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6 behalf of all others similarly situated

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF SAN DIEGO**

10 KELLY LANCASTER, DAVID BOENTIZ, ) CASE NO: 37-2011-00096238-CU-PO-CTL  
MARY ERICKSON and RICHARD GILB, )  
11 )  
Plaintiffs, ) SECOND AMENDED CLASS ACTION  
12 ) COMPLAINT FOR BREACH OF  
v. ) CONSTITUTIONAL AND FIDUCIARY  
13 ) DUTIES  
SAN DIEGO CITY EMPLOYEES' )  
14 RETIREMENT SYSTEM, and DOES 1-40, )  
15 Defendants. ) Judge: Hon. Ronald S. Prager  
Dept: C-71  
Action Filed: August 12, 2011  
16 Trial Date: Not yet set

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**THIS IS A CLASS ACTION LAWSUIT.**

19 1. This is a class action lawsuit brought by the plaintiffs Kelly Lancaster, David  
20 Boentiz, Mary Erickson and Richard Gilb ("plaintiffs"). Plaintiffs are all beneficiaries of a  
21 pension trust fund administered by defendant San Diego City Employees' Retirement System  
22 ("SDCERS"). The plaintiffs bring this suit on their own behalf and for all those others similarly  
23 situated. The definition of the class is set forth in paragraph 60 of this complaint.

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

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



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

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

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

12 **SDCERS Does Not Owe Any Fiduciary Duty to the**  
13 **San Diego County Regional Airport Authority**

14 12. SDCERS does not owe any fiduciary duty to the San Diego County Regional  
15 Airport Authority (“SDCRAA”).

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

17 13. A SDCRAA employee’s pension is determined by multiplying (a) years of  
18 employment (called “credited service”), (b) the highest compensation earned by the employee in  
19 any one-year period, and (c) a retirement factor.

20 14. Based on San Diego City Charter section 149, San Diego Municipal Code section  
21 24.1801, and the First Amended Retirement Plan for Airport Authority Employees (“Airport  
22 Plan”), SDCERS administers SDCRAA employees’ pensions under provisions similar to those  
23 under which it administers the employee pension plan for San Diego City employees.

24 15. In 1993 the City established the purchase of service credit program (“PSC”) to  
25 allow employees to purchase service credits for periods of actual service or authorized leaves of  
26 absence that were otherwise ineligible for service credits. Such categories of service eligible for  
27 purchase were employment probationary periods, part-time service, military services, and  
28 approved leaves of absence, among others.

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

3           17.     The City adopted and expanded the PSC program because, according a July 30,  
4 2010 sworn declaration by the City's Chief Operating Officer, Jay Goldstone, the City has a  
5 "legitimate and overriding business interest in attracting and retaining qualified public employees  
6 so as to maintain a qualified, cost-effective public work force[.]" and "[a]dopting and  
7 maintaining pension benefits . . . achieve this goal by awarding competitive pension benefits to  
8 experienced employees."

9           18.     The 1997 ordinance adopted by the City permitting employees to purchase up to  
10 five years of service credit provided that "the cost [of such service] purchased . . . is the amount  
11 the [SDCERS'] Board determines to be the employee and employer cost of that . . . service."  
12 The SDCRAA adopted a similar rule in section 1104(d) of the Airport Plan.

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

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

23           21.     At its March 1997 meeting, the SDCERS' board, which has a majority of  
24 members appointed by the Mayor (City Charter, § 144), approved the rates for general and safety  
25 members. City employees were then permitted to purchase service credits at the rates the board  
26 established.

27           22.     The City had actual knowledge of the rates set by SDCERS and made no  
28 objection to those rates, or to SDCERS' "average price" PSC rate structure. Indeed, SDCERS

1 board members appointed by the City voted in favor of such a structure.

2 23. In 2000 and in 2002, the City retroactively increased the retirement factor used to  
3 compute its employees' pensions. This caused an increase in the value, and therefore the cost, of  
4 a year of purchased service credit under the PSC program. At a SDCERS board meeting in July  
5 2002, SDCERS retirement administrator commented that the current PSC rate structure might  
6 therefore be insufficient to fund a year of purchased service credit.

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

9 25. The actuary completed his study in August 2003 and recommended to the board  
10 that the rates be adjusted upwards to 27 percent current annual compensation for general member  
11 employees and 37 percent current annual compensation for safety member employees.

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

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

22 **Any Shortfall Created by the Window Period Was Being Paid by the City in Its**  
23 **Amortization of the Unfunded Accrued Actuarial Liability**

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

28 29. There are two components to the City's and the SDCRAA's annual employer

1 contribution: (a) a “normal” contribution and (b) an additional contribution designed to amortize  
2 any unfunded liability of the trust fund over a period not to exceed 15 years. (City Charter, §  
3 143.) These employers’ annual employer contributions are determined in annual actuarial  
4 valuations, which are provided to the City and to the SDCRAA.

5 30. Therefore, if the 1997 PSC pricing did not pay the full cost of the service credits  
6 purchased, the City and the SDCRAA would be required to amortize any such deficiency and  
7 make such an amortization payment as a component part of its annual employer contribution.

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

9 31. 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, issued on January 9, 2003, estimated that the PSC program increased the  
12 City’s employer contribution that year by more than \$5 million. SDCERS board member and  
13 Deputy City Auditor Terri Webster, in e-mails dated July 16, 2003, and August 11, 2003,  
14 complained that the old PSC rates had caused the retirement system to “incur[] an approximate  
15 \$56 million loss due to the under funding of the [PSC] program.” Webster also complained that  
16 “the [PSC] program has been administered by the Board at a loss to . . . the City . . .” Webster’s  
17 August 18, 2003 e-mail, directed to fellow board member Ray Garnica, specifically criticized  
18 SDCERS’ failure to immediately increase the PSC rates after the SDCERS board had received  
19 their actuary’s August 2003 report.

20 32. 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 33. 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 SDCRAA's Knowledge of the Airport Window Period in 2004**

2            34.        On or about April 16, 2004, SDCERS' board approved increases in the cost to  
3 purchase service credits for SDCRAA employees. Those rates increases from 15 percent of an  
4 employee's annual compensation at the time of purchase to 32 percent (and 34 percent for  
5 "executive" employees under the Airport Plan). However, as it had done by opening the window  
6 period for City employees, SDCERS delayed implementation of the rate increases until July 1,  
7 2004 (the "Airport window period").

8            35.        The SDCRAA was fully aware that service credits purchased by SDCRAA  
9 employees during the Airport window period would increase the unfunded liability of the  
10 SDCRAA employees' pension plan and that, because a component of the SDCRAA's annual  
11 employer contribution paid an amortization payment towards this unfunded liability, the Airport  
12 window period would increase the SDCRAA's annual required employer contribution.

13           36.        Nevertheless, the SDCRAA, in a written memorandum dated April 16, 2004,  
14 encouraged SDCRAA employees to "[t]ake advantage of the current 15 % PSC (lower cost),  
15 [and to] submit an application to purchase service to SDCERS **no later than June 30, 2004.**"  
16 Based on information and belief, the SDCRAA encouraged its employees to make service credit  
17 purchases before the price increased at other times and in other oral and written statements  
18 between April 16, 2004 and June 30, 2004.

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

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

22           38.        In that 2005 litigation, the City alleged by cross-complaint that certain pension  
23 benefits were "illegal." In that litigation, the City dubbed these "Contested Benefits."

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

27           40.        On October 16, 2006, SDCERS obtained an order granting its motion for  
28 summary adjudication from The Honorable Jeffrey B. Barton expressly declaring that SDCERS

1 “may properly and legally pay all of the Contested Benefits . . . .” That order became final  
2 without alteration in June 2011.

### 3 The City’s Second PSC Lawsuit

4 41. On or about September 18, 2006, the City Attorney issued “Interim Report # 12,”  
5 which concluded that the PSC purchases made during the window period were illegal.

6 42. As a result of that report, SDCERS asked its new actuary, which had replaced  
7 SDCERS previous actuary, to study the PSC program since inception and report to the SDCERS  
8 board whether the program had historically been administered in a cost neutral manner, i.e., had  
9 SDCERS accurately charged employees an appropriate amount, for the service credits purchased  
10 under the PSC program.

11 43. The new actuary prepared a report dated August 14, 2007. In that report, he  
12 concluded that the SDCERS board had, under the previous PSC pricing structure developed by  
13 the prior actuary, charged an insufficient amount for the service credits purchased by general  
14 members during the window period.

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

19 45. Realizing that SDCERS had already been charging the City for any PSC-related  
20 window period underfunding since 2003, as set forth in paragraphs 28-33, above, the SDCERS  
21 board was implored by speakers at those meetings, including Ann Smith, an attorney for the  
22 City’s largest labor union, not to take any action. As these speakers explained, any underfunding  
23 problem was already being cured because such a deficit was being amortized by the City’s annual  
24 employer contributions. Further, in light of the City’s knowledge of the window period, any  
25 action taken in 2007 by the SDCERS board might impair SDCERS’ statute of limitations defense  
26 if the City decided to file suit based upon action taken by the SDCERS board in 2007. (*Marin*  
27 *Healthcare District v. Sutter Health* (2002) 103 Cal.App.4th 861, 879 [statutes of limitation  
28 apply even to void contracts].)



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

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

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

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

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

26           51.     In the City's second PSC lawsuit, SDCERS also failed to raise the doctrine of  
27 unclean hands. In light of the City's conduct in encouraging its employees to purchase service  
28 credits during the window period, SDCERS should have raised this defense and had it done so,

1 SDCERS would have prevailed in the City's second PSC lawsuit.

2 52. SDCERS' imprudent acts, which permitted the City's second PSC lawsuit to be  
3 adjudicated on the merits, adversely affected the beneficiaries of the employee pension trust fund  
4 because SDCERS lost that case.

5 53. On or about June 1, 2011, after SDCERS lost the City's second PSC lawsuit,  
6 SDCERS offered to rescind or reform the PSC contracts entered into during the window period.  
7 However, SDCERS refused to perform those contracts as written.

8 **SDCRAA Never Challenged the Airport Window Period**

9 54. Unlike the City, which filed two lawsuits against SDCERS, the SDCRAA never  
10 challenged SDCERS' 2004 decision to open the Airport Window Period.

11 55. Nevertheless, on or about January 21, 2011, without input from any of the affected  
12 employee trust fund beneficiaries employed by the SDCRAA, SDCERS provided the SDCRAA  
13 with the option of avoiding the unfunded liability created (and already partially amortized) by the  
14 Airport window period. SDCERS never considered the applicable statute of limitations defense  
15 it could have successfully asserted if the SDCRAA ever challenged the Airport window period  
16 and the unfunded liability it had created. SDCERS conduct was inimical to the interests of its  
17 trust beneficiaries and benefitted only the SDCRAA, to which SDCERS owed no fiduciary duty.

18 56. On or about February 10, 2011, the SDCRAA board voted to cease amortizing the  
19 unfunded liability created by the Airport window period, and demanded reimbursement from  
20 SDCERS for all amortization payments the SDCRAA had already made to SDCERS from 2004  
21 through 2011.

22 57. On or about June 1, 2011, SDCERS offered to rescind or reform the PSC  
23 contracts entered into by SDCRAA employees during the Airport window period. However,  
24 SDCERS refused to perform those contracts as written.

25 58. Between September 18, 2006 and July 1, 2010, despite its duty of full disclosure  
26 (*Hittle, supra*, 39 Cal.3d 374), although SDCERS knew that the City was challenging PSC  
27 service credits purchased during the window period, it failed to inform and adequately apprise  
28 affected persons of this fact and the impact it could have on the amount of those employees'

1 pensions. Consequently, some members of SDCERS made life-altering decisions to retire based  
2 on incomplete knowledge.

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

### 6 CLASS ACTION ALLEGATIONS

7 60. The plaintiff class consists of:

8 “All SDCERS members or beneficiaries, employed or formerly employed by the  
9 San Diego County Regional Airport Authority, who have been subjected to  
10 SDCERS’ Board Rule 4.90, relating to Purchase of Service Credit Corrections.”

11 61. This action is brought and is maintained properly as a class action under Code of  
12 Civil Procedure section 382 because:

- 13 (a) The questions and issues of law and fact raised herein are of a  
14 common and general interest affecting the class;
- 15 (b) The plaintiff class is estimated to contain 39 individuals, and it is  
16 impractical to bring all members of the class individually before  
17 the court;
- 18 (c) The questions of law or fact common to the class are substantially  
19 similar and predominate over those questions that affect individual  
20 members. These common questions include:
- 21 (i) What is the nature and extent of the duties that were owed  
22 by SDCERS (and the DOE defendants) to the members of  
23 the class?
- 24 (ii) Did various acts and omissions of SDCERS (and the DOE  
25 defendants) breach fiduciary duties owed to the class?
- 26 (iii) Were the acts and omissions of SDCERS (and the DOE  
27 defendants) below the standard of care required by the  
28 California Constitution (art. XVI, § 17(c))?

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- (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 other members not parties to the adjudications; or (3) adjudications which would substantially impair or impede the ability of individual members to protect their interests;
- (g) A plaintiff class action is superior to other available methods for the fair and efficient adjudication of the claims presented in this complaint, and will prevent the undue financial, administrative and procedural burdens on the parties and on this Court which individual litigations would impose.



1 SECOND CAUSE OF ACTION

2 **BREACH OF COMMON LAW AND CONSTITUTIONAL FIDUCIARY DUTIES**  
3 **AGAINST SDCERS AND DOES 11-21**

4 68. Plaintiffs incorporate paragraphs 1-63 as if fully set forth here.

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

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

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

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

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

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

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

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

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

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

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

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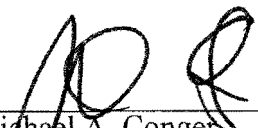
WHEREFORE, plaintiffs pray for judgment as follows:

1. for damages according to proof;
2. for payment of money by SDCERS in accordance with Probate Code section 16420, subdivision (a)(3) and common law;
3. for an order setting SDCERS' acts in accordance with Probate Code section 16420, subdivision (a)(6) and common law;
4. for prejudgment interest;
5. for attorney fees;
6. for costs of suit; and
7. for such other and further relief as the court deems just and proper.

Dated: January 24, 2013

**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.