ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)

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CalPERS Board Unit

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BY FAX AND BY MAIL

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Re: Respondent's Argument: In Re Joseph Tanner and City of Vallejo, Respondents
CalPERS Case No. 9796, OAH Case No. 2011060337

Dear Ms. Swedensky:

Joseph Tanner submits his Respondent's Argument urging the Board of Administration to reject the *Proposed Decision* ("*Decision*") in OAH Case No. 2011060337 scheduled for Board consideration on February 21, 2013. This Respondent's Argument addresses only a few of the many errors in the *Decision*.

Introduction

The erroneous *Decision* is premised in flawed and incorrect Factual Findings and Legal Conclusions. Legally, the *Decision* is contrary to accepted tenets of California law. Factually, the *Decision* relies on selectively incorporated testimony that fails to weigh both sides of the evidence presented. Partial quotes or incomplete "summaries" are not supported by citation or context.

For example, CalPERS admits that testimony established that Tanner and Vallejo intended to provide Tanner with a PERSible pay rate in excess of $300,000. (CalPERS' post-hearing *Opposition*, 8:3-4.) Tanner and Vallejo attempted to contract for this. But in this hearing, CalPERS decides that the governing law of contracts is irrelevant. CalPERS eviscerates the Parol Evidence Rule. CalPERS dismisses the fact that the parties reformed the mistaken language of the first November 2006 agreement. CalPERS rejects the tenets of contract reformation when denying effect to the reformed Tanner-Vallejo March 8, 2007 agreement which established Tanner's pay rate for purposes of the proceeding.

Parol Evidence Rule

The Parol Evidence Rule ("PER") requires that "[t]erms set forth in a writing *intended* by the parties as a *final expression* of their agreement … *may not be contradicted* by evidence of any prior agreement or of a contemporaneous oral agreement." (*Code of Civil Procedure*, §1856(a), emphasis added.) CalPERS violates the PER and *Code of Civil Procedure* section 1856 by varying the terms of written agreements that were agreed to and ratified by Tanner and Vallejo. The *Decision* rejects the fact that the PER bars much of the evidence the *Decision* relies on. The March 8, 2007 agreement was not challenged by Vallejo. In direct contradiction to the

PER, CalPERS is attempting to introduce evidence, argument and testimony that directly contradict the terms of written March 8, 2007 agreement.

Under California law, only the amended March 8, 2007 employment contract exists. CalPERS has no authority to vary or to disregard the relevant terms in the March 8, 2007 contract.

Trying to use terms in a superseded, inadmissible employment contract in violation of the PER, CalPERS founded its arguments on a legally deficient foundation. For example, CalPERS argues that Tanner once briefly contracted to work as a retired annuitant with specialized skills in a limited term employment (a non-CalPERS position) before he was reinstated and employed as a full time permanent City Manager, (i.e. employed in a job subject to CalPERS). Factual Finding No. 7 relies on and quotes the superseded November 2006 contract for the sole evidence to support CalPERS argument: "The City Manager shall initially be hired as a limited term employee and shall not be enrolled in [CalPERS]. On or before March 8, 2007, the City Manager shall become a permanent employee and be reinstated in PERS." (Emphasis added.)

Reformation of the Contract is Required

Legally, reformation and revision contemplate the existence of a valid contract that failed to express the actual intention of the parties and seeks the continuance of the contractual relationship on the basis originally intended by the parties. Mistakes are correctable. (*Civil Code*, §§3399, 3402.) Reformation continues the existence of a valid contract (i.e. the November contract) that failed to express the actual intention of the parties, but reforms the agreement to the terms intended by the parties (i.e. the March 8, 2007 agreement).

As amply proven at the hearing, once Tanner and Vallejo realized that the November 2006 contract contained legal and factual errors, they reformed it. The reformed March 8, 2007, agreement explicitly superseded and replaced the November 2006 contract. (Pursuant to the PER and reformation, the terms in the earlier superseded November 2006 contract at that point became legally nonexistent.)

The *Decision* eviscerates the PER. Without authority consistent with California law, the *Decision* broadly allows CalPERS to examine and rely on the terms in the November 2006 contract to vary the terms of the March 8, 2007 contract and establish the compensation terms that the parties rejected as mistaken. CalPERS uses the superseded contract to determine the amount of pension benefits payable to Tanner.

The Proposed Decision inverts the PER and uses the superseded contract to force the parties to adopt the mistaken (and subsequently reformed) terms. As justification, the *Decision* appears to assume that Tanner and Vallejo were incapable of providing Tanner with $300,000-plus in PERSible compensation in the initial negotiations, even though that was the amount Tanner and Vallejo City Council agreed to. Seeming to adopt tautological circular decision making, the *Decision* in effect argues that the parties could not correct the November 2006 contract's errors because CalPERS has concluded that they could not correct those errors. In other words, the *Decision* justifies looking to the November 2006 contract (in violation of the

PER) in order to prove the assumption that the ALJ and CalPERS have started with.

Correction of Contract Errors

The uncontradicted testimony proved that Vallejo offered Tanner "PERSible compensation" of greater than $300,000 to work in a permanent full time position as City Manager. Vallejo and Tanner believed that the November 2006 contract achieved their agreement. After CalPERS identified potential issues with the November 2006 employment contract prior to Tanner reinstating to CalPERS, Vallejo quickly reformed the language errors in the contract to make the language reflect the intent of the parties. Mistakes are correctable.

Vallejo was required to correct its mistakes in the Tanner-Vallejo employment contract. CalPERS is also required to correct the errors of a contracting agency, and is in privity of contract with Vallejo and Tanner. As a result, CalPERS has a mandatory duty to recognize and accept the corrected and reformed agreement. Instead, CalPERS inserts itself between Tanner and Vallejo to deny them the substance of their agreement. CalPERS forces Tanner and Vallejo into a mistake.

Under equitable estoppel, CalPERS is also estopped to deny the corrections and estopped from denying benefits based on the corrected contract. (*Boxx v. Board of Administration* (1980) 114 Cal.App.3d 79.) CalPERS also has an affirmative duty to correct. (*Government Code*, §20160.)

Correction of November 2006 Mistakes Via the March 8, 2007 Contract

Contrary to the evidence presented, the *Decision* assumes that Vallejo and Tanner's corrections were an effort to subvert the PERL. For example, Factual Finding No. 46 says of the testimony of Debora Boutte, at the time Vallejo's Human Resources assistant director, that "Her claim that she had no reason to believe that the contract amendments were 'not PERSible,' defies comprehension". Later, the ALJ concludes in Factual Finding No. 23 that the Mayor and Council "may have been uninformed when acting on the matter of respondent's compensation."

However, CalPERS never said the mistakes in the November 2006 contract could not be corrected. Rather, it said aspects of the November 2006 contract did not then comply with the PERL. CalPERS anticipated and expected that Vallejo and Tanner would correct and reform the contract. In fact, CalPERS offered suggestions to correct many of the errors (which CalPERS later accepted). However, the *Decision* rules that some mistakes for some unstated reasons are not correctable. Importantly, at the time of correction, Tanner was not yet reinstated into CalPERS. Since he was not enrolled, there should be no limitations on the ability correct mistaken contract terms.

Further, CalPERS received the corrections. CalPERS' analyst Carlous Johnson acknowledged that he received and reviewed the changed March 8, 2007 contract but *did nothing* to inform Vallejo and Tanner of CalPERS' concerns for more than two years. (Factual Finding No. 35.)

The record and the evidence clearly established, including via the testimony of CalPERS' actuary, that the total costs of the two contracts and Tanner's compensation (approximately $300,000) remained the same. Factual Finding No. 22 says "it is not clear if the Council reviewed the Cost Analysis prior to passing the related resolutions." But the undisputed testimony of two Councilmembers in the hearing clearly demonstrated that they understood that they were agreeing to pay Tanner the $300,000-plus PERSIble salary.

Vallejo's Charter City Autonomy

CalPERS violates Vallejo's home rule autonomy granted to Charter Cities under Article XI, section 5, subdivision (a)-(b) of the California Constitution. The fact that CalPERS is violating of Vallejo's Charter City constitutional autonomy on internal governance and compensation as clearly supported by a recent Supreme Court decision. (See *State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547 ("*City of Vista*").)

> Charter cities[1] are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs... (*California Fed. Savings, supra,* 54 Cal.3d at p. 12, 283 Cal.Rptr. 569, 812 P.2d 916, quoting *Ex Parte Braun* (1903) 141 Cal. 204, 207, 74 P. 780.)
> (*City of Vista, supra,* at 555-556.)

The amount of compensation paid to municipal employees is a basic "municipal affair" protected by the charter city home rule autonomy. Vallejo decision about the amount of the compensation for pension purposes is not delegated, preempted, or subject to CalPERS determination by the CalPERS-Vallejo benefit contract. CalPERS is not permitted to adjust the amount of monthly "pay rate" paid to a municipal employee of a Charter City for pension purposes. (Cal. Const., art XI, §5(a)-(b).)

The *Decision* flatly rejects Vallejo's challenge on constitutional Charter City autonomy grounds. Factual Finding No. 50 says that "there is no question in law or fact that CalPERS has jurisdiction to administer and hear all matters related to respondent's application for service retirement." The Constitution dictates otherwise. The *Decision* misstates and oversteps CalPERS' authority when it presumes that the PERL trumps Charter City rights. (See, e.g., *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1.)

Evidentiary Issues, Failing to Accept Undisputed, Uncontradicted Evidence

Without justification for why it discards the testimony of neutral participants, the *Decision* rejects undisputed testimony which clearly establishes that Vallejo City

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[1] "There are 120 charter cities in the state of California. SBCTC states in its brief that more than half the state's population live in charter cities." (*City of Vista, supra.*)

Councilmembers agreed to pay Tanner $300,000-plus in PERSible compensation.

Conflating Tanner's Separate Tenures as *Interim* City Manager (and Retired Annuitant) and Later as *Permanent* City Manager

Misapplying the terms "retired annuitant", "limited term employee" and "permanent employee", the *Decision* conflates Tanner's initial service as Vallejo's *interim* City Manager (a time when Tanner was a retired annuitant who was *not yet reinstated* to active CalPERS service) with his later service as *permanent* City Manager (when he *was* reinstated to CalPERS). The *Decision* incorrectly treats the two different employments as one single, unified position. (See, e.g., Factual Finding No. 3.)

However, the undisputed evidence and testimony establishes that Tanner first served in an interim position as a retired annuitant, then later became permanent City Manager who was reinstated into CalPERS.

Misunderstanding of "Retired Annuitant" Status

As a threshold matter, CalPERS cannot look to Tanner's "retired annuitant" period of "employment without reinstatement" between January and March 2007 as a means to deprive Tanner of retirement rights in his later reinstated period. His full time reinstated Vallejo employment occurred starting effective March 8, 2007. CalPERS granted Tanner reinstatement in April 2007, effective simultaneously with the March 8, 2007 contract.

The *Decision* improperly argues that Tanner could not have served as an interim City Manager because an "interim" employee normally works in a position until replaced by some *other* individual as a permanent employee. (Factual Finding No. 9.) There is nothing in the PERL or applicable Regulations preventing a CalPERS-contracting agency from hiring a retired CalPERS Member in a retired annuitant position for less than 960 hours, and then subsequently hiring him into a permanent position with the same or similar duties. A limited term is different than a permanent position.

The *Decision* then states that "Respondent's Initial Agreement did not use the term 'retired annuitant,' it used the term 'limited term employee' " and "[a] limited term employee can be enrolled in CalPERS". (Factual Finding No. 9.) The ALJ misunderstands the meaning of "retired annuitant". A retired annuitant is someone drawing pension benefits from CalPERS. They can work for a CalPERS agency for less than 960 hours in a fiscal year.

Tanner went to work for Vallejo originally as a retired limited term employee for less than 960 hours in a specific "interim" position. At that time, he was a "retired annuitant". He was also a limited term employee. The terms are not synonymous. Without reenrolling in CalPERS, he could not change or augment PERSible final compensation and other CalPERS benefits. Only after he was reinstated to active CalPERS membership could he increase his years of service, final compensation, and other benefits.

Correction of Errors is Not a "Conversion" of Benefits

Testimony and written documentation firmly establish that Tanner and Vallejo always intended that Tanner would receive $300,000-plus in PERSible compensation. The *Decision* conjectures or assumes that Tanner (apparently with the assistance of certain Vallejo employees) intended to "convert" benefits to compensable earnings in order to hide his compensation from the Vallejo electorate. No evidence was introduced to support this, it is merely an imaginative supposition worthy of a detective novel.

No Retroactive Application of New Law or Regulations

CalPERS cannot use laws were passed after Tanner retired in a retroactive manner to divest Tanner of his rights after retirement, unless the legislation clearly demonstrates retroactive intent (and is otherwise constitutional). The *Decision* supports CalPERS' attempts to use statutes or regulations adopted or changed after Tanner retired. (*Government Code*, §§21220, *et seq.*; *C.C.R.*, §§570.5, 571.) For example, Factual Finding No. 32's statement that "Mr. Johnson stated that retired annuitants should not earn more than an active employee. (Gov. Code, § 21224, subd. (a).)" refers to changes in the PERL that occurred after Tanner retired.

Estoppel

CalPERS is equitably estopped from reducing Tanner's pension. CalPERS made various representations to Tanner and Vallejo. They relied reasonably on CalPERS' representations to their detriment. For example, they reformed the employment contract in reliance at least in part on CalPERS' notification of errors. For example, Vallejo and Tanner relied on CalPERS' representations (and silence or withheld advice) to continue Tanner in employment with the belief that the compensation issues had been corrected.

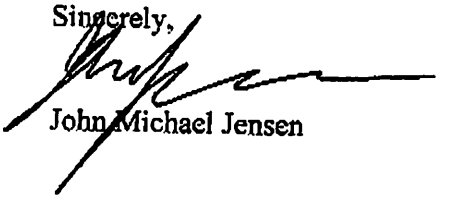
However, the *Decision* found that CalPERS is not estopped. In part, the *Decision* simply assumes that Tanner and Vallejo had never agreed that Tanner would receive $300,000-plus PERSible compensation from Vallejo.

Other Issues

The other factual and legal errors are too numerous to name here but are also grounds to reject the *Decision*.

Based on the foregoing, Tanner urges the Board to reject the *Decision* and grant Tanner the pension he has requested.

Sincerely,



John Michael Jensen

JMJ:gm
cc: Joseph Tanner

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DATE: February 4, 2013

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Re: Respondent's Argument: In Re Joseph Tanner and City of Vallejo, Respondents

CalPERS Case No. 9796, OAH Case No. 2011060337

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