1 employees of Stanislaus County (the "County"), as well as the City of Ceres, the Superior Court
2 of the State of California for Stanislaus County, and five special districts located in Stanislaus
3 County. StanCERA administers the plaintiffs' defined benefit pension plan and provides
4 retirement, health insurance, disability, and death benefits to plaintiffs and other members.

5 3. The true names or capacities, whether individual, corporate, associate, or
6 otherwise, of defendants Does 1 to 30, inclusive, are unknown to plaintiffs, who therefore sue
7 said defendants by such fictitious names.

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

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

20 **A Portion of Plaintiffs' Compensation When They Were Employed by the County**
21 **Included Deferred Compensation**

22 6. While they were employed by the County, each of the plaintiffs earned
23 compensation in exchange for the labor they provided for the public good. A portion of that
24 compensation was deferred until retirement. (Gov. Code, § 31451 ["retirement compensation
25 [and other benefits are] additional elements of compensation".])

26 7. This deferred compensation is paid annually by the County in the form of
27 employer contributions to the plaintiffs' pension trust fund, which is administered by StanCERA.

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1 retirement system and their beneficiaries and defraying reasonable expenses of administering the
2 system.” (Cal. Const., art. XVI, § 17, subd. (a), italics added.)

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

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

10 **StanCERA Does Not Owe Any Fiduciary Duties to the County**

11 16. StanCERA does not owe any fiduciary duty to the County.

12 **StanCERA’s Mismanagement of the Pension Trust Fund**

13 17. As of June 30, 2006, StanCERA was ostensibly overfunded (i.e., assets at market
14 value minus liabilities) by \$80.7 million.¹

15 18. As of June 30, 2006, StanCERA’s funded ratio (i.e., the ratio of assets to
16 liabilities) was 106.8 percent.

17 19. As of June 30, 2008, StanCERA was underfunded (i.e., liabilities minus assets at
18 market value) by \$237.5 million.²

19 20. As of June 30, 2008, StanCERA’s funded ratio (i.e., the ratio of assets to
20 liabilities) was 73.7 percent.

21 21. As of June 30, 2009, StanCERA was underfunded by \$595.6 million.

22 22. As of June 30, 2009, StanCERA’s funded ratio was 59.0 percent.

23 23. Numerous pension industry standards state that a pension fund with less than an
24 80 percent funded ratio is in poor health and one of less than a 70 percent funded ratio is in

25
26 ¹ According to StanCERA, the June 30, 2006 valuation understated its liabilities
and costs. See paragraph 25.

27 ² To plaintiffs’ knowledge, StanCERA has not publicly disclosed its assets or
28 liabilities, or funded ratio, as of June 30, 2007.

1 critical condition.

2 24. As the health of the pension trust fund dramatically plunged, StanCERA
3 imprudently and by the artifice of various actuarial schemes, manipulated the pension trust fund
4 it administers in order to *reduce* County employer contributions by an at least \$94 million, rather
5 than to assure the competency of the assets of the plan. (See, Cal. Const., art. XVI, § 17(e)
6 [requiring StanCERA’s actuarial function be exercised “consistent with [its] exclusive fiduciary
7 responsibilities” and “in order to assure the competency of the assets of the public pension or
8 retirement system”].) During this and all other periods, all County employees have continued to
9 make their full contributions.

10 25. Additionally, in 2007 and 2008 StanCERA failed to collect in excess of \$40
11 million in employer contributions that County owed to StanCERA in order to fund the pension
12 trust fund. Although StanCERA claims this was due to an error of its actuary, Buck Consultants,
13 in “significant[ly] understat[ing] future Plan liabilities and costs,” in the almost two years since
14 StanCERA claims to have discovered this error, it has not acted to collect this money from the
15 County or pursue a claim against Buck for actuarial malpractice. Moreover, although plaintiffs
16 are acting to pursue a malpractice claim against Buck Consultants for damages, with the proceeds
17 to be paid to StanCERA for the benefit of all of its participants and beneficiaries (United States
18 District Court for the Eastern District of California, Case No. 1:09-cv-02061-OWW-GSA),
19 StanCERA has actively impeded the plaintiffs’ ability to pursue that litigation and refused to
20 cooperate with them.

21 26. StanCERA assumes an annual rate of return on its assets of 8.16 percent, net of
22 investment and administrative expenses. It uses this rate of return to calculate employer
23 contributions from the County. The higher the rate of return, the lower the County’s employer
24 contributions. The lower the assumed rate of return, the higher the County’s employer
25 contributions. Of the 20 public employee pension trust funds (such as StanCERA) operating
26 under Government Code section 31450, et seq., this assumed rate of return is one of the highest,
27 if not the highest.

28 27. Government Code sections 31592, 31592.2, 31592.3, which are applicable to

1 StanCERA, provide that “excess interest” or “excess earnings” are annual earnings from
2 investments which exceed the assumed actuarial rate plus one percent. Those statutes permit
3 such funds to be used to provide pension benefits, including health benefits and cost-of-living
4 adjustments, to StanCERA’s participants and beneficiaries, including the plaintiffs.

5 28. StanCERA has adopted an “Excess Earnings Policy” which provides that certain
6 statutorily-authorized pension benefits, including those described in the preceding paragraph, will
7 never be paid to participants and beneficiaries of StanCERA, including plaintiffs, so long as
8 StanCERA’s funded ratio (assets divided by liabilities) is less than 100 percent.

9 **StanCERA Is Liable for Breach of Any of Its Fiduciary Duties**

10 29. “[A] wealth of . . . legal remedies exist[] to ensure . . . retirement boards do not
11 abuse the public trust . . . [including] declaratory relief and mandamus actions.” (*Lexin v.*
12 *Superior Court* (2010) 47 Cal.4th 1050, 1102.)

13 30. “Retirement board trustees are fiduciaries (Cal. Const., art. XVI, § 17) and as such
14 are subject to suit for breach of fiduciary duty when their decisions fall short of the standard the
15 law demands.” (*Lexin, supra*, 47 Cal.4th at p. 1102.)

16 31. “The violation by a trustee of any duty owed to the beneficiaries of the trust
17 constitutes a breach of trust.” (*City of Atascadero v. Merrill, Lynch, Pierce, Fenner & Smith*
18 (*“City of Atascadero”*) (1999) 68 Cal.App.4th 445, 462, citing Rest.2d Trusts, § 201.)
19 “Generally, a breach of duty by a trustee gives rise to a cause of action in the beneficiary.” (60
20 Cal.Jur.3d (2005) Trusts, § 388, p. 535.)

21 32. “The beneficiaries of a trust may sue a trustee to recover profits or recoup losses
22 resulting from a trustee’s breach of any [of its] duties.” (*City of Atascadero, supra*, 68
23 Cal.App.4th at p. 463.)

24 33. “No one except a beneficiary or one suing on behalf of a beneficiary, such as a co-
25 trustee, may maintain a suit against the trustee to enforce the trust.” (*Ibid.*; 76 Am. Jur. 2d
26 Trusts, § 615 [“[a]n action or proceeding to enforce the trust must ordinarily be brought by
27 beneficiaries”].) “The trustees’ obligations can be enforced only by the beneficiary or one who
28 sues on the beneficiary’s behalf . . .” (13 Witkin, Summary of Cal. Law, Trusts (10th ed. 2005)

1 § 121, pp. 687-88, citing Rest.2d, Trusts, §§ 199, 200, 214.)

2 34. “If a trustee violates a duty owed to the beneficiary, the trustee has committed a
3 breach of trust and may be subject to any appropriate remedy. In California, as in most
4 jurisdictions, the law related to remedies for breach has been largely left to the common law.”
5 (13 Witkin, Summary of Cal. Law, Trusts (10th ed. 2005) § 121, p. 688.) “Remedies should
6 remain sufficiently flexible, as they are under the common law, so that courts can fashion an
7 appropriate response in particular circumstances.” (*Ibid.*)

8 35. “The beneficiary may sue the trustee ‘to redress a breach of trust by payment of
9 money or otherwise.’” (13 Witkin, Summary of Cal. Law, Trusts (10th ed. 2005) § 124, p. 690,
10 quoting Prob. Code, § 16240, subd. (a)(3); Rest.2d, Trusts, §§ 199(c), 205; *Work v. County Nat.*
11 *Bank & Trust Co. of Santa Barbara* (1935) 4 Cal.2d 532, 536; *Edgar v. Bank of America* (1942)
12 50 Cal.App.2d 827, 833; *Estate of Talbot* (1956) 141 Cal.App.2d 309, 322.) “If a trustee
13 commits a breach of trust, or threatens to commit a breach of trust, a beneficiary or co-trustee of
14 the trust may commence a proceeding for any of a number of statutorily specified purposes.” (60
15 Cal.Jur.3d (2005) Trusts, § 388, p. 535.) These include “compel[ling] the trustee to redress a
16 breach of trust by payment of money or otherwise.” (*Id.*, p. 536, citing Prob. Code, § 16420,
17 subd. (a)(3).)

18 36. “If the trustee commits a breach of trust, he is chargeable with (a) any loss or
19 depreciation in value of the trust estate resulting from the breach of trust; or . . . (c) any profit
20 which would have accrued to the trust estate if there had been no breach of trust.” (Rest.2d
21 Trusts, § 205.)

22 37. “If the trustee commits a breach of trust, the beneficiary may have the option of
23 pursuing a remedy which will put him in the position in which he was before the trustee
24 committed the breach of trust . . . or of pursuing a remedy which will put him in the position in
25 which he would have been if the trustee had not committed the breach of trust.” (Rest.2d Trusts,
26 § 205, com. a; see 76 Am. Jur. 2d Trusts, § 325.)

27 **Compliance with the Government Claims Act**

28 38. To the extent the plaintiffs were required to comply with the Government Claims

1 Act, they have so complied.

2 39. On or about March 22, 2011, StanCERA \$12.6 million (in addition to \$81.4
3 million transferred in the previous two years) from a non-valuation reserve of pension trust funds
4 to be used as the employer contribution from the County for fiscal year 2011-2012. In other
5 words, because of this transfer, the County paid \$12.6 million less into already severely
6 underfunded pension trust fund than it otherwise would have paid. As a result, StanCERA has
7 \$12.6 million fewer assets that it otherwise would have had.

8 40. StanCERA will also lose the expected investment earnings (8.16 percent per year)
9 from this \$12.6 million, and will continue to lose those earnings (\$1,028,160 per year) for each
10 year until the skipped \$12.6 million County contribution, including lost earnings, is paid.

11 41. StanCERA's use of \$12.6 million from the pension trust fund to substitute for the
12 County's employer contribution for 2011-2012 was a breach of StanCERA's common law,
13 fiduciary duties to the plaintiffs.

14 42. StanCERA's use of \$12.6 million from the pension trust fund to substitute for the
15 County's employer contribution for 2011-2012 was a breach of StanCERA's constitutional,
16 fiduciary duties to the plaintiffs under section 17 of article 16 of the California Constitution.

17 43. As a result of StanCERA's transfer of \$12.6 million, the plaintiffs' trust fund has
18 suffered the following monetary damages:

- 19 a. it has \$12.6 million less assets than it otherwise would have had;
20 b. it will lose approximately \$1,028,160 per year in investment earnings from
21 the \$12.6 million never paid by the County; and
22 c. the funded ratio dropped further.

23 44. Plaintiffs have been deprived of pension benefits by StanCERA's intentional
24 mismanagement of the trust fund to maintain a funded ratio of less than 90 percent.

25 45. Plaintiffs are bringing this action in a representative capacity on behalf of all
26 participants and beneficiaries in StanCERA whose status results in whole or in part from
27 employment for the County. Plaintiffs do not seek monetary recovery for themselves.

28 46. "The beneficiary may sue to enjoin the trustee from committing a breach of trust."

1 (13 Witkin, Summary of Cal. Law, Trusts (10th ed. 2005) § 123, pp. 689-90; Rest.2d, Trusts,
2 § 199(b).)

3 47. Civil Code section 3422 expressly allows injunctive relief “[w]here the obligation
4 arises from a trust.”

5 48. ““This may be an appropriate remedy in situations such as where the trustee
6 intends to make a transfer of property forbidden in the trust instrument” (13 Witkin,
7 Summary of Cal. Law, Trusts (10th ed. 2005) § 123, p. 690, quoting 18 Cal. Law. Rev. Com.
8 Reports, p. 551.)

9 49. Moreover, injunctive relief is an appropriate remedy for constitutional violations.
10 (*Katzberg, supra*, 29 Cal.4th at p. 343 [“it is also clear that, like many constitutional provisions,
11 [violation of article 1, section 7(a)] supports and action, brought by a private plaintiff against a
12 proper defendant, for declaratory relief or for an injunction”].)

13 50. Plaintiffs seek an injunction prohibiting StanCERA from ever engaging in similar
14 conduct to that alleged in this cause of action. Plaintiffs also seek damages from StanCERA
15 (paid by available insurance coverage) and/or an injunction mandating that StanCERA collect
16 from the County, by special assessment, an amount of funds sufficient to put the plaintiffs’
17 pension trust fund in the position it would be in but for the unlawful use of trust funds to offset
18 the County’s employer contribution for 2011-2012.

19 51. Plaintiffs seek costs, attorney fees and such other and further relief as the court
20 deems just and proper on this cause of action.

21 WHEREFORE, plaintiffs pray for judgment granting:

- 22 1. monetary damages, according to proof, from available insurance coverage;
- 23 2. if such relief is inadequate, injunctive relief;
- 24 3. attorney fees, as sought in paragraph 51;
- 25 4. costs of suit incurred, as sought in paragraph 51; and
- 26 5. such other and further relief as the court deems just and proper, as sought in
27 paragraph 51.

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1 Dated: March 12, 2013

LAW OFFICE OF MICHAEL A. CONGER

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By:



Michael A. Conger
Attorney for Plaintiffs

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5 Jury trial demanded.

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