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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ANANTA BAIDYA et al.,

Plaintiffs and Appellants,

v.

SAN DIEGO CITY EMPLOYEES'  
RETIREMENT SYSTEM,

Defendant and Respondent.

D066678

(Super. Ct. Nos. 37-2011-00096237-  
CU-PO-CTL, 37-2011-00096238-CU-  
PO-CTL, 37-2011-00096587-CU-BC-  
CTL)

APPEAL from judgments of the Superior Court of San Diego County, Ronald S.

Prager, Judge. Reversed in part.

Law Office of Michael A. Conger and Michael A. Conger for Plaintiffs and  
Appellants.

Kirby, Noonan, Lance & Hoge, David J. Noonan, Steven W. Sanchez and Micaela P.  
Banach for Defendant and Respondent.

This is an appeal from three consolidated lawsuits, two of which concern the pension  
benefits of employees of the City of San Diego (City), and one of which concerns the  
pension benefits of the employees of the San Diego County Regional Airport Authority

(Airport Authority). Both pension systems are administered by the San Diego City Employees' Retirement System (SDCERS), who is the defendant in all three lawsuits.

In 2010 this court concluded that SDCERS acted unlawfully in deciding to charge the City for a shortfall in funding of pension service credits purchased by City employees during the period August 15, 2003, to November 1, 2003. (*City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69 (*City of San Diego* or the *City of San Diego* Opinion).) As a result, SDCERS voted in 2011 to require the employees who purchased those pension service credits to make up the funding shortfall. After the *City of San Diego* Opinion issued, SDCERS also took certain actions concerning the funding of the shortfall for pension service credits purchased by employees of the Airport Authority between April 16, 2004, and July 1, 2004. The impacted employees (Plaintiffs) then filed the three lawsuits against SDCERS that are at issue in this appeal: *Baidya v. San Diego City Retirement System*, No. 37-2011-00096237-CU-PO-CTL (*Baidya*), *Lancaster v. San Diego City Retirement System*, No. 37-2011-00096238-CU-PO-CTL (*Lancaster*) and *Lenhart v. San Diego City Retirement System*, No. 37-2011-00096587-CU-BC-CTL (*Lenhart*).<sup>1</sup>

Plaintiffs contend the trial court erred (1) in sustaining without leave to amend the demurrer in the *Lenhart* action to the breach of contract cause of action and the cause of action for mandamus relief; (2) by sustaining the demurrer in the *Lancaster* action to the

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<sup>1</sup> Under case No. D066632, we consider appeals in two other lawsuits filed against SDCERS as a result of SDCERS's decision in 2011 to require City employees to make up the funding shortfall for pension service credits. (*Abitria v. San Diego City Employees' Retirement System* (Super. Ct. San Diego County, 2011, No. 37-2011-00096899-CU-PO-CTL) (*Abitria*); *Abbe v. San Diego City Employees' Retirement System* (Super. Ct. San Diego County, 2011, No. 37-2011-00101161-CU-NP-CTL) (*Abbe*).)

fourth cause of action for breach of fiduciary duty; (3) by sustaining a demurrer to one of the breach of fiduciary causes of action common to all three actions; and (4) in granting summary judgment on the two remaining breach of fiduciary causes of action common to all three actions. We conclude that one of Plaintiffs' arguments in the *Lenhart* action has merit. Specifically, we conclude that the trial court erred in sustaining the demurrer to the cause of action for breach of contract in that action. The remainder of Plaintiffs' arguments lack merit. Accordingly, we reverse the judgment on the breach of contract cause of action in the *Lenhart* action, and otherwise we affirm the judgments.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *The City's Pension System Administered by SDCERS*

As this appeal concerns both the Airport Authority's pension system and the City's pension system, we will begin with the relevant factual background of the City's pension system, and we will then discuss the pension system of the Airport Authority.

For initial background on the City's pension plan, we turn to the general information in our Supreme Court's summary of that system in *Lexin v. Superior Court* (2010) 47 Cal.4th 1050 (*Lexin*). "San Diego is a charter city. It maintains a pension plan for its employees, the San Diego City Employees' Retirement System (SDCERS). (San Diego City Charter, art. IX, § 141; San Diego Mun. Code, § 24.0101.) SDCERS is a defined benefit plan in which benefits are based upon salary, length of service, and age. (San Diego Mun. Code, §§ 24.0402–24.0405.) The plan is funded by contributions from both the City and its employees. (San Diego City Charter, art. IX, § 143; San Diego Mun. Code, § 24.0402.)" (*Lexin*, at p. 1063.)

"The pension fund is overseen by a 13-member board of administration (SDCERS Board or Board). (San Diego City Charter, art. IX, § 144.) Although established by the City, the Board is a separate entity. (*Ibid.*; *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 571.) The SDCERS Board is a fiduciary charged with administering the City's pension fund in a fashion that preserves its long-term solvency; it must ensure that through actuarially sound contribution rates and prudent investment, principal is conserved, income is generated, and the fund is able to meet its ongoing disbursement obligations. (Cal. Const., art. XVI, § 17; San Diego City Charter, art. IX, § 144.) Consistent with that central mission, the SDCERS Board has a range of ancillary obligations, including but not limited to providing for actuarial services, determining member eligibility for and ensuring receipt of benefits, and minimizing employer contributions. (Cal. Const., art. XVI, § 17, subds. (b), (e); San Diego City Charter, art. IX, §§ 142, 144; San Diego Mun. Code, § 24.0901.) To carry out these duties, the Board is granted the power to make such rules and regulations as it deems necessary. (San Diego City Charter, art. IX, § 144; San Diego Mun. Code, §§ 24.0401, 24.0901; see generally *Bianchi*, at p. 571; *Grimm v. City of San Diego* (1979) 94 Cal.App.3d 33, 39-40.)" (*Lexin, supra*, 47 Cal.4th at pp. 1063-1064.)

B. *The Genesis of the Underfunding of the City's Pension Service Credit Program*

The specific facts concerning the underfunding of the pension service credits (PSC) within the City's pension system are set forth the *City of San Diego* Opinion, as follows. "In 1993 the City established the purchase of service credit program . . . to allow employees to purchase service credits for periods of actual service or authorized leaves of absence that were otherwise ineligible for service credits. . . . [¶] In 1997 the PSC [program] was expanded to include the purchase of service credits for periods that were not actually

worked[,] . . . allowing employees to purchase up to five years of general service credit in addition to any other specific credit for which they were eligible (such as military service, approved leaves of absence, and part-time employment). . . . [¶] It is undisputed that from its inception the PSC program was to be cost neutral to the City. In a 1996 memorandum from the City to SDCERS, proposing to retain elements of the original PSC [program] and adding the five-year purchase of service credit feature enacted in 1997, the City emphasized that employees 'would pay into the retirement fund an amount, including interest, equivalent to the employee and employer full cost of such service.' " (*City of San Diego, supra*, 186 Cal.App.4th at pp. 73-74.)

"[I]n 1997, SDCERS's actuary advised the [B]oard that a two-tiered rate structure, 15 percent for general member employees and 26 percent for safety member employees [for each year purchased] would be sufficient to meet the requirement that the purchase price for service credits paid by employees be equivalent to the employer and employee cost.

SDCERS's [B]oard approved the rate structure at its March 1997 meeting. City employees were then permitted to purchase service credits at the rates the [B]oard established. [¶] . . . [¶] Between 1997 and 2002, the City amended the [San Diego Municipal Code] sections governing general member employees' retirement allowance three times and safety member employees' twice. On each occasion, the City made increased retirement factors that were retroactive, i.e., applicable to past years of creditable service. This caused an increase in the value of years of service employees had purchased under the PSC program based upon the rates the [B]oard set in 1997." (*City of San Diego, supra*, 186 Cal.App.4th at pp. 74-75.)

"In August 2002 the [B]oard directed its actuary to evaluate whether the PSC rate structure set in 1997 reflected the current employer and employee costs of the benefit. The

actuary completed his study in August 2003 and recommended to the [B]oard the rates be adjusted upwards to 27 percent for general member employees and 37 percent for safety member employees. In doing so, the actuary noted the 1997 rates were outdated because 'they were set by the Board prior to certain benefit increases. . . .' [¶] . . . [¶] At a meeting on August 15, 2003, the [B]oard discussed the actuary's proposed PSC price increase. . . . The [B]oard approved the increased pricing, but allowed the 60-day window for employees to purchase credits under the old pricing methodology." (*City of San Diego, supra*, 186 Cal.App.4th at pp. 75-76.)

"After that meeting SDCERS sent a notification to all City employees telling them that PSC purchase applications received by SDCERS before November 1, 2003, would be priced under the old rates — 15 percent for general member employees and 26 percent for safety members. During that 60-day window, 5,726 years of service were purchased by 1,609 general members, and 828 years [were] purchased by 412 safety member employees. During this 60-day window, general member employees purchased more years than they had purchased since the PSC [program] inception in 1997. Safety member purchases nearly doubled the amount purchased in previous years." (*City of San Diego, supra*, 186 Cal.App.4th at p. 76.)

C. *The San Diego County Regional Airport Authority's Pension System Administered by SDCERS*

We now turn to the relevant factual background of the Airport Authority's pension system. In addition to administering the City's pension system, the SDCERS Board also administers a pension fund on behalf of the Airport Authority. The Airport Authority's pension system includes a PSC program similar to that of the City. Under the terms of the

Airport Authority's pension plan, the price for employees to purchase credits under the PSC program is determined by SDCERS based on the total employer and employee cost for those credits.

In April 2004, the SDCERS Board approved an increase in the cost at which employees could purchase credits under the PSC program. The cost was raised from 15 percent of annual salary for one year of service credit to 32 percent of annual salary for general employees and 34 percent of annual salary for executive employees. As was the case with SDCERS's price increase in 2003 for purchasing credits under the City's PSC program, SDCERS announced a window period starting on April 16, 2004, and ending on July 1, 2004, under which Airport Authority employees could purchase credits under the PSC program at the previous lower rate.

D. *Litigation over the City's Pension Benefits Prior to 2007*

As relevant here, the City and SDCERS were involved in litigation from 2005 to 2007 over pension benefits. The litigation arose in June 2005 when City Attorney Michael J. Aguirre asserted that certain pension benefits authorized by the City council were illegal and demanded that the City auditor and comptroller direct SDCERS to stop paying them. According to Aguirre, those purportedly illegal benefits included, among a long list of items, "[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." SDCERS filed a declaratory relief action against the City in July 2005, seeking a judicial determination of the legality of the pension benefits and, in a consolidated action, the City filed a series of cross-complaints against SDCERS and others concerning the City's pension benefits. (*San Diego City Employees' Retirement System v. San Diego City Attorney Michael J. Aguirre*, GIC841845, Super. Ct.

San Diego County, consolidated with GIC851286 and GIC852100) (the *Aguirre* litigation).)

Among other things, the trial court in the *Aguirre* litigation ruled in connection with SDCERS's declaratory relief action in 2006 that "SDCERS could continue to pay certain retirement benefits unless, and until[,] such benefits were declared illegal." Judgment was entered on the City's cross-complaint in September 2007 and final judgment in all of the consolidated actions was entered in November 2010.

E. *The SDCERS Board's November 16, 2007 Vote*

Meanwhile, Aguirre wrote to SDCERS in February 2007 pointing out that the PSC program was not cost neutral to the City and threatening to institute litigation if SDCERS did not "cooperate with the City in terminating" the PSC program and rectify past alleged breaches of fiduciary duty by the SDCERS Board with respect to the administration of that program. Aguirre took further action with respect to the PSC program in August and September 2007 when he requested that the City council rescind the PSC program or reduce the value of the service credits.

In the midst of Aguirre's attack on the PSC program and his threat of litigation, the SDCERS Board turned its attention to the PSC program and considered taking action. As we explained in *City of San Diego*, "[i]n August 2007 SDCERS's actuary informed SDCERS that its non-cost-neutral pricing of PSC credits accounted for \$146 million of the unfunded actuarial liability of SDCERS. [¶] At an October 2007 public meeting of the SDCERS [B]oard, SDCERS's fiduciary counsel informed the [B]oard that they had the '1. Duty to preserve and protect the fund; to pay benefits that are promised and earned and *collect sufficient contributions to support the benefits.* 2. Duty to *correct errors when appropriate and not perpetuate erroneous interpretations of the plan.*' (Italics added.) The fiduciary

counsel opined that SDCERS could legally take several courses of action to remedy the underfunding, including 'voiding contracts,' 'collecting arrears payments,' 'offering rewritten contracts,' 'spreading out additional payments,' 'reducing benefit levels,' and 'continuing to collect the shortfall through the amortization of the system's unfunded liability.' [¶] At a meeting on November 16, 2007 (November 16 meeting), the [B]oard decided to charge the City for the unfunded liability. SDCERS's [B]oard voted unanimously to 'continue to amortize the shortfall through the existing unfunded actuarial liability.' In lay terms, the [B]oard voted to charge the City for the underfunding." (Hereafter, November 16 meeting.) (*City of San Diego, supra*, 186 Cal.App.4th at pp. 76-77.)<sup>2</sup> On November 16, 2007, the SDCERS Board publicly reported the vote that it took in closed session earlier in the day at the November 16 meeting, explaining that it believed the decision was "the most prudent and responsible action to take under the totality of the circumstances."

F. *The City Files a Petition for Writ of Mandate Against SDCERS, Leading to the City of San Diego Opinion*

"Four days after the [B]oard's November 16 meeting, the City filed a verified petition for writ of mandate, seeking an order commanding SDCERS to 'set aside its . . .

November [16], 2007 action in full; and . . . take no further action absent full compliance with [the applicable municipal law]' " (the *City of San Diego Action*). (*City of San Diego,*

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<sup>2</sup> As explained in Plaintiffs' complaints, SDCERS performs an annual actuarial valuation that tracks the amount of the City's pension system losses or funding deficiencies, including underfunding associated with the PSC program. The City's annual employer contribution to the pension fund, as determined by SDCERS, includes an amount designed to amortize the unfunded liability. The vote of the SDCERS Board at the November 16 meeting had the effect of maintaining SDCERS's practice of including the underfunding of the PSC program in its annual calculation of the amount that the City would be required to amortize.

*supra*, 186 Cal.App.4th at p. 77.) " 'Thereafter, the City filed a first amended petition, which limited its scope to setting aside the November 16 vote as to 'all persons who have not yet retired as of the date the petition in this matter was first filed.' " (*Ibid.*) The trial court in the *City of San Diego* Action ruled that " '[i]t was unlawful to charge City for the shortfall that resulted for the service credits that were purchased between the establishment of new rates in August 2003 and November 1, 2003' " and ordered that the Board's November 16, 2007 vote be set aside. (*Id.* at p. 78.)

In the *City of San Diego* Opinion, we affirmed the trial court's decision and concluded that "SDCERS's decision to charge the City for the underfunding of the PSC [program] between August 15 and November 1, 2003, was unlawful." (*City of San Diego, supra*, 186 Cal.App.4th at p. 82.) We explained that municipal law provided that an employee purchasing service credits must pay the total cost of those credits, and "City employees were *not* entitled to purchase service credits at a rate that did not reflect the full cost of those credits." (*Ibid.*)<sup>3</sup> Because "the enabling legislation passed by the City for purchase of

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<sup>3</sup> Specifically, as explained in the *City of San Diego* Opinion, the relevant municipal law provisions are as follows. "[San Diego Municipal Code] section 24.1312 states: 'Any Member may purchase a maximum of five years of Creditable Service, in addition to any other Creditable Service the Member is eligible to purchase under this Division. The cost of Creditable Service purchased under [San Diego Municipal Code] section 24.1312 is the amount the Board determines to be the *employee and employer cost* of that Creditable Service.' (Italics added.) [¶] . . . [¶] [San Diego Municipal Code] section 24.0205, applicable to general member employees, and [San Diego Municipal Code] section 24.0305, for safety member employees, states that subject to the rules and regulations prescribed by SDCERS, any member may elect to make additional contributions at rates in excess of his/her normal contributions for the purpose of providing additional benefits. These sections of the [San Diego Municipal Code] state that City shall *not* be liable for any additional contributions for said purchases: 'The exercise of this privilege by a . . . member *shall not require the City to make any additional contributions.*' ([San Diego Mun. Code, ]§ 24.0305[, ] italics added.) [¶] . . . [¶] City Charter, article IX, section 143 (Charter

service credits specifically dictated that the total cost of such purchases would be borne by the employees," "[c]harging the City for SDCERS's underfunding exceeded SDCERS's authority as it was in violation of this legislation and exceeded its powers to administer retirement benefits." (*City of San Diego*, at pp. 79-80.) "The scope of the [B]oard's power as to benefits is limited to administering the benefits set by the City. When the [B]oard decided to charge the City for the underfunding, that decision was in violation of the law and thus exceeded its power." (*Id.* at p. 80.)

G. *The SDCERS Board Responds to the City of San Diego Opinion by Adopting Rule 4.90*

In response to our conclusion in the *City of San Diego* Opinion that it was unlawful for SDCERS to charge the City for the underfunding of the PSC program, the SDCERS Board adopted "Board Rule 4.90" (Rule 4.90) in November 2010.

Rule 4.90 applied to City employees who purchased service credits in the PSC program during the window period beginning August 15, 2003, but who had not retired from City service as of November 19, 2007. It set forth a number of options for the affected employees, under which the employees would bear the entire cost of funding the service credits. The options for the affected employees to choose from included: (1) rescinding the service credit purchase and receiving a refund; (2) requesting that the service credits

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section 143), states that employees who contribute extra money for their pensions are only 'entitled to receive the *proportionate* amount of increased allowances paid for by such additional contributions.' (Italics added.) With regard to the City's obligation toward its employees' pensions, Charter section 143 also states that the City 'shall contribute annually an amount substantially equal to that required of the employees for normal retirement allowances, as certified by the actuary, but *shall not be required to contribute in excess of that amount, except in the case of financial liabilities accruing under any new retirement plan or revised retirement plan because of past service of the employees.*' (Italics added.)" (*City of San Diego, supra*, 186 Cal.App.4th at p. 74.)

purchased be reduced to the amount of credits that could have been purchased by the employee's contributions had the credits been priced at the higher post-window-period rates; or (3) paying, with interest, the difference between the price of the service credits at the window-period rate and the amount that those service credits were priced at the post-window-period rate.

H. *SDCERS Takes Action on the Underfunding of the Airport Authority PSC Program for Window-period Purchases*

In January 2011, SDCERS addressed with the Airport Authority the issue of the underfunding of the window-period purchases of the PSC program credits. Although the appellate record does not contain extensive information on the subject, the *Lancaster* complaint alleges that "on or about January 21, 2011, . . . SDCERS provided [the Airport Authority] with the option of avoiding the unfunded liability created (and already partially amortized) by the . . . window[-]period [PSC program credit purchases]."4

According to Plaintiffs, "[o]n or about February 2011, the [Airport Authority] board voted to cease amortizing the unfunded liability created by the . . . window period, and demanded reimbursement from SDCERS for all amortization payments the [Airport Authority] had already made to SDCERS from 2004 to 2011." Thereafter, in June 2011, according to Plaintiffs, "SDCERS offered to rescind or reform the PSC contracts entered into

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4 As in SDCERS's administration of the City's pension system, SDCERS performs an annual actuarial evaluation of the Airport Authority retirement plan, and all deficiencies that accrue as a result of amendments to the plan are required to be amortized by the Airport Authority over a period of 30 years or less.

by [Airport Authority] employees during the . . . window period" and "SDCERS refused to perform those contracts as written."<sup>5</sup>

I. *Plaintiffs File Three Complaints Against SDCERS*

In August 2011, Plaintiffs filed the three proposed class action lawsuits against SDCERS that are at issue in this appeal: *Baidya*, *Lancaster* and *Lenhart*.<sup>6</sup>

In *Baidya*, the plaintiffs are four "beneficiaries of a pension trust fund administered by [SDCERS]" (the *Baidya* plaintiffs), who filed a lawsuit against SDCERS on behalf of themselves and all other persons similarly situated. The *Baidya* plaintiffs originally alleged three causes of action for "breach of common law and constitutional fiduciary duties" against SDCERS. The first cause of action alleged that SDCERS breached its fiduciary duty by voting on November 16, 2007, to continue to charge the City for the underfunding of the PSC program, because that vote allegedly had the effect of restarting an expired statute of limitations period for the City's claim that service credits purchased during the window period were unlawful, with the result that the City successfully prosecuted the *City of San Diego* Action and SDCERS eventually refused to perform the PSC contracts entered into during the window period. The second cause of action alleged that SDCERS breached its

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<sup>5</sup> Although Plaintiffs' complaints provide no further specifics about SDCERS's action with respect to the Airport Authority window-period PSC program purchases, the appellate record contains Rule 4.90, which by its terms applies not only to City pension plan members but also to Airport Authority pension plan members who purchased during the window-period offered to those individuals for purchase of the PSC credits at the previous lower rate. Accordingly, by stating that "SDCERS offered to rescind or reform the PSC contracts entered into by [Airport Authority] employees during the . . . window-period," Plaintiffs are apparently referring to SDCERS's adoption of Rule 4.90.

<sup>6</sup> According to the parties, the trial court denied class certification motions in each of the three lawsuits.

fiduciary duty when it failed to raise certain affirmative defenses in the *City of San Diego* Action. Specifically, the *Baidya* plaintiffs alleged that SDCERS should have raised affirmative defenses based on (1) a plea in abatement; (2) the rule of exclusive concurrent jurisdiction; and (3) the City's unclean hands.<sup>7</sup> The *Baidya* plaintiffs alleged that SDCERS would have been successful if it raised those defenses and, as a result, the *City of San Diego* Opinion would never have issued, precluding the eventual adoption of Rule 4.90. The third cause of action alleged that SDCERS breached its fiduciary duty to employees who retired or entered a deferred retirement plan between September 18, 2006, and July 1, 2010, by not adequately informing them of the City's challenge to the PSC program credits in the *City of San Diego* Action.

In *Lancaster*, the plaintiffs alleged that they are four "beneficiaries of a pension trust fund administered by [SDCERS]" (the *Lancaster* plaintiffs) suing on behalf of themselves and all others similarly situated. In *Lancaster*, the original allegations focused on SDCERS breaches of fiduciary duties to beneficiaries of the Airport Authority pension system. The first and second causes of action were identical to those in *Baidya*, alleging that SDCERS breached its fiduciary duty by (1) voting on November 16, 2007, to continue to charge the City for the underfunding of the PSC program; and (2) failing to assert certain affirmative defenses in the *City of San Diego* Action. The *Lancaster* plaintiffs contended that these allegedly wrongful acts harmed beneficiaries of the Airport Authority pension system because they led to the judgment in the *City of San Diego* Action, upon which SDCERS

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<sup>7</sup> As we understand the *Baidya* plaintiffs' allegations, the affirmative defenses based on a plea in abatement and the rule of exclusive concurrent jurisdiction would have been premised on the existence of the *Aguirre* litigation.

relied to take action with respect to the Airport Authority PSC program. In the third cause of action (similar to the third cause of action in *Baidya*) the *Lancaster* plaintiffs alleged that SDCERS breached its fiduciary duty to Airport Authority employees who retired or entered a deferred retirement plan between September 18, 2006, and July 1, 2010, by failing to inform them of the City's challenge to the PSC program credits in the *City of San Diego* Action. The fourth cause of action alleged that SDCERS breached its fiduciary duty to beneficiaries of the Airport Authority pension system by providing the Airport Authority with the option of avoiding the unfunded liability created by the PSC program credit purchases during the window period.

*Lenhart* concerns only safety member employees who were beneficiaries of the City's pension system. The causes of action originally alleged in *Lenhart* included the three breach of fiduciary duty causes of action alleged in *Baidya*, with the addition of two other causes of action. Specifically, in the first cause of action the *Lenhart* plaintiffs alleged that SDCERS is liable for breach of contract because it failed to honor the contract for the purchase of the PSC program credits at the price originally stated. In the fifth cause of action, the *Lenhart* plaintiffs sought a writ of mandate based on the allegation that SDCERS improperly includes the cost of the disability retirement plan in the cost of a year of service credit purchased by safety member employees under the PSC program. The specific relief they sought was an order directing SDCERS to cease that practice and to refund the amount it overcharged since 1993.

J. *Proceedings in the Trial Court*

SDCERS filed demurrers to the original complaints in *Baidya*, *Lancaster* and *Lenhart*. In all three actions, the trial court overruled the demurrers to the breach of fiduciary

duty causes of action that alleged SDCERS breached its duty by (1) restarting the statute of limitations by voting on November 16, 2007, to continue to charge the City for the underfunding of the PSC program; and (2) failing to assert certain affirmative defenses in the *City of San Diego* Action. In all three actions, the trial court sustained with leave to amend the cause of action for breach of fiduciary duty that alleged SDCERS wrongfully failed to inform retiring pension plan members of the City's challenge to the PSC program credits in the *City of San Diego* Action. Leave to amend was granted to allow Plaintiffs to limit their claim to those pension plan members who retired or entered the deferred retirement plan after the trial court issued its final ruling in the *City of San Diego* Action.

In *Lancaster*, the trial court sustained the demurrer to the breach of fiduciary cause of action that was unique to that case, which alleged that SDCERS wrongfully provided the Airport Authority with the option of avoiding the unfunded liability for PSC program credits purchased during the window period.

In *Lenhart*, the trial court sustained the demurrers to the two additional causes of action that were unique to that case: the breach of contract cause of action and the cause of action seeking a writ of mandate arising from SDCERS's inclusion of the cost of disability retirement in the pricing of the PSC credits of safety members.

Plaintiffs filed first amended complaints in all three actions. The amended complaints reflected the amendments to the single breach of fiduciary cause of action in each complaint for which the trial court sustained the demurrers with leave to amend. Specifically, a breach of fiduciary duty cause of action in each complaint was amended to allege that SDCERS wrongfully failed to inform employees who retired or entered the deferred retirement plan after the trial court issued its ruling on December 12, 2008, in the *City of San Diego* Action

about the City's challenge to the PSC program credits in that action. SDCERS challenged that amended breach of fiduciary duty cause of action in a demurrer, which the trial court sustained.

Plaintiffs then filed second amended complaints to conform them to the trial court's demurrer rulings, i.e., to focus on the two remaining causes of action for breach of fiduciary duty, based on (1) the SDCERS Board's alleged restarting of the statute of limitations by the November 16, 2007 vote; and (2) SDCERS's failure to assert certain affirmative defenses in the *City of San Diego* Action. Thereafter, the trial court consolidated *Baidya*, *Lenhart*, and *Lancaster* for purposes of discovery and trial.<sup>8</sup>

SDCERS filed a single summary judgment motion that applied to all three actions. The trial court granted the summary judgment motion. Specifically, the trial court ruled that both remaining causes of action for breach of fiduciary duty were barred by the statutory immunity applicable to public entities under the Government Claims Act (Gov. Code, § 814 et seq.).

## II

### DISCUSSION

#### A. *Plaintiffs' Challenges to the Trial Court Orders Sustaining Demurrers in Lenhart, Lancaster and Baidya*

We turn first to a series of arguments challenging the trial court's orders sustaining demurrers in *Lenhart*, *Lancaster* and *Baidya*.

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<sup>8</sup> The consolidation order also included two other cases: *Abitria* and *Abbe*. As we have explained, appeals from those two cases are under a separate appellate docket number — case No. D066632, *Abbe v. San Diego City Employees' Retirement System*.

" 'On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.' " (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) In reviewing the complaint, "we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.) We may affirm on any basis stated in the demurrer, regardless of the ground on which the trial court based its ruling. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.) Further, "[i]f the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. . . . If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. . . . The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081, citations omitted.)

1. *Demurrer to Causes of Action in Each Complaint Alleging SDCERS Breached Its Fiduciary Duty by Not Informing Pension Plan Members of the Possible Impact to the PSC Program from the City of San Diego Action*

We first consider a challenge to the trial court's order sustaining SDCERS's demurrers to a cause of action that appeared in each of the three actions. Specifically, Plaintiffs in all three actions alleged that SDCERS breached its fiduciary duty to pension plan members (the City's pension plan in *Baidya* and *Lenhart*, and the Airport Authority's pension plan in *Lancaster*) by not disclosing to members who retired or entered a deferred retirement plan between September 18, 2006, and July 1, 2010, that the pending *City of San Diego Action* may impact the PSC program. After the trial court sustained the demurrers with leave to

amend, the first amended complaints in each of the three actions narrowed the allegations to focus on SDCERS's breach of duty to pension plan members who retired or entered a deferred retirement plan after December 2008 when the trial court in the *City of San Diego* Action issued a final ruling adverse to SDCERS. The trial court sustained SDCERS demurrers to the amended causes of action as well, concluding that, under the circumstances, SDCERS did not have a duty to inform retiring pension plan members about the *City of San Diego* Action.

Relying on *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374 (*Hittle*), Plaintiffs contend that they pled sufficient facts to state a claim for breach of fiduciary against SDCERS based on SDCERS's failure to inform retiring pension plan members about the risk to the PSC program posed by the pending *City of San Diego* Action. *Hittle* establishes that "[pension] plans create a trust relationship between pensioner beneficiaries and the trustees of pension funds who administer retirement benefits . . . and the trustees must exercise their *fiduciary trust* in good faith and must deal fairly with the pensioners-beneficiaries.'" (*Id.* at p. 392.) As *Hittle* pointed out, the officers of a public pension plan are trustees, and " 'a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.' " (*Id.* at p. 393, quoting former Civil Code, § 2228.)<sup>9</sup> The administrator of a pension plan "exercises toward the pensioner a fiduciary duty of good faith and fair dealing." (*Id.* at p. 393.)<sup>10</sup>

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<sup>9</sup> *Hittle* relied on provisions of the Civil Code to define the fiduciary duties of a trustee. Currently, similar provisions are located in the Probate Code. For example, Probate Code

More specifically, *Hittle* concerned a situation in which a public employee was disabled on the job and terminated from employment. (*Hittle, supra*, 39 Cal.3d at pp. 380-381.) The pension association failed to inform the employee of his right to apply for disability retirement, which would potentially have entitled him to a payment of one-half of his regular compensation for the remainder of his life. (*Id.* at p. 391.) Instead, based on information from the pension association, the employee was led to believe that his only viable option upon termination of employment was to withdraw his retirement contributions and receive reimbursement of \$187.49. (*Id.* at pp. 390-391.) *Hittle* concluded that the pension association breached its fiduciary duty of good faith and fair dealing by failing to inform the employee of his option to apply for disability retirement. (*Id.* at pp. 393-394.)

Plaintiffs contend that by not informing them of the risk that the PSC program could be changed in some way, depending on the outcome of the *City of San Diego Action*, SDCERS breached its fiduciary duty to them, just as the pension association in *Hittle* breached its fiduciary duty to a pension plan member by not informing him of his option to take disability retirement. We disagree.

"The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. [Citation.] Whether a fiduciary duty exists is generally a question of law. [Citation.] Whether the

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section 16002, subdivision (a) states that a "trustee has a duty to administer the trust solely in the interest of the beneficiaries."

10 Moreover, article XVI, section 17 of the California Constitution establishes that the fiduciary duties of a public pension board to its participants and beneficiaries, "take precedence over any other duty." (Cal. Const., art. XVI, § 17, subd. (b).)

defendant breached that duty towards the plaintiff is a question of fact.' " (*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 915 (*Marzec*), italics omitted.) Here, as we will explain, we agree with the trial court that, as a matter of law, a public pension board does not have a duty to inform its members about the possible risk to their pension benefits posed by pending litigation.<sup>11</sup>

Our decision in *San Diego City Firefighters, Local 145 v. Board of Administration etc.* (2012) 206 Cal.App.4th 594, 623 (*San Diego City Firefighters*) is applicable here in determining that SDCERS had no duty to inform pension plan members about the possibility that the credits they purchased under the PSC program would be held in the *City of San Diego* Action to be priced in a manner not permitted by law. In *San Diego City Firefighters*,

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<sup>11</sup> Plaintiffs contend that the issue presented here is not whether a fiduciary duty exists, but rather whether SDCERS *breached* a fiduciary duty. As such, Plaintiffs argue that the trial court erred by resolving that question of *fact* in the context of a demurrer. We disagree with Plaintiffs' characterization of the issue. The central disputed issue here is not whether SDCERS *breached* a duty to inform pension plan members of the risk associated with the *City of San Diego* Action, but instead whether SDCERS had such a duty of disclosure in the first place. As the pertinent disputed issue here is whether a duty exists, Plaintiffs' reliance on *Marzec, supra*, 236 Cal.App.4th 889, is misplaced. In *Marzec*, the plaintiffs alleged that the California Public Employees Retirement System (CalPERS) had a duty to disclose to its members that they would not be able to use the service credits they purchased in the event they retired with an industrial disability before age 50. (*Id.* at pp. 896-897, 915.) In *Marzec* there was no dispute that CalPERS *owed to members a fiduciary duty to disclose material aspects of the pension plan*, including the aspects of the purchased service credit program at issue in that case. (*Id.* at p. 915.) Thus, instead of a dispute over the *legal* question of the *existence of a duty*, the dispute in *Marzec* was *factual*, namely whether the pension plan made *adequate disclosures* concerning the use of the purchased service credits. *Marzec* concluded that because there were factual disputes as to what CalPERS had disclosed, it was error for the trial court to dispose of the breach of fiduciary duty cause of action at the demurrer stage. (*Id.* at p. 916.) Here, in contrast, the dispute is over whether SDCERS *owed* a fiduciary duty to make disclosures to pension plan members about the pending *City of San Diego* Action in the first place, not whether SDCERS *made adequate disclosures* to fulfill any such duty.

plaintiffs were City firefighters who were impacted by the City's repeal of a program that allowed them to convert their annual leave to service credit for the purpose of calculating retirement benefits, as that practice was determined to be out of compliance with federal law. (*Id.* at pp. 600, 603-604.) Among other things, one of the plaintiffs alleged that the SDCERS Board breached its fiduciary duty to him as a pension plan member by allowing him to participate in the annual leave conversion program and to make retirement decisions based on that program, without advising him that the program did not comply with federal law and may be repealed. (*Id.* at p. 623.) *San Diego City Firefighters* determined that it was proper for the trial court to sustain the demurrer to that cause of action because SDCERS's "duty was merely to administer those retirement benefits established by City," and accordingly "it could not have breached a duty . . . by allowing [plaintiff] to participate in the Annual Leave Conversion Program." (*Id.* at p. 623.) Because SDCERS's duty was limited to administering the pension plan enacted by the City, it did not have a duty to advise plaintiff not to participate in the program on the basis that it did not comply with federal law.<sup>12</sup>

Similarly here, Plaintiffs allege that SDCERS had a duty to advise retiring pension plan members that they should not rely on the PSC program because that program, as priced

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<sup>12</sup> Plaintiffs contend *San Diego City Firefighters* is not applicable because in that case there was no indication that SDCERS knew about the possible illegality of the annual leave conversion program and thus could not have made a disclosure on the subject, whereas in this case, SDCERS was well aware of the *City of San Diego* Action and the risk it posed to the pricing of the PSC program credits. We reject this argument because the analysis in *San Diego City Firefighters* did not turn on whether SDCERS knew that the annual leave conversion program failed to comply with federal law, and that issue was not discussed in connection with the breach of fiduciary duty cause of action. (*San Diego City Firefighters*, *supra*, 206 Cal.App.4th at p. 623.) Instead, the breach of fiduciary duty cause of action failed because SDCERS has a limited duty to administer the pension plan, not to advise plan members of a risk that a program may be repealed as unlawful. (*Ibid.*)

at the time, might ultimately be determined to be unlawful and the cost of the PSC program credits might be retroactively increased. However, because, as we determined in *San Diego City Firefighters*, SDCERS's fiduciary duty is limited to administering the program, it had no duty to inform retiring pension plan members of the risk that the PSC program might change as a result of the *City of San Diego* Action.

In addition, *Hittle* establishes that a pension plan administrator has a duty to inform pension plan members of *the terms of the pension plan* and correctly inform them about the scope of their *available options* when making decisions under the plan.<sup>13</sup> However, here there is no suggestion that SDCERS failed to inform Plaintiffs of the current provisions of the PSC program or their options under that program. Instead, SDCERS is alleged to have breached a duty to inform Plaintiffs of *risk* due to *possible future events* concerning the PSC program that were wholly contingent on the outcome of the *City of San Diego* Action.<sup>14</sup> Plaintiffs have cited no authority, and we are aware of none, suggesting that SDCERS has a duty to inform pension plan members about all of the possible future contingencies, either legal or financial, that might eventually affect pension plan benefits. In *Hittle*, our Supreme Court emphasized that it was not the "court's intention to impose unreasonable obligations upon the trustees of a pension trust," and that a trustee could meet its duty of informing

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<sup>13</sup> Similarly, in *Marzec* it was undisputed that CalPERS had a fiduciary duty to disclose the current material *terms* of the pension plan, including the limitations on the use of purchased service credits in the event an employee retired because of disability before age 50. (*Marzec, supra*, 236 Cal.App.4th at p. 915.)

<sup>14</sup> Although the first amended complaints were narrowed to allege that SDCERS had a duty to inform Plaintiffs of the trial court's December 2008 ruling in the *City of San Diego* Action, the complaints still alleged a duty to inform Plaintiffs of a *contingent* risk to the PSC program, as the trial court's ruling was subject to the outcome of the appeal in that action.

pension plan members simply by providing a "booklet [that] fully and fairly describes the plan and its various options and procedures" and "forms pertaining to all available choices." (*Hittle, supra*, 39 Cal.3d at p. 394.) If we were to impose a duty on pension plan administrators to ascertain all contingent future risks to members' pension plan benefits and to disclose those risks to retiring members, we would be creating a duty far beyond the duty to fully disclose pension plan terms and options, and we would be imposing the type of unreasonable obligation that *Hittle* expressly sought to avoid.

2. *Demurrers to Causes of Action Unique to the Lenhart Complaint*

We next consider the ruling on the two demurrers that were unique to the *Lenhart* complaint, namely the demurrers to the cause of action for breach of contract and the cause of action seeking a writ of mandate.

a. *Breach of Contract Cause of Action*

In the first cause of action, the *Lenhart* plaintiffs allege that SDCERS is liable for breach of contract because it failed to honor the window-period PSC purchase agreements for safety members' service credits at the price stated in those agreements.

The breach of contract cause of action in *Lenhart* is premised solely on a circumstance that is unique to safety members. Specifically, Plaintiffs contend that subsequent actuarial analysis shows that the safety members who purchased PSC credits during the window period did *not* underpay for those service credits, and accordingly, SDCERS had no legal basis to refuse to perform the PSC purchase agreements entered into by the safety members.

The allegation that safety member employees did not underpay for their service credits bought during the window period in 2003 is set forth in paragraph 39 of the *Lenhart*

complaint. There, Plaintiffs describe a statement that appeared in an actuarial report prepared for SDCERS in 2007. According to Plaintiffs, SDCERS's actuary concluded in 2007 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.*"<sup>15</sup> As Plaintiffs' appellate briefing summarizes this allegation, "SDCERS learned in 2007 that the 2003 cost increase from 26 percent to 37 percent for safety members of SDCERS was erroneous."

The "elements of a breach of contract claim are: '(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.' " (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614.) Here, the dispute centers on whether Plaintiffs entered into valid contracts with SDCERS, or, on the contrary, whether those contracts were void and unenforceable because they were unlawful under the controlling provisions of the City's pension plan.

As a starting point for our analysis, we observe that the parties do not take issue with the premise that SDCERS may have been legally justified in rescinding the window-period

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<sup>15</sup> In addition, paragraph 24 of the *Lenhart* complaint alleges that the actuary's conclusion in 2003 that the actual cost of safety member service credits was 37 percent, rather than 26 percent "was erroneous, because at 26 percent of 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."

PSC purchase agreements if those agreements did not reflect the full cost of the service credits and, accordingly, were not cost neutral to the City. Indeed, it follows from our *City of San Diego* Opinion that the agreements allowing pension plan members to purchase service credits below their full cost were unlawful in that "[i]t is not within SDCERS's authority to expand pension benefits beyond those afforded by the authorizing legislation . . ." (*City of San Diego, supra*, 186 Cal.App.4th at p. 80), and thus "City employees were *not* entitled to purchase service credits at a rate that did not reflect the full cost of those credits." (*Id.* at p. 82.) "[A] contract entered into by a governmental entity without the requisite constitutional or statutory authority is void and unenforceable." (*San Diego City Firefighters, supra*, 206 Cal.App.4th at p. 609.) Thus, Plaintiffs would not have a contractual right to a benefit under the PSC program if the contracts they entered into with SDCERS were not authorized by the applicable statutory authority. (See *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 871 (*Medina*) [rejecting argument that pension plan members' vested contractual rights were unconstitutionally impaired by the plan administrator, as there was no valid contractual right for members to receive an unlawful benefit].)

The crucial issue, therefore, is whether the purchase agreements were unlawful in that they exceeded SDCERS's statutory authority by creating a PSC benefit that was not cost neutral to the City. Plaintiffs rely on the 2007 actuary report to establish that the safety members' 2003 window-period PSC purchase agreements were, in fact, cost neutral to the City and therefore not unlawful. Plaintiffs contend that if, as they allege, the service credits were cost neutral to the City, SDCERS had statutory authority to enter into them, and thus

the window-period purchase agreements are valid and enforceable. As we will explain, we agree.

As established in the *City of San Diego* Opinion, SDCERS is mandated to administer the PSC program in a manner that is cost neutral to the City. (*City of San Diego, supra*, 186 Cal.App.4th at pp. 79-82.) This means that SDCERS is legally mandated to price the service credits at a cost that reflects the *full cost* of the credits.

It is undisputed that *in 2003* the SDCERS Board believed that the *actual* cost of service credits was 37 percent of annual compensation for safety members, but it nevertheless entered into PSC purchase agreements that reflected the *lower* rate of 26 percent. However, Plaintiffs allege that by the time Rule 4.90 was adopted in 2010, SDCERS had received a new analysis from its actuary in 2007, which showed that the service credits were not, in fact, underpriced during the 2003 window period, and that SDCERS miscalculated when it determined that the actual cost was 37 percent of annual compensation. If indeed those allegations are subsequently proven by evidence in the *Lenhart* action, Plaintiffs would succeed in establishing that safety members are not paying less than the full cost of the service credits. If those facts are proven, there would be no basis for finding that the window-period purchase agreements were unlawful. Accordingly, those purchase agreements for the safety members would be enforceable contracts which SDCERS breached by rescinding and reforming those contracts through Rule 4.90.

Because the facts pled in the *Lenhart* complaint, if subsequently proven, would establish that SDCERS breached the service credit purchase agreements with safety member employees who are subject to reformation and rescission of their agreements under Rule

4.90, we conclude that the trial court erred in sustaining the demurrer to the breach of contract cause of action.

b. *Cause of Action Seeking a Writ of Mandate*

The fifth cause of action in *Lenhart* seeks a writ of mandate on behalf of all safety member employees who ever purchased any service credits under the PSC program. Plaintiffs allege that since 1993, SDCERS has improperly included the cost of the disability retirement plan in the cost of a year of service credit purchased by safety member employees under the PSC program, resulting in an overpricing of the service credits.<sup>16</sup> As Plaintiffs explain, "[b]ecause it is impossible for any person to take disability retirement for a year of service credit purchased under the PSC program, SDCERS should never have included the cost of disability retirement in a year of service credit purchased under the PSC program. To do so has resulted in charging beneficiaries for something they never could have possibly received — disability insurance for a period which had already expired."<sup>17</sup>

Plaintiffs seek an order "directing SDCERS to cease its practice of charging safety members purchasing service credits under the PSC program the cost of disability retirement" and "to calculate and refund the amount it has overcharged the members . . . since 1993." As

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<sup>16</sup> Plaintiffs point to San Diego Municipal Code sections 24.0501 to 24.0515 as the provisions setting forth the City's disability retirement plan.

<sup>17</sup> It is unclear from the allegations in the complaint whether Plaintiffs are alleging (1) that SDCERS's actuaries improperly calculated the cost of the service credits for safety members because they *included* the cost of disability retirement when arriving at the rate that safety members must pay to purchase a year of service credit (i.e., currently 37 percent of annual salary for safety members); or (2) that safety members are required to pay an *additional* amount for the cost of the disability retirement plan when they purchase service credits, *on top of* the amount that they pay based on the rate set by the actuaries.

a legal basis for the order sought, Plaintiffs allege that "SDCERS has . . . a mandatory obligation not to overcharge its safety member beneficiaries for years of service purchased under the PSC program."

The trial court sustained SDCERS's demurrer to *Lenhart* complaint's fifth cause of action for writ of mandate. It explained that the cause of action failed because Plaintiffs could not identify a clear, present and ministerial duty by SDCERS to price the service credits in a certain manner. As we will explain, we agree with the trial court's analysis.

Plaintiffs seek a writ of mandate under Code of Civil Procedure section 1085, which "may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." (*Id.*, subd. (a).) "What is required to obtain writ relief is a showing by a petitioner of '(1) A clear, present and usually ministerial duty on the part of the respondent . . . ; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty . . . .' " (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539-540.)

"To warrant relief by writ of mandate, a petitioner must demonstrate that the public entity had a ministerial duty to perform. [Citation.] A ministerial duty is one that the entity is required to perform in a prescribed manner without any exercise of judgment or opinion concerning the propriety of the act." (*California Assn. for Health Services at Home v. State Dept. of Health Services* (2007) 148 Cal.App.4th 696, 707-708 (*California Assn. for Health Services at Home*).) Accordingly, "[m]andamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner." (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442.) "Mandate will not issue to

compel action unless it is shown the duty to do the thing asked for is plain and unmixed with discretionary power or the exercise of judgment." (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 618.)

Here, Plaintiffs contend that they are seeking to enforce a *ministerial duty* by SDCERS to price service credits in a particular manner. Specifically, Plaintiffs argue that the *City of San Diego* Opinion established that "SDCERS must administer the PSC program on a cost *neutral* basis" and, on that basis, SDCERS has a duty to refrain from overcharging safety members for their service credits by including the cost of disability retirement. As we will explain, Plaintiffs do not establish an enforceable ministerial duty by relying on the *City of San Diego* Opinion.

The issue in the *City of San Diego* Opinion was whether SDCERS could charge *the City* for some of the cost of the service credits purchased by pension plan members. In determining that SDCERS was required to administer the PSC program in a cost neutral manner, we were referring to SDCERS's duty to administer the program in a way that did not result in any cost *to the City*. Beyond requiring that employees cover the full cost of the service credits, we said nothing about *how* SDCERS was to calculate the total employer and employee cost of the service credits. Therefore, Plaintiffs cannot rely on anything in the *City of San Diego* Opinion to establish that SDCERS has a ministerial duty to price the service credits in a particular manner (i.e., by including or not including the cost of disability retirement).

On the contrary, the applicable law governing SDCERS's role in administering the City's pension system shows that determining the cost of service credits is a discretionary act that is not required to be performed in any specific manner. Specifically, San Diego

Municipal Code section 24.1312 states that the cost of service credits shall be "the amount the Board determines to be the employee and employer cost" of that service, and does not provide any further methodology for SDCERS to arrive at the cost. (*Ibid.*) As this provision gives SDCERS the discretion as to how it determines the cost of the service credits, the setting of that cost is not "[a] ministerial duty . . . required to perform in a prescribed manner without any exercise of judgment or opinion concerning the propriety of the act."

(*California Assn. for Health Services at Home, supra*, 148 Cal.App.4th at p. 707.)

Accordingly, SDCERS's approach to determining the cost of the service credits is not the type of act that can be enforced through a writ of mandate. The trial court properly sustained SDCERS's demurrer.

3. *Demurrer to a Cause of Action Unique to the Lancaster Complaint*

The *Lancaster* complaint, which was brought on behalf of Airport Authority pension plan members, alleges a cause of action for breach of fiduciary duty based on SDCERS's actions rescinding and reforming the Airport Authority members' window-period PSC purchase agreements following the *City of San Diego* Opinion. The trial court sustained the demurrer to that cause of action, explaining, among other things, that given the similarities between the Airport Authority's PSC program and the City's PSC program, the *City of San Diego* Opinion established that "SDCERS had likewise erred with respect to the Airport [Authority] window[-]period purchasers" and SDCERS thus "had the same obligation and responsibility to correct the errors." Further, the trial court reasoned that the breach of fiduciary duty claim lacked merit because, like the City's pension plan members, the Airport Authority members did not have a right to receive benefits for which they did not pay the full price required by law. Plaintiffs contend that the trial court erred in sustaining the demurrer.

In their appellate briefing, Plaintiffs explain that their breach of fiduciary duty claim is based on the theory that SDCERS would have had a successful defense based on the statute of limitations, had the Airport Authority taken action to force SDCERS to rescind the PSC purchase agreements. As we understand Plaintiffs' position, unless the Airport Authority had the ability to prevail in a lawsuit establishing that the window-period purchase agreements were unlawful, SDCERS had a fiduciary duty to refrain from taking any action to negatively impact the benefits of the Airport Authority pension plan members who purchased service credits during the window period.

As did the trial court, we reject Plaintiffs' theory of liability because, based on the principles established in the *City of San Diego* Opinion, the Airport Authority members who purchased service credits during the window period did not have a right to the benefits that they were receiving under the window-period purchase agreements. Therefore, any action by SDCERS to rescind and reform their contracts did not breach a fiduciary duty to pension plan members.

We begin with the undisputed fact, as pled in the *Lancaster* complaint, that the Airport Authority's PSC program is governed by the same substantive provisions as the City's PSC program, under which the employees purchasing the service credits must pay the full cost of the credits, with the Airport Authority not responsible for any of the cost. Further, as with the City's PSC program, SDCERS's actuaries determined in April 2004 that the Airport Authority's PSC program service credits were priced below the full cost of those credits, and SDCERS nevertheless created a window period during which Airport Authority employees could purchase service credits at the price that had already been determined by SDCERS to be too low. In the *City of San Diego* Opinion we explained that "City

employees were *not* entitled to purchase service credits at a rate that did not reflect the full cost of those credits." (*City of San Diego, supra*, 186 Cal.App.4th at p. 82.) As the Airport Authority employees also did not pay the full cost of the service credits, they too were not entitled to purchase the amount of service credits reflected in their window-period purchase agreements at the price stated.

Plaintiffs do not have an equitable or vested right to receive the full PSC benefits when it would be unlawful and contrary to the provisions governing the pension system to provide them with those benefits. (See *Medina, supra*, 112 Cal.App.4th at p. 871 [no contractual right or estoppel-based right existed for plaintiffs, who were not safety members, to receive pension benefits legally available only to safety members, even though the pension plan administrator had accepted higher pension plan contributions from plaintiffs and their employer on the incorrect assumption they were classified as safety members].) As Plaintiffs do not have a right to collect pension benefits that are unlawful, SDCERS could not, as a matter of law,<sup>18</sup> have a fiduciary duty to refrain from taking steps to rescind and reform the Airport Authority's PSC program purchase agreements under which Plaintiffs were receiving unlawful benefits.

A similar conclusion was reached in *City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 544 (*City of Pleasanton*). There, a public employee contested the manner in which CalPERS calculated his total pensionable compensation for the purpose of determining the amount of

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<sup>18</sup> As we have explained, "[w]hether a fiduciary duty exists is generally a question of law." (*Marzec, supra*, 236 Cal.App.4th at p. 915.)

his pension benefits. When making pension contributions to CalPERS, the employer had assumed a higher amount of total pensionable compensation. The employee alleged, among other things, that CalPERS should be required, under a theory of estoppel or breach of fiduciary duty, to pay him benefits based on the total amount of pensionable compensation as erroneously calculated by the employer because CalPERS had not earlier informed him about the employer's erroneous calculations.

*City of Pleasanton* concluded that the estoppel and breach of fiduciary duty claims lacked merit. Because it would have been *unlawful* under the governing law for CalPERS to calculate the total pensionable compensation in the manner that the employee sought, there was no legal basis for an award of benefits based on a theory of estoppel or breach of fiduciary duty. (*City of Pleasanton, supra*, 211 Cal.App.4th at pp. 543-544.) Specifically, with respect to the breach of fiduciary duty cause of action, *City of Pleasanton* explained that "[Cal]PERS's fiduciary duty to its members does not make it an insurer of every retirement promise contracting agencies make to their employees. [Cal]PERS has a duty to follow the law." (*Id.* at p. 544.) Although CalPERS had a fiduciary duty to " 'ensure the rights of members and retirees to their full, earned benefits,' " the existence of that duty did "not authorize an order compelling [Cal]PERS to pay greater benefits than" allowed by law. (*Ibid.*) This reasoning applies here as well. Although it is undisputed that SDCERS has a fiduciary duty to Plaintiffs to ensure their right to full earned benefits, it does not have a duty to ensure their right to benefits that are not allowed by the applicable law.

Plaintiffs focus considerable attention on the issue of whether the Airport Authority could have filed a meritorious lawsuit, not barred by the statute of limitations, to require that SDCERS rescind or reform the service credit purchase agreements. That issue, while

interesting, is beside the point. Because Plaintiffs did not have a right to the unlawful pension benefits, SDCERS could not have breached its fiduciary duty to Plaintiffs by taking steps that rescinded those benefits, regardless of whether SDCERS could have been forced to take those steps by the Airport Authority and regardless of whether the statute of limitations would have barred such a lawsuit.

Plaintiffs also contend that they should have been granted leave to amend the fourth cause of action in the *Lancaster* complaint. Specifically, in place of their cause of action for breach of fiduciary duty, Plaintiffs propose to allege a cause of action for breach of contract arising from the fact that SDCERS rescinded the Airport Authority employees' window-period PSC agreements. As Plaintiffs explain, they believe they can state a claim for breach of contract "because SDCERS had no legal justification to repudiate, in 2011, contracts it had entered into with Airport Authority employees during the Airport Authority window period in 2004."

This theory of breach of contract fails for the same reason as the breach of fiduciary duty claim. SDCERS had a legal justification to repudiate the contracts, as they were unlawful under the analysis set forth in the *City of San Diego* Opinion, and thus there is no basis for a breach of contract claim. Accordingly, the trial court did not abuse its discretion in denying leave to amend.

B. *Summary Judgment on the Remaining Breach of Fiduciary Duty Claims Based on Government Claims Act Immunity*

We next consider Plaintiffs' challenge to the trial court's ruling granting summary judgment in favor of SDCERS on Plaintiffs' breach of fiduciary duty causes of action in the second amended complaints in all three actions.

1. *The Breach of Fiduciary Duty Causes of Action*

The second amended complaints contain two causes of action for breach of fiduciary duty against SDCERS, both of which allege breaches of a common law fiduciary duty and a "constitutional" fiduciary duty under article XVI, section 17 of the California Constitution.

The first cause of action alleges that SDCERS breached its fiduciary duty to Plaintiffs by voting on November 16, 2007, to continue to charge the City for the underfunding of the PSC program. According to Plaintiffs, SDCERS's vote on November 16, 2007, served to restart the statute of limitations period for the City's challenge to SDCERS's practice of requiring the City to pay for the underfunding of the PSC program. Plaintiffs contend that the vote was a breach of SDCERS's fiduciary duty to Plaintiffs because the vote enabled the City to pursue the *City of San Diego* Action, eventually resulting in the *City of San Diego* Opinion and SDCERS's adoption of Rule 4.90, which allegedly harmed Plaintiffs.

The second cause of action alleges that SDCERS breached its fiduciary duty to Plaintiffs during its defense of the *City of San Diego* Action because it did not raise affirmative defenses based on a plea in abatement, the rule concurrent jurisdiction, and unclean hands. Plaintiffs contend that if SDCERS had raised those specific affirmative defenses, it would have obtained a dismissal of the *City of San Diego* Action, and Rule 4.90 would not have been adopted.

In all three actions, the trial court granted summary judgment in favor of SDCERS on both breach of fiduciary duty causes of action. The trial court concluded that as a public

entity, SDCERS was immune from liability for the alleged breaches of fiduciary duty under provisions of the Government Claims Act (Gov. Code, § 815 et seq.).<sup>19</sup>

2. *Standard of Review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' " (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

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<sup>19</sup> The trial court also ruled with respect to the first cause of action (which alleged that SDCERS improperly restarted the statute of limitations period) that there was no merit to Plaintiffs' contention that, had the November 16, 2007 vote not occurred, the statute of limitations would have barred the *City of San Diego* Action. As the trial court also granted summary judgment based on its conclusion that the first cause of action was barred by Government Claims Act immunity, and we affirm the summary judgment ruling on that ground, we need not, and do not, consider the trial court's ruling on the statute of limitations.

3. *SDCERS Established That the Breach of Fiduciary Duty Causes of Action Were Barred by Government Claims Act Immunity*

SDCERS's summary judgment motion was based on the assertion that it was entitled to immunity for the acts alleged in the breach of fiduciary duty causes of action. We therefore begin with an overview of the legal basis for that argument.

a. *Legal Basis for Immunity Argument*

Within the Government Claims Act, the relevant statutory immunity applicable to SDCERS in this context is set forth in Government Code section 815.2, subdivision (b), which creates immunity for a public entity when its employees are immune from liability for the act or omission at issue. As set forth in that provision, "[e]xcept as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." (*Ibid.*; see also *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 980 (*Caldwell*) [explaining that under Gov. Code, § 815.2, subd. (b) "public entities are immune where their employees are immune, except as otherwise provided by statute"]; *Masters v. San Bernardino County Employees Retirement Assn. (Masters)* (1995) 32 Cal.App.4th 30, 49 [to the extent that public pension system board had discretionary immunity, the public entity itself was also immune].) As SDCERS points out, the alleged breaches of fiduciary duty are based on acts by the SDCERS Board members, who are SDCERS employees,<sup>20</sup> and thus to the extent the Board members are protected by immunity, SDCERS is as well.

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<sup>20</sup> Plaintiffs argue that the SDCERS Board members are not public employees for the purpose of Government Claims Act immunity because they are appointed to the Board of SDCERS— which is a public entity created by the City — but are primarily employed in other occupations. We reject the argument. Government Code section 810.2 broadly defines

Here, the immunity provision that applies to the individual SDCERS Board members is set forth in Government Code section 820.2. Under that provision, "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." (*Ibid.*)

Our Supreme Court's case law has provided guidance on the type of decisions that fall under the discretionary act immunity set forth in Government Code section 820.2. Immunity under this provision "is reserved for those '*basic policy decisions* [which have] . . . been [expressly] committed to coordinate branches of government,' and as to which judicial interference would thus be 'unseemly. . . .' Such 'areas of quasi-legislative policy-making . . . are sufficiently sensitive' . . . to call for judicial abstention from interference that 'might even in the first instance affect the coordinate body's decision-making process.' " (*Caldwell, supra*, 10 Cal.4th at p. 981, citations omitted.) In contrast, "there is no basis for immunizing lower-level, or 'ministerial,' decisions that merely implement a basic policy already formulated." (*Ibid.*)

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an employee for the purpose of Government Claims Act immunity to include "an officer, judicial officer . . . employee, or servant, whether or not compensated, but does not include an independent contractor." Under this definition, the SDCERS Board members are public employees because they are servants of the public entity SDCERS. (See, e.g., *Caldwell, supra*, 10 Cal.4th at p. 982 [public employee immunity applied to members of a school district's governing board]; *Masters, supra*, 32 Cal.App.4th at p. 47 [public employee immunity applied to members of a public employee pension system board].) Indeed, high level policy-making officials of a public entity, such as its board members, are precisely the type of employees who routinely make the type of policy-level discretionary decisions that public employee immunity for discretionary acts set forth in Government Code section 820.2 most clearly applies.

The application of discretionary act immunity "requires a showing that 'the specific conduct giving rise to the suit' involved an *actual* exercise of discretion, i.e., a '[conscious] balancing [of] risks and advantages . . . .' " (*Caldwell, supra*, 10 Cal.4th at p. 983, citation omitted.) However, there is no requirement that the public employee's exercise of discretion be based on "a *strictly careful, thorough, formal, or correct* evaluation" because "[s]uch a standard would swallow an immunity designed to protect against claims of carelessness, malice, bad judgment, or abuse of discretion in the formulation of policy." (*Id.* at pp. 983-984.)

b. *Plaintiffs Contend SDCERS Is Not Immune Because the SDCERS Board Members Were Not Exercising Lawful Discretion*

Plaintiffs' first argument is that the SDCERS Board members were not performing discretionary acts in taking the actions that gave rise to the breach of fiduciary causes of action, namely making a public announcement of their vote on November 16, 2007, to continue to charge the City for the underfunding of the PSC program and deciding to forego certain affirmative defenses in the *City of San Diego* Action.

Plaintiffs' argument is focused on the assertion that the SDCERS Board did not have the "lawful 'discretion' " to take the actions that it did. According to Plaintiffs, "legally significant events had stripped SDCERS of *discretion* with regard to the acts at issue and dictated instead what SDCERS'[s] ministerial duties were on November 16, 2007, in order to fulfill its article XVI, section 17 constitutional duties to plan members." Plaintiffs also claim that "SDCERS had no lawful discretion . . . to treat [Plaintiffs'] already-determined lawful benefits as if they were open to debate or subject to impairment or reduction." Regarding SDCERS's decisions during the litigation of the *City of San Diego* Action, Plaintiffs contend

that SDCERS was not exercising lawful discretion because SDCERS purportedly "had a legally-mandated, ministerial duty" to "defeat [the *City of San Diego* Action] by raising dispositive affirmative defenses."

These arguments are not persuasive as part of the immunity analysis. By arguing that the Board's exercise of discretion was not "lawful," and that SDCERS Board members purportedly therefore had a "ministerial" duty to act in a certain way, Plaintiffs are in substance arguing the *merits* of their breach of fiduciary duty claims, not presenting an argument as to whether SDCERS was engaging in discretionary, rather than ministerial, acts in reaching a decision on November 16, 2007, or making decisions during the *City of San Diego* Action.

Although Plaintiffs borrow the term "ministerial duty" as part of their argument, they do not properly address the immunity issue. The proper inquiry in an immunity analysis is whether the public employee acted in a discretionary manner or, instead, was merely fulfilling a ministerial duty, *not* whether a discretionary action was a *lawful* and *proper* exercise of discretion. (See *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 749 ["The decision, requiring as it does, comparisons, choices, judgments, and evaluations, comprises the very essence of the exercise of 'discretion' and we conclude that such decisions are immunized under [Government Code ]section 820.2."].) As our Supreme Court has explained, immunity is "designed to protect against claims of *carelessness, malice, bad judgment, or abuse of discretion* in the formulation of policy," and therefore, "claims of *improper* evaluation cannot divest a discretionary policy decision of its immunity." (*Caldwell, supra*, 10 Cal.4th at pp. 983-984, first italics added.)

Here, the acts upon which Plaintiffs base their breach of fiduciary duty claims are discretionary policy-making acts, as they involve decisionmaking on basic policies concerning how to fund the shortfall in the PSC program that had been created by the pricing of the PSC credits during the window period, and what strategy to take in the *City of San Diego* Action. These decisions were discretionary, and were not merely the carrying out of ministerial duties. First, the decision made at the November 16 meeting constituted an exercise of discretionary policymaking, as the City Charter gives the SDCERS Board the discretion to determine the funding obligations of the City for the pension plan (City Charter, art. IX, § 143), and the SDCERS Board was engaged in that function during the November 16 meeting when it determined how to proceed with funding the shortfall in the PSC program in light of Aguirre's attack on that program and threats of litigation. As we explained in the *City of San Diego* Opinion, the SDCERS Board was advised that it "could legally take several courses of action to remedy the underfunding, including 'voiding contracts,' 'collecting arrears payments,' 'offering rewritten contracts,' 'spreading out additional payments,' 'reducing benefit levels,' and 'continuing to collect the shortfall through the amortization of the system's unfunded liability,' " and it exercised its discretion as a policymaking body to continue to charge the City for the unfunded liability. (*City of San Diego, supra*, 186 Cal.App.4th at p. 77.)<sup>21</sup> Second, the SDCERS Board's decisions about

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<sup>21</sup> Plaintiffs contend that at the November 16 meeting, the SDCERS Board was not lawfully exercising the discretion given to it in the City Charter to determine the pension plan funding obligations of the City because, as of that date, it had already determined the City's annual funding obligation. We disagree. As we understand the purpose of the November 16 meeting, it was to decide, whether *going forward*, SDCERS would *continue* to charge the City on an annual basis for the underfunding of the PSC program. Therefore, the

how to proceed in the *City of San Diego* Action were not mere ministerial actions, as making litigation decisions "necessarily requires a judgment based on an evaluation of the merits of the potential claim and possible defenses, as well as a cost-benefit analysis of the litigation" which " 'comprises the very essence of the exercise of "discretion" . . . immunized under [Government Code ]section 820.2.' " (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 342 (*Nasrawi*).

We therefore conclude that the acts at issue here — i.e., announcing a vote on November 16, 2007, to continue to require the City to pay for the underfunding of the PSC program, and making certain litigation choices during the *City of San Diego* Action, were discretionary acts within the meaning of the immunity provision in Government Code section 820.2.<sup>22</sup>

c. *The Breach of Fiduciary Duty Causes of Action Are Subject to Immunity Even Though They Are Based on Provisions in the State Constitution*

Plaintiffs next argue that the immunity in Government Code section 815.2, subdivision (b) does not bar the breach of fiduciary duty causes of action because they arise under provisions of the California Constitution that establish the fiduciary duties of public pension boards. According to Plaintiffs, Government Claims Act immunity applies only

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decision was directly related to SDCERS's role of determining the City's annual funding obligations.

<sup>22</sup> In a variation on their argument that the SDCERS Board members were not exercising *lawful* discretion, Plaintiffs contend that there are disputed factual issues on that subject, precluding summary judgment. This argument fails for the same reasons we have set forth above. The proper inquiry is simply whether the SDCERS Board members were exercising discretion *at all*, not whether the exercise of discretion was *lawful*.

when a tort claim is based on statutory or common law authority, but not when it is based on a constitutional provision.

As the basis for their claim that their breach of fiduciary duty causes of action arise under our state's Constitution, Plaintiffs rely on article XVI, section 17 of the California Constitution, which describes the fiduciary responsibilities of the members of a public pension board. In part that section provides:

"Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following:

"(a) The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. The retirement board shall also have 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 shall 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.

"(b) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.

"(c) The members of the retirement board of a public pension or retirement system shall 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.)<sup>23</sup> In short, this provision establishes that members of a public pension board, such as the SDCERS Board members, are fiduciaries; that they must exercise their fiduciary duties with the purpose, among others, of providing benefits to participants and their beneficiaries; and that the board members' duty to pension plan participants and beneficiaries takes precedence over any other duty. However, as relevant to the following discussion, the plain language of the provision says nothing about creating liability for money damages against public pension plan members in instances when such liability would otherwise be barred by statutory governmental immunity.

Plaintiffs rely primarily on the doctrine of constitutional supremacy to argue that their breach of fiduciary causes of action are not subject to Government Claims Act immunity because they arise under the Constitution. Under that doctrine, "it is well established that '[a] statute cannot trump the Constitution.' " (*City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 788; see also *In re Marriage of Steiner and Hosseini* (2004) 117 Cal.App.4th 519, 527 ["The California Constitution trumps any conflicting provision of the Family Code."].) As stated in the case law upon which Plaintiffs rely, "It has long been acknowledged that our state Constitution is the highest expression of the will of the people acting in their sovereign capacity as to matters of state law. When the Constitution speaks

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<sup>23</sup> The current version of article XVI, section 17 of the California Constitution was put in place as a result of Proposition 162 (The California Pension Protection Act of 1992) "to 'insulate the administration of retirement systems from oversight and control by legislative and executive authorities' . . . , and to protect retirement boards from ' " 'political meddling and intimidation' " ' " (*City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 226, fn. 8, citation omitted.)

plainly on a particular matter, it must be given effect as the paramount law of the state."

(*Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 28.)

The doctrine of constitutional supremacy does not apply here because Plaintiffs have not identified any conflict between the constitutional provisions and the Government Claims Act immunity provisions. As we have explained, the constitutional provisions cited above merely establish that public pension board members have certain fiduciary duties to participants and beneficiaries, but those provisions do not state that beneficiaries and participants have *the right to recover monetary damages* from pension board members who breach those duties. Therefore, no constitutional provision is "trumped" when Government Claims Act immunity is applied to bar liability for monetary damages based on the SDCERS Board members' alleged breach of fiduciary duty.<sup>24</sup>

As SDCERS points out, there *are* instances — such as in suits for inverse condemnation — where the Constitution specifically provides for a monetary remedy against a public entity that trumps any Government Claims Act immunity that might otherwise apply. Indeed, the legislative committee comments to Government Code section 815, which

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<sup>24</sup> Turning to the language of article XVI, section 17 of the California Constitution, Plaintiffs contend that provision expressly excepts breach of fiduciary duty claims from Government Claims Act immunity, because it includes the phrase "notwithstanding any other provisions of law or the Constitution to the contrary." We reject this argument because it takes the phrase out of context. The full phrase provides that "[n]otwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following . . . ." (Cal. Const., art. XVI, § 17.) Nothing in this phrase communicates an intent to create a constitutional claim for monetary damages against public pension board members or to abrogate Government Claims Act immunity. Instead, the phrase is directed at the scope of a public pension board's authority to invest and manage pension system funds.

sets forth the general rule of immunity for public entities, acknowledges that in some instances, such as inverse condemnation, constitutional provisions will trump Government Claims Act immunity.<sup>25</sup> "This section abolishes all common law or judicially declared forms of liability for public entities, *except for such liability as may be required by the state or federal constitution*, e.g., inverse condemnation. In the absence of a constitutional requirement, public entities may be held liable only if a statute (not including a charter provision, ordinance or regulation) is found declaring them to be liable." (Legis. Com. com.—Sen., 32 pt. 1 West's Ann. Gov. Code (2012 ed.) foll. § 815, p. 215, italics added.) Here, because the constitutional provisions at issue do not expressly create a monetary remedy for breach of fiduciary duty against public pension board members, this is not a case, such as inverse condemnation, where the Constitution *requires* liability and therefore trumps Government Claims Act immunity provisions.<sup>26</sup>

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<sup>25</sup> Regarding inverse condemnation, the California Constitution provides in part: "Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." (Cal. Const., art. I, § 19, subd. (a).)

<sup>26</sup> Plaintiffs cite two cases that relied on the legislative committee comment to Government Code section 815 in analyzing whether a constitutionally-based cause of action was barred. Based on the legislative committee comment, *Young v. County of Marin* (1987) 195 Cal.App.3d 863 stated that "it is clear that although Government Code section 815 provides that public entities are not liable for injuries '[e]xcept as otherwise provided by statute,' they are not immune from constitutionally created claims." (*Id.* at p. 869.) *Young* concluded that the plaintiff could therefore state a cause of action against a public entity for wrongful termination based on the reasonable exercise of her First Amendment rights, regardless of the immunity for public entities stated in Government Code section 815. (*Young*, at p. 871.) Similarly, *Fenton v. Groveland Community Services Dist.* (1982) 135 Cal.App.3d 797 cited the legislative committee comment in stating that "the Legislature has recognized that the state Constitution may provide a cause of action independent from any statute providing for liability." (*Id.* at p. 804.) *Fenton* concluded that Government Code section 815 did not bar a cause of action based on the state constitution's right-to-vote

The parties extensively cite *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300 (*Katzberg*) in their discussion of the immunity issue. However, *Katzberg* is not relevant here. In *Katzberg*, our Supreme Court set forth the proper approach for deciding whether a state constitutional provision gives rise to a private right of action for damages. (*Id.* at p. 317) Specifically, the issue in *Katzberg* was whether a plaintiff could sue for monetary damages based on a violation of the due process liberty right in the state Constitution. Applying the specific multi-step approach set forth for the first time in *Katzberg*, our Supreme Court concluded that no private right of action for damages existed for violation of the constitutional due process liberty right.<sup>27</sup> (*Katzberg*, at p. 329.) The parties did not raise, and *Katzberg* did not discuss, whether Government Claims Act immunity might apply to the conduct that gave rise to the lawsuit. Accordingly, *Katzberg*

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provision. (*Fenton*, at p. 805.) We find neither *Fenton* nor *Young* to be dispositive of the issue here. Those cases concerned different constitutional provisions, and thus their conclusion as to whether *those* provisions, with the specific language at issue, *required* liability against a public entity, does not resolve the issue of whether article XVI, section 17 of the California Constitution *requires* liability for the breach of fiduciary duty that it describes. As we have explained here, article XVI, section 17 contains no suggestion that a cause of action for money damages is *required* to be available against public pension board members.

<sup>27</sup> The approach involves the following steps: (1) making an inquiry as to "whether there is evidence from which we may find or infer, within the constitutional provision at issue, an affirmative intent either to authorize or to withhold a damages action to remedy a violation"; (2) if that does not resolve the question, making an inquiry regarding several factors, including "whether an adequate remedy exists, the extent to which a constitutional tort action would change established tort law, and the nature and significance of the constitutional provision"; and (3) if those factors favor recognizing a constitutional tort, taking the final step of considering "the existence of any special factors counseling hesitation in recognizing a damages action." (*Katzberg*, *supra*, 29 Cal.4th at p. 317.)

has no relevance to determining the circumstances under which a constitutional provision might trump Government Claims Act immunity.

*Katzberg* is inapplicable here for a second reason. Specifically, our Supreme Court in *Katzberg* was careful to limit the applicability of its constitutional tort analysis to instances in which a plaintiff was seeking monetary damages for commission of a constitutional tort that was not otherwise based on a tort that was already established by common law or by statute. Specifically, *Katzberg* stated that it was addressing *only* the issue of how to determine "whether an action for damages is available to remedy a constitutional violation that is *not tied to an established common law or statutory action*" and was *not* considering "actions . . . based upon grounds established under common law tort principles." (*Katzberg, supra*, 29 Cal.4th at p. 303, fn. 1, italics added.) Here, a cause of action for breach of fiduciary duty is an established common law tort, with the state constitutional provision simply serving to clarify the nature of the fiduciary duty applicable to public pension board members. Therefore, the analysis set forth in *Katzberg* for determining whether a private right of action for damages exists is not applicable here.

As further support for their argument that Government Claims Act immunity does not apply to the breach of fiduciary causes of action alleged here, Plaintiffs rely on a statement by our Supreme Court in *Lexin, supra*, 47 Cal.4th 1050. *Lexin* was an appeal in a criminal proceeding against several former members of the SDCERS Board, in which they were charged with violating state conflict of interest statutes (Gov. Code, § 1090 et seq.) (*Lexin*, at p. 1062.) *Lexin* concluded that the criminal informations should be set aside as to most of the board members, but made a comment at the end of the opinion, in dicta, explaining that even though the board members could not be criminally prosecuted, other avenues existed to

address the type of misconduct alleged. "In closing, we note that, the applicability of [Government Code] section 1090 aside, a wealth of other legal remedies exists to ensure municipalities and retirement boards do not abuse the public trust. Both groups are subject to actions for declaratory relief or mandamus challenging their decisions . . . , as the City and SDCERS Board were sued here. Retirement board trustees are fiduciaries (Cal. Const., art. XVI, § 17) and as such are subject to suit for breach of fiduciary duty when their decisions fall short of the standard the law demands. We express no opinion as to whether the Lexin defendants breached their fiduciary duties here, nor whether they might otherwise have been subject to civil liability for their actions." (*Lexin*, at p. 1102, citations omitted.)

Plaintiffs argue that by stating in *Lexin* that public pension plan board members are fiduciaries under article XVI, section 17 of the California Constitution and "as such are subject to suit for breach of fiduciary duty" (*Lexin, supra*, 47 Cal.4th at p. 1102), our Supreme Court was indicating that the SDCERS Board members would not be protected by Government Claims Act immunity in such a suit. We disagree. *Lexin* does not mention the issue of immunity, and there is no indication that our Supreme Court even considered the issue when stating that the SDCERS Board members were subject to suit. Indeed, our Supreme Court specifically clarified that it was expressing no opinion on "whether the Lexin defendants . . . might otherwise have been subject to civil liability for their actions" (*Lexin*, at p. 1102), strongly implying that it had *not* considered whether immunity might apply to the specific conduct at issue.

Finally, we note that our decision is consistent with the only other published authority to consider the issue of whether Government Claims Act immunity applies to constitutionally-based breach of fiduciary claims against public pension plan members. In

*Nasrawi, supra*, 231 Cal.App.4th 328, beneficiaries of a county employees pension trust brought suit against the public pension association, alleging that the association breached its fiduciary duty to them by failing to file a lawsuit against actuaries whose negligence allegedly caused the pension trust to be underfunded. *Nasrawi* concluded that the breach of fiduciary duty claims were barred by Government Claims Act immunity (Gov. Code, §§ 815, 815.2, 820.2) because the association's board members exercised their discretion in deciding whether to file suit against the actuaries. (*Nasrawi*, at pp. 342-343.) As do Plaintiffs here, the plaintiffs in *Nasrawi* argued that "because they allege a constitutionally based duty, [the court] should not consider the question of immunity," and contended that "the immunity question" was "answered by the mere fact that the Constitution is the source of the duties at issue." (*Id.* at p. 341.) *Nasrawi* rejected the argument, explaining that "[u]ndoubtedly, the board owes fiduciary duties under [California Constitution, article XVI,] section 17, but whether it is immune from alleged violations of those duties is a separate question." (*Nasrawi*, at p. 341.) Consistent with our conclusion here, *Nasrawi* explained that plaintiffs had not identified any authority that supported their contention that "public entity employees are liable for injuries caused by their *discretionary* acts or omissions that violate *constitutionally* imposed duties." (*Id.* at p. 342, italics added.)

d. *Plaintiffs' Contention That They Seek Equitable Relief for the Breach of Fiduciary Duty Causes Action Does Not Succeed In Rescuing Those Claims from the Immunity Bar*

In another challenge to the applicability of Government Claims Act immunity to their breach of fiduciary duty causes of action, Plaintiffs contend that those causes of action are not barred by Government Claims Act immunity because they seek relief that is not monetary.

Plaintiffs rely on section 814 of the Government Code, which states that nothing in the Government Claims Act immunity provisions "affects liability based on contract or the right to obtain relief *other than money or damages* against a public entity or public employee." (Gov. Code, § 814, italics added.) Under this provision, therefore, immunity does not apply unless Plaintiffs are seeking relief other than money or damages in their breach of fiduciary duty causes of action.

Plaintiffs contend that they are not merely seeking monetary damages for their breach of fiduciary causes of action because they also included a prayer for equitable relief in their pleadings.<sup>28</sup> Specifically, the second amended complaints seek the following relief for the breach of fiduciary duty causes of action: "damages according to proof"; the "payment of money by SDCERS"; and "an order setting [aside] SDCERS'[s] acts." The first and second categories of relief clearly fall under the category of a claim for "*money or damages*" (Gov. Code, § 814, italics added), and thus recovery is barred by Government Claims Act immunity provisions. The third category of relief ("an order setting [aside] SDCERS'[s] acts") does not, on its face, require a payment of money or damages. However, as we will explain, that prayer for relief lacks any meaningful substance in the context of this case, and thus cannot serve as a basis for avoiding the application of Government Claims Act immunity for the breach of fiduciary duty causes of action.

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<sup>28</sup> Plaintiffs specifically contend that equitable relief is permitted as a remedy for breach of fiduciary duty, as set that remedy is expressly allowed by the common law and Probate Code section 16420, subdivision (a). We need not, and do not, express an opinion on the source or availability of equitable relief for breach of fiduciary duty here, or the applicability of the Probate Code. (Cf. Prob. Code, § 82, subd. (b)(13) [excluding from the definition of "Trust" in the Probate Code, a trust "for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind"].)

Although Plaintiffs pray for "an order setting [aside] SDCERS'[s] acts," nowhere in their pleadings or their briefing do they explain what acts they are seeking to set aside, other than stating that a court has authority to " 'set aside' . . . acts in breach of trust." However, as a matter of logic, it would either be impossible or of no use to Plaintiffs to set aside the acts that purportedly constituted the breaches of fiduciary duty. Those acts are alleged to be (1) SDCERS's announcement of its vote at the November 16, 2007 meeting to continue to charge the City for the underfunding of the PSC program; and (2) SDCERS's decisions during the litigation of the *City of San Diego* Action. Plaintiffs would gain nothing if those acts were set aside. Accordingly, there is no substance behind Plaintiffs' vague contention that they are seeking "an order setting aside SDCERS'[s] acts" as a remedy for the breach of fiduciary duty causes of action. As the only substantive relief sought by Plaintiffs is monetary relief or damages, Government Claims Act immunity applies. (See *Esparza v. County of Los Angeles* (2014) 224 Cal.App.4th 452, 460 [in an action alleging improper termination or demotion against the county, the court rejected plaintiffs' contention that they sought injunctive relief and their claims were therefore not subject to Government Claims Act immunity, as plaintiffs "fail[ed] to specify what injunctive relief they seek," and an injunction to provide them with their previous jobs was impossible, as those positions had been eliminated, so that plaintiffs' action was "primarily for money or damages, not injunctive relief"].)<sup>29</sup>

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<sup>29</sup> Although Plaintiffs do not articulate their claim as such, to the extent that Plaintiffs may be seeking an equitable remedy in the form of an injunction requiring SDCERS to allow them to retain the service credits they purchased during the window period without the payment of any additional funds, as SDCERS required in Rule 4.90, that relief would, *in substance* provide monetary relief to Plaintiffs, and would be barred by statutory

4. *The Trial Court Did Not Prejudicially Err in Sustaining an Evidentiary Objection in Ruling on the Motion for Summary Judgment*

As part of their opposition to SDCERS's summary judgment motion, Plaintiffs submitted a January 2004 memorandum prepared by outside counsel for the City, Timothy Pestotnik, providing a status report to the City council and the mayor on a class action lawsuit filed against SDCERS and the City (the Pestotnik memo).<sup>30</sup> Plaintiffs contend that the Pestotnik memo is significant to their argument that the statute of limitations would have barred the *City of San Diego* Action had the SDCERS Board not voted on November 16, 2007, to continue its practice of charging the City for the underfunding of the PSC program. Specifically, Plaintiffs argue that the Pestotnik memo shows that City leaders were on notice as of January 2004 that SDCERS had underpriced PSC program credits, and the City believed that practice was unlawful under the San Diego Municipal Code.<sup>31</sup>

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governmental immunity. (See *Schooler v. State of California* (2000) 85 Cal.App.4th 1004, 1014 [rejecting plaintiff's argument that he was seeking injunctive relief, not damages, and thus was not subject to immunity, as that equitable relief would create financial burdens for the public entity, and observing that "the type of relief covered cannot circumvent the underlying policies behind the governmental tort liability for money damages"].)

<sup>30</sup> The lawsuit, which we do not otherwise discuss here, was *Gleason v. San Diego City Employees Retirement System*, San Diego Superior Court, case No. GIC803779.

<sup>31</sup> As relevant here, the Pestotnik memo states 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. . . . [T]he City believes the Municipal Code requires the SDCERS Board to set the purchase price so that the purchase of service credit would be cost neutral to the retirement system. SDCERS has allowed city employees to contribute at a considerable discount, which results in a significant actuarial loss. Even after recognizing the problem, SDCERS allowed city employees to continue purchasing service credits at a discount, which generated further losses."

SDCERS objected to the admission of the Pestotnik memo on the basis that it was irrelevant, lacked foundation and contained hearsay.<sup>32</sup> The trial court sustained the objection on the ground of hearsay.

Plaintiffs contend the Pestotnik memo should not have been excluded as hearsay because it was not submitted for the purpose of establishing the truth of the matters discussed in it, but rather to show that the City had notice or knowledge of SDCERS's unlawful practices with respect to the pricing of PSC program credits. Plaintiffs rely on the principle that "[a]n out-of-court statement is not hearsay if offered to show the *effect* on the hearer, reader or viewer rather than to prove the truth of the content of the statement — e.g., that a party had prior *notice* or *knowledge*; that a party was given a *warning*; or to prove a party's *motive*, *good faith*, *fear*, etc. (where such notice, knowledge, motive, fear, etc. is *relevant* to an issue in the case)." (Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2015) ¶ 8:1049, p. 8D-13.) We apply an abuse of discretion standard of review in determining whether the trial court erred in sustaining SDCERS's objection.<sup>33</sup>

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<sup>32</sup> Attorney-client privilege was not an issue with respect to the admissibility of the Pestotnik memo, as the parties apparently did not contest that the privilege had been waived.

<sup>33</sup> Although our Supreme Court recently expressly declined to reach the issue in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535, the weight of authority, both before and after *Reid*, holds that an appellate court applies an abuse of discretion standard when reviewing a trial court's rulings on evidentiary objections made in connection with a summary judgment motion. (See, e.g., *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852; *Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133, 143-144; *Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 82-83; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694 (*Carnes*).) Even were we to apply a de novo standard of review to the trial court's evidentiary ruling, we would still conclude that the trial court properly sustained the objections. (See *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1114 [explaining that under any standard of review it would reach the same conclusion regarding

We conclude that the trial court properly sustained the objection on the ground of hearsay. " 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) As Plaintiffs explained the relevance of the Pestotnik memo, it was to establish the *truth* of Pestotnik's statement that City leaders *believed*, as of January 2004, that SDCERS had acted *unlawfully* with respect to the pricing of the PSC program credits. The Pestotnik memo does not purport to provide *notice* of the illegality of the pricing of the PSC program credits, but rather to describe an already-existing belief purportedly held by City leaders on that subject. Therefore, the statements in the Pestotnik memo which describe the beliefs of City leaders about the illegality of the pricing the PSC program credits as of January 2004 were properly excluded because they are hearsay.

In addition, Plaintiffs' argument that the trial court erred in excluding the Pestotnik memo is without merit because Plaintiffs have not established any prejudice from the ruling. To present a successful challenge to an evidentiary argument on appeal, an appellant must show that the evidentiary error was prejudicial, amounting to a miscarriage of justice. (*Carnes, supra*, 126 Cal.App.4th at p. 694; Cal. Const., art. VI, § 13.) Here, the Pestotnik memo was submitted by Plaintiffs to establish the *merits* of their claim that SDCERS breached its fiduciary duty by not asserting a statute of limitations defense to the *City of San Diego* Action. However, as we have explained, because that claim is barred by SDCERS's Government Claims Act immunity, the merits of the breach of fiduciary duty claim are not relevant here. Accordingly, Plaintiffs cannot establish that they were prejudiced by the

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the trial court's ruling on evidentiary objections made in connection with a summary judgment motion].)

exclusion of the Pestotnik memo because it relates to an issue that was not dispositive in the ruling on the summary judgment motion.

#### DISPOSITION

The judgment is reversed in the *Lenhart* action with respect to the breach of contract cause of action. In all other respects, the judgments are affirmed. The parties are to bear their own costs on appeal.

IRION, J.

WE CONCUR:

McINTYRE, Acting P. J.

O'ROURKE, J.