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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

PATRICK A. LENHART and DANIEL STUBER, Plaintiffs, v. SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM, and DOES 1-40, Defendants.	CASE NO: 37-2011-00096587-CU-BC-CTL SECOND AMENDED CLASS ACTION COMPLAINT FOR BREACH OF CONSTITUTIONAL AND FIDUCIARY DUTIES Judge: Hon. Ronald S. Prager Dept: C-71 Action Filed: August 19, 2011 Trial Date: Not yet set

THIS IS A CLASS ACTION LAWSUIT.

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

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

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

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

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

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

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

FACTUAL ALLEGATIONS

SDCERS Owes Plaintiffs Fiduciary Duties

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

9. "The retirement board of a public pension or retirement system [has] the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. The retirement board . . . also ha[s] sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and

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

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

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

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

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

The City Established a Purchase of Service Credit Program

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

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

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

16. The City adopted and expanded the PSC program because, according a July 30, 2010 sworn declaration by the City's Chief Operating Officer, Jay Goldstone, the City has a "legitimate and overriding business interest in attracting and retaining qualified public employees so as to maintain a qualified, cost-effective public work force[,]" and "[a]dopting and

maintaining pension benefits . . . achieve this goal by awarding competitive pension benefits to experienced employees."

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

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

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

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

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

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

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

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

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

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

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

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

28. There are two components to the City's annual employer contribution: (a) a

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

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

The City's Knowledge of the Window Period by 2003

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

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

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

much as $180 million if initial estimates from the City are correct . . . ."

The City's First PSC Lawsuit

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

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

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

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

The City's Second PSC Lawsuit

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

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

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

neutral manner *and was overcharging safety members.*

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

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

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

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

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

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

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

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

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

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

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

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

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

CLASS ACTION ALLEGATIONS

53. The plaintiff class consists of:

"All SDCERS safety members or beneficiaries, employed or formerly employed by the City of San Diego, who have been subjected to SDCERS' Board Rule 4.90, relating to Purchase of Service Credit Corrections (and who are not plaintiffs in either *Abitria, et al. v. SDCERS*, Case No. 2011-00096899, or *Abbe, et al. v. SDCERS*, Case No. 2011-00102161)."

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

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

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

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

(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 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.

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

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

SECOND CAUSE OF ACTION

BREACH OF COMMON LAW AND CONSTITUTIONAL FIDUCIARY DUTIES AGAINST SDCERS AND DOES 11-20

57. Plaintiffs incorporate paragraphs 1-56 as if fully set forth here.

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

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

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

section 3333.

THIRD CAUSE OF ACTION

BREACH OF COMMON LAW AND CONSTITUTIONAL FIDUCIARY DUTIES AGAINST SDCERS AND DOES 21-31

61. Plaintiffs incorporate paragraphs 1-56 as if fully set forth here.

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

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

(b) the rule of exclusive concurrent jurisdiction; and

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

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

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

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

(b) the rule of exclusive concurrent jurisdiction; and

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

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

64. SDCERS' actions in breach of its fiduciary duty and duty of loyalty constituted a breach of trust entitling Plaintiffs to an order setting aside SDCERS' acts in accordance with Probate Code section 16420, subdivision (a)(6) and common law, and/or for the payment of money by SDCERS in accordance with Probate Code section 16420, subdivision (a)(3) and common law. Additionally, as a result of these common law and constitutional-based breaches

of fiduciary duty, Plaintiffs have suffered economic damages compensable under Civil Code section 3333.

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 23, 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.