

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MICHAEL R. O'NEAL et al.,

Plaintiffs and Appellants,

v.

STANISLAUS COUNTY EMPLOYEES'
RETIREMENT ASSOCIATION,

Defendant and Respondent.

F061439

(Super. Ct. No. 648469)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger T. Picquet, Judge. (Retired Judge of the San Luis Obispo Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Law Office of Michael A. Conger and Michael A. Conger; Richard H. Benes for Plaintiffs and Appellants.

Reed Smith, Harvey L. Leiderman and Jeffrey R. Rieger for Defendant and Respondent.

-ooOoo-

This is an appeal from a judgment dismissing an amended complaint for damages and for declaratory and injunctive relief against a county employees' retirement association. The case involves actions taken by a county retirement association in transferring funds from a supplemental benefits account to the general trust fund and in establishing a schedule for the county's payment of unfunded liabilities of the retirement plan. We conclude the trial court erred in sustaining respondent's demurrer to appellants' complaint and, thereafter, in granting judgment when appellants declined to further amend their complaint. In summary, we conclude appellants have standing to seek declaratory and injunctive relief and have adequately pled causes of action for such relief. At the demurrer stage, of course, there is no way to know whether appellants ultimately will prevail, but we conclude the demurrer should have been overruled. Accordingly, we reverse the judgment.

I. FACTS AND PROCEDURAL HISTORY

Appellants Michael R. O'Neal, Rhonda Bieseimeier, and Dennis J. Nasrawi are former Stanislaus County employees; each is a member of respondent Stanislaus County Employees' Retirement Association with vested pension rights. (Because appellants appeal from the trial court's sustaining of a demurrer, we take the well-pleaded facts stated in the complaint as true. (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 505, fn. 1.) The following summary reflects that standard. In addition, we grant the parties' requests that we take judicial notice of certain facts, as further described in the footnote.¹)

¹ The parties have filed three separate requests for judicial notice. We deferred consideration of each request pending consideration of the appeal on its merits.

Two of the requests for judicial notice were filed by appellants and were not opposed by respondent. We grant those requests in full. Accordingly, we take judicial notice of a letter dated March 15, 2011, from the Executive Officer for the Superior Court of California, County of Stanislaus, to the Retirement Board of the Stanislaus County Employees' Retirement Association, available at <<http://www.stancera.org/files/>

2011_Agendas_and_Minutes/20110322_AGN_Item9b_OCR.pdf> (viewed January 25, 2012.) In addition, we take judicial notice of November 1992 California Ballot Pamphlet, pages 36-39, which concern Proposition 162, “Public Employees’ Retirement Systems. Initiative Constitutional Amendment.” We also take judicial notice of the “true signification” in the English language of the word “amortization.” (see Evid. Code, § 451, subd. (e) [judicial notice shall be taken of “true signification of all English words and phrases and of all legal expressions”].)

Respondent has requested that we take judicial notice of a document entitled “Stanislaus County Employees’ Retirement Association Actuarial Review and Analysis as of June 30, 2008, Final Report May 12, 2009,” prepared by EFI Actuaries (hereafter referred to as the actuary report). The trial court denied respondent’s request to take judicial notice of the 75-page actuary report, and we agree with its bases for denying the request. Nevertheless, the actuary report contains a fuller explanation of certain actions of respondent’s governing board (and some of the circumstances giving rise to those actions) than is set forth when those actions and circumstances are alleged in the amended complaint. While appellants have filed an opposition to the request that we take judicial notice of the actuary report, the parties’ briefs clearly agree upon certain of the expanded explanations contained in the report. For the purposes of this appeal, and in light of the standard of review on appeal after an order sustaining a demurrer, we deem these additional facts to be judicially noticed as “not reasonably subject to dispute and [] capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Evid. Code, § 452, subd. (h).) In addition, to the extent the trial court sustained the demurrer without leave to amend, the reviewing court must determine whether there is a reasonable probability that the complaint could be amended to state a cause of action. (*Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 719.) The actuary report provides a basis for such amendment. As with the facts actually alleged in the amended complaint, the legal and actuarial significance of any matter drawn from the actuary report may be disputed at trial, even though we have accepted those facts in this appeal.

We reject, however, respondent’s request for judicial notice of the actuary report to the extent that respondent asserts that the report’s certification that the “valuation was performed in accordance with generally accepted actuarial principles and practices” constitutes an endorsement of respondent’s action in adopting changes to its “amortization policy for the Plan’s unfunded liability.” While the parties agree concerning the actuaries’ *description* of the changes to the amortization policy (and we therefore judicially notice that description), the certification does not, by its terms, purport to approve or disapprove of the policy itself, whether on the basis of actuarial or other considerations, and we do not deem the actuary report to establish any basis for judicially noticing that the report’s authors either approved or disapproved of the changed amortization policy.

A. *Statutory background.*

Respondent was formed and operates under the provisions of the County Employees Retirement Law of 1937 (CERL), Government Code section 31450 et seq.² (Counties are not required to, and many have not, established their retirement plans under CERL. (See *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 433.)) “Under CERL an employee’s pension is a combination of a retirement annuity based on the employee’s accumulated contributions supplemented by a pension established with county contributions sufficient to equal a specified fraction of the employee’s ‘final compensation.’ [Citations.]” (*Ventura County Deputy Sheriffs’ Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 490.)³ Retirement benefits “are funded by employer contributions, employee contributions, and investment earnings on monies deposited in the fund.” (79 Ops.Cal.Atty.Gen. 95, 96 (1996).)

The persons who may qualify as annuitants or beneficiaries under the retirement system of a CERL county constitute that county’s retirement association. (§ 31474.) The association is governed by a board, usually (and apparently is in this case) called the Board of Retirement (hereafter, the board or the retirement board). (See § 31459, subd. (c).)⁴ The board is required to recommend to the county’s board of supervisors a rate of contribution by employees and by the county as employer, at regular intervals,

² All further section references are to the Government Code, except as otherwise noted.

³ In addition to the county employees’ pension plan, the association also administers pension plans for the Superior Court of Stanislaus County, one city and five special districts located in Stanislaus County. Those other plans are not involved in the present appeal.

⁴ The retirement board is not named separately as a party in this action, and all actions taken by the retirement board are alleged in the amended complaint as having been taken by “StanCERA,” an acronym for Stanislaus County Employees’ Retirement Association.

after considering past and expected experience of the association in paying benefits. (See § 31453, subd. (a).) The board of supervisors is then required to establish an appropriation to pay the county's contribution to the pension fund. (§§ 31581, 31584.)

The retirement board's establishment of a contribution rate is to be based on the valuation of the "assets and liabilities of the retirement fund." (§ 31453, subd. (a).) This valuation "shall be conducted under the supervision of an actuary" "at intervals not to exceed three years." (*Ibid.*) The valuation "shall cover the mortality, service, and compensation experience of the members and beneficiaries, and shall evaluate the assets and liabilities of the retirement fund." (*Ibid.*) The retirement board uses these actuarial evaluations of the system, as modified over time, to establish the county's annual pension contribution rate, which is then funded by the county's board of supervisors.⁵ (See § 31584.)

In determining the county's contribution rate, a board of retirement may adopt, and respondent has adopted, a statutory "normal contribution rate." That normal rate "shall be computed as a level percentage of compensation which, when applied to the future compensation of the average new member entering the system, together with the required member contributions, will be sufficient to provide for the payment of all prospective benefits of such member." (§ 31453.5.) To the extent the normal rate does not cover the total liability determined by the actuaries, the board must recommend an additional assessment that will amortize "[t]he portion of liability not provided by the normal contribution rate ... over a period not to exceed 30 years." (*Ibid.*)

⁵ For purposes of illustration, we note that CERL provides that at the inception of a new county retirement system, and until the commencement of valuations pursuant to section 31453, the contribution rate "shall equal 23.77 percent of the total compensation provided for all safety members" and "8.85 percent of the total compensation provided for all other employees who are members of the retirement association." (§ 31581.) ("Safety members" comprises active law enforcement and fire suppression personnel, as well as certain other employees. (See § 31469.3.))

As noted, one source of funds for the payment of retirement benefits is the income from investment of previous contributions to the retirement fund. When the board of retirement determines the liabilities and assets of the fund, it (guided by its actuary) makes certain assumptions about liabilities (including the age and final compensation of employees when they retire) and assets (including the interest or rate of return on existing assets as a source of funds to pay benefits). If the investment earnings during a particular year exceed the amount credited by the board to contributions and reserves for that year, these excess earnings “shall remain in the fund as a reserve against deficiencies in interest earnings in other years, losses on investments, and other contingencies, except that, when such surplus exceeds 1 percent of the total assets of the retirement system, the board may transfer all, or any part, of such surplus in excess of 1 percent ... for the sole purpose of payment of the cost of the benefits described in this chapter.” (§ 31592.2.) Among the “benefits described in this chapter” for which excess earnings may be used is the payment of “all, or a portion, of the premiums, dues, or other charges for health benefits” for retirees. (*Ibid.*) Retirees have no vested interest in the payment of these supplemental benefits, which are provided at the option of the county. (70 Ops.Cal.Atty.Gen. 1, 4 (1987).) In previous years, respondent accrued such excess earnings and transferred certain of those earnings in excess of required reserves to an account it called a non-valuation reserve. As explained in respondent’s brief on appeal “the system’s actuaries did not count those assets against its pension liabilities when determining the system’s long term pension funding needs; hence the designation, ‘non-valuation.’” A primary focus of the amended complaint is respondent’s use of these non-valuation reserves for other purposes, which we will describe in the next sections.

B. Allegations concerning respondent’s actions.

At some point after the June 30, 2006, valuation of respondent’s assets and liabilities, respondent determined that its actuaries had erred and had underestimated the association’s liabilities by approximately \$40 million. (The complaint alleges the

shortfall as “in excess of \$40 million.” The actuary report estimates the shortfall as “nearly \$38 million.”) In addition, the value of the association’s investment assets apparently decreased during the economic upheavals of 2007 into 2009. The amended complaint appears to allege (and our understanding of the allegation is augmented by the actuary report) that as a result of these two factors and certain other changes in actuarial assumptions, the pension fund was “underfunded by \$595.6 million” as of June 30, 2009.

The amended complaint alleges that, confronted with this “dramatic[] plunge[]” in the “health of the pension trust fund,” the association “imprudently and by the artifice of various actuarial schemes, manipulated the pension trust fund it administers in order to *reduce* County employer contributions by [] at least \$81.4 million, rather than to assure the competency of the assets of the plan.”⁶ The amended complaint alleges four specific actions taken by respondent as the basis for the complaint’s four causes of action, which we now describe.

C. The amended complaint and the demurrer.

The first cause of action of the amended complaint alleges that on April 28, 2009, respondent “transferred \$10 million from a non-valuation reserve of pension trust funds to be used as the County’s employer contribution from the County for fiscal year 2009-2010.” In addition, that cause of action alleges the pension fund lost and will continue to lose the income from the \$10 million that should have been contributed by the county “until that skipped \$10 million employer contribution ... is paid.” It alleges the \$10 million transfer “was a breach of [respondent’s] constitutional, fiduciary duties to the plaintiffs under section 17 of article 16 of the California Constitution.” Further, it alleges

⁶ California Constitution, article XVI, section 17, subdivision (e) states: “The retirement board of a public pension or retirement system, consistent with the exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system.”

that appellants “have been deprived pension benefits” by respondent’s actions. Although the nature of such benefits is not directly stated, the parties and the trial court inferred that the allegation intended to address the loss of the supplemental benefits, such as payment for medical insurance, that previously had been paid from the non-valuation assets.

The second cause of action alleges that, also on April 28, 2009, respondent separately acted to “transfer ... from non-valuation reserves to valuation reserves in order to reduce the County’s employer contribution for 2009-2010” a further \$50 million. The second cause of action alleges similar loss of investment income, breach of fiduciary duty, and deprivation of supplemental benefits as a result of the removal from non-valuation reserves of the \$50 million.

For purposes of narrative continuity, we now skip to the fourth cause of action in the amended complaint. That cause of action alleges that on June 9, 2010, several months after this action was filed, respondent “transferred another \$21.4 million ... from a non-valuation reserve of pension trust funds to be used as the County’s employer contribution from the County for fiscal year 2010-2011.” The fourth cause of action alleges similar loss of investment income, breach of fiduciary duty, and deprivation of supplemental benefits as a result of the payment of the employer contribution from non-valuation reserves.

The third cause of action addresses a different kind of action by respondent. That cause of action alleges that respondent violated its fiduciary duty and its duty under section 31453.5 by requiring an employer contribution that failed to amortize the retirement plan’s unfunded liability within 30 years. This allegation is further explained by the actuary report (and the parties agree with this expanded explanation in their briefs on appeal), as follows: At some point after June 30, 2008, the retirement board made two changes in its existing policy for the recovery of unfunded liability through the county’s employer contributions. First, the board extended the period during which the unfunded

liability would be amortized from 20 to 30 years. (See § 31453.5 [“The portion of liability not provided by the normal contribution rate shall be amortized over a period not to exceed 30 years.”].) In addition, the board changed the calculation of the amortization amount from a level-amount amortization to the same percentage-of-pay calculation permitted for the “normal” contribution under section 31453.5. Because of this second change, the amount of the county’s contribution would be expected to increase over time as a result of the increase in the county’s total payroll for active employees. As a result of this “back loaded” payment schedule stretched over 30 years, the county’s current contribution was reduced, according to the actuary report, by 4.73 percent of annual payroll, from 17.47 percent of payroll to 12.74 percent of payroll—a reduction of \$11.5 million in the county’s contribution in the first year of the new policy. As further described in the actuary report: “Because of this change, the projected rate of recovery in the funding level will be significantly curtailed: Under current projections with continued 30-year level percentage of pay amortization, the funding ratio is expected to be 10% lower at the end of ten years than it would be under the old amortization policy. With a level percentage of pay amortization policy and a period of 17 or more years, the amortization payment in the current year will be less than the interest on the unfunded amount—no payment towards ‘principal’ is made.” The third cause of action alleges that this failure to amortize the unfunded liability—that is, “[t]o liquidate (a debt) by installment payments or payment into a sinking fund” (American Heritage Dict. (3d college ed. 2000) p. 45)—in violation of section 31453.5 reduces the funded ratio of the pension fund below the level at which respondent is permitted to pay for supplemental benefits.

In addition to seeking injunctive relief to prevent future acts in violation of respondent’s fiduciary duty and to require respondent to assess against the county a proper employer contribution, each cause of action seeks “damages” from respondent “(paid by available insurance coverage).”

Respondent filed a general demurrer to the amended complaint. It contended the amended complaint failed to allege facts sufficient to constitute a cause of action. In particular, respondent contended the complaint attacked discretionary acts of respondent but failed to allege an abuse of discretion; that it failed to allege legally cognizable damages; that respondent was immune from damages claims for discretionary acts; and that the complaint failed to allege a basis for injunctive relief.

D. Proceedings in the trial court.

After a hearing on the demurrer, the trial court sustained the demurrer. The court concluded the amended complaint “does not allege facts which if true would show any abuse of discretion” by respondent. The court further determined that the complaint failed to allege legally cognizable damages: The mere reduction in value of the pension fund does not constitute cognizable injury, nor does the loss of discretionary supplemental benefits to which appellants do not have a vested right. In addition, the court determined appellants had not alleged a right to injunctive relief because the past acts alleged in the complaint were not alleged to be an abuse of discretion, so future repetitions of such acts were not wrongful. Finally, the court concluded respondent’s immunity claim was moot, since the amended complaint “fails to adequately seek legally cognizable damages.” The court permitted appellants to further amend the complaint as to some of these defects, but not others. Appellants elected not to further amend the complaint and the court entered judgment dismissing the action with prejudice.

II. DISCUSSION

We review a judgment entered on a demurrer de novo to determine whether the well-pleaded facts in the complaint state a cause of action. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034-1035.)

Many of the specific powers and duties of a county board of retirement are set forth in CERL. (See, e.g., § I(A), *ante*.) Underlying those statutory provisions are the

requirements of article XVI, section 17 of the California Constitution (hereafter, section 17), which addresses the powers and duties of the governing boards of all “public pension or retirement system[s].” “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.” (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1102 (dicta)⁷.)

Section 17 contains the following provisions that are relevant to the present appeal: “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.” (*Id.*, subd. (a).) “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.” (*Id.*, subd. (b).) These are “fiduciary responsibilities.” (*Id.*, subd. (e).) “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.” (*Id.*, subd. (c).)

⁷ The pension fund is not, however, a “trust” for purposes of the Probate Code. (See Prob. Code, § 82, subd. (b)(13) [excluding trusts “for the primary purpose of paying ... pensions[] or employee benefits of any kind”].)

The amended complaint alleges, and respondent does not dispute, that appellants, as members of the retirement system, are beneficiaries of a trust, administered by respondent and by the retirement board as trustees. The “beneficiary of a trust can maintain a suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; [and] (c) to compel the trustee to redress a breach of trust” (Rest.2d Trusts, § 199 [paragraph breaks omitted]; see *Triplett v. Williams* (1969) 269 Cal.App.2d 135, 138.)

Three somewhat related conclusions follow from these initial principles. First, injury to the trust corpus, and violation of fiduciary duties resulting in such injury, causes sufficient harm to the beneficiary to support an equitable action to remediate the breaches of the fiduciary duty. Indeed, if a beneficiary with knowledge of the trustee’s breach of fiduciary duty does not seek judicial relief, the beneficiary may be guilty of laches, precluding such equitable relief. (See Rest.2d Trusts, § 219; *id.*, com. a, p. 512; cf. *Triplett v. Williams, supra*, 269 Cal.App.2d at p. 138.) Accordingly, the fact that appellants do not allege that respondent’s acts have resulted in immediate loss of vested benefits is not a sufficient basis to sustain the demurrer. (See *Harnedy v. Whitty* (2003) 110 Cal.App.4th 1333, 1339-1342; cf. *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1125 [mandate proceedings].) Appellants have alleged that respondent has statutory and constitutional fiduciary duties both to administer the trust assets solely for the benefit of the members and to obtain contributions to amortize unfunded liability in a timely manner. While appellants still must prove these allegations, and there may be defenses available to respondent (see *Bandt v. Board of Retirement* (2006) 136 Cal.App.4th 140, 159), appellants’ allegations are sufficient to

defeat the demurrer to the extent it was based upon appellants' failure to allege cognizable damages.⁸

⁸ In *Bandt v. Board of Retirement, supra*, 136 Cal.App.4th 140, San Diego County had issued certain bonds that generated \$550 million, which the county voluntarily contributed to the employees' pension fund. (*Id.* at p. 144.) The board of retirement conducted an interim valuation of its assets reflecting this voluntary contribution. (*Ibid.*) Appellants, current retirees of the system, sought declaratory and mandamus relief, contending that the interim valuation reduced the county's required contribution for the next fiscal year. They contended "the Board was constitutionally required under section 17 to maximize the amount of money in the pension fund in the short run by refusing to conduct an interim valuation that would take into account the \$550 million payment." (*Id.* at p. 145.) In affirming a judgment in the retirement board's favor, after a trial on the merits, the appellate court noted that the board's action did not reduce any benefit to the appellants and did not materially diminish the fund's security for payment of future benefits. (*Id.* at pp. 157-158.) To the contrary, the board's action could have encouraged future voluntary payments by the county and, by reducing the county's mandatory contribution, "stav[e] off [] possible job losses" among current county employees. (*Id.* at p. 159.)

By contrast, in the procedural posture of the present case, potential defenses of respondent under the so-called "business judgment" rule or otherwise (see *Bandt v. Board of Retirement, supra*, 136 Cal.App.4th at p. 156) are not before the court. We do observe, however, that use of funds *already in the retirement trust fund* to reduce current obligations of the county employer presents significantly different questions than does merely crediting the county employer for a voluntary contribution of *new funds*. (See 79 Ops.Cal.Atty.Gen., *supra*, at pp. 99-101 [use of excess earnings to reduce current county employer contribution violates CERL]; Ballot Pamp., Gen. Elec. (Nov. 3, 1992) text of Prop. 162, § 3, subd. (d), p. 70 ["assets of public pension systems are [to be] used exclusively for the purpose of efficiently and promptly providing benefits and services to participants of these systems, and not for other purposes"].) Nevertheless, there are doubtless difficult discretionary decisions a retirement board must make in the context of the discharge of its constitutional fiduciary duty and "there is nothing in section 17, subdivision (b) that would require that the Board act in a manner consistent with the principle of intergenerational equity" (*Bandt v. Board of Retirement, supra*, 136 Cal.App.4th at p. 160) as it balances the interests of active and retired members.

One further point is worth making. There may well be a difference under CERL between a retirement board's use of excess earnings "as a reserve against deficiencies in interest earnings in other years, losses on investments, and other contingencies" (§ 31592.2) and use of those funds to pay (or reduce) the county's employer contribution. A retirement board's actions in using the reserve to pay retirement benefits would

Second, appellants have alleged cognizable, immediate harm resulting from the alleged breaches of fiduciary duty. The complaint alleges, in effect, that respondent (through its governing retirement board) took funds that had been set aside to provide discretionary supplemental retirement benefits, including health insurance benefits, and used those funds for a different and impermissible purpose, namely, to lower the county's employer contribution for the years in question. It is true, as the trial court concluded and respondent argues on appeal, that appellants and other retired members do not have a vested right to supplemental retirement benefits. Respondent's board has discretion to discontinue those benefits—and would be required to do so if respondent did not have sufficient excess earnings to fund the supplemental benefits. (See § 31592.2.) Nevertheless, any exercise of discretion that results in termination of those supplemental benefits “must be measured against the general rules of law and, in the case of a statutory grant of discretion, against the specific law that grants the discretion.” (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393.) “The scope of discretion always resides in the particular law being applied, i.e., in the ‘legal principles governing the subject of [the] action....’ Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such

indirectly affect the amount assessed for the rate of employer contributions “necessary to fund the system in the future.” (79 Ops.Cal.Atty.Gen., *supra*, at p. 101.) Similarly, a retirement board's actions in using the reserve to make up losses on investments from its current assets would indirectly affect the amount assessed for employer contributions for unfunded losses. The complaint alleges, however, that respondent used the reserve funds not to offset losses, but to directly reduce the employer's contribution in the years in question. In addition, any exercise of discretion to apply reserves to such losses in a particular instance would be subject to review under the standards of section 17, subdivision (b), to the extent it was properly alleged that the transfer was not in the interest and for the benefit of the members of the association.

action an ‘abuse’ of discretion.” (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.)⁹

In this case, the discretion vested in respondent must always be exercised “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.” (§ 17, subd. (b).) Thus, while there may be good reasons for termination of supplemental retirement benefits, and while termination of the benefits is within the statutory discretion of respondent’s board, the exercise of that discretion is measured not against the retirees’ *contractual* right to such benefits, but against the constitutional duty of the board to act at all times for the benefit of its members. Accordingly, the allegation in the amended complaint that respondent breached its fiduciary duty is, in the circumstances of this case, the legal equivalent of an allegation that respondent’s actions were a breach of discretion, since respondent’s board does not have lawful discretion to act in contravention of its constitutional duties. (See *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1494.) Thus, the allegations in the amended complaint that respondent breached its fiduciary duty to appellants in causing the termination of

⁹ Respondent contends *Claypool v. Wilson* (1992) 4 Cal.App.4th 646 approved the use of reserve assets to pay the public employer’s contribution to a pension fund. The petitioners in *Claypool*, however, challenged the constitutionality of statutes enacted by the Legislature, not (as in this case) the actions of the trustees of a public pension. (*Id.* at p. 652.) The court in *Claypool* found the trust provisions of subdivision (b) of section 17, pertained to “the duties of the fiduciary of the public pension or retirement system,” but did not apply to the duties of the Legislature. (*Claypool v. Wilson, supra*, 4 Cal.App.4th at p. 673, fn. 9.) Also, unlike *Claypool*, this case post-dates the voters’ adoption of Proposition 162 in November 1992, which added the constitutional requirement in section 17, subdivision (b), that a retirement board’s duty to its members and their beneficiaries “shall take precedence over any other duty.”

discretionary benefits sufficiently alleges a breach of duty causing legal injury to appellants and is sufficient to withstand respondent's demurrer.

Third, because the amended complaint adequately alleges wrongful acts by respondent both before and after commencement of this action, and because it alleges the harmful effects of those actions will continue until and unless respondent takes corrective action, the amended complaint adequately alleges the grounds for declaratory and injunctive relief. (See *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 307.) In the case of alleged breaches of fiduciary duties by trustees, as previously stated, such injunctive relief may not only prohibit future breaches of fiduciary duty but may also require the trustee to act to remediate previous breaches of fiduciary duty. (See Rest.2d Trusts, § 199.)

As a result of these conclusions, we further conclude that the trial court erred in sustaining respondent's demurrer to the amended complaint to the extent it determined appellants failed to state causes of action for injunctive relief.

The trial court did not rule on the issue of respondent's immunity from damages arising from exercise of discretionary duties. (See §§ 815.2, subd. (b), 820.2.) We do not reach this issue on appeal from a judgment on a sustained demurrer: Where the complaint states a cause of action, as does the present complaint with respect to declaratory and injunctive relief, a demurrer will not lie to challenge a claim for alternative or additional relief, such as damages. (See *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047.) In addition, it seems likely that, if appellants are successful on the merits, respondent has ample authority under CERL to correct its actions, through establishment of additional employer contributions or other injunctive relief the court may grant, thereby obviating a claim for damages.

Finally, we briefly address appellants' contention that we should order the removal of the trial judge in this case because in some manner he shares the same financial interest in the action that resulted in his assignment to the case in the first place. After

notice to the parties, we take judicial notice of the order of the Chief Justice of California assigning the Honorable Roger T. Picquet, Retired Judge of the Superior Court of the State of California for the County of San Luis Obispo for all purposes in Stanislaus County Superior Court case No. 648469. In addition, we take notice of the “assignment request worksheet” (full capitalization omitted), which indicates assignment of an out-of-county judge was required under Code of Civil Procedure section 170.8 because of a “[f]ull bench recusal.” Appellants contend they and their counsel did not become aware until after judgment was entered that there may be grounds upon which they might wish to seek recusal of Judge Picquet. Because the matter was not raised in the trial court, and because of the limited record before us concerning both the timeliness and the grounds for the request for recusal, we deny appellants’ request without prejudice to appellants’ renewal of this request in the trial court, and without prejudice to respondent’s objection to the timeliness and grounds for such recusal.

DISPOSITION

The judgment is reversed. The matter is remanded for entry of a new order overruling the demurrer to the first amended complaint filed June 11, 2010. Appellants’ requests for judicial notice are granted; respondent’s request for judicial notice is granted in part and denied in part, as set forth in footnote 1, *ante*. Appellants are awarded costs on appeal.

DETJEN, J.

WE CONCUR:

CORNELL, Acting P.J.

GOMES, J.