ATTACHMENT C

RESPONDENT'S ARGUMENT

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THOMAS J. WICKE, ESQ., SBN: 86747
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE, LLP
20750 Ventura Boulevard, Suite 400
Woodland Hills, CA 91364-2338
(818) 703-6000
(818) 703-0200 Fax

Attorneys for Respondent
SUSAN STOCKHAMMER

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BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

SUSAN STOCKHAMMER, Respondent, vs. CALIFORNIA STATE UNIVERSITY, FULLERTON; CALIFORNIA STATE UNIVERSITY, DOMINGUEZ HILLS; LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	**Agency Case No. 2013-1036** **RESPONDENT'S ARGUMENT** **Hearing Date: September 30, 2014** **Administrative Law Judge,** **The Honorable Joseph David Montoya**

I.

INTRODUCTION

On September 30, 2014 Respondent, Susan Stockhammer, appeared before Administrative Law Judge Joseph D. Montoya in her request to establish reciprocity between the California State Teacher's Retirement System (hereinafter "CalSTRS"), and California Public Employees' Retirement System, (hereinafter "CalPERS"). CalPERS was represented by Senior Staff Attorney, Wesley Kennedy.

By cover letter dated January 6, 2015, Judge Montoya's Decision was forwarded to Respondent Stockhammer. Judge Montoya denied Ms. Stockhammer's request to purchase service credit with CalPERS to establish reciprocity between CalPERS and CalSTRS.

Ms. Stockhammer inadvertently failed to timely provide proper documentation to CalPERS. An inadvertence or excusable neglect must not preclude Ms. Stockhammer from

Feb/3/2015 3:06:27 PM Lewis, Marenstein, Wicke, Sher 818-703-0200 2/8

purchasing additional CalPERS service credit to establish reciprocity. [Government Code Section 20160].

II.

FACTS OF CASE

Ms. Stockhammer worked 38 years as a Teacher contributing both to CalSTRS and CalPERS. Turning age 72, she contemplated retirement and contacted CalSTRS, her last employer, for purposes of consultation. During the consultation she learned of her right to redeposit her prior service credit with CalPERS. On the same day of meeting with a CalSTRS counselor, she also met with a CalPERS representative for purposes of initiating a request to redeposit funds into the CalPERS system.

By May 9, 2012, nearly two months prior to retirement, CalPERS was provided a document by Ms. Stockhammer's requesting the costs to purchase service credit. [Exhibit R2]

Since she was retiring on July 1, 2012 and had not heard anything she immediately, by June 28, 2012, faxed to CalPERS an urgent request to act upon her request for purchasing of service credit or in the alternative to extend the period of time to allow her to complete the necessary paperwork. Within five days of her fax, she contacted a union representative, Mr. Bradford, to make inquiries in her behalf. Mr. David Bradford contacted Board Member George Diehr for purposes of obtaining additional information. As a result of these communications, Ms. Stockhammer learned there was an installation of a new system within CalPERS and there was a , a "terrible backlog", of requests to purchase prior service credit but to be "assured" that her request was in the "queue". [Exhibit R7, R8].

A CalPERS representative testified at the administrative hearing and indicated a cost package was sent to Ms. Stockhammer by cover letter dated August 17, 2012. Within two weeks and on October 1, 2012, Ms. Stockhammer completed the "Election to Purchase Service Credit" the initiating document for purposes of obtaining service credit. [Exhibit R11]. Later, Ms. Stockhammer also completed her choice for payment through an installment payment option of $287.35 to be paid over 180 months.

Unfortunately, Ms. Stockhammer failed to timely return the correct forms which were due 60 days from August 17, 2012 or October 16, 2012. Ms. Stockhammer returned the forms 28 days late on November 13, 2012 due to her inadvertence. As Ms. Stockhammer explained at her hearing, she was inundated with various forms from CalPERS, CalSTRS, Social Security, Kaiser Permanente, and Medi-Care. Additionally, she contracted bronchitis and the flu. Her energy had been diminished and she even canceled a trip to Seattle and lost her airfare purchase. Ms. Stockhammer testified that it was an inadvertence and mistake that she did not return the documents timely or 28 days late.

The CalPERS representative who testified in this matter indicated that the 60 day limitation is not a "hard and fast rule". Exceptions can be made. The representative further testified that she personally receives hundreds of requests for redeposit and purchase of service credit forms. No direct contact was made to Ms. Stockhammer from her or anyone else from CalPERS concerning the completion of the paperwork, the appropriate documents, or the timeliness.

After submission of the documents, Ms. Stockhammer did not hear anything for the months of November, December and January. By February 2013, she made further inquiries with CalPERS and learned by March 2013 that her request had been denied, and she was sent a second cost package. Later, CalPERS determined the second cost package was sent in error.

III.

ISSUE

Whether Ms. Stockhammer's late filing of service credit purchase documents occurred as a result or inadvertence or excusable neglect pursuant to Government Code Section 20160?

IV.

THE PROPOSED DECISION FAILS TO CONSIDER INADVERTENCE AND EXCUSABLE NEGLECT.

As a music teacher, Ms. Stockhammer was unfamiliar with the details of retiring from CalSTRS. Having met with CalSTRS she learned about the option of reciprocity with CalPERS for purposes of increasing her monthly pension allowance. The process of purchasing service

credit was overwhelming, confusing and complex for Ms. Stockhammer. While she recognizes the error in submitting documents late, nevertheless, she completed the appropriate documents timely (October 1, 2012), but simply failed to return them timely and did so merely 28 days late. Ms. Stockhammer recognizes her errors, but seeks equitable relief pursuant to Government Code Section 20160 with **the statutory interpretation to be viewed in the fiduciary relationship between CalPERS and its members.** Judge Montoya does not discuss the fiduciary relationship as Stockhammer presented to him in her Closing Brief.

Not only case law but the California Constitution sets forth the obligation of CalPERS to its members. Article XVI, Section 17, **Public Pension or Retirement System** states in pertinent part:

> "(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, for the exclusive purpose of providing benefits to, participants and beneficiaries,** minimizing employer contributions thereto, and defraying reasonable expenses of administrating the system. **A Retirement Board's duty to its participants and their beneficiaries shall take precedence over any other duty."** [Emphasis added]

As early as 1985 and prior to the passage of the constitutional mandate, the California Supreme Court in Hittle v. Santa Barbara County Employees' Retirement System (1985) 39 Cal. 3d 374, at p. 393 states in pertinent part:

> **"We believe that courts must be vigilant in protecting the rights of the pensioner against powerful and distant administrators; the relationship should be one in which the administrator exercises towards the pensioner a fiduciary duty of good faith and fair dealing."** [Emphasis added]

The undisputed facts in this case are that at no time did CalPERS contact Stockhammer for purposes of correcting or clarifying forms and documents that were required on a timely basis. While Ms. Stockhammer recognizes the volume of work required of CalPERS, nevertheless, overwork does not excuse the failure to adequately and correctly communicate with its members.

Government Code Section 20160 states in pertinent part:

> "(a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just...correct the errors or omissions of an active or retired member, of any beneficiary of an

active or retired member, provided that all of the following facts exist:

(2) The error of omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in **Section 473 of the Code of Civil Procedure.**

With the backdrop of the fiduciary relationship, Government Code Section 20160 must be broadly interpreted for the benefit of Ms. Stockhammer. Judge Montoya at page 7 states:

"(B) This case is cited by Complainant, interpreting Code of Civil Procedure section 473, are apposite [sic] to this case, and establish that respondent has failed to carry her burden of showing that her failure to timely file an election to make the redeposit was a result of mistake, inadvertence, surprise, or excusable neglect."

Ms. Stockhammer relied upon the general principles of excusable neglect and inadvertence for failing to timely return her election forms. Ms. Stockhammer cited Alderman v. Jacobs (1954) 128 Cal. App. 2d 273 where the court defined "inadvertence" as well as "excusable neglect" as found in Code of Civil Procedure Section 473. Specifically, at page 276 the court stated:

"A party or his legal representative may be relieved from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect (Code Civ. Proc. Section 473.) **Inadvertence is a lack of heedfulness or attentiveness, inattention, fault from negligence. Excusable neglect is that neglect which might have been the act of a reasonable prudent person under the same circumstances."** [citation omitted] [Emphasis added].

With CalPERS' representative testifying that the 60 day rule was "not hard and fast" and Ms. Stockhammer completing the election forms timely on October 1, 2012 but forgetting to return that form timely, is clearly "inattention".

Judge Montoya cites Davis v. Fayer (1980) 113. Cal. App. 3d 892, involved a default judgment for a complaint of restitution and damages in a commodity transaction. After the default judgment against the defendants, a motion was made to set aside the judgment pursuant to Code of Civil Procedure 473. Judge Montoya relies upon Davis for the proposition that no evidence was presented at his hearing as to the flu or bronchitis symptoms that Ms. Stockhammer was experiencing. Ms. Stockhammer's position, simply put, is it was not only her illness that was a reason for the 28 day delay, but also the additional paperwork which needed to be completed associated with her other medical benefits and CalSTRS documents. **Most importantly,**

Feb/3/2015 3:06:27 PM Lewis, Marenstein, Wicke, Sher 818-703-0200 8/8

however, is the relief from default in Davis is found in an adversarial proceeding in a Superior Court. Ms. Stockhammer's case is brought through administrative hearing procedures and within the confines of CalPERS fiduciary responsibility to Stockhammer.

Judge Montoya's reliance upon Kim v. Westmoore Partners, Inc. (2011) 201 Cal. App. 4th, 267, 280-281 offers no further assistance by discussing anxiety, depression and financial hardships which again are primarily medically related.

V.

CONCLUSION

Admittedly, Ms. Stockhammer was inattentive and made a mistake. However, her intentions were always to obtain reciprocity with CalPERS and purchase her prior service credit. Her actions as early as April 2012 indicate her intent. Her submission of documents prior to her retirement date of July 1, 2012 indicate her intent. Completing the Election to Purchase Service Credit before the due date of October 16, 2012 but mailing forms 28 days late is further intent to complete the purchase.

At no time did CalPERS advise Ms. Stockhammer she completed the incorrect forms. With the heavy CalPERS workload, the failure to contact Ms. Stockhammer was understandable. **However, workload does not excuse CalPERS' fiduciary duty to its members.**

Ms. Stockhammer requests the CalPERS Board not adopt Administrative Law Judge Montoya's Decision and find that her actions were inadvertent, inattentive and excused pursuant to Government Code Section 20160. Ms. Stockhammer requests the opportunity to purchase her prior CalPERS service credit.

DATED: February 3, 2015

Respectfully submitted,

LEWIS, MARENSTEIN, WICKE,
SHERWIN & LEE, LLP

By: Thomas J. Wicke

THOMAS J. WICKE
Attorneys for Respondent
SUSAN STOCKHAMMER

Feb/3/2015 3:08:27 PM Lewis, Marenstein, Wicke, Sher 818-703-0200 7/8

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 20750 Ventura Boulevard, Suite 400, Woodland Hills, CA 91364-2338.

On February 3, 2015, I served true copies of the following document(s) described as **RESPONDENT'S ARGUMENT** on the interested parties in this action as follows:

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701
Also sent via fax to:
(916) 795-3972

Susan Stockhammer
[redacted]

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Lewis, Marenstein, Wicke, Sherwin & Lee, LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Woodland Hills, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 3, 2015, at Woodland Hills, California.

Terry Hernandez

Terry Hernandez