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9 **BEFORE THE BOARD OF ADMINISTRATION**
10 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

11 In the Matter of Applicability of Government
Code Section 20638 to Member Fred Guido:

Case No. 9711
OAH No. 2012030387

12 FRED GUIDO,

CALPERS' POST-HEARING BRIEF

13 Respondent,

Hearing Date: November 13, 2012 through
November 16, 2012 at 9:00 a.m.

14 CITY OF CUDAHY,

Place: Office of Administrative Hearings
320 West Fourth St.,
6th Floor, Suite 630
Los Angeles, CA

15 Respondent.
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**STATE'S
EXHIBIT
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I. INTRODUCTION

When a member of CalPERS retires, his pension is determined under the provisions of the Public Employees' Retirement Law, Government Code sections 20000, *et seq.* ("PERL"). The computation of a CalPERS member's retirement allowance is based, in part, on that member's "compensation earnable" while working for a CalPERS-eligible employer. If a member satisfies the requirements of PERL section 20638, his "compensation earnable" may be based on his highest salary earned while working under another public retirement system, such as the Los Angeles County Employees' Retirement Association ("LACERA"). This is commonly referred to as "reciprocity."

Prior to 1994, there was a loophole in the PERL that was resulting in windfall benefits being paid to local officials. That windfall arose from the fact that local officials were receiving full-time service credit for part-time service. In many cases, officials received nominal pay for their part-time service. The contributions that they and their local governments paid to fund their CalPERS retirement benefits were based on that nominal pay. But, if a local official also was employed in a regular full-time CalPERS-eligible job, or in a job entitling him to reciprocity, he could apply his highest "compensation earnable" from that full-time job to all years of service credit in CalPERS, including the service credit he earned as part-time official for nominal pay. The Legislature closed this loophole in 1994, but only for future local officials as of July 1, 1994. Thus, local officials who served before July 1, 1994 can still take advantage of this loophole.

Fred Guido is a former local official who, in theory, can still take advantage of this historical loophole, based on his service on the Cudahy City Council from 1970 to 1982. Guido contends that he would have taken a CalPERS-eligible job at the end of his career in order to increase his CalPERS retirement allowance, if he had known that his service under LACERA did not allow him to achieve essentially same result. He claims that, because CalPERS misinformed him that his highest pay from Los Angeles County would apply to his 12 years of CalPERS service credit under PERL section 20638, he decided not to pursue

1 employment in a CalPERS-eligible job. Guido argues that CalPERS should be required to
2 grant him reciprocity, even though he does not qualify for reciprocity under PERL section
3 20638. This would increase his retirement allowance from less than \$1,000 per year to
4 almost \$40,000 per year, for the rest of his life (plus annual cost of living increases). This
5 amount would be paid in addition to his LACERA retirement allowance, which is based on
6 his 17 years of service and highest pay from Los Angeles County. Guido's LACERA
7 retirement allowance is not at issue in this administrative appeal.

8 Guido's appeal should be denied because he failed to meet his burden of proof on his
9 equitable estoppel claim. CalPERS concedes that by human error, computer error or some
10 combination of both, CalPERS incorrectly informed Guido that his highest salary from Los
11 Angeles County would apply to his 12 years of service credit with CalPERS. That fact,
12 however, is not enough for Guido to satisfy his burden of proof on the four required elements
13 of his equitable estoppel claim. As we explain in Section IV(A), *infra*, Guido fails to satisfy
14 his burden of proof on the third and fourth elements of his estoppel claim.

15 Further, even if Guido had satisfied his burden of proof on all four elements, equitable
16 estoppel would be unavailable to him as a matter of law. As we explain in Section IV(B)
17 *infra*, equitable estoppel may not be applied to expand statutory rights. A CalPERS
18 member's rights must be governed by the PERL; not the errors of CalPERS' staff members
19 and computer systems. This legal principle has been applied to public employees' retirement
20 benefits in several published cases, most recently in *City of Pleasanton v. Board of*
21 *Administration* (2012) 211 Cal.App.4th 522, which found estoppel to be "barred as a matter
22 of law" to expand the statutory rights of CalPERS members. *Id.* at 543.

23 Finally, even if Guido could meet his burden of proof on all required elements, and
24 even if equitable estoppel were legally available to him, to apply estoppel against CalPERS
25 the Court would have to balance the equities and find that this is one of those "rare" and
26 "exceptional" cases in which estoppel can be applied against a public agency. *See City of*
27 *Long Beach v. Mansell* (1970) 3 Cal.3d 462. As we explain in Section IV(C), *infra*, the
28 balance of the equities in this case weighs against applying equitable estoppel.

1 **II. THE RULES OF RECIPROCITY**

2 PERL section 20638 allows a CalPERS member to use his highest salary while
3 working under a LACERA-participating employer to calculate his CalPERS' retirement
4 allowance, if he (1) leaves employment under one system, (2) establishes employment under
5 the other system within six months, and (3) retires concurrently from the two systems.¹
6 These requirements of section 20638 are not in dispute. Further, the parties agree that Guido
7 did not satisfy the first two requirements of section 20638, although he did satisfy the third
8 requirement. *See* Guido Post-Hearing Brief at 3:1-4 ("this Appeal does not contest the law
9 and factual issues that Guido had not met the technical requirements of the reciprocity
10 provisions of the Public Employees' Retirement Law.")

11 **III. THE UNDISPUTED FACTS**

12 Many of the underlying facts are not in dispute and, therefore, CalPERS will only
13 briefly summarize the undisputed facts, which are already set forth in Guido's Closing Brief.
14 In Section IV ("Argument"), *infra*, we provide the additional relevant facts that were
15 established by the evidence at the hearing.

16 Between 1970 and 1982, Guido served as an elected member of the Cudahy City
17 Council. Guido received \$150 per month for his service. Guido's and the City of Cudahy's
18 contributions to CalPERS to fund his retirement benefits were determined as percentages of
19 that \$150 monthly pay. Guido has over 12 years of service credit in CalPERS based on the
20 time he served on the Cudahy City Council. *See* Guido's Post-Hearing Brief at page 6.

21 From 1973 to 1977, while still serving on the City Council, Guido also became
22 employed by the Los Angeles County Sheriff's Department. He remained a Los Angeles
23 County employee until November 1977, at which time he separated from service. *Id.* at
24 pages 6-7.

25 Between 1982 and 1996, Guido was employed only in the private sector and was
26

27 ¹ Section 20638 establishes the basic right with a 90-day window. Section 20355 then expands that 90-day
28 window to six months for Guido.

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1 therefore not an active member of either CalPERS or LACERA. *Id.* at page 7.

2 Guido returned to employment with Los Angeles County in 1996, more than 14 years
3 after his last service as a member of the Cudahy City Council. In that capacity he returned to
4 active membership in LACERA. He remained a Los Angeles County employee until his
5 termination of employment and retirement from the County on or about June 1, 2009. *Id.* at
6 pages 7 and 12.

7 Guido concedes that, based on this work history, he does not qualify for reciprocity
8 under PERL section 20638, because (a) he never terminated his CalPERS-eligible service
9 before starting his first LACERA-eligible service in the 1970s (i.e., he had “concurrent”
10 service); and (b) there was a 14-year break in service between his termination from his
11 CalPERS-eligible service and his second period of service in a LACERA-eligible service.
12 *See* Guido’s Post-Hearing Brief at 3:1-4.

13 On several occasions between 2003 and 2008, Guido requested that CalPERS staff
14 generate retirement allowance estimates for him. In CalPERS’ communications providing
15 those estimates to Guido, CalPERS staff mistakenly communicated that he had established
16 reciprocity. *Id.* at pages 7-8. According to Guido, CalPERS staff members also
17 communicated this inaccurate information to him orally on several occasions. *Id.* at page 12.
18 Based on salary information provided by Guido, CalPERS staff used salaries as high as
19 \$11,838 per month to generate Guido’s retirement allowance estimates, which resulted in an
20 unmodified retirement allowance estimate of over \$3,300 per month. *Id.* at page 8; Exs. 207
21 and 208.

22 After Guido filed his retirement application, CalPERS staff discovered its errors and
23 therefore denied Guido reciprocity. *Id.* at page 13. Thus, under the ordinary operation of the
24 PERL, his retirement allowance was based on the \$150 per month of “compensation
25 earnable” that he earned when he was a member of the Cudahy City Council, resulting in a
26 monthly benefit of approximately \$70 per month. *See* Ex. 216.

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1 **IV. ARGUMENT**

2 **A. Guido Has Not Met His Burden Of Satisfying The Elements Of Estoppel**

3 Guido has the burden of proof in this proceeding. *See Coffin v. Alcoholic Beverage*
4 *Control Appeals Bd.* (2006) 139 Cal.App.4th 471, 476 (holding that the person against whom
5 the statement of issues is filed “bear[s] the burden of proof at the hearing regarding the issues
6 raised”). To meet his burden on the elements of estoppel, Guido has to prove that: (1)
7 CalPERS was apprised of the facts; (2) CalPERS intended that its conduct would be acted
8 on, or must have so acted that Guido had a right to believe it was so intended; (3) Guido was
9 ignorant of the true state of facts; and (4) Guido reasonably relied on CalPERS conduct to his
10 injury. *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28; *Doheny Park Terrace*
11 *Homeowners Assn., Inc. v. Truck Insurance Exchange* (2005) 132 Cal.App.4th 1076, 1098
12 (reliance must be “reasonable”).

13 **1. Guido did not satisfy his burden on the third element of his claim**

14 Guido did not satisfy the third element of his estoppel claim because he knew or
15 should have known that he did not qualify for reciprocity.

16 In *City of Pleasanton, supra*, 211 Cal.App.4th at 544, the court explained that a
17 person asserting equitable estoppel must prove he “did not have notice of facts sufficient to
18 put a reasonably prudent man upon inquiry, the pursuit of which would have led to actual
19 knowledge.” The court then held that the applicable provision of the PERL, the related
20 Board Regulation and the terms of the compensation plan at issue in that case “should have
21 put the city on notice the extra pay might not be pensionable.” *Id.* at 544.

22 Guido was as high-ranking public employee, who had experience reviewing,
23 interpreting and applying law. RT2 at 8:15-12:21. He had received and reviewed numerous
24 materials from both CalPERS and LACERA that clearly explained both (a) the six-month
25 window for establishing reciprocity, and (b) the concurrent service prohibition. *See* Ex. 6 (at
26 PERS 75); Ex. 34 (at LA 028); Ex. 35 (at LA 073); Ex. 36 (at LA 119); Ex. 42 (at LA 202);
27 Ex. 45 (at LA 318); Ex. 204 (at FGUIDO 000041); RT2 at 32:1-33:3 and 35:20-37:20.

28 On direct examination, Guido gave no indication that he knew the rules of reciprocity

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1 before he started asking questions of CalPERS. Indeed, he testified that he had no opinion
2 “about whether reciprocity applied to [his] case.” RT1 at 78:14-17. On cross-examination,
3 however, Guido admitted that he understood those reciprocity rules before he started asking
4 CalPERS whether he was entitled to reciprocity.² RT2 at 43:16-24. On re-direct, he then
5 testified that the purpose of his inquiries of CalPERS was “to find out how [he] could
6 remarry [his], or reconnect rather, [his] county time with [his] CalPERS time to take
7 advantage of the 12 years that [he] had with CalPERS.” RT2 at 79:11-80:4. He testified that
8 the information he initially received from CalPERS indicating that he had established
9 reciprocity was “speciously favorable.” RT2 at 83:13-19. Upon receiving the inaccurate
10 information from CalPERS that he had already established reciprocity, he then made the
11 assumption that he had somehow been “grandfathered in” to different rules than the only
12 rules he had ever reviewed. RT2 at 80:16-81:19. This assumption was not based on any
13 information that he had received from CalPERS or any other source. RT2 at 112:1-6. He
14 made no effort at all to confirm that his assumption was accurate. RT2 at 112:18-114:6.
15 Guido explained his rationale for not making any efforts to confirm his assumption: “I was
16 pleased that I had this letter. I didn’t feel I had a duty to investigate to find how they came to
17 that conclusion.” RT2 at 112:22-24.

18 Rather than taking the steps that a reasonably prudent person would have taken to
19 determine whether he actually had been “grandfathered in” to some unspecified set of rules
20 that were different than the rules appearing in the numerous written materials he received
21 from CalPERS and LACERA, Guido just kept asking for the same types of reciprocal
22 retirement estimates, which elicited the same response from CalPERS each time. He never
23 asked CalPERS how he could have established reciprocity given that he knew he did not
24 qualify under the only rules he had ever reviewed. The most reasonable inference that
25 emerges from Guido’s conduct is that he was hearing the answer he wanted to hear. He
26

27 ² “Q: Okay. So, in 2003, you were aware that for reciprocity to apply you had to join your second system within
28 six months after terminating with your first system; is that right? A: Yes, that’s right. Q: And you were aware
specifically that you had to terminate with your first system; is that right? A: Yes.” RT2 at 43:16-24.

1 asked CalPERS the same question over and over again and received the same answer in
2 response each time, based on the same flaw in CalPERS' systems. Whether consciously or
3 subconsciously, he chose not to dig any deeper, even though he had enough information to
4 put a reasonably prudent man on inquiry notice that something might be amiss.

5 In sum, the preponderance of the evidence demonstrated that Guido had "notice of
6 facts sufficient to put a reasonably prudent man upon inquiry, the pursuit of which would
7 have led to actual knowledge" and, therefore, Guido failed to satisfy his burden of proof on
8 the third element of his estoppel claim. *City of Pleasanton, supra*, 211 Cal.App.4th at 544.

9 **2. Guido did not satisfy his burden on the fourth element of his claim**

10 Guido did not satisfy the fourth element of his claim because he did not prove that he
11 reasonably relied on CalPERS' error to his detriment.

12 ***Community Development Department Job***

13 Guido did not apply for the Community Development job and he was not interviewed
14 for that job. RT2 at 146:13-20. He put no documents into evidence regarding that job or his
15 alleged qualification for it. He did not call any witness who had hiring authority over that
16 job. The one witness (other than Guido himself) who testified about the Community
17 Development job, Mr. Henry, testified: "I wasn't in the position to make them hire him. I
18 could only offer him to them and give them the credentials and show how he fit in that
19 particular position." RT2 at 130:18-21. No witness with hiring authority testified that Guido
20 was qualified for the job, much less that he would have been hired for the job. This Court
21 explained when striking hearsay testimony: "I think we would need someone to come
22 forward and say 'yes, we were familiar with Mr. Guido and, yes, we would have hired him'
23 to prove the point that Mr. Guido would have gotten the job." *See* RT2 136:21-24. Even
24 after receiving this ruling of the Court while there was still time to put on evidence in
25 support of his claim, Guido failed to present testimony of a witness with hiring authority to
26 provide that type of testimony and he offered no explanation for his failure to do so. *See*
27 Evid. Code § 550(b) ("The burden of producing evidence as to a particular fact is initially on
28 the party with the burden of proof as to that fact.")

1 ***Temple City Job***

2 Guido did not apply for the Temple City job and he was not interviewed for that job.
3 RT2 at 48:16-24. He put no documents into evidence regarding that job or his alleged
4 qualification for it. The one witness (other than Guido himself) who testified about the
5 Temple City job, Mayor Yu, was one of five voting members of the City Council, which had
6 hiring authority for the job. In responding to the question of whether he had authority to hire
7 Guido, Mayor Yu testified: “No, sir. I am one of the five City Council members.” RT1 at
8 31:4-7. Thus, at least two other members of the City Council would have had to vote to hire
9 Guido. RT1 at 38:19-22. There was no evidence that any of the other four members of the
10 City Council would have voted to hire Guido. To the contrary, Mayor Yu testified that, in a
11 closed session meeting on May 5, 2009, the City Council rejected the idea of hiring Guido
12 outside of the normal competitive hiring process “because the rest of the City Council
13 members ... were not familiar with Mr. Guido ... the plan was to appoint somebody ... as an
14 acting interim, and then to look for other avenues.” RT1 at 47:15-48:11.

15 Thus, the City Council began the normal competitive process. Mayor Yu testified
16 about a multi-stage hiring process in which the City Council and its consultants reviewed
17 approximately 18 to 20 applicants, who were initially narrowed down to five, then two, and
18 then the City Council made the final selection. RT1 at 42:23-43:19. There was no evidence
19 that Guido would have moved on through any of these stages, much less that he would have
20 been chosen over the other 18-20 candidates who had applied.

21 Guido implicitly concedes the failure of his evidence on the fourth element of his
22 estoppel claim. He argues: “The essence of the matter, however, is not whether Guido
23 would have been offered or would have taken any specific CalPERS position. The issue is
24 *whether he would have pursued such options if he had been told by CalPERS that reciprocity*
25 *did not exist.”* Guido’s Closing Brief at 38:9-11 (italics and underlining in original). This
26 argument is flawed on its face. “Pursuing” a CalPERS eligible job would not have increased
27 Guido’s benefits. Only being hired into a CalPERS eligible job could have accomplished
28 that. Thus, to prove that he reasonably relied on the inaccurate information he received from

1 CalPERS, it was Guido's burden to prove by the preponderance of the evidence that he
2 would have been hired into a CalPERS job. He failed to meet that burden.

3 Further, if CalPERS-eligible jobs were truly Guido's for the taking as he claims, there
4 was nothing preventing him from applying to those jobs after he knew that his reciprocal
5 status was in question at both LACERA and CalPERS. The Temple City job was not filled
6 until about five months after Guido knew that CalPERS' prior communications were in error
7 and he still had plenty of time to participate in the application process for that job. Indeed, in
8 late May 2009, in response to LACERA's May 19, 2009 denial of reciprocity, Guido
9 consulted with two lawyers about his potential reciprocal rights long before the time had run
10 out to apply for the Temple City job. Ex. 214; RT1 at 135:15-136:20. In a June 5, 2009
11 communication, Guido received information from CalPERS showing that his benefit would
12 be approximately \$70 per month. Ex. 216; RT1 at 157:22-158:9 and 161:11-23. Guido
13 received written confirmation from CalPERS that it had denied reciprocity in a June 30,
14 2009 letter. Ex. 219. The ads for the Temple City position were not even placed until June
15 2009 and the applications for the position were received in August, according to Mayor Yu's
16 best recollection. RT1 at 34:8-11 and 35:19-21. Thus, if the Temple City job was ever an
17 option for Guido, it was still an option for him after he knew the true facts about his lack of
18 reciprocity. Further, Guido has made no efforts at any time since LACERA and CalPERS
19 denied reciprocity to seek any other CalPERS-eligible job or otherwise find a way to achieve
20 his desired retirement allowance from CalPERS.³ RT2 at 55:1-56:11 and 65:12-66:15 and
21 73:17-74:8 (Q: Did you look into that possibility at all? A: It never --- No. Never crossed
22 my mind.")

23 For these reasons, Guido's alleged reasonable reliance on the inaccurate information
24

25 ³ Contrary to Guido's claims, he did not have to retire concurrently with LACERA to achieve his goal of
26 increasing his CalPERS retirement allowance. Becoming employed in a CalPERS-eligible job for a year would have
27 generated a new and higher "final compensation" and then he would not have to rely on reciprocity at all. Further, the
28 fact that Guido retired effective June 1, 2009 did not prevent him from coming back into active status with a CalPERS-
eligible employer and increasing his retirement allowance. See PERL §21196 (allowing reinstatement). Indeed, the
PERL requires a CalPERS'-eligible employer to re-enroll all full time employees as active members. See PERL §21202
and §§ 21220, *et seq.* (requiring reinstatement for full time employees).

1 he received from CalPERS cannot be based on his claimed decision not to take a CalPERS-
2 eligible job. That is the only theory of reasonable reliance he proffered to this Court and
3 therefore he has failed to satisfy the fourth element of his estoppel claim.

4 **B. Estoppel Is Not Available To Guido As A Matter Of Law**

5 **1. Estoppel may not be applied to expand statutory rights**

6 Estoppel is not available to Guido as a matter of law because “estoppel is barred
7 where the government agency to be estopped does not possess the authority to do what it
8 appeared to be doing.” *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 870;
9 *see also, Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886, 893
10 (“principles of estoppel are not invoked to contravene statutes and constitutional provisions
11 that define an agency’s powers.”). Another court explained:

12 A fundamental maxim of jurisprudence is that equity must follow the law.
13 Equity is bound by rules of law; it is not above the law and cannot controvert
14 the law. Equity penetrates beyond the form to the substance of a controversy,
15 but is nonetheless bound by the prescriptions and requirements of the law.
16 While equitable relief is flexible and expanding, its power cannot be intruded
17 in matters that are plain and fully covered by positive statute. A court of equity
18 will not lend its aid to accomplish by indirect action what the law or its clearly
19 defined policy forbids to be done directly. *Barrett v. Stanislaus County*
Employees Retirement Assn. (1987) 189 Cal.App.3d 1593, 1608 (internal
20 citations omitted)

21 *Medina, supra*, 112 Cal.App.4th 864, is particularly instructive to the present case. In
22 *Medina*, for over ten years, members of a county retirement system relied on
23 communications from the system stating that they were entitled to “safety” status. Indeed,
24 they had made higher contributions to the retirement system based on that “safety” status.
25 Just like Guido, in theory, those members could have pursued a different job, but they
26 allegedly remained in their non-“safety” jobs for over a decade based on the communications
27 from the retirement system stating that they qualified for “safety” status. The court held,
28 however, that equitable estoppel was not available to those members, because “estoppel is
barred where the government agency to be estopped does not possess the authority to do

1 what it appeared to be doing.” *Id.* at 870.

2 Just like in *Medina*, CalPERS’ staff can only calculate members’ pensions in
3 compliance with the PERL and therefore CalPERS’ staff “does not possess the authority” to
4 calculate members’ pensions in amounts that are greater than what is provided for under the
5 PERL. *Medina, supra*, 112 Cal.App.4th at 870. These are matters that are “fully covered by
6 positive statute” (*Barrett, supra*, 189 Cal.App.3d at 1608) and CalPERS may not
7 “contravene statutes and constitutional provisions that define [its] power” (*Fleice, supra*, 206
8 Cal.App.3d at 893). Accordingly, even if Guido relied to his detriment on any statements or
9 omissions by CalPERS’ staff regarding his expected retirement benefits, as a matter of law
10 estoppel would not be available to him. *See also, Molina v. Board of Administration, etc.*
11 (2011) 200 Cal.App.4th 53, 64 (“Molina’s Pension Can Only Be Determined by the
12 Provisions of PERL.”)

13 A few months ago, the First District Court of Appeal resolved any doubt on the
14 question of whether estoppel can be applied to expand a CalPERS member’s rights under the
15 PERL. In *City of Pleasanton, supra*, 211 Cal.App.4th 522, the trial court awarded increased
16 retirement benefits to a CalPERS member based on the trial court’s reading of the PERL and,
17 alternatively, based on equitable estoppel. The First District Court of Appeal found that the
18 trial court had misapplied the PERL and it also reversed the trial court’s equitable estoppel
19 ruling, explaining: “Because we disagree with the trial court’s conclusion, and find section
20 20636 did at all times preclude PERS from treating Linhart’s standby pay as pensionable
21 compensation, we hold any award of benefits to Linhart based on estoppel is barred as a
22 matter of law.” *Id.* at 543. In the present case, Guido concedes that he is not entitled to the
23 benefits he seeks under the PERL. *See* Guido Post-Hearing Brief at 3:1-4 (“this Appeal does
24 not contest the law and factual issues that Guido had not met the technical requirements of
25 the reciprocity provisions of the Public Employees’ Retirement Law.”) Thus, as in *City of*
26 *Pleasanton*, this Court should find that estoppel is “barred as a matter of law.”

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1 **2. Guido’s cited cases are not on point**

2 **a. *Crumpler* Is Not On Point**

3 Guido “principally” relies on *Crumpler v. Board of Administration* (1973) 32
4 Cal.App.3d 567. Guido’s Post-Hearing Brief at 19:22. Indeed, that is the only California
5 published opinion he cites that “upheld the application of estoppel against state and county
6 government retirement associations.” Guido Post-Hearing Brief at 18:21-22.

7 *Crumpler* is materially distinguishable. The court’s conclusion in *Crumpler* appears
8 to have been based on that court’s view that the classification issue in that case (i.e., whether
9 the public employees were “miscellaneous” or “safety” members) involved some exercise of
10 discretion or judgment by the CalPERS Board of Administration. Thus, the court held that
11 “in view of the statutory powers conferred on the board by section 20124 [now 20125], this
12 is not a case where the government agency utterly lacks the power to effect that which an
13 estoppel against it would accomplish.”⁴ *Id.* at 584.

14 Here, the eligibility requirements of PERL section 20638 are clearly stated and do not
15 require any exercise of judgment or discretion. Neither the CalPERS Board nor CalPERS
16 staff has authority to expand the sixth-month window to 14 years or eliminate the concurrent
17 service prohibition. These rules are “plain and fully covered by positive statute” with no
18 room for discretion or judgment. *Barrett, supra*, 189 Cal.App.3d at 1608. Indeed, Guido
19 concedes he does not meet these requirements. Guido’s proposed use of PERL sections
20 20125 (board’s authority to determine benefits) and 20160, *et seq.* (board’s authority to
21 correct errors) would render the PERL meaningless because member rights would be
22 governed by the extent of CalPERS’ errors rather than the provisions of the PERL. Guido’s
23 Post-Hearing Brief at 29:2-13. *Medina* and *City of Pleasanton* control here; not *Crumpler*.

24 _____
25 ⁴ The continuing vitality of *Crumpler* is questionable in light of *Medina* and *City of Pleasanton*. 30 years after
26 *Crumpler*, *Medina* addressed precisely the same classification question as *Crumpler* and rejected any application of
27 estoppel against a county retirement board. Just last year, *City of Pleasanton* held that estoppel cannot be applied against
28 CalPERS to expand statutory rights. Put simply, the relevant case law that has been published in the 40 years since
Crumpler holds that a retirement boards and the staffs working for those boards do not have authority to create new
statutory rights or eliminate statutory requirements for benefits. Accordingly, estoppel may not be applied to create new
rights or eliminate statutory requirements for benefits.

1 **b. *Mansell* is not on point.**

2 Guido also relies on *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, but the
3 unique facts in *Mansell* render it inapplicable here.

4 In *Mansell*, the City of Long Beach sought a “writ of mandate commanding its city
5 manager and city clerk to execute and put into effect certain agreements designed to resolve
6 title and boundary problems in the Alamitos Bay area.” *Id.* at 467. The dispute in *Mansell*
7 arose after a combination of factors cast a cloud on the title to the dry land bordering the bay.
8 *Id.* To resolve the dispute, the Legislature enacted chapter 1688 “disclaiming state and other
9 public interest in certain described lands . . . and authoriz[ed] the settlement of certain
10 boundary questions.” *Id.* After years of negotiation, two agreements were completed to
11 carry out the purposes of the legislation. *Id.* The City Manager and City Clerk of Long
12 Beach, however, refused to execute the agreements because they believed that they were
13 contrary to constitutional and common law prohibitions against the alienation of state-owned
14 tidelands and submerged lands. *Id.*

15 One of the City of Long Beach’s arguments was that the state and city were estopped
16 from reclaiming the land bordering the Alamitos Bay area because the city had exercised full
17 municipal jurisdiction over the area since 1923. *Id.* at 487. During that time, it had granted
18 building permits, approved subdivision maps, constructed and maintained streets and city
19 services and had collected taxes. *Id.* As a result, the City argued that equitable estoppel
20 should prevent the state and city from asserting paramount title to the land. *Id.* The
21 California Supreme Court agreed, finding that it was one of “those exceptional cases where
22 justice and right require[d] that the government be bound by an equitable estoppel.” *Id.* at
23 501 (internal marks omitted). In *Mansell*, the state and the city had conducted themselves as
24 though the land in question was private property wholly free from trust claims for over forty-
25 seven years. *Id.* at 499. In reliance on this conduct, thousands of citizens had settled on the
26 land. *Id.* As a result, the court concluded that “manifest injustice would result if the very
27 governmental entities whose conduct [over a span of forty-seven years had] induced” those
28 citizens to settle on the land were permitted to “assert a successful claim of paramount title.”

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1 *Id.* at 499.

2 Since *Mansell* was published in 1970, numerous published opinions have explained
3 that the application of estoppel against a public agency is “rare” and only available in a
4 “special,” “unusual,” “exceptional,” “unique” or “extraordinary” case, like *Mansell*. For
5 example:

- 6 • *West Washington Properties, LLC v. Department of Transportation* (2012) 210 Cal.App.4th 1136, 1146: “In *Mansell*, our Supreme Court noted that the government will be estopped only in an **‘exceptional’** case.”
- 7 • *Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 259: “estoppel can be invoked in the land use context in only the most **‘extraordinary’** case where the injustice is great and the precedent set by the estoppel is narrow.”
- 8 • *Poway Royal Mobilehome Owners Assn. v. City of Poway* (2007) 149 Cal.App.4th 1460, 1471: “The courts of this state have been careful to apply the rules of estoppel against a public agency only in those **‘special’** cases where the interests of justice clearly require it.”
- 9 • *Seymour v. Cal.* (1984) 156 Cal.App.3d 200, 203: “in **‘unusual’** cases estoppel may be applied against the government.”
- 10 • *Chaplis v. County of Monterey* (1979) 97 Cal.App.3d 249, 259: “It was the extent of reliance which made the *Mansell* case **‘unique’**. The earlier cases frequently declared that estoppels against the government are **‘rare’** and to be invoked only in **‘extraordinary’** circumstances ... Subsequent cases have consistently held to this policy.”

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19 Further, all of the cases we cited in Section IV(B)(1), *supra*, including those that
20 expressly rejected the application of estoppel to expand the statutory rights of public
21 retirement system members, were decided after *Mansell*, which was a unique land use case
22 that expressly set an “extremely narrow precedent.” *Mansell, supra*, 3 Cal.3d at 500.

23 c. ***Hittle and Welch are not on point.***

24 Guido also relies on *Hittle v. Santa Barbara County Employees’ Retirement Assn.*
25 (1985) 39 Cal.3d 374, and *Welch v. California State Teachers’ Retirement Bd.* (2012) 203
26 Cal.App.4th 1, but *Hittle* and *Welch* are not on point. As an initial matter, the word
27 “estoppel” does not even appear in those opinions and those courts certainly were not
28 applying estoppel to expand substantive statutory rights.

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1 In both *Hittle* and *Welch*, the members were eligible to apply for a disability
2 retirement benefits and only failed to take the procedural steps necessary to apply for those
3 benefits, because the retirement systems inaccurately told them they were not eligible.
4 Neither *Hittle* nor *Welch* had to take any other actions, such as applying for and being hired
5 into another job, to avail themselves of the benefits at issue in those cases. They merely had
6 to apply for the benefits.

7 Allowing estoppel to be applied in Guido's case based on *Hittle* and *Welch* would be
8 a dramatic expansion of those cases and would be directly contrary to *Medina* and *City of*
9 *Pleasanton*, which addressed attempts to expand substantive statutory rights by application
10 of estoppel and are therefore much more on point to the question at hand. In *Medina*, the
11 members might have sought different jobs if they had known that they would not be entitled
12 to "safety" status, but the Court held estoppel was unavailable to them when the public entity
13 did not have authority to confer "safety" status on a non-"safety" job. In *City of Pleasanton*,
14 the City and the member argued that they would have converted the "standby pay" at issue in
15 that case to another form of pay that appeared on Board Regulation 571. Even though the
16 employer in that case supported the application of estoppel and was willing to incur the costs
17 of the increased benefits the member sought,⁵ the court confirmed the public policy principle
18 that estoppel cannot be applied to expand statutory rights and therefore was "barred as a
19 matter of law." *City of Pleasanton, supra*, 211 Cal.App.4th at 543.

20 **3. There are strong public policy reasons to not apply estoppel here and the**
21 **balance of equities weighs in favor of not applying estoppel**

22 As explained in *Mansell*, "the government may be bound by an equitable estoppel in
23 the same manner as a private party when the elements requisite to such an estoppel against a
24 private party are present and, in the considered view of a court of equity, the injustice which
25 would result from a failure to uphold an estoppel is of sufficient dimension to justify any
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27 ⁵ In the present case, the City of Cudahy does not support Guido's request and has not agreed to take on the
28 additional liability that would be created by the benefits he seeks.

1 effect upon public interest or policy which would result from the raising of an estoppel.”
2 *Mansell, supra*, 3 Cal.3d at 496. Thus, as Guido acknowledges in his Closing Brief, the
3 Court must balance the equities before applying estoppel against CalPERS here.

4 The California Supreme Court explained in *Mansell*: “Even more significant, we
5 think, from the standpoint of assessing the effect of estoppel upon the public policy in
6 question, is the fact that the rare combination of government conduct and extensive reliance
7 here involved will create an extremely narrow precedent for application in future cases.”
8 *Mansell, supra*, 3 Cal.3d at 500. In contrast, applying estoppel to the present case would set
9 a dangerously broad precedent. Retirement law is highly complex and CalPERS administers
10 contributions and benefits for over 1.5 million active and retired public employees.
11 CalPERS’ systems are designed to implement the law, but no system is perfect, particularly
12 when a complex statutory scheme must be administered for 1.5 million members who all
13 have different circumstances that may impact their retirement rights. If estoppel could be
14 applied in this case, it could be applied in any case where a CalPERS member claims to have
15 relied on inaccurate information from CalPERS before making decisions about where to
16 work and when to retire. All CalPERS members, in theory, have options to pursue other
17 employment and may well make different decisions about which jobs to pursue and when to
18 pursue them if the facts turn out to be different than they may have believed for a time based
19 on inaccurate information they received from CalPERS. Thus, applying estoppel to expand
20 members’ rights under the PERL would cause members’ rights to not be governed by the
21 PERL at all, but rather by how far the errors of the imperfect human beings and computer
22 systems administering CalPERS extend. For all practical purpose, it would give CalPERS’
23 staff the power to rewrite the law passed by the Legislature and signed by the Governor in a
24 democratic process. Unlike *Mansell*, the precedent set by applying estoppel here would not
25 be “extremely narrow”; it would be extremely broad.

26 Further, CalPERS is a public trust fund with no profit motive. Although CalPERS
27 systems were flawed here, there was no evidence that any CalPERS staff member intended
28 to deceive Guido. Applying estoppel against CalPERS does not punish a culpable individual

1 or shareholders of a private corporation, as is the case when estoppel is applied against an
2 individual or a private corporation. Applying estoppel against CalPERS punishes the tax
3 paying public, which is ultimately responsible for funding additional benefits that may be
4 awarded to CalPERS members by estoppel. This is why the rules of estoppel are different
5 when estoppel is asserted against a public entity. Neither CalPERS nor its counsel “makes
6 light” of CalPERS’ errors, as Guido repeatedly claims in his Closing Brief. Nobody is
7 pleased that CalPERS provided Guido with inaccurate information and CalPERS strives to
8 prevent these types of errors. These issues before the Court, however, have important public
9 policy implications that extend far beyond the cast of characters in this particular case.

10 Finally, Guido acknowledges that the Court must balance the equities before applying
11 estoppel against a public agency, but, as he purports to balance the equities he ignores the
12 elephant on the scale: The benefits Guido seeks are “windfall” benefits that should have
13 never been available to Guido or anyone else who lives in a rational and fair society. They
14 were a historical accident; the product of a loophole that should have never existed. The
15 word “windfall” is not merely a rhetorical device in this brief; it is the term the California
16 Legislature itself used to describe the type of grossly inflated benefits Guido seeks.

17 In 1993, Senate Bill 53 was a substantial legislative overhaul of the PERL, which
18 came about “in response to the recently uncovered, but apparently widely used, practice of
19 ‘spiking’ (intentional inflation) the final ‘compensation’ (upon which retirement benefits are
20 based) of employees of [Cal]PERS local contracting agencies.” LH 88. The Legislative
21 History explained: “This bill is intended to address the issue of pension abuse/spiking by
22 public employees who are members of PERS by clarifying the compensation base upon
23 which benefits are calculated and assuring that benefits are actuarially funded over the career
24 of employees.” LH 101.

25 This overhaul of the PERL addressed the problem of “spiking” in its many forms.
26 One form of spiking that SB 53 addressed was the kind of spiking that Guido seeks here.
27 The Legislative History explained that action was necessary to “eliminate windfall benefits
28 to certain elected or appointed board/council members who can now receive full-time PERS

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1 credit for monthly meetings.” LH at 90 (emphasis added). The nature of the windfall was
2 described:

3 Elected or appointed officers receive a year of service credit for each year of
4 tenure in office regardless of the amount of service actually performed. ... In
5 many cases only minimal remuneration is received for service in the office.
6 Frequently, the benefit accruing from this service is substantial because of high
7 final compensation acquired through an other highly compensated position
8 while a member of PERS or of a reciprocal retirement system. This can result
9 in a large unfunded liability for the employer with whom the member served in
10 an elected or appointed capacity. LH 93-94.

11 To address this problem, the Legislature provided that a member with such elected or
12 appointed service would have two separate “final compensations,” with one based on his
13 highest elected/appointed pay applied to that service and the other based on highest pay in
14 any other CalPERS-eligible (or reciprocal) job he may have held while a member of
15 CalPERS or a reciprocal retirement system applied to that other service. *See* PERL §20039.

16 Presumably to avoid costly litigation about changing the law for individuals who had
17 already provided service under the prior law, the Legislature did not close this loophole for
18 those elected/appointed officials who held those positions before July 1, 1994. Thus, in
19 theory, Guido could have taken advantage of this historical loophole and obtained what the
20 Legislature described as “windfall” benefits if he had been hired into a CalPERS-eligible job
21 at full-time pay. But he was not hired into a CalPERS-eligible job at full time pay. Just
22 because windfall benefits theoretically may have been available to Guido, that does not mean
23 this Court should recommend to the CalPERS Board that it award those benefits under a
24 theory of equitable estoppel.

25 The City of Cudahy made contributions on Guido’s \$150 per month pay when he was
26 a member of the City Council. RT1 at 190:4-15. Guido contributed only \$821.41 in
27 member contributions to fund the benefits he seeks from CalPERS. RT1 at 186:14-21.
28 CalPERS erred, but the tax payers would pay the windfall Guido seeks.

Further, whatever mistakes CalPERS made in its communications to Guido (and it
admittedly erred), Guido was at least partially responsible for his claimed misunderstanding

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1 of his reciprocal rights, given that he knew the rules of reciprocity and allegedly based his
2 employment decisions on his own unconfirmed assumption that he had been “grandfathered
3 in” to another set of rules, rather than seek further clarification on that point.

4 For these reasons, even if the Court finds that equitable estoppel would otherwise be
5 legally available to Guido, the balance of the equities weighs against applying equitable
6 estoppel under all relevant circumstances in this case. Put simply, this is not the type of
7 exceptional case, like *Mansell*, that warrants the application of estoppel against a public
8 entity.

9 **C. Guido’s Other Theories Do Not Save His Defective Estoppel Claim**

10 None of Guido’s other theories save his defective estoppel claim. Each one of those
11 other theories “is simply a way of restating his equitable estoppel claim.” *City of*
12 *Pleasanton, supra*, 211 Cal.App.4th at 544.

13 Guido’s statute of limitations and laches theories do not apply at all because CalPERS
14 is not asserting any claim against Guido. CalPERS pays Guido a retirement allowance based
15 on CalPERS’ interpretation of the PERL and Guido asserts a claim that seeks a higher
16 retirement allowance. Statute of limitations and laches defenses are fish out of water in this
17 case. They might have applied against Guido if he had delayed filing his administrative
18 appeal, but they have no potential application to CalPERS, which is responding to that
19 appeal. Further, just like estoppel, “laches is not available where it would nullify an
20 important policy adopted for the benefit of the public.” *Feduniak v. California Coastal Com.*
21 (2007) 148 Cal.App.4th 1346, 1381.

22 Guido also claims that he can achieve the same results he seeks on his estoppel claim
23 through a separate claim that CalPERS breached its fiduciary duties to him and/or that
24 CalPERS could “correct” its errors by paying him benefits for which he does not qualify.
25 CalPERS’ fiduciary duties and its correction statute (PERL section 20160, *et seq.*), however,
26 require CalPERS to bring members’ benefits into compliance with PERL. They do not
27 require, or allow, CalPERS to pay benefits in violation of the PERL. Under PERL section
28 20160(a)(3), CalPERS is authorized to correct errors or omissions of members, contracting

1 agencies, or itself, but not to provide the party seeking correction with a “status, right, or
2 obligation not otherwise available” under the PERL. Guido concedes that “there is no way
3 to now restore Guido’s rights as they existed prior to his retirement, unless CalPERS could
4 ... [do things that are] beyond CalPERS’ statutory authority.” Guido’s Post-Hearing Brief at
5 27:21.

6 Indeed, the court in *City of Pleasanton, supra*, 211 Cal.App.4th at 544, expressly
7 rejected these types of claims, explaining: “In our view, Linhart’s breach of fiduciary duty
8 theory is simply a way of restating his equitable estoppel claim, which we have already
9 found is barred as a matter of law.” The Court further explained that CalPERS’ fiduciary
10 duties and correction authority require it to follow the law governing members’ rights, not
11 expand it. The court explained: “PERS has a duty to follow the law.” *Id.* As another court
12 explained, a retirement board “cannot fulfill this [constitutional and fiduciary] mandate
13 unless it investigates applications and pays benefits only to those members who are eligible
14 for them.” *McIntyre v. Santa Barbara County Employees’ Ret. Sys.* (2001) 91 Cal.App.4th
15 730, 734.

16 V. CONCLUSION

17 For the foregoing reasons, CalPERS respectfully requests that the Court prepare a
18 proposed decision to the CalPERS Board of Administration recommending that it deny
19 Guido’s appeal.

20 DATED: March 21, 2013.

21 REED SMITH LLP

22 By _____
23

24 Jeffrey R. Rigger
25 Attorneys for Petitioner California Public
26 Employees Retirement System
27
28

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105-3659. On March 21, 2013, I served the following document(s) by the method indicated below:

CALPERS' REQUEST FOR OFFICIAL NOTICE AND CALPERS' POST-HEARING BRIEF

by transmitting via facsimile on this date from fax number +1 415 391 8269 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 PM and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing. The transmitting fax machine complies with Cal.R.Ct 2003(3).

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

by placing the document(s) listed above in a sealed envelope(s) and by causing personal delivery of the envelope(s) to the person(s) at the address(es) set forth below. A signed proof of service by the process server or delivery service will be filed shortly.

by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.

by transmitting via email to the parties at the email addresses listed below:

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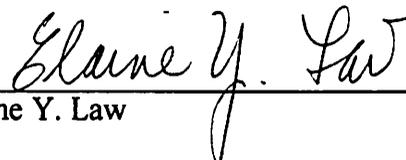
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 21, 2013, at San Francisco, California.



Elaine Y. Law

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