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

11
12 In the Matter of Applicability of Government)
13 Code Section 20638 to Member Fred Guido)

CALPERS CASE NO. 9711
OAH CASE NO. 2012030387

14 **FRED GUIDO,**

FRED GUIDO'S POST-HEARING BRIEF

15 Respondent,

OAH Hearing: November 13-15, 2012

16 and

Hearing Location: Los Angeles OAH

Presiding ALJ: Eric Sawyer

17
18 **CITY OF CUDAHY,**

19 Respondent.
20
21

22 Respondent Fred Guido submits this *Post Hearing Opening Brief* concerning the Office
23 of Administrative Hearings proceedings about his retirement benefits held on November 13-15,
24 2012.
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RESPONDENT'S
EXHIBIT
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INTRODUCTION

1 CalPERS should be estopped to deny Guido reciprocity between CalPERS and
2 LACERA. CalPERS explicitly and repeatedly advised Guido specifically and personally that he
3 *had* established reciprocity. Guido relied on CalPERS' representations in many ways, including
4 to make career choices. CalPERS did not inform Guido that it denied reciprocity until *after* he
5 retired from both CalPERS and LACERA, when it was too late for Guido to remedy the situation
6 in any practical, effective manner.
7

8 Cavalierly disclaiming any responsibility or estoppel obligation, CalPERS freely admits
9 that it wrongly informed Guido about the important reciprocity benefit, but it has offered no
10 relief. (Reporter's Transcript, November 13, 2012, pp 19:10-22:7.¹)

11 Moreover, CalPERS' designated "person most knowledgeable" ("PMK") testified that she
12 knew that reciprocity errors were *routinely* made for a number of years, involving unknown
13 numbers of Members, including Guido.

14 CalPERS' PMK went so far as to testify that CalPERS *knew* such important errors had
15 been made but did nothing to identify or contact the Members who had received misinformation
16 to advise them in order to correct their misunderstanding. (3RT, 16:22-17:5; 3RT, 27:14-20.)
17 CalPERS has constitutional and statutory fiduciary duties to correctly inform.²

BACKGROUND

18
19 Reciprocity is a significant benefit. If a member of more than one public retirement
20 pension system qualifies for reciprocity, that member receives benefits calculated on the basis of
21 his or her highest earnings, regardless of which retirement system that occurred in. The member
22 thereby receives a larger pension.

23 Fred Guido dedicated approximately 25 years of the most productive years of his
24

25 ¹ Citations to the hearing transcripts will be indicated by volume number and page/line
26 numbers, e.g. RT1, 19:10-22:7, with RT1, RT2 and RT3 being the transcripts for the proceedings
27 on November 13, 14 and 15, respectively.

28 ² As a corollary to estoppel, CalPERS is also not immune from tortious misrepresentation
because CalPERS has specific statutory and constitutional obligations to correctly, adequately
and timely inform Guido and other members. (*Government Code*, §818.8, *et seq.*).

1 working life to public service. As a result of his public employment, he was automatically
2 enrolled as a member in the California Public Employees' Retirement System ("CalPERS") or in
3 the Los Angeles County Employees' Retirement Association ("LACERA") throughout all of that
4 time.

5 During the last five and one-half years of Guido's public service (while working in jobs
6 that awarded him LACERA benefits), he specifically and personally sought advice and
7 information from CalPERS about reciprocity between his CalPERS and LACERA service.

8 CalPERS is a fiduciary with statutory and constitutional duties to correctly and
9 unambiguously inform its beneficiaries of their interest as beneficiaries. Beneficiaries are entitled
10 to rely on the information provided by the trustee or fiduciary.

11 As a beneficiary seeking information about the terms of his benefits, Guido made direct
12 personal contact with CalPERS' representatives for information, advice, and details on specific
13 factual and legal issues about how reciprocity applied to him in his situation. As a fiduciary and
14 trust, CalPERS and its authorized representatives accepted Guido's specific inquiries, undertook
15 an independent review, and specifically later advised Guido that reciprocity had been
16 established. Thereafter, CalPERS specifically and repeatedly advised Guido in writing that
17 nothing further needed to be done because he *already had* established reciprocity between
18 CalPERS and LACERA. Guido specifically and detrimentally relied on CalPERS'
19 representations and advice in many ways, including in his end-of-career employment choices and
20 in his retirement plans.

21 As it turned out, CalPERS had provided Guido with reasonable but "incorrect"
22 information, in that the statutory reciprocity requirements had not been met. CalPERS admits
23 that it informed Guido time after time during his entire final five and one-half years of work that
24 reciprocity had been established, through the time of his retirement.³

25
26 ³ Although this information was "reasonable" for Guido and the typical Member to
27 believe, it turned out to be incorrect under the statute. The manner of CalPERS' review and its
28 subsequent unwillingness to correct what it knew to be incorrect information fell below the
standard of care of a fiduciary or a reasonable person. CalPERS knew or expected Members to

1 Urging the Court to estop CalPERS from renegeing on the advice relied upon by Guido to
2 plan his life, this Appeal does not contest the law and factual issues that Guido had not met the
3 technical requirements of the reciprocity provisions of the Public Employees' Retirement Law
4 ("PERL", *Government Code*, §§20000, *et seq.*).

5 Guido recognizes that estoppel is not lightly applied against the government. When
6 determining whether a governmental body will be estopped, it must first be determined whether
7 the traditional elements necessary for assertion of an estoppel against a private party are present,
8 and then the equities must be weighed and the impact on public policy considered. When
9 estoppel is applied against a governmental body, the facts on which such an estoppel must rest
10 go beyond the ordinary principles of estoppel; each case must be examined carefully to ensure
11 that a precedent is not established through which the public interest or public policy is defeated.
12 (2 Cal.Jur.3d, *Administrative Law*, §171.)

13 However, in this case based on these facts and circumstances, Guido has a right to estop
14 CalPERS from denying its representations to him about reciprocity. CalPERS specifically
15 answered his detailed legal and factual questions on complex subject matter over which it has
16 superior knowledge and experience. It is important for estoppel purposes that CalPERS knew
17 that erroneous information about reciprocity was being generated, yet CalPERS did not seek to
18 correct the false impression that it *knowingly* gave about this important benefit.

19 It was not until after he retired from CalPERS that CalPERS notified Guido or even
20 hinted that reciprocity might not apply. A full month *after* he retired from both CalPERS and
21 LACERA, CalPERS informed Guido that CalPERS was wrong and that technically the
22 reciprocity requirements had not previously been established.

23 By then, after retirement from public service, it was too late for Guido to do anything
24 (within his practical options) to establish reciprocity.

25 All four elements of estoppel are satisfied here: (1) CalPERS knew or should have known
26 there was a discrepancy between the reciprocity requirement and the information that it provided

27
28 rely on the reciprocity information that it provided, so CalPERS' failure to correct the
misinformation was negligent, careless, or unsupportable.

1 that reciprocity was established; (2) CalPERS either intended this representation (its failure to
2 identify this discrepancy) be relied upon, or Guido had the right to believe it was so intended; (3)
3 Guido was ignorant of the discrepancy; and (4) Guido relied upon the conduct of CalPERS in
4 making his retirement plans to Guido's injury. (See *Driscoll v. City of Los Angeles* (1967) 67
5 Cal.2d 297, 305.)

6 CalPERS' PMK testified explicitly that CalPERS knew about the existence of or nature
7 and purpose of the reciprocity determination that it had made to Members, including Guido.
8 CalPERS' PMK testified that she established new rules because she knew that many people had
9 been misinformed by CalPERS about the establishment of reciprocity and erroneously believed
10 that reciprocity was established. But when it had the knowledge and opportunity to correct its
11 errors in a way that Members could effectively change their retirement planning, CalPERS did
12 nothing to correct the false information that it had provided to Members that reciprocity was
13 established.

14 Although CalPERS' PMK testified that she had access to the searchable Customer Touch
15 Point database where she could have searched for those Members who had sought information or
16 advice about reciprocity, CalPERS failed to undertake any steps to correct the misinformation
17 about reciprocity that it intentionally led Guido and others to believe. CalPERS did not make
18 efforts to correct the untrue statements to the general membership at all, and only made efforts to
19 correct its incorrect representations to Guido *after* he retired, once this dispute brought the facts
20 to light.

21 Laches also applies to CalPERS. CalPERS knew at the time but failed to correct the
22 misinformation in a timely manner. CalPERS' failure or omission to timely act impaired and
23 negatively impacted Guido. See discussion on laches, *infra*.

24 The PMK testimony establishes the first element of estoppel, that CalPERS knew the true
25 facts. CalPERS' PMK testimony establishes the necessary degree or level of proof of both actual
26 knowledge or of "careless and culpable conduct resulting in the deception of the party entitled to
27 claim the estoppel." (*Banco Mercantil v. Sauls, Inc.* (1956) 140 Cal.App.2d 316.) In light of
28 CalPERS' knowledge that the reciprocity representations were made and then its failure to

1 correct them, the Court must deem CalPERS' actions "careless and culpable".

2 Further, Guido also proved that he "did not have actual knowledge of the true facts [and]
3 did not have notice of facts sufficient to put a reasonably prudent man upon inquiry, the pursuit
4 of which would have led to actual knowledge." (*Banco Mercantil v. Sauls, Inc., supra.*) In fact,
5 Guido made additional inquiries of CalPERS, and CalPERS reinforced his belief that reciprocity
6 had been established.

7 Nothing from CalPERS put Guido on notice that reciprocity had not been established
8 before he retired. While the reciprocity rules are explained in the documents or manual that
9 CalPERS provides, Guido specifically inquired of CalPERS and was specifically told reciprocity
10 had been established after or including his review of documents. Considering all of the
11 circumstances, CalPERS' representation that reciprocity applied, and Guido's direct and specific
12 inquiries to CalPERS about it and Guido's reliance on information received from CalPERS, all
13 support an estoppel remedy. (See also *City of Pleasanton v. Board of Administration of the*
14 *California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 542-544 ("*City of*
15 *Pleasanton*").)

16 Guido requests that the Administrative Law Judge make a proposed decision estopping
17 CalPERS from denying reciprocity, including for example:

18 (1) Finding that CalPERS repeatedly and consistently told Guido that he *had*
19 established reciprocity;

20 (2) Finding that Guido relied upon that advice to his detriment, including the
21 significant difference reciprocity would make in his eventual pension income, in planning his
22 retirement;

23 (3) Finding that Guido suffered significant damages as a result of that reliance,
24 leaving him with a CalPERS pension that is *only about one-fortieth (1/40)* of what he had been
25 promised and justifiably expected to receive; and

26 (4) Estopping CalPERS from denying reciprocity, slashing Guido's pension, and
27 punishing Guido for CalPERS' own errors.

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FACTUAL BACKGROUND

Guido's CalPERS service with City of Cudahy

1. Fred Guido was elected to public office with the city council of the City of Cudahy in March 1970. (1RT, 64:3-8.)

2. Beginning on October 25, 1975, the City of Cudahy contracted with the California Public Employees' Retirement System (CalPERS) to provide pension benefits to city council members. The contract provided city councilmembers with service credit for prior years' service back to April 21, 1970. (1RT, 65:1-66:13.) The City of Cudahy remains a contract city today by *Government Code* definitions.

3. Between 1970 and 1982, Guido served as member of the city council of the City of Cudahy. (1RT, 66:14-16.)

4. Guido's monthly salary as a councilmember for the City of Cudahy was \$150.00 per month. (1RT, 190:4-7.) The salary as public officer was set by the *Government Code* based on the city's population.

5. The City of Cudahy took monthly deductions from Guido's pay checks consisting of State and Federal tax deductions as well as employee contributions to CalPERS.

6. Choosing not to run a fourth term, Guido stepped down from the City of Cudahy city council the second Tuesday of April 1982.

Guido's Earned CalPERS Service Credit

7. Guido's CalPERS service credit spans 12.25 years, with his membership beginning April 21, 1970 and continuing through April 1982. (1RT, 128:14-21.)

8. The five (5) years between April 21, 1970 and October 25, 1975 were credited to Guido. A seven day discrepancy between the membership data form and the letter Guido received exists in the record.

Guido's Service Under Los Angeles County Employees' Retirement Association (LACERA)

9. Guido joined the Los Angeles County Sheriff's Department in March 1973 and was thereafter credited for time and service under LACERA. (1RT, 66:20-67:17.)

10. Guido maintained employment with Los Angeles County through November

1 1977 (approximately four and one half years). (1RT, 66:20-67:17.)

2 11. Guido left the employment of Los Angeles County in 1977 and went into the
3 private sector for the next 19 years. (1RT, 67:18-21.)

4 12. At the request of Los Angeles County Supervisor Don Knabe, Guido returned to
5 employment with Los Angeles County in December 1996 to serve as Supervisor Knabe's Chief
6 of Staff, at which time he began earning additional service credit with LACERA. (1RT, 67:22-
7 68:15.)

8 **CalPERS' Communications to Guido Confirming Reciprocity**

9 13. In or about Fall 2003, Guido began contemplating eventual retirement and sought
10 information about what, if anything, was necessary to get the maximum pension credit for both
11 his CalPERS and LACERA service. (1RT, 68:16-72:21.)

12 14. Guido understood that by law, if he was entitled to reciprocity between the two
13 pension systems, his CalPERS pension would be calculated using his total CalPERS service
14 credit multiplied by his much higher LACERA "final compensation". (1RT, 70:2-7.)

15 15. Guido contacted CalPERS to inquire about the establishment of such reciprocity.
16 (1RT, 71:16-72:21.)

17 16. On October 6, 2003, CalPERS wrote Guido that:

18 CalPERS has reviewed your account and determined that
19 Reciprocity has been established between CalPERS and LACERA.
20 Since you have established Reciprocity, CalPERS will use the
21 highest final compensation earned under either system as long as
22 you retire on the same date under both systems and you are not an
"Elective or Appointed Officer" on or after July 1, 1994.

23 Please provide us with your final compensation amount with
24 LACERA. That final compensation amount may be higher than
your final compensation amount is with CalPERS.

25 (Exh 201.)

26 17. At that point in time, Guido estimated his final compensation with LACERA at
27 \$10,000 per month. Accordingly, CalPERS' retirement estimate in October 2003 utilized the
28 \$10,000 figure as Guido's final compensation amount for all of the service credit he had earned

1 in connection with his City of Cudahy employment. (Exh 202.)

2 18. CalPERS' October 2, 2007 retirement estimate that it provided to Guido included
3 the City of Cudahy as a CalPERS Employer and listed his Final Compensation as \$11,838.00
4 which would have entitled him to greater than \$3,000 a month in a CalPERS pension under
5 reciprocity. (Exh 206.)

6 **CalPERS' Written Determination of Reciprocity**

7 19. As he began to approach retirement, and following the instructions in printed
8 CalPERS' material urging Members to request an official retirement estimate approximately six
9 months before their actual retirement, Guido again asked CalPERS to provide him with such an
10 official retirement estimate. On October 20, 2008, *less than seven (7) months before his*
11 *planned retirement, CalPERS again confirmed reciprocity* and wrote Guido that:

12
13 CalPERS has reviewed your account and determined that
14 Reciprocity has been established between CalPERS and LACERA.

15 Per your request, CalPERS has used the final compensation
16 amount of \$11,838.00 with LACERA. The information in this
17 estimate has been provided by you and has not been verified by
18 your employer. Any changes to your final compensation could
19 affect your retirement estimate and a new estimate would need to
20 be requested.

21 (Exh. 207.)

22 **Guido's Reliance on CalPERS' Communications**

23 20. In Fall 2003, Guido was deciding (i) whether to and (ii) when to leave his
24 employment position with Los Angeles County Supervisor Knabe. (1RT, 68:16-18.)

25 21. At that point in time, Guido was offered several different employment
26 opportunities working for the County of Los Angeles. (1RT, 81:9-86:24.)

27 22. One of those opportunities was with the Los Angeles County Public Works
28 Department, allowing Guido to benefit from his past and current work experience. This position
would increase his LACERA pension. (1RT, 85:16-86:11.)

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1 **Transfer to a CalPERS-Covered Job Was Available**

2 23. Guido also considered a position with the Los Angeles County
3 Department Commission ("CDC"). Although a department of Los Angeles County, employees of
4 the CDC are enrolled in the CalPERS system, rather than in LACERA like the vast majority of
5 Los Angeles County employees. (1RT, 83:10-85:1; 2RT, 128:10-129:25; 2RT, 144:7-25.)

6 24. *Relying on CalPERS' representations that reciprocity had been established,*
7 Guido took into consideration and weighed the opportunities based on the expected amount of
8 salary and total pension benefit (LACERA and CalPERS) associated with the offered positions.
9 (1RT, 81:9-86:24.)

10 25. The expected amounts of salary and total pension benefit to be received were
11 determining factors in Guido's decision. (1RT, 81:9-86:24.)

12 **Guido's Detrimental Reliance on CalPERS' Representations of Reciprocity When**
13 **Choosing Employment**

14 26. When deciding which new job to take in Fall 2003, Guido's choices and
15 opportunities included (1) starting a new position with Los Angeles County in a department that
16 had pension benefits with LACERA and (2) starting a new position with Los Angeles County in
17 the CDC which contracted for pension benefits with CalPERS. (1RT, 81:9-86:24.)

18 27. Based on information and belief, Guido believes that he knows another person
19 who retired after he did who went to work for CDC for the specific reasons to (i) increase his
20 final compensation for his CalPERS service pension and/or (ii) establish reciprocity and link his
21 city council years of service and final compensation with a CalPERS contracting city to his
22 county time and final compensation under LACERA (in order to gain a higher pension). (1RT,
23 81:9-86:24.)

24 28. *Based on CalPERS' representations,* and because CalPERS had repeatedly
25 assured Guido that reciprocity had been established, Guido did not take the CDC position which
26 also would have offered Guido reciprocity and/or provided Guido with a higher CalPERS benefit
27 based on the final compensation earned for that service. (1RT, 84:23-86:24.)

28 29. Specifically, after Guido made an inquiry of CalPERS in September/October of

1 2003, Guido heard directly from CalPERS that reciprocity had already been established. (Exh.
2 201.)

3 30. As a result of CalPERS' representation, Guido opted to transfer to the Los
4 Angeles County Department of Public Works, a LACERA-covered position. (1RT, 85:8-86:13.)

5 31. As a result of CalPERS' representation, Guido declined the opportunity (i) to
6 transfer to another county department (the CDC) which had a pension plan under contract with
7 CalPERS or (ii) to take another CalPERS-covered position. (1RT, 85:8-86:24.)

8 32. Specifically, if Guido had been informed that reciprocity had not been
9 established, then Guido would have taken the CDC position (or another position where the entity
10 had contracted with CalPERS), and as such he would have reinstated in full to CalPERS and
11 increased his CalPERS pension based either on (i) his then earned "final compensation" or (ii)
12 via reciprocity through his prevailing county salary. (1RT, 84:23-86:24.)

13 **Detriment to Guido Caused By CalPERS' Representation That Reciprocity Had Been**
14 **Established**

15 33. By CalPERS' errors and omission misinforming Guido (by CalPERS informing
16 Guido that he had established reciprocity already), CalPERS denied Guido the timely
17 opportunity to establish reciprocity.

18 34. CalPERS' misinformation denied Guido that opportunity to thereby increase his
19 pension benefits to those allowed by law.

20 35. In October 2003, based on CalPERS' representation that reciprocity had been
21 established, Guido took a position as Chief of Administrative Operations with the Los Angeles
22 County Department of Public Works with the same salary he was earning before leaving Los
23 Angeles County Supervisor Knabe's office. The Public Works position provides pension benefits
24 via LACERA and does not have a separate contract with CalPERS. (1RT, 85:4-86:13.)

25 **CalPERS' Further Representations That Reciprocity Had Been Established**

26 36. In Fall 2008, approximately one year before his planned retirement, Guido
27 reassessed his retirement benefits, including medical coverage, monthly stipend, reciprocity and
28 retirement coordination.

1 37. In Fall 2008, Guido again called and inquired of CalPERS about the amount and
2 status of his pension benefits.

3 38. In October 2008, in response to Guido's inquiry, CalPERS sent Guido a letter
4 again confirming that reciprocity had been established. (Exh. 207.)

5 39. In October 2008, in response to Guido's inquiry, CalPERS sent Guido a letter that
6 was personalized to Guido's fact situation. In that letter, CalPERS provided Guido a monthly
7 benefit statement based on projected final year compensation that was determined based on the
8 fact that reciprocity had been established. (Exh. 208.)

9 40. In April 2009 and *after* filing his Service Retirement Election Applications with
10 CalPERS and LACERA, but *before* retiring on June 1, 2009, Guido was approached by a council
11 member of a local city to be hired as a full time interim City Manager of a CalPERS contracting
12 city. (1RT, 28:6-29:7; 1RT, 148:17-149:18)

13 **Detrimental Reliance on CalPERS' Representations By Guido Causes Him Harm**

14 41. On or before April 2009, if CalPERS had made Guido aware of the reciprocity
15 issue in October 2008 or even as late as April 2009 when Guido filed his Retirement Election
16 Application, then Guido would have pursued the opportunity to become the interim City
17 Manager and thereafter reinstate into CalPERS. He would thereby have either (i) increased his
18 CalPERS pension for the increased salary or (ii) separately established reciprocity.

19 42. In April 2009, Guido again considered his employment options. The expected
20 amount of the LACERA and CalPERS pension benefit played a determining factor in Guido's
21 decision whether to retire or whether to continue full-time employment.

22 43. **In April 2009, Guido again relied on CalPERS' representations to him that**
23 **reciprocity had been established.**

24 44. In April 2009, if Guido had known that he had not established reciprocity, then he
25 would have taken the executive level position at the city or pursued employment with some other
26 agency contracting for CalPERS pension benefits and thus earned a higher final compensation
27 rate for his CalPERS position, even if reciprocity with LACERA had not been earlier
28 established.

1 45. In April 2009, CalPERS' misinformation (or its failure to timely inform Guido of
2 his rights) denied Guido the opportunity to establish reciprocity and thereby receive the higher
3 benefit.

4 46. In April 2009, Guido relied on CalPERS' specific representation that reciprocity
5 had been established when he turned down the position at the contracting city. (1RT, 153:10-
6 154:21.)

7 47. In April 2009, Guido relied on CalPERS representations (i) that reciprocity had
8 been established and (ii) that he was entitled to use the highest salary that he earned at LACERA
9 for use in his "final compensation" for his CalPERS pension, when he declined the position as
10 City Manager. (1RT, 153:10-154:21.)

11 48. In April 2009, based on representations from CalPERS that he had established
12 reciprocity, Guido decided not to seek further employment as an interim City Manager with a
13 CalPERS contracting agency or to pursue any other position offering CalPERS membership that
14 would have increased his CalPERS pension benefits. (1RT, 153:10-154:21.)

15 49. Guido remained an employee with Los Angeles County until he retired on June 1,
16 2009.

17 **Guido Retires**

18 50. On April 7, 2009, Guido filed his Service Retirement Election Application at the
19 Regional CalPERS Office in Glendale, California. He indicated on the form that he was retiring
20 from two public employment systems on June 1, 2009 and that he would be using his single
21 highest year of salary with LACERA for purposes of calculating his benefits from both CalPERS
22 and LACERA. (1RT, 113:2-118:13.)

23 51. CalPERS' representative in Glendale who reviewed Guido's application consulted
24 Guido's electronic file in the CalPERS database, and validated that reciprocity had already been
25 established at the time that Guido filed his retirement application. (1RT, 117:9-20.)

26 52. Guido once again relied on the specific representation of the CalPERS
27 representative that reciprocity had been established and that he was entitled to the higher
28 CalPERS benefit when and such that he filed his application.

1 53. Had CalPERS raised questions about reciprocity at that time, Guido would not
2 have filed his retirement application.

3 **CalPERS Reneges on Reciprocity**

4 54. On June 30, 2009, or *nearly three months after Guido submitted his retirement*
5 *application, and a month after retiring*, CalPERS wrote Guido that CalPERS was denying
6 reciprocity. (Exh. 219.)

7 **Guido's Damages**

8 55. CalPERS informed Guido that his CalPERS benefit would be approximately \$70
9 a month instead of approximately \$3,000 a month for the rest of his life. (Exh. 216-219)

10 **Guido Timely Appeals**

11 56. Guido timely filed an Appeal on July 20, 2009. (Exh. 220-221.)

12 **CalPERS' Systemic, Long-Standing Misrepresentations to Members Concerning**
13 **Reciprocity**

14 57. Emily Perez de Flores, CalPERS' designated PMK on reciprocity issues, testified
15 that reciprocity is an important benefit to a Member and that it could have a significant financial
16 impact. (2RT, 178:14-21.)

17 58. The PMK further testified that it would be important to inform a Member about
18 issues with their reciprocity status before the Member retired. (2RT, 179:3-18.)

19 59. The letter that Guido received in October 2003 (Exh. 201) informing him that
20 reciprocity had been established was prepared using a template for letter sent out at the time of a
21 request for a retirement estimate. (2RT, 155:12-156:18.) It is used whenever a Member indicated
22 on a retirement estimate form that they are a member of another retirement system. The PMK
23 does not know the volume or frequency of such letters being sent out. (2RT, 157:14-20.)

24 60. The PMK became head of the retirement estimate unit in June 2003 and remained
25 in that position until she left the unit in February 2009. (3RT, 25:8-18.)

26 61. At some point after becoming head of the retirement estimate unit, the PMK
27 became aware that staff was not following correct procedures to validate whether reciprocity had
28 been established prior to sending Members the template letters advising that reciprocity had, in

1 fact, been established. She then oversaw development of the procedures described in Exh. 225,
2 pages PERS0356-PERS0357 to ensure staff followed proper procedures to validate that
3 reciprocity had been established, and unit staff was trained in the procedures. (3RT, 14:8-16:5;
4 3RT, 24:6-26:19.)

5 62. The unit was generating over 100,000 retirement estimates during the time the
6 PMK headed the unit. She does not know how many of those involved reciprocity. (3RT, 16:11-
7 16.)

8 63. The PMK testified that accurate retirement estimates are important to Members.
9 (3RT, 16:17-21.) She believes letters were sent to Members misinforming them about their
10 reciprocity rights. (3RT, 16:7-10.) However, CalPERS took no efforts to inform Members who
11 had been told reciprocity existed that CalPERS had not done a complete determination, because
12 no mechanism existed to identify all the individuals who might have received incorrect
13 information. (3RT, 16:22-17:5, 3RT, 27:14-20.)

14 64. Even after the development of the new protocol to verify the establishment of
15 reciprocity, the retirement estimate unit sent a reciprocity confirmation letter and retirement
16 estimates (Exh. 206, 207 and 208) to Guido. (3RT, 33:11-36:21.)

17 65. CalPERS' PMK admitted that she had access to the Customer Touch Point
18 database which she believed to be searchable. (3RT, 16:22-17:5, 3RT, 27:14-20.) She understood
19 that CalPERS enters the date and nature of Members' inquiries to CalPERS about reciprocity in
20 the Touch Point database. (3RT, 16:22-17:5, 3RT, 27:14-20.)

21 66. CalPERS' PMK admitted that neither she nor others at CalPERS undertook efforts
22 to correct the misinformation about reciprocity that CalPERS had provided. (3RT, 16:7-1, (3RT,
23 16:22-17:5, 3RT, 27:14-20.) (Exh. 206, 207 and 208).)

24 LAW AND ARGUMENT

25 I. CalPERS' Admission of Errors Does Not Grant It Immunity from the Consequences 26 of Those Errors

27 CalPERS admitted through its counsel at the outset of the OAH hearing that it had
28 advised Guido of the establishment of reciprocity in error. (1RT, 19:10-22:7.) Moreover,

1 CalPERS' designed "person most knowledgeable" ("PMK") on the issue of reciprocity testified
2 that such errors were *routinely* made for a number of years, not just with Guido but involving
3 vast numbers of Members. The PMK went so far as to testify that CalPERS *knew* such errors had
4 been made but did nothing to identify or contact the Members who had received misinformation
5 to advise them. (3RT, 16:22-17:5; 3RT, 27:14-20.)

6 CalPERS is expected to make light of this, just as its counsel did in hearing. It is expected
7 to essentially say that it is sorry for the mistaken advice but "it's part of the deal of public
8 employment" as its counsel put it. (RT1, 22:8-9.)

9 **Pension is Consideration for Work.** " 'A pension plan offered by the employer and
10 impliedly accepted by the employee by remaining in employment constitutes a contract between
11 them, whether the plan is a public or private one, and whether or not the employee is to
12 contribute funds to the pension. [Citations.] The continued employment constitutes consideration
13 for the promise to pay the pension, which is deemed deferred compensation. [Citations.]'
14 (*Hannon Engineering, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 425, 179 Cal.Rptr. 78.) As a
15 result, '[p]ension plans create a trust relationship between pensioner beneficiaries and the trustees
16 of pension funds who administer retirement benefits ... and the trustees must exercise their
17 *fiduciary trust* in good faith and must deal fairly with the pensioners-beneficiaries. [Citations
18 omitted.]' (*Ibid.*; emphasis in originals.)" (*Hittle v. Santa Barbara County Employees Retirement*
19 *Assn.* (1985) 39 Cal.3d 374, 392.)

20 **Duty to Inform.** CalPERS has a fiduciary duty to provide timely and *accurate*
21 information to its members. (See *In re Application of Smith* (March 31, 1999) PERS Prec. Dec.
22 No. 99-01 ["The duty to inform and deal fairly with members also requires that the information
23 conveyed be complete and unambiguous"]; see also *Boxx v. Board of Administration* (1981) 114
24 Cal.App.3d 79, 90 [once local agency entered into PERS contract, it, too, had duty to properly
25 classify employee]; *City of Oakland v. Public Employees' Retirement System* (2002) 95
26 Cal.App.4th 29, 40.)

27 **Misinformation.** CalPERS and its officers are charged with the fiduciary relationship
28 described in *Civil Code* section 2228: "In all matters connected with his trust, a trustee is bound

1 to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein
2 over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any
3 kind."

4 As this court has previously noted, "[i]n the vast development of pensions in
5 today's complex society, the numbers of pension funds and pensioners have
6 multiplied, and most employees, upon retirement, now become entitled to
7 pensions earned by years of service. We believe that courts must be vigilant in
8 protecting the rights of the pensioner against powerful and distant administrators;
9 the relationship should be one in which the administrator exercises toward the
10 pensioner a fiduciary duty of good faith and fair dealing."

11 (*Symington v. City of Albany* (1971) 5 Cal.3d 23, 33, 95.)

12 This fiduciary relationship is judicially guarded by the application of *Civil Code* section
13 2235, which provides that "[a]ll transactions between a trustee and his beneficiary during the
14 existence of the trust, or while the influence acquired by the trustee remains, by which he obtains
15 any advantage from his beneficiary, are presumed to be entered into by the latter without
16 sufficient consideration, and under undue influence. (*Hittle v. Santa Barbara County Employees
17 Retirement Assn., supra*, at 393-394.)

18 *Hittle* provides an analogous example:

19 With these considerations in mind, we conclude that SBCERA did not fulfill its
20 fiduciary duty to Hittle to deal fairly and in good faith. The means by which
21 SBCERA sought to inform Hittle of his options in disposing of his retirement
22 contributions are tantamount to the misrepresentation and concealment, however
23 "slight," prohibited by Civil Code section 2228. SBCERA's obscure handwritten
24 notation constituted its sole effort to inform Hittle of his option to apply for
25 disability retirement. No reference to disability retirement was contained in either
26 the form letter or "Distribution of Retirement Contribution" form which SBCERA
27 sent to Hittle to provide for the distribution of his retirement contributions. **This
28 omission was not remedied by the form letter's invitation to retiring
employees to contact the Association if any additional information is
required.** [Emphasis added] These factors also support the presumption of Civil
Code section 2235, that the advantage to SBCERA resulting from Hittle's choice
to withdraw his retirement contributions, rather than seek a life-time allowance,
was gained without sufficient consideration and under undue influence.

(*Hittle v. Santa Barbara County Employees Retirement Assn., supra*, at 393-394.)

Equitable Estoppel. CalPERS takes the position is that it is required to apply the PERL

1 no matter what, and that therefore estoppel can never apply as a matter of law. CalPERS
2 essentially says it cannot be held accountable when it repeatedly and consistently provides
3 Members with incorrect advice over a long period of time and those Members rely on and act
4 upon that advice to their significant harm. In short, CalPERS grants itself absolute immunity
5 from any prior mistakes, no matter how egregious.

6 A passing oversight by CalPERS could perhaps be overlooked in minor cases. But the
7 instant case involves one of those exceptional situations where the harm caused by such advice
8 was not only serious and irreparable, but exacerbated by the fact that CalPERS did nothing to
9 correct the bad advice *despite knowing the advice was inaccurate* until it was too late for Guido
10 to do anything to mitigate his harm. CalPERS should be held accountable. That is the whole
11 point of equitable estoppel.

12 Thus, the doctrine of equitable estoppel is a rule of fundamental fairness, founded
13 on concepts of equity and fair dealing, that prevents a party from profiting from
14 the detriment he or she induced another to suffer. It is based on the theory that a
15 party who by declarations or conduct misleads another to the latter's prejudice
16 should be estopped to prevent the former from obtaining the benefit of his or her
17 misconduct; provides that a person may not deny the existence of a state of facts
18 if he or she intentionally led another to believe a particular circumstance to be true
19 and to rely upon that belief to his or her detriment; and applies to prevent a person
20 from asserting a right where his or her conduct or silence makes it unconscionable
21 for him or her to assert it. Thus, equitable estoppel precludes a party from
22 asserting rights he or she otherwise would have had against another when his or
23 her own conduct renders assertion of those rights contrary to equity.

24 (30 Cal.Jur.3d, *Estoppel and Waiver*, §1.)

25 The harm caused by CalPERS' misinformation is no minor matter. Guido is suffering a
26 cut of 97.5% of his expected CalPERS pension as a result of CalPERS' errors and bad advice.
27 Moreover, the testimony from CalPERS' own designated PMK establishes that CalPERS *knew* it
28 had provided incorrect advice to untold numbers of Members for years and did nothing to try to
correct the situation. Such callous and reckless behavior cannot be swept under the carpet as
some kind of legitimate trade-off for obtaining public employment.

In the words of our state Supreme Court, Guido's long term detrimental reliance on a
seemingly reasonable representation by CalPERS creates one of those " 'exceptional cases' where

1 'justice and right require' that the government be bound by an equitable estoppel." (*City of Long*
2 *Beach v. Mansell* (1970) 3 Cal.3d 462, 501 ("*Mansell*").)

3 **II. Equitable Estoppel Can – and in Specific Cases Should – Apply Against CalPERS**

4 Guido was entitled to receive accurate information from CalPERS regarding his
5 reciprocity status, particularly because he sought such information precisely to ensure that he
6 would be able to benefit from such reciprocity at the time of his eventual retirement. He sought
7 information from the very agency charged with awarding reciprocity to qualifying Members. He
8 had no reason to disbelieve the advice he received. He should receive the protection of the
9 constitutionally derived mandate that CalPERS fully, accurately and timely inform Members of
10 matters affecting vested pension rights and benefits. (*City of Oakland v. Public Employees'*
11 *Retirement System, supra; In Re the Application of Smith, supra.*)

12 Guido is not seeking to impose strict liability on CalPERS for every representation that it
13 makes to its 1.5 million Members. However, Guido is also entitled to estop CalPERS from
14 denying its representation of a reasonable benefit, even if it is in excess of the PERL. Rather than
15 immunize CalPERS, the estoppel promotes the Constitution and qualifies as an "exceptional
16 case" where "justice and right require" such estoppel in the words of *Mansell*.

17 **A. Elements of Equitable Estoppel**

18 It is well-established that the doctrine of estoppel may be applied against a government
19 body where justice and right require it. (*Mansell, supra; Piazza Properties, Ltd. v. Department of*
20 *Motor Vehicles* (1977) 71 Cal.App.3d 622, 631.)

21 Courts in several jurisdictions, including California, have specifically upheld the
22 application of equitable estoppel against state and county government retirement associations.
23 (See e.g. *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567; *Sellers v. Board of*
24 *Trustees of Police and Firemen's Retirement System* (2008) 399 N.J.Super. 51; *Fike v. Board of*
25 *Trustees, Teachers' and State Emp. Retirement System* (1981) 53 N.C.App. 78; *Kentucky*
26 *Retirement Systems v. Fryrear* (2009) 316 S.W.3d 307.)

27 **Elements of Estoppel.** The requisite elements for equitable estoppel are the same
28 whether applied against a private party or the government: (1) the party to be estopped was

1 apprised of the facts, (2) the party to be estopped intended by conduct to induce reliance by the
2 other party, or acted so as to cause the other party reasonably to believe reliance was intended,
3 (3) the party asserting estoppel was ignorant of the facts, and (4) the party asserting estoppel
4 suffered injury in reliance on the conduct. (*Mansell, supra*, at 489.)

5 **Equitable Estoppel Against CalPERS.** All four elements of estoppel are satisfied here:

6 (1) CalPERS knew or should have known there was a discrepancy between the reciprocity
7 requirement and the information that it provided that reciprocity was established; (2) CalPERS
8 either intended this representation (its failure to identify this discrepancy) be relied upon, or
9 Guido had the right to believe it was so intended; (3) Guido was ignorant of the discrepancy; and
10 (4) Guido relied upon the conduct of CalPERS in making his retirement plans to Guido's injury.
11 (*See Driscoll v. City of Los Angeles, supra.*)

12 **Threshold Matter, Whether Estoppel Applies.** As a threshold matter, the parties differ
13 over whether the estoppel remedy is available as a matter of law. CalPERS asserts estoppel is not
14 available "where the government agency to be estopped does not possess the authority to do what
15 it appeared to be doing." (*Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 870; see
16 also *Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886, 893
17 ["principles of estoppel are not invoked to contravene statutes and constitutional provisions that
18 define an agency's powers".].)

19 In *Medina*, the Court of Appeal found estoppel was not available because the retirement
20 board lacked authority to classify as safety members employees whose duties did not encompass
21 being a police officer and did not otherwise meet the statutory definition of safety members.

22 Guido principally relies on *Crumpler v. Board of Administration, supra* (*Crumpler*). In
23 *Crumpler*, the city had misclassified animal control officers as police officers. When the
24 misclassification came to CalPERS' attention, it reclassified the officers retroactively as
25 miscellaneous members and the employees sued. The trial court set aside the CalPERS decision
26 in part on grounds of estoppel, and the Court of Appeal affirmed this determination. (*Id.* at pp.
27 583–584.)

28 *Crumpler* is persuasive. It noted the asserted "rule" that estoppel cannot enlarge a public

1 agency's statutory or constitutional authority, but found the "rule" was inapplicable because of a
2 PERL provision, former section 20124 (now section 20125), stating CalPERS was the "sole
3 judge of the conditions under which persons may be admitted to and continue to receive benefits
4 under this system". "In view of the statutory powers conferred upon the board by section 20124,
5 this is not a case where the governmental agency 'utterly lacks the power to effect that which an
6 estoppel against it would accomplish.'" (*Crumpler, supra*, at 584.)

7 Moreover, Guido points out below that the PERL also provides CalPERS with statutory
8 authority under the so-called "correction statutes" to allow reciprocity as a correctable error, even
9 though some technical requirements of reciprocity as such may not have been established under
10 the statutes.

11 Nothing in the PERL precludes CalPERS from determining that reciprocity was available
12 is a remedy for correction of errors. CalPERS could have made that correction of errors itself and
13 estoppel is therefore available to Guido as a remedy if its conditions are satisfied.

14 **Guido Proved All Elements.** Guido has proven all essential elements of estoppel.
15 CalPERS specifically represented to Guido that he had established reciprocity. The CalPERS
16 PMK testified explicitly that CalPERS knew about the existence of or nature and purpose of the
17 reciprocity determination that it had made to Guido. CalPERS' PMK testified that she established
18 new rules because she knew that many people erroneously believed that reciprocity had been
19 established, but CalPERS did nothing to correct the false information about reciprocity given to
20 them. CalPERS did not make any effort to correct the incorrect advice to Guido that reciprocity
21 had been established until this dispute brought the facts to light, and after Guido retired.

22 The PMK testimony establishes the first element of estoppel, that CalPERS knew the true
23 facts. CalPERS' PMK testimony establishes the necessary degree or level of proof of both actual
24 knowledge or of "careless and culpable conduct resulting in the deception of the party entitled to
25 claim the estoppel." (*Banco Mercantil v. Sauls, Inc., supra*.) In light of CalPERS' knowledge that
26 the reciprocity representations were made and its failure to correct them, the Court must deem
27 CalPERS' actions "careless and culpable".

28 Further, Guido also proved that he "did not have actual knowledge of the true facts [and]

1 did not have notice of facts sufficient to put a reasonably prudent man upon inquiry, the pursuit
2 of which would have led to actual knowledge." (*Banco Mercantil v. Sauls, Inc., supra.*) In fact,
3 Guido made additional inquiries of CalPERS, and CalPERS reinforced his believe that
4 reciprocity had been established.

5 Nothing from CalPERS put Guido on notice that reciprocity had not been established
6 before he retired. While the reciprocity rules are explained in the documents or manual that
7 CalPERS provides, Guido specifically inquired and was specifically told it had been established
8 after or including his review of the documents. Considering all of the circumstances, CalPERS'
9 representation that reciprocity applied, and Guido's direct and specific inquiries to CalPERS
10 about it, support an estoppel remedy.

11 **Evidence Not in Conflict.** Although estoppel is generally a question of fact, when the
12 evidence is not in conflict and is susceptible of only one reasonable inference, the existence of an
13 estoppel is a question of law. (*Driscoll v. City of Los Angeles, supra*, at 305.) Further, an
14 estoppel binds not only the immediate parties to the transaction but those in privity with them.
15 (*Crumpler, supra*, at 582-584 [finding that city and the board of public employees' retirement
16 system were in privity with each other as agents of the state, and, therefore, estoppel of city from
17 asserting that petitioners had been erroneously classified necessarily extended to board].)

18 **B. Application of the Balancing Test in *Mansell***

19 CalPERS has argued against estoppel in other cases with citations to *Mansell, supra*, that
20 "estoppel will not be applied against the government if to do so would effectively nullify 'a
21 strong rule of policy, adopted for the benefit of the public'." (*Mansell, supra*, at 493.) CalPERS
22 has interpreted this to mean that the Supreme Court meant that estoppel will not be applied
23 against the government *whenever* doing so would nullify "a strong rule of policy, adopted for the
24 benefit of the public", *regardless* of any other factors.

25 Much more nuanced and broad, the *Mansell* opinion is clear:

26 It is settled that "[t]he doctrine of equitable estoppel may be applied against the
27 government where justice and right require it. (*United States Fid. & Guar. Co. v.*
28 *State Board of Equalization* (1956) 47 Cal.2d 384, 388-389 [303 p.2d 1034] and
cases there collected.)" (*Driscoll v. City of Los Angeles, supra*, 67 Cal.2d 297,

1 306.) (See generally Am. Jur.2d, Estoppel and Waiver, §§ 122-133, pp. 782-802;
2 31 C.J.S., Estoppel, §§ 138-147, pp. 675-733.) Correlative to this general rule,
3 however, is the well-established proposition that an estoppel will not be applied
4 against the government if to do so would effectively nullify "a strong rule of
5 policy, adopted for the benefit of the public," (*County of San Diego v. Cal.*
Water etc. Co. (1947) 30 Cal.2d 817, 829-830 [186 P.2d 124, 175 A.L.R. 747],
see also cases there cited.) *The tension between these twin principles makes up the*
doctrinal context in which concrete cases are decided.

6 (*City of Long Beach v. Mansell, supra*, at 493; emphasis added.)

7 Courts must balance the appropriateness of estoppel against the government by weighing
8 a "strong rule of policy, adopted for the benefit of the public" against situations "where justice
9 and right require" estoppel. *Mansell* clarifies that there are "exceptional cases" where estoppel *is*
10 *very much appropriate.*

11 In *Mansell* the Supreme Court took note of a "strong rule of policy, adopted for the
12 benefit of the public" (i.e. a constitutional provision prohibiting alienation of tidelands), but it
13 found that it was outweighed by the even *stronger* interest to settle title and boundary issues in
14 the Belmont Shores area of Long Beach. The Supreme Court allowed the sale of tidelands
15 contrary to a prohibition against their alienation, instead quitclaiming the tidelands in question to
16 those who had lived on the property for decades. As the Supreme Court put it:

17 We are here concerned with thousands of homeowners who, through the long
18 continuing conduct of the government entities involved, have been led to believe
19 and have acted upon the belief that the lands upon which they reside are their own
20 private properties. Because similarly compelling circumstances will not often
21 recur, the public policy expressed in article XV, section 3, of the Constitution will
not suffer substantial erosion as a result of the decision we reach today. (*Mansell,*
supra, at 500.)

22 **C. Correctly Determining the "Strong Rule of Policy, Adopted for the Benefit of**
23 **the Public"**

24 Implicit in *Mansell's* "tension" doctrine is correctly identifying the "strong rule of policy,
25 adopted for the benefit of the public" being weighed. CalPERS has argued that the *only* policy in
26 issue in this case is the PERL's reciprocity requirements. It doing so, it ignores other even
27 *stronger* policies present in the California Constitution and derivative case law flowing from it:

28 (i) that "[a] retirement board's duty to its participants and their beneficiaries shall take

1 precedence over any other duty" (Cal. Const., art. XVI, §17), and (ii) the board's "fiduciary duty
2 to provide timely and *accurate* information to its members" (*City of Oakland, supra*, at 40).

3 Whether viewed as statutes or otherwise, the policy governing reciprocity is trumped by
4 the larger, stronger public interest in ensuring that CalPERS abides by its constitutional and
5 fiduciary duties, including to timely and accurately inform its membership. The ability to
6 meaningfully rely on CalPERS' information affects 1.5 million Members and the general public.

7 Implicit in the *Mansell* opinion is the requirement that a court first identify the
8 *preeminent* public policy involved, and then balance the upholding of *that* policy against the
9 harm alleged by the party seeking estoppel to determine if it is one of those "exceptional cases"
10 where "justice and right require" estoppel.

11 Further, the strong rule of public policy herein *supports* estoppel. There is no conflict
12 between the "strong rule of policy, adopted for the benefit of the public" (i.e., the constitutional
13 and fiduciary duties to put the interests of the Members first and to fully and accurately inform
14 them as outlined above) and Guido's interest in estoppel against CalPERS (stemming from
15 CalPERS' repeatedly advising him that he had established reciprocity with LACERA when he
16 had apparently not done so, with the consequent impact that he would not even learn of the
17 drastic reduction in his CalPERS pension until *after* he retired). Only the weak rule of the
18 technical reciprocity requirements, which is at odds both with the constitutional fiduciary duties
19 and estoppel, argues to deny Guido the increased benefit resulting from reciprocity.

20 **D. Crumpler Is Precedent For Estoppel Against CalPERS**

21 In *Crumpler v. Board of Administration, supra*, a California appellate court applied
22 estoppel against the PERS Board.

23 *Crumpler* involved four CalPERS Members who had taken jobs as animal control
24 officers with the City of San Bernardino Police Department after being told they would be
25 classified as and receive CalPERS benefits as local "safety members". Years later, CalPERS
26 determined that petitioners had been erroneously classified and retroactively reclassified them to
27 "miscellaneous" membership. (*Crumpler, supra*, at 570-571.)

28 Because of the more dangerous nature of safety positions, safety Members generally

1 receive more favorable pension benefits than miscellaneous Members. In the case of the
2 *Crumpler* petitioners, this meant being eligible to retire and receive substantial pension benefits
3 at age 55 as safety Members, versus having to wait until age 65 to earn comparable benefits in a
4 miscellaneous classification. (*Id.* at 572-573.)

5 The court began by reviewing the relevant statute governing who does and does not meet
6 the definition of "local safety member". It found that animal control officers *did not*, in fact, meet
7 that standard under Section 20020 [since renumbered as 20425], and that CalPERS'
8 determination that they should be classified as miscellaneous, not safety, was correct:

9 In a loose sense animal control officers are engaged in active law enforcement but
10 so are a myriad of other public employees....Petitioners' duties as animal control
11 officers cannot be said to "clearly fall within the scope of active law enforcement
12 service" as that term is used in section 20020. The board's determination that
13 petitioners were improperly classified as local safety members must be upheld.

14 (*Id.* at 578-579.)

15 However, the court then went on to examine "whether the board was estopped from
16 reclassifying petitioners to miscellaneous membership." (*Id.*, at 579.) After discussing the
17 elements of estoppel, including as applied against the government, the court concluded:

18 All of the requisite elements of equitable estoppel are present...The city was
19 apprised of the facts. The city knew that petitioners were being employed by the
20 police department as animal control officers at the time it erroneously advised
21 them they would be entitled to retirement benefits as local safety members. The
22 fact that the advice may have been given in good faith does not preclude the
23 application of estoppel. Good faith conduct of a public officer or employee does
24 not excuse inaccurate information negligently given. (*Driscoll v. City of Los
25 Angeles, supra*, 67 Cal.2d 297, 307-308; *Orinda-County Fire Protection Dist. v.
26 Frederickson and Watson Co.* 174 Cal.App.2d 589, 593 [344 P.2d 873].) In a
27 matter as important to the welfare of a public employee as his pension rights, the
28 employing public agency "bears a more stringent duty" to desist from giving
misleading advice. (*Driscoll v. City of Los Angeles, supra*, 67 Cal. 2d 297, 308.)

All of the other requisite elements of equitable estoppel against the city were
established by uncontradicted evidence. The city manifestly intended its
erroneous representations to be acted upon and petitioners had a right to believe
the city so intended. Petitioners were ignorant of the fact that the city's advice was
erroneous. Petitioners relied upon the representations to their injury by
relinquishing other employment to accept city employment and by paying over

1 the years the greater contributions required of safety members. Petitioner
2 Crumpler served as animal control officer for over 20 years. During those years
3 he paid safety member contributions and arranged his personal financial affairs in
4 the expectation he would ultimately receive the retirement benefits of a safety
5 member. Petitioner Ingold relinquished federal civil service employment with 15
6 years accrued federal pension rights to accept city employment on the
7 representation that his city pension rights would be that of a safety member.

8 (*Crumpler, supra*, at 583.)

9 **E. CalPERS' Authority to Effect What Estoppel Would Accomplish**

10 CalPERS has argued in other cases that *Crumpler* is inapposite because the *Crumpler*
11 court found that CalPERS "possessed the authority to do what it appeared to be doing" in that
12 case, but that CalPERS lacks such authority to do so in cases where the PERL requires certain
13 pension calculations.

14 **Fiduciary Duty to Members.** Firstly, CalPERS has "plenary authority and fiduciary
15 responsibility for ... administration of the system", subject among other things to the mandate
16 that "[a] retirement board's duty to its participants and their beneficiaries shall take precedence
17 over any other duty." (Cal. Const., art. XVI, §17.) If CalPERS is permitted to seriously and
18 repeatedly misinform a Member in ways that cause the Member permanent, irreparable and
19 substantial harm, this would eviscerate the mandate to put the interest of Members above all
20 other duties. The constitutionally mandated fiduciary duties certainly give CalPERS the authority
21 to now grant reciprocity, even if Guido has not met all of the technical requirements.

22 **PERL Authority to Determine Conditions of Membership and Benefits.** Secondly,
23 CalPERS has the authority to determine membership in the pension system and the benefits
24 flowing therefrom. The *Crumpler* court found that the authority which CalPERS had "to effect
25 that which estoppel against it would accomplish" was Section 20124 of the PERL, since
26 renumbered as Section 20125. "Nor may estoppel be avoided on the ground that to invoke it
27 would enlarge the statutory power of the board. In view of the *statutory powers conferred upon*
28 *the board by section 20124*, this is not a case where the governmental agency 'utterly lacks the
power to effect that which an estoppel against it would accomplish.'" (*Crumpler, supra*, at 499,
emphasis added, quoting *City of Long Beach v. Mansell*.)

1 **§ 20125. Determination of Recipients**

2 The board shall determine who are employees and is the sole judge of the
3 conditions under which persons may be admitted to and continue to receive
4 benefits under this system.

5 In this situation, "the conditions under which" Guido is a Member of CalPERS is
6 precisely the condition of *reciprocal membership* and the benefits he shall "continue to receive"
7 are those flowing from such reciprocal membership.

8 **Corrections Must Restore the "Status, Rights and Obligations" of the Parties to**
9 **What They Would Have Been.** Thirdly, the PERL contains what are colloquially referred to as
10 the "correction statutes" (*Government Code*, §§20160-20164) which govern the correction of
11 "errors and omissions" of CalPERS, its Members and beneficiaries, and contracting CalPERS
12 entities. Section 20161, "Criteria for Correction", has particular relevance:

13 **§ 20160. Criteria for Correction**

14 ...
15 (b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as
16 a result of errors or omissions of the university, any contracting agency, any state
17 agency or department, or this system.

18 (c) The duty and power of the board to correct mistakes, as provided in this
19 section, shall terminate upon the expiration of obligations of this system to the
20 party seeking correction of the error or omission, as those obligations are defined
21 by Section 20164.

22 (d) The party seeking correction of an error or omission pursuant to this section
23 has the burden of presenting documentation or other evidence to the board
24 establishing the right to correction pursuant to subdivisions (a) and (b).

25 (e) Corrections of errors or omissions pursuant to this section shall be such that
26 the status, rights, and obligations of all parties described in subdivisions (a) and
27 (b) are adjusted to be the same that they would have been if the act that would
28 have been taken, but for the error or omission, was taken at the proper time.
29 However, notwithstanding any of the other provisions of this section, corrections
30 made pursuant to this section shall adjust the status, rights, and obligations of all
31 parties described in subdivisions (a) and (b) as of the time that the correction
32 actually takes place if the board finds any of the following:

- 33 (1) That the correction cannot be performed in a retroactive manner.
- 34 (2) That even if the correction can be performed in a retroactive manner, the
35 status, rights, and obligations of all of the parties described in subdivisions (a) and
36 (b) cannot be adjusted to be the same that they would have been if the error or
37 omission had not occurred.
- 38 (3) That the purposes of this part will not be effectuated if the correction is
39 performed in a retroactive manner.

1 Note that the Legislature specifically included the requirement in subsection (e) of
2 Section 20160 that any correction "adjust the status, rights, and obligations of all parties ... to be
3 the same that they would have been if the act that would have been taken, but for the error or
4 omission, was taken at the proper time". On the other hand, the Legislature *barred* corrections
5 where "the status, rights, and obligations of all of the parties ... cannot be adjusted to be the
6 same that they would have been if the error or omission had not occurred. (*Government Code*,
7 §20160(e)(2), emphasis added.)

8 In this case, the "error or omission" is CalPERS' repeated and consistent incorrect advice
9 to Guido that he had already established reciprocity with LACERA and would receive a
10 CalPERS pension based on his highest earnings in LACERA. However, there is no way to now
11 restore Guido's rights as they existed prior to his retirement unless CalPERS could:

- 12 (a) Reinstatement Guido into active CalPERS membership and LACERA
13 membership (since reciprocity benefits can only be obtained by simultaneously retiring
14 from both reciprocal systems on the same day);
- 15 (b) Provide Guido with a LACERA position so that he could resign that job
16 and accept CalPERS employment within six months of his LACERA resignation;
- 17 (c) Ensure that Guido could now find employment with a CalPERS employer;
18 and
- 19 (d) Then allow Guido to confirm the establishment of reciprocity and retire
20 from both CalPERS and LACERA at some point in the future.

21 "Find Mr Guido a job", etc., is not only beyond CalPERS' statutory authority, it is likely
22 beyond what is humanly possible in this time of government layoffs and exceedingly tight
23 budgets.

24 As Guido and others testified to at hearing, however, Guido was prepared to seek and
25 accept a new position with a CalPERS employer prior to retirement, establish reciprocity and/or
26 increase the highest compensation figure that would be used to calculate his CalPERS pension,
27 and *then* simultaneously retire from CalPERS and LACERA. The only thing that kept him from
28 doing so was that CalPERS kept assuring him that he had *already* established reciprocity.

1 The only way CalPERS *can* provide Guido with the "status, rights, and obligations" he
2 would have had but for CalPERS' error or omission would be to provide him a CalPERS pension
3 calculated on the basis of his highest earnings in LACERA—i.e., provide him with exactly what
4 he *could* have received had CalPERS not misinformed him about his reciprocity status until it
5 was too late for him to do anything about it.

6 **F. City of Pleasanton is Inapposite**

7 Guido expects CalPERS to cite to *City of Pleasanton, supra*, in support of its argument
8 that estoppel may not be imposed in this case because CalPERS lacks the authority to do so
9 under the PERL. *City of Pleasanton*, however, is inapposite to Guido's situation.

10 In *City of Pleasanton*, James Linhart, a former Division Chief for the Livermore-
11 Pleasanton Fire Department, the appellate court reversed the trial court's award of a writ
12 directing CalPERS to include Linhart's "standby pay" in his final compensation and to award him
13 additional pension benefits based on that inclusion. Linhart argued, among other things, that
14 CalPERS was estopped from denying inclusion based on the fact that it had accepted the City of
15 Pleasanton's contributions to CalPERS based on the standby pay.

16 Firstly, the *City of Pleasanton* court found that Linhart had not established either of the
17 first two elements required to maintain an estoppel claim: (a) It found that CalPERS had never
18 advised Linhart that he would receive pension benefits based on the standby pay, opining that
19 "[a]lthough the estimate Pleasanton provided Linhart of his retirement allowance in 2006
20 included standby pay as part of his pensionable final compensation, there is no evidence PERS
21 ever represented to Linhart that his pension benefit would be calculated by including standby pay
22 as part of his final compensation" (*City of Pleasanton, supra*, at 528); and (b) it further found
23 that Pleasanton should have known that the standby pay *would not* qualify as "special
24 compensation" for pension purposes and should not have reported it to CalPERS.

25 Guido, on the other hand, has met all conditions necessary to support imposition of
26 estoppel.

27 Secondly, the *City of Pleasanton* court found that Linhart provided no statutory authority
28 for CalPERS to include his standby pay in his pension calculations. In this case, however, Guido

1 cites two separate statutes in the PERL which provide authority to now grant him reciprocity:

2 (1) *Government Code* section 20125 states that the CalPERS Board "is the sole judge
3 of the *conditions under which persons may be admitted to and continue to receive benefits* under
4 this system" (emphasis added).

5 (2) *Government Code* section 20160 gives CalPERS to correct its errors and
6 omissions when it can ensure that "the status, rights, and obligations of all parties ... are adjusted
7 to be the same that they would have been if the act that would have been taken, but for the error
8 or omission, was taken at the proper time", but *barring* such corrections when the "status, rights,
9 and obligations" cannot be restored to what they would have been. By time CalPERS belatedly
10 advised Guido that reciprocity was denied, it was impossible to restore him to his prior condition
11 because he had already foregone opportunities to take a position granting CalPERS benefits and
12 thus establish reciprocity, and he had already irrevocably retired from both CalPERS and
13 LACERA.

14 In any event, the *City of Pleasanton* court concluded that "Linhart has not proven all
15 essential elements of estoppel are present." Guido has. Therefore, *City of Pleasanton* is not
16 authority for theories not considered or ruled on. *City of Pleasanton's* findings concerning the
17 necessity of specific statutory authorization in the PERL to support an award of benefits is mere
18 dicta.

19 **G. Applicability of *Welch v. California State Teachers' Retirement Bd.***

20 The case of *Welch v. California State Teachers' Retirement Bd.* (2012) 203 Cal.App.4th 1
21 bears directly on these issues.

22 Melanie Welch was violently attacked by a group of students shortly after she began her
23 first teaching job and never worked as a full-time teacher again. The case involved her claim that
24 the California State Teachers' Retirement System ("CalSTRS") misinformed Welch of her right
25 to apply for disability retirement shortly after the incident and she did not learn that she had in
26 fact been so entitled until six years later.

27 The court ruled that the CalSTRS Board had improperly rejected Welch's eventual
28 disability retirement application for her failure to show a continuing disability, finding that

1 CalSTRS' misinformation about eligibility for disability retirement shortly after she was attacked
2 had thereby prevented her from timely compiling the evidence of her disability required by the
3 CalSTRS Board. It then estopped CalSTRS from summarily denying Welch's disability
4 application and ordered the Board to reconsider the matter in light of its misinformation to
5 Welch and the impact that had on her ability to gather relevant evidence based on the Board's
6 duty to correct its errors and omissions pursuant to *Education Code* section 22308.

7 Important to the case herein, the appellate court contrasted CalSTRS' *permissive* duty to
8 correct under *Education Code* section 22308 with CalPERS' *mandatory* duty to do so found in
9 the language of *Government Code* section 20160:

10 As Welch points out, subdivision (b) of Government Code section 20160 provides
11 that CalPERS "*shall* correct all actions taken as a result of errors or omissions of
12 the university, any contracting agency, any state agency or department, or this
13 system." (Italics added.) According to Welch, while section 22308, subdivision (c)
14 uses the word "may" instead of "shall," we should construe the statute that applies
15 to CalSTRS to have the same meaning as the one that applies to CalPERS,
16 especially because section 22308, subdivision (d) refers to "[t]he *duty* and the
17 power of [CalSTRS] to correct errors and omissions, as provided in this section."
(Italics added.) Welch suggests that the reference to a "duty" to correct errors
18 requires us to construe the word "may" in section 22308, subdivision (c) as
19 meaning the same as the word "shall" in Government Code section 20160,
20 subdivision (b).

21 We disagree, because the statutory history of both statutes supports the conclusion
22 that the Legislature intended to give both words their usual meanings, with "may"
23 being permissive and "shall" being mandatory. In 1988, the Legislature enacted
24 the predecessor to section 22308 (former § 22233) at the same time it enacted the
25 predecessor to Government Code section 20160 (former Gov. Code, § 20180).
26 (Stats. 1988, ch. 1089, §§ 2, 5, pp. 3512-3514.) In the statute applying to the
27 predecessor of CalSTRS, the Legislature used the word "may" (*id.*, § 2, at p.
28 3513); in the statute applying to CalPERS, the Legislature used the word "shall"
(*id.*, § 5, at p. 3514). We have no reason to believe this was an oversight.
Moreover, the use of the word "duty" in section 22308, subdivision (c) (which is
also traceable to the predecessor statute) (see Stats. 1988, ch. 1089, § 2, p. 3513)
is easily reconcilable with the use of the word "may" in section 22308,
subdivision (c). As we see it, the "power" of CalSTRS to correct errors or
omissions in the exercise of its discretion that is expressed with the use of the
word "may" becomes a "duty" under those circumstances where to take any other
action would constitute an abuse of discretion.

In this manner, section 22308 is internally consistent, and its meaning is not

1 altered by the different language the Legislature chose to use in the correction
2 provision applicable to CalPERS.

3 We therefore conclude that, under the facts presented here, as found by the trial
4 court, CalSTRS had the power and the duty, to correct the actions taken as a result
5 of the misinformation CalSTRS provided Welch in 1999 regarding the eligibility
6 requirements for disability retirement benefits. It was an abuse of discretion for
7 CalSTRS not to consider whether to apply section 22308 to this case, and if so
8 how. To the extent the trial court implicitly concluded otherwise, by concluding
9 that Welch was not disabled in 1999 and therefore could not have presented better
10 evidence of disability at that time even in the absence of the misinformation from
11 CalSTRS, the trial court erred. The matter must be remanded to CalSTRS for
12 CalSTRS to consider, in the first instance, the proper application of section 22308
13 here. In doing so, CalSTRS must fairly consider how its misinformation to Welch
14 in 1999 affected her ability to provide CalSTRS with contemporaneous medical
15 documentation of her psychological condition, and *CalSTRS must strive to the
16 fullest extent possible to relieve Welch of the disadvantage she suffered because of
17 that lost opportunity.* Section 22308 requires no less.

18 (*Welch, supra*, italics in original.)

19 The appellate court found that CalSTRS had misinformed Ms. Welch sufficient to justify
20 estoppel based on a single case of telephonic misinformation. Given that CalPERS consistently,
21 continually and seriously failed to correctly advise Guido about his actual reciprocity status,
22 repeatedly led him to believe his eventual CalPERS pension allowance would be based on his
23 highest earnings in LACERA, and did not advise him otherwise until *after* his retirement when it
24 was too late to do anything to mitigate his damages, the findings in *Welch* should have even
25 more force and effect in this case.

26 **H. CalPERS' Representations to Guido**

27 As described in detail above, CalPERS advised Guido for years that he had established
28 reciprocity between his CalPERS and LACERA service and would therefore earn an eventual
pension based on his highest LACERA earnings:

- On October 6, 2003, CalPERS wrote Guido that:

CalPERS has reviewed your account and determined that
Reciprocity has been established between CalPERS and LACERA.
Since you have established Reciprocity, CalPERS will use the
highest final compensation earned under either system as long as
you retire on the same date under both systems and you are not an
"Elective or Appointed Officer" on or after July 1, 1994.

1 Please provide us with your final compensation amount with
2 LACERA. That final compensation amount may be higher than
3 your final compensation amount is with CalPERS.

4 (Exh. 201.)

- 5 • CalPERS' October 2, 2007 retirement estimate that it provided to Guido included the
6 City of Cudahy as a CalPERS Employer and listed his Final Compensation as
7 \$11,838.00 which would have entitled him to greater than \$3,000 a month in a
8 CalPERS pension under reciprocity. (Exh. 206.)
- 9 • Then again on October 20, 2008, *less than seven (7) months before his planned*
10 *retirement, CalPERS again confirmed reciprocity* and wrote Guido that:

11 CalPERS has reviewed your account and determined that
12 Reciprocity has been established between CalPERS and LACERA.

13 Per your request, CalPERS has used the final compensation
14 amount of \$11,838.00 with LACERA. The information in this
15 estimate has been provided by you and has not been verified by
16 your employer. Any changes to your final compensation could
17 affect your retirement estimate and a new estimate would need to
18 be requested.

19 (Exh. 207.)

- 20 • On April 7, 2009, Guido filed his Service Retirement Election Application at the
21 Regional CalPERS Office in Glendale, California, indicating that he was retiring
22 from two public employment systems on June 1, 2009 and that he would be using his
23 single highest year of salary with LACERA for purposes of calculating his benefits
24 from both CalPERS and LACERA. The CalPERS representative in Glendale who
25 reviewed his application consulted Guido's electronic file in the CalPERS database
26 and validated that reciprocity was established at the time that Guido filed his
27 retirement application.

28 In sum, CalPERS repeatedly and consistently advised Guido over the course of five and a
half years that he had established reciprocity between his CalPERS and LACERA service, and
that he had the right to have his pension allowance calculated based on his highest earnings,

1 which in this case were his earnings in his LACERA position. All of this advice very directly
2 informed Guido's career choices, including his decision to forego taking a CalPERS-covered
3 position later in his career to establish a higher final compensation amount in that pension system
4 alone, as well as Guido's decision to retire when he did.

5 **I. CalPERS' Knowing Failure to Correct Misinformation Given to Guido**

6 As discussed in the next subsection immediately below, CalPERS was aware of the fact
7 that it had assured numerous Members that they had established reciprocity without the basis to
8 make such representations. CalPERS also learned later that new procedures established to
9 prevent such errors were not being followed and bad advice continued to be given to Members,
10 yet CalPERS did nothing to identify those Members and make sure they were correctly
11 informed. This alone should justify the imposition of estoppel against CalPERS for its repeated
12 misrepresentations to Guido.

13 However, the situation is even more egregious. Testimony and documentary evidence
14 reveal that CalPERS finally looked into the issue of whether reciprocity had, in fact, been
15 established by Guido beginning in mid-April 2009, a month and a half before Guido's retirement.
16 (Exh. 212; Exh. 18, page LA 013.)

17 After consultations with a representative of LACERA, CalPERS staff realized no later
18 than May 18, 2009 – nearly two full weeks before Guido retired – that reciprocity either had not
19 been established or at least was in question. Specifically, CalPERS' "Customer Touch Point"
20 computerized log indicates that CalPERS employee Kerry L. Griffin "[s]poke with LACERA
21 (Clarence Malone)" to review the following dates, 4-1-73 thru 11-25-77 and 1-1-1997 to current.
22 Reciprocity will not apply due to concurrent service for incoming and lapse for outgoing.
23 Unfortunately a letter was sent to the member in 2003 from the estimate unit that states
24 reciprocity will apply this letter was sent in error." (Exh. 224, page 3, first entry; Exh. 18, pages
25 LA 014 and LA 016.)

26 In other words, CalPERS knew almost two weeks *before* Guido's retirement that
27 reciprocity had not, in fact, been established; that the advice going back to 2003 asserting that
28 reciprocity *had* been established was wrong; that Guido had received retirement estimates based

1 upon confirmation of reciprocity; and that Guido was retiring with the understanding that he
2 would receive the benefits of reciprocity. CalPERS, however, did nothing to contact Guido,
3 delay his retirement from CalPERS and LACERA, or in any other way warn him of the
4 consequences of CalPERS' inaccurate reciprocity advice.

5 In fact, the first time CalPERS notified Guido that it was now *denying* reciprocity was by
6 letter dated June 30, 2009, a full month after his simultaneous retirement from CalPERS and
7 LACERA. (Exh. 219.) By then, it was too late for Guido to take steps to mitigate or avoid the
8 harm that resulted from the denial of reciprocity.

9 **J. CalPERS' Systemic Wrong Advice to Members Regarding Reciprocity**

10 CalPERS' counsel has tried to make light of the consistent misinformation the agency
11 provided to Guido about reciprocity, minimizing the impact of such bad advice and putting
12 forward what amounts to a "stuff happens" defense. The testimony of CalPERS' PMK, however,
13 revealed the widespread extent of the problem across the membership, the serious consequences
14 of such bad advice for Members, and the fact that CalPERS took no steps to correct the
15 misinformation in spite of knowing all this.

16 First, the PMK testified that reciprocity is an important benefit to Members and can have
17 significant financial impact. (2RT, 178:14-21.) Because reciprocity allows a member of two
18 reciprocal systems to have their pension calculated based on the highest earnings in *either*
19 system, it can significantly increase total retirement earnings. In recognition of this, the PMK
20 acknowledged that it would be very important to accurately inform a Member about issues with
21 his or her reciprocity status before the Member retired. (2RT, 179:3-18.)

22 Second, after the PMK's appointment as head of CalPERS' retirement estimate unit, she
23 became aware that unit staff had been sending out template letters confirming that reciprocity
24 had been established (such as Exhibits 201 and 207 sent to Guido) without first confirming that
25 reciprocity had been verified. Similarly, unit staff had also been sending out retirement estimates
26 based on reciprocity (such as Exhibits 202, 206 and 208 sent to Guido), again without first
27 confirming that reciprocity had been verified. She was so concerned about this that she oversaw
28 the development of a new written protocol to ensure that staff followed proper procedures to

1 validate that reciprocity had been established before sending out retirement estimates based on
2 reciprocity. (3RT, 14:8-16:5, 3RT, 24:6-26:19; Exh. 225, pages PERS0356-PERS0357.)

3 Third, the PMK later learned that even after the creation and training of staff in the new
4 protocol, retirement confirmation letters and retirement estimates *continued* to be sent to
5 Members without first verifying that reciprocity had in fact been confirmed. (3RT, 33:11-36:21.)
6 She indicated the unit was generating over 100,000 estimates during the time she headed the
7 retirement estimate unit but said she could not say how many of these involved reciprocity.
8 (3RT, 16:11-16.)

9 In sum, CalPERS staff (a) apparently routinely advised Members that reciprocity had
10 been established and provided them with retirement estimates based on that reciprocity without
11 confirming the information was accurate, (b) the PMK as head of the retirement estimate unit
12 saw this as a serious problem and developed a protocol and trained her staff to prevent this from
13 occurring in the future, (c) the problem *continued* to occur after the protocol was put in place,
14 and (d) **CalPERS took no steps to identify Members who had received bad information and**
15 **correct that information**, (e) despite the admitted understanding that reciprocity has important
16 financial implications and accurate reciprocity information is important to Members.

17 CalPERS' misrepresentations to Guido, occurring for nearly six years and continuing
18 until *after* he had retired and could no longer do anything to mitigate his harm, should be enough
19 to impose estoppel against CalPERS. The fact that the problems were systemic, reaching the
20 level of "careless and culpable conduct resulting in the deception of the party entitled to claim
21 the estoppel" (*Banco Mercantil v. Sauls, Inc., supra.*) makes imposition of estoppel all the more
22 appropriate.

23 **K. CalPERS Had the Obligation to Alert Guido Once it Realized Reciprocity**
24 **Was In Question**

25 Guido anticipates that CalPERS will try to escape its fiduciary responsibilities and dodge
26 the imposition of estoppel by arguing that Guido learned about the denial of reciprocity from
27 LACERA shortly before his retirement. The notice in question is a May 19, 2009 letter from
28 LACERA to Guido. (Exh. 215.) Guido testified at length about this issue and it bears

1 examination here.

2 First, Guido testified that he did not receive the letter until Saturday, May 23, 2009.
3 (RT1, 135:21-136:2.) Since Monday, May 25, was Memorial Day, it was unable to do anything
4 about the letter until Tuesday or Wednesday, May 26th or 27th. Guido then consulted with two
5 attorneys about the matter. As Guido testified, he met with them to review the communications
6 he'd previously received from CalPERS saying that reciprocity *had* been established. Guido
7 testified that they were "perplexed over the fact that I was getting this letter from L.A.C.E.R.A."
8 (RT1, 136:15-20.)

9 Second, Guido explained that he did not believe LACERA had any role to play in
10 whether he was granted or denied reciprocity since the reciprocal benefits were being paid by
11 CalPERS, the agency that had advised him reciprocity had already been established.

12 Q. So did you think L.A.C.E.R.A. could deny you reciprocity?

13 A. Well, that's why I checked. That's why I checked with counsel.

14 Q. But did you think that L.A.C.E.R.A. could deny you reciprocity?

15 A. No. Because it was not binding. I mean, they didn't have – they explained
16 to me that it was not in their purview what money – how much money I
17 made from CalPERS because the money I was retiring and based my
18 retirement on was predicated on my final retirement salary with
19 L.A.C.E.R.A.

20 (RT1, 137:1-12.)

21 Third, *CalPERS* was the agency that had misinformed Guido about reciprocity, not
22 LACERA. CalPERS had the fiduciary duty to correct the record and provide him with accurate
23 advice. CalPERS knew at least as early as May 18, 2009 that reciprocity was *not* established
24 (Exh. 224, page 3, first entry; Exh. 18, pages LA 014 and LA 016), but never told Guido about
25 its finding prior to his June 1, 2009 retirement date (RT1, 140:4-6). In fact, CalPERS waited a
26 full month after Guido had retired from both pension systems, too late to suspend either
27 retirement, before telling him reciprocity had been denied. (Exh. 219.)

28 **L. CalPERS Is Estopped From Now Rescinding Reciprocity Between Guido's
CalPERS and LACERA Service**

The doctrine of equitable estoppel is based on the theory that the party estopped has misled the other party to its prejudice, and may be applied against a governmental body where

1 justice and right require it. (*Piazza Properties, supra; Emma Corp. v. Inglewood Unified School*
2 *District* (2004) 114 Cal.App.4th 1018.) Whenever a party has, by his own statement or conduct,
3 intentionally and deliberately led another to believe a particular thing to be true and to act upon
4 such belief, he is not, in any litigation arising out of such statement or conduct, permitted to
5 contradict it. (*Leasequip Inc. v. Dapeer* (2002) 103 Cal.App.4th 394; *California Evidence Code*
6 §623.)

7 The requisite elements for equitable estoppel are met in this case: (1) The party to be
8 estopped (CalPERS) was apprised of the facts; (2) the party to be estopped (CalPERS) intended
9 by its conduct to induce reliance by the other party (Guido) on the communications from
10 CalPERS stating that reciprocity between his CalPERS and LACERA service had been
11 established (and acting in such a way as to cause Guido reasonably to believe reliance was
12 intended); (3) the party asserting estoppel (Guido) was ignorant of the facts; and (4) the party
13 asserting estoppel (Guido) suffered injury in reliance on CalPERS' conduct, to wit: he both
14 relinquished the opportunity to seek employment in a CalPERS-covered position and thereby
15 increase the final compensation amount to be used in calculating his eventual CalPERS pension,
16 even if reciprocity would not apply concerning his LACERA service, and he retired at the time
17 he did and thereby ended his career, only to find that he would be receiving a far smaller pension
18 allowance from CalPERS than he had been promised.

19 If those estoppel elements are established against the government, the court must then
20 balance (i) the burden on the party asserting estoppel if the doctrine is not applied against (ii) the
21 public policy that would be affected by the estoppel. (*Lentz v. McMahon* (1989) 49 Cal.3d 393,
22 400-401.)

23 If for purposes of argument the PERL does not permit Guido to have established
24 reciprocity between his CalPERS and LACERA service, then CalPERS misled Guido, by its own
25 statements and conduct, to believe that he was entitled to establish reciprocity and had, in fact,
26 done so, and that he would receive increased retirement benefits for life based on that.

27 As the doctrine of equitable estoppel states, justice and right require that CalPERS be
28 estopped from now withdrawing reciprocity concerning Guido's CalPERS and LACERA service.

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1 **III. Establishing Reciprocity After Guido Retired Was Virtually Impossible**

2 Guido testified at length about how he could and would have taken a CalPERS position
3 before retirement if he learned this was necessary to establish reciprocity. Witnesses Michael
4 Henry and Vincent Yu provided testimony that such CalPERS positions were likely available
5 had Guido expressed interest in them. But as Guido testified, he declined any such CalPERS
6 position based upon explicit representations from CalPERS that reciprocity was already in place.

7 CalPERS is expected to argue that the CalPERS jobs were at best "possibilities", and that
8 Guido cannot demonstrate that he would have been hired for such positions. The essence of the
9 matter, however, is not whether Guido would have been offered or would have taken any
10 specific CalPERS position. The issue is *whether he would have pursued* such options if he had
11 been told by CalPERS that reciprocity did not exist.

12 Guido testified in depth about the fact that the very reason he considered taking a position
13 at a CalPERS-contracting entity was to make sure he met the requirements of reciprocity and
14 would therefore receive the benefits of reciprocity for all of his CalPERS time. There is no doubt
15 from Guido's testimony that if he *had* been told that reciprocity had not been established, he
16 would have done whatever was required to obtain a CalPERS position and establish that
17 reciprocity.

18 CalPERS is also likely to argue that even if CalPERS *had* misinformed Guido about
19 reciprocity, he did nothing to establish reciprocity after he was informed that it had not been
20 established. Such arguments badly distort what would be involved in such an attempt.

21 As noted above, an individual cannot benefit from reciprocity unless he retires from both
22 reciprocal systems on the same day. Guido talked at some length about the steps he took to
23 ensure there was no confusion about his retirement date, including taking his retirement
24 applications in person to both the CalPERS and LACERA offices to make sure he correctly filled
25 out the retirement applications.

26 Once an individual retires, he cannot "un-do" the retirement and reinstate back into active
27 membership unless he becomes reemployed in a position offering pension benefits in that
28 retirement system. Because Guido had retired simultaneously from both CalPERS and

1 LACERA, he could not receive the benefits of reciprocity (especially the benefit of having his
2 pension calculated on the basis of his highest earnings in either system) unless he reinstated in
3 *both* systems and then at some subsequent date simultaneously *re-retired* from both systems a
4 second time.

5 For CalPERS, reinstatement is governed by *Government Code* sections 21190 and 21196:

6 **§21190. Generally**

7 A person who has been retired under this system for service may be reinstated
8 from retirement by the board as provided in this article, and thereafter may be
9 employed by the state or by a contracting agency in accordance with the laws
10 governing that service, in the same manner as a person who has not been so
11 retired.

12 **§21196. Reinstatement from Retirement—Retiree Application**

13 The board may reinstate a person from retirement upon (a) his or her application
14 to the board for reinstatement and (b) the determination of the board that his or
15 her age at the date of application for reinstatement is at least six months less than
16 the age of compulsory retirement for service applicable to members of the class or
17 category in which it is proposed to employ him or her. The provisions of clause
18 (b) of this section shall apply only to patrol, state peace officer/firefighters, and
19 safety members. The effective date of reinstatement for purposes of this article
20 shall be the first day of compensated employment following approval of
21 reinstatement.

22 For LACERA, reinstatement is governed by *Government Code* section 31680.4 which
23 reads in relevant part:

24 **§31680.4. Reemployment; reinstatement to active membership; contingent
25 operation**

26 Notwithstanding any other provision of law, a member retired for service and
27 reemployed in a county or district under this chapter shall become again an active
28 member of the retirement association upon (a) his or her application to the board
29 for reinstatement, (b) the determination of the board, based upon medical
30 examination, that he or she is not incapacitated for the duties assigned to him or
31 her; and (c) meeting the conditions for membership in Article 4 (commencing
32 with Section 31550) are met.

33 For the purposes of this section, the effective date of the member's reinstatement
34 to active membership shall be the first day of the month following the date of
35 reemployment.

36 As indicated, both CalPERS and LACERA require an individual to (a) apply to the
37 respective retirement board for reinstatement and (b) begin compensated employment with a

1 contracting agency of that pension system. Even assuming arguendo that Guido would quickly
2 obtain approval from both CalPERS and LACERA to reinstate (so as to take the necessary steps
3 to meet the technical requirements of reciprocity), he could only do so if he had a job waiting for
4 him – and moreover, would need to do this twice, once in each system.

5 **IV. CalPERS' Constitutionally Mandated Fiduciary Duties Are Supreme**

6 CalPERS has been a trust arrangement since its inception, with the Board of
7 Administration acting as trustee for the Members as beneficiaries. The Board owes fiduciary
8 duties to each Member individually and to the membership collectively. Standard trust duties
9 apply. (*Hannon Engineering, Inc. v. Reim, supra*, at 425 [pension plans create a trust relationship
10 between pensioner-beneficiaries and the trustees of pension funds who administer retirement
11 benefits; trustees must exercise their fiduciary trust in good faith and deal fairly with the
12 pensioners-beneficiaries].)

13 When adopted in 1992, however, Proposition 162 strengthened and extended these
14 fiduciary duties. The amended California Constitution now reads in relevant part:

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

19 (a) The retirement board of a public pension or retirement system shall have the
20 sole and exclusive fiduciary responsibility over the assets of the public pension or
21 retirement system. The retirement board shall also have sole and exclusive
22 responsibility to administer the system in a manner that will assure prompt
23 delivery of benefits and related services to the participants and their beneficiaries.
24 The assets of a public pension or retirement system are trust funds and shall be
25 held for the exclusive purposes of providing benefits to participants in the pension
26 or retirement system and their beneficiaries and defraying reasonable expenses of
27 administering the system.

28 (b) The members of the retirement board of a public pension or retirement system
shall discharge their duties with respect to the system solely in the interest of, and
for the exclusive purposes of providing benefits to, participants and their
beneficiaries, minimizing employer contributions thereto, and defraying
reasonable expenses of administering the system. A retirement board's duty to its
participants and their beneficiaries shall take precedence over any other duty.
(Constitution, Art. XVI, §17.)

CalPERS' duty to inform does not require it to provide the full text of the PERL to each

1 Member, which would be incomprehensible. As a corollary, CalPERS cannot absolve itself of its
2 fiduciary duties by demanding that Members *themselves* investigate and seek to interpret the
3 labyrinth of PERL statutes and associated regulations. Instead, CalPERS' duty is to supply
4 accurate, meaningful information to those individuals making a choice.

5 The courts have interpreted CalPERS' constitutional duties and Proposition 162 in other
6 contexts. (See, e.g., *Westly v. California Public Employees' Retirement System Bd. of*
7 *Administration* (2003) 105 Cal.App.4th 1095 [CalPERS Board "plenary authority" protects
8 pension funds from interference]; *Teachers Retirement Bd. v. Genest* (2007) 154 Cal.App.4th
9 1012 [prevents the Legislature from "raiding" pension funds].)

10 In addition to CalPERS' pre-existing trust and fiduciary duties, Proposition 162 mandates
11 that a retirement board shall have *fiduciary responsibility to its members and beneficiaries above*
12 *all other duties*. In other words, the constitutional changes were not simply aimed at blocking
13 "outside forces" (i.e., the government) from exerting control over the disposition and
14 management of pension funds, but were also directed at ensuring that *the pension systems*
15 *themselves* fulfilled their fiduciary responsibilities to their respective memberships.

16 Proposition 162 added new language imposing a hierarchy of duties that clarified that
17 "[n]otwithstanding any other provisions of law or this Constitution to the contrary [a]
18 retirement board's duty to its participants and their beneficiaries shall take precedence over any
19 other duty". (Constitution, Art. XVI, §17.)

20 The prefatory phrase "[n]otwithstanding any other provisions of law ... to the contrary"
21 clarifies that constitutional fiduciary duties trump the PERL. CalPERS cannot fulfill its fiduciary
22 duties simply by following the PERL. The fundamental nature of the constitutional fiduciary
23 duties to the Member means that CalPERS cannot place a particular statute in the PERL above
24 the *constitutional* duties. Taking refuge in the argument that it is a "creature of statute", rather
25 than recognizing that it is a constitutional trust, CalPERS essentially claims that its primary duty
26 is *to itself*, rather than to its Members.

27 **V. CalPERS' Breach of Constitutional and Fiduciary Duties Owed to Guido**

28 The constitutional duties are not simply general statements of responsibility. Rather, they

1 must actually guide CalPERS' day-to-day communications with its Members, such as Guido,
2 including imposing a specific duty of care on CalPERS to ensure the accuracy of its
3 communications with its Members.

4 As the California Court of Appeals ruled in *City of Oakland v. Public Employees'*
5 *Retirement System, supra*, "[CalPERS] owes a fiduciary duty to provide timely and accurate
6 information to its members". (*City of Oakland, supra*, at 40, italics in original.) CalPERS itself
7 has recognized this same duty to accurately inform in its precedential decision *In Re Application*
8 *of Smith*, where CalPERS adopted the *Proposed Decision* of the ALJ stating, "[t]he duty to
9 inform and deal fairly with members also requires that the information conveyed be complete
10 and unambiguous." (*In Re Application of Smith, supra.*)

11 CalPERS has a special relationship with Guido. CalPERS Members such as Guido repose
12 great trust and confidence in CalPERS.

13 In the instant case, however, CalPERS essentially acts as if the duty to accurately inform
14 Members such as Guido is meaningless – that CalPERS' prior representations to him, *made over*
15 *the course of more than five years*, carry no weight whatsoever so long as CalPERS *now* claims
16 that the PERL allegedly requires a different result than what was earlier promised.

17 **A. CalPERS Breached Its Fiduciary Duties Owed to Guido**

18 Under California law, a breach of fiduciary duty includes (1) the existence of fiduciary
19 relationship giving rise to fiduciary duty; (2) breach of that duty; and (3) damage proximately
20 caused by the breach. (*Estate of Migliaccio v. Midland Nat'l. Life Ins. Co.* (C.D. Cal. 2006) 436
21 F.Supp.2d 1095.)

22 CalPERS' unjust denial of Guido's reciprocity with LACERA meets each of the elements
23 to bring a breach of fiduciary claim against CalPERS.

24 **B. The Existence of A Fiduciary Relationship Giving Rise to Fiduciary Duty**

25 CalPERS and Guido were engaged in a fiduciary relationship giving rise to a fiduciary
26 duty. It has been held that the administrator of a pension is a fiduciary in its relationship with its
27 pensioner. In *Hittle v. Santa Barbara County Employees Retirement Assn., supra*, at 392-393, the
28 Supreme Court concluded that trustees who administer pension plan retirement funds owe

1 fiduciary duties of good faith and fair dealing towards the pensioner-beneficiaries.

2 Similarly, in *Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32
3 Cal.App.4th 30, 43-45, the court acknowledged the existence of fiduciary duties owed by a
4 retirement plan and its administrator to a pension plan beneficiary. Pensions and retirement
5 systems have fiduciary obligations to deal fairly and have a duty to inform employees.

6 CalPERS is an administrator of pensions and is in a fiduciary relationship with its
7 Members, specifically Guido. CalPERS also has fiduciary duties to its Member-beneficiaries
8 which have a Constitutional basis in Article XVI, Section 17, of the California Constitution.

9 CalPERS' other fiduciary duties as provided by statute.

10 As seen by both case law and statute, CalPERS had a duty to deal with Guido fairly and
11 in good faith. Included within the fiduciary obligation is the duty to fully inform its Members of
12 their options in obtaining retirement benefits, as stated in CalPERS' own Precedential Board
13 decision, *In re William R. Smith, supra*.

14 **C. CalPERS' Breach of Fiduciary Duty**

15 CalPERS breached this duty by failing to fully inform and/or correctly inform Guido of
16 reciprocity.

17 In *Hittle, supra*, the court found that a handwritten notation on a form letter from a
18 county retirement association to an injured former county employee, briefly mentioning the
19 possibility of filing for disability retirement, was inherently ambiguous and uninformative, and
20 could not be said to have satisfied the association's fiduciary obligation to adequately inform the
21 employee. The association did not fulfill its fiduciary duty to the employee to deal fairly and in
22 good faith. The court also found that the means by which the association sought to inform the
23 employee of his options in disposing of his retirement contributions were tantamount to the
24 misrepresentation and concealment, however slight, prohibited by *California Civ. Code*, § 2228.
25 (*Id.*)

26 CalPERS breached its duty to Guido by failing to fully inform and/or correctly inform
27 him about the establishment of reciprocity between his CalPERS and LACERA service and the
28 impact this would have on his eventual pension allowance. Time and again, CalPERS explicitly

1 presented information to Guido showing that he was entitled to reciprocity.

2 **D. Damage to Guido Caused By CalPERS' Breach**

3 Due to CalPERS' breach, Guido suffered serious, long-term and irrevocable damage. If
4 CalPERS had informed Guido that he was not entitled to reciprocity, Guido could have forgone
5 employment at a Department of Los Angeles County position covered by LACERA and taken a
6 different job with an agency that provided CalPERS benefits.

7 Guido suffered a loss because of CalPERS' breach of fiduciary duty to correctly inform
8 him of reciprocity.

9 **VI. CalPERS Is Barred By Laches**

10 Laches is such unreasonable delay by a plaintiff in asserting a right to relief as will render
11 the granting of relief inequitable. (*Nicolopoulos v. Superior Court* (2003) 106 Cal.App.4th 304; 30
12 Cal.Jur.3d, *Equity* §36.) Laches will operate as a bar in equity to the successful maintenance of
13 the plaintiff's cause of action. (*Cahill v. Superior Court of City and County of San Francisco*
14 (1904) 145 Cal. 42; *Kleinclaus v. Dutard* (1905) 147 Cal. 245; 30 Cal.Jur.3d, *Equity*, §36.) The
15 defense of laches requires unreasonable delay in bringing suit plus either acquiescence in the act
16 about which plaintiff complains, or prejudice to the defendant resulting from the delay. (*Conti v.*
17 *Board of Civil Service Commissioners* (1969) 1 Cal.3d 351; *Miller v. Eisenhower Medical*
18 *Center* (1980) 27 Cal.3d 614.)

19 **A. Laches in Administrative Hearings**

20 The elements of unreasonable delay and resulting prejudice, which must be established in
21 order for the defense of laches to operate as a bar to a claim by a public agency, may be "met" in
22 two ways: first, they may be demonstrated by the evidence in the case, and the person arguing in
23 favor of a finding of laches has the burden of proof on the laches issue; second, the element of
24 prejudice may be "presumed" if there exists a statute of limitations which is sufficiently
25 analogous to the facts of the case, and the period of such statute of limitations has been exceeded
26 by the public administrative agency in making its claim. (*Fountain Valley Regional Hospital &*
27 *Medical Center v. Bonta* (1999) 75 Cal.App.4th 316; 2 Cal.Jur.3d, *Administrative Law*, §440.)

1 **B. Acquiescence By CalPERS**

2 **Acquiescence At Time of Letter.** CalPERS acquiesced in the reciprocity when it
3 informed Guido that reciprocity had been established. CalPERS acquiesced in Guido's
4 reciprocity when it realized that it had misinformed many Members yet failed to do anything to
5 correct the misinformation. *Guido specifically asked CalPERS for an opinion about reciprocity*
6 *and CalPERS sent letters for more than five years explaining that reciprocity had been*
7 *established.* Guido provide CalPERS with the information it needed to verify his eligibility for
8 reciprocity, he in effect invited CalPERS to review that information in order to verify that Guido
9 was eligible for reciprocity.

10 **CalPERS' Knowledge and Acquiescence.** As described above, CalPERS repeatedly
11 informed and confirmed in writing that Guido had established reciprocity. CalPERS had
12 sufficient information in its possession to determine reciprocity. Between 2003 and 2009,
13 CalPERS acquiesced in Guido's reciprocity based on a full knowledge of the facts. (*Weadon v.*
14 *Shahen* (1942) 50 Cal.App.2d 254.)

15 **CalPERS' Actual Knowledge.** As shown above, CalPERS had actual knowledge of
16 Guido's situation. Every person who has actual notice of circumstances sufficient to put a
17 prudent person on inquiry as to a particular fact, has constructive notice of that fact in all
18 instances in which he or she, by making an inquiry, might have learned it. (*Code of Civil*
19 *Procedure*, §19.)

20 **Acquiescence in Communications.** CalPERS acquiesced to reciprocity when it made its
21 various communications to Guido.

22 **C. Undue Prejudice and Injury To Guido**

23 Guido was injured by CalPERS' delay in waiting to raise the reciprocity ineligibility until
24 after he retired. CalPERS delayed years after its initial written confirmation of reciprocity. After
25 CalPERS knew that Members were being misinformed, CalPERS still delayed. CalPERS
26 delayed when it learned of Guido's retirement application. CalPERS delayed until after Guido's
27 retirement. All of this is unreasonable delay and is not excusable.

28 In his career and life choices, Guido did or omitted to do something that detrimentally

1 altered his position with respect to his retirement based on CalPERS' representations that it had
2 established reciprocity. Specifically, as one example, Guido retired without taking another
3 position providing CalPERS membership. Guido made decisions were based in part on his firm
4 belief that his pension allowance would be calculated in part based upon reciprocity. Guido
5 would have made different job, career, or work choices had he known that he was not entitled to
6 the reciprocity.

7 Guido suffered prejudice because he relied on CalPERS' representation about reciprocity
8 in planning his retirement and in his job selection and generally planning his life. The large and
9 small, conscious and unconscious, decision matrix that an individual uses to plan his life, his
10 retirement, his activities are founded on the accepted facts of one's life. Reciprocity was a large
11 fact in Guido's life. Material changes of condition, including retirement, have taken place
12 between the parties during that period of CalPERS' neglect. CalPERS should not now be able to
13 unsettle his expectations by belatedly and prejudicially asserting that it has a right to change its
14 mind.

15 **D. CalPERS' Delay Creates An Injustice**

16 Guido suffered prejudice in that he retired based on CalPERS' representations that he
17 would have the benefit of reciprocity. Now, years after the representation and after Guido's
18 retirement, CalPERS' delay would, were the claim upheld, permit the imposition of an
19 unwarranted injustice. Guido could not now easily begin to look for other work, make alternative
20 jobs choices, or seek other benefits.

21 **E. Laches is Appropriate**

22 Guido may assert laches against CalPERS to prevent relief of a strictly legal nature
23 because of CalPERS' failure to make the correction, or to prosecute it with diligence. In some
24 cases of delay, equity may bar an administrative proceeding, and the courts will apply notions of
25 laches borrowed from the civil law. (30 Cal.Jur.3d, *Equity*, §36.) Where equity borrows a statute
26 of limitations to apply in an administrative proceeding, it is to avoid unfairness due to delay by
27 the public agency against whom laches was asserted. (*City of Oakland, supra*; 30 Cal.Jur.3d,
28 *Equity*, §36.)

1 The doctrine of laches and statutes of limitations are both designed to promote justice by
2 preventing surprises through the revival of claims that have been allowed to slumber until
3 evidence has been lost, memories have faded, and witnesses have disappeared. These policies
4 also guard against other injuries caused by a change of position during a delay. While a statute of
5 limitations bars proceedings without proof of prejudice, laches requires proof of delay that
6 results in prejudice or change of position.

7 **F. Statute of Limitations**

8 To the extent that a statute of limitations applies directly or by implication, CalPERS is
9 barred by the statute of limitations for bringing this action. Statutes of limitations for a written
10 contract are 4 years (*Code of Civil Procedure*, §437), and for a liability created in statute are 3
11 years (*Code of Civil Procedure* § 338).

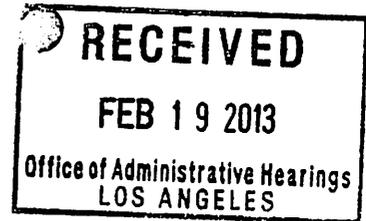
12 **VII. CalPERS' "Mandatory Duty" to Correctly Inform**

13 CalPERS is expected to argue that it cannot be subject to estoppel because *Government*
14 *Code* section 818.8 holds that a public entity is not liable for injury caused by misrepresentation
15 of an employee of the public entity.

16 This argument ignores the fact that CalPERS has a mandatory fiduciary duty to provide
17 accurate information to its membership. That fiduciary duty is precisely the type of "mandatory
18 duty" discussed in *Government Code* section 815.6 which permits a public entity to be sued for
19 an injury of the kind proximately caused by its failure to discharge the duty.⁴ In the *City of*
20 *Oakland* case, the court reviewed the Proposition 162 constitutional amendment and ruled that
21 CalPERS has "a fiduciary duty to provide timely and *accurate* information to its members". (*City*
22 *of Oakland, supra*, at 40, emphasis in original.)

23 CalPERS' fiduciary duties are precisely the type of "mandatory duty" that *permits* a
24 public entity to be sued for injuries caused by its failure to discharge that duty under *Government*
25

26 ⁴ "Where a public entity is under a mandatory duty imposed by an enactment that is
27 designed to protect against the risk of a particular kind of injury, the public entity is liable for an
28 injury of that kind proximately caused by its failure to discharge the duty unless the public entity
establishes that it exercised reasonable diligence to discharge the duty." (*Government Code*,
§815.6.)



1 Code section 815.6.

2 **§ 815.6. Mandatory duty of public entity to protect against particular kinds**
3 **of injuries**

4 Where a public entity is under a mandatory duty imposed by an enactment that is
5 designed to protect against the risk of a particular kind of injury, the public entity
6 is liable for an injury of that kind proximately caused by its failure to discharge
7 the duty unless the public entity establishes that it exercised reasonable diligence
8 to discharge the duty.

9 In the seminal case of *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, the California
10 Supreme Court found that the applicability of Section 815.6 required the following:

11 First and foremost, application of section 815.6 requires that the enactment at
12 issue be *obligatory*, rather than merely discretionary or permissive, in its
13 directions to the public entity; it must *require*, rather than merely authorize or
14 permit, that a particular action be taken or not taken. (*Morris v. County of Marin*
15 (1977) 18 Cal.3d 901, 907, 910.)...

16 Second, but equally important, section 815.6 requires that the mandatory duty be
17 "designed" to protect against the particular kind of injury the plaintiff suffered.
18 The plaintiff must show the injury is " 'one of the consequences which the
19 [enacting body] sought to prevent through imposing the alleged mandatory duty.'
20 " (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 939, fn. omitted.)

21 (*Haggis, supra*, at 498-499.)

22 Regarding the first condition, the Constitution and Proposition 162 both meet the
23 requirement that it be an *obligatory* enactment: "A retirement board's duty to its participants and
24 their beneficiaries *shall take precedence over any other duty.*" (Constitution, Art. XVI, §17(b),
25 emphasis added.)

26 Regarding the second condition, the electorate "designed" the Constitution and the
27 amendment to protect Guido and other Members against the particular kind of harm that Guido
28 suffered. While the voters could simply have amended the Constitution to give retirement
systems like CalPERS plenary authority and fiduciary for investment of moneys and
administration of the system, the voters instead made this plenary authority and fiduciary
responsibility subject to the mandate that "[a] retirement board's duty to its participants and their
beneficiaries shall take precedence over any other duty." (Constitution, Art. XVI, §17(b).)