Harvey L. Leiderman (SBN 55838)
Email: HLeiderman@reedsmith.com
Jeffrey R. Rieger (SBN 215855)
Email: jrieger@reedsmith.com
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3659
Telephone: +1 415 543 8700
Facsimile: +1 415 391 8269

Attorneys for Petitioner, California Public Employees' Retirement System

BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of Applicability of Government Code Section 20638 to Member Fred Guido: FRED GUIDO, Respondent, CITY OF CUDAHY, Respondent.	Case No. 9711 OAH No. 2012030387 **CALPERS PREHEARING CONFERENCE STATEMENT** Conference: Oct. 12, 2012, 1:30 p.m. Hearing Date: November 13, 2012 through November 16, 2012 at 9:00 a.m. Place: Office of Administrative Hearings 320 West Fourth St., 6th Floor, Suite 630 Los Angeles, CA

1. Identification of all operative pleadings by title and date signed

(a) Statement of Issues, signed January 24, 2012.

(b) Fred Guido's Notice of Defense, Affirmative Defenses and New Matter, signed February 20, 2012.

(c) City of Cudahy's Notice of Appearance, signed February 27, 2012.

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2. The party's current estimate of time necessary to try the case

CalPERS anticipates that its case in chief will come in through cross examination of Guido and the witnesses he calls for his case in chief. CalPERS anticipates calling its own witnesses only to the extent that additional testimony is necessary to respond to Guido's case in chief. CalPERS anticipates the matter may be tried in 2-4 days of testimony. After Guido has rested, CalPERS will determine whether it needs to call additional witnesses.

CalPERS proposes that, in the interests of efficiency and convenience for the witnesses, the parties should anticipate that Guido will make his case in chief on November 13 and 14, 2012. CalPERS would then be expected to put on any witnesses it determines are necessary no earlier than November 15, 2012.

3. The name of each witness the party may call at hearing along with a brief statement of the content of each of the witness's expected testimony

(a) Fred Guido, regarding all aspects of his employment with the City of Cudahy, the compensation he received from the City of Cudahy, and his claim that he detrimentally relied on information from CalPERS suggesting that he had established reciprocity between CalPERS and the Los Angeles County Employees' Retirement Association ("LACERA").

(b) City of Cudahy Person Most Knowledgeable, regarding all aspects of Guido's employment with the City of Cudahy and the compensation he received from the City of Cudahy.

(c) LACERA Custodian of Records and/or Person Most Knowledgeable, to the extent testimony is necessary to authenticate records that were produced by LACERA in response to a public records act request and/or to explain the meaning of those records.

(d) Emily DeFlores, who will serve as CalPERS' Person Most Knowledgeable regarding CalPERS' processes relating to reciprocity in the time period of 2003 through 2008 when Guido claims to have detrimentally relied on information from CalPERS suggesting that he had established reciprocity between CalPERS and LACERA, as may be necessary.

(e) Connie Molloy, regarding Guido's requests for retirement estimates and CalPERS' responses to those requests, as may be necessary.

(f) Deborah Fogal, regarding Guido's requests for retirement estimates and CalPERS' responses to those requests, as may be necessary.

(g) Kevin Chikasawa, regarding Guido's requests for retirement estimates and CalPERS' responses to those requests, as may be necessary.

(h) At this time, CalPERS does <u>not</u> expect to call the following witnesses, but may call them as rebuttal witnesses to the extent rebuttal is necessary:

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Elizabeth Reese, Kerry Griffin, Denise Horton, Shane McAdams, Phyllis Streeter, Mindy Fox, Manjit Singh, Jose Doria, Melissa Estrada, Christopher John Wigington and Brittany Woo. These individuals work for CalPERS and they had some connection Mr. Guido's communications with CalPERS.

CalPERS reserves its rights to (a) call any other witness identified by Guido, the City of Cudahy and/or CalPERS in their discovery responses or appearing on any of their witness lists, (b) supplement the above witness list as it discovers new facts in discovery or in preparation for the hearing on this matter, and (c) call rebuttal witnesses, as necessary, to rebut the testimony of Guido, or other witnesses that Guido or the City of Cudahy may call.

4. The identity of any witness whose testimony will be presented by affidavit pursuant to Government Code section 11514, if known

None known at this time, but CalPERS may offer an affidavit from the Person Most Knowledgeable and/or Custodian of Records from LACERA, to the extent that the parties cannot reach a stipulation as to the authenticity of records that LACERA produced in response to a public records act request.

5. The name and address of each expert witness the party intends to call at hearing along with a brief statement of the opinion the expert is expected to give. The party shall also attach a copy of a current resume for each expert witness

None known at this time.

6. Whether there is need for an interpreter or special accommodation at the hearing

No need known at this time.

7. A list of the documentary exhibits the party intends to present at hearing and a description of any physical or demonstrative evidence.

CalPERS reserves its right to introduce any document that has been produced in discovery in this case. At present, this includes: PERS 1-546; LA 1-483 and FGUIDO 1-146. Below, CalPERS has listed the documents it may introduce at the hearing, but the below list is not a waiver of any right to introduce other documents produced in discovery that do not appear on this list and/or to introduce documents that were not produced in discovery for the purposes of rebuttal, as necessary.

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- CalPERS Customer Touch Point (CTP) report. PERS 1-6.
- October 20, 2008 response to retirement estimate request. PERS 14-18.
- Calculation Information Service Retirement. PERS 23
- Precalculation Process Information Sheet. PERS 24.
- June 5, 2009 letter re retirement allowance. PERS 25-28.
- Precalculation Process Information Sheet. PERS 30.
- Transcript of Member's Account. PERS 31-32, 47-50 and 59-65.
- October 6, 2003 response to retirement estimate request. PERS 46.
- October 28, 1975 election of membership. PERS 52.
- December 12, 1975 letter from CalPERS to Cudahy Auditor. PERS 53.
- 1/5/76 Notice of Change and/or Certification of Contribution Rate. PERS 54.
- December 29, 1975 Election of Optional Membership. PERS 55.
- Chart re service. PERS 57.
- May 19, 1982 Report of Status Change or Separation. PERS 66.
- Membership data form. PERS 67.
- December 12, 1975 letter from Betty L. Sayers to Fred Guido. FGUIDO 50.
- January 5, 1976 letter from Betty L. Sayers to Fred Guido. FGUIDO 49.
- March 23, 1976 letter from CalPERS. FGUIDO 51.
- June 30, 1977 CalPERS Annual Statement. FGUIDO 52.
- 1976 CalPERS Annual Statement. FGUIDO 55.
- 1982 CalPERS Annual Statement. FGUIDO 57.
- 2008 CalPERS Annual Statement. FGUIDO 58-61.
- 2007 CalPERS Annual Statement. FGUIDO 62-65.
- 2006 CalPERS Annual Statement. FGUIDO 66-69.
- 2005 CalPERS Annual Statement. FGUIDO 74-75.
- 2004 CalPERS Annual Statement. FGUIDO 76-79.
- 2003 CalPERS Annual Statement. FGUIDO 80-85.
- 2002 CalPERS Annual Statement. FGUIDO 86-92.

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- 2001 CalPERS Annual Statement. FGUIDO 93-98.
- 2000 CalPERS Annual Statement. FGUIDO 99-104.
- 1999 CalPERS Annual Statement. FGUIDO 105-110.
- 1998 CalPERS Annual Statement. FGUIDO 111-116.
- 1997 CalPERS Annual Statement. FGUIDO 117-122.
- 1996 CalPERS Annual Statement. FGUIDO 123-128.
- 1995 CalPERS Annual Statement. FGUIDO 129-134.
- 1994 CalPERS Annual Statement. FGUIDO 135-140.
- 1993 CalPERS Annual Statement. FGUIDO 141-146.
- Hand written letter from Fred Guido to Betty Sayers. PERS 70.
- "When You Change Retirement Systems" - August 2002. PERS 72-81.
- "When You Change Retirement Systems" - September 2005. PERS 82-91.
- "When You Change Retirement Systems" – May 2007. PERS 92-101.
- "When You Change Retirement Systems" - August 2007. PERS 102-111.
- "When You Change Retirement Systems" - June 2008. PERS 112-130.
- "When You Change Retirement Systems" - February 2009. PERS 131-147.
- Local Member Benefits - August 2002. PERS 148-154.
- Local Miscellaneous Benefits - April 2005. PERS 155-188.
- Local Miscellaneous Benefits - March 2006. PERS 189-224.
- Local Miscellaneous Benefits - March 2006. PERS 225-258.
- Local Miscellaneous Benefits - November 2007. PERS 259-297.
- Local Miscellaneous Benefits - January 2009. PERS 298-337.
- Active and Inactive Reciprocity Procedures. PERS 338-355.
- Reciprocity Procedures When Applying Reciprocity Salaries. PERS 356-357.
- Student Procedures For Reciprocal Agencies. PERS 358.
- Printout of CalPERS Smartdesk Plus Screen shots. PERS 359-373.
- City of Cudahy Contract File PERS 374-532.
- Retirement Estimate Request Form - June 2002. PERS 533-534.

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- Retirement Estimate Request Form - June 2004. PERS 535-536.
- Retirement Estimate Request Form - September 2005. PERS 537-538.
- Retirement Estimate Request Form - November 2005. PERS 539-540.
- Retirement Estimate Request Form - December 2006. PERS 541-542.
- Retirement Estimate Request Form - December 2007. PERS 543-544.
- Retirement Estimate Request Form - August 2008 PERS 545-546.
- October 29, 2003 Response to Estimate Request. FGUIDO 3-4.
- Estimate Request. FGUIDO 5.
- October 2, 2007 Response to Estimate Request. FGUIDO 8-12.
- Estimate Request. FGUIDO 20.
- October 20, 2008 Response to Estimate Request FGUIDO 21-25.
- April 15, 2009 LACERA letter. FGUIDO 36.
- May 19, 2009 LACERA letter. FGUIDO 31.
- July 27, 2007 letter from CalPERS. FGUIDO 37-45.
- September 7, 2012 letter from Christine Roseland. LA 1.
- Handwritten letter with enclosure. LA 2-3.
- April 15, 2009 LACERA letter. LA 4.
- LACERA information to CalPERS. LA 5.
- April 24, 2009 letter. LA 6-7.
- CalPERS information to LACERA. LA 8-9
- May 19, 2009 LACERA letter. LA 10.
- May 19, 2009 LACERA letter. LA 11.
- CalPERS information to LACERA LA 12.
- LACERA notes. LA 13-17.
- LACERA Retirement Plans A, B & C, General Member. LA 18-61.
- LACERA Retirement Plans A & B, Safety Member. LA 62-100.
- LACERA Retirement Plans A & B, Safety Member. LA 101-164.
- LACERA documents. LA 165-190.

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- LACERA Retirement Plans. LA 191-226.
- LACERA "Some Day." LA 227-261.
- LACERA Retirement Plans A & B, Safety Member. LA 263-298.
- LACERA Retirement Plans A, B & C, General Member. LA 299-364.
- LACERA Retirement Plans A, B & C, General Member. LA 365-400.
- LACERA "Some Day." LA 401-435.
- LACERA New Member Guide. LA 436-451.
- LACERA New Member Guide. LA 452-467.
- LACERA Withdrawal/Reciprocity. LA 468-483.

8. A concise statement of any legal issues which may affect the presentation of evidence or the disposition of the case.

When a member of CalPERS retires, his or her pension is determined under the provisions of the Public Employees' Retirement Law, Government Code sections 20000, *et seq.* ("PERL"). The computation of a CalPERS member's retirement allowance is based, in part, on that member's "compensation earnable."

Under Government Code sections 20638 and 20355 CalPERS may look to a member's average monthly salary earned while he or she was an active member of a county retirement system to establish that member's CalPERS "compensation earnable," so long as that CalPERS member becomes an active member of the county retirement system within six months after terminating service with his or her employer that participates in CalPERS. This benefit is commonly referred to as "reciprocity."

Between 1970 and 1982, Guido served as an elected member of the Cudahy City Council. Guido received $150 per month for his work. Guido has about 12 years of service credit in CalPERS based on the time he served on the Cudahy City Council.

From 1973 to 1977, while still serving on the City Council, Guido also became employed by the Los Angeles County Sheriff's Department. He remained a Los Angeles County employee until or about November 1977, at which time he separated from service. This time period did not qualify him for the advantage of section 20638, because section 20638 requires a member to transfer to

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active membership status in a county retirement system within six months after discontinuance of service with a CalPERS employer. Guido did not terminate service with the City of Cudahy before going to work for Los Angeles County in 1973 and he was already a member of the Cudahy City Council when he terminated with Los Angeles County in 1977.

Between 1982 and 1996, Guido was employed only in the private sector and was therefore not an active member of either CalPERS or LACERA.

Guido returned to employment with Los Angeles County in 1996, more than 14 years after his last service as a member of the Cudahy City Council. In that capacity he returned to active membership in LACERA. He remained a Los Angeles County employee until his termination of employment and retirement from the County on or about June 1, 2009. Because more than 14 years separated Guido's active memberships in CalPERS and LACERA, this second period of service did not qualify him for the advantage of section 20638.

On several occasions between 2003 and 2008, Guido requested that CalPERS staff generate retirement allowance estimates for him. In response, CalPERS' staff generated retirement allowance estimates, which were partially based on information that Guido provided to CalPERS staff. Those estimates and related communications were based on the mistaken assumption that Guido's CalPERS retirement allowance would be calculated using amounts that he earned while he was employed by Los Angeles County. Based on information provided by Guido, CalPERS staff used salaries as high as $11,838 per month to generate Guido's retirement allowance estimates, which resulted in an unmodified retirement allowance estimate of over $3,300 per month.

Based on the PERL, Guido is not entitled to the advantage of PERL section 20638 and therefore his CalPERS retirement allowance must be based on the $150 per month of "compensation earnable" that he earned when he was a member of the Cudahy City Council. This results in a monthly benefit of approximately $70 per month.

Guido claims that he made a variety of decisions based on his belief that he was entitled to receive a CalPERS retirement allowance of over $3,300. Thus, Guido claims that he is entitled, by equitable estoppel, to have his CalPERS retirement allowance based on his highest salary that he earned with Los Angeles County, resulting in a monthly benefit of over $3,300 per month.

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Guido has the burden of proof in this proceeding. CalPERS expects that, in his case in chief, Guido will attempt to meet his burden of proof on all elements of his claim for equitable estoppel. CalPERS contends that Guido will not be able to satisfy his burden of proof on those elements.

Whether or not Guido can meet his burden of proof on all elements of equitable estoppel is ultimately irrelevant, however, because equitable estoppel is not available to him as a matter of law. The law is clear that "estoppel is barred where the government agency to be estopped does not possess the authority to do what it appeared to be doing." *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 870; *see, also, Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886, 893 ("principles of estoppel are not invoked to contravene statutes and constitutional provisions that define an agency's powers.") *Id.* at 893; *Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1608 (although "equitable relief is flexible and expanding, its power cannot be intruded in matters that are plain and fully covered by positive statute.")

Further, even if Guido could meet his burden of proof on all elements of equitable estoppel, and even if equitable estoppel were legally available to him, the Court would still have to be satisfied that applying equitable estoppel is equitable in this case, under all existing circumstances. Guido was paid only $150 per month for his service on the Cudahy City Council. Guido and the City of Cudahy paid contributions to CalPERS to fund Guido's retirement benefits, based on a percentage of that monthly pay. To award Guido a retirement allowance over $3,300 per month under these circumstances would not be equitable.

DATED: October 9, 2012.

REED SMITH LLP

By _____
Jeffrey R. Rieger
Attorneys for Petitioner California Public Employees Retirement System

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105-3659. On October 9, 2012, I served the following document(s) by the method indicated below:

CALPERS PREHEARING CONFERENCE STATEMENT

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

Attorneys for Respondent
Fred Guido
John Michael Jensen
Law Offices of John Michael Jensen
11500 W. Olympic Blvd., Suite 550
Los Angeles, CA 90064
Telephone: 310-312-1100
Facsimile: 310-477-7090

Attorneys for Respondent
City of Cudahy
Rick Olivarez
Juanda Lowder Daniel
Olivarez Madruga PC
1100 S. Flower St., Suite 2200
Los Angeles, CA 90015
Telephone: 213-744-0099
Facsimile: 213-744-0093

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 9, 2012, at San Francisco, California.

Ann H. Devor

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101 Second Street
Suite 1600
San Francisco, CA 94105-3659
+1 415 543 8700
Fax +1 415 391 8269
reedsmith.com

From: Ann H. Devor
Direct Phone: +1 415 659 5642
Email: ADevor@reedsmith.com

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October 9, 2012

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John Michael Jensen	Law Offices of John Michael Jensen	310-477-7090	310-312-1100
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Notes:

Attached please find CalPERS Prehearing Conference Statement in the matter of OAH No. 2012030387, Fred Guido, Respondent and City of Cudahy, Respondent.

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Reed Smith LLP
101 Second Street
Suite 1800
San Francisco, CA 94105-3659
+1 415 543 8700
Fax +1 415 391 8269
reedsmith.com

From: Ann H. Devor
Direct Phone: +1 415 659 5642
Email: ADevor@reedsmith.com

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Reed Smith LLP
101 Second Street
Suite 1800
San Francisco, CA 94105-3659
+1 415 543 8700
Fax +1 415 391 8269
reedsmith.com

From: Ann H. Devor
Direct Phone: +1 415 659 5642
Email: ADevor@reedsmith.com

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