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Office of Administrative Hearings
LOS ANGELES

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

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

) CALPERS CASE NO. 9711
) OAH CASE NO. 2012030387

14 FRED GUIDO,

) FRED GUIDO'S POST-HEARING REPLY
) BRIEF

15 Respondent,

16 and

) OAH Hearing: November 13-15, 2012
) Hearing Location: Los Angeles OAH
) Presiding ALJ: Eric Sawyer

17 CITY OF CUDAHY,

18 Respondent.
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20

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22 Respondent Fred Guido submits this *Post Hearing Reply Brief* concerning the Office of
23 Administrative Hearings proceedings about his retirement benefits held on November 13-15,
24 2012, and in response to *CalPERS' Post-Hearing Brief*.
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RESPONDENT'S
EXHIBIT
279

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1 **California Cases (continued):**

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12 **California Constitution:**

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1 **I. INTRODUCTION**

2 Equitable estoppel is the only effective way to give meaning to the beneficiaries'
3 constitutional and statutory rights to receive timely accurate information from CalPERS,
4 pursuant to CalPERS' fiduciary duties.

5 Without equitable estoppel, the constitutional and statutory fiduciary duties are void,
6 meaningless, and without remedy.

7 The California Constitution entitles members to the right to timely accurate information:

8 [CalPERS] shall discharge [its] duties with respect to the system solely in the
9 interest of, and for the exclusive purposes of providing benefits to, participants
10 and their beneficiaries, A retirement board's duty to its participants and their
11 beneficiaries shall take precedence over any other duty.
(Cal. Const., art. XVI, §17.)

12 PERS has a fiduciary duty to provide timely and *accurate* information to its
13 members. (See *In re Application of Smith* (March 31, 1999) PERS Prec. Dec. No.
14 99-01 [The duty to inform and deal fairly with members also requires that the
15 information conveyed be complete and unambiguous']; see also *Boxx v. Board of*
16 *Administration* (1981) 114 Cal.App.3d 79, 90, 170 Cal.Rptr. 538.
(*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th
29, 40.)

17 See also *Hittle v. Santa Barbara County Employees' Retirement Assn.* (1985) 39 Cal.3d
18 374.

19 Fred Guido's and other beneficiaries' right to benefit from CalPERS' duty to timely and
20 accurately inform them only has value and meaning if CalPERS can be held accountable, and not
21 deny its prior representations. A constitutional or statutory right is meaningless without a
22 remedy. The law does not do meaningless acts. The Constitution cannot be construed as to be
23 meaningless.

24 Equitable estoppel is the effective and perhaps only means to make CalPERS accountable
25 for its constitutional and statutory fiduciary duties to timely and accurately inform. In a sense,
26 equitable estoppel is the enforcement mechanism that provides significance for these
27 constitutional and statutory rights. As such, the constitutional and statutory rights underlie and
28 support the equitable estoppel.

1 Instead of contravening a statutory right, equitable estoppel promotes the constitutional
2 right and provides the enforcement and relief mechanism to ensure that these constitutional and
3 statutory rights are respected. Positive law, equity and public policy support the application of
4 the estoppel against CalPERS.

5 As it arises in the context of CalPERS' breach of its existing duties to Guido, Guido's
6 equitable estoppel case is different than other equitable estoppel cases relied on by CalPERS.

7 As a practical matter, denying the application of equitable estoppel (especially based on a
8 statutory or policy reason that estoppel will provide a benefit in excess of statute) denies the
9 Member the benefit of a constitutional right. CalPERS' denial of estoppel denies Guido the
10 benefit of his rights to receive timely and accurate information. CalPERS should not be allowed
11 to contravene the Constitution by arguing that it must follow the lesser authority of a statute.

12 As it omits its constitutional and statutory duties to inform from its analysis, CalPERS'
13 opposition fails. At best, CalPERS only argues against the "normal" rule of estoppel against the
14 government (i.e., where the government is not bound by higher obligations or fiduciary duties.)

15 Factually, CalPERS admits that it contravened its duties to inform, but then implicitly
16 seeks to excuse the breach of those duties and render the constitutional and statutory fiduciary
17 duties meaningless, and without remedy. CalPERS contravenes its duties and seeks this Court to
18 rule on another matter that would excuse or ignore its failure to perform those *antecedent duties*.
19 CalPERS' greater, pre-existing, antecedent, constitutional duties cannot be excused by saying
20 that PERL does not provide for "reciprocity" in these instances, when Guido relied on CalPERS'
21 serial representations that Guido was entitled to reciprocity.

22 Implicitly or explicitly, CalPERS' Post-Hearing Brief violates cardinal rules of legal
23 analysis. First, the Constitution takes precedence over statutes. Statutes are unconstitutional to
24 the extent that they contrast with or violate the Constitution.

25 Second, the Court must interpret the Constitution and statutory scheme as a whole. (See
26 *People v. Allen* (2007) 42 Cal.4th 91.) Ultimately, the Court must select the construction that
27 comports most closely with the apparent intent of the Legislature, with a view to promoting
28 rather than defeating the general purpose of the Constitution and the statute. (*Lopez v. Superior*

1 *Court* (2010) 50 Cal.4th 1055.) The meaning may not be determined from a single word or
2 sentence; the words must be construed in context, and provisions relating to the same subject
3 matter must be harmonized to the extent possible. (*TrafficSchoolOnline, Inc. v. Superior Court*
4 (2001) 89 Cal.App.4th 222, as modified (May 31, 2001).)

5 Pension legislation should be liberally construed to provide benefits. The PERS laws are
6 to be interpreted in favor of the employee or beneficiary when a semantic ambiguity is presented
7 by the statute at issue. (*City of Sacramento v. Public Employees Retirement System* (1991) 229
8 Cal.App.3d 1470, 1488; *City of Oakland v. Public Employees' Retirement. Systems, supra*, 39.)

9 CalPERS misconstrues *City of Long Beach v. Mansell v. City of Long Beach* (1970) 3
10 Cal.3d 462 to state that CalPERS can never provide a benefit greater than the specific language
11 of the reciprocity statutes. *Mansell* actually provides for a benefit in excess of statute.

12 At root, CalPERS misconstrues estoppel.

13 **CalPERS' Three Fundamental Flaws in Opposition**

14 CalPERS' Post-Hearing Brief is premised on at least three fundamental flaws:

15 First, CalPERS' argues as a foundational matter that it can *never* be equitably estopped if
16 the result is to award the complaining party with something different or greater than what the
17 Public Employees' Retirement Law ("PERL") provides.

18 California case law contains no such categorical bar. In fact, the case law specifically
19 *permits* estoppel against government entities when justified by equitable considerations.
20 CalPERS misrepresents the case law history with semantical sleight-of-hand arguments that
21 distort the actual opinions. If adopted, CalPERS' position would fundamentally rewrite
22 California law so as to bar estoppel claims against *all* governmental entities in *all* circumstances.

23 Second, CalPERS argues that even if estoppel exists, Guido failed to meet the
24 requirements to invoke it. In particular, CalPERS contends that Guido "knew or should have
25 known that he did not qualify for reciprocity" (CalPERS' Brief, 5:14-15) and in any event, he did
26 not prove he "reasonably relied on CalPERS' error [of repeatedly advising him that he had
27 established reciprocity] to his detriment" (CalPERS' Brief, 7:10-11).

28 Again, CalPERS resorts to sleight-of-hand arguments to misdirect the Court and distort

1 what was required of Guido *and what Guido actually did*.

2 As a legal matter, CalPERS equates "being put on inquiry notice" with the status of
3 "knowing or should have known". In other words, it asserts that once put on inquiry notice, a
4 person is no longer entitled to equitable estoppel. CalPERS argues that inquiry notice denies
5 estoppel even if the entity that is to be estopped makes further representations that an individual
6 relies on. In a sense, CalPERS argues that once on inquiry notice, you waive the right to
7 equitable estoppel, no matter what the entity says in response to the inquiry. That is not
8 California (or any state or federal) law.

9 CalPERS' "inquiry notice" limitation would mean that an entity is free to continue to
10 make serial incorrect statements and void equitable estoppel, as long as it continues to make the
11 erroneous statements (that it causes people to rely upon). In other words, CalPERS argues for a
12 rule which says that the more often a government agency makes incorrect statements, the less
13 likely it can be held accountable for those incorrect statements.

14 Significantly, CalPERS' Post-Hearing Brief completely fails to address the significance
15 of its own PMK's testimony about CalPERS' practice around reciprocity advice. Emily Perez de
16 Flores freely admitted that (1) CalPERS regularly misinformed Members over many years that
17 they had established reciprocity, (2) Flores established a new protocol after becoming head of the
18 reciprocity division to prevent such misinformation, (3) Flores later discovered that staff failed to
19 follow the new protocol and had *continued* misinforming Members, and yet (4) CalPERS never
20 did anything to identify the Members who had been given false information or make efforts to
21 correct that misinformation.

22 Third, CalPERS argues that even if estoppel exists, and even if Guido meets the
23 requirements to claim estoppel, he should be denied the benefits of that estoppel on grounds that
24 he is somehow "cheating" the pension system by asserting the benefit of law. The law provides
25 for the benefit that Guido seeks. Guido is entitled to seek it. If he is legally entitled to it, then
26 CalPERS should provide it, even if CalPERS disagrees with the law.

27 In support of CalPERS' argument that seeking the benefit of a lawfully enacted piece of
28 legislation is somehow "cheating", CalPERS sought administrative or judicial notice of the

1 legislative history of Senate Bill 53 (1993-1994) which included some 900 pages of mostly
2 irrelevant material. Guido filed a *Motion to Strike* the *RJN* and all references in CalPERS'
3 closing brief to both the legislative history and how this allegedly applies to Guido, arguing that
4 CalPERS was introducing the matter after the close of the hearing in order to prejudice the Court
5 and malign Guido.

6 The Court has since denied the *Motion to Strike* and granted CalPERS' *Request for*
7 *Judicial Notice* only as to the handful of pages specifically cited. Guido therefore will make his
8 arguments about the inapplicability and improper nature of CalPERS' references in this Reply
9 Brief.

10 **II. APPLICABILITY OF ESTOPPEL**

11 Contrary to CalPERS' contentions, California law unequivocally permits estoppel against
12 public entities in appropriate circumstances. Nor is this limited solely to *procedural* issues
13 (versus substantive rights and remedies) as CalPERS claims.

14 CalPERS may wish to overturn the California Supreme Court on the matter, but the
15 seminal case of *City of Long Beach v. Mansell, supra*, continues not only to constitute good law,
16 but explicitly to permit estoppel against the government.¹

17 **A. Estoppel is Available Against Government Agencies**

18 In *Mansell*, the Supreme Court justices spoke of "the principle of justice and fair dealing
19 inherent in [the estoppel] doctrine". (*Id.*, at 492.) The Court then put forth what has become
20 foundational jurisprudence on the question of estoppel against the government:

21 It is settled that '(t)he doctrine of equitable estoppel may be applied against the
22 government where justice and right require it' [citations omitted]. Correlative to
23 this general rule, however, is the well-established proposition that an estoppel will
24 not be applied against the government if to do so would effectively nullify 'a
25 strong rule of policy, adopted for the benefit of the public' [citations omitted]. The
26 tension between these twin principles makes up the doctrinal context in which
27 concrete cases are decided. (*Id.*, at 493.)

27 ¹ Ironically, CalPERS' references to case law about how "special," "unusual,"
28 "exceptional," "unique" or "extraordinary" estoppel is prove the point – that estoppel *does* exist,
even if only in rare circumstances.

1 As discussed below, this is most definitely a case where the equities – the "justice and right" of
2 the matter – call for the imposition of estoppel against CalPERS.

3 CalPERS attempts a sleight-of-hand, hoping that the Court will not look beyond
4 CalPERS' interpretations to the actual facts and law involved in this situation. Essentially it
5 argues that (i) because it is mandated to apply the PERL, and (ii) because the PERL only grants
6 reciprocity under specific conditions which Guido in retrospect did not technically meet,
7 therefore (iii) it is impossible for the Court to estop CalPERS from now denying reciprocity to
8 Guido, no matter how long or egregiously CalPERS told him he *had* established it.

9 CalPERS' argument pivots on its interpretation of the statements that "estoppel is barred
10 where the government agency to be estopped does not possess the authority to do what it
11 appeared to be doing" (quoting from *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864,
12 870) and that "principles of estoppel are not invoked to contravene statutes and constitutional
13 provisions that define an agency's powers" (quoting from *Fleice v. Chualar Union Elementary*
14 *School Dist.* (1988) 206 Cal.App.3d 886, 893). Its interpretation of both is flawed.

15 **B. CalPERS' Fiduciary Duties to Correctly and Accurately Inform its Members**

16 Pursuant to the California *Constitution*, CalPERS owes extremely high fiduciary duties to
17 its Members. "A retirement board's duty to its participants and their beneficiaries shall take
18 precedence over any other duty." (Cal. Const., art. XVI, §17.) The courts have interpreted
19 CalPERS' constitutionally-mandated duty to its Members to include the mandate that CalPERS
20 owes "a fiduciary duty to provide timely and *accurate* information to its members." (*City of*
21 *Oakland v. Public Employees' Retirement System, supra*, at 40.) This standard is also insisted on
22 in CalPERS' own Precedential Decision 99-01, *In re Application of William R. Smith* (1999),
23 where CalPERS adopted the ALJ's finding that "[t]he duty to inform and deal fairly with
24 members also requires that the information conveyed be complete and unambiguous."

25 In short, CalPERS is required to and clearly does "possess the authority" to carry out its
26 fiduciary duties to timely and accurately inform its Members of matters bearing directly on
27 critical, vested pension rights and in fact is *required* to do so by the express language in the
28 Constitution.

1 Despite CalPERS' insistence otherwise (or more accurately its avoidance of *this* statutory
2 and constitutional mandate), the failure to carry out these duties is precisely the kind of action
3 that would "contravene statutes and constitutional provisions that define an agency's powers".
4 CalPERS hopes to sidestep this and muddy the waters by pointing to individual sections of the
5 PERL and claiming it has no authority to exceed *those* statutory provisions, while remaining
6 silent about its duty to carry out the constitutional mandate. The Court should reject those efforts
7 and focus on CalPERS' *higher* duty to correctly and accurately inform the membership.

8 **C. More on the Balancing Test in *Mansell***

9 Assuming for sake of argument that CalPERS' constitutionally-imposed fiduciary duties
10 were taken off the table, CalPERS would still be subject to estoppel under the holdings in
11 *Mansell*.

12 The situation the Supreme Court confronted in *Mansell* was the need to balance a clear
13 constitutional prohibition barring the alienation of tidelands on the one hand, against the
14 competing fact that insistence on that prohibition would have caused great harm to the thousands
15 of homeowners who had purchased such lands in the City of Long Beach in detrimental reliance
16 on the assurances that those lands were available for sale.

17 There was no question that the *Mansell* property fell under the alienation prohibition. "It
18 must therefore be concluded that those lands, to the extent they are in fact public 'tidelands'
19 within the meaning of article XV, section 3, of the California Constitution, have not been
20 withdrawn from that category by proper legislative action and remain subject to the prohibition
21 against alienation contained in that section." (*Mansell, supra*, at 487.) But the Supreme Court
22 nevertheless found estoppel was warranted against the State and the City of Long Beach,
23 opining:

24 We conclude without hesitation that the activities, representations, and conduct of
25 the state and its subtrustee the city during the period here in question rise to the
26 level of culpability necessary to support an equitable estoppel against them
27 relative to the lands described in section 2(a) of chapter 1688. The stipulated facts
28 clearly establish that from an early date the state and city have been aware of the
serious and complex title problems in the Alamitos Bay area. More importantly,
those public entities have been in a position to resolve such problems and to
determine the true boundaries between public and private lands. This they have

1 not done. Instead they have conducted themselves relative to settled and
2 subdivided lands in the section 2(a) area as if no title problems existed and have
3 misled thousands of homeowners in the process. Under these circumstances we
4 think it clear that knowledge of the true boundaries between state and private
5 lands in the section 2(a) area must be imputed to the public entities in question,
6 and that their conduct in light of this imputed knowledge must be deemed so
7 culpable that fraud would result if an estoppel were not raised.
8 (*Id.*, at 492.)²

9 The Supreme Court then went on to apply the "balancing test" cited above, weighing
10 considerations of "justice and right" favoring estoppel on the one hand against the proscription
11 that "estoppel will not be applied against the government if to do so would effectively nullify 'a
12 strong rule of policy, adopted for the benefit of the public' " on the other. (*Id.*, at 493.)

13 As part of its analysis, the Supreme Court did a detailed comparison to the cases of
14 *County of San Diego v. Cal. Water and Tel. Co.* (1947) 30 Cal.2d 817 (where estoppel was *not*
15 upheld) with *City of Imperial Beach v. Algert* (1962) 200 Cal.App.2d 48 (where estoppel was
16 imposed). As the Court put it in its analysis of the *Algert* case:

17 [The appellate] court went on to point out that the case before it, unlike *County of*
18 *San Diego* and related cases, involved an impressive combination of
19 governmental acts encouraging reliance. [Fn. omitted.] Viewing this combination
20 as a whole, the court concluded: 'We are not prepared to say what portion of this
21 total chain of events, if missing, would vitiate the use of equitable estoppel. What
22 we do hold is that the sum total of all the facts actually here presented convinces
23 us, as it did the trial judge, that this case presents one of those exceptional
24 conditions in which estoppel against a governmental agency is justified and
25 should be applied.' [Citation omitted.]
26 (*Mansell, supra.*, at 495-496.)

27 The Supreme Court concluded its analysis by stating the following rule governing
28 equitable estoppel against the government: "The government may be bound by an equitable
estoppel in the same manner as a private party when the elements requisite to such an estoppel

² Concerning the *Mansell* statement that "from an early date the state and city have been aware of the serious and complex title problems in the Alamitos Bay area", see discussion *infra* about *infra* about CalPERS' PMK testimony that CalPERS made systematic erroneous communications about reciprocity over a prolonged period, then knowingly failed to follow up and correct the misinformation, even after acknowledging that reciprocity was an important right.

1 against a private party are present and, in the considered view of a court of equity, the injustice
2 which would result from a failure to uphold an estoppel is of sufficient dimension to justify any
3 effect upon public interest or policy which would result from the raising of an estoppel."

4 **D. CalPERS' Assertion That Estoppel May Not Enlarge the Powers of the**
5 **Public Entity Involved**

6 Importantly, the Supreme Court then went on to discuss the very argument advanced by
7 CalPERS: that estoppel may not be imposed if the public entity being estopped does not have
8 the power to do what the estoppel will accomplish indirectly "because to do so would effectively
9 enlarge the powers of the public entity involved." The Court returned to the *City of San Diego*
10 and *Algert* cases. It found that in both cases the public entities lacked the authority to do what
11 estoppel would require them to do (to abandon the specific property sought by the private
12 plaintiffs seeking estoppel without going through the proper legal procedures).

13 However, it also found that upholding estoppel in the first case would frustrate a strong
14 rule of public policy (by permitting evasion of strict statutory procedures governing
15 abandonment), whereas the interests of justice and equity weighed in favor of estoppel in the
16 second. Guido argues that his case is more similar to the *Algert* case in that the interests of
17 justice and equity outweigh any minor impact the granting of estoppel would have on public
18 policy overall.

19 Further, as argued extensively in Guido's Post-Hearing Opening Brief, CalPERS *does*
20 have the power to accomplish what estoppel seeks, i.e., to grant Guido the benefits of reciprocity.

21 First, the constitutional mandate that CalPERS "duty to its participants and their
22 beneficiaries shall take precedence over any other duty" (Cal. Const., art. XVI, §17) provides
23 CalPERS with the legal authority to balance, correct errors and omissions, and to override any
24 particular PERL statute in instances where the fiduciary duties and PERL restrictions are in
25 conflict.

26 CalPERS worries that Guido's proposed remedy "would render the PERL meaningless
27 because member rights would be governed by the extent of CalPERS' errors rather than the
28 provisions of the PERL" (CalPERS' Post-Hearing Brief, 12:19-22). CalPERS does not

1 simultaneously worry about the fact that its constitutional fiduciary duties would be rendered
2 meaningless. In fact, Guido is simply asking this Court to rule that serious, repeated and flagrant
3 violations of CalPERS' *constitutionally-imposed* fiduciary duties as occurred here should be
4 corrected and the constitutional public policies to inform be valued and respected.

5 If not, then CalPERS is really arguing that the fiduciary duties should be deemed
6 meaningless no matter how egregious and long-standing CalPERS' misrepresentations to a
7 Member, so long as CalPERS can eventually discover some provision in the PERL that calls for
8 a different result. CalPERS' argument is particularly defiant and impudent in Guido's case where
9 CalPERS *could and should* have correctly advised Guido about the requirements to establish
10 reciprocity in time for him to do something about it. Instead, we learned through the admission
11 and testimony of CalPERS' PMK that CalPERS misinformed untold numbers of Members about
12 their reciprocity status over the course of several years. When informed of CalPERS' errors,
13 CalPERS did nothing to correct the mis-advice or even to identify who might have received the
14 bad information.

15 Under the facts in Guido's case, CalPERS could have timely prevented the harm in many
16 different ways. Even very late in time, CalPERS clearly realized no later than May 18, 2009 that
17 reciprocity had *not* been established by Guido after a conversation between CalPERS employee
18 Kerry Griffin and LACERA employee Clarence Malone. Griffin further realized that Guido had
19 been told as early as 2003 that reciprocity *did* apply. (CalPERS' internal "Customer Touch Point"
20 Report, Exh. 224, page 3, first entry; LACERA's internal notes, Exh. 18, pages LA 014 and LA
21 016.) In other words, CalPERS knew almost two weeks *before* Guido's retirement that
22 reciprocity had not, in fact, been established; that the advice going back to 2003 asserting that
23 reciprocity *had* been established was wrong; that Guido had received retirement estimates based
24 upon confirmation of reciprocity; and that Guido was retiring with the understanding that he
25 would receive the benefits of reciprocity.

26 CalPERS, however, did nothing to contact Guido, delay his retirement from CalPERS
27 and LACERA, or in any other way warn him of the consequences of CalPERS' inaccurate
28 reciprocity advice. Its serial continued failures to timely inform Guido when he still had

1 sufficient time to do something about it, reeks of institutional hubris and disregard of CalPERS'
2 constitutionally mandated fiduciary duties.

3 Second, CalPERS has the authority to determine membership in the pension system and
4 the benefits flowing therefrom.

5 **§ 20125. Determination of Recipients**

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

9 In this situation, "the conditions under which" Guido is a Member of CalPERS is
10 precisely the condition of *reciprocal membership* and the benefits he shall "continue to receive"
11 are those flowing from such reciprocal membership. As the appellate court said in *Crumpler v.*
12 *Board of Administration* (1973) 32 Cal.App.3d 567, "Nor may estoppel be avoided on the ground
13 that to invoke it would enlarge the statutory power of the board. In view of the *statutory powers*
14 *conferred upon the board by section 20124* [since renumbered as 20125], this is not a case where
15 the governmental agency 'utterly lacks the power to effect that which an estoppel against it
16 would accomplish.'" (*Crumpler, supra*, at 499, emphasis added, quoting *Mansell*.)

17 Finally, CalPERS also has authority under *Government Code* sections 20160-20164 (the
18 so-called "correction statutes") to correct the errors and omissions of CalPERS, its Members and
19 beneficiaries, and contracting CalPERS entities. Section 20160, "Criteria for Correction", has
20 particular relevance:

21 **§ 20160. Criteria for Correction**

22 ...
23 (b) Subject to subdivisions (c) and (d), the board shall correct all actions taken as
24 a result of errors or omissions of the university, any contracting agency, any state
25 agency or department, or this system.

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

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

(e) Corrections of errors or omissions pursuant to this section shall be such that
the status, rights, and obligations of all parties described in subdivisions (a) and

1 (b) are adjusted to be the same that they would have been if the act that would
2 have been taken, but for the error or omission, was taken at the proper time.
3 However, notwithstanding any of the other provisions of this section, corrections
4 made pursuant to this section shall adjust the status, rights, and obligations of all
5 parties described in subdivisions (a) and (b) as of the time that the correction
6 actually takes place if the board finds any of the following:

- 7 (1) That the correction cannot be performed in a retroactive manner.
8 (2) That even if the correction can be performed in a retroactive manner, the
9 status, rights, and obligations of all of the parties described in subdivisions (a) and
10 (b) cannot be adjusted to be the same that they would have been if the error or
11 omission had not occurred.
12 (3) That the purposes of this part will not be effectuated if the correction is
13 performed in a retroactive manner.

14 Note that the Legislature specifically included the requirement in subsection (e) of
15 Section 20160 that any correction "adjust the status, rights, and obligations of all parties ... to be
16 the same that they would have been if the act that would have been taken, but for the error or
17 omission, was taken at the proper time". On the other hand, the Legislature *barred* corrections
18 where "the status, rights, and obligations of all of the parties ... *cannot* be adjusted to be the
19 same that they would have been if the error or omission had not occurred." (*Government Code*,
20 §20160(e)(2), emphasis added.)

21 In this case, the "error or omission" is CalPERS' repeated and consistent incorrect advice
22 to Guido that he had already established reciprocity with LACERA and would receive a
23 CalPERS pension based on his highest earnings in LACERA.

24 The only way to now restore Guido's rights as they existed prior to his retirement would
25 be to deny CalPERS the right to renege on its representation, provide him the reciprocity status,
26 and provide him with a CalPERS pension calculated on the basis of his highest earnings in
27 LACERA—i.e., provide him with exactly what he *could* have received had CalPERS not
28 misinformed him about his reciprocity status until it was too late for him to do anything about it.

29 **III. GUIDO MEETS ELEMENTS OF ESTOPPEL**

30 CalPERS argues that Guido has failed to meet his burden of proof concerning the third
31 and fourth elements of estoppel.³ CalPERS is wrong on both counts.

32 ³ CalPERS apparently concedes that Guido has met the second element – that CalPERS
33 intended its conduct to be acted upon or that Guido had the right to believe it was so intended.

1 **A. Guido Did Not Know He Had Not Established Reciprocity**

2 Guido believed that he had established reciprocity. Among other things, Guido believed
3 that he had been grandfathered into rights before any subsequent changes. He reasonably relied
4 on CalPERS' explicit written representations. CalPERS claims Guido knew or should have
5 known he did not qualify for reciprocity. In support, it quotes from *City of Pleasanton v. Board*
6 *of Administration* (2012) 211 Cal.App.4th 522 that a person asserting estoppel must prove he "did
7 not have notice of facts sufficient to put a reasonably prudent man upon inquiry, the pursuit of
8 which would have led to actual knowledge." (*City of Pleasanton* at 544.)

9 Guido inquired. CalPERS told him he established reciprocity. Even if Guido was put on
10 inquiry notice, he inquired in response. CalPERS told him that he established reciprocity. In each
11 communication before his retirement, CalPERS consistently responded with the same
12 information and the same assurances that reciprocity had been established.

13 Illogically, CalPERS equates "inquiry notice" with the concept that Guido knew or
14 should have known the information was wrong. In effect, CalPERS uses the "inquiry notice"
15 standard as a way to deny equitable estoppel (i.e., if Guido inquired, he must have known
16 CalPERS' representation was incorrect). Essentially, CalPERS argues that Guido inquired
17 because he "knew" CalPERS was wrong. However, Guido inquired because reciprocity (and the
18 amount of his pension) was important to him. His inquiry shows that he wanted to maximize his
19 pension benefit. Inferentially, the inquiry supports estoppel because it shows that he would have
20 taken another job to establish reciprocity if reciprocity had not already been established.

21 As a flawed logical assumption, CalPERS asserts that Guido was not entitled to rely on
22 CalPERS' representations, although reasonable, because CalPERS later turned out to be wrong.
23 In other words, CalPERS tries to limit the application of equitable estoppel to statements that are
24 legally correct at the time that they were made (i.e., a person is not entitled to rely on a
25 reasonable representation if it later turns out to be incorrect). Equitable estoppel is not so limited.
26 Generally, it is likely that estoppel is more important when the agency makes repeated incorrect
27 statements that it causes people to rely on, (rather than correct statements which perhaps are less
28 likely to generate damages from detrimental reliance).

1 As a self-serving conclusion, CalPERS argues that "the most reasonable inference that
2 emerges from Guido's conduct is that he was hearing the answer he wanted to hear". (CalPERS'
3 brief, 6:24-25.) Actually, the most reasonable inference from Guido's conduct is that Guido was
4 reading and relying on CalPERS' unambiguous written and oral representations that "estoppel
5 has been established". CalPERS quotes Guido as saying that his 2003 contact with CalPERS was
6 "speciously favorable". (CalPERS' brief, 6:9.) First, it is highly unlikely that Guido said or used
7 the word "speciously" in the hearing. "Specious" is entirely inconsistent with his manner of
8 speaking and expression. Specious means "superficially plausible, but actually wrong", which is
9 inconsistent with his explicit reliance. So either Guido did not use the word, or he misused the
10 word. "Speciously favorable" is an internally inconsistent statement, not a fact and certainly is
11 not a "knowing admission" that equitable estoppel should not apply. It is likely that the
12 transcripts reporter simply mis-transcribed [sic] and made an error. What CalPERS leaves out,
13 however, tells the true story.

14 Subsequently, Guido was explicitly asked by his attorney what he meant and to explain
15 his inquiries to CalPERS. Guido explained that after recounting his CalPERS and LACERA
16 work histories to the CalPERS representative he spoke to by phone, he was "encouraged" by the
17 fact that she said it appeared he had reciprocity though it required further investigation. (2RT,
18 83:20-84:25.) In other words, he believed CalPERS that reciprocity applied, and was waiting for
19 CalPERS to follow up with him to confirm that reciprocity applied.

20 CalPERS quickly answered his inquiries by confirming in writing its prior
21 representations that reciprocity had been established and applied. In response to his inquiries,
22 CalPERS sent Guido an official letter informing him that "Reciprocity has been established
23 between CalPERS and LACERA". (Exh. 201.) Guido again received the same assurances by
24 official letter in 2008. Then he received in-person confirmation of reciprocity in April 2009
25 when he took his Service Retirement Election Application to the CalPERS Glendale office.

26 Further, CalPERS is the agency with power and expertise to confirm reciprocity, not
27 Guido. CalPERS is the expert in the PERL and its application. CalPERS encourages Members to
28 call and rely on CalPERS' advice. Guido called and relied on CalPERS' specific representations

1 to him in response to his specific inquiries. Guido relied on CalPERS' representations when he
2 chose not to seek employment that would have otherwise established reciprocity or CalPERS
3 benefits because he relied on CalPERS' representations. It was reasonable for Guido to rely.
4 Equitable estoppel is established.

5 In effect, CalPERS argues its *several* confirming representations and assurances, orally
6 and in writing, over nearly six years are undermined or negated because *Guido* inquired about his
7 rights (and CalPERS thereafter confirmed its representations and his reliance). If estoppel was
8 voided by single inquiry, then estoppel would never apply. CalPERS limits estoppel to "true
9 statements", and those that the individual does not inquire into.

10 CalPERS (a) was the agency authorized to provide opinions about the PERL, and (b)
11 continued advising Guido that he had established reciprocity. After CalPERS realized that it was
12 providing incorrect information, CalPERS (c) set up a new protocol precisely to prevent
13 disseminating incorrect reciprocity information, and (d) later learned that despite the new
14 protocol, CalPERS was still providing incorrect information, including to Guido. CalPERS then
15 (e) chose to do *nothing* to identify and correct the misinformation knowingly provided to
16 Members, and (f) despite knowing that Guido believed and was relying on the specific wrong
17 information it had repeatedly provided him about establishing reciprocity, CalPERS waited a
18 month and a half until it was too late (after he retired) to provide the correct information to him.

19 As far as the party best situated to avoid the harm, CalPERS unequivocally *knew* that
20 reciprocity had not been established when the responsible CalPERS person in charge discussed
21 the matter with LACERA. (Exh. 224, page 3, first entry; Exh. 18, pages LA 014 and LA 016.)
22 The responsible CalPERS personnel then delayed doing anything for an additional six weeks,
23 knowing that Guido was in the process of retiring. Guido's first notice from CalPERS about its
24 denial of reciprocity was a full month after he had retired from both CalPERS *and* LACERA.
25 And now CalPERS wishes to wash its hands of the problem, blaming Guido when CalPERS
26 itself could have easily warned him not to retire until the matter was straightened out.

27 CalPERS innocently says in its Post-Hearing Brief that "After Guido filed his retirement
28 application, CalPERS staff discovered its errors and therefore denied Guido Reciprocity. (4:22-

23.) What it fails to include is that "CalPERS staff discovered its errors" as early as May 18, 2009, two weeks before Guido retired, "and therefore denied Guido reciprocity" *a full month after his retirement* when it was too late to readily do anything to ameliorate the problem.

B. Guido Relied Upon CalPERS' Assurances to His Detriment

CalPERS asserts that Guido did not prove that he reasonably relied on CalPERS' errors to his detriment, claiming the proof is that Guido never applied for or even proved he would have been selected for either the Los Angeles County Community Development Department ("CDD") or Temple City positions. Again, CalPERS is targeting straw men of its own construction.

The reason that Guido did not apply was because he relied on CalPERS' representations that reciprocity was established. If he did not believe or rely on CalPERS' representations, then he would have sought and received a CalPERS benefited position. This case would not exist. But to argue that Guido is denied the benefit of estoppel because he did not actually take another job renders estoppel absurd and meaningless -- if Guido had applied for and taken another CalPERS job, he would not be disputing CalPERS' denial of his correct pension rights and would not be asserting equitable estoppel.

Both the CDD and Temple City positions were covered by CalPERS pension benefits. Guido, as well as Michael Henry (the then-head of the Los Angeles County Personnel Department) and Vincent Yu (from Temple City), all testified that Guido was looking into those or other CalPERS-covered jobs precisely because he wanted to make sure he received reciprocal benefits for both his CalPERS and LACERA time. Mr. Henry testified that he specifically talked with Guido about whether he had already established reciprocity between his CalPERS and LACERA time because if Guido had not, he could do so by taking the CDD position. (2RT, 129:4-130:24, 144:7-145:10.) Guido, however, assured Mr. Henry that he *had* established reciprocity and had a letter from CalPERS stating this. (2RT, 129:21-25.)

When CalPERS assured Guido in 2003 (the time period he was considering the CDD job) and again in 2009 (when approached about a Temple City position) that he already had reciprocity, he had no need to take a CalPERS-covered job.

If CalPERS had made clear that Guido had not established reciprocity, then the facts

1 would be different. But since reciprocity was represented, it is logical that Guido relied on this
2 by not seeking a CalPERS benefitted position. CalPERS tries to defeat estoppel by arguing that
3 Guido did not prove that he would have been hired even if the offers were made. But that ignores
4 the essence of estoppel: that Guido acted on CalPERS' representations by not seeking the
5 positions. Guido's testimony was unmistakable that establishing such reciprocity – "marrying"
6 his CalPERS and LACERA service as he put it – was a high priority for him and one that
7 governed is career and retirement decisions.

8 As for the question of detriment, there is no confusion on this score. Guido thought he
9 had already established reciprocity. His failure to *actually* take the steps necessary to establish it
10 flowed directly from the fact that CalPERS had repeatedly told him he had *already* done so and
11 did not need to do anything further. Once he retired, and once CalPERS gave him the bad news
12 30 days too late that it was cutting his CalPERS pension benefit by *97.5% of his expected*
13 *allowance*,⁴ the damage was done.

14 **C. CalPERS Argues Guido Should Pursue Other Remedies**

15 CalPERS says that Guido could mitigate his damages by now taking a job with an agency
16 that contracts with CalPERS and in this way increase the final compensation amount used in
17 calculating the CalPERS portion of his pension. There are numerous problems with this
18 proposal.

19 First, it is a dodge – it completely ignores the question of whether CalPERS should be
20 estopped because of its conduct. The issue in this OAH proceeding, *including* as framed by
21 CalPERS in its *Statement of Issues*, is whether it should be estopped from denying reciprocity to
22 Guido based on its long-standing, consistent, but false representations that he had already
23 established reciprocity.

24 Second, it denies Guido his rights to be timely informed and rely on CalPERS'
25 representations pursuant to its constitutional and statutory fiduciary duties. It requires Guido to

26 ⁴ Based on assurances of reciprocity, Guido retired expecting to receive a total pension
27 from CalPERS and LACERA of approximately 65% of his final salary with the County of Los
28 Angeles based on his total LACERA and CalPERS service. Instead, he receives a pension of
only 42% of what he earned at the County, two-thirds of what he counted on.

1 completely abandon his retirement plans. Guido made numerous career choices over the years
2 leading up to his retirement on the basis of CalPERS' untrue representations. He could have
3 easily resolved the problem as early as 2003 by taking the Los Angeles County CDD position
4 which offered CalPERS membership and benefits if CalPERS had informed him of the actual
5 state of reciprocity. CalPERS' proposal would instead require him to work longer than planned,
6 simply because *CalPERS* failed to correctly inform him.

7 Third, the proposal would require Guido to find a position that paid at least as much as
8 his LACERA final compensation (\$11,838 per month) and to work that position for a full year to
9 use it as his CalPERS final compensation figure (and possibly have to work *three* years if the
10 agency he went to work for calculated final compensation based on the employee's highest three
11 consecutive years of employment). If CalPERS had correctly informed him about his true
12 reciprocity status, he would have qualified for reciprocal rights (including use of his highest
13 LACERA salary in calculating his CalPERS pension) immediately upon taking a CalPERS
14 position.

15 **IV. CALPERS' EFFORTS TO MALIGN AND PREJUDICE GUIDO**

16 As a matter of due process, CalPERS has to timely present the issues in dispute and allow
17 Guido to present evidence and argument to dispute them.

18 Prejudicing Guido after the close of the evidentiary hearing with innuendo not present in
19 the pleadings or administrative record, CalPERS has waited until its Post-Hearing Brief to bring
20 up an issue that was never raised in its *Statement of Issues* or any other pre-hearing pleading, nor
21 at any point during the hearing proceedings themselves: That Senate Bill 53 (1993-1994) was
22 passed to "fix a loophole" in the PERL as CalPERS describes it.

23 First of all, the material referenced by CalPERS concerning the legislative history of
24 Senate Bill 53 (1993-1994) and its repeated references to alleged "windfalls", "pension spiking"
25 and "loopholes" is irrelevant. No evidence or law supports it. It contributes nothing to the
26 resolution of the matters that are at issue, is highly prejudicial, and is improperly included in
27 CalPERS' *Post-Hearing Brief* and its *RJN* simply to impugn and prejudice Guido. The *Statement*
28 *of Issues* categorically states:

1 **ISSUE FOR DETERMINATION**

2 This Appeal is limited to the issue of whether Guido is entitled to have his
3 "compensation earnable" based on his "average monthly salary during any period
4 of service" as a member of LACERA, for the purposes of calculating the "final
5 compensation" used to determine his retirement allowance from CalPERS,
6 pursuant to *Government Code* section 20638.

7 Further, the only issues discussed at the hearing and in all briefing prior to CalPERS'
8 *Post-Hearing Brief* deal exclusively with the question of whether Guido believed he had
9 established reciprocity between his CalPERS and LACERA time and whether CalPERS should
10 be estopped from denying its representations that he had.

11 As matter of due process, CalPERS convened the OAH hearing when it issued its
12 *Statement of Issues* and *Notice of Hearing*. If CalPERS wished to have the matters in the
13 designated portions of its *Post-Hearing Brief* and the materials in its *RJN* considered in the
14 proceedings, it should have timely raised and addressed them earlier in the case, for example in
15 the *Statement of Issues*. It did not do so, and should be estopped and barred from introducing
16 them now. At this point, Guido has no opportunity to contest them in the OAH hearing.

17 Second, the PERL explicitly permits Guido (who served on the Cudahy City Council
18 from 1970 to 1982) to have his pension allowance calculated as a product of his highest
19 qualifying CalPERS compensation multiplied by his total service credit, including his elective
20 service. This is true for all elected city council members or county supervisors who began their
21 elective service prior to July 1, 1994.

22 Subsequently enacted law is irrelevant. It does not matter that the Legislature added new
23 statutory language barring that for those beginning their elected local service after that time. The
24 new law did not change retroactive rights. The new law specifically permitted those elected prior
25 to 1994 to receive pension benefits under the old structure. CalPERS prejudicially and without
26 any evidence or support suggests that this was done "presumably to avoid costly litigation". But
27 the fact is that the Legislature considered service rendered up to that point to be vested under the
28 old arrangements. That is the law (not a "loophole").

 If CalPERS has issues with the Legislature's course of action, it is free to introduce
 legislation changing the law. However, such a change is unlikely to be constitutional or

1 otherwise acceptable.⁵

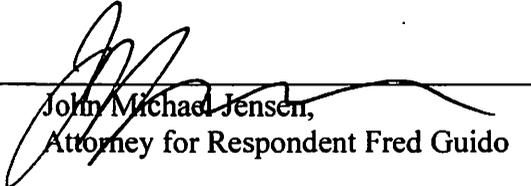
2 Since the law is the law, CalPERS' reference to it as a "loophole" is simply disrespectful
3 of the Legislature, trying to substitute CalPERS' opinion for the actual action of the Legislature.
4 It is improper for CalPERS to cast aspersions on the results of the law and argue its interpretation
5 for no other purpose than to prejudice the rights of Guido.

6 **V. CONCLUSION**

7 Equitable estoppel applies. CalPERS is barred from renegeing on its prior representations
8 that reciprocity is established. The constitutional, statutory and fiduciary duties all align and
9 support the application of equitable estoppel, even if the benefit provided is "in excess" of a
10 narrow reading of the reciprocity statute alone. Guido is entitled to reciprocity and have his
11 CalPERS pension benefit calculated pursuant to reciprocity with LACERA. Guido should be
12 entitled to have his CalPERS pension allowance calculated based on reciprocal rights to use his
13 highest LACERA earnings. Thus, CalPERS is encouraged to provide correct information,
14 Members are encouraged to rely on the information, CalPERS bears the burden of its mistake up
15 to the time of discovery, there is no windfall, and Guido receives a reasonable allowance, as
16 promised.

17 Due to the foregoing reasons, Guido respectfully requests the court to find that CalPERS
18 must grant Guido reciprocity and increase his CalPERS retirement for the additional years of
19 service and additional salary earned at LACERA.

20
21 Dated: April 26, 2013

22 By: 
23 John Michael Jensen,
24 Attorney for Respondent Fred Guido

25
26 ⁵ Interestingly, CalPERS argues that Guido could now mitigate his damages by obtaining
27 a high-paying CalPERS position (for one to three years). That would become his final
28 compensation amount for all CalPERS service, including his City Council tenure. CalPERS
apparently would have not view this as a "windfall". It only considers it a "windfall" if he insists
on receiving the same rights through recognition of reciprocity based on estoppel.

