

1 John Michael Jensen, Esq., State Bar No. 176813
2 Law Offices of John Michael Jensen
3 11500 West Olympic Blvd Suite 550
4 Los Angeles CA 90064
5 (310) 312-1100
6 (310)477-7090 Facsimile
7 johnjensen@johnmjensen.com

8 Attorneys for Petitioner

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

11) OAH No
12	FRED GUIDO, an individual;) CalPERS No.
13)
14	Petitioner and Appellant) FRED GUIDO'S APPEAL
15) OF CalPERS' DENIAL OF
16	v.) RECIPROCITY AND DENIAL OF
17) ASSOCIATED INCREASE IN CALPERS
18) BENEFITS
19	CALIFORNIA PUBLIC EMPLOYEES')
20	RETIREMENT SYSTEM (CalPERS);) EXHIBITS 1-3 INCORPORATED
21	BOARD OF ADMINISTRATION OF)
22	CALIFORNIA PUBLIC EMPLOYEES')
23	RETIREMENT SYSTEM;)
24	Respondents)

25 Fred Guido submits this augmented *Appeal* of (i) CalPERS' denial of reciprocity and (ii)
26 denial of an associated increase in his years of service and final compensation based on his
27 service and payrate earned under LACERA. Attached and incorporated into this Appeal are
28 Exhibits 1-3. We reserve the right to correct and augment this appeal at any time.

Dated April 9, 2010

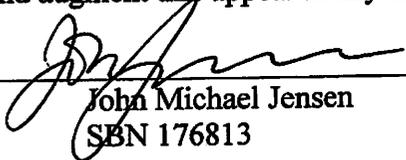

John Michael Jensen
SBN 176813

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2 **I. INTRODUCTION**

3 CalPERS incorrectly and unjustly denied Fred Guido ("Guido") reciprocity and an
4 associated increase in his CalPERS pension benefits for his years of services and final
5 compensation earned while a member of Los Angeles County Employees Retirement
6 Association (LACERA).

7 Guido denies each and every allegation in CalPERS denial letter.

8 Guido asserts all his equitable defenses and rights. It is well-established that the doctrine
9 of estoppel may be applied against a government body where justice and right require it. *City of*
10 *Long Beach v. Mansell* 3 Cal.3d 462, 493 (1970); *Piazza Properties, Ltd. v. Department of*
11 *Motor Vehicles*, 71 Cal.App.3d 622, 631 (1977).¹ Courts in several jurisdictions, including
12 California, have specifically upheld the application of equitable estoppel against state and county
13 government retirement associations. See e.g. *Crumpler v. Board of Administration*, 32
14 Cal.App.3d 567 (1973); *Sellers v. Board of Trustees of Police and Firemen's Retirement System*,
15 399 N.J.Super. 51 (2008); *Fike v. Board of Trustees, Teachers' and State Emp. Retirement*
16 *System*, 53 N.C.App. 78 (1981); *Kentucky Retirement Systems v. Fryrear*, --- S.W.3d ----, 2009
17 WL 2901300 (Ky.App.).

18 CalPERS is equitably estopped from unjustly denying Guido reciprocity and an associated
19 increase in his retirement benefits for his service and salary under LACERA.

20 CalPERS' actions are a breach of its fiduciary duties.

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27 ¹ Estoppel may not be applied against the government under the following the circumstances: (1) when doing so
28 "would effectively nullify a strong rule of policy, adopted for the benefit of the public," *Mansell*, 3 Cal.3d at 493
(internal citation omitted); (2) where the government agency to be estopped does not possess the authority to do
what it appeared to be doing, *Crumpler v. Board of Administration*, 32 Cal.App.3d 567 (1973).

1
2 **II. FACTS**

3 **Guido's CalPERS service with City of Cudahy.**

- 4 1. Fred Guido was elected to public office for the City of Cudahy in March 1970.
5 2. The City of Cudahy contracted with California Public Employees Retirement System
6 (CalPERS) to provide pension benefits on October 25, 1975. The contract provided
7 Councilmembers with service credit for prior years' service back to April 21, 1970. The
8 City of Cudahy still remains a contract city today by Government Code definition.
9 3. Between 1970 and 1982, Guido served as member of the city council of the City of
10 Cudahy.
11 4. Fred Guido's monthly salary as a councilmember for the City of Cudahy was \$150.00 per
12 month. The salary as public officer was set by the Government Code based on the city's
13 population.
14 5. The City of Cudahy took monthly deductions for Guido consisting of State
15 and Federal tax deductions as well as employee and employer contributions to CalPERS.
16 6. The Annual Member Statements for the years 1976, 1977 and 1982 will be produced and
17 entered as Exhibits .
18 7. Choosing not to run a fourth term, Guido stepped down from the City of Cudahy city
19 council the second Tuesday of April 1982.

20 **Guido's Earned CalPERS Service Credit**

- 21 8. Guido's PERS service credit spans 12.25 years, with his membership beginning April 21,
22 1970 and continuing through April 1982.
23 9. The five (5) years between April 21, 1970 and October 25, 1975 were credited to Guido.
24 A seven day discrepancy between the membership data form and the letter Guido
25 received exists in the record.

26 **Guido's Service under Los Angeles County Employee Retirement Association (LACERA)**

- 27 10. Guido joined the L.A. County Sheriff's Dept in March 1973 and was thereafter credited
28 for time and service under LACERA.

1 11. Guido maintained employment with Los Angeles County through November 1977

2 (approximately four and one half years)

3 12. Guido left the employment of Los Angeles County in 1977 and went into the private

4 sector for the next 19 years.

5 13. Guido returned to employment with the Los Angeles County in December 1996 as

6 Supervisor Knabe's Chief of Staff.

7 **CalPERS Communications to Guido Confirming Reciprocity.**

8 14. On October 6, 2003, CalPERS wrote Fred Guido that:

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

14 Please provide us with your final compensation amount with LACERA. That final
15 compensation amount may be higher than your final compensation amount is with
16 CalPERS.

17 EXHIBIT 1.

18 15. CalPERS' October 2, 2007 retirement estimate included the City of Cudahy as a

19 CalPERS Employer and lists the Final Compensation as \$11,838.00 which would have
20 entitled him to greater than \$3,000 a month in a CalPERS pension under reciprocity.

21 EXHIBIT 3.

22 16. Five (5) years later, on October 20, 2008, *less than seven (7) months before his planned*
23 *retirement, CalPERS again confirmed reciprocity* and wrote Fred Guido that:

24 "CalPERS has reviewed your account and determined that Reciprocity has been
25 established between CalPERS and LACERA.

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

EXHIBIT 2.

1 **Guido's Reliance on CalPERS' Communications.**

2 17. In Fall of 2003, Mr. Guido was offered several different opportunities, including several
3 employment opportunities within the County.

4 18. Specifically in fall of 2003, Guido was deciding (i) whether to and (ii) where to leave his
5 employment position with Los Angeles County Supervisor Knabe.

6 19. At this time, Guido was given an opportunity to transfer to a Los Angeles County
7 department that could benefit from his past and current work experience. This position
8 would increase his LACERA pension.

9 20. **Relying on CalPERS' representations that reciprocity had been established**, Guido
10 took into consideration and weighed the opportunities based on the expected amount of
11 salary and total pension benefit (LACERA *and* CalPERS) associated with the offered
12 positions.

13 21. The expected amounts of salary and total pension benefit to be received were determining
14 factors in Guido's decision.

15 22. When deciding which new job to take in Fall of 2003, Guido's choices and opportunities
16 included (1) starting a new position with Los Angeles County in departments that had
17 pension benefits with LACERA and (2) starting a new position with Los Angeles County
18 in departments that had contracted for pension benefits with CalPERS.

19 23. Specifically, Guido had an opportunity to transfer to the Community Development
20 Department (CDC) of the County which offered CalPERS pension benefits.

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

27 25. **Based on CalPERS representations**, and because CalPERS had repeatedly assured
28 Guido that reciprocity had been established, Guido did not take the CDC position which

1 would have also offered Guido reciprocity and/or provided Guido with a higher CalPERS
2 benefit based on the final compensation earned for that service.

3 26. Specifically, after Guido made an inquiry of CalPERS in September/October of 2003,
4 Guido heard directly from CalPERS that reciprocity had already been established.

5 27. As a result of CalPERS' representation, Guido opted to transfer to Dept of Public Works
6 (LACERA).

7 28. As a result of CalPERS' representation, Guido declined the offer (i) to transfer to another
8 county department (CDC) who's pension plan is under contract with CalPERS or (ii)
9 take another CalPERS contracted position.

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

15 30. In October 2003, based on CalPERS' representation that reciprocity had been
16 established, Guido took a position as Chief Administrative Officer with the Los Angeles
17 County Department of Public Works with the same salary he was earning before leaving
18 Los Angeles County Supervisor Knabe's office. The Public Works position provides
19 pension benefits via LACERA and does not have a separate contract with CalPERS.

20 31. In Fall 2008, approximately one year before his planned retirement Guido re-assessed his
21 retirement benefits-- medical, monthly stipend, reciprocity and retirement coordination.

22 32. In Fall 2008, Guido again called and inquired of CalPERS about the amount and status of
23 his pension benefits.

24 33. In October 2008, in response to Guido's inquiry, CalPERS sent Guido a letter again
25 confirming that reciprocity had been established.

26 34. In October 2008, in response to Guido's inquiry, CalPERS sent Guido a letter that was
27 personalized to Guido's fact situation. In that letter, CalPERS provided Guido a monthly
28

1 benefit statement based on projected final year compensation that was determined on the
2 fact that reciprocity had been established.

3 35. In April 2009 *after* filing his Service Retirement Election Application with CalPERS and
4 LACERA, but *before* retiring on June 1, 2009, Guido was approached by a Council
5 member of a local city to be hired as a full time interim City Manager of a CalPERS
6 contracting city.

7 36. On or before April 2009, if CalPERS had made Guido aware of the reciprocity issue in
8 October 2008 or even as late as April 2009 when Guido filed his Retirement Election
9 Application, then Guido would have pursued the opportunity to become the Interim City
10 Manager and thereafter reinstated into CalPERS and thereby either (i) increased his
11 CalPERS pension for the increased salary or (ii) separately established reciprocity.

12 37. In April 2009, Guido again considered his employment options. The expected amount of
13 the LACERA and CalPERS pension benefit played a determining factor in Guido's
14 decision whether to retire or whether to seek employment.

15 38. In April 2009, Guido again relied on CalPERS' representations to him that reciprocity
16 had been established.

17 39. In April 2009, if Guido had known that he had not established reciprocity, then he would
18 have taken the executive level position at the City and thus earned a high final
19 compensation rate for his CalPERS position even if reciprocity with LACERA had not
20 been earlier established.

21 40. In April 2009, Guido relied on CalPERS specific representation that reciprocity had been
22 established when he turned down the position at the contracting City.

23 41. In April 2009, Guido relied on CalPERS representations that (i) reciprocity had been
24 established and (ii) that he was entitled to use the highest salary that he earned at
25 LACERA for use in his "final compensation" for his CalPERS pension, when he declined
26 the position as City Manager.

1 42. In April 2009, based on representation from CalPERS that he had established reciprocity,
2 Guido decided not to seek further employment as an interim City Manager with a
3 CalPERS contracting agency that would have increased his CalPERS pension benefits.

4 43. Guido remained an employee with Los Angeles County until he retired on June 1, 2009.

5 **Guido Retires.**

6 44. On April 7, 2009, Guido filed his Service Retirement Election Application at the
7 Glendale CalPERS office. He indicated on the form that he was retiring from two public
8 employment systems on June 1, 2009 and that he would be using his single highest year
9 of salary with LACERA for purposes of calculating his benefits from both CalPERS and
10 LACERA.
11

12 45. CalPERS representative in Glendale who reviewed his application, consulted Guido's
13 electronic file in the CalPERS database, and validated that reciprocity was established at
14 the time that Guido filed his retirement application.
15

16 46. Guido once again relied on the specific representation of the CalPERS representative that
17 reciprocity had been established and that he was entitled to the higher CalPERS benefit
18 when and such that he filed his application
19

20 47. Had CalPERS raised questions about reciprocity at that time, Guido would not have filed
21 his retirement application.

22 **CalPERS reneges on Reciprocity.**

23 48. On June 20, 2009, or *two and a half (2 ½) months after Guido submitted his retirement*
24 *application, and three (3) weeks after retiring*, CalPERS wrote Guido that CalPERS will
25 no longer grant reciprocity.
26
27
28

1 **Guido's Damages.**

2 49. CalPERS informed Guido that his CalPERS benefit would be approximately \$70.00 a
3 month instead of approximately \$3,0000 a month for the rest of his life.

4 **Guido Timely Appeals.**

5 50. Guido timely filed an Appeal on July 29, 2009.

7 **LAW AND ARGUMENT:**

8 **VI. EQUITABLE RIGHTS AND DEFENSES**

9 **1. Equitable Estoppel Applied Against the Government**

10 The California Supreme Court ruled:

11 The cases which have applied Estoppel to the narrow area of public employee
12 pensions, have emphasized the unique importance of pension rights to an
13 employee's well-being, and have frequently arisen after employees were induced
14 to accept and maintain employment on the basis of expectations fostered by
15 widespread, long-continuing misrepresentations by their employers. In each of
16 these instances the potential injustice to employees or their dependents clearly
17 outweighed any adverse effects on established public policy. *Longshore v. County
18 of Ventura* 25 Cal.3d 14.

19 Clearly, Equitable Estoppel may apply against government², and in particular against
20 retirement systems. For example, CalPERS favorably cites *Medina*:

21 The applicable principles are set forth by the California Supreme Court in *City
22 of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 91 Cal.Rptr. 23, 476 P.2d 423
23 (*Mansell*). The requisite elements for equitable Estoppel against a private party
24 are: (1) the party to be estopped was apprised of the facts, (2) the party to be
25 estopped intended by conduct to induce reliance by the other party, or acted so as
26 to cause the other party reasonably to believe reliance was intended, (3) the party
27 asserting Estoppel was ignorant of the facts, and (4) the party asserting Estoppel
28 suffered injury in reliance on the conduct. (*Id.* at p. 489, 91 Cal.Rptr. 23, 476 P.2d
423.) " [T]he doctrine of equitable Estoppel may be applied against the

26 ² Where owner of property, in good-faith reliance upon governmental representation that
27 construction is fully approved, has suffered substantial detriment by proceeding with
28 development, government is estopped from prohibiting project by subsequent change in law.
Patterson v. Central Coast Regional Coastal Zone Conservation Commission (App. 1 Dist.
1976) 130 Cal.Rptr. 169, 58 Cal.App.3d 833.

1 government where justice and right require it. [Citation.]' [Citations.] Correlative
2 to this general rule, however, is the well-established proposition that an Estoppel
3 will not be applied against the government if to do so would effectively nullify 'a
4 strong rule of policy, adopted for the benefit of the public....' [Citation.] The
5 tension between these twin principles makes up the doctrinal context in which
6 concrete cases are decided." (*Id.* at p. 493, 91 Cal.Rptr. 23, 476 P.2d 423.) "The
7 government may be bound by an equitable Estoppel in the same manner as a
8 private party when the elements requisite to *869 such an Estoppel against a
9 private party are present and, in the considered view of a court of equity, the
10 injustice which would result from a failure to uphold an Estoppel is of sufficient
11 dimension to justify any effect upon public interest or policy which would result
12 from the raising of an Estoppel." (*Id.* at pp. 496-497, 91 Cal.Rptr. 23, 476 P.2d
13 423.)

14 *Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.*, 112
15 Cal.App.4th 864, 5 Cal.Rptr.3d 634 Cal.App. 2 Dist.,2003.Sep 18, 2003.

16 The requisite elements for equitable Estoppel are met: (1) the party to be estopped
17 (CalPERS) was apprised of the facts, (2) CalPERS, the party to be stopped, intended by conduct
18 to induce reliance by Guido on the communications establishing reciprocity (and also acted so as
19 to cause Guido reasonably to believe reliance was intended), (3) Guido, the party asserting
20 Estoppel, was ignorant of the facts, and (4) Guido, the party asserting Estoppel suffered injury
21 in reliance on CalPERS' conduct.

22 If those [Estoppel] elements are established against the government, the court must then
23 balance the burden on the party asserting Estoppel if the doctrine is not applied against the public
24 policy that would be affected by the Estoppel. *Lentz v. McMahon* (1989) 49 Cal.3d 393, 400-401,
25 261 Cal.Rptr. 310, 777 P.2d 83.)

26 **1. Significant Public Policies At Stake**

27 Public policies supporting Guido are (i) the Constitutional requirement in Art. 16, § 17
28 for CalPERS to act with fiduciary duties (including to correctly and adequately inform the
pensioner), (ii) honoring the Constitutional duties to put the beneficiaries' interests first, (iii) the
unique importance of pension rights to an employee's well-being; (iv) providing incentives for

1 increased correct communications between pensioner and government retirement plans , (v)
2 providing relief to employees who were induced to accept and maintain employment on the basis
3 of expectations fostered by long-continuing misrepresentations by their retirement systems; (vi)
4 have the entity with more information and expertise be responsible for correctly providing
5 information in a timely manner; (vii) as is consistent with a retirement plan, spread the "cost"
6 over a larger set of pensioners rather than making Guido singularly bear the entire cost of an
7 incident for which he is not to blame; (viii) provide the promised life-long benefit as in *Driscoll*;
8 (xi) provide incentive for CalPERS to improve its informational practices; (xii) prevent situations
9 where at the end of a government employee's working life, the promised benefit is drastically
10 reduced; and (x) other important policies.

11
12
13 On CalPERS side, the public policies supporting CalPERS are (i) not providing a benefit
14 in excess of the PERL and (ii) not creating an "unfunded liability" (which is not legal authority
15 to support denying a benefit see *Metropolitan Water Dist. v. Superior Court (Cargill)* (2004) 32
16 Cal.4th 491).).

17 18 **2. Limitations on the Application of Estoppel in Simpler Contexts**

19 In simpler context, Estoppel has been additionally limited, especially when there is (i) no
20 offsetting legal right or (ii) competing public policy to balance.
21

22 "In each of these instances the potential injustice to employees or their dependents
23 clearly outweighed any adverse effects on established public policy. *However, no*
24 *court has expressly invoked principles of Estoppel to contravene directly any*
25 *statutory or constitutional limitations. (See, e.g., Driscoll v. City of Los Angeles [*
26 *(1967)] 67 Cal.2d 297, 308-309 [61 Cal.Rptr. 661, 431 P.2d 245] Farrell v.*
27 *County of Placer (1944) 23 Cal.2d 624, 630-631 [145 P.2d 570] Baillargeon v.*
28 *Department of Water & Power (1977) 69 Cal.App.3d 670, 679-681 [138 Cal.Rptr.*
338] Crumpler v. Board of Administration (1973) 32 Cal.App.3d 567, 584-585
[108 Cal.Rptr. 29" (Id. at pp. 28-29, 157 Cal.Rptr. 706, 598 P.2d 866, italics
added.) The latter point is critical here: principles of Estoppel may not be invoked
to directly contravene statutory limitations.

1 *Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.* 112
2 Cal.App.4th 864, 5 Cal.Rptr.3d 634 Cal.App. 2 Dist.,2003.Sep 18, 2003.

3 Case law has also limited Estoppel to cases where it does not “effectively nullify 'a strong rule
4 of policy” (assuming no other competing public policy supports Estoppel).

5 **3. Avoidance of Estoppel and Statutory Limitations are Viewed Narrowly**

6 The courts narrowly view avoidance of Estoppel and apply it only when the agency 'utterly
7 lacks the power to effect that which an Estoppel' would accomplish:³.

9 Nor may Estoppel be avoided on the ground that to invoke it would enlarge the
10 statutory power of the board. In view of the statutory powers conferred upon the
11 board by section 20124, this is not a case where the governmental agency 'utterly
12 lacks the power to effect that which an Estoppel against it would accomplish.'
13 *City of Long Beach v. Mansell, supra*, 3 Cal.3d 462, 499 [91 Cal.Rptr. 23, 476
14 P.2d 423]]].

15 **4. Public Policies, Constitutional Rights, and Statutory Limitations in Guido**

16 Various factors point to applying or restricting the application of Estoppel.

17 **A. Constitutional Fiduciary duties.**

18 CalPERS and other pension plans act with Constitutional fiduciary duties to Members,
19 including the duty to inform. The existence of fiduciary duties clearly increases CalPERS' duties
20 to their members.⁴

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

25
26
27 ³ CalPERS has the duty to correct omissions and mistake under Section 20160, including presumably its own errors
28 and mistakes, so that it has the power to correct the informational error that Guido relied on. However Section 20160
indicates that it may not be used to provide a benefit greater than statute. In a sense, CalPERS indicates that the
statutory duty to correct its error is balanced by its statutory duty to apply Section 20039.

1 (a) The retirement board of a public pension or retirement system shall have the
2 sole and exclusive fiduciary responsibility over the assets of the public pension or
3 retirement system. **The retirement board shall also have sole and exclusive**
4 **responsibility to administer the system in a manner that will assure prompt**
5 **delivery of benefits and related services to the participants and their**
6 **beneficiaries. The assets of a public pension or retirement system are trust**
7 **funds and shall be held for the exclusive purposes of providing benefits to**
8 **participants in the pension or retirement system and their beneficiaries and**
9 **defraying reasonable expenses of administering the system. (Emphasis added)**

7 (b) The members of the retirement board of a public pension or retirement system
8 shall discharge their duties with respect to the system solely in the interest of, and
9 for the exclusive purposes of providing benefits to, participants and their
10 beneficiaries, minimizing employer contributions thereto, and defraying
11 reasonable expenses of administering the system. **A retirement board's duty to**
12 **its participants and their beneficiaries shall take precedence over any other**
13 **duty. (Emphasis added)**

11 Cal.Const. Art. 16, § 17.

12 **B. Application of Constitution**

13 In interpreting constitutional provision, each word must be given some value. *In re Kent's*
14 *Estate* (1936) 6 Cal.2d 154, 57 P.2d 901. A special constitutional provision authorizing the
15 exercise of particular powers will override a general prohibition. *Ex parte Mascolo* (App. 1914)
16 25 Cal.App. 92, 142 P. 903. Court may not construe constitution so as to defeat its obvious ends
17 when another construction, equally accordant with the words and sense thereof, will enforce and
18 protect them. *In re East Contra Costa Irr. Dist.*, N.D.Cal.1935, 10 F.Supp. 175. Statute does not
19 trump the Constitution. *People v. Ortiz* (App. 3 Dist. 1995) 38 Cal.Rptr.2d 59, 32 Cal.App.4th
20 286 review denied.

21 **C. On Different Facts, Mansell: Estoppel Trumps California Constitution as Public Policy**

22 The leading case on governmental Estoppel is *City of Long Beach v. Mansell*
23 *(1970) 3 Cal.3d 462, 91 Cal.Rptr. 23, 476 P.2d 423* There the question was
24 whether the State of California and the city were estopped from claiming an
25 interest in public tidelands that the state and city had allowed to be developed as
26 private property since the turn of the century. The case was complicated by article
27 XV, former section 3 (now article X, section 3) of the California Constitution
28 which forbade the transfer of certain public tidelands to private persons. The court
had to decide whether an Estoppel that would have the effect of quieting title to
public lands in private persons could apply in the face of public policy reflected in

1 a constitutional provision forbidding transfer. *Smith v. County of Santa Barbara* 7
2 Cal.App.4th 770, 9 Cal.Rptr.2d 120 Cal.App. 2 Dist.,1992. At 775.

3 The court set forth a "broad and comprehensive standard" for making such a
4 decision: "The government may be bound by an equitable Estoppel in the same
5 manner as a private party when the elements requisite to such an Estoppel against
6 a private party are present and, in the considered view of a court of equity, the
7 injustice which would result from a failure to uphold an Estoppel is of sufficient
8 dimension to justify any effect upon public interest or policy which would result
9 from the raising of an Estoppel." (*City of Long Beach v. Mansell, supra, 3 Cal.3d*
10 *462, 496-497, 91 Cal.Rptr. 23, 476 P.2d 423* Applying this standard to the facts of
11 the case, the court held that the state and city were estopped. *Smith v. County of*
12 *Santa Barbara* 7 Cal.App.4th 770, 9 Cal.Rptr.2d 120 Cal.App. 2 Dist.,1992. At
13 775.

14 Here, the California Constitution supports Guido's right to an Estoppel.

15 **D. California Constitution as a Public Policy to Be supported**

16 The constitution and fiduciary duties are important sources of "public policies".

17 CalPERS' trustee and fiduciary duties require CalPERS supply Members with accurate timely
18 information. Const. Art. 16, § 17 Guido was clearly entitled to timely reliable information.

19 However, CalPERS breached the duty. Applying Estoppel to deny CalPERS the right to renege
20 on these representations would support Guido's right (in the California constitutional and
21 elsewhere) to receive and to act on timely accurate information. Not applying Estoppel against
22 CalPERS would contravene Guido's Constitutional right to have CalPERS act with fiduciary
23 duties toward him.⁵

24
25
26
27 ⁵ Outside of Constitutional fiduciary duties, the fact that (i) a Member has money on deposit with
28 CalPERS and (ii) CalPERS is the only source of information reinforce that CalPERS has
additional duties to inform to members.

1 **E. Estoppel Cases Against the Government In Other Contexts are Inapplicable**

2 To characterize the relationship between the beneficiary Guido and the trustee CalPERS as being
3 a generic relationship between an individual and government is inappropriate.⁶ Clearly in a
4 beneficiary-trustee relationship supported by Constitutional fiduciary duties, a CalPERS member
5 stands in an enhanced relationship.

6 **F. Public Policies**

7 Where Estoppel is sought against the government, “the weighing of policy concerns” is, in
8 part, a question of law. *Lentz v. McMahon* (1989) 49 Cal.3d 393, 403, 261 Cal.Rptr. 310, 777
9 P.2d 83.) While there is a strong public policy in favor of CalPERS providing correct
10 information, there is no public policy that explicitly encourages barring recovery for an
11 Member’s reliance on CalPERS’ incorrect information.

12 **G. Statutory Limitations in PERL**

13 Several cases rule that Estoppel may not enlarge a right beyond what is contained in statute. In
14 practical effect, the cases (*Hittle et al*) apply Estoppel to CalPERS and provide a benefit (whether
15 timing or a right to re-designate options, benefits) that is greater than provided in PERL.
16 17
17 18

18 **H. Balancing Competing Public Policies.**

19 The real world meaning of fiduciary duties are already established, however not credited.
20 CalPERS presumably typically provides Members with benefits as provided in PERL. An issue
21 of Estoppel only arises where a Member is informed of and relies on a CalPERS communication
22 that describes a reasonable benefit that is in excess of PERL. Since the meaningful remedy of
23 Estoppel for CalPERS misinformation is to provide a reasonable benefit above that provided in
24 25
25 26
26 27
27 28

1 PERL, in order for Estoppel to have any real purpose or effect it would have to provide a
2 reasonable benefit in excess of that allowed in PERL.

3 I. **EQUITABLE ESTOPPEL AGAINST THE GOVERNMENT IN PENSION**
4 **CONTEXT**

5
6 It is well-established that the doctrine of estoppel may be applied against a government
7 body where justice and right require it. *City of Long Beach v. Mansell* 3 Cal.3d 462, 493 (1970);
8 *Piazza Properties, Ltd. v. Department of Motor Vehicles*, 71 Cal.App.3d 622, 631 (1977).⁷
9 Courts in several jurisdictions, including California, have specifically upheld the application of
10 equitable estoppel against state and county government retirement associations. See e.g.
11 *Crumpler v. Board of Administration*, 32 Cal.App.3d 567 (1973); *Sellers v. Board of Trustees of*
12 *Police and Firemen's Retirement System*, 399 N.J.Super. 51 (2008); *Fike v. Board of Trustees,*
13 *Teachers' and State Emp. Retirement System*, 53 N.C.App. 78 (1981); *Kentucky Retirement*
14 *Systems v. Fryrear*, --- S.W.3d ----, 2009 WL 2901300 (Ky.App.).

15
16 The requisite elements for equitable estoppel are the same whether applied against a
17 private party or the government: (1) the party to be estopped was apprised of the facts, (2) the
18 party to be estopped intended by conduct to induce reliance by the other party, or acted so as to
19 cause the other party reasonably to believe reliance was intended, (3) the party asserting estoppel
20 was ignorant of the facts, and (4) the party asserting estoppel suffered injury in reliance on the
21 conduct. *Mansell*, 3 Cal.3d at 489. Although estoppel is generally a question of fact, when the
22 evidence is not in conflict and is susceptible of only one reasonable inference, the existence of an
23 estoppel is a question of law. *Driscoll v. City of Los Angeles*, 67 Cal.2d 297, 305 (1973).
24
25
26

27 ⁷ Estoppel may not be applied against the government under the following the circumstances: (1) when doing so
28 "would effectively nullify a strong rule of policy, adopted for the benefit of the public," *Mansell*, 3 Cal.3d at 493
(internal citation omitted); (2) where the government agency to be estopped does not possess the authority to do
what it appeared to be doing, *Crumpler v. Board of Administration*, 32 Cal.App.3d 567 (1973).

1 Further, an estoppel binds not only the immediate parties to the transaction but those in privity
2 with them. Crumpler, 32 Cal.App.3d at 582-84 (finding that city and the board of public
3 employees' retirement system were in privity with each other as agents of the state, and,
4 therefore, estoppel of city from asserting that petitioners had been erroneously classified
5 necessarily extended to board).

6
7 In Crumpler, *supra*, a California appellate court, applied estoppel against the PERS
8 Board on facts similar to this case. The Crumpler petitioners became members of PERS when
9 they were hired by the City of San Bernardino Police Department as animal control officers. At
10 the time of employment, petitioners were classified under the retirement system as local safety
11 members. Years later, the executive officer of the PERS Board determined that petitioners had
12 been erroneously classified as local safety members and reclassified them into miscellaneous
13 membership. Crumpler, 32 Cal.App.3d at 570-71. This reclassification resulted in petitioners
14 being required to wait until age 65 to receive substantial retirement benefits, when under their
15 original classification they were entitled to such benefits at age 55. Id. at 572-73. Petitioners
16 decided to accept employment with the city police department at least in part on the basis of
17 being advised that they would receive retirement benefits as local safety members. Id.

18
19
20 The Crumpler court held that the Board (by virtue of its privity with the City) was
21 estopped from reclassifying petitioners *Nunc pro tunc* as of the date they became PERS members
22 on the following grounds:

23
24 All of the requisite elements of equitable estoppel are present...The city was
25 apprised of the facts. The city knew that petitioners were being employed by the
26 police department as animal control officers at the time it erroneously advised
27 them they would be entitled to retirement benefits as local safety members. **The**
28 **fact that the advice may have been given in good faith does not preclude the**
application of estoppel. Good faith conduct of a public officer or employee does
not excuse inaccurate information negligently given. [Citation]. **In a matter as**
important to the welfare of a public employee as his pension rights, the

1 **employing public agency “bears a more stringent duty” to desist from giving**
2 **misleading advice.** (Driscoll v. County of Los Angeles, Supra, 67 Cal.2d 297,
3 308, 61 Cal.Rptr. 661, 431 P.2d 245.).... All of the other requisite elements of
4 equitable estoppel against the city were established by uncontradicted evidence.
5 The city manifestly intended its erroneous representations to be acted upon and
6 petitioners had a right to believe the city so intended. Petitioners were ignorant of
7 the fact that the city's advice was erroneous. Petitioners relied upon the
8 representations to their injury by relinquishing other employment to accept city
9 employment and by paying over the years the greater contributions required of
10 safety members. Petitioner Crumpler served as animal control officer for over 20
11 years. During those years he paid safety member contributions and arranged his
12 personal financial affairs in the expectation he would ultimately receive the
13 retirement benefits of a safety member. Petitioner Ingold relinquished federal civil
14 service employment with 15 years accrued federal pension rights to accept city
15 employment on the representation that his city pension rights would be that of a
16 safety member.

17 Id. at 583 (emphasis added)

18 The California Supreme Court has expressly recognized the “unique importance of
19 pension rights to an employee’s well-being” and affirmed the application of estoppel against
20 government retirement agencies to protect those rights, particularly in cases where “employees
21 were induced to accept and maintain employment on the basis of expectations fostered by
22 widespread, long-continuing misrepresentations.” *Longshore v. County of Ventura*, 25 Cal.3d
23 14, 28 (1979). Under such circumstances, “**the potential injustice to employees or their**
24 **dependents clearly outweigh[s] any adverse effects on established public policy.”** Id.
25 (emphasis added).

26 **J. CalPERS IS ESTOPPED FROM DENYING GUIDO INCREASED PENSION**
27 **BENEFITS**

28 CalPERS is estopped from denying Guido retirement benefits from PERS based upon his
salary at LACERA. If for purposes of argument the PERL does not support a higher benefit, then
CalPERS misled Guido, by its own statements and conduct, to believe that he was entitled to
increased retirement benefits for reciprocity for his work at LACERA. As the doctrine of
equitable estoppel states, justice and right require that Guido receive retirement benefits
consistent with the salary earned at LACERA because CalPERS intentionally and deliberately

1 led Guido to believe that Guido was entitled to reciprocity. Guido received CalPERS information
2 specifically listing his reciprocity.

3
4 **K. CalPERS' Communications about Reciprocity**

5 CalPERS sent information to Guido, specifically informing him that he had established
6 reciprocity. These letters from CalPERS led Guido to plan for his retirement based on
7 reciprocity and demonstrated Guido's justifiable reliance upon CalPERS' information
8

9 **V. FIDUCIARY DUTIES**

10 **1. CalPERS BREACHED ITS FIDUCIARY DUTIES IT OWED TO GUIDO**

11
12 Under California law, a breach of fiduciary duty includes (1) the existence of
13 fiduciary relationship giving rise to fiduciary duty; (2) breach of that duty; and (3) damage
14 proximately caused by the breach. *Estate of Migliaccio v. Midland Nat'l. Life Ins. Co.*, 436
15 F.Supp.2d 1095.
16

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

19 **2. The Existence of Fiduciary Relationship Giving Rise to Fiduciary Duty:**

20 CalPERS and Guido were engaged in a fiduciary relationship giving rise to a
21 fiduciary duty. It has been held that the administrator of a pension is a fiduciary in its
22 relationship with its pensioner. In *Hittle v. Santa Barbara County Employees Retirement Assn.*
23 (1985) 39 Cal.3d 374, 392-393, the Supreme Court concluded that trustees who administer
24 pension plan retirement funds owe fiduciary duties of good faith and fair dealing towards the
25 pensioner-beneficiaries.
26
27
28

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

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

8 CalPERS' other fiduciary duties as provided by statute.

9 As seen by both case law and statute, CalPERS had a duty to deal with Guido fairly
10 and in good faith. Included within the fiduciary obligation is the duty to fully inform its
11 Members of their options in obtaining retirement benefits, as stated in CalPERS' own
12 Precedential Board decision, *In re William R. Smith*, No. 99-01.

13 "The duty to inform and deal fairly with members also requires that the information
14 conveyed be complete and unambiguous." (Emphasis added). *City of Oakland, Plaintiff and*
15 *Appellant, v. Public Employees Retirement System et al., Defendants and Appellants. United*
16 *Public Employees' Local 790 etc., Real Party in Interest and Appellant.* 95 Cal.App.4th 29, 115
17 Cal.Rptr.2d 151, 02 Cal. Daily Op. Serv. 258, 2002 Daily Journal D.A.R. 345.

18 3. CalPERS' Breach of Fiduciary Duty

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

21 In *Hittle*, the court found that a handwritten notation on a form letter from a county
22 retirement association to an injured former county employee, briefly mentioning the possibility
23 of filing for disability retirement, was inherently ambiguous and uninformative, and could not be
24

1 said to have satisfied the association's fiduciary obligation to adequately inform the employee.
2 *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374. The
3 association did not fulfill its fiduciary duty to the employee to deal fairly and in good faith. The
4 Court also found that the means by which the association sought to inform the employee of his
5 options in disposing of his retirement contributions were tantamount to the misrepresentation and
6 concealment, however slight, prohibited by *California Civ. Code*, § 2228. *Idem*.

8 CalPERS breached its duty to Guido by failing to fully inform and/or correctly inform
9 Guido. CalPERS specifically misinformed Guido. Time and again, CalPERS presented
10 information to Guido showing that he was entitled to reciprocity.

11
12 4.. Damage to Guido Caused By CalPERS' Breach

13 Due to CalPERS' breach, Guido suffered damage. If CalPERS had informed Guido
14 that he was not entitled to reciprocity, Guido could have forgone employment at a Department of
15 Los Angeles County and taken a different job with an agency that provided PERS benefits.

16 Guido suffered a loss from CalPERS' breach of fiduciary duty to correctly inform him of
17 reciprocity

18
19 V. CONCLUSION

20 Guido is entitled to be granted reciprocity and have his CalPERS pension benefit
21 calculated pursuant to reciprocity with LACERA. Due to the foregoing reasons, Guido
22 respectfully requests CalPERS to grant Guido reciprocity and increase his CalPERS retirement
23 for the additional years of service and additional salary earned at LACERA
24

25
26 Dated: April 9, 2010

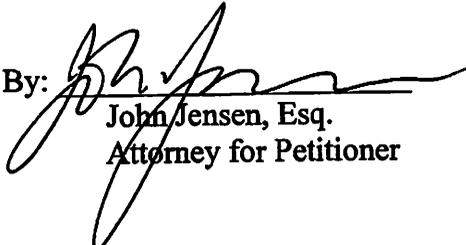
27 By: 
28 John Jensen, Esq.
Attorney for Petitioner

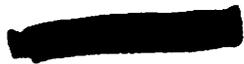
EXHIBIT 1

09-10 11152007

1913



Member Services Division
P O Box 942717
Sacramento, CA 94229-2717
(888) 225-7377, FAX (916) 231-7878
Telecommunications Device for the Deaf - (916) 326-3240



17 NOV 14 PM 1 09
DCC - 5

October 6, 2003

Fred Guido



**APPROVED
TO RETAIN**

Dear Fred Guido,

Thank you for your recent Retirement Estimate request

CalPERS has reviewed your account and has 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

Please provide us with your final compensation amount with LACERA. That final compensation amount may be higher than what your final compensation amount is with CalPERS. Please fill out the attached estimate request form and complete part 7 at the bottom so we will have the information needed to calculate your retirement benefits. We have also included the publication "When You Change Retirement Systems" which explains Reciprocity in full detail.

If you have any questions that you don't feel the publication can answer, please don't hesitate to give us a call at (888) 225-7377

Retirement Estimate Unit
Member Services Division

California Public Employees' Retirement System

EXHIBIT 2



Member Services Division
P O Box 942717
Sacramento, CA 94229-2717
Telecommunications Device for the Deaf – (916) 795-3240
888 CalPERS (or 888-225-7377), FAX (916) 795-7878

October 20, 2008

Fred, Guido


Dear Fred Guido

Thank you for your recent Retirement Estimate request

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

Per your request, CalPERS has used the final compensation amount of \$11,838 00 with LACERA. The information in this estimate has been provided by you and has not been verified with your employer. Any changes to your final compensation could affect your retirement estimate and a new estimate would need to be requested.

Additional information regarding reciprocity may be found on the CalPERS web site www.calpers.ca.gov

If you have any additional questions, please contact our Customer Contact Center at 888 CalPERS (or 888-225-7377)

Retirement Estimate Unit
Member Services Division

Estimate contains information that has not been validated.

Unofficial

EXHIBIT 3



Member Services Division
P.O. Box 942717
Sacramento, CA 94229-2717
888 CalPERS (or 888-225-7377)
TDD - (916) 795-3240
FAX - (916) 795-7878

Fred Guido
2735 Rocky Trail Rd
Diamond Bar CA 91765

MEMBER INFORMATION

Date: 10/02/2007
Social Security Number: XXX-XX-0396
Your Date of Birth: 08/1948
Beneficiary's Date of Birth: 01/24/1948

ESTIMATE INFORMATION

Retirement Date: 01/26/2009
Age at Retirement: 60.25
Total Years of Service Credit at Retirement: 12.248

Dear Fred Guido:

This is an estimate of your Service Retirement. An estimate is a calculation of potential future benefits based on the following assumptions:

- Current pay rates reported by the employer
- Current retirement law
- Information provided by you

On page 3 of your retirement estimate, you are shown approximately what you would receive as a retirement allowance should you retire on 01/26/2009. When you apply for retirement, you will be required to select **one** of the retirement options shown. This is an irrevocable election.

The results are broken down by the following:

For You - This is the estimated monthly allowance you will receive for the Unmodified Allowance or one of the other retirement options.

For Your Beneficiary - This is the estimated monthly allowance your beneficiary will receive. Your beneficiary can be anyone you choose and does not need to be a spouse or relative. Based on the option selected at retirement your beneficiary may receive a lump sum payment or a monthly allowance after your death. There is no amount shown for the Unmodified Allowance since this option does not provide for a beneficiary after your death.

For You, If Your Beneficiary Predeceases You - This is the monthly allowance you are entitled to receive should your beneficiary die before you.

Fred Guido

XX

The information below was used to calculate your retirement estimate for 01/26/2009, at age 60.25.

Employer Name	Years of Service	Formula/ Benefit Factor	% of Final Compensation	Final Compensation
City Of Cudahy	6.800	2% @ 55/ 2.274	15.463	\$ 11,775.00
City Of Cudahy	5.448	2% @ 55/ 2.274	12.389	\$ 11,775.00

IMPORTANT INFORMATION ABOUT THE CALCULATION

Final compensation is your highest average monthly pay rate for 12 or 36 months of consecutive employment based on your employer's contract. The final compensation dollar amount(s) shown have not been modified, most members that contributed to Social Security at any time during their CalPERS' employment should subtract \$133.33 from that employer's final compensation to obtain the dollar amount that was used to calculate the estimate. Certain exceptions may exist such as School members with service credit earned on or after January 1, 2001, or State Second Tier Members. Any change in the information will result in a different benefit calculation.

Any change in your years of service, benefit factor, or final compensation will result in a different benefit calculation. You should also keep in mind the following:

Guido

XXX-XX-0396

Retirement Date: 01/26/2009 Age at Retirement: 60.25

Unmodified Allowance Highest allowance payable. Benefit ends at your death. The only benefit payable is the lump sum death benefit.	For You	\$ 3,279
OPTION 1 Less than the Unmodified Allowance but provides that if there are any member contributions remaining at the time of your death the balance would be paid to your designated beneficiary(ies) in a lump sum. The Option 1 allowance does not provide for a monthly allowance to a beneficiary after the member's death.	For You	\$ 3,278
	For Your Beneficiary	Your total contributions of \$ 6,023.94 will be reduced by \$ 48 for each month that you receive an allowance. Your contributions will be reduced to zero in approximately 10.38 years.
	For You, if Your Beneficiary Predeceases You.	\$ 3,278
OPTION 2 X Lowest monthly allowance payable to you. Upon your death, CalPERS pays out the same monthly allowance. Returns to the Unmodified Allowance amount if your beneficiary predeceases you.	For You	\$ 2,987
	For Your Beneficiary	\$ 2,987
	For You, if Your Beneficiary Predeceases You	\$ 3,279
OPTION 2W This is just like Option 2, except it does not return to the Unmodified Allowance amount if your beneficiary predeceases you. In exchange, the allowance to you and your beneficiary is slightly higher.	For You	\$ 3,043
	For Your Beneficiary	\$ 3,043
	For You, if Your Beneficiary Predeceases You	\$ 3,043
OPTION 3 Provides a higher allowance than under Option 2, but upon your death your beneficiary receives a lower allowance. Returns to the Unmodified Allowance amount if your beneficiary predeceases you.	For You	\$ 3,125
	For Your Beneficiary	\$ 1,562
	For You, if Your Beneficiary Predeceases You	\$ 3,279
OPTION 3W This is just like Option 3, except it does not return to the Unmodified Allowance amount if your beneficiary predeceases you. In exchange, the allowance to you and your beneficiary is slightly higher.	For You	\$ 3,158
	For Your Beneficiary	\$ 1,579
	For You, if Your Beneficiary Predeceases You	\$ 3,158

Fred Guido

Things to remember...

- When planning your retirement you may want to consider how your retirement date affects your first cost of living increase. Cost of living increases are provided by law and are based on the consumer price index for all United States cities. For more information, visit the CalPERS website at www.calpers.ca.gov.
- If you have contributed to Social Security and would like to know how it impacts your retirement, you can contact the Social Security Administration at 1-800-772-1213 or by visiting their web site at www.ssa.gov.

CALPERS WEB SITE

You have taken an important step in planning your retirement by requesting an estimate of your retirement allowance. You may obtain additional information on all programs administered by CalPERS by logging on to our web site at www.calpers.ca.gov.

You can use the CalPERS Retirement Calculator to help estimate your future retirement benefits. The Retirement Planning Calculator can be used with or without a Password. If a Password is used the information from your latest Annual Member Statement will be automatically added to the calculator. Using the Retirement Planning Calculator without a Password enables you to add various retirement dates, salary information, and future employment information to see how these changes would impact your future retirement benefits. To obtain this Password register for the online access at the CalPERS web site listed above.

CalPERS suggest all members attend one of our free Retirement Financial Planning Seminars or Retirement Planning Workshops. The CalPERS website makes it easy and convenient to review dates and locations, and register to attend one of these sessions.

SEE THE FOLLOWING PAGE FOR MORE INFORMATION

1 PROOF OF SERVICE BY US MAIL

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the county of Los Angeles, State of California. I am over the
4 age of 18 and not a party to the within action; my business address is 11500 W.
5 Olympic Blvd., Suite 550, Los Angeles, CA 90064-1524.
6

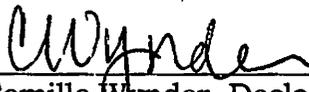
7 On **April 9, 2010**, I served the foregoing document described as **FRED**
8 **GUIDO'S APPEAL OF CALPERS' DENIAL OF RECIPROCITY AND DENIAL OF**
9 **ASSOCIATED INCREASE IN CALPERS BENEFITS** on interested parties in this action
10 by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

11 **PLEASE SEE ATTACHED SERVICE LIST**

12 Marguerite Seabourn
13 CalPERS Legal Office
14 P.O. Box 942707
Sacramento, CA 94229

15 I am "readily familiar" with the firm's practice of collection and processing
16 correspondence for mailing. Under that practice it would be deposited with U.S.
17 postal service on that same day with postage thereon full prepaid at Los Angeles,
18 California in the ordinary course of business. I am aware that on motion of the party
19 served, service is presumed invalid if postal cancellation date or postage meter date is
20 more than one day after date of deposit for mailing in affidavit.
21

22 Executed on **April 9, 2010**, at Los Angeles, California. I declare under penalty
23 of perjury under the laws of the State of California that the above is true and correct.

24 
25 _____
26 Camille Wynder, Declarant
27
28