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8 Attorneys for Respondent Fred Guido

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

11 In the Matter of the Applicability of
12 Government Code Section 20638 to Member
13 Fred Guido,
14 FRED GUIDO and CITY OF CUDAHY,
15 Respondents.

) **CALPERS CASE NO.: 9711**
) **OAH CASE NO.: 2012-030387**
)
)
) **FRED GUIDO'S REQUEST FOR**
) **OFFICIAL AND JUDICIAL NOTICE**
)
) Hearing Dates: November 13-16, 2012
) Hearing Location: Los Angeles OAH
) 320 W. Fourth St., 6th Fl.
) Los Angeles, CA
) Hearing Time: 9:00 am
) Presiding ALJ: _____
)
)

21
22 Respondent Fred Guido respectfully provides notice that he requests the Administrative
23 Law Judge hearing the above-captioned matter to take official and judicial notice, and recognize
24 and accept for use by the trier of fact or by the Court, of the existence of various matters of law
25 or fact. (*Government Code 11515, Evidence Code, §§450, et seq.*)

26 **REQUEST FOR JUDICIAL NOTICE**

27 Respondent Guido asks the Court to take official and judicial notice of documents, and
28 materials that are subject to Official and Judicial Notice. (*Government Code 11515, Evidence*

1 *Code, §§450, et seq.*) Specifically, Respondent Guido requests Judicial Notice of the briefs filed
2 by Appellant Leonard Chaidez and by Respondent CalPERS in the California Court of Appeal,
3 Third Appellate District, in the case of *Leonard Chaidez, Appellant v. California Public*
4 *Employees' Retirement System, et al., Respondents*, Appellate Court Case No. C065913.

5 Although the Court of Appeal has not yet indicated whether it will request oral argument
6 or when that might occur, the case has been fully briefed and the written briefs submitted by the
7 parties bear directly on issues of equitable estoppel that are central to the matters at issue in this
8 OAH proceeding.

9 As described in greater detail in the attached Memorandum of Points and Authorities,
10 government records are subject to mandatory or discretionary Judicial Notice. True and correct
11 copies of the materials to be judicially noticed are attached as exhibits to the supporting
12 Declaration of John Michael Jensen.

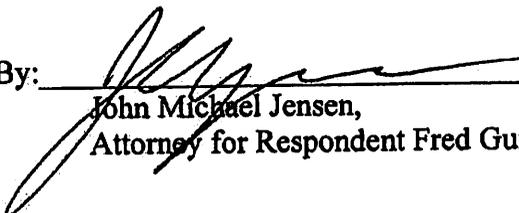
13 In support of his appeal of CalPERS' denial of reciprocity herein based on the claim of
14 equitable estoppel, Respondent Guido seeks Judicial Notice of the documents attached hereto:

<u>Exhibit No.</u>	<u>Description</u>
Exhibit 1	Appellants' Opening Brief filed by Appellant Leonard Chaidez.
Exhibit 2	Respondent's Brief filed by Respondent CalPERS.
Exhibit 3	Appellants' Reply Brief filed by Appellant Leonard Chaidez.

15
16
17
18
19 Accordingly, Respondent Guido requests that this Court take judicial notice of the
20 materials and information contained in said exhibits.

21 Respectfully submitted,

22
23 Dated: November 9, 2012

24 By: 
25 John Michael Jensen,
26 Attorney for Respondent Fred Guido

POINTS AND AUTHORITIES

I. FACTS

This Request for Judicial Notice provides this Court with copies of the written briefs submitted by the appellant and by Respondent CalPERS in the California Court of Appeal, Third Appellate District, in the case of *Leonard Chaidez, Appellant v. California Public Employees' Retirement System, et al., Respondents*, Case No. C065913.

CalPERS has denied reciprocity to Respondent Guido for his service earned in two reciprocal government pension systems, CalPERS and the Los Angeles County Employees' Retirement Association (LACERA). Although CalPERS claims Respondent Guido never satisfied the requirements to establish reciprocity, it admits that it explicitly and repeatedly advised him over the course of nearly six years that he had established reciprocity. Moreover, it failed to advise him that he did not have reciprocity until nearly a month after he had simultaneously retired from CalPERS and from LACERA, based upon the representation that he had established reciprocity and would be entitled to a CalPERS pension calculated on the basis of his highest earnings in either pension system.

By time Respondent Guido was so notified, it was too late for Respondent Guido to "undo" his retirement in both the CalPERS and LACERA systems, seek new employment, and take any other steps necessary to comply with CalPERS' requirements concerning the establishment of reciprocity.

Accordingly, Respondent Guido asserts herein that CalPERS is now estopped from denying reciprocity. He submits the attached documents because they constitute legal argument, including argument advanced by CalPERS, on the central issue of estoppel. If the Court of Appeal ultimately rules on behalf of Appellant in the *Chaidez v. CalPERS* case and finds that CalPERS can be subject to estoppel, that will bear directly on Respondent Guido's rights herein.

II. LEGAL ISSUES

Respondent Guido requests the Court to take judicial notice, and recognize and accept for use by the trier of fact or by the Court, of the existence of various matters of law or fact. (*Evidence Code*, §§450, *et seq*; *People v. Rowland* (1992) 4 Cal.4th 238, 268.) Guido request the

1 Court to take official notice of the documents under *Government Code 11515*.

2 **A. Discretionary Judicial Notice**

3 The Court *may* take judicial notice of certain matters. (*Evidence Code*, §452
4 [discretionary judicial notice].)

5 The Court may take notice of official acts of any state or federal legislative, executive or
6 judicial department. (*Evidence Code* §452(c); see *Fowler v. Howell* (1996) 42 Cal.App.4th 1746,
7 1750 [court can take judicial notice of records and files of *state administrative agencies*]; *C.R. v.*
8 *Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102 [licenses issued by state agency];
9 *Cal. Prac. Guide Civ. Pro. Before Trial*, Ch. 7(I)-A.)

10 The Court can take Judicial Notice that CalPERS is a state administrative agency and that
11 the documents offered in Exhibit 2 are judicial positions taken in a court of law by CalPERS.
12 The Respondent's Brief filed by CalPERS in *Chaidez v. CalPERS* is not itself in dispute.

13 The Court can also take Judicial Notice that the Court of Appeal is a court of law
14 established under the laws of the State of California and that the documents offered in Exhibits 1,
15 2 and 3 are the records and files of Court of Appeal. The official records and acts themselves are
16 not in dispute.

17 **B. Discretionary Judicial Notice of Public Records, Acts, and Documents of**
18 **Public Entities (Court of Appeal, CalPERS)**

19 The court may judicially notice "(r)egulations and legislative enactments issued by ... *any*
20 *public entity* in the United States." (*Evidence Code*, §452(b), emphasis added; *Cal. Prac. Guide*
21 *Civ. Trials & Ev.*, Ch. 8C-J.)

22 A court may take judicial notice of "official acts" of legislative, executive and judicial
23 departments of any state government. (*Evidence Code*, §452(c); *Arce v. Kaiser Found. Health*
24 *Plan, Inc.*, *supra*, at 484; *Cal. Prac. Guide Civ. Trials & Ev.* Ch. 8C-J.)

25 A trial court acted within its discretion in taking judicial notice of "All County Letters"
26 issued by the State Department of Social Services stating the Department's interpretation of a
27 statute, even though the letters were not rendered in accordance with the Administrative
28 Procedure Act, since the letters were official acts of the state's executive department. (*In re*

1 *Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, review denied; 31 Cal.Jur.3d,
2 *Evidence*, §36.)

3 **C. Official Acts**

4 *Evidence Code*, §220(c) provides for judicial notice of the official acts of the legislative,
5 executive, and judicial departments of the United States and any state, territory, or possession of
6 the United States. See the broad definition of "state" in *Evidence Code* §220. Subdivision (c)
7 states existing law as found in subdivision 3 of *Code Civ. Proc.*, §1875.

8 Under this provision, the California courts have taken judicial notice of a wide variety of
9 administrative and executive acts, such as proceedings and reports of the House Committee on
10 Un-American Activities, records of the State Board of Education, and records of a county
11 planning commission. (See Witkin, *California Evidence*, §49 (1958), and 1963 Supplement
12 thereto; *Evidence Code*, §452.)

13 **D. Request for Judicial Notice of Exhibits**

14 Exhibits 1, 2 and 3 are official documents of the California Court of Appeal.
15 Furthermore, Exhibit 2 is also the official judicial position of CalPERS.

16 The Court must take judicial notice of any matter specified for discretionary judicial
17 notice in *Evidence Code* §452 since Respondent Guido has here:

- 18 • Requested the Court to take judicial notice of that matter (*Evidence Code*, §453);
- 19 • Given each adverse party sufficient notice of the request, through the pleadings or
20 otherwise, to give the adverse party time to prepare to dispute the request
21 (*Evidence Code*, §453(a));
- 22 • Furnished the Court with sufficient information to enable it to take judicial notice
23 of the matter (*Evidence Code*, §453(b)); and
- 24 • Persuaded the Court that the matter is a proper subject of judicial notice under
25 *Evidence Code* §452.

26 Respectfully submitted.

27 Dated: November 9, 2012

28 By: _____

John Michael Jensen,
Attorney for Respondent Fred Guido

DECLARATION OF JOHN MICHAEL JENSEN

I, JOHN MICHAEL JENSEN, declare as follows:

1. The statements herein are based upon my personal knowledge and if called to testify under oath in court I could and would so testify.
2. I am over 18 years old.
3. I am the attorney for Respondent Fred Guido in this matter.
4. Attached as Exhibit 1 to this Request for Judicial Notice is a true and correct copy of a document entitled Appellants' Opening Brief filed by Appellant Leonard Chaidez in the California Court of Appeal, Third Judicial District, in the case of *Leonard Chaidez, Appellant v. California Public Employees' Retirement System, et al., Respondents*, Case No. C065913.
5. Attached as Exhibit 2 to this this Request for Judicial Notice is a true and correct copy of a document entitled Respondent's Opposition Brief filed by Respondent CalPERS in the California Court of Appeal, Third Judicial District, in the case of *Leonard Chaidez, Appellant v. California Public Employees' Retirement System, et al., Respondents*, Case No. C065913.
6. Attached as Exhibit 3 to this this Request for Judicial Notice is a true and correct copy of a document entitled Appellants' Reply Brief filed by Appellant Leonard Chaidez in the California Court of Appeal, Third Judicial District, in the case of *Leonard Chaidez, Appellant v. California Public Employees' Retirement System, et al., Respondents*, Case No. C065913.
7. I am the attorney of record for Appellant in the *Chaidez v. CalPERS* case and prepared Exhibits 1 and 3 in that capacity.
8. I also can confirm that Exhibit 2 was prepared and filed by counsel for CalPERS in the *Chaidez v. CalPERS* case.

Under penalty of perjury, I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true.

DATED: November 9, 2012

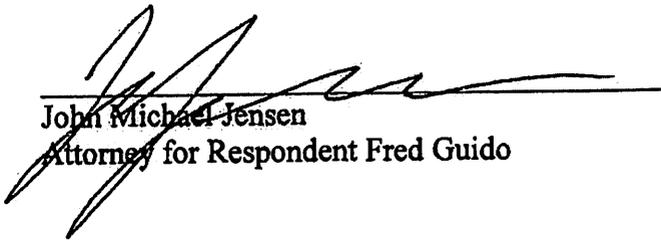

John Michael Jensen
Attorney for Respondent Fred Guido

EXHIBIT 1

3RD Civil No. C065913

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

LEONARD CHAIDEZ and
CITY OF HAWAIIAN GARDENS,
Appellants,

vs.

BOARD OF ADMINISTRATION, CALIFORNIA PUBLIC
EMPLOYEES' RETIREMENT SYSTEM, and
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Respondents.

APPELLANTS' OPENING BRIEF

Appeal from a Judgment of the
Superior Court of the County of Sacramento
Case No. 07CS01248
The Honorable Michael P. Kenny, Judge

John Michael Jensen (SBN 176813)
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310-312-1100

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Leonard Chaidez and City of Hawaiian Gardens*

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EXHIBITS (10 pages per C.R.C., Rule 8.204(d))

Exhibit 1 – *Election of Optional Membership form* (3CT0694)

Exhibit 2 – Transcript of OAH Hearing, December 21, 2007 (AR001465:3-AR001466:19) (Testimony of Appellant Chaidez)

Exhibit 3 – Transcript of OAH Hearing, December 21, 2007 (AR001501:8-24) (Testimony of Appellant Chaidez)

Exhibit 4 – CalPERS 2005 *Annual Membership Statement* (4CT0901-4CT0904)

Exhibit 5 – CalPERS retirement estimate, December 6, 2005, provided to Appellant Chaidez (1CT0024-1CT0025)

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31 C.J.S., Estoppel, §§ 138-147, pp. 675-733 32

2 Davis, Administrative Law Treatise, 491, 492 42
2 Witkin, Cal. Procedure (1954) § 46 42

INTRODUCTION

This appeal focuses on the following issues:

- Pursuant to Article XVI, Section 17 of the California Constitution, CalPERS owes fiduciary duties to Members. Fiduciary duties require CalPERS to provide Members and others with timely, accurate information. (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 40.) Are Members entitled to rely on reasonable information supplied by CalPERS pursuant to its constitutional duties?
- Generally estoppel can be asserted against the government, especially if public policy (e.g. constitutional duties) supports the estoppel. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462.) Can Members who have reasonably relied on information estop CalPERS from renegeing if the estoppel will result in a retirement allowance that is reasonable but in excess of the benefit otherwise described in parts of the Public Employees Retirement Law ("PERL", *Government Code* sections 20000, *et seq.*)?
- If CalPERS retirement allowances are unvaryingly limited to the benefit described in the PERL, regardless of a Member's long-standing, reasonable reliance upon representations from CalPERS, do the constitutional fiduciary duties and estoppel have any tangible legal meaning, substance, or advantage?

Although the facts of this appeal are specific to the instant matter involving the pension of Appellant Leonard Chiadez (and the City of

Hawaiian Gardens), the legal principles and issues re-occur often.

Appellants will be filing a motion in the near future to request Judicial Notice of other pending cases where the same legal principles are in issue.

STATEMENT OF THE CASE

In 1992, the California electorate approved Proposition 162 and thereby amended portions of the California Constitution governing pension systems, such as CalPERS¹. Affirming a retirement system's (like CalPERS') existing trust duties and obligations to its Members and others, the voters approved language giving the retirement boards of such pension systems "plenary authority and fiduciary responsibility for ... [the] administration of the system" but specifying that "[a] retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty." (California Constitution, Art. XVI, §17.)

The core issues of this appeal grow directly out of the implications of CalPERS' trust duties and the constitutional amendment, and the practical meaning and impact of CalPERS' fiduciary duties:

1. CalPERS' constitutionally-mandated duty to its Members includes the mandate that CalPERS owes "a fiduciary duty to provide timely and *accurate* information to its members." (*City of Oakland, supra*, at 40, italics)

¹ Both CalPERS and its Board of Administration were named as Respondents and are collectively referred to herein as "CalPERS".

in original.)² Is this simply inconsequential verbiage? Is CalPERS free to inform its Members as it pleases – accurately or not – so long as CalPERS claims parenthetically or subsequently that its statements "[do] not have the force and effect of law, rule or regulation"? Can CalPERS grant itself immunity and freedom from its fiduciary standard by including a disclaimer or statement that "should any difference or error occur, the law will take precedence"³

2. To provide meaning to its duties, should CalPERS' fiduciary duties to *timely* and *accurately* inform also involve a subsequent consequence for CalPERS' failures, errors or omissions to timely and accurately inform? In this case, should CalPERS be equitably estopped from subsequently renegeing on its false or misleading representations that gave rise to a reasonable expectation of a larger pension? Who bears the loss when Members have suffered serious and substantial harm because of

² In *City of Oakland, supra*, the Third District appellate court discussed the implications of the Proposition 162 constitutional amendments, then immediately followed that discussion with the above-quoted language about "provid[ing] timely and *accurate* information" and cited to CalPERS' own Precedential Decision 99-01, *In re Application of William R. Smith* (1999), where CalPERS adopted the ALJ's finding that "[t]he duty to inform and deal fairly with members also requires that the information conveyed be complete and unambiguous."

³ See, for example, CalPERS' quoting of such language in its opposition to Appellants' Opening Brief in support of their Writ of Administrative Mandamus and Fifth Amended Complaint in the Superior Court proceedings, 4CT1018:17-18. ("CT" refers to the Clerk's Transcript on Appeal, with 1CT, 2CT, 3CT and 4CT referring to volumes 1 through 4, respectively, of the Transcript.)

irrevocable decisions they have made in reasonable reliance on CalPERS' erroneous information or advice provided pursuant to these mandated duties?

In the vast majority of cases, the constitutional duties and the PERL are not in conflict. However, when CalPERS' constitutional duties are in conflict with statute, do the constitutional duties (including the derivative duty to fully, accurately and timely inform Members concerning matters involving their vested pension rights), trump the statutory requirements⁴ ?

Especially when a retirement system is breaching its duties by failing to adequately and timely inform, can a CalPERS or other Member estop the retirement system from denying an assertion if the result is to provide a retirement allowance that is reasonable but also in excess of what the PERL would otherwise provide?

Appellants Leonard Chaidez ("Chaidez") and City of Hawaiian Gardens ("City") assert that the constitutional duties are supreme. CalPERS cannot supplant its constitutional duties by asserting the mere application of specific statutory provisions of the PERL. (See, e.g., 4CT1079:2-19; RT3:16-RT4:23 ["RT" refers to Reporters Transcript].) Constitutional duties are not simply general statements of responsibility or guidance. The

⁴ **The PERL is not constitutional, but only statutory. Any constitutional aspects of the retirement system would overpower any lesser statutory enactments in the PERL. In comparing the Constitution to the PERL, any statute in conflict with the Constitution would be unconstitutional.**

duties must provide a real remedy and actually guide CalPERS' day-to-day communications with its Members, including imposing a specific duty of care on CalPERS to ensure the accuracy of its Member communications.⁵ (See, e.g., 2CT0356:14-2CT0357:9; 2CT0597:13-2CT0598:25.)

CalPERS believes that its constitutional duty to accurately and timely inform Members is merely advisory and without meaningful remedy. CalPERS argues that equitable estoppel can never increase a benefit greater than statute. CalPERS believes that the retirement system is nothing but a creature of statute.

In practically denying its duties, CalPERS pleads for immunity. In effect, CalPERS wants the right to say anything with impunity. CalPERS will bear no penalty for its inaccurate and misleading representations to its Members so long as CalPERS itself *later* decides that the statutes require a different result than what was earlier promised.⁶ (See, e.g., 4CT1014:15-23;

⁵ The issue of whether a breach of CalPERS' fiduciary duties resulted in a claim for money damages was litigated in the underlying matter as a question of constitutional tort. We assert, in the alternative to estoppel, the right for corresponding monetary damages. See 2CT0362:4-2CT0371:25; 2CT0528:1-2CT0541:8.

⁶ CalPERS generally cannot decide on its own to act outside the confines of the PERL (and the Regulations adopted by CalPERS to implement statutory direction). As discussed more thoroughly below, however, there is a significant difference between (i) CalPERS' authority to act on its own to go beyond statutory limitations, and (ii) the authority of an ALJ or court judge to impose equitable estoppel remedies in the context of a neutral administrative or legal proceeding.

4CT1041:13-4CT1042:7.)

Although squarely presented time and again, neither the Administrative Law Judge (ALJ) nor the trial court ruled on either of these two very challenging core legal issues. The ALJ had no authority to decide the constitutional issues.⁷ (AR001437:17-AR001438:15 ["AR" refers to the OAH Administrative Record].) The trial court, on the other hand, side stepped them, despite the fact that they were thoroughly briefed and orally argued at length. (See, e.g., Fifth Petition and Complaints [2CT0577-3CT0694]; Petitioners' Opening Brief [4CT0920-4CT1004]; Petitioners' Reply Brief [4CT1075-4CT1088]; RT2:15-RT4:23; RT7:20-RT8:28; RT11:19-RT16:5; RT66:22-RT72:7.)

To Appellants' knowledge, these are issues of first impression to the Court: Do CalPERS' constitutional fiduciary duties support an estoppel if the result is a reasonable benefit greater than described in the PERL?

Two important public policies, CalPERS' constitutional fiduciary duties and estoppel, are meaningless without providing a remedy. One mechanism for allowing the higher result is expressed in another section of the PERL. (*Government Code* section 20160.) Case law finding estoppel, such as *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567,

⁷ Appellants asserted their constitutional, fiduciary and statutory claims at the administrative hearing to preserve their appeal rights but simultaneously indicated that the ALJ had no authority to rule on issues of constitutional interpretation and related claims. The ALJ agreed. (AR001437:17-AR001438:15.)

has allowed a benefit higher than statute but has not specifically established another mechanism (such as guiding legal theory concerning the implications of CalPERS' constitutional and fiduciary duties).

STATEMENT OF APPEALABILITY

This appeal is from the July 29, 2010 final judgment of the Sacramento County Superior Court and is authorized by *Code of Civil Procedure* section 904.1, subdivision (a)(1).

FACTUAL BACKGROUND

Appellant Chaidez worked for Appellant City for nine years, from July 1988 through July 1997. (4CT1095:3-5.) He served his last two years as City Administrator and ended his civil service career earning a monthly salary of \$7,374. (4CT1095:6-10.) CalPERS informed Chaidez that his CalPERS pension would be calculated pursuant to the standard CalPERS pension formula where all of his years of service at a CalPERS contracting agency would be multiplied by his highest pay earned at any time during that service. (AR001454:9-23; AR001484:11-21.) This is the standard retirement formula under which perhaps 99% of CalPERS pensions are calculated. CalPERS unvarying reasserted the same standard retirement formula to Chaidez and others many times, without contradiction, until near Chaidez's retirement.⁸

⁸ Up until near the time of Chiadez's retirement, CalPERS always, without contradiction, informed Chiadez of the same standard retirement

In 1999, two years after leaving the City Administrator post, Chaidez returned to public service with City as an elected member of the Hawaiian Gardens City Council. (4CT1095:13-14.) After he was elected, he signed a CalPERS-generated *Election to Optional Membership* form that represented to Chaidez that he was a CalPERS Member in his elected position. (4CT1095:19-23; 3CT0694 [copy attached hereto as Exhibit 1].)

CalPERS is responsible for writing the *Election* forms and informing Members and potential Members of their retirement options and benefits. Pursuant to *Government Code* section 20322, local elected officials such as city council members do not automatically qualify as CalPERS Members. Instead, they have the option to elect membership with CalPERS. If they so elect, they must do so in writing by an *Election* form to accrue additional CalPERS service credit.⁹

Elections are important. For example, by written election, Members can select beneficiary options. Pursuant to elections, Members can purchase prior elected office service before they were Members.

Shortly after he took elective office, Chaidez elected optional

formula. While it is true that CalPERS at times changed the dollar amount of retirement estimates, CalPERS unvarying asserted the same retirement formula. Chaidez relied on CalPERS' representations of the standard retirement formula.

⁹ Once they sign the *Election*, Members earn service credit so long as they continuously remain in elected office. (*Government Code*, §20322.)

CalPERS membership by signing and returning a CalPERS-generated *Election of Optional Membership* form. (4CT1095:19-20; 3CT0694 [Exhibit 1].) CalPERS specially created the form for elected officials, as indicated by the notation "FOR ELECTED OFFICIALS ONLY" (upper case in original)¹⁰ (3CT0694 [Exhibit 1].)

However, CalPERS omitted vital information. Nothing in the *Election* form advised Chaidez that CalPERS would not credit Chaidez's City Council service under the standard formula of (total service credit) x (benefit factor) x (highest compensation).¹¹ (AR001465:3-AR001466:19 [copy attached hereto as Exhibit 2]; 3CT0694 [Exhibit 1].) The City of Hawaiian Gardens did not know either.

Chaidez was re-elected several times and remained in office for another 8 years until his retirement in late 2007. (4CT1095:13-15.) He received \$721.85 per month for his City Council service (4CT1095:18), but forswore higher earnings because of his commitment to public service and because he expected to eventually benefit once he collected his pension (AR001460:17-AR001461:4; AR001465:3-AR001466:19; AR001501:8-24 [copy attached hereto as Exhibit 3]). Up until almost the end of the eight

¹⁰ The *Election* form also refers to *Government Code* section 20361 (the former section number for what is now *Government Code* section 20322) which only applies to this group.

¹¹ Chaidez's highest salary was his City Administrator pay of \$7,374 per month.

years, Chiadez did not know that CalPERS would dilute the credit for his City Council service by calculating it at a different, far lower rate.

Chaidez relied on the higher formula to take and keep the City Council position. Throughout his career, Chaidez consistently understood and relied upon communications from CalPERS that his retirement pension would be based on the following formula: total service credit (whether in an appointed or elected position) x benefit factor (his pension plan's formula adjusted for age at retirement) x highest compensation (his \$7,374 monthly City Administrator earnings). (AR001454:9-23; AR001484:11-21; 4CT1096:2-9.)

Time and again, CalPERS reinforced Chaidez's belief that his eventual pension would be calculated based on the standard retirement formula. For example, CalPERS annually provided Chaidez with personalized Annual Member Statements that included Chiadez's personal information and explicitly stated Chiadez would be entitled to the standard formula. (See, e.g., the Annual Member Statements for 1996-1998 while Chaidez held a civil service position [3CT0872-3CT0886] and for 2004-2006 while he held his City Council position [3CT0897-4CT0908; copy of the 2005 Annual Member Statement (4CT0901-4CT0904) is attached hereto as **Exhibit 4**].)

Even when Chiadez specifically requested CalPERS provide him with individualized retirement estimates, CalPERS reinforced Chaidez's

belief about his pension formula. As he began thinking about retirement, Chaidez requested from CalPERS and received retirement estimates in December 2005 using two different retirement dates. Both estimates multiplied his *entire* CalPERS service credit, both civil service and City Council, by his highest career pay rate of \$7,374 per month, the amount he earned as City Administrator. (1CT0024-1CT0025 [copy attached hereto as Exhibit 5]; 1CT0027-1CT0029.)

After almost seven years as an elected officeholder, Chaidez began considering retirement. (AR001498:9-23.) Relying on representations from CalPERS, Chaidez believed that his pension would be based on the standard formula as represented by CalPERS over his whole career. (AR001454:9-23; AR001484:11-21; 4CT1096:2-9.) It was not until a retirement estimate dated December 28, 2006, received by Chaidez in early January 2007 on the eve of his planned retirement, that CalPERS first informed Chaidez that his pension calculation would be bifurcated, with the portion attributable to his City Council service based on his much lower \$721.85 salary. (AR001513:5-AR001514:9; 1CT0031-1CT0033.) Effectively, CalPERS reduced his pension by 42%. (4CT1096:11-13.)

As Chaidez came to learn, the drastic reduction his pension was based on CalPERS' application of *Government Code* section 20039 to his City Council years of service. Unlike virtually all other CalPERS Members who earn pension benefits based on their highest "final compensation",

regardless of the membership category they were in when earning that compensation, Section 20039 mandates that members of city councils and boards of supervisors shall receive pension benefits for their city council/supervisor service based on their generally much lower earnings in those positions. (*Government Code* section 20039.)

Section 20039 had gone into effect more than a decade earlier, and five years before Chaidez was first elected to the City Council, but CalPERS had never informed Chaidez about Section 20039, never referred to it on the vital *Election* form at the time Chaidez re-entered the system, and never revealed the impact it would have on his eventual pension. Even the December 28, 2006, estimate did not notify him of the existence of *Government Code* section 20039 or its effects.¹² (1CT0031-1CT0033.)

¹² CalPERS asserts that it sent out a Circular Letter to all CalPERS agencies in November 1994 which discussed *Government Code* section 20039. Chaidez, however, testified without contradiction that he had never seen nor heard of the Circular Letter or of *Government Code* section 20039 (AR001455:7-AR001457:1; AR001594:10-AR001595:21). CalPERS never introduced any evidence or testimony to the contrary. CalPERS argues that Chaidez, as the City's personnel officer, should have memorized all of the PERL in case he would run for office four years later (in 1999) and be subject to Section 20039. (4CT1016:17-4CT1017:28.)

In essence, CalPERS argues that Chiadez has to be subject to the statutory law, while CalPERS does not have to be subject to its constitutional duties. CalPERS neglects that it is in a far superior position of knowledge, responsibility, and timing to inform Chaidez of his benefits at the important time of the *Election*. Besides, even if Chaidez or City *could* have known, this does not relieve CalPERS of *its* fiduciary obligation to timely notify a Member of material information at the time he or she elects into the system.

CalPERS must timely disclose material information when a Member enters the system, or makes important choices. *Election* forms are some of the most important documents that a Member signs because they generally establish irrevocable pension contracts with CalPERS. In this case, CalPERS' *Election of Optional Membership* contained no reference whatsoever to Section 20039 or its devaluation of Chaidez's pension, despite the fact that CalPERS specially designed it "FOR ELECTED OFFICIALS ONLY".¹³ (3CT0694 [Exhibit 1].) Obviously, the *Election* could have and should have referred to Section 20039¹⁴ to give notice of the drastic and unusual reduction on the pension that results from applying Section 20039.¹⁵

In fact, CalPERS so negligently carried out its fiduciary

¹³ Section 20039 only applies to a small group of CalPERS Members. CalPERS should have added language such as: "Warning: If you choose to elect in to CalPERS as an elected member of a city council or board of supervisors, your eventual pension calculation will be bifurcated and the portion attributable to your elected position will be calculated at a different, likely lower, rate than any other CalPERS service credit. See *Government Code* section 20039. Please contact CalPERS for further information."

¹⁴ While the *Election* omitted any reference to *Government Code* section 20039, the *Election* specifically referenced *Government Code* section 20361 (now renumbered as section 20322) which applies only to elected officials. (3CT0694 [Exhibit 1].)

¹⁵ If no notice is provided at the time of election, it is unfair to later apply *Government Code* section 20039 after the fact and after years of employment. Chaidez relied on CalPERS' representations that the more beneficial typical pension formula applies.

responsibilities that it provided an *Election* form that was at least nine years old when Chiadez signed it. (3CT0694 [Exhibit 1].)

Oddly, although CalPERS alleges that Chiadez should have known of the effect of Section 20039, CalPERS itself did not appear to know or inform others of the effect of Section 20039 at the time when Chaidez was provided the defective form, even though (i) Section 20039 had become operative on July 1, 1994, more than four years after the form was revised and more than five years before CalPERS provided Chiadez with the *Election* form, and (ii) the out-of-date *Election* form still referred to *Government Code* section 20631, even though it was renumbered as Section 20322 in 1995. (3CT0694 [Exhibit 1].) Thus, CalPERS had done nothing to ensure that Chaidez (and other elected members of city councils and county boards of supervisors signing such *Election* forms) were put on notice at the time they elected CalPERS membership for such service that any pension allowance for such service would be calculated based on their earnings in that position, rather than their highest earnings in any CalPERS position.

In sum, until near the end of his working career, CalPERS represented to Chaidez that he would be entitled to the standard formula for all his service. During his career, Chiadez relied on CalPERS representations and maintained the City Council job when he could have sought or received other higher paying employment. CalPERS did not

inform or advise Chaidez that his pension would not be calculated at the standard formula as CalPERS had always led him to believe. Chaidez suffered harm by the 42% reduction in his benefit that resulted.

PROCEDURAL HISTORY

On September 17, 2007, Chaidez and City filed their Petitions for Writ of Administrative Mandamus (*Code of Civil Procedure* §1094.5) and Writ of Mandate (*Code of Civil Procedure* §1085), challenging CalPERS' decision to reduce Chaidez's retirement pension allowance by 42% from what he had been led to believe he would receive. (1CT0002-1CT0056.)

A lengthy procedural history ensued, including an early stay on proceedings while an administrative proceeding was conducted in OAH Case No. 2007090666 and a *Proposed Decision* was issued by ALJ Joseph D. Montoya; several subsequent demurrers by CalPERS; and five amended Petitions and Complaints. (*See* summary of procedural history in 4CT1096:22-26.)

On October 2, 2009, Sacramento Superior Court Judge Michael Kenny granted CalPERS' demurrer to Petitioners' request for a Writ of Mandate pursuant to *Code of Civil Procedure* section 1085. (3CT0787-3CT0790.) Ten months later, on July 29, 2010, Judge Kenny granted CalPERS' demurrer to the handful of issues remaining in the Fifth (and ultimate) Amended Petitions and Complaint, including Petitioners' request for a Writ of Administrative Mandamus pursuant to *Code of Civil*

Procedure section 1094.5, and issued a final judgment of dismissal.

(4CT1090-4CT1115.)

LOWER COURT'S FINDINGS

Despite exhaustive and repeated argument by Appellants of their factual and legal claims, the trial court side stepped the difficult issues and did not directly address: (1) whether CalPERS' constitutional and fiduciary duties to timely and accurately inform Members have any meaning in the real world; and (2) are there situations (such as Chaidez's) where CalPERS should be equitably estopped from subsequently renegeing on its earlier (and only *now* claimed inaccurate) representations to those Members if it results in a pension higher than statute.

Chiadez framed these arguments in various ways, including in specific causes of action and supportive law and argument. For example, the Fourth and Fifth Amended Petitions and Complaint (albeit in summary form) argue:

Respondent CalPERS breaches its fiduciary duties enumerated in Article 16, Section 17, of the California Constitution to its approximately 1.5 million member-beneficiaries on an ongoing basis including by failing to act in accordance with its duties to inform, to account, to act in good faith, to deal fairly, and to discharge its duties solely in the interest of its beneficiaries.

CalPERS fails to appropriately perform its constitutional and other fiduciary duties, including the duties to fully account, inform, and disclose. These are mandatory duties. Chaidez seeks by a Petition for Writ

under CCP §1085 for a court order to compel CalPERS to correctly act on and perform its fiduciary duties for its 1.5 million members.

(2CT0341:6-10 and 2CT0343:6-9; 2CT0597:16-24.)

The trial court *failed* to rule on the above issues, ruled *incorrectly*, or ruled on *secondary* issues.

I. LEGAL ERROR: IGNORING THE SUPREMACY OF THE CALIFORNIA CONSTITUTION OVER STATUTE

Instead of addressing the constitutional or fiduciary issues as presented, the trial court ruled several times about the interpretation of *Government Code* section 20039. (2CT0335-2CT0339; 2CT0562-2CT0563; 3CT0788-3CT0789.)¹⁶ In brief, the trial court ruled that (i) CalPERS correctly interpreted Section 20039 and was mandated to apply this to the calculation of Chaidez's pension, and (ii) CalPERS' calculation correctly reduced Chaidez's pension. (2CT0335-2CT0339; 2CT0562-2CT0563; 3CT0788-3CT0789.)

Ignoring other issues, the trial court effectively found that *the*

¹⁶ The trial court found that *Government Code* section 20039 mandates CalPERS to bifurcate Chaidez's pension, with approximately 9.5 years of service credit attributable to his appointed City service calculated based on his highest earnings in that category (\$7,374 per month) and an additional 8 years of service credit attributable to his elected City Council service calculated based on his earnings in that category (only \$721.85 per month).

*application of Section 20039 is determinative*¹⁷ – that CalPERS' obligation to apply Section 20039 to Chaidez means that all claims for breach of constitutional and fiduciary duties to Appellants were rendered moot. (4CT1094-4CT1113.)

Essentially ignoring the supremacy and constitutional nature of the fiduciary duties and estoppel, the trial court ruled that the limiting statute (*Government Code* section 20039) was constitutional and correctly applied. (2CT0335-2CT0336; 2CT0562; 4CT1098:17-4CT1099:22.) Specifically, the trial court granted CalPERS' demurrer to Petitioners' request for a Writ of Mandate under *Code of Civil Procedure* section 1085 without leave to amend on grounds that Petitioners (i) had no beneficial interest in the issuance of such a writ because there could be no other result than the pension allowance calculated by CalPERS (3CT0788), and (ii) had failed to state facts to show that they came within the public right exception, opining that "the gravamen of Petitioners' complaint and petition concerns Mr. Chaidez's displeasure with CalPERS's re-computation of his retirement

¹⁷ The trial court thus provided CalPERS with immunity against any remedy for failing to timely inform Appellants about Section 20039's existence and terms. If Chaidez had been told about Section 20039 and its implications *at the time* when he elected CalPERS membership as a city councilman, this claim about timely information would never have arisen. He would have made an informed decision to optionally elect into CalPERS at the time and continue as City Council member or could have instead taken another job. Instead, he worked nearly the entire final decade of his public service career before being told about Section 20039 and by then he had made irrevocable career decisions that could no longer be undone.

benefits." (3CT0788.)

Petitioners' beneficial interest and public right exception claims partially arise from CalPERS' constitutional and fiduciary duties to provide accurate information to each Member individually, to the contracting entities and generally to the public. This claim and assertion was thoroughly presented in pleadings (see, e.g., 2CT0579:22-2CT0580:20; 2CT0597:13-2CT0598:25) and in oral argument (RT58:27-RT72:7, RT75:1-RT77:18, RT78:14-RT80:17).

**II. LEGAL ERROR: IGNORING THE REQUIRED MANSELL
BALANCING TEST, IGNORING COMPETING PUBLIC
POLICIES**

Ignoring the required balancing test set forth in *City of Long Beach v. Mansell, supra*, the trial court refused to acknowledge the competing public policies of fiduciary duties and estoppel versus the public policy of limiting city council members' pensions. Instead, the trial court solely focused on its interpretation of Section 20039 when granting CalPERS' demurrer to Petitioners' estoppel cause of action. (4CT1128:23-4CT1130:15; 4CT1137:21.) The court cited the proposition that "an estoppel will not be applied against the government if to do so would effectively nullify a 'strong rule of policy, adopted for the benefit of the public' " (citing from *Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.* (2003) 112 Cal.App.4th 864, 868).

(4CT1100:12-16.) The court wrongly concluded that the *only* "strong rule of policy, adopted for the benefit of the public" at issue was the application of *Government Code* section 20039 to reduce Chaidez's pension allowance (4CT1108:4-4CT1110:16).

Legally in error, the trial court ignored both the balancing test and the *even stronger* "rule of policy, adopted for the benefit of the public" incorporated in the California Constitution, namely, that CalPERS' "duty to its participants and their beneficiaries shall take precedence over any other duty" (Constitution, Art. XVI, §17(b)), and the "fiduciary duty to provide timely and *accurate* information to its members" explored in depth in *City of Oakland, supra*.

While Chaidez, the City of Hawaiian Gardens, and the public have an interest in the application of the PERL, they have a stronger public interest in having CalPERS act consistent with its constitutional and fiduciary duties to timely and accurately inform. Members, contracting agencies and the public must be able to rely on CalPERS' representations.

III. IMMUNITY PER GOVERNMENT CODE SECTION 818.8,
IGNORING SECTION 815.6

Further mistaken rulings by the trial court include, *inter alia*, its grant of CalPERS' demurrer to Petitioners' request for damages for CalPERS' breach of fiduciary duties by citing to *Government Code* section 818.8 (a public entity is not liable for injury caused by misrepresentation of

an employee of the public entity). (2CT0564-2CT0565.) The trial court mischaracterized the Eighth Cause of Action of Petitioners' Fourth Amended Petitions and Complaint as a complaint for negligent disclosure and/or failure to disclose and analogized that to a complaint for misrepresentation (2CT0564-2CT0565), rather than a breach of fiduciary duties as titled and pled (2CT0362-2CT0371). For example, the Eighth Cause of Action alleges that CalPERS had a duty to disclose that it would apply *Government Code* section 20039 to the calculation of Chaidez's pension benefits but failed to so advise him. (2CT0364:25-2CT0367:16.)

That fiduciary duty is precisely the type of "mandatory duty" discussed in *Government Code* section 815.6 which permits a public entity to be sued for an injury of the kind proximately caused by its failure to discharge the duty.¹⁸ In the *City of Oakland* case, the court reviewed the Proposition 162 constitutional amendment and ruled that CalPERS has "a fiduciary duty to provide timely and *accurate* information to its members". (*City of Oakland, supra*, at 40, emphasis in original.) Informing a Member long after the fact fails to provide an opportunity for the Member to meaningfully consider the information when making choices, and provides

¹⁸ "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (*Government Code*, §815.6.)

only a "gotcha" trap for the unwary after the fact. CalPERS' failure to carry out this duty in a timely manner, by delaying nearly a decade and waiting until long after the fact to notify Chaidez that the portion of his pension attributable to his City Council-service would be calculated at a drastically lower level because of *Government Code* section 20039, caused precisely the "particular kind of injury" that the Constitution and *City of Oakland's* mandate was designed to protect against. (See, e.g., *Huggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498-499.)

IV. UNCONSTITUTIONALITY OF SECTION 20039

Appellants also maintain their arguments regarding the unconstitutionality of *Government Code* section 20039. (E.g., 2CT0358:1-2CT0362:3, 2CT0590:24-2CT0597:2.)

The trial court's errors on these and related issues are discussed in greater detail below.

LAW AND ARGUMENT

I. STANDARD OF REVIEW

No facts are at issue, and the issues were decided as a matter of law.¹⁹

¹⁹ For example, the trial court ruled as a matter of law that CalPERS' application of *Government Code* section 20039 to its determination of Chaidez's pension benefits trumped CalPERS' constitutional and fiduciary duties (4CT1094-4CT1113); that the application of Section 20039 to the calculation of Chaidez's pension allowance precluded as a matter of law all estoppel claims asserted by Petitioners (4CT1128:23-4CT1130:15;

Therefore, the Court of Appeal must conduct an independent *de novo* review that does not grant deference to the trial court's determination. (*Estate of Coate* (1979) 98 Cal.App.3d 982.)

**II. CALPERS' CONSTITUTIONALLY MANDATED
FIDUCIARY DUTIES ARE SUPREME**

CalPERS has been a trust arrangement since its inception, with the Board of Administration acting as trustee for the Members as beneficiaries. The Board owes fiduciary duties to each Member individually and to the membership collectively. Standard trust duties apply. (*Hannon Engineering, Inc. v. Reim* (1981) 126 Cal.App.3d 415, 425 [pension plans create a trust relationship between pensioner-beneficiaries and the trustees of pension funds who administer retirement benefits; trustees must exercise their fiduciary trust in good faith and deal fairly with the pensioner-beneficiaries].)

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

Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and

4CT1137:21); and that Petitioners' request for damages for CalPERS' breach of fiduciary duties was unsustainable because the breach was legally a claim for negligent disclosure and/or misrepresentation by CalPERS' employees and CalPERS was immune from such a claim pursuant to *Government Code* section 818.8 (2CT0564-2CT0565).

fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following:

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

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

CalPERS' duty to inform does not require it to provide the full text of the PERL to each Member, which would be incomprehensible. Instead, CalPERS' duty is to supply accurate, meaningful information to those individuals making a choice.

A. Election Forms

For example, the *Election of Optional Membership* form brought Chaidez into membership again. (3CT0694 [Exhibit 1].) He reasonably believed that the membership was established on the same standard terms he had already been aware of and contracted for when he worked in civil service positions for City. (AR001465:3-AR001466:19.) In order to provide

accurate information, CalPERS had a duty to write the *Election* form applicable to city council members and county supervisors in a way that informed them the standard terms did *not* apply.

Election forms are some of the most important documents a Member signs. Beneficiary designations and other important rights are established by *Election* documents. All Members enter into a contractual pension relationship with CalPERS when they accept employment at a CalPERS-contracting agency. (*Government Code* section 20281.) However, the standard retirement formulas can be modified when Members sign special *Election* documents. For example, CalPERS uses *Election* documents to allow Members to purchase various types of optional service credit, elect disability retirement (if eligible) versus service retirement, or select specific optional retirement plans and corresponding benefits at the time Members retire. *Elections* are generally irrevocable except under narrowly defined conditions.

B. Constitutional Amendment

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

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

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

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

III. EQUITABLE ESTOPPEL CAN – AND IN SPECIFIC CASES
SHOULD – APPLY AGAINST CALPERS

A Member's long term detrimental reliance on a reasonable representation by CalPERS creates "one of those 'exceptional cases' where 'justice and right require' that the government be bound by an equitable estoppel." (*City of Long Beach v. Mansell, supra*, at 501; internal citations omitted.)

Chaidez was entitled to receive accurate information at the time he elected back into CalPERS. He should receive the protection of the constitutionally derived mandate that CalPERS fully, accurately and timely inform Members of matters affecting vested pension rights and benefits. (*City of Oakland, supra*, and *In Re the Application of Smith, supra*.)

A. CalPERS' Immunity Arguments

CalPERS is attempting to absolve itself from responsibility for a repeated representation that it made over years – even after a Member has relied on such information to his or her serious and irreparable detriment. CalPERS denies both estoppel and its legal duties.

Chiadez is not seeking to impose strict liability on CalPERS for every representation that it makes to its 1.5 million Members. However, Chiadez is also entitled to estop CalPERS from denying its representation of a reasonable benefit, even if it is in excess of the PERL. Rather than immunize CalPERS, the estoppel promotes the Constitution and qualifies as

an "exceptional case" where "justice and right require" such estoppel in the words of *City of Long Beach v. Mansell*.

B. Elements of Equitable Estoppel

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

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

The requisite elements for equitable estoppel are the same whether applied against a private party or the government: (1) the party to be estopped was apprised of the facts, (2) the party to be estopped intended by conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended, (3) the party asserting estoppel was ignorant of the facts, and (4) the party asserting estoppel suffered injury in reliance on the conduct. (*City of Long Beach v. Mansell, supra*, at 489.)

Although estoppel is generally a question of fact, when the evidence is not in conflict and is susceptible of only one reasonable inference, the existence of an estoppel is a question of law. (*Driscoll v. City of Los Angeles* (1973) 67 Cal.2d 297, 305.) Further, an estoppel binds not only the immediate parties to the transaction but those in privity with them. (*Crumpler, supra*, at 582-584 [finding that city and the board of public employees' retirement system were in privity with each other as agents of the state, and, therefore, estoppel of city from asserting that petitioners had been erroneously classified necessarily extended to board].)

C. **Crumpler Is Precedent For Estoppel Against CalPERS**

In *Crumpler*, the court estopped the CalPERS Board from reclassifying petitioners retroactively. CalPERS had mischaracterized a group of Members for years, and much later wished to correct its error retroactively. The Court said that CalPERS could *prospectively* re-classify the Members, but it could not retroactively upset their settled expectations and reliance.

In *Crumpler*, petitioners had taken jobs as animal control officers with a CalPERS-contracting city after being told they would be classified as and receive CalPERS benefits as local "safety members". Years later, CalPERS determined that petitioners had been erroneously classified and retroactively reclassified them to "miscellaneous" membership. This resulted in petitioners being required to wait until age 65 to receive

substantial retirement benefits, rather than at age 55. (*Crumpler, supra*, at 572-573.)

In *Crumpler*, the court estopped the CalPERS Board (by virtue of its privity with the City) from reclassifying petitioners *nunc pro tunc* as of the date they became CalPERS Members:

All of the requisite elements of equitable estoppel are present... The city was apprised of the facts. The city knew that petitioners were being employed by the police department as animal control officers at the time it erroneously advised them they would be entitled to retirement benefits as local safety members. The 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. (*Driscoll v. City of Los Angeles, supra*, 67 Cal.2d 297, 307-308; *Orinda-County Fire Protection Dist. v. Frederickson and Watson Co.* 174 Cal.App.2d 589, 593 [344 P.2d 873].) In a matter as important to the welfare of a public employee as his pension rights, the employing public agency "bears a more stringent duty" to desist from giving misleading advice. (*Driscoll v. City of Los Angeles, supra*, 67 Cal. 2d 297, 308.)

All of the other requisite elements of equitable estoppel against the city were established by uncontradicted evidence. The city manifestly intended its erroneous representations to be acted upon and petitioners had a right to believe the city so intended. Petitioners were ignorant of the fact that the city's advice was erroneous. Petitioners relied upon the representations to their injury by relinquishing other employment to accept city employment and by paying over the years the greater contributions required of safety members. Petitioner Crumpler served as animal control officer for over 20 years. During those years he paid safety member contributions and arranged his personal financial affairs in the expectation he would ultimately receive the retirement benefits of a safety member. Petitioner Ingold relinquished federal civil service employment with 15 years

accrued federal pension rights to accept city employment on the representation that his city pension rights would be that of a safety member.

(*Crumpler, supra*, at 583.)

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

D. Trial Court's Error: Mansell and Equitable Estoppel Against the Government

Quoting from *City of Long Beach v. Mansell, supra*, but failing to engage in the balancing test set out in that case, the trial court ruled that equitable estoppel should not apply. (4CT1128:23-4CT1130:15; 4CT1137:21.) A careful examination of the trial court's references to *Mansell*, however, reveals that it has left out a crucial portion of the Supreme Court's opinion.

(1) **Failing to Recognize or Balance The "Tension"**

Discussed in Mansell

The trial court's "Court Ruling on Submitted Matter" (4CT1094-4CT1114) focused only on one part of *Mansell*. It cited to the statement that estoppel against a government entity will not lie except in " 'exceptional cases' where 'justice and right require' that the government be bound by an equitable estoppel". However, the court then went on to say that "[a]ccordingly, 'an estoppel will not be applied against the government if to do so would effectively nullify "a strong rule of policy, adopted for the benefit of the public." ' ". (4CT1100:10-15, emphasis added.) Failing to engage in the *Mansell* balancing test, the trial court implied that estoppel will not be applied against the government *whenever* doing so would nullify "a strong rule of policy, adopted for the benefit of the public", *regardless* of any other factors.

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

It is settled that "[t]he doctrine of equitable estoppel may be applied against the government where justice and right require it. (*United States Fid. & Guar. Co. v. State Board of Equalization* (1956) 47 Cal.2d 384, 388-389 [303 p.2d 1034] and cases there collected.)" (*Driscoll v. City of Los Angeles, supra*, 67 Cal.2d 297, 306.) (See generally Am. Jur.2d, Estoppel and Waiver, §§ 122-133, pp. 782-802; 31 C.J.S., Estoppel, §§ 138-147, pp. 675-733.) Correlative to this general rule, however, is the well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify "a strong rule of policy, adopted for the benefit of the public," (*County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 829-830

[186 P.2d 124, 175 A.L.R. 747], see also cases there cited.)
The tension between these twin principles makes up the doctrinal context in which concrete cases are decided.

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

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

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

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

(2) **Correctly Determining the "Strong Rule of Policy,
Adopted for the Benefit of the Public"**

Implicit in *Mansell's* "tension" doctrine is correctly identifying the "strong rule of policy, adopted for the benefit of the public" being weighed. In *Chaidez*, the trial court wrongly concluded that the *only* policy in issue was *Government Code* section 20039. (4CT1108:4-4CT1110:16.) The trial court ignored other even *stronger* policies present in the California Constitution and derivative case law flowing from it: (i) that "[a] retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty" (*Constitution*, Art. XVI, §17), and (ii) the board's "fiduciary duty to provide timely and *accurate* information to its members" (*City of Oakland, supra*, at 40).

Whether viewed as a statute or otherwise, the policy of *Government Code* section 20039 is trumped by the larger, stronger public interest in ensuring that CalPERS abides by its constitutional and fiduciary duties, including to timely and accurately inform its membership. The ability to meaningfully rely on CalPERS' information affects 1.5 million Members and the general public.

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

and right require" estoppel.

Further, in *Chaidez*, the strong rule of public policy *supports* estoppel. There is no conflict between the "strong rule of policy, adopted for the benefit of the public" (i.e., the constitutional and fiduciary duties to put the interests of the Members first and to fully and accurately inform them as outlined above) and Appellants' interest in estoppel against CalPERS (stemming from CalPERS' repeated failure to advise Chaidez of *Government Code* section 20039's existence and impact on his pension until it was far too late in his career to do anything different). Only the weak rule of *Government Code* section 20039, which is at odds both with the constitutional fiduciary duties and estoppel, argues to deny Chaidez the increased benefit.

(3) **CalPERS Does Have the Authority to Effect That Which Estoppel Would Accomplish**

Some courts have held that estoppel may not be applied against the government "where the governmental entity in question utterly lacks the power to effect that which an estoppel against it would accomplish" (*City of Long Beach v. Mansell, supra*, at 499), or as the trial court put it, quoting CalPERS, "estoppel cannot be used to override a statute or to enlarge a governmental entity's statutory authority." (4CT1044:13-14.)

In this case, however, CalPERS *has* the power to effect that which Appellants seek. CalPERS has "plenary authority and fiduciary

responsibility for ... administration of the system", subject among other things to the mandate that "[a] retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty."

(Constitution, Art. XVI, §17.)

CalPERS also has an affirmative duty to correct. The PERL gives CalPERS the authority to consider the harm inflicted on Chaidez by CalPERS' failure to notify him of the effect of *Government Code* section 20039:

§ 20160. Criteria for Correction

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

(c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this system to the 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 (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. [Emphasis added.]** However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive

manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

(See generally Chapter 2, Article 4, of the PERL, "Correction of Errors and Omissions".)

CalPERS' failure to timely and accurately inform Appellants about its intention to apply *Government Code* section 20039 to Chaidez's pension calculation is one of those "errors" or "omissions" correctable by CalPERS under Section 20160(b).

Since the law authorizes retroactive corrections, CalPERS is authorized to recognize it made a mistake at the time of Chaidez's *Election*, and that the mistake was not corrected until shortly before his retirement. It is now seeking to retroactively correct its mistake, contrary to *Crumpler, supra*. Looking prospectively, CalPERS can correct its mistake by providing Chiadez with the higher benefit (at the typical pension calculation formula) up until the point when CalPERS informed Chiadez of the error. In that way, CalPERS bears the burden of its error, rather than punishing Chiadez for CalPERS' error.

In rejection of its constitutional duties, CalPERS will presumably argue that its reduction of Chaidez's pension allowance accomplishes the goal of Section 20160(e) because it adjusts Chaidez's pension to what it

"would have been if the act that would have been taken [the calculation of the City Council portion of his pension pursuant to *Government Code* section 20039] ... was taken at the proper time."

Recognizing the prospective versus retroactive ruling in *Crumpler*, the thrust of Section 20160(e) is to correct errors so that "the status, rights, and obligations of all parties ... are adjusted to [what] they *would have been*" but for the error. (*Government Code*, §20160(e), emphasis added.) The error is CalPERS' failure to disclose the bifurcation of his pension calculations *at the time* that Chiadez elected to become a CalPERS Member again. Chaidez was essentially denied the opportunity to make alternative career choices or arrangements.

The timeliness of the information is essential. *Crumpler* recognizes that timeliness is essential. Chaidez could have made numerous other career choices, including to protect his eventual pension allowance.²⁰ But Chiadez would have to be informed in a way that he could make meaningful choices, such as change jobs. CalPERS informed Chiadez of the 42% pension reduction after his civil service working career was essentially over.

²⁰ Chaidez testified at the administrative hearing that had he known about *Government Code* section 20039, he could have chosen to take almost any other civil service position available, knowing that all of his additional service credit would eventually be contribute to a pension allowance based on his highest earnings as City Administrator. (AR001531:18-AR001532:20.)

The fair way to correct errors where "the status, rights, and obligations of all parties [including Chaidez] ... are adjusted to be the same that they *would have been* if the act that would have been taken ... was taken at the proper time" (*Government Code*, §20160(e), emphasis added) requires that CalPERS provide Chiadez the higher benefit (up to the time of discovery) because CalPERS cannot "un-do" its misinformation, nor can it give Chaidez either those years or that important choice back by informing him long after he'd made irrevocable career choices that cannot be reversed.

As *Government Code* section 20160(e) spells out, corrections of errors and omissions shall be made retroactively unless "(1) ... the correction cannot be performed in a retroactive manner" or "(2) ... even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties ... cannot be adjusted to be the same that they would have been if the error or omission had not occurred". (*Government Code*, §20160(e).)

Chaidez's rights (as well as CalPERS' obligations) can only be "adjusted to be the same that they would have been" by *refraining* from applying *Government Code* section 20039 to Chaidez, at least up until the time CalPERS first informed Chaidez in January 2007. Chaidez's seven-plus years of City Council service prior to January 2007 should be calculated using his civil service final compensation. Anything less would punish Chaidez for relying on CalPERS' information and absolve CalPERS

of responsibility for its failure to "fully and accurately inform" him. That unfair result undermines, rather than effectuates, the correction of errors and omissions pursuant to Section 20160.

Arguing that estoppel cannot support a benefit higher than statute, CalPERS may argue that "[n]o court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations" (4CT1047:8-13, where CalPERS cites to *Longshore, supra.*) However, at least two "statutory or constitutional limitations" permit CalPERS to adopt this approach – the California Constitution in Article XVI, Section 17, and *Government Code* section 20160(e).

Finally, CalPERS may argue that its fiduciary duties run only to the membership as a collective whole, and that enforcing estoppel would benefit a single Member at the expense of the whole membership. Case law indicates that the duty is also to individual Members, and estoppel to benefit a Member is appropriate. See, e.g., *Crumpler, supra.*

(4) **The Trial Court Erred When Trying to Distinguish**

Mansell

The trial court distinguished *Mansell, supra*, by noting that the California Legislature had expressed its intent in favor of estoppel against the City of Long Beach and State of California, whereas Section 20039 evidences a legislative intent to reduce pensions for city council members. (4CT1104:23-4CT1105:1.) However, there is no legislative intent in the

Constitution, the Legislature, or in any statute to deny estoppel if a Member relies on reasonable but inaccurate representations by CalPERS.

On the contrary, Section 20160 indicates that CalPERS should correct errors and omissions retroactively unless doing so would not restore the "status, rights and obligations of the parties". Section 20160(e)(2) recognizes situations where CalPERS should only prospectively correct "the act that would have been taken, but for the error or omission", including as a way to restore the Member's "status, rights and obligations".

(5) **Trial Court Error: Government Acquiescence to Estoppel Not Required**

The trial court distinguished *Mansell* by adding an extra requirement that the government entity agree to the estoppel in order for it to apply. While in *Mansell*, the City of Long Beach and State of California recognized that estoppel was appropriate because "justice and right require[d]" it, estoppel may be applied against a government entity without the government's approval. It should not matter that CalPERS opposes estoppel and stubbornly refuses to fairly correct its errors. As a legal doctrine, the courts must *impose* estoppel against CalPERS because "justice and right require" it.

Estoppel would cease to exist if it required acquiescence. As the appellate court put it in *Crumpler, supra*, citing to its opinion in *Shoban v. Board of Trustees* (1969) 276 Cal.App.2d 534:

"The theory that estoppel may not be asserted against a governmental agency is a progeny of the broader doctrine of sovereign immunity. (See 2 Davis, Administrative Law Treatise, 491, 492.) In this state, the doctrine of sovereign immunity has been repudiated as 'an anachronism, without rational basis.' (*Muskopf v. Corning Hospital Dist.*, 55 Cal.2d 211, 216 [11 Cal.Rptr. 89, 359 P.2d 457]; see 2 Witkin, Cal. Procedure (1954) § 46.) The rigid application of the concept that estoppel may not be invoked against the government is likewise inconsistent with the underlying principles of a democratic society. A citizen ought to have the right to expect his government to deal fairly with him.... Commentators have been uniformly critical of judicial reluctance to invoke the doctrine of estoppel against a governmental agency where justice and equity so require. [Citations omitted.]" (*Crumpler, supra*, at 579-580, citing *Shoban v. Board of Trustees, supra*, at 542-543.)

E. Continuing Unvarying Evidence of CalPERS'

Representations To Chaidez About the Formula

For nearly a decade CalPERS led both Chaidez and City to believe that Chaidez's retirement pension would be calculated based on the standard retirement formula, including his highest earnings while a CalPERS Member, i.e., the compensation he earned as City Administrator for City:

- Annual Member Statements – Throughout the time he held civil service positions with City, as well as during his later City Council service, each of the Annual Member Statements that Chaidez received each year from CalPERS reiterated the formula that his pension benefit would be calculated as *Service Credit x Benefit Factor x Final Compensation = Unmodified Allowance*. (See, e.g., 3CT0872-3CT0886,

3CT0897-4CT0908.)

- Election Document – When Chaidez signed the *Election of Optional Membership* form in 1999 electing to receive CalPERS service credit for his City Council service, there was nothing on that form which informed Chaidez that the *Service Credit x Benefit Factor x Final Compensation = Unmodified Allowance* formula would be modified in any way. (3CT0694 [Exhibit 1].)
- Further, there was nothing in the *Election of Optional Membership* form that in any way disclosed or even hinted at *Government Code* section 20039 or its ramifications concerning the pension calculations of elected city council members. (3CT0694 [Exhibit 1].)
- Retirement Estimates – The retirement estimates provided by CalPERS to Chaidez in 2005 calculated his entire CalPERS service credit, including his City Council service, based on his highest earnings as City Administrator. The estimates applied the standard pension calculation formula, and said nothing about any deviation from that formula. (1CT0024-1CT0025 [Exhibit 5]; 1CT0027-1CT0029.)
- First Letter – It was not until early January 2007, when Chaidez received a letter from CalPERS dated December 28,

2006, that he was first notified that CalPERS intended to bifurcate his pension and to apply his City Council earnings to calculate the portion of his pension allowance attributable to that service pursuant to *Government Code* section 20039. (ICT0031-1CT0033.) Chiadez had finished his civil service by this time and was moving toward retirement.

In sum, CalPERS repeatedly and consistently advised Chaidez over the course of his nearly 20 year public service career that his pension formula and his eventual pension would be based on the standard retirement formula that involved his total service credit x benefit factor x highest compensation (which he understood to be his \$7,374 monthly City Administrator earnings). CalPERS did not advise Chaidez otherwise until January 2007, virtually at the end of his public service career. By then it was too late to "unring the bell" and make different career choices.

F. CalPERS Is Estopped From Calculating the City Council Portion of Chaidez's Employment History Retroactively Back to the Start of That City Council Tenure

The doctrine of equitable estoppel is based on the theory that the party to be estopped has misled the other party to its prejudice, and may be applied against a governmental body where justice and right require it. (*Piazza Properties, supra; Emma Corp. v. Inglewood Unified School District* (2004) 114 Cal.App.4th 1018.) Whenever a party has, by his own

statement or conduct, intentionally and deliberately led another to believe a particular thing to be true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it. (*Leasequip Inc. v. Dapeer* (2002) 103 Cal.App.4th 394; *Evidence Code*, §623.)

Appellants' estoppel claims meet all of the requisite elements for equitable in *City of Long Beach v. Mansell, supra*, at 489:

"(1) The party to be estopped was apprised of the facts...." (Ibid.)

CalPERS knew that *Government Code* section 20039 would apply to the service credit earned by Chaidez and all other Members who earned applicable service credit as either city council or board of supervisors officials. It knew that the application of Section 20039 would result in a bifurcated pension for Chaidez. It knew this at least as of July 1, 1994, the date Section 20039 took effect. And it knew this five years later when it required Chaidez to elect CalPERS membership for his City Council service by completing the *Election of Optional Membership* form, yet CalPERS did nothing to apprise Chaidez of these essential facts.

"(2) The party to be estopped intended by conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended...." (Ibid.)

By writing inaccurate *Election* documents, sending false information, and failing to timely notify Chaidez or City of the facts cited

above, and especially by failing to include any notice of Section 20039 and its impact on the calculation of Chaidez's pension in the *Election of Optional Membership* form (3CT0694 [Exhibit 1]), CalPERS acted in a manner that would have induced Chaidez to believe that he would receive a pension based on the standard formulas. CalPERS led Chiadez to believe that electing optional CalPERS membership imposed no new conditions on that membership or on the calculation of his eventual retirement pension.

CalPERS has a special relationship with its Members. It actively encourages its Members to rely on information provided by CalPERS. Because it is often the only source of information about their pension rights and benefits, public sector workers such as Chaidez repose great trust and confidence in CalPERS. Given its fiduciary duty to fully and accurately inform its Members on matters relating to their vested pension rights, CalPERS knew or should have known that Chaidez would believe there were no additional conditions on his City Council membership and service credit.

"(3) the party asserting estoppel was ignorant of the facts..." (Ibid.)

Chaidez testified that he was ignorant of the facts. Chaidez had never heard of Section 20039 and its impact on his pension calculations until CalPERS finally disclosed that to him on the eve of his planned retirement. (AR001594:10-AR001595:21.) He testified that he never saw the Circular Letter discussing Section 20039 that CalPERS claimed it sent

to all member agencies, including City, in November 1994. (AR001455:7-AR001457:1.) And CalPERS introduced no evidence below to contradict this testimony, other than its mere assertion that Chaidez must have seen the Circular Letter because of his position as City Administrator for Hawaiian Gardens. (4CT1016:17-4CT1017:28.)

"(4) the party asserting estoppel suffered injury in reliance on the conduct." (Ibid.)

Chaidez was injured by relying on CalPERS' assertions. As a result of CalPERS' complete failure to timely notify Chaidez and City about the existence and impact of *Government Code* section 20039, Chaidez made significant and irrevocable career choices that could not be reversed by time he was finally advised about Section 20039. Had he known that the pension allowance attributable to the City Council portion of his career would be calculated at a far lower rate than the rest of his CalPERS service, he could have taken another civil service position with any CalPERS agency, completed his civil service career basically on the same time frame as he did, and ended up with a pension based entirely on his highest earnings at any point in his CalPERS' career. (AR001531:18-AR001532:20.)

CalPERS led Chaidez and City, by its own statements and conduct, to believe that Chaidez would receive retirement benefits for life based on the standard retirement formula. (AR001454:9-23; AR001484:11-21; 4CT1096:2-9.) Moreover, Chaidez might have been able to make other

plans had CalPERS timely informed him about the eventual bifurcation of his pension calculations. (AR001595:2-21.)

IV. CHAIDEZ AND CITY'S BENEFICIAL AND PUBLIC RIGHT EXCEPTION INTERESTS

The trial court granted CalPERS' demurrer to Petitioners' request for a Writ of Mandate under *Code of Civil Procedure* section 1085 on grounds that Petitioners (i) had no beneficial interest in the issuance of such a writ and (ii) had failed to state facts to show that they came within the public right exception. (3CT0788.) Both positions were based on the logic that if the application of *Government Code* section 20039 reduced Chaidez's pension allowance as calculated by CalPERS, then neither party had any interest in issuance of a writ because there could be no other result. (3CT0788.)

The trial court misstates the law and side steps whether CalPERS bears any constitutional and fiduciary duties to its Members beyond the mere application of specific statutory provisions. Chaidez and City's beneficial and public right exception interests in issuance of the requested writ flow directly from their entitlement as a CalPERS Member, and as a CalPERS-contracting agency employing Members, to the performance of those duties, and as members of the general public. (RT58:27-RT62:10.)

No Member or Member-employing agency would have standing to bring a claim for breach of constitutional and fiduciary duties until a

Member is harmed or in imminent risk of being harmed by CalPERS' failure to perform those duties. However, what CalPERS posits (and the trial court ruling endorses) is that (i) there can be no right to claim breach of constitutional and fiduciary duties *until* the Member is harmed, but (ii) once such harm occurs, the Member or agency *no longer* has any right to request redress for the harm because CalPERS can point to some statutory provision mandating the actions causing the harm.

Disclaiming its duties, CalPERS asserts that it should bear no consequences for providing wrong or woefully deficient advice to its Members so long as it claims parenthetically or subsequently that its statements "[do] not have the force and effect of law, rule or regulation" and that "should any difference or error occur, the law will take precedence". (4CT1018:17-18.) It is the functional equivalent a "get out of jail free" card in the game of Monopoly.

Under CalPERS' construction, no Member could *ever* assert a breach of CalPERS' "fiduciary duty to provide timely and *accurate* information to its members" in the language of *City of Oakland, supra*.

V. **CALPERS CANNOT ESCAPE ITS MANDATORY
FIDUCIARY DUTIES BY RELYING ON GOVERNMENT
CODE SECTION 818.8**

Sua sponte, the trial court granted CalPERS' demurrer to the breach of fiduciary duty claims by citing to *Government Code* section 818.8 that a

public entity is not liable for injury caused by misrepresentation of an employee of the public entity. (2CT0564-2CT0565.)²¹ The court should not be able *sua sponte* to dismiss based on *Government Code* section 818.8 without taking into consideration *Government Code* section 815.6.

This ruling made two important errors:

First, the trial court mischaracterized Petitioners' Eighth Cause of Action in the Fourth Amended Petitions and Complaint as a complaint for negligent disclosure and/or failure to disclose and analogized that to a complaint for misrepresentation (2CT0564-2CT0565), rather than acknowledging that it was a complaint for breach of fiduciary duties as titled and pled (2CT0362-2CT0371).²² CalPERS is likely unique among California government agencies in having constitutional fiduciary duties and those duties would support a separate claim from misrepresentation or

²¹ In the same ruling, the trial court argued that Petitioners could not maintain a claim for damages for breach of fiduciary duties because they could not establish their right to assert a constitutional tort, citing to *Katzberg v. Regents of the University of California* (2002) 29 Cal.4th 300. However, it was not necessary to reach the level of constitutional tort. Though possibly not pled as clearly as it could have been, the damages requested were not simply monetary – they also include equitable estoppel damages preventing CalPERS from retroactively imposing *Government Code* section 20039 calculations on Chaidez's pension allowance after failing to timely notify him of Section 20039. (2CT0362:4-2CT0371:25; also see discussion of the nature of the damages pled in RT69:24-RT70:27; RT83:13-RT84:9.)

²² See, for example, the allegation that CalPERS had a duty to disclose to Chaidez and City its intention to apply *Government Code* section 20039 to the calculation of Chaidez's pension allowance but failed to do so. (2CT0364:25-2CT0367:16.)

negligent disclosure.

Second, and more significant, CalPERS' fiduciary duties are precisely the type of "mandatory duty" that *permits* a public entity to be sued for injuries caused by its failure to discharge that duty under *Government Code* section 815.6.

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

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

In the seminal case of *Haggis v. City of Los Angeles, supra*, the California Supreme Court found that the applicability of Section 815.6 required the following:

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

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

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

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

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

The *City of Oakland* court drew the conclusion that the constitutional amendment meant CalPERS has "a fiduciary duty to provide timely and accurate information to its members", then went on to quote from CalPERS' own precedential decision, *In re the Application of Smith, supra*, that "[t]he duty to inform and deal fairly with members also requires that the information conveyed be complete and unambiguous". (*City of Oakland, supra*, at 40.)

CalPERS' damaging failure to provide timely, accurate, complete

and unambiguous information to Chaidez is precisely the "particular type of injury" discussed in *Government Code* section 815.6 that the constitutional mandate and *City of Oakland's* derivative interpretation was designed to protect against.

The trial court erred when it transformed CalPERS' failure to fully and accurately inform its Members into "misrepresentations". The trial court further erred when it ruled that CalPERS is immune from suit for such misrepresentations under *Government Code* section 818.8.²³

Ironically, if CalPERS is allowed escape this mandatory duty merely by pointing to some statutory provision calling for a different result than CalPERS led the Member to believe, it would essentially mean sanctioning a "Catch 22" where CalPERS could slip out of any constitutional and fiduciary responsibility to fully and accurately inform *simply by later telling the Member that it had failed to fully and accurately inform him or her and then retroactively correcting it!*

²³ *Government Code* section 818.8 grants a public entity immunity from the misrepresentations of its employees. However, for some of the most serious negligent representations to Chaidez, for example, were in the official publications of CalPERS as an agency, not the representations of this or that employee, including specifically, the *Election of Optional Membership* and the Annual Member Statements are official publications of CalPERS itself.

VI. A REASONABLE STANDARD FOR DETERMINING WHEN ESTOPPEL SHOULD APPLY TO CALPERS FOR BREACH OF CONSTITUTIONAL AND FIDUCIARY DUTIES

Mansell, Crumpler, and other cases provide a roadmap for resolving the differences between (i) CalPERS' assertion that it has no authority on its own to exceed statutory PERL limitations, and (ii) the imposition of equitable estoppel, especially in a neutral adjudicatory proceeding. After all, CalPERS remains subject to judicial oversight. (*Board of Retirement v. Santa Barbara County Grand Jury* (1997) 58 Cal.App.4th 1185.)

Mansell holds that estoppel should not lie against the government except in those "exceptional cases" where "justice and right require" it.

Appellants do not seek to hold CalPERS strictly liable for every wrong assertion. However, Appellants contend that estoppel *should* apply in situations where it would be fair and reasonable:

(1) where a Member's reliance on CalPERS' statements or lack of accurate disclosure by the Member requesting estoppel has been reasonable;

(2) where CalPERS' failure to accurately and timely inform the Member has occurred over a significant period of time;

(3) where the Member did not know or could not reasonably be expected to have known that the information supplied by CalPERS was false;

(4) where the Member has incurred damages, loss, or diminution because he or she has relied on the information provided by CalPERS (or relied on CalPERS' failure to provide accurate information) to the Member's detriment or harm; and

(5) where circumstances make it unfair for the Member to bear the loss arising from decisions that were made based on CalPERS' disclosures or failure to disclose (for example, because the Member is at the end of his or her working career, has already retired, or has otherwise taken irrevocable action in reliance on CalPERS' advice or failure to disclose relevant information).

Crumpler is instructive.²⁴ The appellate court estopped CalPERS from reclassifying Members retroactively after finding (i) that the CalPERS agency employing plaintiffs had induced them to accept employment and remain in those jobs for years by wrongly advising them they were entitled to the safety positions and the greater benefits flowing there from, and (ii) that CalPERS was in privity with the employing agency and therefore both were estopped from retroactively reclassifying plaintiffs. The court,

²⁴ CalPERS told the trial court that *Crumpler, supra*, did not support a finding of estoppel in the instant case on similar facts, arguing "[i]n fact, *Crumpler* involved the Board's internal decision to retroactively reclassify certain city employees; no contrary statute was at issue." (4CT1047:16-19.) This is simply a repetition of the same argument that CalPERS' constitutional and fiduciary duties are inherently subservient to CalPERS' application of this or that particular statutory provision.

however, held that plaintiffs *could* be reclassified prospectively, from the time of the discovery or disclosure of the error, forward.

As a result, the *Crumpler* plaintiffs had their harm mitigated by permitting them to keep their safety classifications for all of their past service (and to collect higher pension benefits based on that classification once they retired), but the court also permitted CalPERS to reclassify plaintiffs in accordance with the mandates of the PERL going forward.

At minimum, Chaidez should receive the same treatment: He should be entitled to have his pension allowance calculated based on his highest earnings (the \$7,374 per month salary he earned as City Manager) for all service credit up to the time when CalPERS finally notified him of the existence and impact of *Government Code* section 20039, and at most Section 20039 should apply to pension calculations for the balance of his City Council service credit from the point he was first informed until the end of his CalPERS career.

Thus, CalPERS is encouraged to provide correct information, Members are encouraged to rely on the information, CalPERS bears the burden of its mistake up to the time of discovery, there is no windfall, and Chaidez receives a reasonable allowance, as promised.

VII. ARGUMENTS RE THE UNCONSTITUTIONALITY OF
GOVERNMENT CODE SECTION 20039

Although this appeal focuses on the issues of estoppel and breach of

constitutional fiduciary duties, Chiadez maintains and reiterates his arguments about the unconstitutionality of *Government Code* section 20039 as violating equal protection in its application only to city council members and county supervisors, and reducing their pension for elective service. (See, e.g., 2CT0358:1-2CT0362:3, 2CT0590:24-2CT0597:2.)

VIII CONCLUSION

CalPERS' fiduciary duties to timely and accurately inform a Member are constitutional. Equitable estoppel against government is rare, but necessary at times. In this case, Chiadez is requesting the Court to uphold and give meaning to CalPERS' constitutional fiduciary duties by estopping CalPERS from denying its prior representations.

Respectfully submitted.

Dated: August 24, 2011

LAW OFFICES OF JOHN MICHAEL
JENSEN

By: _____

JOHN MICHAEL JENSEN
Attorneys for Appellants Leonard
Chaidez and City of Hawaiian Gardens

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 13,129 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By _____

John Michael Jensen
SBN 176813

Exhibit 1

PERS

PUBLIC EMPLOYEES' RETIREMENT SYSTEM

P.O. Box 942794
Sacramento, CA 94129-2794
(916) 316-2178

Reply to Section 216-CPT

ELECTION OF OPTIONAL MEMBERSHIP

Government Code Section 20161 provides that an "elective officer" is excluded from membership in the Public Employees' Retirement System unless he or she files with this system an election in writing to become a member. This right of optional membership is retained while the person is in office.

"Elective officer" includes any officer of the Senate or Assembly who is elected by vote of the members of either or both of such houses of the Legislature, and any appointive officer of a city or county occupying a fixed term of office, and any person holding the office of city attorney, as well as officers of the State or contracting agencies elected by the people. An assistant city attorney may be included in this definition of elective officer if the contracting agency has included Section 20161.3 in its PERS contract. Compensation must be received by the elective officer to qualify for optional membership.

If your election for membership in PERS will result in concurrent service for different employment credited in another retirement system, please contact that system for information regarding the impact of such concurrent service. The election will result in concurrent service under PERS; contact PERS Member Services Division before completing this election form.

Once membership is established, you may contribute and receive service credit for any previous eligible elective employment. A separate request to the Member Services Division is required to initiate credit action.

(DO NOT DETACH)

I am an elective officer, being the _____ Mayor Pro Tem _____ of _____ (Title) _____ My present term will expire _____

~~As a condition of my election to the office of _____ of the Government Code, I shall be deemed a member of the Public Employees' Retirement System as my election to become a member.~~

I UNDERSTAND THIS ELECTION IS IRREVOCABLE AS LONG AS I REMAIN IN THIS POSITION

Leonard J. Charles _____ (Printed Name in FULL) _____ (Signature)

_____ (Social Security Number) _____

July 26, 1999 _____ (Date) _____ (City & State) _____ (Zip Code)

_____ (Home Phone Number)

000000004

Exhibit 2

1 were elected to Council?

2 A That's correct.

3 Q Mr. Chaidez, I want to refer you to Respondent's
4 Number 57.

5 For purposes of the record, this is a one-page
6 document, CalPERS document. It says at the top "for
7 elected officials only." At the bottom there is
8 "Leonard Chaidez."

9 (Respondent's Exhibit 57 was marked for
10 identification by the Court.)

11 BY MS. DAUBE:

12 Q I'm assuming, Mr. Chaidez, that is your signature.

13 A Yes, it is.

14 Q And the date on this is July 26, 1999.

15 Mr. Chaidez do you recall filling this document
16 out?

17 A Yes, I do.

18 Q And what was your understanding with respect to what
19 this document^{tr} was going to do?

20 A Well, this document, basically, allowed an elected
21 official to continue with his PERS coverage and service
22 credits.

23 Q Was this document in the packet that you received,
24 you think, from the City Clerk after your election?

25 A Yes. Good chance it probably was. It's been some

1 time.

2 Q And did you understand that you didn't have to fill
3 out this document and elect membership in PERS?

4 A Oh, yeah.

5 Q But you wanted to do that?

6 A Absolutely.

7 Q And why was that?

8 A Well, because from what I understood of how PERS is
9 calculated, it's based on your highest rate of pay times
10 the number of service years, and I believe I had already
11 established my rate of pay, and even though I, you know --
12 well, I'm not in capacity of a City Administrator, but I'm
13 in capacity of a City Council person and that my service
14 years would continue and that's what this form was all
15 about. So I felt that I
16 could put in service years and still have some
17 retirement.

18 Q So retirement was important to you?

19 A Oh, absolutely.

20 Q Mr. Chaidez, if you look at Exhibit Number 58. For
21 purposes of the record this is a one-page CalPERS
22 form.

23 (Respondent's Exhibit 58 was marked for
24 identification by the Court.)

25

Exhibit 3

1 my retirement, that's all I was looking for, and I was
2 looking for trying to do something for the city so that
3 I didn't leave the city out hanging. So I prepped as
4 much as I could so that the city could continue in being
5 one of the more positive -- in a more positive condition
6 than when I left it, and I'm sure it has absolutely done
7 that.

8 Q And Mr. Chaidez, isn't it true that one of reasons
9 that you actually ran for Council is to make sure that your
10 retirement would be in place?

11 A Absolutely. I knew that when I ran for Council,
12 that it would be great to turn around and be a policy maker
13 and try to gear this little city that I lived in to a
14 viable city, and I felt it's a good decision to make
15 because I still have my participation in PERS, I'm a real
16 estate agent, there's not really any retirement programs
17 for real estate agents, but because I was a public employee
18 or staff member, at least I had my PERS to fall back on.

19 So the retirement system was a very important
20 part and factor for me to go ahead and run. I felt that
21 I would do good to do that, not only because I had a
22 hand in directing the city, but I couldn't lose in the
23 way of trying to establish having a greater impact on my
24 retirement.

25 Q So what else did you do? When you got this, the

Exhibit 4

Annual Member Statement 2005

California Public Employees' Retirement System

For fiscal year July 1, 2004 through June 30, 2005

LEONARD J. CHAIKIN
[REDACTED]

EXHIBIT
72
300709086
[REDACTED]

Your Membership Status

Your June 30, 2005 Annual Member Statement contains important information on your account and the benefits available to you and your family as a member of the California Public Employees' Retirement System (CalPERS).

Your total CalPERS service credit of 15.513 years consists of:

Miscellaneous (2.7% at age 55 formula)	15.513	City of Hawaiian Gardens
--	--------	--------------------------

You can view your personal online Annual Member Statement any time by visiting CalPERS On-Line. And, be sure to give us your feedback by completing the Statement survey.

While every effort has been made to ensure the accuracy of this report, it should be understood that it does not have the force and effect of law, rule, or regulation governing the payment of benefits. Should any difference or error occur, the law will take precedence.

www.calpers.ca.gov

(888) CalPERS (225-7377)

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Member: **LEE, L. A. CHAIKIN**

Month/Year: **10/1990**

Your CalPERS Account Summary

	After Tax Contributions	Tax Deferred Contributions	Interest	Total	Service Credit
BEGINNING Balance July 1, 1988	\$0.00	\$34,251.19	\$0,618.51	\$66,378.20	14.513
CHANGES Fiscal Year 2000/2001	\$9.00	\$158.31	\$4,923.14	\$4,839.95	1.000
ENDING Balance June 30, 2005	\$9.00	\$36,717.58	\$34,641.65	\$71,362.15	15.513

These funds cannot be borrowed against and are available to you only upon permanent separation from all CalPERS-covered employment. The interest credited to your account was computed at the annual interest crediting rate of 6%.

Your member contribution rate is 8% of your monthly earnings above \$133.33. The amount you pay may differ from this rate due to bargaining agreements with your employer. In addition, your employer also contributes each pay period toward your future monthly pension. These contributions are paid into the employer's account; they are not shown in your account balance and are not refundable to you.

If you are interested in participating in the CalPERS 457 Deferred Compensation Program, please contact your employer.

Your Future Benefits

Service Retirement Benefits

You are eligible for a monthly pension once you separate from all CalPERS-covered employment. Provided below are estimates of your future monthly pension.

Your future CalPERS monthly service retirement benefit will be based on your:

- service credit with each of your employers,
- benefit factor(s) of your retirement formula(s) for your retirement age, and
- final compensation which is your average monthly pay rate for the last, or highest, 12 or 36 months.

Your benefit is calculated as follows:

$$\text{Service Credit} \times \text{Benefit Factor} \times \text{Final Compensation} = \text{Unmodified Allowance (highest monthly pension)}$$

Based on your last reported salary as of June 30, 2000 assuming continuous employment until retirement, we estimate that if you retire at age 56, you will receive a lifetime unmodified allowance of \$586 per month. If you retire at age 59, we estimate that you will receive a lifetime unmodified allowance of \$740 per month. These calculations of your future retirement benefit are approximations of the amount you will receive upon retiring. Any future changes in salary or other factors could affect the amounts shown.

Upon your death after retirement, a \$500 lump sum death benefit will be paid by CalPERS to your named or statutory beneficiary.

www.calpers.ca.gov

(888) CalPERS (225-7377)

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Additional Information

Service Credit

The CalPERS service credit shows reflects your qualifying years of service under all your CalPERS-covered employers. Generally, 1720 hours equals one year of service credit. Part-time employees earn service credit based on the number of hours worked. This service credit may differ from that used by your employer for personnel-related matters, such as sick leave and vacation accrual. You may be eligible to increase your retirement allowance by purchasing additional service credit, military service credit, maternity/paternity leave, re-depositing withdrawn contributions, or many others. Please visit our Web site for more information.

Final Compensation

Final compensation for state and school service is the average monthly pay rate for the last or highest 12 consecutive months of CalPERS membership. For public agency service, either 12 or 36 months is applicable, based on your employer(s) contract provision(s) at the time you retire. Final compensation may be adjusted for service that is coordinated with Social Security.

Retiring Soon?

If you are considering retirement in the near future, please read our booklet *Planning Your Service Retirement*. If you have made the decision to retire, please review the booklet *Stepping Into Retirement: A Guide to Completing Your CalPERS Service Retirement Election Application*. This booklet includes the application for retirement, and detailed information and processing instructions for completing your application.

Disability Retirement Benefits

If you have a disability that is permanent or of extended and uncertain duration, you may be entitled to a monthly disability allowance payable for life or until recovery.

Pre-Retirement Death Benefits and Beneficiary Designation

If you die before retirement, your beneficiary or eligible survivor may be entitled to a lump sum or monthly death benefit (or both) depending on your unique circumstances. Your member benefit booklet provides a description of these benefits. If you would like to name or change your beneficiary(ies), please visit our Web site. Certain life events, such as marriage, divorce, and birth or adoption of a child, may affect your beneficiary(ies). If there is no valid designation on file at the time of your death, the benefit will be paid as provided by law.

Questions about the amount of your pension, interest, or service credit

Please write to CalPERS and include your full name, Social Security number, address, daytime telephone number, and your current employer's name. Send your questions to:



Actuarial & Employer Services Division
P.O. Box 942709
Sacramento, CA 94229-2709

Member Education

Become a More Informed Member...

CalPERS has a variety of ways you can learn about your benefits and how to plan for your financial future. Take advantage of these five opportunities:

Online Information - www.calpers.ca.gov

- Guide To Understanding Your Annual Member Statement
- Order or download member benefit booklet - Forms and Publications Center
- Benefit details - explanations of specific benefits

Online Services - www.calpers.ca.gov

- View your Annual Member Statement
- Change your address
- Request an official retirement estimate
- Register for an education program (seminar or workshop)
- Estimate the cost of additional Service Credit - Service Credit Cost Estimator
- Do your own pension estimate - Retirement Planning Calculator
- Develop a financial plan, personalize financial reports, take interactive financial classes - Online Financial Planning Center

In-Person Classes - Available Statewide

- Financial Planning Seminars - your CalPERS benefits and the importance of financial planning (all day classes)
- Retirement Planning Workshops - your CalPERS benefits (2-hour class)

How to Register for Your In-Person Class

- Register online using our seminars, workshop, and event registration service
- Call CalPERS
- Print out registration forms from our Web site and FAX to CalPERS

Need More Information?

- By phone - toll-free at (888) CalPERS (225-7377)
- Telecommunication device for the deaf (916) 795-3240
- Visit your nearest CalPERS Regional Office
Monday - Friday 8:00 a.m. to 5:00 p.m.

FRESNO Regional Office
10 River Park Plaza East, Suite 230
Fresno, CA 93720

ORANGE Regional Office
500 North State College Blvd, Suite 750
Orange, CA 92668

SAN DIEGO Regional Office
7676 Hazard Center Drive, Suite 350
San Diego, CA 92108

GLENDALE Regional Office
655 North Central Avenue, Suite 1400
Glendale, CA 91209

SACRAMENTO Regional Office
400 Q Street
Sacramento, CA 95814

SAN FRANCISCO Regional Office
301 Howard Street, Suite 2000
San Francisco, CA 94105

SAN JOSE Regional Office
181 Metro Drive, Suite 520
San Jose, CA 95110

SAN BERNARDINO Regional Office
650 East Hospitality Lane, Suite 330
San Bernardino, CA 92408

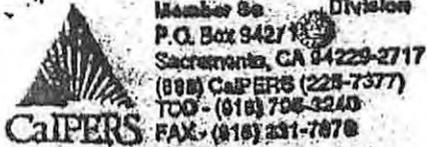
PERS-MEM-081 (Rev. 1/31/03)

www.calpers.ca.gov

(888) CalPERS (225-7377)

nnnnnnnnnn

Exhibit 5



Leonard J Chaldez

MEMBER INFORMATION

Date:	12/08/2008
Social Security Number:	[REDACTED]
Your Date of Birth:	[REDACTED]
Beneficiary's Date of Birth:	[REDACTED]

ESTIMATE INFORMATION

Retirement Date:	10/23/2008
Age at Retirement:	58.00
Total Years of Service Credit at Retirement:	18.834

Dear Leonard J Chaldez:

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 10/23/2008. 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 Your Survivor - Survivor Continuance is an employer-paid benefit payable to an eligible dependent upon your death. To have a dependent who is eligible for Survivor Continuance you must be married or have a domestic partner legally recognized in California on and at least one year prior to your tentative retirement date; have an unmarried child who is under age 18 or disabled; or have a parent dependent on you for at least 1/2 of their support.

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

A beneficiary who is also your survivor will receive both the beneficiary amount and the survivor amount.

Leonard J Chaidas

The information below was used to calculate your retirement estimate for 10/23/2008, at age 58.09.

Employer Name	Years of Service	Formula/ Benefit Factor	% of Final Compensation	Final Compensation
City Of Hawaiian Gardens	18.884	2.7% @ 58 / 2.700	45.587	\$ 7,374.00

IMPORTANT INFORMATION ABOUT THE CALCULATION

Final compensation is highest average monthly pay rate for 12 or 36 months of consecutive employment based on your employer's contract. For the service which required that you contribute to Social Security, we have reduced your final compensation by \$133.33.

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:

EXHIBIT 2

IN THE COURT OF APPEAL, STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

LEONARD CHAIDEZ, et al.,)	Court of Appeal Case No. C065913
)	
Petitioners Real Parties in Interest:)	
and Appellants)	(Sup. Ct. No. 07 CS 01248)
)	
vs.)	
)	EXEMPT FROM FILING FEES
BOARD OF ADMINISTRATION)	(Gov. Code, § 6103)
OF CALIFORNIA PUBLIC)	
EMPLOYEES' RETIREMENT)	
SYSTEM, et al.,)	
)	
Defendant/Respondent.)	

RESPONDENT'S BRIEF

Appeal from the Superior Court for the County of Sacramento
Honorable Michael P. Kenny

Peter H. Mixon, General Counsel
Wesley E. Kennedy, Senior Staff Counsel (State Bar #99369)
California Public Employees' Retirement System
Lincoln Plaza North, 400 Q Street, Sacramento, CA 95814
P.O. Box 942707, Sacramento, CA 94229-2707
Telephone: (916) 795-3675
Facsimile: (916) 795-3659

Attorneys for Defendant and Respondent
California Public Employees' Retirement System

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: <p style="text-align: center; font-weight: bold;">C065913</p>
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): WESLEY E. KENNEDY SBN 99369 California Public Employees' Retirement System Lincoln Plaza North, 400 "Q" Street, Room 3340 Sacramento, CA 95811 TELEPHONE NO.: 916-795-0725 FAX NO. (Optional): 916-795-3659 E-MAIL ADDRESS (Optional): wesley_kennedy@calpers.ca.gov ATTORNEY FOR (Name): Defendant and Respondent	Superior Court Case Number: <p style="text-align: center; font-weight: bold;">07 CS 01248</p>
	FOR COURT USE ONLY
APPELLANT/PETITIONER: LEONARD CHAIDEZ, et al., RESPONDENT/REAL PARTY IN INTEREST: CalPERS, et al.,	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.	

1. This form is being submitted on behalf of the following party (name): Defendant and Respondent CalPERS

2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
 b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of Interest (Explain):
--	-------------------------------

- (1)
- (2)
- (3)
- (4)
- (5)

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: November 27, 2011

WESLEY E. KENNEDY
 (TYPE OR PRINT NAME)


 (SIGNATURE OF PARTY OR ATTORNEY)

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service retirement benefit was correctly calculated pursuant to section 20039. Rather, they assert that the Board failed to adequately inform Chaidez of the effect of that section on the calculation of his service retirement benefit, and therefore should be either estopped from applying that section or pay damages. The trial court rejected Appellants' contentions. The Board requests that the rulings and judgment of the Board and trial court be affirmed.

II.

FACTUAL BACKGROUND AND STATEMENT OF CASE

A. Factual Background

Mr. Chaidez was employed full time by the City of Hawaiian Gardens (the "City") from 1988 to July 1997, and by virtue of such employment was a CalPERS miscellaneous member. (Administrative Decision ("AD") at AR2440, ¶ 3); (Administrative Transcript ("AT") at (Administrative Record) AR1448, p. 21: lns. 12-14; AR1457, p. 30: lns. 13-15; AR1533; p. 106: lns. 5-7). His highest and final compensation was \$7,374 per month for the period July 1, 1996 through June 30, 1997, during which time he held the position of City Administrator. (AD at AR2440, ¶ 3); (Estimate of Service Retirement for Chaidez dated June 5, 2007, AR816-20); (AT at AR1457, p. 30: lns. 2-15). From 1993 to 1997, Mr. Chaidez also served as the City's Personnel Officer, making him the highest ranking authority with respect to City personnel matters, including employee benefits. (AD at AR2440-41, ¶ 6; AT at AR1536, p. 109: lns. 5- to p. 110: ln. 5.) In that position, he was directly responsible for communicating with and receiving any notices from CalPERS regarding matters touching on City employee benefits. (AD at AR2440-41, ¶ 6; AT at AR1536-37, p. 109: ln. 20 to p. 110: ln. 5). It was during this period, in 1993, that the Legislature enacted section 20039⁴ which provides in pertinent part:

⁴ See Former § 20024.03 (Stats. 1993, c. 1297 (S.B.53), § 7).

Notwithstanding any other provision of this part, "final compensation" of a local member for the purpose of determining any pension or benefit resulting from state service as an elective or appointed officer on a city council or a county board of supervisors accrued while in membership pursuant to Section 20322, shall be based on the highest average annual compensation earnable by the member *during the period of state service in each elective or appointed office. Where that elective or appointed service is a consideration in the computation of any pension or benefit, the member may have more than one final compensation.*

The plain language of section 20039 requires a bi-furcated calculation process where the benefit is to be calculated separately (i.e., by calculating the benefit based on his years of service as a non-elected official and his final compensation for that period and by separately calculating the benefit based on his years of service as an elected official and his final compensation for that period). (Clerk's Transcript (CT)) 2 CT 335-336, 10/24/08 Order, at 3-4, sustaining CalPERS' demurrer to the extent Petitioners sought to compel CalPERS to apply Chaidez's proffered interpretation of § 20039).

In November 1994, CalPERS issued to the City (and all local employers of CalPERS members) a "Circular Letter" entitled "Eligibility & Payroll Reporting of Elective Officers," which notified the City of the enactment and application of section 20039. (AD at AR2444, ¶ 24; AT at AR1616, p. 30: lns. 2-4; AR1674-75, p. 38: lns. 17-20; AR1674-75, p. 39: lns. 1-7; see also Circular Letter to Agencies Contracting with PERS October 31, 1994, AR624-26 (hereinafter, the "Circular Letter")). The Circular Letter specifically stated that "elected or appointed officers may now have more than one final compensation period. . . . One final compensation period will be the highest one or three year compensation earned for the elected officer position and the other[s] will be for the non-elected position[s]." (AD at AR2424, ¶ 24; see also Circular Letter at AR624-26).

Moreover, the 2005 installment of CalPERS' Procedures Manual for Contracting Agencies (such as the City) specifically stated in a section pertaining to cities, that pursuant to section 20039, "the final compensation of an elective or appointed officer on a city council . . . accrued while in these positions shall be based on the highest average earned while on the city council . . ." (AD at AR2425, ¶ 25; CalPERS Procedures Manual – "Optional Members of CalPERS, dated May 2005, at AR659-63 (hereinafter, the "Procedures Manual"). Bob Franco ("Franco"), the City's Human Resources Manager, testified that the City maintains a copy of the CalPERS Procedures Manual, which was there when Franco joined the City in or around 2002 (approximately five years before Chaidez retired in November 2007), and that the City receives annual updates from CalPERS. (AT at AR1618, p. 191: lns. 2-15). Franco further confirmed that the May 2005 CalPERS Procedures Manual refers to section 20039 and the calculation of an elected official's final compensation. (AT at AR1633-34, p. 206: ln. 22 to p. 207: ln. 15.) Accordingly, as found by the Administrative Decision, "some information regarding the impact of section 20039 had been communicated to the City, while Chaidez was an employee there. Further, the PERS Procedures Manual stated the [CalPERS'] interpretation of section 20039 in at least 2005, if not in earlier versions." (AD at AR2429, ¶ 9(C)).

CalPERS also distributes a mailer to its active members known as an Annual Member Statement ("AMS"). The purpose of this mailer is to apprise members of their credited years of service and contributions. (AD at AR2440, ¶ 9); AT at AR1669, p. 33: lns. 18-20; AR1670, p. 34: lns. 4-10). There is no dispute in this case that the AMSs issued to Chaidez provided correct information regarding his credited years of service and contributions. (AT at AR1551-52, p. 124: ln. 18 to p. 125: ln. 2; see 1996 AMS of Chaidez, at AR1079-81; 1997 AMS of Chaidez, AR1082-87).

The AMSs issued in 1996 and 1997 also contained statements regarding an estimated retirement benefit with the following cautionary language:

(1) *"the calculation of your retirement benefit is only an approximation of the amount you will receive upon retiring. Any future changes in salary or other factors will affect the amount shown."*

and/or

(2) *"while every effort has been made to ensure the accuracy of this report, it should be understood that it does not have the force and effect of law, rule, or regulation governing the payment of benefits. Should any difference or error occur, the law will take precedence."*

(AD at AR2422, ¶ 10(c); 1996 AMS of Chaidez, AR1079-81; 1997 Annual Member Statement of Chaidez, AR1082-87).

Mr. Chaidez testified that he personally knew that the AMSs contained incorrect estimates, so that by 1996, he was "very skeptical" about the estimates. (AD at AR2442, ¶ 12; AT at AR1469-70, p. 42: ln. 22 to p. 43: ln. 4).

In July 1997, Chaidez was terminated from his position with the City. (AT at AR1533, p. 106: lns. 5-10).⁵ He stated that, at some point prior to his departure, he was offered, but turned down, an opportunity to become the Assistant City Administrator which would have maintained his status as a miscellaneous non-elective member. (AD at AR2440-41, ¶ 6; AT at AR1533, p. 106: lns. 8-13). At that time, Chaidez also applied for ten to fifteen other positions with various

⁵ Appellants seemed to imply that Chaidez left his City Administrator position contingent on some representation from CalPERS concerning his pension. (4 CT 928 at 1:19-20,) "Leaving his City Administrator job with a monthly [pay] of \$7,374, Chaidez relied on CalPERS' representations of the pension formula . . .". However, Chaidez admitted at the administrative hearing that he had no choice but to leave his job, having been "pretty much" terminated from the City Administrator position. (AT at AR1533, pg. 106: lns. 5-7).

public agencies, including cities, but was not offered employment by any of them. (AD at AR2441, ¶ 7; AT at AR1533-34, p. 106: ln. 8 to 107: ln. 15). Chaidez neither worked for the City nor participated in CalPERS from July 1997 to July 26, 1999, but instead opened a real estate practice. (AD at AR2440, ¶ 4). (AT at AR1549, p. 122: lns. 9-25). He did not cash out his CalPERS benefits when he left the City's employ. (AD at AR2441, ¶ 7).⁶

Mr. Chaidez testified that in or around November 1998, he decided to run for the City Council of Hawaiian Gardens. (AD at AR2441, ¶ 7; AT at AR1461, p. 34: lns. 5-10). He was elected in March 1999.⁷ (AD at AR2441, ¶ 7; AT at AR1461, p. 34: lns. 11-14). Then, some four months later, on or around July 26, 1999, Mr. Chaidez decided to reenter active CalPERS membership as an "Optional Member" pursuant to section 20322 by submitting an "Election of Optional Membership" form as an elected local official. (AD at AR2441, ¶ 8; Election of Optional Membership signed by Chaidez, at AR637). Chaidez's highest and final compensation as a City Councilperson was \$721.85 per month.

⁶ Chaidez received an AMS from CalPERS in 1998, which reflected his credited years of service and contributions, but did not contain any statements regarding his estimated retirement benefit. (AD at AR2442, ¶ 10(c); 1998 Annual Member Statement of Chaidez, at AR 1088-93).

⁷ Petitioners imply that, at or around the time Chaidez was elected to public office in 1999, he both applied for and declined job opportunities at the City and with other cities "due to his belief that his entire pension would accrue, even as a public official under § 20039 due to CalPERS' failure to disclose." (4 CT 942 at 15:6-20). However, the only testimony Petitioners cite in support of their assertions is Chaidez's statements that, after he left his City Administrator position in 1997, he applied for more than ten other positions with various public agencies or cities, but was not offered employment by any of them. (AD at AR2441, ¶ 7; AT at AR1533-34, pg. 106: ln. 8 to pg. 107: ln. 15). Indeed, the only job offer to Chaidez of which CalPERS is aware (based on Chaidez's testimony) is the City's offer for Chaidez to take the Assistant City Administrator position, which Chaidez declined. (AD at AR2440-41, ¶ 6; AT at AR1533, pg. 106: lns. 8-13). However, Chaidez received that offer in 1997, more than two years before he was elected to his City Council position. *Id.*

(AD at AR2440, ¶¶ 3-4; see Estimate of Service Retirement for Chaidez dated June 5, 2007, at AR816-20).

It is undisputed that the AMSs issued to Mr. Chaidez from 1999 through 2005 provided correct information regarding his credited years of service and contributions. (AT at AR1551-52, 124: ln. 18 to p. 125: ln. 2; AMSs for 2000, 2001, 2002, 2003, 2004 and 2005, AR643-58 and AR660-63). However, the AMSs did not separate years of service for Chaidez's elective vs. non-elective service. (AMSs for 2000, 2001, 2002, 2003, 2004 and 2005, at AR643-58 and AR660-63). Although not the purpose of the AMSs, some (but not all) of the AMSs issued prior to December 2005 also contained estimates of Chaidez's retirement benefits based, in part, on his compensation as an elective member. (AD at AR2441-42, ¶ 10(B)-(C); AMSs for 2000, 2001, 2002, 2003, 2004 and 2005, at AR643-58 and AR660-63). These estimates were uniformly incorrect in that they were far too low (because they used a final pay estimate based on his compensation as an elected official for all years of service, rather than using a separate calculation for his higher final compensation for the years of non-elected service). (AT at AR1474-75, p. 47: ln. 22 to p. 48: ln. 1; AR1487-88, p. 60: ln. 25 to p. 61: ln. 4); (AMS for 2004, at AR655-58; AMS for 2005, AR660-63). The AMSs issued in 2000, 2001, 2002 and 2003 contained no estimates of Chaidez's retirement benefits. (AD at AR2441-42, ¶ 10(B)-(C); AMSs for 2002 and 2003, at AR0649-54). The 2004 and 2005 AMSs did estimate Chaidez's retirement benefits, but the estimate provided was too low (for the reason discussed above). (AD at AR2441-42, ¶ 10(B)-(C); AMS for 2004, at AR655-58; AMS for 2005, at AR660-63).

Because of inconsistencies Mr. Chaidez admitted that he did not rely on the estimates contained therein:

By [1996], I'm very skeptical about the kind of calculations that CalPERS gives through the annual membership statement. . . . Because the annual membership statements are done in error, and [they are] consistently done in error. I have . . . questioned PERS consistently from 1999 – actually and even subsequently . . . that the statements that they've given me have actually shown me decreasing my benefits the longer I was in the CalPERS program.

(AD at AR2442, ¶ 12; AT at AR1470, p. 43: lns. 2-12).

Those AMSs, as did the prior ones, contained an estimate of retirement benefits and contained express warnings that the calculation was “*only an approximation*” that would be affected by future changes in salary or other factors, that the calculations did not have “the force and effect of law, rule, or regulation governing the payment of benefits,” and/or that “*separate calculations are made for each of your employers and retirement formulas . . .*” (AD at AR2442, ¶¶ 10(C)-11; AMSs for 2000, 2001, 2002, 2003, 2004 and 2005, AR643-58 and AR660-63).

In late 2005, Mr. Chaidez attended a CalPERS retirement workshop, at which Mr. Chaidez expressed concerns regarding the calculation of his estimated retirement benefit. (AT at AR1752, p. 116: lns. 6-12). After the workshop, Mr. Franco, the City's Human Resources Manager, on Chaidez's behalf, asked the CalPERS staff person for an estimate of Chaidez's retirement benefit and *specifically requested that she provide him an estimate using Chaidez's compensation solely from July 1996 to July 1997 as the “final compensation.”* (AD at AR2443, ¶¶ 14-15; AT at AR1755, p. 119: lns. 5-17). The CalPERS Member Services Division's Estimates Unit complied with Mr. Franco's specific request and provided an estimate based solely on Chaidez's July 1996 to July 1997 compensation. (AD at AR2443, ¶¶ 14-15; Customer Touch Point Report, AR735; AT at AR1756, p. 120: lns. 2-25). As a result, in December 2005, Mr. Chaidez received (within a few weeks of each other) two retirement estimates (dated

December 6, 2005 and December 27, 2005), based solely on his highest and final compensation as a miscellaneous member. (AD at AR2443, ¶ 16); (Estimate of Service Retirement for Chaidez dated December 6, 2005 at AR670-71; Estimate of Service Retirement for Chaidez dated December 27, 2005 at AR675-79). In other words, consistent with Mr. Franco's specific instructions, the estimates applied to all years of service using Chaidez's final and highest compensation from only his non-elective service of \$7,374. *Id.*

Using the inputs specified by Chaidez (*i.e.*, a final compensation of \$7,374 applied to all years of service), CalPERS generated an estimated retirement allowance of \$3,268 per month – a much greater amount than any of his prior estimates. *Id.* Chaidez states in his testimony that he “*relied on the December 2005 CalPERS estimate by (1) purchasing a retirement home, (2) deciding that he would not run again for City Council, and (3) deciding that ‘I would go ahead and retire.’*” (4 CT 940, lns. 19-20, emphasis supplied.)

Each of these statements is contradicted by Chaidez's testimony at the administrative hearing. Chaidez admitted that he bought the home in question in 1999, over six years before receiving the estimates. (AD at AR2448, ¶ 8(B); AT at AR1571, p. 144: lns. 21-22). Chaidez conceded that more than a year after he received the December 2005 estimate which was generated using his specific instructions, he still had not yet definitely decided he was going to retire. (AD at AR2444, ¶ 21; AT at AR1582-83, p. 155: ln. 23 to p. 156: ln. 6, Mr. Chaidez agreeing that he “*had not yet firmly indicated ‘I am retiring’*” as of December 12, 2006); see also, Letter from Chaidez and Franco to CalPERS Member Services and Malloy dated December 12, 2006, at AR741-43, stating Chaidez had not made a definitive decision to retire, but was merely “*contemplating retirement upon completion of his current term of office*”).

Shortly after receiving the December 2005 estimates, Chaidez requested that CalPERS also provide him with an estimate of the cost to purchase Additional Retirement Service Credit ("ARSC"), which would, in effect, allow him to buy additional CalPERS service credit. *In March 2006, CalPERS provided Chaidez with the requested cost estimate for his purchase of ARSC, which was appropriately based on Chaidez's City Councilperson compensation (because he only could buy ARSC with respect to his current employment)* (AD at AR2443, ¶ 18; Information package regarding purchase of ARSC dated March 17, 2006, AR0685-704). On April 3, 2006, at Chaidez's behest, Franco requested that CalPERS recalculate the ARSC purchase estimate based solely on Chaidez's July 1996 to July 1997 compensation. (AD at AR2443, ¶ 18; Letter from Franco to Member Services regarding Chaidez – 5 year ARSC recalculation dated April 3, 2006, at AR705-22). In the Summer of 2006, Chaidez received an additional service credit packet, indicating what he considered to be a surprisingly low ARSC purchase estimate. (AT at AR1507, p. 80: lns. 1-18). He called CalPERS and questioned the estimate. On October 25, 2006, Chaidez received a voicemail message confirming that the calculation was correct. (AD at AR2443-44, ¶ 19; AT at AR1507-10, p. 80: ln. 24 to p. 83: ln 22; see also, CTP Report, AR733-34). Franco contacted the same staff person from whom he had previously received the 2005 estimate, she in turn contacted a CalPERS subject matter expert.⁸ (AD at AR2443-44, ¶¶ 19-20; CTP Report, at AR733-34). During a November 27, 2006, telephone call between Franco (on Chaidez's behalf), the RPS and the staff member, the RPS confirmed that section 20039 required that Chaidez's retirement benefit be calculated in the bifurcated manner set forth above. (AD at AR2444, ¶

⁸ At the time this Retirement Program Specialist ("RPS"), in that capacity, regularly dealt with calculating the retirement benefits of elected officials. (AT, AR1785, p. 149: lns. 3-16).

20; CTP Report, AR733-34). Immediately thereafter, Franco sent an email to Chaidez summarizing his conversation with the RPS, setting forth the text of section 20039, and confirming that section 20039 governed the calculation of Chaidez's retirement benefit. (AD at AR2444, ¶ 20; Email from Franco to Chaidez dated November 29, 2006 at AR869).

On December 12, 2006, Chaidez and Franco jointly sent a letter to CalPERS requesting an additional retirement estimate. (AD at AR2444, ¶ 21; Letter from Chaidez and Franco to CalPERS Member Services and the RPS dated December 12, 2006, AR741-43). The letter indicated that Chaidez had not made a definitive decision to retire, but was "contemplating retirement upon the completion of his current term of office." *Id.* On December 28, 2006, CalPERS issued an estimate of retirement benefits to Chaidez that, pursuant to section 20039, utilized the required bifurcated calculation and assigned two different final compensation rates to calculate his benefit. (AD at AR2444, ¶ 21; Estimate of Service Retirement for Chaidez dated December 28, 2006, AR680-84). The resulting estimate yielded an estimated monthly retirement benefit of \$1,926. *Id.*

On April 17, 2007, Chaidez submitted a "rebuttal" to the Chief of Member Services of CalPERS. (AD at AR2444, ¶ 22; Letter from Chaidez to Chief of Benefit Services dated April 16, 2007, at AR744-815). In the rebuttal, Chaidez cited a number of concerns and requested that CalPERS provide him with a written explanation. *Id.* Chaidez also asserted that it was improper to bifurcate his elected and non-elected service and to use different amounts of final compensation in calculating his retirement benefit. *Id.* Chaidez acknowledged that section 20039 requires such a bifurcation, but asserted that section 20039 granted CalPERS the discretion not to do so. *Id.*

On June 20, 2007, CalPERS responded to Chaidez's letter. (AD at AR2444, ¶ 23; Letter from Darryl Watson to Chaidez dated June 20, 2007,

AR821-43). CalPERS stated that the December 28, 2006 calculation of Chaidez's retirement benefits was correct, based on his service as a miscellaneous non-elected employee and as an elected City Councilperson. *Id.* CalPERS also provided a detailed discussion of section 20039's application to elected officials, such as Chaidez, and concluded that CalPERS, being bound to follow the law, did not have discretion to disregard section 20039. *Id.*

Chaidez retired from service as a City Councilperson in November 2007, approximately one year after CalPERS informed him that section 20039 required a bifurcated calculation of his retirement benefit with two final compensation amounts. (AD at AR2444, ¶¶ 20, 23; AT at AR1594-95, p. 167: ln. 10 to p. 168: ln. 4). Chaidez admitted that he could have chosen not to retire in November 2007, but decided to proceed with retiring *because* he understood his benefit calculation would be bifurcated:

“... [W]hy continue anyway at that point in time. If you're going to bifurcate, what is that going to do for me to continue as a City Councilman, I mean, in the sense that service credits are really not a factor according to CalPERS.”

(AT at AR1595, p. 168: lns. 17-21).

Chaidez received service credit for the entire period of time he served as an elected City Councilperson. However, as required by section 20039, CalPERS calculated Chaidez's retirement benefit for his years as a city councilperson according to his final compensation as a city councilman at \$721.85 per month. (AD at AR2440, ¶ 4); Estimate of Service Retirement for Chaidez dated June 5, 2007, at AR816-20).

The parties participated in a two-day administrative hearing conducted by the Office of Administrative Hearings in December 2007 and January 2008, during which an ALJ received evidence related to Appellants claims by Chaidez

and the City. All parties were represented by counsel, testified and were cross-examined. On April 7, 2008, the Administrative Law Judge (ALJ), issued a detailed fourteen-page Proposed Decision, which set forth ALJ's factual findings and legal conclusions. (AD at AR2436-51). The Proposed Decision recommended that Chaidez's appeal of his retirement benefits be denied and that CalPERS' application of section 20039 to the calculation of Chaidez's retirement benefits be upheld. (AD at AR2450). *The ALJ specifically considered and rejected arguments that CalPERS was estopped from applying section 20039 to Chaidez's benefits calculation.* (AD at AR2448-49, ¶¶ 8(A)-(E)). *The ALJ further determined that Chaidez did not establish that CalPERS breached any fiduciary duties, or that he was damaged by any such breaches of duty, even if any occurred.* (AD at AR2449-50, ¶¶ 9(A)-(F)). The Board adopted the Proposed Administrative Decision on June 19, 2008, and it became the Board's Final Decision in July 2008. (Decision of the Board of Administration dated June 23, 2008, at AR2436-51).

B. The Trial Court's Judgment And Issues On Appeal

After five amended petitions and complaints (APCs), corresponding rulings and a judgment, Appellants assert that trial court made four errors:

- (1) Dismissal of Appellants' cause of action seeking issuance of a writ of mandate under Code of Civil Procedure 1085 on the ground that Appellants lacked standing under either the personal or public interest exceptions (AOB at pp. 17-19);
- (2) Denial of Appellants' request to invoke the doctrine of equitable estoppel (AOB at pp. 19-20);
- (3) Failure to consider section 815.6 in dismissing Appellants' eighth cause of action in their Third Amended Petition/Complaint alleging

damages for the Board's alleged breach of its fiduciary duties
(Appellants' Opening Brief) (AOB at pp. 20-22);

- (4) Dismissal of Appellants' causes of action challenging section 20039 as unconstitutional. (AOB at p. 22.)⁹

III.

STANDARD OF REVIEW

The trial court granted the Board's demurrers to Appellants' (1) constitutional challenges; (2) standing to seek issuance of a writ of mandate, and; (3) immunity under section 818.8 and entered judgment denying Appellants claim of equitable estoppel.

A demurrer tests the legal sufficiency of the complaint and is reviewed de novo under the independent judgment test whether the complaint states a cause of action as a matter of law. When the trial court sustains a demurrer without leave to amend, the question is whether the complaint might state a cause of action if a defect could reasonably be cured by amendment. The plaintiff bears the burden of demonstrating a reasonable possibility to cure any defect by amendment. *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 480; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967, noting also that the appellate court does not assume the truth of contentions, deductions or conclusions of law; *Swift v. Department of Corrections* (2004) 116 Cal.App.4th 1365, 1370, upholding demurrer based on defendant's immunity.

A petition that fails to allege facts sufficient to show standing is a proper subject of a demurrer for failure to state a cause of action and the granting of which will be reviewed as a question of law under an independent review standard where the facts are undisputed. *Carsten v. Psychology Examining Com.* (1980) 27

Cal.3d 793, 796; *Martin v. Bridgeport Community Assn. Inc.* (2009) 173 Cal. App.4th 1024, 1031-1032. However, the judgment must be affirmed if any ground for the demurrer is well taken. *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320. The trial court's interpretation of section 20039 is also reviewed de novo. *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824.

On issues of fact, this court's inquiry will be whether there is any substantial evidence, contradicted or un-contradicted, that supports the essential findings of the trial court's judgment, disregarding all contrary evidence. *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 389 fn.9 (*Hittle*), citing *Moran v. State Bd. of Medical Examiners* (1948) 32 Cal.2d 301, 308-309. The court will view the evidence in the light most favorable to the Respondent, resolving all conflicts in favor of Respondents, and draw all reasonable inferences to uphold the lower court's findings. Where two or more inferences can be reasonably deduced from the same facts, the appellate court will not substitute its deductions for those of the superior court. *Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363, 1367.

IV.

OTHER PRINCIPALS AFFECTING REVIEW

A. Administrative Interpretations

The Legislature has vested "the management and control" of CalPERS with the Board which is empowered to "determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under [the] system." (§§ 20120, 20125) The Board's determinations are entitled to great weight and ought not to be overturned unless clearly erroneous. *Yamaha Corp. of America v. State Bd. of Equalization* (1998)

⁹ Appellants do not appeal the trial court's decision that section 20039 requires a bifurcated calculation of Chaidez's pension allowance. (2 CT 334-336)

19 Cal.4th 1, 12; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App. 3d 1470, 1478.

B. Liberal Construction

Pension legislation is to be construed liberally, however, this rule “should not be blindly followed so as to eradicate the clear language and purpose of the statute and allow eligibility for those for whom it was obviously not intended.” *Riverside Sheriffs' Assn. v. Board of Administration of Cal.* (2010) 184 Cal.App. 4th 1, 13; *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 39 (*City of Oakland*); *Hudson v. Board of Admin. of Public Employees' Retirement System* (1997) 59 Cal.App.4th 1310, 1324-1325.

C. The Board's Constitutional And Fiduciary Duties

The Board does not have a fiduciary duty to its participants and beneficiaries, under Article XVI, § 17, of the California Constitutional, to disregard the express provisions of the PERL in providing benefits. *City of San Diego v. San Diego City Employee's Retirement System* (2010) 186 Cal.App.4th 69, 78-83 (*San Diego*).¹⁰

¹⁰ Article XVI, § 17 of the California Constitution provides, in part, that

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

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

Cal. Const. art. XVI, § 17, subsection (b), emphasis added.

In *San Diego*, the County's Employee's Retirement System (SDCERS), the functional equivalent of the CalPERS Board, voted to charge the City, the functional equivalent of the legislature, for what it determined to be an underfunding of the plan caused by the City's extension of a benefit to its members at a cost less than its anticipated additional liability to the plan. The City sought a writ of mandate to compel the SDCERS to reverse its vote. The court granted, in part, the City's petition and SDCERS appealed.

Notwithstanding the fact that SDCERS held the "sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system" under California Constitution, Article XVI, section 17, its authority was not without limit. *San Diego* at p. 79, citing, *Westly v. California Public Employees' Retirement System Bd. of Administration* (2003) 105 Cal.App.4th 1095. In *Westly*, the court held that the Board "does not have plenary authority to evade the law." *Id.* at p. 1100. The plenary authority to administer the pension system was "limited to actuarial services and to the protection and delivery of the assets, benefits, and services for which the Board has a fiduciary responsibility." *Id.* at p. 1110. Similarly, the court in *San Diego*, concluded that the establishment of retirement benefits was a legislative action within the exclusive jurisdiction of the City. In passing the resolution allowing purchase of service credits, the City had specifically dictated that the total cost of such purchases would be borne by the employees. By charging the City for the underfunding, SDCERS was in violation of the legislation and exceeded its *plenary authority* "to administer retirement benefits."

The Court concluded that "[i]t is not within SDCERS's authority to expand pension benefits beyond those afforded by the authorizing legislation. This is because the granting of retirement benefits is a power resting exclusively with the City. The scope of the board's power as to benefits is limited to administering the benefits set by the City. When the board decided to charge the City for the

underfunding, that decision was in violation of the law and thus exceeded its power." *San Diego* at p. 80.

In this case, the Board's duty is to provide benefits as set by the Legislature. Appellants are requesting that the Board act in violation of the law and exceed its power. Such request cannot be supported by Appellants' contention that the Board can exercise its plenary authority to "trump the PERL" and disregard existing and expressly applicable provisions of the PERL and provide a benefit to which this member is not otherwise entitled.

Appellants' contend that the Board does not fulfill its duties, "simply by following the [PERL.] (AOB at p. 26.) This assertion is in fact inapposite to its actual duties. The Board does not have a duty to inform a member of a benefit to which they are not entitled or to disregard or ignore the law.

V.

ARGUMENT

A. **This Court Should Affirm Dismissal Of The Appellants' Cause Of Action Seeking Issuance Of A Writ Of Mandate In Their Fifth Amended Petition/Complaint For Lack Of Standing.**

Appellants contend that they have a beneficial interest and thereby standing to seek issuance of a writ of mandate. The Board disagreed and demurred. After initially sustaining the Board's demurrer, with leave to amend, the court later granted a similar request following Appellants' *Fifth* ACP without further leave to amend.

"Standing is a jurisdictional issue that must be established in some manner". *Waste Management of Alameda County Inc.; v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232. In order to establish the requisite standing, Appellants must allege a clear, *present* duty upon the part of respondent, and a correlative clear, present and beneficial interest in the petitioner. Code of Civil Procedure §§ 1085, 1086; *Sullivan v. State Bd. of Control* (1985) 176 Cal.App.3d

1059, 1062-63.¹¹ A writ will not issue to control an exercise of discretion, or a right which is abstract or moot, and never to compel an act which will tend to an unlawful purpose. *Slater v. City Council of City of Los Angeles* (1965) 238 Cal. App. 2d 864, 868.

Appellants have failed to allege some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. *Chiatello v. City and County of San Francisco*, *supra*, 189 Cal. App. 4th at pp. 480-481. The petition does not allege a "particularized harm" to which issuance of a writ would directly respond. *Shamison v. Dept. of Conservation* (2006) 136 Cal. App.4th 621, 633. Nor does it allege an interest that is concrete and actual, and not conjectural or hypothetical. *Id.*

Appellants' amended *Fifth APC* merely described their characterization of the Board's fiduciary duties without identifying any specific beneficial interest therein. (2 CT 585, 597; 3 CT 598.) As in the *Fourth APC*, Appellants have challenge only that they seek issuance of a mandate on behalf the "1.5 million members ..to compel CalPERS to honor beneficiary members." (AOB at p. 27; 2 CT 562; 3 CT 796.) The trial court appropriately granted the Board's renewed demurrer on the grounds, that Appellants lack standing for issuance of such a writ under section 1086. (3 CT 705 -706, 714.)

Finally, the only possible particularized interest that Appellants may have alleged, was to compel the Board to more specifically disclose to Chaidez the effect that section 20039 on the on the calculation of his retirement benefit. Even Appellants contend that interest is entirely moot. (AOB at p 11.) Appellants

¹¹ "The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested." § 1086; *Sullivan v. State Bd. of Control*, *supra*, 176 Cal.App.3d at 1063. The trial court also properly noted that Appellants had available to them and had pursued an action under Code of Civil Procedure section 1094.5. (3 CT 796.)

cannot have a beneficial interest in seeking the Board to disregard the correct application of section 20039.¹²

(1) This Court Should Affirm Dismissal Of The Appellants' Cause of Action Seeking Issuance of A Writ Of Mandate In Their Fifth Amended APC For Lack of Public Interest Standing.

Appellants also assert standing under the public interest exception. Under this exception, standing may be recognized where, in the considered opinion of the court, a petitioner seeks to enforce a sharply defined public duty responding to a weighty public need. *Waste Mgmt. at pp. 1237-1237*, citing *McDonald v. Stockton Met. Transit Dist.* (1973) 36 Cal. App. 3d 436, 440 - 443; *Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist.* (1992) 11 Cal. App. 4th 1513, 1519 (*Driving School*). However, standing under this exception will not be recognized where it may conflict with competing considerations of a more urgent nature. *Id.*, citing *Green v. Obledo* (1981) 29 Cal. 3d 126, 145 and *Nowlin v. Department of Motor Vehicles* (1997) 53 Cal. App.4th 1529, 1538.

The Board does not have a duty to disregard the express provision of the PERL. *San Diego at pp. 78-83*. And the Board may not simply disregard a specific statute. Cal. Const. Art. III, §3.5. CalPERS is established and administered pursuant to a detailed and comprehensive legislative and administrative scheme. *Lee at p. 134; Hudson v. Posey at p. 91*.

What appellants whimsically refer to as the Board's "get out of jail free card" [AOB at p. 49] is in fact the performance of CalPERS fiduciary duty to provide benefits to members to compel the Board to override and ignore its mandates and duties. Nor to create and establish an alternative and additional member benefit "in excess of the PERL" as a remedy whenever an individual

¹² Appellants have challenged the Board CalPERS interpretation section 20039.

member may allege a breach of a fiduciary duty to a member. (AOB at p. 27; pp. 54-55.)

“There is no need to risk such chaos, because there is no pressing need for the [Appellants] to have standing here. This is not a situation where the issues raised ... will be removed from judicial review if standing is denied.” *Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Board II* (1990) 75 Cal.App.4th 327, citing, *Board of Social Welfare v. Los Angeles County* (1945) 27 Cal.2d 98, 100; *Driving School* at pp. 1513, 1518-1519. The system expressly makes available processes and procedures for addressing and correcting errors and omissions when they may occur by members, employers and the Board. §§ 20160 – 20164; and if needed administrative and judicial review of its actions. Title 2, Cal.Code Reg. 555 et seq.; §§ 15000 et seq.; Code of Civil Procedure § 1094.5; *Singh v. Board of Retirement* (1996) 41 Cal.App.4th 1180, 1192.

(2) This Court Should Find That Appellants Have Abandoned Any Substantive Claim For Issuance Of A Writ Of Mandate.

The trial court sustained Appellants' request for issuance of a writ of mandate under section 1085, without further leave to amend, concluding, in part:

Because the Court has already held that §20039 is not amendable to the construction put forward by Petitioners and Respondents have already provided accurate information to Mr. Chaidez about his benefits, the court finds Petitioners have not stated facts sufficient to demonstrate their standing to seek §1085 writ relief. For the same reasons, Petitioners have failed to identify a duty that Respondents presently owe to Petitioners, despite being granted leave to amend the fourth petition and complaint to identify such a duty. The court therefore denies leave to amend the request for a writ under § 1085.

Appellants fail to identify or advance any further argument in support of the existence of a present, ministerial duty upon which a writ of mandate might act. Indeed, their entire argument is limited to an attempt to incorporate by reference their failed argument from their pleadings in the trial court. (AOB at p. 19).

Appellants should be deemed to have abandoned their cause of action for issuance of a writ of mandate. Cal. Rules of Court, Rule 8.204(a)(1)(B); *Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 720.

B. This Court Should Affirm Dismissal Of The Appellants' Request To Invoke The Doctrine Of Equitable Estoppel

Following an exhaustive discussion of the law and facts in this case, the trial court rejected Appellants' request to invoke the doctrine of equitable estoppel. Specifically the trial court refused to compel the Board to ignore and/or disregard the application of section 20039, and refused to provide Chaidez a service retirement benefit "higher" than he would otherwise be eligible to refuse to receive under the PERL. In rejecting the application of the doctrine, the trial court recognized that to do otherwise would require the Board to disregard the statutes that define and delineate its very "measure of authority." (4 CT 1099-1110.)

(1) General Precepts Of The Doctrine Of Equitable Estoppel

The party asserting the doctrine of equitable estoppel must establish: (1) the party to be estopped was apprised of the facts; (2) the party to be estopped intended or reasonably believed that claimant would act in reliance on its conduct; (3) the claimant was ignorant of the true state of facts; and (4) the claimant actually and reasonably relied on the conduct of the party to be estopped to his detriment. *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489 (*Mansell*). Where estoppel is sought to be asserted against a governmental entity, a fifth element must be established - the interests of a private party must outweigh any effect on public interests and policies. *Mansell*, at pp. 496-97.¹³ It is the burden

¹³ In order to successfully assert estoppel against governmental entity appellants must establish that (1) the government's actions amounted to "affirmative misconduct," and (2) "the government's wrongful conduct threatened to work a serious injustice and . . . the public's interest would not be unduly damaged by the

of the party asserting estoppel to affirmatively establish each of its elements.

McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051 fn.5. “[W]here one of the elements of an estoppel is missing there can be no estoppel.” *People ex rel. Franchise Tax Bd. v. Superior Court* (1985) 164 Cal. App.3d 526, 552.

(2) The Trial Court Properly Refused To Apply Equitable Estoppel To Require The Board To Disregard Express Statutory Provisions Of The Law

Summarizing the decisional law following its decision in *Mansell*, the California Supreme Court in *Longshore v. County of Ventura* (1979) 25 Cal.3d 14 (*Longshore*) concluded: “[N]o court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations.”¹⁴

See also, *Smith v. Governing Bd. of Elk Grove Unified School Dist.* (2004) 120 Cal.App.4th 563, 569 (*Smith*) stating:

Although in some cases a public entity can be estopped, an estoppel cannot rewrite a statutory limitation on a benefit or privilege. Neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public. Although [Appellant] infers a general public policy to protect teachers, as explained in the analogous context of civil service reclassification, such a general policy should not blindly be followed so as to eradicate the clear language and purpose of the statute and allow eligibility for those for whom it was obviously not intended. As stated more directly ...our holding that granting relief would exceed statutory authority leaves no room to apply the estoppel doctrine. (internal citations and punctuation omitted.)

imposition of estoppel.” See *Jaa v. U.S. I.N.S.*, 779 F.2d 569, 572 (9th Cir. 1986) (citations omitted); See also *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297

¹⁴ The immediate issue in *Longshore* concerned application of estoppel to matters touching on civil service compensation for (overtime leave). The court distinguished compensation from pension rights, but expressed the above quote directly in reference to matters addressing pension rights. *Longshore* at p. 28-29.

Retirement benefits are entirely creatures of statute. *Hudson v. Posey*, *supra*, 255 Cal.App.2d at p. 91. However, Appellants seek to invoke estoppel in order to provide Chaidez a benefit "even if it's in excess of the PERL." (AOB at p. 27.) However, estoppel "cannot rewrite a statutory limitation on a benefit or privilege." *Smith* at p. 569.

Similarly, in *Crumpler v. Bd. of Admin.* (1973) 32 Cal.App.3d 567, the issue was whether the Board could reclassify animal control officers employed by a local agency as miscellaneous rather than local safety members of the system. *Id.* at pp. 570-71. Acknowledging the Board's authority to make such determinations, the court addressed the question of whether the Board should be estopped from making such a reclassification. First, finding that all prerequisites for applying estoppel were indisputably present, the court concluded that it was presented with a case where the Board was without *the power to effect that which estoppel against it would accomplish*. *Id.* at pp. 582-584. The Board "possessed the authority to do what it appeared to be doing, [it] was not depriving the public of the protection of any statute ..., [and therefore had] ... no reason to bar an estoppel." *Id.*¹⁵ The court also noted that applying estoppel where "justice and right require" is subject to a further requirement that it not otherwise be "harmful to some specific public policy or public interest or where it would enlarge the power of a governmental agency or expand the authority of a public official. *Id.* at pp. 580-581. The *Crumpler* court concluded that precluding the Board from retrospectively reclassifying the employees would not cause an effect on public policy of sufficient dimension to justify its rejection but, doing so *prospectively*, once it discovered the error and made its determination, would have such an

¹⁵ In addition, the *Crumpler* decision also significantly rested on the fact that the employer would have been estopped from requesting the reclassification of its employees retroactively. *Id.* at p. 581.

effect, stating:

Public interest and policy would be adversely affected if petitioners, despite the discovery of the mistaken classification, were required to be continued to be carried as local safety members when all other contract members of the retirement system throughout the state performing like duties and functions are classified as miscellaneous members. Manifestly, it would have a disruptive effect on the administration of the retirement system.

(*Id.* at p. 584.)¹⁶ See similarly, *Medina v. Board of Retirement* (2003) 112 Cal. App.4th 864, 870-71.

In this case, Appellants' assertion of a broad public policy to involve and apply estoppel to require the Board to disregard an express provision of the PERL and manifestly disrupt the administration of system, must be rejected.

(3) The Trial Court Correctly Applied Mansell

The decision in *Mansell*, addressed a "rare combination of government conduct and extensive reliance "and created" an extremely narrow precedent for application in future cases." (4 CT 1104, citing *Mansell*, at pp. 499-501). In *Mansell*, thousands of homeowners, through the conduct of government entities over several decades, were led to believe that land on which they resided belonged to them, not the government. "Without hesitation" the court found that the culpability of the governmental activities, representations and conduct was so reprehensible that to not find estoppel would result in fraud and justify "any effect upon public interest or policy which would result" from it being raised. *Mansell* at pp. 496-497; See also, *Page v. City of Montebello* (1980) 112 Cal.App.3d 658, 666.

This case presents a single individual seeking to invoke estoppel to inflate

¹⁶ "Petitioners have no vested right in an erroneous classification. Indeed, as we have noted, the act expressly provides for correction of errors such as occurred in the instant case." *Id.* at p. 586.

his pension by compelling the Board to disregard an otherwise correct calculation of his service retirement allowance under section 20039. (AOB at p. 34 - 35.) Appellants assert that this result is justified under an "implicit" principle derived from *Mansell* (AOB at p. 32). That is, that a court must first identify the "preeminent public policy involved and then balance the upholding of that policy against the harm alleged by the party seeking estoppel, and only then can it determine whether this is one of the 'exceptional cases where justice and right require estoppel.'" (AOB at pp. 34-35, (emphasis in original.)

The trial court in this case appropriately rejected Appellants' argument and refused to apply estoppel to "trump" a specific statutory requirement where it might otherwise be argued not to conflict with an asserted broader public policy. (4 CT 1101.) There is, in fact, no support for the asserted "implicit" requirement in *Mansell*. To the contrary, the "tension" which the *Mansell* court addressed was that estoppel *may* be applied when justice and right require, but not if to do so would nullify a strong rule of policy adopted for the benefit of the public. *Mansell* at p. 493. Epitomizing this "tension", the *Mansell* court cited its prior decision in *County of San Diego v. Cal. Water & Telco.* (1947) 30 Cal.2d 817, wherein it concluded that estoppel would not apply, even in light of an express contract between the parties supporting the relief sought after, where in an indirect enforcement of the provision by estoppel, would conflict with a specific statutory requirement. *Mansell* at pp. 493-494.

Unlike *Mansell*, the court here is truly faced with a situation where the Board or "utterly lacked the power to effect that which an estoppel against it would accomplish." (4 CT 1108.) In addition, permitting estoppel in this case would conflict with the very purpose underlying section 20039 – "to prevent a

large unfunded liability to the employer.” (2 CT 562, 3/6/09 Order, at 2.)¹⁷ Indeed, the stark difference between Chaidez’s non-elected and elected compensation and embodies exactly the notion of an “unfunded liability” that the Legislature sought to prevent by enacting section 20039. (See AD at AR2440, ¶¶ 3-4; Estimate of Service Retirement for Chaidez dated June 5, 2007, at AR816-20; see also 2 CT 562, 3/6/09 Order at 2, concluding that [t]he legislative history of section 20039 shows that its purpose was to prevent a large unfunded liability for the employer”); see AR 614-23, SB 53 Bill Analysis dated March 29, 1993, noting that “a series of audits have shown widespread ‘spiking’ (purposeful inflation) of the final ‘compensation’ (upon which retirement benefits are based)”.¹⁸ Here, Chaidez’ attempt to obtain an inflated pension is simply pension-spiking.

(4) This Court Should Find Section 20160 Bolsters The Trial Court’s Rejection Of Estoppel

Appellants do not challenge that the Board’s calculation of Chaidez’s retirement benefit under section 20039. However they apparently seek to evade its application by citing to section 20160 (“the mistake statute.”) Section 20160 requires that CalPERS correct all errors or omissions in benefits calculations. [AOB at pp. 39 -40.] Essentially, based on a series of attenuated, speculative and hypothetical scenarios Appellants argue that Chaidez may, had he been more

¹⁷ Maintenance of a sound actuarial system reflects a recognized public policy. *Hudson* at p. 1331, citing, *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1133.

¹⁸ Even by his own testimony, Chaidez decided not to run for City Council again based on the fact that he would not accrue benefits for the period of his elected official position at the inflated compensation rate of his non-elective City Administrator position suggesting he also knew he fits the anti-pension-spiking purpose of section 20039, at AR1595, pg. 168: lns. 17-21. Thus, allowing an estoppel in this case would undermine all of the public policies effectuated through section 20039, by creating an unfunded liability through reverse-pension spiking.

aware of the effect of Section 20039 on his benefits, he may have made alternative life choices (e.g., quit his job as city councilperson and taken another position not subject to section 20322). However, Appellants' argument ignores the actual facts, as well as the statutory requirements and specific provisions of section 20160. Under section 20160, the Board may correct a mistake. However, the "status, rights, and obligations" must be "adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time." § 20160(b).

Accordingly, section 20160(b) and the fiduciary duty imposed on CalPERS under the California Constitution requires it to correct the perceived error in Chaidez's December 2005 benefits estimates. The doctrine of estoppel cannot prevent this correction. *Crumpler v. Bd. of Admin.* (1973) 32 Cal.App.3d 567, 585. See also, *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 870-71.

Appellants simply assert that the Board may correct its "mistake" by "retroactively" recalculating Chaidez a "higher benefit at least up until ...January 2007." (AOB at p. 39.) Appellants ask this court to assume that this would have reflected the "status, rights and obligations" of the parties had Chaidez been "timely" informed of the effect of section 20039. Appellant's contention that section 20160 provides the Board with administrative authority to undertake correction of mistakes retroactively, even where the right, status or obligation has no factual or legal antecedent, is unsupported.¹⁹ Further, even if Appellants could

¹⁹ Such conclusion is also inapposite to the Board's precedential decision cited in *City of Oakland, supra*, at p. 46, in *In re Henderson* (Nov. 18, 1998) PERS Prec. Dec. No. 98-02, which had concluded that it "although retiree detrimentally relied on PERS mistake in benefits amount, To find an estoppel here would be to allow CalPERS to unilaterally alter the statutory retirement benefit formula without benefit of enabling statutory authorization." Similarly, in *Crumpler* and *Medina* retroactive corrections or reclassifications were made for benefits that had already been paid out, thereby directly impacting the members, but estoppel still was not available. Petitioners certainly cannot invoke estoppel or

establish that an error had occurred in this case, the error could not, under section 20160, be retroactively corrected because it would require the Board to disregard an affirmative provision of the PERL. §20160(e)(3).

(5) Appellants Cannot Show Estoppel Is Otherwise Appropriate.

The trial court did not find it necessary to expressly rule on every element of estoppel to conclude that Appellants could not invoke the doctrine of equitable estoppel in the present case. (4 CT 1110, ln. 10-16).

However, it is unclear whether Appellants may be attempting to do so. However, the Board did in the event this court may wish to consider those arguments; they are summarized in the following discussion and the Board's Decision. (3 CT 850-51, finding 8). Recognizing that estoppel would effectively nullify the Legislature's determination of how pension benefits must be calculated:

The legislature has clearly determined to control the benefits accruing to local elected officials, and the wisdom of that decision should not be overthrown on the grounds that such a member may have relied on the AMS documents, when . . . several stated that all benefits were ultimately to be determined on the basis of the law.

(AD at AR2449, ¶ 8(E)). Thus, the issue is whether Chaidez's implausible claims of reliance (which the Board Decision rejected) justified overruling a legislative mandate dictating how benefits should be calculated for elected officials.

Section 20039 does not operate to "lower" or reduce Chaidez's benefits. Rather, section 20039 "defines what those benefits are." (3 CT 797, 10/2/09, Order, at 3.) It is well-settled that estoppel cannot be used to override a statute or to enlarge a governmental entity's statutory authority. According to the California

section 20160 to prevent a statutorily required calculation of Chaidez's benefits where made long before any benefits were paid. The trial court specifically addressed this issue in its decision on the merits. (4 CT 1109.)

Supreme Court: "the authority of a public officer cannot be expanded by estoppel" because doing so "would have the effect of granting to the state's agents the power to bind the state merely by representing that they have the power to do so." *Boren v. State Personnel Bd.* (1951) 37 Cal.2d 634, 643. The Second Appellate District explicitly applied this principle to CalPERS in *Page v. City of Montebello* (1980) 112 Cal.App.3d 658. There, the court expressly refused to apply the doctrine of estoppel to enforce a promise to pay a CalPERS' death benefit because doing so would contravene the statutory basis for eligibility:

It is established that the unauthorized promise of an employee does not constitute grounds for an estoppel as to the governmental body by which he or she is employed where the means and limitations on its power to act are prescribed by statute. *Id.* at 669.

In *Page*, decedent Page's widow sued the City of Montebello (Montebello) to enforce an alleged promise made by the Montebello police department. Decedent worked for the Montebello police and was killed in the line of duty. Mrs. Page alleged that decedent had performed his job duties in reliance on the Montebello police department's promise that he was eligible for a CalPERS death benefits and that, if he died, Mrs. Page and their child would receive the same benefit as if he had been a Montebello policeman. When Mrs. Page attempted to recover death benefit, the City of Montebello refused to pay her, determining that it had no authority to do so. The court found that because the right to determine CalPERS' retirement and death benefits is governed by statute, the doctrine of estoppel could not be used to expand Montebello's authority. *Id.* at 668. The court concluded that:

Since the ultimate power to hire and compensate employees . . . is a discretionary function of government, vested by statute in the legislative body of the City, the promise . . . cannot as a matter of law be enforced . . . by application of . . . estoppel.

Because CalPERS' authority to pay benefits is specified by statute, the trial court's decision that Appellants' estoppel claim must fail as a matter of law is well supported. So supported too is the result that the Board cannot be estopped to pay Chaidez more benefits than are authorized by statute – i.e. by operation of Section 20039.

Chaidez could not have relied on the election form, which he contended should have given notice of section 20039 in deciding to seek office, since he executed the form approximately eight months after he was elected to office (Administrative Decision, AR2448, ¶ 8(B); compare AT at AR1461, p. 34: lns. 5-10, admitting Chaidez decided to run for office in November 1998; with Election of Optional Membership signed by Chaidez on July 26, 1999, AR637). Chaidez offered no evidence that he would have resigned or left office if his retirement benefits were not calculated as he hoped. (AD at AR2448, ¶ 8(B)). The 1997 AMS (and subsequent AMSs) showed a lesser estimated retirement benefit than the amount calculated pursuant to section 20039, however, Chaidez took no action to retire or leave his job as a result. (AD at AR2448, ¶ 8(B); 1997 AMS for Chaidez, at AR1082-87; AMS for 2004, AR655-58; AMS for 2005, AR660-63). Although Chaidez initially contended that he purchased a home in reliance on the 2005 estimates, he subsequently admitted that he bought the home in 1999, six years before he received any statements by CalPERS. (AD at AR2448, ¶ 8(B); AT at AR1571, p. 144: lns. 21-22).

Finally, even if Chaidez did hold a subjective belief that his retirement benefit would be calculated contrary to the provisions of section 20039, such belief was not reasonable. In *Del Oro Hills v. City of Oceanside* (1995) 31 Cal. App.4th 1060, 1083, a developer sought to equitably estop the City of Oceanside from applying a residential growth control ordinance to a developer's project. *Id.* at p. 1083. The developer alleged that it relied on implied promises from City

officials that the developer's proposed use would not be prohibited when it constructed improvements on the property. *Id.* Rejecting the equitable estoppel claim, the court found that the developer could not have reasonably relied on any alleged promises in light of a planning commission resolution expressly stating that development rights would be subject to further hearing. *Id.*

The undisputed facts here show that each of these documents contained a specific warning and qualification, that the "estimates" were simply that, and that ultimately the law would control all calculations. *Id.*; See also AMSs for 2000, 2001, 2002, 2003, 2004 and 2005, at AR643-58 and AR660-63. The fact that the AMSs expressly cautioned that Chaidez's benefits would be subject to formal calculation later is fatal to Appellants' estoppel claim under the *Del Oro Hills* case.

In addition, the City (and therefore Chaidez, as the City's highest personnel officer) received actual notice of section 20039 via the 1994 Circular Letter and in at least one iteration of the Procedures Manual. (AD at AR2448, 2449, ¶ 24 and ¶ 9(C)); (TT at AR1536-37, p. 109: ln. 5 to p. 110: ln. 5; see also Circular Letter, at AR624-26; Procedures Manual, at AR659-63). Based on Chaidez's own testimony, even before he left his non-elective position, Chaidez "had become skeptical about the [benefit] estimates" because "the estimates of his benefits had fluctuated." (AD at AR2442, ¶ 12; AT at AR1470, p. 43: lns. 2-12).

Further there was no evidence that credibly established that Chaidez suffered any detriment by his alleged reliance. (AD at AR2448, ¶ 8(C)). Appellants contend that he could have taken another job, had he known that his position as city councilperson would be based on the final compensation earned only in that position. [AOB at p. 47.] But such contentions are entirely speculative, and fail to establish that Chaidez suffered any actual detriment as a result of any conduct by CalPERS. See *US Ecology, Inc. v. State* (2005) 129 Cal.

App.4th 887, 910 (estoppel claim failed due to the “speculative nature of Ecology’s damages”.)

Chaidez did not take any action (or decline to do so) based on the AMS estimates. The AMSs (including the 1997, 2004 and 2005 AMSs) showed estimates of retirement benefits that were substantially less than the amount calculated pursuant to section 20039. (AD at AR2448, ¶ 8(B); 1997 AMS for Chaidez, at AR1082-87; AMS for 2004, AR655-58; AMS for 2005, AR660-63.) By March of 2006 (only a few months after receiving the December 2005 estimates), Chaidez knew that the issue of what compensation would be used to determine his retirement benefit was unresolved, because his March 17, 2006 ARSC estimate was based solely on his elected official employment rate (meaning that CalPERS was calculating his then-current benefit accruals based on his elected-official compensation). (AD at AR2443, ¶ 18; Information package regarding purchase of ARSC dated March 17, 2006, at AR685-704). On November 26, 2006, Appellant actually knew that section 20039 would apply to his retirement benefit calculation, almost a year prior to his retirement. (AR at 1594-95, p. 167: ln. 22 to p. 168: ln. 1). Chaidez had not decided to retire as of the time he received the December 2005 retirement estimate reflecting only his higher non-elected compensation. (AT at AR1582-83, p. 155: ln. 23 to p. 156: ln. 6). Chaidez’ claim that he declined other job opportunities based on information he received from CalPERS from 1999 to 2005 is unsupported by the record. (AOB at pp. 47-48). Chaidez testified that he received only one other job offer from the City (or another public entity), but that offer was extended in 1997 (well before he ran for and was elected to public office and ultimately became an optional CalPERS member) (AD, AR2440-41, ¶ 6; AT at AR1533, and at 106: lns. 8-13).

In short, Petitioners cannot point to any cognizable detriment or injury to justify the raising of an estoppel. In order to establish an estoppel against the government there must be a clear showing that "the private party's reliance upon the government's conduct has caused him to change his position for the worse, that is, that the reliance has caused him to suffer injury." *People ex. rel. Franchise Tax Bd. v. Superior Court* (1985) 164 Cal.App.3d 526, 552. In this case, the undisputed facts would support the determination that Chaidez suffered no cognizable injury.

It is also clear that the Board did take reasonable steps to communicate to its participating employers and members the existence and impact of section 20039 by (1) issuing the Circular Letter in 1994, and (2) issuing the Procedures Manuals which described the impact of section 20039 on local elected officials. (AD at AR2444, ¶ 24; AR2449, ¶ 9(C); AT at AR1536-37, p. 109: ln. 5 to p. 110: ln. 5; see also, Circular Letter, AR 624-26; Procedures Manual, at AR 659-63). These materials were readily available to the City and to Chaidez as the City's highest ranking personnel officer. Chaidez simply chose not to review them. (AT at AR 1538-40, p. 111: ln. 2 to p. 113: ln. 12).

Further, the AMS estimates, expressly warned against reliance because the law would take precedence over any estimates provided therein. (2 CT 598, *Fifth APC* at 22, lns. 9-15, admitting that the AMSs included a disclaimer that "while every effort has been made to ensure the accuracy of this report, it should be understood that it does not have the force and effect of law, rule, or regulation governing the payment of benefits. Should any difference or error occur, the law will take precedence."; AD at AR 2442, ¶ 10(C)). This undisputed warning refutes any claim that the Board could have intended or reasonably anticipated that Chaidez would solely rely on the AMS estimates. In *Lee* at p. 34, a case directly on point, the plaintiff, a designated beneficiary of a deceased state employee,

claimed that CalPERS should be estopped from denying her death benefits and group term life insurance benefits because it distributed literature to its members, indicating that they had the ability to designate anyone as a beneficiary. In rejecting the plaintiff's claim, the court concluded that because the literature CalPERS distributed made clear that if the information CalPERS provided was wrong, "any decision [relating to benefits] will have to be based on the Law [PERL] and not this booklet," CalPERS could not be estopped from following the law and providing the benefits to the member's surviving spouse. *Id.* at 135 (internal quotation marks omitted). The court further found:

[E]stoppel cannot be applied against a public agency in every instance where it's erroneous or incomplete representations results [sic] in damages to a claimant. This is particularly true where the subject matter involved is as detailed and complex, as is the retirement scheme set up for state employees. In light of the myriad of 'optional settlement' . . . , distribution and types of benefits . . . , and other provisions regarding retirement . . . , the information presented in the PERS literature could not be anything more than a rudimentary overview of the system and how it operates.

Because CalPERS makes this point clear to its members, the Administrative Decision properly concluded that any "injustice" suffered by Chaidez "did not outweigh the public policy that public pension benefits must be calculated under the law." (AD at AR2449, ¶ 8(E), citing *Mansell* at pp. 496-97.)

Finally, Appellants also cited to *Hittle* in support of their estoppel claim. (4 CT 958 – 962.) But the Board's administrative decision correctly concluded that *Hittle* presented a materially different scenario and thus was inapposite for two reasons. (AD at AR2450, ¶9(F)).

Hittle involved a relinquishment of existing statutory rights: the "member . . . waived his rights to substantial retirement benefits . . . by withdrawing from the system" based upon "grossly inaccurate information which drove the worker's decision, destroying the knowing quality of the alleged waiver, and enriching the retirement system in the process." Consequently, the court in *Hittle* determined

that the member's decision could not be enforced. *Hittle*, at 380. The court restored the member to his previous position before he relinquished his rights – a position that was entirely consistent with the applicable statutory scheme.

Here, Chaidez did not relinquish any rights based on the information he received from CalPERS. Rather, “there was never a way for Chaidez to use his years of service as an elected official as years of service as a regular employee” because section 20039 (and CalPERS’ interpretation thereof) long preceded Chaidez’s decision to run for office. (AD at AR2450, ¶ 9(F)). Instead, Chaidez asked CalPERS (and now asks this Court) to invent for him a new right to a different benefits calculation that flatly contradicts the existing statutory scheme.

Unlike the present situation, the misinformation provided in *Hittle* drove the member’s benefits election decision. Here, the Administrative Decision rightly noted the absence of any evidence that Chaidez took any affirmative action in reliance on any alleged misinformation: “[Chaidez] cannot demonstrate how his circumstances would be any different if he had had information to the effect that [s]ection 20039 would apply to his retirement calculations, or if he had had proper calculations in the AMSs he received.” (AD at AR2450, ¶ 9(F)). As the Administrative Decision pointed out, Chaidez’s decision to run for office preceded (by more than four months) his receipt of the CalPERS enrollment form that allegedly contained inadequate information, and Chaidez chose to remain in office well after receiving estimated benefits that were substantially less than those ultimately calculated. *Id.* Thus, the Board’s Decision appropriately declined to extend *Hittle* to the facts in this case.²⁰

²⁰ Finally, section 20039 did not operate to “lower” or reduce Chaidez’s benefits. Rather, as the Court recognized, section 20039 merely “defines what those benefits are.” (3 CT 789). Failure to require a retirement benefit which would be greater than that provided for under the law is not an injury. *Crumpler* at p. 586.

C. This Court Should Ignore Appellants' Argument That The Board Failed To Consider Section 815.6

At the hearing on the demurrer to their *Fourth APC*, Appellants requested that the court "more fully address" the decision on Appellants' claim for damages for the alleged breach of the Board's fiduciary duties. The court did so by acknowledging that it had previously dismissed similar allegations in Appellants' *Third APC*, pursuant to section 818.8. (2 CT 564, Ruling on Submitted Matter, RT (Reporter's Transcript) at p. 37.) Referring to its prior ruling (2 CT 339), the trial court specifically concluded that Appellants' claim was for the negligent and/or intentional failure to disclose and therefore subject to the immunity provisions under section 818.8. (2 CT 564, citing, *Chevlin v. Los Angeles Community College Dist.* (1989) 212 Cal.App.3d 382; see also, Judgment on Submitted Matter, 4 CT 1110 -13.) In that same ruling, the trial court further considered and rejected Appellants' contention as to the applicability of section 815.6. [2 CT 339, citing, *Jopson v. Feather River Air Quality Management Dist.* (2003) 108 Cal.App.4th 492, 496 and *Grenell v. City of Hermosa Beach* (1980) 103 Cal.App.3d 864, 873-74.]

(1) The Board's Immunity Under Section 818.8.

Section 818.8 provides a public entity is immune from liability for an injury caused by misrepresentations of an employee of the public entity whether or not such misrepresentation be negligent or intentional. *U.S. v. Neustadt* (1961) 366 U.S. 696; *Jopson v. Feather River Air Quality Mgmt. Dist.*, *supra*, 108 Cal.App.4th at pp. 496-497; *Grenell v. City of Hermosa Beach*, *supra*, 103 Cal.App.3d at pp. 873-74. The immunized conduct that falls within section 818.8 is the communication of misinformation on which the recipient relies. *Id.* Summarizing the related case law, the court in *Jopson* found that "... courts have unanimously rejected the attempts to evade the public entities' immunity defense

provided under section 818.8 by characterizing the misconduct as something other than intentional or negligent misrepresentation. Essential to each claim was the plaintiff's reliance upon misinformation communicated to him by the government." *Id.* at pp. 498 - 499.

Appellants contend that the trial court mischaracterizes the cause of action as seeking damages for "negligent disclosure and/or failure to disclose and analogized that to a complaint for misrepresentation," rather than a "misrepresentation or negligent disclosure" caused by breach of "constitutional fiduciary duties." (AOB at pp. 50-55.) The putative distinction, if any, is patently intended to serve the sole purpose of evading the otherwise clearly applicable provisions of section 818.8, does not apply (RT at p. 38:5 - 39:26), and should be rejected. *Id.*

(2) This Case Does Not Invoke Section 815.6

Appellants assert that the trial court erred in when it dismissed Appellants' eighth cause of action in their *Fourth APC* because it failed to take into consideration section 815.6. (2 CT 564-5; AOB at p. 50).²¹ The crux for imposing liability under section 815.6 is to permit a cause of action for damages where the injury is caused by a breach of a mandatory duty specifically created to prevent such an injury.

Appellants fail to acknowledge that the trial court dismissed their petition under 1094.5, and rejected many of their claims that CalPERS breached any fiduciary duty. They also ignore or that the trial court's finding that they "fail[ed]" to present any reasoned or developed arguments in support of their contention that

²¹ "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to

[the Board] breached their fiduciary duties to Chaidez [and therefore deemed Appellants'] breach of fiduciary duties claim to have been waived." (4 CT 1110-1113.) Appellants ignore the fact that the trial court correctly rejected their attempt to assert a basis for damages arising out of a "constitutional tort" [AOB at p. 50, fn 21], and ignore a previously established mandatory duty giving rise to a cause of action exempt from immunity pursuant to section 818.8. [AOB 20-22, 49-53.]²² Rather, they candidly admit that they are simply seeking to argue around the issue by asserting estoppel. (AOB p. 5, fn. 5.)

Appellant's claim of liability under section 815.6 fails on the merits. First, liability under section 815.6 does not exist unless some other provision imposes a mandatory duty.²³ The specific provision to which Appellants cite as creating a mandatory duty states a retirement Board's duty to its participants and beneficiaries shall take precedence over any other duty. Even if the use of the term "shall" were taken in an obligatory sense, any mandate it might create would be to require the Board to give precedence to its duty to participants and

discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." § 815.6.

²² Even Appellants, however, cannot avoid characterizing what they refer to their claim as a "negligent representation" and impliedly acknowledge the immunity under section 818.8, but try to avoid its application by stating that the "election of option membership and Annual Member Statements are official publication of CalPERS itself" apparently to distinguish them the representations of actual staff. (AOB at p. 53, fn 22.) To the extent that the understands Appellants assertion it disputes it and responds that neither the election form nor the member statement represented that Chaidez was exempt from the correct and proper application of the law regarding his benefits.

²³ *O'Toole v. Superior Court* (2006) 140 Cal.App.4th 488, 509-10, "A statute is deemed to impose a mandatory duty on a public official only if the statute affirmatively imposes the duty and provides implementing guidelines. (citations) If a statute does not require that a 'particular action' be taken, ... section 815.6 does not create the right to sue a public entity." Citing, *Shamsian v. Department of Corrections* (2006) 136 Cal.App.4th 621, 632; *Creason v. Department of Health Services* (1998) 18 Cal.4th 623, 631, a statute creating "a mere obligation to perform a discretionary function" is not sufficient to create a mandatory duty.

beneficiaries of the system. There has been no evidence in this case that the Board has acted contrary to this duty.

Appellants must further show that “the injury is one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty. [The] ... inquiry in this regard goes to the legislative *purpose* of imposing the duty. That the enactment confers some benefit on the class to which plaintiff belongs is not enough; if the benefit is incidental to the enactment's protective purpose, the enactment cannot serve as a predicate for liability under section 815.6.” *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499 (internal citations deleted).

In this regard, Appellants cite to the Board's fiduciary duty to provide timely and accurate information to its members. *City of Oakland*, at p. 40. Although in no manner disavowing such obligation, the literal language of the measure cited by Appellants and as referenced by this court in *City of Oakland* was to “affirm” that the Board's primary duty was “providing benefits to participants and their beneficiaries.” *Id.* However, such obligation is incidental to the more general purpose stated in the referenced constitutional provision.

Appellants also ignore (AOB p. 50, at fn. 21) the fact that the court specifically granted the Board's motion to strike and dismiss their cause of action “..for money damages based on violations of the California Constitution.” (2 CT at pp. 456 -469.) Appellants do not dispute the court's findings that Article XVI, § 17, subpart (b) *does not create* a private right of action for damages (2 CT 562-563, 564-565). They simply deem such finding to be irrelevant and unnecessary because they contend the same conduct is actionable under section 815.6 (AOB at p. 52.) Appellants' assertion in this regard seeks to avoid the obvious fact that they are asserting indirectly a right to pursue an action under the same provision that would not otherwise support a cause of action directly.

Finally, Appellants have not suffered any injury resulting from any breach of a mandatory duty. Chaidez is receiving an amount perhaps less than he hoped, but otherwise correct under the law. The Board has no fiduciary duty to disregard an express and applicable provision of the law. *San Diego* at pp. 78-83. Indeed the Board fulfills its duty when it provides a benefit consistent with the applicable law. *McIntyre v. Santa Barbara County Employee' Retirement System* (2001) 91 Cal.App.4th 730, 734.

D. Appellants Have Abandoned Their Arguments That Section 20039 Is Unconstitutional

Appellants summarily assert that they maintain their arguments regarding the unconstitutionality of section 20039. In lieu of argument and authority, they simply refer to the arguments "about the unconstitutionality" of that section by incorporating by reference their allegations in their Fourth and Fifth Amended Petition. (AOB at pp. 22, 56-57.)

Appellants' failure to articulate any discussion or analysis in support constitutes a waiver of these arguments. Rules of Court, Rule 8.204; *Unite Here Local 30 v. Department of Parks and Recreation* (2011) 194 Cal.App.4th 1200, 1208; *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 656, *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647; *Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 720. Therefore, any assertion on those arguments must be ignored.

VI.

CONCLUSION

Based on the forgoing reasons, Respondent requests that this court affirm in whole the judgment of the trial court.

Respectfully submitted,

Dated: 11/22/11


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CERTIFICATE OF WORD COUNT

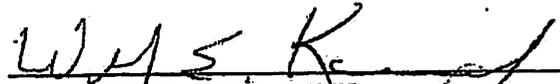
*Board of Administration of California Public Employees' Retirement System, et
al., Defendant and Respondent*

Third District Court of Appeal Case No. C065913
(Sacramento County Superior Court Case No. 07 CS 01248)

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Respectfully submitted,

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PROOF OF SERVICE

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Board of Administration, California Public Employees' Retirement System and
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EXHIBIT 3

3RD Civil No. C065913

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

LEONARD CHAIDEZ and
CITY OF HAWAIIAN GARDENS,

Appellants,

vs.

BOARD OF ADMINISTRATION, CALIFORNIA PUBLIC
EMPLOYEES' RETIREMENT SYSTEM, and
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Respondents.

APPELLANTS' REPLY BRIEF

Appeal from a Judgment of the
Superior Court of the County of Sacramento
Case No. 07CS01248
The Honorable Michael P. Kenny, Judge

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INTRODUCTION

Despite a great deal of sound and fury, CalPERS' Respondent's Brief ("RB") (i) mischaracterizes important evidence, (ii) misstates or negates relevant case law, (iii), sidesteps the real issues, and (iv) fails to address Appellants' opening arguments.

Three decisive issues are:

(1) Fiduciary Duties. Is there any real meaning to CalPERS' "fiduciary duty to provide timely and *accurate* information to its members"? (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 40, italics in original)¹;

(2) Equitable Estoppel. Can CalPERS be equitably estopped if it seriously misinforms a Member with otherwise reasonable information that a Member relies on over a long period of time?; and

(3) Precedent Valid? Is *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567 still "good law"?

CalPERS essentially argues that estoppel can *never* apply if it

¹ The *City of Oakland* court also cited to CalPERS' own Precedential Decision 99-01, *In re Application of William R. Smith* (1999), where CalPERS adopted the ALJ's finding that "[t]he duty to inform and deal fairly with members also requires that the information conveyed be complete and unambiguous."

Elements of both cases also bear a remarkable similarity to issues ruled on only weeks ago by the Third Appellate District in *Welch v. California State Teachers' Retirement System* (2012) 203 Cal.App.4th 1, discussed in more detail below.

produces a benefit higher or different than that indicated in the Public Employees' Retirement Law ("PERL", *Government Code*, §§20000, *et seq.*)². However, for estoppel to have any legal significance, it must provide some remedy that is in excess of or different than the rights that a Member is already entitled to under the PERL (because the Members should already receive everything that is due them under the PERL).

BACKGROUND

CalPERS is bound by Constitutional, statutory, and other authority to provide timely and accurate information to its Members pursuant to its fiduciary duties. (See, e.g., *City of Oakland, supra*; *In re Application of William R. Smith, supra*.) CalPERS encourages Members to rely on CalPERS' information to make long-term choices about the Members' individual careers.

However, sometimes CalPERS misinforms or fails to adequately inform a Member over a long period of time. Most of these are unusual cases, like in the case of Leonard Chaidez. CalPERS provides the Member with seemingly reasonable and believable information. The Member relies on it over a long period of time. Years pass. At or after retirement, CalPERS suddenly provides radically different information that undermines the individual's prior understanding. It is discovered that CalPERS' *Election*

² Unless otherwise indicated, all statutory references are to the *Government Code*.

documents and communications have been seriously false, misleading and long-standing.

In this case, the evidence shows that Chaidez acted on CalPERS' representations to his significant detriment in ways that cannot now be repaired. Disclosure of CalPERS' false and misleading statements on the eve of his retirement made it too late for Chaidez to get back the lost years. He cannot "re-do" his career and life choices. The result is CalPERS belatedly applied an unusual statute, which it had never informed Chaidez about, to reduce Chaidez's pension by over forty percent (-40%).

Rather than own up to the mistakes, CalPERS now (i) fails to admit that it had breached its fiduciary duties to provide Chaidez and the City of Hawaiian Gardens ("City") with timely accurate information and (ii) instead argues that CalPERS can only provide the benefit that is indicated in statute. CalPERS points to the PERL and claims that it solely determines the benefit to be provided. CalPERS grants itself immunity and claims freedom from any consequence of breaching its fiduciary standard or from estoppel. To back up its claims of immunity, CalPERS argues that it has included a disclaimer in its publications that "should any difference or error occur, the law will take precedence."³

³ See, e.g., CalPERS' opposition to Appellants' Opening Brief in support of their Writ of Administrative Mandamus and Fifth Amended Complaint in the Superior Court proceedings, 4CT1018:17-18. ("CT" refers to the Clerk's Transcript on Appeal, with 1CT, 2CT, 3CT and 4CT referring

CalPERS' fiduciary duties typically are not in conflict with the benefits indicated in the PERL, but the burden of CalPERS' explicit misinformation should be on CalPERS, not the Member. CalPERS' constitutional, statutory, and other fiduciary duties (i) increase CalPERS' duties to provide timely accurate information, and (ii) support the Member's ability to rely on CalPERS' information as the beneficiary of that information.

However, when the estopped benefits do conflict, CalPERS asserts that (i) the breach of fiduciary duties provide no remedy for increasing the benefit and (ii) CalPERS cannot be estopped if it means providing an expected benefit greater than in statute. As its current policy and practice, CalPERS asserts that equitable estoppel should *never* apply to such situations because it would "require the Board to disregard an express provision of the PERL and manifestly disrupt the administration of [sic] system...." (RB, p. 25.)⁴

Neither estoppel nor CalPERS' duties have any meaning without

to volumes 1 through 4, respectively, of the Transcript.) CalPERS cites favorably to exactly this language in its RB at p. 5.

⁴ CalPERS generally cannot decide on its own to act outside the confines of the PERL (and the Regulations adopted by CalPERS to implement statutory direction). However, there is a significant difference between (i) CalPERS' authority to act on its own to go beyond statutory limitations, and (ii) the authority of an ALJ or court judge to *impose* equitable estoppel remedies in the context of a neutral administrative or legal proceeding.

providing a remedy.

For the last 40 years, *Crumpler, supra*, has stood for the proposition that CalPERS could be estopped. (See practice guides attached). Case law and the practice guides recognize *Crumpler* as applying estoppel to CalPERS, including providing a benefit in addition to (or contrary to) the benefits in the PERL.

Now, in addition to denying estoppel as a matter of policy, CalPERS wishes to deny standing to anyone who might also make a claim or challenge arising out of estoppel (or a claim greater than statute based on estoppel). To interpose "standing" as a bar, CalPERS assumes that the claims have no validity, that estoppel does not apply, and therefore anyone asserting such a claim cannot show any beneficial interest in a proceeding on that issue. The result of CalPERS' tautology is that Chaidez and the City (and others) would not even be entitled to "their day in court" to see whether estoppel applies.

Strategically, CalPERS appears to propose the "standing" issue as an "out" so the Court will not formally deal with the difficult substantive issues. If litigants have no standing for estoppel claims, then CalPERS overturns *Crumpler* in all practical effect (as it has already done on the administrative level by fiat).

Avoiding "shadow law", Appellants seek the Court's explicit formal ruling on the substantive issues. They affect many people. Chaidez and the

City want to avoid undermining either a city's or a Member's ability to force CalPERS to account for its actions, and to get Court review of a powerful institution's actions and policies.

In this particular case, the specific request is for the Court to equitably estop CalPERS from (i) subsequently renegeing on its representations providing for a higher benefit for Chaidez, and (ii) failing to provide the reasonable benefit that it led Chaidez to believe he was entitled to over the seven (7) plus years of his reliance.

The bigger issue is whether *any* Member could *ever* be entitled to estop CalPERS when he or she (i) is grossly misinformed by CalPERS, (ii) acts in reasonable reliance on that misinformation, and (iii) suffers serious and substantial harm because of irrevocable decisions made based on that reliance.

FACTUAL BACKGROUND OF CHAIDEZ'S CLAIM

CalPERS spends more than 25% of its RB laying out its version of the factual background in the case (pages 2 through 13) and another 10% purportedly applying relevant case law to those "facts" (pages 31-36).

But most of what is presented is either a misinterpretation of testimony or misapplication of those facts in the context of applicable case law. With respect to the unusual Standard of Review presented below (as this case is part Administrative Writ, part Writ of Mandate, and part Superior Court original jurisdiction), we urge the Court to review the

Administrative Record and the Clerk Transcripts and Reporter's Transcripts of the Superior Court case.

I. Summary of Essential and Uncontested Background Facts

Chaidez worked for approximately nine years for City of Hawaiian Gardens ("City"), serving the final two years as City Manager with a monthly salary of \$7,374. (CalPERS' adopted *Decision*, 4CT1095:3-10.) After a brief private sector stint selling real estate, Chaidez returned to City employment as an elected member of the Hawaiian Gardens City Council where he served another 8 years until retiring in late 2007. (4CT1095:13-15.)

Several months after he was first elected, Chaidez signed a CalPERS-generated *Election to Optional Membership* form providing him with renewed CalPERS membership in his elected position. (4CT1095:19-23; *Election* form at 3CT0694.) The form was specially created by CalPERS for elected officials, as indicated by the notation "FOR ELECTED OFFICIALS ONLY" (upper case in original), but CalPERS failed to make any mention of Section 20039 on the *Election* form. (3CT0694.)⁵

⁵ Given that the only Members affected by Section 20039 are those who serve on a city council or board of supervisors, all of whom need to affirmatively opt into CalPERS membership by completing such an *Election* form, it would have been simple to add a sentence to the *Election* explaining the statute. Appellants' AOB, for example, suggested: "Warning: If you choose to elect in to CalPERS as an elected member of a city council

Chaidez was re-elected several times and remained in office for another 8 years until his retirement in late 2007. (4CT1095:13-15.) He received \$721.85 per month for his City Council service (4CT1095:18), but forswore higher earnings because of his commitment to public service and because he expected to eventually benefit once he collected his pension (AR001460-AR001461 AT33:17-AT34:4; AR001465-AR001466 AT38:3-AT39:19; AR001501 AT74:8-24.)⁶

Chaidez testified repeatedly that CalPERS informed him (and he believed) the standard CalPERS pension formula of (length of service) x (benefit factor) x (highest final compensation) would apply to all of his time, both civil service and elected positions. (AR001454 AT27:9-23; AR001466 AT39:8-19; AR001478 AT51:11-16.) He received AMS's every year, many of which repeated the same formula. (3CT0872-4CT0908.) In

or board of supervisors, your eventual pension calculation will be bifurcated and the portion attributable to your elected position will be calculated at a different, likely lower, rate than any other CalPERS service credit. See *Government Code* section 20039. Please contact CalPERS for further information."

The absence of any mention of Section 20039 on the *Election* is all the more egregious in that Section 20039 had gone into effect five years earlier (plenty of time for CalPERS to amend its *Election* form) and the form CalPERS had Chaidez sign was a May 1990 version, prepared more than four years before Section 20039's effective date and more than nine years before Chaidez signed it.

⁶ "AR" refers to the administrative Record, and "AT" to the Administrative Transcript taken by the reporter at the administrative proceedings.

fact and confirmation, CalPERS provided Chaidez with retirement estimates in December 2005 (as he began thinking of retirement) that confirmed that his *entire* CalPERS service credit was multiplied by his highest career pay rate of \$7,374 per month, the amount he earned as City Administrator. (1CT0024-1CT0025; 1CT0027-1CT0029.)

The first time CalPERS told Chaidez about Section 20039 and its harsh impact on his expected pension allowance was more than seven and one-half years after he was first elected city councilperson and elected to CalPERS membership.

II. Date of Informing Chaidez and City

On November 27, 2006, there was a telephone conversation between Bob Franco, the City's HR Manager (calling on Chaidez's behalf) and, and two CalPERS representatives where CalPERS disclosed Section 20039 for the first time.⁷ (*Decision*, ¶20, AR2444.) CalPERS followed a month later with a December 28, 2006, retirement estimate which for the first time calculated Chaidez's pension in two bifurcated portions: approximately 9 years of civil service based on a highest final compensation of \$7,374, and about 9 years of elected service based on a highest final compensation of \$721.85. (AR001513:5-AR001514:9; 1CT0031-1CT0033.) Using a formula different than total service multiplied

⁷ Appellants address CalPERS' assertion that Chaidez knew about Section 20039 during his civil service career at City below.

by highest year's compensation, CalPERS' new estimate reduced Chaidez's total expected pension by approximately 42%. (4CT1096:11-13.)

As succinctly put in Appellants' AOB:

In sum, until near the end of his working career, CalPERS represented to Chaidez that he would be entitled to the standard formula for all his service. During his career, Chaidez relied on CalPERS representations and maintained the City Council job when he could have sought or received other higher paying employment. CalPERS did not inform or advise Chaidez that his pension would not be calculated at the standard formula as CalPERS had always led him to believe. Chaidez suffered harm by the 42% reduction in his benefit that resulted.

(AOB, pp. 14-15.)

III. Implications of Government Code Section 20039

CalPERS' argument is that Section 20039 mandates the reduction of Chaidez's pension, *period*. Estoppel does not apply. There is no remedy for breach of fiduciary duties.

Based on this foundation, CalPERS argues (i) that it makes no difference that CalPERS failed to notify Chaidez of the existence or implications of Section 20039 until the eve of his retirement, long after he had made irrevocable career choices based on CalPERS' representations of a vastly *different* framework governing his situation; (ii) that any complaints about CalPERS' lack of timely disclosure or correction of misinformation are irrelevant because "[r]etirement benefits under CalPERS are wholly statutory in origin." (RB, p. 1, opening sentence); and

(iii) that therefore CalPERS has fully met its fiduciary responsibilities and estoppel cannot and should not apply in any form.

For probably 99.9% of CalPERS Members⁸, "highest final compensation" will be the highest earnings in a 12- or 36-month period, irrespective of whether the Member has switched positions or employers or even benefit formulas during his or her career. That highest final compensation figure will apply to *all* of a Member's service, even if the Member started out as a mailroom clerk earning \$10 per hour and ended his or her career at an annual salary of \$80,000. Indeed, this pension calculation formula is almost a "mantra" understood by virtually everyone in CalPERS membership.

Section 20039, however, represents an anomaly – possibly the only anomaly like it in the CalPERS system. It states that if a Member serves as an officer of a city council or board of supervisors, then CalPERS must *bifurcate* his or her pension, with one portion based on the highest final compensation earned while in that position and a second portion based on the Member's highest final compensation earned in any other CalPERS

⁸ As background, a CalPERS Member's service retirement allowance is equal to (years of service) x (a benefit factor based pension formula and retirement age) x (the employee's highest final compensation). (See, e.g., *Prentice v. Board of Administration, California Public Employees' Retirement System* (2007) 157 Cal.App.4th 983, 989.) CalPERS itself cites this pension formula and the *Prentice* case at the outset of its brief. (RB, p. 1.)

position, regardless of position, employer or benefit factor. To Appellants' knowledge, Section 20039 describes the only exception to the standard formula of (length of service) x (benefit factor) x (highest final compensation) and it appears to affect no more than a miniscule handful of the CalPERS membership.

IV. CalPERS' Unsupported Assertions That Chaidez Knew About Section 20039

CalPERS argues that Chaidez had notice of Section 20039 long before he ran for the city council position, based on the fact that it sent out a Circular Letter in 1994 on the new law. CalPERS asserts that Chaidez presumably would have seen it in his position as the City's highest personnel officer at the time. (RB, pp. 2-3.) Chaidez, however, testified without contradiction that he had never seen nor heard of the Circular Letter or of Section 20039 (AR001455-AR001457 AT28:7-AT30:1; AR001594-AR001595 AT167:10-AT168:21). CalPERS never introduced any evidence or testimony to the contrary. Chaidez also testified that during his civil service tenure at the City, employees with CalPERS questions were referred to CalPERS for answers. (AR001452-AR001453 AT25:3-AT26:15.) Prior to Franco's hiring in 2003, (AR001629-AR001630 AT202:1-AT203:4.) Bob Franco testified that when he became HR Manager in 2003, it was the first time the City had ever had someone with comprehensive responsibility for personnel issues; prior to that, the City

had various administrative employees handle different elements.

(AR001628-AR001630 AT201:23-AT203:4.)

CalPERS further argues that Chaidez had notice of Section 20039 because there was a section on the statute in the CalPERS manual.⁹ (RB, pp. 3-4.) Again, Chaidez testified that he had never seen such a manual. (AR001540 AT113:2-16.) CalPERS relies on the fact that *Franco* knew the City maintained a copy of the CalPERS manual during his tenure. (RB, p. 4.) But this was years after Chaidez left his civil service position. There is no evidence that city councilpersons either had access to the manual or requested to see it. Further, Franco testified that he himself had never reviewed that section of the manual. Franco testified that the CalPERS manual was far too large to expect him (or anyone else) to memorize or even be familiar with each section. (AR001634 AT207:3-25.)

V. **CalPERS' Misrepresentation of Chaidez's Testimony About His Retirement Estimates**

Taking remarks out of context, CalPERS seizes upon testimony from Chaidez that he knew the AMS's contained incorrect estimates and so was "very skeptical" about the estimates as early as 1996. CalPERS takes the

⁹ CalPERS chalks this up to the assertion that "Chaidez simply chose not to review" the Procedures Manual as well as the 1994 Circular Letter. Besides being pure speculation, completely contrary to the testimony presented, it puts the entire onus on CalPERS Members and absolves CalPERS itself of any obligation to provide "accurate and timely" information. (*City of Oakland, supra*, at 40.)

testimony completely out of the context that Chaidez always understood and believed that the *pension formula was stated correctly* (but simply that CalPERS' computers inadvertently included his last pay instead of his highest pay in one variable of the correct formula).

The transcripts show that Chaidez testified that he was "skeptical" of the AMS estimates because they utilized his *most recent* pay rate (the \$721.85 he earned on the City Council), rather than his *highest* earnings (the \$7,374 as City Manager). (AR001477-AR001478 AT50:10-AT51:16.; AR001482-AR001484 AT55:7-AT57:21.) He also said he knew there was something wrong because his estimated retirement allowance was dropping, despite the fact that he was accruing increased service credit and was getting older (so a higher benefit factor would apply). (AR001474-AR001475 AT47:4-AT48:14.)

Perhaps more significantly, Chaidez testified that he was told on at least two occasions by CalPERS employees that CalPERS often pulls the latest compensation amount of a Member to do the calculations, rather than the highest compensation amount as the PERL directs, exactly what he thought was wrong with the estimates. (AR001482-AR001484 AT55:7-AT57:4; AR001490-AR001492 AT63:2-AT65:4; AR001527-AR001529 AT100:15AT102:24.)

Importantly, CalPERS itself admits that the estimates in Chaidez's AMS's for 2000-2005 "were uniformly incorrect in that they were far too

low (because they used a final pay estimate based on his compensation as an elected official for all years of service)." (RB, p. 7.) This is exactly the point -- CalPERS used a single calculation for all service credit, regardless of position, precisely how Chaidez understood the formula to work, *but it did so incorrectly by using his latest salary instead of his highest.*

CalPERS also questions Chaidez's reliance on the AMS's, saying that they contained a statement that "*separate calculations are made for each of your employers and retirement formulas*" (RB, p. 8, emphasis in original). This might appropriately warn Members who worked for more than one employer or in more than one membership position with different benefit formulas, though one might expect CalPERS to at least run those different calculations on the AMS's. Chaidez, however, had the *same* employer (City of Hawaiian Gardens) and *same* retirement formula for both his civil service and elected positions.¹⁰

Further, even though the caution (about different employers and retirement formulas) applies to all CalPERS Members, in 99.9% of the time this is still calculated based on a *single highest final compensation* figure that gets applied across the board to *all* CalPERS service. The only exception: those who serve as elected city councilpersons or on an elected

¹⁰ The City's CalPERS formula was 2% at 60 when Chaidez began, then was later increased to 2% at 55 and eventually 2.7% at 55. (See, e.g., 3CT0872-3CT0875, 3CT0893-3CT0895, 3CT0897-3CT0900.) But the same formula applied to both civil service and elected positions with the City at all times.

board of supervisors. Only a tiny handful of CalPERS Members receive *bifurcated* calculations.

CalPERS was in the best (or only) position to inform Chaidez. In the *Election* document, it would have been quite simple for CalPERS to simply inform Chaidez and others of this fact. First and foremost, the *Election* document is vital. It established the optional membership term. The point when Chaidez signed the *Election* was the appropriate time to inform him. But CalPERS failed to inform him at the time he elected to receive city council service credit.

Importantly, thereafter CalPERS confirmed or aggravated the misinformation by communicating the "*highest compensation multiplied by all years of service formula*" on all of his AMS's and other communications with CalPERS. Chaidez's "admission" that he was skeptical of the estimates does not in any way indicate that he understood there would be a bifurcated calculation, or that he was not entitled to the highest formula. Certainly, it does not absolve CalPERS of its fiduciary duty to so inform him. Otherwise, a Member's right to "timely and *accurate*" disclosures (*City of Oakland, supra*) or that it be "complete and unambiguous" (*In re Application of William R. Smith, supra*) is negated.

Finally, CalPERS dismisses Chaidez's claim to having relied on the 2005 retirement estimate he got from CalPERS with the statement that Bob Franco (acting on Chaidez's behalf) "specified the inputs" CalPERS was to

use for the 2005 estimates, i.e., Franco told CalPERS to use Chaidez's highest earnings as City Manager (\$7,374 per month) as the final compensation figure used to prepare the estimates. Again, Chaidez specifically understood that the CalPERS pension formula required use of his highest final compensation amount. Perhaps even more troublesome for CalPERS is the fact that *Chaidez was told by a CalPERS representative to use the higher final compensation figure when he submitted his retirement application.* (AR000734, bottom of page, 12/14/05 entry from Karleen J. Lueras.)

In sum, Chaidez (i) believed before and when he elected to optional membership that he was entitled to have his CalPERS pension calculated based on the (length of service) x (benefit factor) x (highest final compensation) formula, (ii) CalPERS consistently represented this to Chaidez in both written and verbal communications before, after, and during his service until the last period before retirement (when it was too late to make any substantive changes), (iii) Chaidez relied on CalPERS' representations about the pension formula to take and hold the city council position, and (iv) CalPERS never told Chaidez about the application, implications or even the *existence* of Section 20039 until the eve of his retirement.

CalPERS has been unable to point to any evidence to the contrary – indeed, the best it can do is to draw the tenuous conclusion that Chaidez

"must have" known about Section 20039 because it was buried in CalPERS materials that Chaidez testified he never saw. What CalPERS' position really comes down to is saying that (i) Chaidez *should* have known about Section 20039, (ii) despite the fact that *CalPERS'* informed him otherwise (leading him to believe that he was entitled to the standard formula), (iii) while CalPERS is the primary source of most Members' pension information and (iv) *CalPERS* bore the fiduciary responsibility to inform him.

LAW AND ARGUMENT

I. Standard of Review

The standard of review is complex. The case was originally filed in the Superior Court with constitutional, equitable estoppel, and other causes of action. CalPERS demurred to the *Complaint* for failure to exhaust administrative appeals, and the Superior Court directed that some of the causes of action had to be heard in the Office of Administrative Hearings.

The agency had no jurisdiction to hear the constitutional and other causes of action. Further, CalPERS disclaims the ability to apply equitable estoppel so the estoppel claims are not included in the jurisdiction of the administrative agency and must be subject to the Independent Judgment Standard of Review. Both the equitable estoppel and constitution claims must be reviewed under the Independent Judgment Standard with a *de novo*

review of the law. Other claims were subject to demurrer such that the facts must be viewed in the light most favorable to Chaidez and the City. The question of whether there is a duty also requires a higher standard of review.

CalPERS asserts that because some of the causes of action were determined by the Superior Court under a *Petition for Writ of Administrative Mandamus*, the Substantial Judgment Standard has to apply to those issues. However, the facts were not determined in some of those causes of action.

A. Independent Standard – De Novo Review

Review of Pure Questions of Law – "Independent Review"

Standard: Matters presenting pure questions of law, not involving the resolution of disputed facts, are subject to the Appellate Court's *independent ("de novo") review*: i.e., the Appellate Court gives no deference to the trial court's ruling or the reasons for its ruling, but instead decides the matter anew. (*Ghirardo v. Antonioli* (1994) 8 Cal.App.4th 791, 799; *Topanga & Partners, LLP v. Toghia* (2002) 103 Cal.App.4th 775, 780-781 (citing text).)

The legal question of whether and how equitable estoppel applies against CalPERS is a legal issue. The meaning of the Constitutional duties must be reviewed *de novo*. (*Herbst v. Swan* (2002) 102 Cal.App.4th 813, 816; *State of Ohio v. Barron* (1997) 52 Cal.App.4th 62, 67.) The proper

interpretation of constitutional provisions (as with statutes, below) is a question of law reviewed *de novo*. (*Silicon Valley Taxpayers Ass'n., Inc. v. Santa Clara County Open Space Auth.* (2008) 44 Cal.4th 431, 448-449; *Redevelopment Agency of City of Long Beach v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74.)

Appellate Courts may *independently* determine the proper interpretation of a statute; they are not bound by evidence on the question presented in the trial court or by the trial court's interpretation. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *In re Clarissa H.* (2003) 105 Cal.App.4th 120, 125; see also *Woo v. Super. Ct. (Carey)* (2000) 83 Cal.App.4th 967, 974 (city charter).)

Duty of care: Whether a duty of care is owed is a question of law for the court and is reviewable *de novo*. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.App.4th 666, 674; *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139; see *Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1450-1451 (citing text).) In this case, whether CalPERS owes Chaidez and the City a duty to adequately and timely inform them at the time of Election to benefits is a question of whether CalPERS has a duty of care at that point. As a consequence, the issue of the consequences of failing to inform them is also a matter of law to be reviewed *de novo*.

Review by Presuming Truth of Allegations or Evidence

Favorable to Appellant: In certain situations (below), Appellate Courts

had various administrative employees handle different elements.

(AR001628-AR001630 AT201:23-AT203:4.)

CalPERS further argues that Chaidez had notice of Section 20039 because there was a section on the statute in the CalPERS manual.⁹ (RB, pp. 3-4.) Again, Chaidez testified that he had never seen such a manual. (AR001540 AT113:2-16.) CalPERS relies on the fact that *Franco* knew the City maintained a copy of the CalPERS manual during his tenure. (RB, p. 4.) But this was years after Chaidez left his civil service position. There is no evidence that city councilpersons either had access to the manual or requested to see it. Further, Franco testified that he himself had never reviewed that section of the manual. Franco testified that the CalPERS manual was far too large to expect him (or anyone else) to memorize or even be familiar with each section. (AR001634 AT207:3-25.)

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Taking remarks out of context, CalPERS seizes upon testimony from Chaidez that he knew the AMS's contained incorrect estimates and so was "very skeptical" about the estimates as early as 1996. CalPERS takes the

⁹ CalPERS chalks this up to the assertion that "Chaidez simply chose not to review" the Procedures Manual as well as the 1994 Circular Letter. Besides being pure speculation, completely contrary to the testimony presented, it puts the entire onus on CalPERS Members and absolves CalPERS itself of any obligation to provide "accurate and timely" information. (*City of Oakland, supra*, at 40.)

Reply Brief provide all information necessary to determine the issues.

B. Abuse of Discretion

Abuse of Discretion Standard: The Court must still adhere to *applicable legal criteria* and cannot act arbitrarily. (*Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal.4th 359, 393-394 ["judicial discretion must be measured against the general rules of law and, in the case of a statutory grant of discretion, against the specific law that grants the discretion"]; *Thayer v. Wells Fargo Bank, N.A.* (2001) 92 Cal.App.4th 819, 833 ["scope of discretion always resides in the particular law being applied"]. "Judicial discretion" has been described as "the sound judgment of the court, to be exercised according to the rules of law." (*Lent v. Tilson* (1887) 72 Cal 404, 422.)

Equitable Estoppel on Disputed Facts Can Be Abuse of Discretion Standard: If the Court rules that CalPERS is bound by equitable estoppel as a matter of law under the *de novo* standard, the Appellate Court can review the trial court ruling on a claim of equitable estoppel, if the underlying facts are disputed. Many of the facts in this case are undisputed. But where the underlying facts are undisputed, and the issue is whether those facts constitute sufficient legal basis for estoppel, the trial court's decision presents a question of law, reviewed *de novo*. (*Mt. Holyoke Homes, LP v. California Coastal Comm'n* (2008) 167 Cal.App.4th

830, 840; see *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 484-485.)

Abuse of Discretion – Failure to Follow Law: The Superior Court failed to recognize that *Crumpler* provided for equitable estoppel on similar facts, and thus committed the abuse of discretion.

Mixed Administrative Decision and Superior Court Decision: In the instant case, it was first filed as a *Complaint* with constitutional and other causes of action that a Superior Court only had jurisdiction to hear (and which the administrative court did not have jurisdiction to hear). Upon CalPERS' motion, the Superior Court then transferred many parts of the case to the Office of Administrative Hearings for failure to exhaust administrative appeals.

C. **Substantial Evidence Standard**

Some of the Decision May Be Subject to the Substantial Evidence Review on Appeal: Notwithstanding the nature of the right involved, Appellate Courts reviewing the Superior Court's decision on a Petition for Writ of Administrative Mandamus *always* apply a *substantial evidence* standard to the administrative finds: i.e., even if the trial court exercised its independent judgment, the Appellate Court will *not* conduct an independent review of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824; *Bixby v. Pierno* (1971) 4 Cal.3d 130; *Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 359, 368.)

However, the administrative hearing could not hear and did not hear the constitutional, equitable and other causes of action. As such, those causes of action must be reviewed under the Independent Judgment Standard and reviewed *de novo*.

On appeal of a Superior Court review of an appealed administrative decision, the substantial evidence test on appeal is applied to either the *trial court judgment* or the *administrative decision*, depending on whether the Superior Court exercised independent judgment or applied the substantial evidence test (above). (See *Fort Mojave Indian Tribe v. California Dept. of Health Services* (1995) 38 Cal.App.4th 1574, 1590.)

On appeal of a Superior Court review of an appealed administrative decision, if the Superior Court exercised *independent judgment* (vested fundamental right involved), the Appellate Court will review the record to determine whether the *trial court judgment* is supported by substantial evidence. (*Bixby v. Pierno, supra*, at 243, fn. 10; *County of Alameda v. Board of Retirement* (1988) 46 Cal.3d 902, 910; *Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 321; but see also *Barber v. Long Beach Civil Service Comm'n* (1996) 45 Cal.App.4th 652, 659-660 [where trial court is required to exercise independent judgment but fails to do so, Appellate Court cannot apply substantial evidence review and must remand for new trial].)

But on the issues that were only subject to the Superior Court's

jurisdiction, the Court has to apply the *de novo* standard of review.

On equitable estoppel, which CalPERS says cannot be applied in an administrative hearing, the Court must review the case *de novo*.

Pure issues of law, of course, are always subject to *independent* Appellate Court determination.

Court Did Not Resolve the Factual Dispute, CalPERS Argues

For the Substantial Evidence Standard: The substantial evidence rule is based on the assumption the trial court *actually performed* its function of weighing the evidence and thus *actually resolved* the factual dispute. If the record demonstrates that the trial court's judgment or order was based solely on an erroneous legal ruling (i.e., in this case that equitable estoppel could not apply and CalPERS was immune under the *Government Code*, etc.), the Appellate Court will not affirm merely because there was substantial evidence upon which the trial court might have ruled against appellant. (*Kemp Bros. Const., Inc. v. Titan Elec. Corp.* (2007) 146 Cal.App.4th 1474, 1477-1478; *Affan v. Portofino Cove Homeowners Ass'n* (2010) 189 Cal.App.4th 930, 944-945 [substantial evidence rule *inapplicable* where trial court did not weigh evidence but erroneously relied on judicial deference standard]; but see *J.H. McKnight Ranch, Inc. v. Franchise Tax Board* (2003) 110 Cal.App.4th 978, 984 [court's solicitation of draft statement of decision from trial counsel "creates no inference" that court failed to perform its function of weighing evidence].)

II. Administrative Interpretations

The Supreme Court found that "it is the duty of this court ... to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction"

An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to "make law," and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves, the binding power of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation. Justice Mosk may have provided the best description when he wrote in *Western States Petroleum Assn. v. Superior Court*, *supra*, 9 Cal.4th 559, 38 Cal.Rptr.2d 139, 888 P.2d 1268, that "The appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other." [Citation.] Quasi-legislative administrative decisions are properly placed at that point of the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum." (*Id.* at pp. 575-576, 38 Cal.Rptr.2d 139, 888 P.2d 1268; see also *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 325-326, 109 P.2d 935 [An "administrative interpretation ... will be accorded great respect by the courts and will be followed if not clearly erroneous. [Citations.] But such a tentative ... interpretation makes no pretense at finality and it is the duty of this court ... to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction. [Citations.] The ultimate interpretation of a statute is an exercise of the judicial power ... conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body."].)

Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. (See *Traverso v. People ex rel. Dept. of Transportation* (1996) 46 Cal.App.4th 1197, 1206, 54 Cal.Rptr.2d 434.)

Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative. To quote the statement of the Law Revision Commission in a recent report, "The standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action." (Judicial Review of Agency Action (Feb.1997) 27 Cal. Law Revision Com. Rep. (1997) p. 81, italics added.)

(*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8.)

CalPERS has no expertise in equity or constitutional law, and certainly has no advantage over the courts when interpreting these legal policies and doctrine. Deference is appropriate where the administrative agency's expertise indicates it has a comparative interpretive advantage over the courts." (*Jim Beam Brands Co. v. Franchise Tax Bd.* (2005) 133 Cal.App.4th 514, 521.)

Here, CalPERS is asserting new interpretations of estoppel, contrary to long-standing case law. In this case, the interpretation is not entitled to

any weight because it is " 'arbitrary, capricious or without rational basis' [citations], or is 'clearly erroneous or unauthorized.' [Citation]." (*Yamaha, supra*, at 6.)

III. Standing

There are several interest asserted: the individual pension issues, the individual estoppel issues; and the larger issues that CalPERS needs to fully inform the public. The estoppel issue is specific and individual as applied to Chaidez and the City, but CalPERS' failure to apply estoppel generally (contrary to law) is a public interest.

A. Appellants Establish "Beneficial Interest" Standing Because Their Interest In This Matter Is Not Equal to That Shared with the Public

Chaidez and the City are "beneficially interested" in the subject matter of the proceeding over and above the interest held in common with the public at large. (*Code of Civil Procedure*, §1086.) Chaidez and the City show that they have a substantial right or interest in the action sought to be commanded by the writ(s) because their legal rights are injuriously affected by the challenged action. Clearly, a specific increased pension benefit could accrue to Chaidez. The employer (the City) also has an interest in assuring the benefit to its employees if the writ were issued (via estoppel or otherwise). Chaidez and the City will suffer detriment in a reduced pension and more uncertain employee rights if the writ is denied.

Putting the cart before the horse, CalPERS assumes *apriori* the result that no remedy can arise from estoppel and breach of fiduciary duties, and thus tries to deny Chaidez and the City standing to even litigate the issue. However, estoppel is clearly a triable issue presented which allows standing. Obviously, if estoppel can be applied, then Chaidez and the City are entitled to relief that will specifically benefit them.

In *Mission Hosp. Regional Medical Center v. Shewry* (2008) 168 Cal.App.4th 460, the court emphasized the extremely broad nature of the "beneficial interest standard".

Section 1085 "is available not only to those who have enforceable private rights, but to those who are 'beneficially interested' parties within the meaning of Code of Civil Procedure section 1086." [Citation.] (*Doctor's Medical Laboratory, Inc. v. Cornell, supra*, 69 Cal.App.4th at p. 896, 81 Cal.Rptr.2d 829.)

...
As Professor Davis states the rule: 'One who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable.' (Davis, 3 Administrative Law Treatise (1958) p. 291.)" (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796-797, 166 Cal.Rptr. 844, 614 P.2d 276.)

(*Mission Hosp. Regional Medical Center, supra*, at 479.)

Persons who were entitled to participate in the administrative level as interested parties and to take an appeal at the administrative level have a sufficient interest to participate in an administrative mandamus proceeding. (2A Cal.Jur.3d, *Administrative Law* §775.)

Chaidez and the City also each have a special interest in the

performance of the CalPERS' duties sought in the writ claims as well as in the Amended Complaints. Similarly, standing to assert a writ claim exists "if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." *Carsten v. Psychology Examining Com., supra*, at 796. Both Appellants meet this standard.

Chaidez is personally injured by, and beneficially interested in remedying, CalPERS' unlawful practices. A CalPERS Member who was and is entitled to base his life choices on information provided to him by CalPERS, Chaidez has been actively seeking reliable information on his pension from CalPERS in order to make life choices.

The City also has a direct and substantial interest in the outcome of this litigation.

B. Beneficial Interest and Public Interest

The beneficial interest standard is so broad, even citizen or taxpayer standing may be sufficient to obtain relief in mandamus. (*Doctor's Medical Laboratory, Inc., supra* at 896; *Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1182.) "[W]here a public right is involved, and the object of the writ of mandate is to procure enforcement of a public duty," a citizen is beneficially interested within the meaning of Code of Civil Procedure section 1086 if "he is interested in having the public duty enforced." (*Citizens Assn. for Sensible Development of Bishop Area v.*

County of Inyo (1985) 172 Cal.App.3d 151, 158.)

C. Appellants Also Establish Public Interest Standing

Appellants have standing under the public interest writ standing doctrine. CalPERS' divergence from the *Crumpler* standard applying estoppel against CalPERS is clearly a public issue in that CalPERS is failing to follow the law. To deny Chaidez and the City standing (i.e., to deny them the right to even litigate the question) is to deny the right to estoppel in the first place without making a ruling.

An exception to the beneficial interest standing requirement known as "citizen's standing" may apply where "a public right is involved, and the object of the writ of mandate is to procure enforcement of a public duty." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1236-37.)

Chaidez and the City also share a generalized harm with the public, claiming that they and other members of the public have been harmed as a result of CalPERS' failure to fully inform its Members and failure to follow the law in denying estoppel. In the public interest, Chaidez and the City are affirmatively claiming that their interest in requiring CalPERS to fully inform the public is the same interest shared by the public at large.

Nature of Exception: The conditions of the petitioner's right and the respondent's duty may be greatly relaxed, if not virtually abandoned, where the question is one of public interest. (See *Common Cause of Calif. v.*

Board of Supervisors (1989) 49 Cal. 3d 432, 439, citing the text; *State Bd. of Pharmacy v. Superior Court* (1978) 78 Cal.App.3d 641, 646, citing the text; *Newland v. Kizer* (1989) 209 Cal.App.3d 647, 653 [writ review is proper where plaintiff is interested as citizen in having laws executed and public duty enforced]; 52 Am.Jur.2d (2000 ed.), *Mandamus* §§381, *et seq.*)

The failure to recognize estoppel, the failure to adequately inform Members and the failure to inform the public are clear examples of the public interests and duties governed by this standing doctrine. (*See, e.g., Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1564.)

City of Hawaiian Gardens Has Standing: The PERL affords a duty to correct errors and omissions of the system and its employers. The City is an employer that is subject to this duty and is seeking to remedy CalPERS' errors. The City has an interest under the PERL as an employer generally, and has an interest directly as Chaidez's employer in assuring that Chaidez's pension is properly corrected by estoppel. It has expended resources combating CalPERS' improper actions.

CalPERS' Paradox. Paradoxically, as a public interest matter, CalPERS argues that it cannot be estopped. Because it cannot be estopped, a writ of mandate cannot apply. However, if estoppel does apply, then CalPERS' arguments simply reinforce that a Writ relief is necessary, and Chaidez and the City must have standing. Otherwise, estoppel would apply

under law, but no one would have the standing to compel CalPERS to honor it.

IV. Correct Interpretation of *Crumpler*

Appellants suggested in their Opening Brief that *Crumpler, supra*, provides a road map for resolving the differences between (i) CalPERS' assertion that it has no authority on its own to exceed statutory PERL limitations, and (ii) the imposition of equitable estoppel, especially in a neutral adjudicatory proceeding. Although distinguished on other issues, the core elements of *Crumpler* are still good law.

A. Findings in *Crumpler*

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

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

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

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

(*Id.* at 578-579.)

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

All of the requisite elements of equitable estoppel are present... The city was apprised of the facts. The city knew that petitioners were being employed by the police department as animal control officers at the time it erroneously advised them they would be entitled to retirement benefits as local safety members. The 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. (*Driscoll v. City of Los Angeles, supra*, 67 Cal.2d 297, 307-308; *Orinda-County Fire Protection Dist. v. Frederickson and Watson Co.* 174 Cal.App.2d 589, 593 [344 P.2d 873].) In a matter as important to the welfare of a public

employee as his pension rights, the employing public agency "bears a more stringent duty" to desist from giving misleading advice. (*Driscoll v. City of Los Angeles, supra*, 67 Cal. 2d 297, 308.)

All of the other requisite elements of equitable estoppel against the city were established by uncontradicted evidence. The city manifestly intended its erroneous representations to be acted upon and petitioners had a right to believe the city so intended. Petitioners were ignorant of the fact that the city's advice was erroneous. Petitioners relied upon the representations to their injury by relinquishing other employment to accept city employment and by paying over the years the greater contributions required of safety members. Petitioner Crumpler served as animal control officer for over 20 years. During those years he paid safety member contributions and arranged his personal financial affairs in the expectation he would ultimately receive the retirement benefits of a safety member. Petitioner Ingold relinquished federal civil service employment with 15 years accrued federal pension rights to accept city employment on the representation that his city pension rights would be that of a safety member.

(*Crumpler, supra*, at 583.)

Finally, the court considered whether estoppel should actually be imposed, given the Supreme Court's warning in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 that "[t]he doctrine of equitable estoppel may be applied against the government where justice and right require it" [citation]" but that an estoppel will not be applied against the government if to do so would effectively nullify " 'a strong rule of policy, adopted for the benefit of the public, ...' [citation]." (*City of Long Beach, supra*, at 493.) After weighing the "tension between these twin principles", the *Crumpler* court held that CalPERS was estopped from retroactively classifying

petitioners *nunc pro tunc* back to their joining the retirement system but permitted to do so going forward:

Nor may estoppel be avoided on the ground that to invoke it would enlarge the statutory power of the board. In view of the statutory powers conferred upon the board by section 20124, this is not a case where the governmental agency "utterly lacks the power to effect that which an estoppel against it would accomplish." (*City of Long Beach v. Mansell, supra*, 3 Cal.3d 462, 499.)

The effect, if any, upon public interest or policy of invoking estoppel with respect to petitioners' past service is not of sufficient dimension to justify its rejection.... **We discern no harmful effect upon any specific public policy or interest which would result from invoking estoppel in the instant case where pension rights of a public employee are involved. We conclude the board is estopped from reclassifying petitioners *nunc pro tunc* as of the date of their initial membership in the system (Emphasis added).**

We will not, however, extend estoppel to preclude the board from reclassifying petitioners prospectively from the date of the board's decision. Public interest and policy would be adversely affected if petitioners, despite the discovery of the mistaken classification, were required to be continued to be carried as local safety members when all other contract members of the retirement system throughout the state performing like duties and functions are classified as miscellaneous members. Manifestly, it would have a disruptive effect on the administration of the retirement system.

(*Crumpler, supra*, at 584.)

B. CalPERS Argues It "Utterly Lacks the Power To Effect That Which Estoppel Against It Would Accomplish"

CalPERS attempts to distinguish *Crumpler* from the instant case with the argument that the *Crumpler* court found that CalPERS "possessed

the authority to do what it appeared to be doing" in that case, but that it "utterly lacks the power to effect that which estoppel against it would accomplish" in the instant case (RB, p. 24).

The *Crumpler* court found that the authority which CalPERS had "to effect that which estoppel against it would accomplish" was Section 20124 of the PERL, since renumbered as Section 20125. "Nor may estoppel be avoided on the ground that to invoke it would enlarge the statutory power of the board. In view of the *statutory powers conferred upon the board by section 20124*, this is not a case where the governmental agency 'utterly lacks the power to effect that which an estoppel against it would accomplish.' " (*Crumpler, supra*, at 499, emphasis added, quoting *City of Long Beach v. Mansell*.)

§ 20125. Determination of Recipients

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

Section 20125 has been in the PERL since 1946. Further, this is the exact statute CalPERS cites as authority for the argument that the Court should defer to CalPERS' administrative decision in the instant case. (RB, p. 15.)

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

Appellants also argue in their Opening Brief that the PERL contains

a second statutory provision which permits CalPERS to grant Appellants the relief sought – Section 20160, the so-called "mistake statute". Rather than repeat that entire argument here, Appellants respectfully refer the Court to their Opening Brief, pp. 35-40. However, they do wish to add additional legal authority for this argument as a result of the very recently decided case of *Welch v. California State Teachers' Retirement Bd.*, *supra*.

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

The court ruled that the CalSTRS Board had improperly rejected Welch's eventual disability retirement application for her failure to show a continuing disability, finding that CalSTRS' misinformation about eligibility for disability retirement shortly after she was attacked had thereby prevented her from timely compiling the evidence of her disability required by the CalSTRS Board. It then estopped CalSTRS from summarily denying Welch's disability application and ordered the Board to reconsider the matter in light of its misinformation to Welch and the impact that had on her ability to gather relevant evidence based on the Board's duty to correct its errors and omissions pursuant to *Education Code* section 22308.

Important to the case herein, the Appellate Court contrasted CalSTRS' *permissive* duty to correct under Section 22308 with CalPERS' *mandatory* duty to do so found in the language of *Government Code* section 21060:

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

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

that is expressed with the use of the word "may" becomes a "duty" under those circumstances where to take any other action would constitute an abuse of discretion. In this manner, section 22308 is internally consistent, and its meaning is not altered by the different language the Legislature chose to use in the correction provision applicable to CalPERS.

We therefore conclude that, under the facts presented here, as found by the trial court, CalSTRS had the power and the duty, to correct the actions taken as a result of the misinformation CalSTRS provided Welch in 1999 regarding the eligibility requirements for disability retirement benefits. It was an abuse of discretion for CalSTRS not to consider whether to apply section 22308 to this case, and if so how. To the extent the trial court implicitly concluded otherwise, by concluding that Welch was not disabled in 1999 and therefore could not have presented better evidence of disability at that time even in the absence of the misinformation from CalSTRS, the trial court erred. The matter must be remanded to CalSTRS for CalSTRS to consider, in the first instance, the proper application of section 22308 here. In doing so, CalSTRS must fairly consider how its misinformation to Welch in 1999 affected her ability to provide CalSTRS with contemporaneous medical documentation of her psychological condition, and *CalSTRS must strive to the fullest extent possible to relieve Welch of the disadvantage she suffered because of that lost opportunity.*

Section 22308 requires no less.

(Welch, supra, italics in original.)

The Third District found that CalSTRS had misinformed Ms. Welch sufficient to justify estoppel based on a single case of telephonic misinformation. Given that CalPERS consistently, continually and seriously failed to notify Chaidez about the existence and impact of Section 20039 and concurrently repeatedly led him to believe his eventual pension

allowance would be based on his highest compensation multiplied against *all* of his service credit, the findings in *Welch* should have even more force and effect in this case.

D. CalPERS' Incorrect Understanding of *Crumpler's* Finding

Re Statutory Authority

CalPERS attempts to "tweak" the *Crumpler* finding by arguing that the Board had the authority to make classification determinations, but that it has no authority to contravene statutory provisions such as Section 20039. In doing so, CalPERS implies that classification determinations are not founded in statutory requirements. This misstates both the facts of the case and the findings of the Appellate Court.

The *Crumpler* court spent a great deal of time on the question of whether the principal duties of the appellants "clearly fall within the scope of active law enforcement service" as required by Section 20020 (since renumbered as Section 20425), including examining the legislative history and relevant Attorney General opinions. It ultimately concluded, as quoted earlier, that "Petitioners' duties as animal control officers cannot be said to 'clearly fall within the scope of active law enforcement service' as that term is used in section 20020. The board's determination that petitioners were improperly classified as local safety members must be upheld." (*Crumpler*, *supra*, at 579.)

Then, however, the court went on to *estop* CalPERS (and the City of

San Bernardino) from retroactively reclassifying petitioners, despite the fact that petitioners clearly did not meet the *statutory requirements* to be classified as "local safety members".

In fact, the reason the court concluded that CalPERS *could* reclassify the petitioners beginning from the point of CalPERS' discovery of their wrong classification and going forward was precisely because of they did not meet the statutory requirement to remain classified as "local safety members".¹¹

E. Impact on Public Policy, "Unfunded Liabilities"

Finally, it is worth noting that the *Crumpler* court found that estopping CalPERS from retroactively reclassifying the employees would not cause a sufficiently serious effect on public policy as to justify its rejection, but doing so prospectively, after the classification error and determination had been made, would do so. (*Crumpler, supra*, at 584.) CalPERS cites this exact point, yet misses the point that the court estopped CalPERS from *retroactive* reclassification. (RB, p. 24.)

Petitioner's entitlement to maintain the classification up to the point of discovery and determination was no minor matter. It enabled all four

¹¹ CalPERS' footnote 15 on page 24 of its brief that "the *Crumpler* decision also significantly rested on the fact that the employer would have been estopped from requesting the reclassification of its employees retroactively" (RB, p. 24) is less than forthcoming: (i) it wasn't simply the case that the employer "*would* have been estopped", it actually *was* estopped, and (ii) the court did not simply impose estoppel against the employer, it did so against the employer *and also against CalPERS*.

petitioners to keep their "safety" classification and benefits for their respective past periods of employment and thus be eligible for enhanced retirement benefits earned by safety employees *that technically speaking they were not entitled to.*

Nonetheless, the court found that it could "discern no harmful effect upon any specific public policy or interest which would result from invoking estoppel in the instant case where pension rights of a public employee are involved. We conclude the board is estopped from reclassifying petitioners *nunc pro tunc* as of the date of their initial membership in the system." (*Crumpler, supra*, at 584.)

As for CalPERS' allegation that the remedy sought by Appellants will provide Chaidez with a windfall based on "pension spiking" or cause "unfunded liabilities" (RB, p. 27), the City of Hawaiian Gardens (the agency ultimately responsible for covering the expenses of Chaidez's pension) is affirmatively appealing CalPERS' decision with full knowledge that it may be required to make additional contributions in the future with respect to the obligation that it understood it undertook. Moreover, any adjustment in the funds necessary to pay out the larger pension amount will be amortized by CalPERS over 30 years. Looking at any one time, whether the pension system or a particular fund is currently underfunded or "super funded" is a matter of market forces, investments, as well as speculation.

In any event, the *Crumpler* court understood that permitting

petitioners to keep their "local safety member" classification retroactively would also impose additional liabilities on the pension system. The *Crumpler* court felt this would have "no harmful effect upon any specific public policy or interest which would result from invoking estoppel in the instant case where pension rights of a public employee are involved."

(*Crumpler, supra*, at 584.)

In sum, the *Crumpler* court (i) found that petitioners held a classification they were not entitled to under the PERL, but (ii) also found that they had long relied on the incorrect representations (from their employer and from CalPERS acting in privity with the employer) and would be harmed if they were reclassified retroactively as of the date they each entered employment, (iii) estopped CalPERS and petitioners' employer from reclassifying them retroactively; and (iv) permitted the petitioners to accrue the benefits attributable to their (wrongful or non-statutory) safety classification. The court permitted reclassification from the point of discovery forward.

V. **A Reasonable Standard for Determining When Estoppel Should Apply to CalPERS**

Appellants do not seek to impose strict liability on CalPERS for every representation that it makes to its 1.5 million Members. However, where the misrepresentations are wrong, long-standing, consistent and cause great harm to the Member or contracting agency that reasonably

relies on them, we truly are presented with one of those " 'exceptional cases' where 'justice and right require' that the government be bound by an equitable estoppel" as the Supreme Court opined in *City of Long Beach v. Mansell, supra*, at p. 501.

In the instant case, Chaidez is entitled to estop CalPERS from denying its representation of a reasonable benefit, even if that benefit is in excess of the PERL. *Crumpler's* "road map" resolves any conflict between (i) CalPERS' assertion that it has no authority on its own to exceed statutory PERL limitations, and (ii) the imposition of equitable estoppel, especially in a neutral adjudicatory proceeding.

CalPERS remains subject to judicial oversight (*Board of Retirement v. Santa Barbara County Grand Jury* (1997) 58 Cal.App.4th 1185), and such oversight includes the imposition of equitable estoppel when that is the only means to hold CalPERS accountable for its actions. As suggested in Appellants' Opening Brief, this is an appropriate sanction against CalPERS:

(1) Where a Member's reliance on CalPERS' statements or lack of accurate disclosure by the Member requesting estoppel has been reasonable and believable;

(2) Where CalPERS' failure to accurately and timely inform the Member has occurred over a significant period of time;

(3) Where the Member did not know or could not reasonably be

expected to have known that the information supplied by CalPERS was false;

(4) Where the Member has incurred significant damages, loss, or diminution because he or she has relied on the information provided by CalPERS (or relied on CalPERS' failure to provide accurate information) to the Member's detriment or harm; and

(5) Where circumstances make it unfair for the Member to bear the loss arising from decisions that he or she made based on CalPERS' disclosures or failure to disclose – for example, because the Member is at the end of his or her working career, has already retired, or has otherwise taken irrevocable action in reliance on CalPERS' advice or failure to disclose relevant information.

Thus, the *Crumpler* plaintiffs had their harm mitigated by permitting them to keep their safety classifications for all of their past service (and to collect higher pension benefits based on that classification once they retired), but the court also permitted CalPERS to reclassify plaintiffs in accordance with the mandates of the PERL going forward.

At minimum, Chaidez should receive the same treatment: He should be entitled to have his pension allowance calculated based on his highest earnings (the \$7,374 per month salary he earned as City Manager) for all service credit up to the time when CalPERS finally notified him of the existence and impact of Section 20039. At most, Section 20039 should

apply to pension calculations for the balance of his City Council service credit from the point he was first informed of its existence and impact (November 26, 2006 at the earliest) until the end of his CalPERS career.

This solution promotes public policy by (i) encouraging CalPERS to provide correct information, (ii) encouraging Members to rely on the information, and (iii) compelling CalPERS to bear the burden of its mistake up to the time of discovery.

VI. CalPERS' Constitutional and Fiduciary Duties

In an effort to escape its "fiduciary duty to provide timely and accurate information to its members" and be subject to the imposition of estoppel when it has grossly failed to do so, CalPERS cites to the cases of *City of San Diego v. San Diego City Employee's Retirement System* (2010) 186 Cal.App.4th 69 and *Westly v. California Public Employees' Retirement System Bd. of Administration* (2003) 105 Cal.App.4th 1095. Both cases are inapposite to the issues in this appeal. In brief, CalPERS relies on cases that do not recite estoppel to deny that estoppel applies.

The issue in *Westly* was whether CalPERS had authority to exempt its employees from civil service and issue its own warrants. Steve Westly, the state Controller at the time, contended CalPERS exceeded its authority to manage the assets of the pension system. While the issue of estoppel was raised in the opinion, it was in the context of discussing CalPERS' assertion of affirmative defenses of laches and waiver on grounds the Controller had

not previously objected to CalPERS' conduct. In that context, the Appellate Court made the statement that "neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public" (citing to *County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 826) and went on to say "[w]e will not recognize equitable defenses where the plaintiff in an official capacity seeks equitable relief on behalf of the citizens of this state". Estoppel apparently was never raised by CalPERS and thus has no relevance to the issues in this appeal.

The issue of estoppel against the pension system and the underlying conduct leading to such a remedy also played no role in the *City of San Diego* case. The issue was whether the SDCERS (the County retirement system) could charge the City of San Diego for underfunding in the plan caused by SDCERS' own failure to properly price "air time" optional service benefits. The enabling legislation mandated that the pricing was to be "cost neutral" with the employee purchasers paying the full cost of all expected pension increases resulting from the purchases. (*City of San Diego, supra*, at 73-74.)

After discovery that the prices set were apparently too low to cover the projected pension increases once purchasers retired, SDCERS increased the purchase price but granted employees a 60-day window to buy "air time" at the old rates. However, the SDCERS board voted to delay

implementing the cost increase for 60 days, allowing employees to continue to purchase service credits during that time using the old pricing methodology. As a result, more years of "air time" were purchased during the 60-day window than had been purchased in the previous six years since the program began. (*Id.* at 76.)

In that context, the Appellate Court looked at the limits of SDCERS' plenary authority. The court found that SDCERS could not bill the City of San Diego when the enabling city legislation explicitly mandated that the cost of the "air time" benefits be borne entirely by the employees. Nevertheless, the City of San Diego on its own agreed to honor all of the prior underfunded "air time" purchase agreements up to the point at which the City filed the petition challenging SDCERS.

It is true that the granting of retirement benefits is a legislative action and it is not within a retirement system's authority to expand pension benefits beyond those afforded by the authorizing legislation. The scope of the board's power as to benefits is limited to administering the benefits set by the Legislature (or city). The SDCERS' decision to charge the City of San Diego for the shortfall in funding "air time" purchases was in violation of the law and thus exceeded SDCERS' power. (*Id.* at 79-80.)

However, a close reading of the facts of that case reveals that estoppel was applied in fact. While the court ruled that SDCERS could not charge San Diego for the system's errors, the court did not void all the

contracts with the individuals. As a better analogy to Chaidez, the court did not void the purchase contracts at all, even those in the "60 day window". In fact, the City accepted the service credit purchases, especially of retired Members, from July 2002, to August 15, 2007, even though recognizing that the undercharging was creating an unfunded liability.

So in reality, the retirement system did create a benefit in excess of statute, and San Diego implicitly or explicitly recognized estoppel when it chose only to target the benefit increases of those not yet retired at the time that it filed its legal challenge.¹² (Id. at 77.)

¹² From *City of San Diego, supra*:

In a board meeting held in July 2002 SDCERS' then-administrator, Larry Grissom, commented that underpricing of the PSC program costs to employees was creating an unfunded liability that San Diego was not supposed to bear: ... "But now we are aware of this problem it seems like it is our fiduciary duty to fix it [be]cause every time somebody signs a purchase of service contract, or almost every time it seems like, we're increasing the liability to the plan sponsor, which isn't right. And the Board doesn't have the authority to allow subsidizing for the member's purchase.... [W]e need to fix the bleeding."

In August 2002 the board directed its actuary to evaluate whether the PSC rate structure set in 1997 reflected the current employer and employee costs of the benefit. The actuary completed his study in August 2003 and recommended to the board the rates be adjusted upwards to 27 percent for general member employees and 37 percent for safety member employees....."

SDCERS board member Terri Webster understood the fact the PSC was not cost neutral to the City. In a July 16, 2003 e-

petitioners to keep their "safety" classification and benefits for their respective past periods of employment and thus be eligible for enhanced retirement benefits earned by safety employees *that technically speaking they were not entitled to.*

Nonetheless, the court found that it could "discern no harmful effect upon any specific public policy or interest which would result from invoking estoppel in the instant case where pension rights of a public employee are involved. We conclude the board is estopped from reclassifying petitioners *nunc pro tunc* as of the date of their initial membership in the system." (*Crumpler, supra*, at 584.)

As for CalPERS' allegation that the remedy sought by Appellants will provide Chaidez with a windfall based on "pension spiking" or cause "unfunded liabilities" (RB, p. 27), the City of Hawaiian Gardens (the agency ultimately responsible for covering the expenses of Chaidez's pension) is affirmatively appealing CalPERS' decision with full knowledge that it may be required to make additional contributions in the future with respect to the obligation that it understood it undertook. Moreover, any adjustment in the funds necessary to pay out the larger pension amount will be amortized by CalPERS over 30 years. Looking at any one time, whether the pension system or a particular fund is currently underfunded or "super funded" is a matter of market forces, investments, as well as speculation.

In any event, the *Crumpler* court understood that permitting

benefit of those people who were not retired at the time that it challenged the underpriced benefits.

CalPERS argues that the "board does not have a duty to inform a member of a benefit to which they are not entitled or to disregard or ignore the law." (RB, p. 18.) But CalPERS admits it does have the duty to adequately inform a Member-beneficiary about the benefit to which he or she is entitled. *City of San Diego* shows that once a retirement system advises members that a benefit is underpriced (which is what occurred when SDCERS raised the purchase price of "air time" but allowed members a 60-day window to buy at the old, lower price), anyone who purchases from that point forward would *not* be entitled to estoppel.

In Chaidez's case, Chaidez did not know that he was working under a bifurcated pension formula. CalPERS informed him that his pension formula was as he expected. CalPERS failed to adequately inform Chaidez and misinformed Chaidez about his eventual pension benefits, much as San Diego failed to inform the pre-August 2003 buyers that they were underfunding the benefit.

In other words, Chaidez is more similar to the retired members in San Diego for whom the city agreed (and the court authorized) payment of the "air time" benefits, even though they turned out to be underfunded. Chaidez is dissimilar from the active San Diego members who bought an

underpriced benefit during the 60-day window after being fully informed that the benefit was underpriced.

Plenary Authority. A final word on plenary authority: CalPERS cites both *City of San Diego* and *Westly* for the proposition that CalPERS' plenary authority only allows it to manage the benefits of the system within the four corners of the literal language of the PERL. This is no different than the argument that CalPERS can never be estopped so long as it asserts its actions are required by the PERL, which is nothing less than a *de facto* overturning of *Crumpler* by administrative fiat.

VII. CalPERS' Mandatory Duties, Damages Arising from Breach of Mandatory Duties

Containing the word "shall", CalPERS' statutory and constitutional fiduciary duties are mandatory. CalPERS ignores that that the beneficiary of the mandatory duties is the individual Member. A fiduciary duty must have a beneficiary. A fiduciary/trustee cannot have a duty to itself, or to the corpus; it must have a duty to a beneficiary.

Referring to the 1992 amendment to the *California Constitution* specifying that "[a] retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty" (*California Constitution, Art. XVI, §17*), CalPERS argues that "any mandate it might create would be to require the Board to give precedent to its duty to participants and beneficiaries of the system. There has been no evidence in

this case that the Board acted contrary to this duty." (RB, pp. 39-40.)

CalPERS fails to recognize that its *Election* to benefits contract and other communications did not inform Chaidez in a timely and accurate manner that his pension would be bifurcated. This is a breach of its mandatory fiduciary duties. That breach or failure to inform is a breach of its mandatory duties that gave rise to the damage that Chaidez and the City suffered.

The fiduciary duties are "designed" to protect against the particular kind of injury the plaintiff suffered. The plaintiff must show the injury is "one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty." (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 939, fn. omitted; *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499.)

Clearly, a fiduciary duty imposes the obligation to properly inform the beneficiary. Injuries arising from failure to inform are sought to be prevented by imposing fiduciary duties. If not, then the fiduciary duty is not owed to the Member (who suffered the injury), but rather to the corpus. But if the duty is owed to the corpus, then it is not a fiduciary duty, it is a managerial or investment duty.

Once dissected, CalPERS essentially takes the position that the mandatory duties only apply to managing the assets, not to informing the individual Member. CalPERS cannot argue that it does not have "a duty to

provide timely and *accurate* information to its members" (*City of Oakland, supra*), because that would make CalPERS unaccountable.

In essence, CalPERS is arguing for a half fiduciary duty, where as long it holds the assets in trust, it can treat the putative beneficiaries of the trust in any way that it wants without liability or consequence. But that it not a fiduciary duty .

The case law and statutes cited above shows that an essential required part of fiduciary duties is providing timely and accurate information to the beneficiaries of the nature of their interest in the trust.

In other words, providing timely and accurate information to the beneficiaries is "*obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken." (*Haggis, supra*, citing to *Morris v. County of Marin* (1977) 18 Cal.3d 901, 907.)

CalPERS seeks an explicit private right of action in the statute. However, the language of the statute creating the duty is not required to explicitly create a private right of action.

When an enactment establishes a mandatory governmental duty and is designed to protect against the particular kind of injury the plaintiff suffered, section 815.6 provides that the public entity "is liable" for an injury proximately caused by its negligent failure to discharge the duty. *It is section 815.6, not the predicate enactment, that creates the private right of action.* If the predicate enactment is of a type that supplies the elements of liability under section 815.6—if it places the public entity under an obligatory duty to act or refrain from

acting, with the purpose of preventing the specific type of injury that occurred—then liability lies against the agency under section 815.6, regardless of whether private recovery liability would have been permitted, in the absence of section 815.6, under the predicate enactment alone. (See *Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 125–126, 62 Cal.Rptr.2d 620 [distinguishing between use of enactment directly to establish private right of action, which requires legislative intent to create such a right, and use of enactment to establish one or more elements of a preexisting, independent cause of action, which does not require legislative intent to create a cause of action in the predicate enactment].) *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499-500 [93 Cal.Rptr.2d 327, 333, 993 P.2d 983, 988]

The effect of CalPERS' breach of its mandatory duty to provide accurate and timely information is directly involved in Chaidez's loss. It is not incidental either to the purpose of the fiduciary duty, the legislative purpose, or the cause of the damage. In this case, creating liability associated with the failure to provide timely and accurate information would not provide any disincentive to provide information, it would align CalPERS' interests more closely with the Members.

CONCLUSION

CalPERS bears a fiduciary duty to timely and accurately inform a Member about issues related to his or her pension rights.

Equitable estoppel against government is rare, but necessary at times. In this case, Chaidez and the City are requesting the Court, in reliance on *Crumpler, supra*, to uphold and give meaning to CalPERS' duties by estopping CalPERS from denying its prior representations and

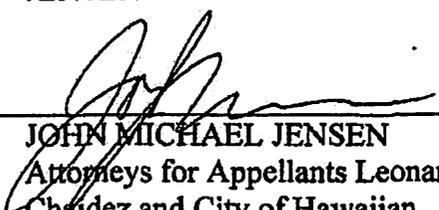
compelling CalPERS to provide Chaidez with a pension based on his
higher compensation multiplied by all of his years of service.

Respectfully submitted.

Dated: March 8, 2012

LAW OFFICES OF JOHN MICHAEL
JENSEN

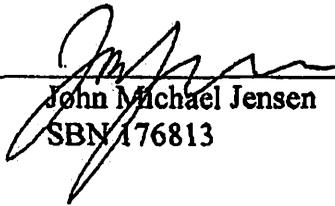
By: _____


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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 13,861 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By _____


John Michael Jensen
SBN 176813

EXHIBITS (per C.R.C., Rule 8.204(d))

a. [§ 199] Balancing Approach WestlawNext

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RELATED TOPICS

- Nature and Essentials
- Estoppel of Government Agency

a. [§ 199] Balancing Approach Wilkin, Summary 10th (2005) Equity 5 199, p. 540
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 Chapter XIX. Equity
 IX. EQUITABLE ESTOPPEL
 B. Estoppel Against Governmental Agency.
 2. Estoppel Upheld.

a. [§ 199] Balancing Approach.

Subject to recognized exceptions (*supra*, §198 at seq.), the estoppel doctrine is now applied freely against the state, its subdivisions, and other governmental agencies. (See *United States Fidelity & Guaranty Co. v. State Bd. of Equalization* (1956) 47 C.2d 384, 388, 303 P.2d 1034; *Shoban v. Board of Trustees of Desert Center Unified School Dist.* (1989) 278 C.A.2d 534, 542, 81 C.R. 112; *Crumpler v. Board of Administration* p.541>> *Public Employees' Retirement System* (1973) 32 C.A.3d 567, 579, 108 C.R. 293; *Housing Authority of Los Angeles v. Los Angeles* (1953) 40 C.2d 882, 891, 256 P.2d 4 [concurring opinion]; *Strong v. Santa Cruz* (1975) 15 C.3d 720, 725, 125 C.R. 896, 543 P.2d 264 [rule recognized, but evidence was insufficient to support finding of estoppel]; *Advance Med. Diagnostic Laboratories v. Los Angeles* (1976) 58 C.A.3d 263, 273, 129 C.R. 723; *Canfield v. Prod* (1977) 87 C.A.3d 722, 731, 137 C.R. 27 [failure of Director of Department of Benefit Payments to inform plaintiff of her status and obligation to pay employer's tax; elements were established]; *Baillargeon v. Department of Water & Power* (1977) 69 C.A.3d 670, 679, 138 C.R. 338; *Killian v. San Francisco* (1978) 77 C.A.3d 1, 13, 16, 18, 143 C.R. 430, citing the text; *Fullerton Union High School Dist. v. Riles* (1983) 139 C.A.3d 369, 378, 188 C.R. 897 [reviewing cases and holding that doctrine was applicable]; *In re Marriage of Smith* (1989) 209 C.A.3d 196, 203, 204, 257 C.R. 47 [county, as assignee of mother's claim against father for unpaid child support, was subject to estoppel defense that father could raise against mother concerning preassignment arrearages]; *Emma Corp. v. Inglewood Unified School Dist.* (2004) 114 C.A.4th 1018, 1031, 8 C.R.3d 213 [following *Fullerton Union High School Dist.*; school district deliberately misled bidder on school construction contract into failing to correct mistaken bid]; 50 Cal. L. Rev. 542; 29 *Hastings L. J.* 648 [zoning]; 42 *So. Cal. L. Rev.* 391; 28 *Am.Jur.2d* (2000 ed.), Estoppel and Waiver §138 et seq.)

In *Long Beach v. Mansell* (1970) 3 C.3d 462, 496, 91 C.R. 23, 476 P.2d 423, the court observed that the doctrine may be applied against the government "where justice and right require it"; but it will not be applied where this would nullify a strong rule of policy adopted for the benefit of the public; and "[t]he tension between these twin principles makes up the doctrinal context in which concrete cases are decided." (3 C.3d 493.) "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 against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (3 C.3d 496.) (See *Kieffer v. Spencer* (1984) 153 C.A.3d 954, 963, 200 C.R. 755 [quoting *Mansell*]; *Lentz v. McMahon* (1989) 49 C.3d 393, 400, 281 C.R. 310, 777 P.2d 83, *infra*, §201 [same].)

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RELATED TOPICS

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3d Estoppel and Waiver § 5
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Database updated February 2012
Estoppel and Waiver

Jeffrey A. Schafer, J.D.

I. Equitable Estoppel
B. Application of Doctrine

Topic Summary Correlation Table References

§ 5. Availability against governmental entities

West's Key Number Digest

West's Key Number Digest, Estoppel 62.1 to 62.5

Whether an estoppel may be invoked against a governmental entity is generally to be tested by the same rules that apply to private individuals.¹ In particular, the government will be bound by an equitable estoppel in the same manner as a private party if the elements requisite to an estoppel against a private party are present and if, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect on the public interest or policy that would result from the raising of the estoppel.² Furthermore, the executive branch of government is not the only one of the three branches that may find its interest in conflict with the interest of a litigant, such that it might be estopped from pursuing that interest to the litigant's detriment. Thus, the doctrine may be applied against the judicial branch.³

However, estoppel will not be invoked against the government or its agencies except in rare and unusual circumstances.⁴ Although estoppel may be asserted against the government where justice and right require it, it will not be applied against the government if to do so would effectively nullify a strong rule of policy adopted for the benefit of the public,⁵ or would contravene directly any statutory or constitutional limitations.⁶ In short, the doctrine of equitable estoppel ordinarily will not apply against a governmental body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy.⁷ Thus, in addition to the elements of a claim of equitable estoppel against a private party, when the claim is asserted against the government an additional element requires the party asserting the estoppel to demonstrate that the injury to his or her personal interests if the government is not estopped exceeds the injury to the public interest if the government is estopped.⁸

For purposes of estoppel, the acts of one public agency will bind another public agency only when there is privity, or an identity of interests between the agencies.⁹ A public agency may not avoid estoppel by privity on the ground that the conduct that gave rise to the estoppel was committed by an independent public entity.¹⁰ However, where a governmental entity is involved, the proof necessary for estoppel includes proof of an agency relationship between the governmental entity to be estopped and the person or entity that made the act or omission on which the estoppel is based; such a relationship is not established simply because two separate governmental entities each have responsibilities under a particular statutory scheme.¹¹ Also, estoppel against a government agency is barred where the agency to be estopped does not possess the authority to do what it appeared to be doing;¹² in no event will estoppel operate where the act or contract relied on to create the estoppel is outside the corporate powers of the governmental agencies or officials.¹³ An estoppel also cannot be invoked to enlarge the

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power of a public agency,¹⁴ or public officer,¹⁵ or to defeat the effective operation of a policy or statute adopted for the protection of the public.¹⁶

In determining whether an estoppel may be raised against a public agency, an important consideration is the degree of culpability or negligence of the public agency or its representatives in their conduct or advice and the seriousness of the impact or effect of that conduct or advice on the party claiming estoppel.¹⁷

CUMULATIVE SUPPLEMENT

Cases:

Equitable estoppel will not apply against a governmental body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy. *City of Goleta v. Superior Court*, 52 Cal. Rptr. 3d 114 (Cal. 2006).

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 against a private party are present and, in the considered view of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel. *Pamar v. Board of Equalization*, 198 Cal. App. 4th 705, 2011 WL 2323288 (2d Dist. 2011).

The doctrine of estoppel is available against the government where justice and right require it. *Doe v. California Dept. of Justice*, 173 Cal. App. 4th 1095, 2009 WL 1234886 (4th Dist. 2009).

Estoppel does not apply when enforcement of a stipulation would be contrary to the Legislature's plain directive, would entail a serious risk to public safety, and where the party seeking estoppel did not detrimentally rely on the position advanced by the public entity below. *People v. Castillo*, 170 Cal. App. 4th 1156, 89 Cal. Rptr. 3d 71 (2d Dist. 2009).

While the doctrine of equitable estoppel may be applied against the government where justice and right require, it will not be applied if doing so would effectively nullify a strong rule of policy, adopted for the benefit of the public. In re *Social Services Payment Cases*, 166 Cal. App. 4th 1249, 83 Cal. Rptr. 3d 434 (2d Dist. 2008).

If the elements of estoppel are established against the government, the court must then balance the burden on the party asserting estoppel if the doctrine is not applied against the public policy that would be affected by the estoppel. In re *Social Services Payment Cases*, 166 Cal. App. 4th 1249, 83 Cal. Rptr. 3d 434 (2d Dist. 2008).

A government agency may be bound by an equitable estoppel only if the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel. *County of Humboldt v. McKee*, 165 Cal. App. 4th 1476, 82 Cal. Rptr. 3d 38 (1st Dist. 2008), opinion modified on denial of reh'g, *County of Humboldt v. McKee*, 2008 WL 4151595 (Cal. App. 1st Dist. 2008).

An estoppel will not be applied against the government if to do so would effectively nullify a strong rule of policy, adopted for the benefit of the public. *Golden Gate Water Ski Club v. County of Contra Costa*, 165 Cal. App. 4th 249, 80 Cal. Rptr. 3d 876 (1st Dist. 2008).

County was not barred by laches from ordering demolition and removal of residential dwelling units and docks on island, 35 years after it first notified water skiing club of violations of county land use ordinances, since application of laches would nullify the important policy, adopted for the public benefit, of preserving open space. *Golden Gate Water Ski Club v. County of Contra Costa*, 165 Cal. App. 4th 249, 80 Cal. Rptr. 3d 876 (1st Dist. 2008).

Neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of

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a policy adopted to protect the public. *Niles Freeman Equipment v. Joseph*, 181 Cal. App. 4th 765, 74 Cal. Rptr. 3d 890 (3d Dist. 2008).

The estoppel doctrine is applicable to government entities where justice and right require it, but correlative to such general rule, estoppel will not be applied against government if to do so would effectively nullify a strong rule of policy, adopted for benefit of the public. *Cotta v. City and County of San Francisco*, 157 Cal. App. 4th 1550, 69 Cal. Rptr. 3d 612 (1st Dist. 2007).

In cases involving estoppel against a public agency, the facts upon which such an estoppel must rest go beyond the ordinary principles of estoppel and each case must be examined carefully and rigidly to be sure that a precedent is not established through which, by favoritism or otherwise, the public interest may be mulcted or public policy defeated. *Poway Royal Mobilehome Owners Ass'n v. City of Poway*, 149 Cal. App. 4th 1460, 58 Cal. Rptr. 3d 153 (4th Dist. 2007).

A public agency is subject to estoppel from the assertion of either the time limits for filing tort claims, or the statute of limitations on a cause of action. *Jordan v. City of Sacramento*, 148 Cal. App. 4th 1487, 56 Cal. Rptr. 3d 641 (3d Dist. 2007), as modified, (Apr. 11, 2007).

Where estoppel is sought against the government, the question whether estoppel should apply is not solely a question of fact; whether the injustice that would result from a failure to uphold an estoppel is of sufficient dimension to justify the effect of the estoppel on the public interest must be decided by considering the matter from the point of view of a court of equity. *Feduniak v. California Coastal Com'n.* 148 Cal. App. 4th 1346, 56 Cal. Rptr. 3d 591 (6th Dist. 2007).

Estoppel may be applied against the government where justice and right require it; however, courts will not apply estoppel to a public agency if the result will be the frustration of a strong public policy. *Phelps v. State Water Resources Control Bd.*, 68 Cal. Rptr. 3d 350 (Cal. App. 3d Dist. 2007).

Public policy must be considered where a party raises estoppel to prevent enforcement of environmental statutes. *Phelps v. State Water Resources Control Bd.*, 68 Cal. Rptr. 3d 350 (Cal. App. 3d Dist. 2007).

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 against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel. *City and County of San Francisco v. Ballard*, 39 Cal. Rptr. 3d 1 (Cal. App. 1st Dist. 2006).

[END OF SUPPLEMENT]

Footnotes

- 1 *Strong v. County of Santa Cruz*, 15 Cal. 3d 720, 125 Cal. Rptr. 896, 543 P.2d 264 (1975); *Longshore v. County of Ventura*, 25 Cal. 3d 14, 157 Cal. Rptr. 706, 598 P.2d 866 (1979); *Sagaser v. McCarthy*, 178 Cal. App. 3d 288, 221 Cal. Rptr. 746 (5th Dist. 1986).

A.L.R. Library

Comment Note.—Applicability of doctrine of estoppel against government and its governmental agencies, 1 A.L.R.2d 338.

- 2 *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 91 Cal. Rptr. 23, 476 P.2d 423 (1970); *County of Los Angeles v. City of Alhambra*, 27 Cal. 3d 184, 165 Cal. Rptr. 440, 612 P.2d 24 (1980); *Lentz v. McMahon*, 49 Cal. 3d 393, 261 Cal. Rptr. 310, 777 P.2d 83 (1989); *Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.*, 112 Cal. App. 4th 864, 5 Cal. Rptr. 3d 834 (2d Dist. 2003), as modified, (Nov. 4, 2003).

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As to the requisite elements of equitable estoppel, see §§ 7 et seq.

- 3 *Greene v. State Farm Fire & Casualty Co.*, 224 Cal. App. 3d 1583, 274 Cal. Rptr. 736 (1st Dist. 1990).
- 4 *City of Santa Cruz v. Pacific Gas & Elec. Co.*, 82 Cal. App. 4th 1167, 99 Cal. Rptr. 2d 198 (6th Dist. 2000).
- 5 *Lentz v. McMahon*, 49 Cal. 3d 393, 261 Cal. Rptr. 310, 777 P.2d 83 (1989); *Escondido Union School Dist. v. Casa Sueños De Oro, Inc.*, 129 Cal. App. 4th 944, 29 Cal. Rptr. 3d 89 (4th Dist. 2005).
- 6 *Transamerica Occidental Life Ins. Co. v. State Bd. of Equalization*, 232 Cal. App. 3d 1048, 284 Cal. Rptr. 9 (2d Dist. 1991); *In re Joshua G.*, 129 Cal. App. 4th 189, 28 Cal. Rptr. 3d 213 (4th Dist. 2005).
- 7 *Hughes v. Board of Architectural Examiners*, 17 Cal. 4th 763, 72 Cal. Rptr. 2d 624, 952 P.2d 641 (1998).
- 8 *Stewart v. City of Pismo Beach*, 35 Cal. App. 4th 1600, 42 Cal. Rptr. 2d 382 (2d Dist. 1995); *Golden Day Schools, Inc. v. Department of Education*, 69 Cal. App. 4th 881, 81 Cal. Rptr. 2d 758, 131 Ed. Law Rep. 808 (3d Dist. 1999).

As to the elements of equitable estoppel, see §§ 7 et seq.

- 9 *Lusardi Construction Co. v. Aubry*, 1 Cal. 4th 976, 4 Cal. Rptr. 2d 837, 824 P.2d 843 (1992).
- 10 *Crumpler v. Board of Administration*, 32 Cal. App. 3d 567, 108 Cal. Rptr. 293 (4th Dist. 1973); *Hartway v. State Board of Control*, 69 Cal. App. 3d 502, 137 Cal. Rptr. 199 (1st Dist. 1976).
- 11 *Moore v. State Bd. of Control*, 112 Cal. App. 4th 371, 5 Cal. Rptr. 3d 116 (3d Dist. 2003), review denied, (Dec. 23, 2003).
- 12 *Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.*, 112 Cal. App. 4th 884, 5 Cal. Rptr. 3d 634 (2d Dist. 2003), as modified, (Nov. 4, 2003).
- 13 *City of Santa Cruz v. Pacific Gas & Elec. Co.*, 82 Cal. App. 4th 1167, 99 Cal. Rptr. 2d 198 (6th Dist. 2000).
- 14 *Merco Const. Engineers, Inc. v. Los Angeles Unified School Dist. of Los Angeles County*, 274 Cal. App. 2d 154, 79 Cal. Rptr. 23 (2d Dist. 1969); *A. J. Settling Co. v. Trustees of Cal. State University & Colleges*, 119 Cal. App. 3d 374, 174 Cal. Rptr. 43 (2d Dist. 1981).
- 15 *A. J. Settling Co. v. Trustees of Cal. State University & Colleges*, 119 Cal. App. 3d 374, 174 Cal. Rptr. 43 (2d Dist. 1981).
- 16 *State of California v. Superior Court (Fogerty)*, 29 Cal. 3d 240, 172 Cal. Rptr. 713, 825 P.2d 256 (1981); *Smith v. Governing Bd. of Elk Grove Unified School Dist.*, 120 Cal. App. 4th 583, 16 Cal. Rptr. 3d 1, 189 Ed. Law Rep. 814 (3d Dist. 2004), review denied, (Sept. 29, 2004).
- 17 *Canfield v. Prod.*, 67 Cal. App. 3d 722, 137 Cal. Rptr. 27 (1st Dist. 1977); *Lee v. Board of Administration*, 130 Cal. App. 3d 122, 181 Cal. Rptr. 754 (3d Dist. 1982); *Berlin v. McMahon*, 26 Cal. App. 4th 66, 31 Cal. Rptr. 2d 427 (2d Dist. 1994).

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 9, 2012, at Los Angeles, California.


Griselda Montes de Oca