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SUPERIOR COURT  
SAN DIEGO COUNTY, CA

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

12 JAMES F. GLEASON, DAVID W. WOOD, and )  
13 WILLIAM J. McGUIGAN, )

14 Plaintiffs, )

15 v. )

16 GABRIEL, ROEDER, SMITH & COMPANY, )  
17 RICK A. ROEDER, and DOES 1-30, )

18 Defendants. )

CASE NO: GIC 849882

COMPLAINT FOR FRAUD BY  
CONCEALMENT AND  
NEGLIGENCE

19 1. The plaintiffs in this action are former employees of the City of San Diego ("the  
20 City") who have acquired vested contractual rights to receive pension and related benefits from  
21 the San Diego City Employees' Retirement System ("SDCERS"). Each of the plaintiffs is a  
22 member of SDCERS.

23 2. SDCERS is a public entity established in 1927 by the City, in accordance with  
24 California Constitution article XVI, section 17, San Diego City Charter articles IX and X,  
25 sections 141 to 148.1, and San Diego Municipal Code sections 24.0100, *et seq.* SDCERS  
26 administers the City's defined benefit pension plan, and provides retirement, health insurance,  
27 disability and death benefits to its members.

28 3. GABRIEL, ROEDER, SMITH & COMPANY ("GRS"), is a Michigan  
Corporation doing substantial business in the City, including providing actuarial services to

1 SDCERS and its members, including plaintiffs.

2 4. RICK A. ROEDER ("Roeder") resides in San Diego County, California, is a  
3 managing agent of GRS, and was at all times relevant to this complaint the principal actuary  
4 providing actuarial services to SDCERS and its members, including plaintiffs.

5 5. 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 6. 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 7. 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 8. The plaintiffs have a vested contractual right to an actuarially sound retirement  
21 system. (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1131-1137.)

22 9. Impairment of the plaintiffs' right to an actuarially sound retirement system is  
23 unconstitutional. (*Board of Administration v. Wilson, supra*, 52 Cal.App.4th at p. 1161.)

24 10. SDCERS owes each plaintiff a fiduciary duty.

25 11. "The assets of a public pension or retirement system are trust funds and [are] held  
26 for the exclusive purposes of providing benefits to participants in the pension or retirement  
27 system and their beneficiaries and defraying reasonable expenses of administering the system."

1 (Cal. Const., art. XVI, § 17, subd. (a).)

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

4 13. From at least November 1, 2002, to the present, the defendants provided actuarial  
5 services to SDCERS, in its capacity as the trustee of the plaintiffs pension trust fund.

6 14. On November 15, 2002, SDCERS agreed to an underfunding scheme, commonly  
7 known as Manager's Proposal II, which allowed the City to massively underfund the City  
8 employee pension system administered by SDCERS. A key component of this scheme was for  
9 the City to provide a financial benefit to certain key members of the SDCERS board of  
10 administration so that they would vote in favor of Manager's Proposal II. This was a  
11 constructive fraud and a breach by those trustees of their fiduciary duties to the plaintiffs.

12 15. The defendants actively participated with, aided, and abetted in SDCERS' breach  
13 of trust by concealing that Manager's Proposal II would render the City's employee pension trust  
14 fund actuarially unsound.

15 16. The defendants participated with, aided, and abetted in SDCERS's breach of trust  
16 for defendants' own financial gain.

17 17. The defendants also concealed their participation and assistance with SDCERS'  
18 breach of trust.

19 18. SDCERS has been unwilling to prosecute this action to recover assets belonging  
20 to the trust.

21 19. This action is brought in the public interest because members of the public,  
22 including citizens of and visitors to the City of San Diego, benefit from a solvent pension system  
23 which (a) keeps promises to loyal public servants and therefore promotes public service, (b)  
24 reduces the specter of insolvency of the pension fund administered by SDCERS' board of  
25 administration, and (c) reduces the chances of bankruptcy by the City of San Diego and/or  
26 SDCERS.

27 20. This suit is brought in a representative capacity on behalf of SDCERS and its  
28

1 members and any recovery obtained in this action will be paid to SDCERS.

2 21. Plaintiffs do not seek any relief greater than or different from the relief sought for  
3 the class of SDCERS beneficiaries of which they are members.

4 22. This action, if successful, would confer a significant pecuniary benefit to the  
5 public trust fund administered by SDCERS, and therefore the general public and the more than  
6 16,000 members of SDCERS.

7 23. Private enforcement is necessary because SDCERS has refused to act to prosecute  
8 this claim and has continued to employ defendants. This private enforcement has placed a  
9 disproportionate financial burden on plaintiffs in relation to their stake in this matter.

10 **FIRST CAUSE OF ACTION**

11 **FOR FRAUD BY CONCEALMENT**

12 (Against GRS, Roeder, and Does 1-15)

13 24. Plaintiffs restate the previous paragraphs of this complaint as if fully set forth  
14 here.

15 25. The defendants disclosed some material facts to SDCERS and plaintiffs but  
16 intentionally failed to disclose other material facts, making its disclosure deceptive.

17 26. SDCERS, the City, and plaintiffs did not know of the concealed fact that entering  
18 into Manager's Proposal II would render the pension trust fund actuarially unsound.

19 27. The defendants intended to deceive SDCERS, the City, and plaintiffs by  
20 concealing the fact that Manager's Proposal II would render SDCERS actuarially unsound.

21 28. If the defendants had disclosed that Manager's Proposal II would render SDCERS  
22 actuarially unsound, SDCERS' board of administration would not have entered into that  
23 transaction.

24 29. SDCERS and plaintiffs were harmed.

25 30. The defendants' concealment was a substantial factor in causing this harm.

26 31. The conduct of the defendants as described above caused the SDCERS' trust fund  
27 and plaintiffs to sustain damages, including but not limited to: (a) lost contributions from the

1 City of San Diego which would have been paid to the trust fund under either (i) the 1996  
2 contribution agreement, (ii) the City Charter, or (iii) former San Diego Municipal Code section  
3 24.0801; (b) earnings from those contributions; and (c) attorney fees, costs, and other expenses  
4 incurred by SDCERS in attempting to defend the legality and actuarial soundness of Manager's  
5 Proposal II.

6 32. The conduct of the defendants and their agents and employees, and each of them  
7 as described herein, was despicable and was carried on by defendants with wilful and conscious  
8 disregard for the rights of the plaintiffs and other beneficiaries of the pension trust fund. Many of  
9 these beneficiaries are elderly, dependent on the actuarial soundness of their pensions, and are  
10 extremely vulnerable. The defendants were aware of the probable dangerous consequences of  
11 their conduct and wilfully and deliberately failed to avoid those consequences. This conduct  
12 constitutes malice, oppression and fraud such that the plaintiffs are entitled pursuant to California  
13 Civil Code section 3294 to recover punitive damages in an amount sufficient to punish and set an  
14 example of these defendants.

15 **SECOND CAUSE OF ACTION**

16 **FOR NEGLIGENCE**

17 (Against GRS, Roeder, and Does 16-30)

18 33. Plaintiffs restate the previous paragraphs of this complaint as if fully set forth  
19 here.

20 34. Defendants owed SDCERS and plaintiffs a duty to perform actuarial services  
21 competently.

22 35. Defendants breached that duty by failing to disclose that Manager's Proposal II  
23 would render the pension trust fund actuarially unsound.

24 36. SDCERS and plaintiffs were harmed.

25 37. The defendants' negligence was a substantial factor in causing this harm.

26 38. Any applicable statute of limitations is tolled because (a) the defendants have  
27 continued to provide actuarial services to SDCERS and plaintiffs, and (b) the defendants

1 concealed their negligence through a series of acts since November, 2002.

2 WHEREFORE, plaintiffs and others similarly situated pray for judgment as follows:

3 1. For general damages according to proof;

4 2. For special damages according to proof;

5 3. For punitive damages for concealment;

6 4. For cost of suit herein incurred;

7 5. For reasonable attorney fees under the common fund doctrine or Code of Civil

8 Procedure section 1021.5; and

9 6. For such other and further relief as the court deems just and proper.

10  
11 Dated: June 28, 2005

**LAW OFFICES OF MICHAEL A. CONGER**

12  
13 By:

  
Michael A. Conger  
Attorney for Plaintiffs

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15  
16 Jury trial demanded.