ATTACHMENT C

RESPONDENTS ARGUMENTS

Submitted

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Fax:	(916) 795-3972	Pages:	3
Phone:		Date:	October 4, 2013
Re:	Respondent City's Argument: In the Matter of the Applicability of Government Code Section 20638 to Member Fred Guido: FRED GUIDO, Respondent, and CITY OF CUDAHY, Respondent, Case No. 9711	cc:	

☐ Urgent ☐ For Review ☐ Please Comment or Reply ☐ Please Sign and Return

● Comments:

Please see attached letter.

Attachment C

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October 4, 2013

VIA FACSIMILE AND U.S. MAIL
Fax No.: (916) 795-3972

CalPERS Board of Administration
c/o Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, California 94229-2701

Re: Respondent City's Argument: In the Matter of the Applicability of Government Code Section 20638 to Member Fred Guido: FRED GUIDO, Respondent, and CITY OF CUDAHY, Respondent, Case No. 9711

Dear CalPERS Board of Administration:

I serve as counsel for Respondent City of Cudahy (the "City") in the above-referenced matter (the "Matter"). This correspondence constitutes the City's responsive argument to the August 6, 2013 proposed decision (the "Proposed Decision") of Eric Sawyer, Administrative Law Judge of the Office of the Administrative Hearings in this Matter. Judge Sawyer erroneously concludes that Respondent Fred Guido ("Guido") is entitled to reciprocity pursuant to Government Code section 20638 thereby enabling him to have his compensation from his service as a member of Los Angeles County Employees' Retirement Association (LACERA) figure into the calculation of his retirement benefits under CalPERS. The City requests that the Board reject the Proposed Decision because: 1) Government Codes sections 20638 and 20355 preclude reciprocity; 2) Guido has failed to meet his burden of satisfying the elements of estoppel; 3) estoppel is not available as a matter of law; and 4) Guido's other theories do not save his estoppel claim.

Government Code sections 20638 and 20355 allow a CalPERS member to use his highest salary while working under a LACERA-participating employer to calculate his CalPERS' pension retirement allowance, if he: 1) leaves employment under one system; 2) establishes employment under the other system within six (6) months; and 3) retires concurrently from the two systems. Guido did not satisfy the first two requirements of Government Code sections 20638. Guido terminated his employment with the City in April of 1982. In order to be eligible for reciprocity and thereby have his earnings while working under Los Angeles County (a LACERA-participating employer) considered for the purpose of determining his retirement benefits under CalPERS, he must have entered into employment within a LACERA-participating employer no later than September 1982. Since he did not enter into employment with Los Angeles County until December 1996, over fourteen (14) years later, the statutory provisions preclude Guido from reciprocity.

In this proceeding, Guido had the burden of proving the elements of estoppel as follows: 1) CalPERS was apprised of the facts; 2) CalPERS intended that its conduct would be acted on, or must have so acted that Guido had a right to believe it was so intended; 3) Guido was ignorant of the true state of facts; and 4) Guido reasonably relied on CalPERS conduct to his injury.

Guido failed to satisfy the third and fourth elements of his claim because he did not prove that he did not know that he did not qualify for reciprocity and did not prove that he reasonably relied on CalPERS' error to his detriment. All of the information provided to Guido over the course of his employment with the City, as well as with Los Angeles County, clearly states that his employment with the second system must begin within six (6) months of leaving the first system in order for reciprocity to apply. The CalPERS' documents also advised Mr. Guido to read all of the information regarding retirement and reciprocity before making such an important decision. Accordingly, Mr. Guido is unable to demonstrate that he was ignorant of the true facts. In addition, in order to prove that he reasonably relied on CalPERS' inaccurate representations to his detriment, Guido was obligated to prove that would have been hired into a CalPERS job. He only provided evidence of his pursuit of employment opportunities, but did not prove that he would have been hired into a CalPERS eligible job. Therefore, the fourth element of estoppel was not met.

Estoppel is also precluded in this case as a matter of law. It is not available to oppose the statutes or provisions that determine the powers of the government agency to be estopped. In *Medina v. Boar of Retirement* (2003) 112 Cal.App.4th 864, 870, the court held that "equitable estoppel is barred where the government agency to be estopped does not possess the authority to do what it appeared to be doing." In this case, CalPERS employees do not have the authority to calculate pensions greater that the proper amounts determined by state law. Thus, even if Guido relied on the statements of CalPERS staff, estoppel is not available as a matter of law.

Finally, Guido's additional theories for defense to not remedy the defects in his estoppel claim. Rather, these theories either do not apply to the case or simply reiterate the defective estoppel claim. The statute of limitations and laches theories are inapplicable since CalPERS did not assert a claim against Guido. Guido's breach of fiduciary duties claim asserts benefits which restate his estoppel claim which is barred as a matter of law. With regard to both estoppel and breach of fiduciary duties claims, only those benefits allowed by law are eligible to members. *McIntyre v. Santa Barbara County Employees' Ret. Sys.* (2001) 91 Cal.App.4th 730, 734. Consequently, Guido is only entitled to benefits that do not incorporate reciprocity from Guido's tenure under LACERA.

For the foregoing reasons, the City respectfully requests that the Board reject the Proposed Decision in accordance with Government Code section 11517.

Very truly yours,

Isabel Birrueta
Attorney for Respondent, City of Cudahy

cc: Albert Santos, Acting City Manager *(Via -Email Only)*
Steven Dobrenen, Finance Director *(Via -Email Only)*
Rick R. Olivarez, City Attorney *(Via -Email Only)*

Attachment C

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October 4, 2013

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701

Re: In the Matter of the Application to Establish Reciprocity:
Fred Guido, Respondent, and City of Cudahy, Respondent
CalPERS Case No. 9711, OAH Case No. 2012030387

Dear Ms. Swedensky:

Pursuant to the August 16, 2013 letter from Roland Hyatt of the CalPERS Legal Office to me, I am enclosing Respondent Fred Guido's Argument in support of the Board of Administration's adoption of the *Proposed Decision* in the above matter.

I am also asking the Board to designate the *Proposed Decision* as precedential.

Pursuant to Mr. Hyatt's letter, the deadline for this submission is October 4, 2013. This *Respondent's Argument* is timely submitted.

Should you have any questions, please do not hesitate to contact me at your earliest convenience.

Sincerely,

John Michael Jensen

JMJ:gm
Enclosure
cc: Fred Guido, OAH

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October 4, 2013

Re: Respondent Fred Guido's Argument for Adoption of *Proposed Decision*

To CalPERS Board President Feckner, Board Vice President Diehr, Board Member Bilbrey, Board Member Chapman, Board Member Chiang, Board Member Costigan, Board Member Jelincic, Board Member Jones, Board Member Lind, Board Member Lockyer, Board Member Mathur, and Board Member Slaton:

Fred Guido respectfully submits this *Respondent's Argument*. As this Board undertakes a great responsibility, it is worthwhile to carefully read pages 10 through 14 of the meticulously reasoned *Proposed Decision* by Administrative Law Judge Eric Sawyer.

Candidly, ALJ Sawyer's *Proposed Decision* carefully presents both sides of public policy, the PERL statutes, constitutional case law, equitable estoppel, and agency liability.

If you have questions regarding the law in the *Proposed Decision*, I encourage you to request an independent opinion from the California Attorney General's Office. I expect that it will support ALJ Sawyer's reasoning.

In other words, ALJ Sawyer's *Proposed Decision* is legally correct. In the end, this is a question of law. CalPERS must follow the law.

There are no far reaching effects to CalPERS to adopting the *Proposed Decision*. *Equitable Estoppel applies in the exceptional case where government misleads someone to act in a significantly detrimental way that causes the loss of an important right that the person could have otherwise gotten.* For the individual, the person would not have acted in the way that hurt them unless the person relied on the government's misrepresentation.

In other words, equitable estoppel is rare, but it applies to CalPERS. Equitable estoppel does not make CalPERS liable for every single casual mistake. But this *Proposed Decision* is the rare case where equitable estoppel applies.

Underlying this case is CalPERS' duties to provide accurate reliable information to Members that Members can use to plan their lives. As a retirement system, CalPERS undoubtedly wants to be able to give information to its Members that is sufficiently reliable that the Members can make good choices. Often Members make detailed requests over many years to CalPERS about certain issues that only CalPERS can provide reliable information about. Based on the information that CalPERS provides, the Members make important decisions over many years, planning their work, family, investments, careers, and lives based on that information.

So should a Member be entitled to rely on information that CalPERS leads them to believe is correct for years, after many requests, with the result that the Member retires based specifically on that information? Can CalPERS after retirement renege on its promises and then make the Member suffer the consequences, bear the loss or burden alone?

In the *Proposed Decision*, ALJ Eric Sawyer carefully examined each of CalPERS' legal arguments that would cause the Member to suffer alone the loss arising from being misinformed about these important rights. The *Proposed Decision* examined CalPERS' arguments against the availability of estoppel and rejected them one by one. As discussed briefly below and in extraordinary detail in the *Proposed Decision*, Judge Sawyer has found:

(i) The PERL contains statutory authority that would have provided Guido the benefits sought if CalPERS had correctly and timely informed him. CalPERS staff's stark legal argument voiding this Board's power and authority to grant estoppel is unfounded;

(ii) Even more broadly, current California law recognized by the Supreme Court in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 is that estoppel _is_ available against a government entity, *whether or not* the requested relief is within the statutory authority of the governing body, when the injustice that the denial of estoppel would create trumps any effect on public interest that upholding estoppel would create;

(iii) Guido has satisfied all of the necessary conditions to raise estoppel; and

(iv) The granting of estoppel will not open the flood gates to estoppel claims whenever a Member is dissatisfied with CalPERS' advice. Instead, the law creates a narrow, but justifiable, window to provide higher benefits under meritorious estoppel claims that truly rise to the level warranting estoppel.

I. Background

CalPERS' constitutional and statutory mandate is to put the interests of Members over any other duty. (Cal.Const., art. XVI, §17; *Government Code*, §20151.) CalPERS "owes a fiduciary duty to provide timely and *accurate* information to its Members. (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 40.) CalPERS' own precedential decision holds that "[t]he duty to inform and deal fairly with members also requires that the information conveyed be complete and unambiguous." (*In re Application of Smith* (March 31, 1999) PERS Prec. Dec. No. 99–01.)

II. Facts of Claim

CalPERS repeatedly and consistently told Guido over many years of his employment, that he had established reciprocity. Guido had no reason to believe that CalPERS' information was wrong. He relied on CalPERS' inaccurate information in planning for and taking his retirement.

CalPERS repeatedly told Guido that he had established reciprocity, leading him to rely on that until it was too late for him to do anything else. The *Proposed Decision* details the pervasive, continual nature of CalPERS' wrong advice and Guido's reliance, which are summarized briefly as follows:

- In 2003, Guido began thinking of possible future retirement and contacted CalPERS to find out how to "marry" the service between the two retirement systems to maximize his pension allowance. He asked what steps he would need to take to establish reciprocity, including the possibility of leaving LACERA employment and obtaining a job with a CalPERS agency. (*Factual Findings*, Nos. 18-19.)

- The CalPERS representative said she thought he had *already* established reciprocity, but would research it further and send him a letter. Soon after that Guido received a letter from CalPERS which explicitly said that CalPERS had reviewed his account, determined that reciprocity had been established between his CalPERS and LACERA service, and said he had the right to retire based on his highest earnings in either system so long as he retired from both on the same date. (*Factual Findings*, No. 26.)

- CalPERS provided Guido with a retirement estimate in October 2003 utilizing his $10,000 LACERA highest compensation figure. (*Factual Findings*, No. 21.)

- During the same period, Guido consulted with Michael Henry, LA County's Human Resources Director, about possible new jobs. Henry was prepared to help Guido find a job with CalPERS coverage if necessary to help him establish reciprocity. (*Factual Findings*, No. 25.)

- Based on CalPERS' representation that he already had reciprocity, Guido declined Henry's offer to find him a CalPERS-covered position and instead took another LACERA-covered job. (*Factual Findings*, No. 26.)

- In 2007, Guido requested and received another retirement estimate from CalPERS that again utilized his LACERA compensation figure. (*Factual Findings*, Nos. 27-28.)

- As he approached retirement, Guido asked CalPERS to provide him with an official retirement estimate. CalPERS responded by letter in October 2008 which reiterated that he had established reciprocity and provided a retirement estimate utilizing his LACERA highest compensation figure. (*Factual Findings*, No. 29.)

- Guido retired in reliance on CalPERS' long-standing representations. On April 7, 2009, Guido filed his retirement application with the CalPERS regional office in Glendale, indicating that he was retiring simultaneously from CalPERS and LACERA. A CalPERS representative reviewed his application, consulted his electronic file in the CalPERS database, and confirmed that reciprocity had been established. (*Factual Findings*, Nos. 31-32.) He counted on receiving the pension allowance CalPERS promised him as part of those representations.

- After filing both his CalPERS and LACERA retirement applications but before his actual retirement date, Guido was approached about possibly taking an executive-level position with Temple City, a CalPERS-contracting agency. Guido, however, declined the position in large part because he believed he had already established reciprocity. (*Factual Findings*, Nos. 34-35.)

- However, at least weeks prior to Guido's retirement, CalPERS' staff knew or should have known that reciprocity was not established. Unbeknownst to Guido, representatives of LACERA and CalPERS spoke by phone on May 18, 2009, two weeks before Guido's chosen retirement date, and definitively determined that he had <u>not</u> established reciprocity between the two systems. Further, the CalPERS representative conclusively determined *before* Guido's retirement that he had been systematically misinformed for years and made a note of this in Guido's file. Nevertheless, CalPERS again did not tell Guido that he had not established reciprocity (when he still had time to act on it). Unaware, Guido went forward with his retirement as planned. (*Factual Findings*, No. 37.)

- Although CalPERS staff knew that Guido was scheduled to retire in two (2) weeks from both systems, irrevocably setting him on a course headed for shipwreck, CalPERS staff *did absolutely nothing* to inform or communicate to Guido for six (6) weeks.

- Weeks *after* Guido's retirement, CalPERS cavalierly informed him that he did not in fact have reciprocity. Weeks after retirement, CalPERS staff told Guido that he would receive about $3,000 per month less than he had been told he would receive – money he without question had relied on when planning his retirement. (*Factual Findings*, No. 41.)

III. CalPERS' Errors Concerning Reciprocity Advice

Guido's detrimental reliance on CalPERS' assurance of the establishment of reciprocity warrants imposition of estoppel. CalPERS' misrepresentations to Guido were of a serious nature, frequency and duration about important rights.

At the hearing, CalPERS' "person most knowledgeable" ("PMK") about reciprocity testified that reciprocity is an important benefit to Members and could have significant financial impact. She agreed that it would be important to correctly inform Members about their reciprocity status before they retired. (*Factual Findings*, No. 47.)

The PMK, however, freely admitted that CalPERS failed to conduct the investigation necessary to establish whether Members asking about reciprocity had established it, and that it regularly *misinformed* Members over many years that they had established reciprocity when they had not. (*Factual Findings*, No. 48.) She testified that she established a new protocol after becoming head of the Retirement Estimate Unit to make sure reciprocity was actually confirmed before Members were told it had been established (*Factual Findings*, No. 48), but acknowledged that staff failed to follow the new protocol and had *continued* misinforming Members.

Although the PMK testified that she had access to the searchable CalPERS Customer Touch Point database which could have been utilized to identify Members who had sought information or advice about reciprocity, she said neither she nor anyone in her department had done so. (*Factual Findings*, No. 51.) The ALJ also noted that CalPERS could have issued a notice in Members' annual statements asking them to contact CalPERS about reciprocity determinations but did not. (*Legal Conclusions*, No. 8C.)

In short, when CalPERS had the knowledge and opportunity to correct its errors in a way that Members could effectively change their retirement planning, CalPERS did nothing to correct the false information that it had provided to Members that reciprocity was established. Guido's situation was no fluke, but the logical outcome of a policy and practice by CalPERS of callously ignoring its fiduciary duty to "provide timely and *accurately* information to its Members". (*City of Oakland, supra.*)

IV. Applicable Law Governing Estoppel

CalPERS' legal staff argued in this case that estoppel can never apply to CalPERS, no matter how long it has misinformed a Member or how egregious that misrepresentation has been, so long as CalPERS can point to some element of the PERL allegedly justifying CalPERS' actions. Indeed, CalPERS' legal staff has made the same argument in other cases. Judge Sawyer systematically examined and rejected each of CalPERS' legal arguments, summarized briefly as follows:

- Judge Sawyer identified the pivotal issue as whether estoppel is available against government entities like CalPERS, referencing CalPERS' reliance on *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864 and *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522 for the proposition that "estoppel is barred where the government agency to be estopped does not possess the authority to do what it appeared to be doing." (*Medina, supra*, at 870.) As Judge Sawyer pointed out, both cases are vastly different.

- The *Medina* court denied estoppel after finding that the Los Angeles County Employees' Retirement Association board lacked authority to classify plaintiffs as safety officers when they performed no safety duties. As the *Proposed Decision* points out, however, Section 20125 of the PERL grants the CalPERS Board authority to "judge ... conditions under which persons may be admitted to and continue to receive benefits under this system." Forty years ago the appellate court in *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567 imposed estoppel against CalPERS, citing to that precise code section.

- In *City of Pleasanton*, plaintiff was denied credit for standby pay because he could cite no statutory authority to include it in pensionable compensation. As the *Proposed Decision* notes, by contrast, Section 20039 permitted Guido to increase his final compensation in CalPERS simply by finding a CalPERS-contracting job – something he testified he was prepared to do but for CalPERS' assurance that he had reciprocity.

- Judge Sawyer then went on to point out that the Supreme Court in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 ruled that even without statutory authority, "estoppel is available against a government entity, whether or not the requested relief is within the legal authority of the government agency in question, 'when the elements requisite to such an estoppel against a private party are present and ... the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.' " (*Legal Conclusions*, No. 8A, quoting *Mansell.*)

- Judge Sawyer recounted (i) the repeated representations to Guido that he had reciprocity, (ii) CalPERS staff's actual knowledge that misrepresentations on reciprocity were not accurate, (ii) CalPERS staff's failure to do anything to identify the misinformed Members; (iii) CalPERS staff's failure to correct the false information, (iv) CalPERS staff's explicit knowledge *prior* to Guido's retirement that Guido had <u>not</u> in fact established reciprocity but (v) CalPERS staff's failure to inform him until a month <u>after</u> he retired (and after it was too late for Guido to effectively correct his career choices) . (*Legal Conclusions*, No. 8C.) Judge Sawyer found that all this "is such that fraud would result if an estoppel were not raised." (*Ibid.*)

- The *Proposed Decision* notes that estoppel would be available to a much smaller number of CalPERS Members than claimed (*Legal* Conclusions, No. 8D) and dismisses the argument that granting estoppel to Guido would be against public interest because CalPERS is funded by public tax payers, noting that the same would apply to any government entity (*Legal Conclusions*, No. 8E).

- Finally, the *Proposed Decision* rejects CalPERS' claim that the equities tip against Guido because he is seeking an alleged "windfall", noting (a) that the Legislature explicitly allowed the benefits Guido seeks under Section 20039, benefits he would have every right to claim under reciprocity had CalPERS simply given him accurate information and afforded him the opportunity to take a CalPERS-covered job, and (b) CalPERS' actions were such that "[i]f this case supports a public policy or interest, it is that when the government systematically misinforms its constituents about something material to their lives, subsequently learns of that but then fails to take any action to mitigate the situation, it is in the public interest to allow those potentially harmed to seek equitable avenues of redress, including estoppel." (*Legal Conclusions*, No. 8F.)

V. Conclusion

In a fair and unbiased interpretation of existing law, ALJ Sawyer carefully examined each of CalPERS' arguments, found them unpersuasive, and rejected them. In detail, Judge Sawyer's *Proposed Decision* meticulously considers all legal elements of estoppel and conclusively finds that estoppel *is* available against CalPERS. (*Legal Conclusions*, Nos. 7-8.) As part of his ruling, Judge Sawyer finds that the number of cases where estoppel would apply is likely quite small, but that they do exist and similar interpretations of the law would apply.

As far as whether equitable estoppel can be applied, the Board should consider the following logic: does CalPERS have the authority to grant reciprocity at all? The answer is clearly yes. Did CalPERS inform Guido and others that they had established reciprocity? The answer is yes. Did Guido rely on it? The factual finding is yes. If Guido had known that he had not established reciprocity, would he have taken a CalPERS job and established reciprocity? The factual finding is yes. If that course had been taken, there would be no issue before you on appeal. Guido would have reciprocity. But because CalPERS misinformed Guido while at the same time CalPERS has the authority to establish reciprocity at that time, then it is appropriate to grant Guido the benefit of reciprocity under equitable estoppel.

Although popularly stated in movies and elsewhere, the saying "With great authority comes great responsibility" applies directly to the Board here. Rather than limiting CalPERS authority, the attached *Proposed Decision* wisely and legally implements CalPERS' authority.

Adoption of the *Proposed Decision* would also give the Board the opportunity to ensure that CalPERS' employees take greater care to advise membership correctly. Although limited and rare, estoppel *can* apply against CalPERS when it conducts itself as it did in Guido's case.

Guido respectfully seeks (i) Board approval of the *Proposed Decision*; and (ii) adoption of the *Proposed Decision* as a precedential decision in order to guide CalPERS' actions in the future.

Sincerely,

John Michael Jensen

JMJ:gm
cc: Fred Guido, OAH

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FACSIMILE TRANSMITTAL

DATE: October 4, 2013

TO: Cheree Swedensky, Assistant to the Board
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Received

OCT - 4 2013

CalPERS Board Unit

FROM:

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<u>Re: In the Matter of the Application to Establish Reciprocity: Fred Guido, Respondent, and City of Cudahy, Respondent</u>
CalPERS Case No. 9711, OAH Case No. 2012030387