



**Westly v. California Public Employees' Retirement System Bd. of Administration**  
Court of Appeal, Third District, California. | January 30, 2003 | 105 Cal.App.4th 1095 | 130  
Cal.Rptr.2d 149

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## Outline

West Headnotes  
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Distinguished by People ex rel. Department of Conservation v.  
El Dorado County, Cal.App. 3 Dist., May 9, 2003

105 Cal.App.4th 1095  
Court of Appeal, Third District, California.

Steve WESTLY, as Controller, etc., Plaintiff and  
Appellant,

v.  
CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM BOARD OF  
ADMINISTRATION et al., Defendants and  
Appellants.

No. C039686. | Jan. 30, 2003. | As Modified on  
Denial of Rehearing Feb. 25, 2003. | Review Denied  
April 23, 2003.

State Controller brought action for declaratory and injunctive relief against the Board of Administration for the California Public Employees' Retirement System (CalPERS), challenging Board's assertion of plenary authority to exempt its employees from civil service, to bypass the Controller's duty to issue warrants for the pay of employees, and to issue stipends, salaries, and other payments in excess of amounts permitted by statute. The Superior Court, Sacramento County, No. 01AS00633, Charles C. Kobayashi, J., sustained Board's demurrer as to cause of action challenging Board's authority to exempt its portfolio managers from civil service, but otherwise granted Controller's motion for judgment on the pleadings. Board appealed, and Controller cross-appealed. The Court of Appeal, Blease, Acting P.J., held that: (1) Controller had standing to challenge Board's authority to exempt its portfolio managers from civil service; (2) Board's "plenary authority" under State Constitution did not include Board's challenged actions; (3) motion for judgment on the pleadings was appropriate method to resolve Controller's claims; and (4) doctrines of waiver and laches did not bar Controller's claims.

Overruled in part; affirmed as modified.

West Headnotes (22)

<sup>[1]</sup> **Declaratory Judgment**  
State or state officers

118A Declaratory Judgment

118AIII Proceedings  
118AIII(C) Parties  
118Ak302 Government or Officers as Parties  
118Ak303 State or state officers

State Controller had standing, in action for declaratory and injunctive relief, to challenge authority of the Board of Administration for the California Public Employees' Retirement System (CalPERS) to exempt its portfolio managers from civil service; statute provided Controller, as head of a state department, with authority to prosecute actions concerning matters related to business activities and subjects under the department's jurisdiction, and Board's actions constituted an attempt to bypass Controller's authority to issue warrants and audit and pay state employees through a uniform payroll system. West's Ann. Cal. Const. Art. 16, § 17; West's Ann. Cal. Gov. Code §§ 11180, 12410 et seq.

2 Cases that cite this headnote

<sup>[2]</sup> **States**  
Administration of finances in general

360 States  
360IV Fiscal Management, Public Debt, and Securities  
360k121 Administration of finances in general

State Controller has the power, indeed the duty, to ensure that the decisions of an agency that affect expenditures are within the fundamental jurisdiction of the agency.

Cases that cite this headnote

<sup>[3]</sup> **Administrative Law and Procedure**  
Statutory basis and limitation

15A Administrative Law and Procedure  
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents  
15AIV(A) In General  
15Ak303 Powers in General  
15Ak305 Statutory basis and limitation

An attempt by an administrative agency to exercise control over matters which the Legislature has not seen fit to delegate to it is not authorized by law and in such case the agency's actions can have no force or effect.

1 Cases that cite this headnote

[4]

**Declaratory Judgment**

Termination or settlement of controversy

- 118A Declaratory Judgment
- 118AI Nature and Grounds in General
- 118AI(A) In General
- 118Ak8 Termination or settlement of controversy

A declaratory judgment properly may be sought as a prophylactic measure to resolve a dispute.

Cases that cite this headnote

[5]

**Officers and Public Employees**

Offices, employments or appointments affected

**Officers and Public Employees**

Compensation and Fees

**Officers and Public Employees**

Allowance and recovery of compensation

- 283 Officers and Public Employees
- 283I Appointment, Qualification, and Tenure
- 283I(B) Appointment
- 283k11 Restrictions of Civil Service Laws or Rules
- 283k11.1 Offices, employments or appointments affected
- 283 Officers and Public Employees
- 283III Rights, Powers, Duties, and Liabilities
- 283k93 Compensation and Fees
- 283k94 In general
- 283 Officers and Public Employees
- 283III Rights, Powers, Duties, and Liabilities
- 283k93 Compensation and Fees
- 283k101 Allowance and recovery of compensation

"Plenary authority" granted by the State Constitution to the Board of Administration for the California Public Employees' Retirement System (CalPERS) does not include exclusive power to set the salaries of its employees, to

determine their civil service status, to determine the amount to reimburse its members and its members' employers, and to pay its employees without a warrant from or the review of the State Controller; Board cannot evade the laws that limit the pay of the Board and its employees, that specify the employees exempt from civil service, and that authorize the Controller to issue warrants and audit their legality. West's Ann.Cal. Const. Art. 7, §§ 1, 4; Art. 16, § 17; West's Ann.Cal.Gov. Code §§ 18800, 20091, 20092.

1 Cases that cite this headnote

[6]

**Statutes**

Construction and operation of initiated statutes

- 361 Statutes
- 361XII Submission to Popular Vote
- 361XII(B) Initiative
- 361k1760 Construction and operation of initiated statutes (Formerly 361k325)

The rules of statutory construction are the same for initiative enactments as for legislative enactments.

Cases that cite this headnote

[7]

**Statutes**

Construction and operation of initiated statutes

- 361 Statutes
- 361XII Submission to Popular Vote
- 361XII(B) Initiative
- 361k1760 Construction and operation of initiated statutes (Formerly 361k325)

When construing initiative enactments, the goal is to determine and effectuate voter intent.

1 Cases that cite this headnote

<sup>[8]</sup> **Statutes**  
Construction and operation of initiated statutes

361 Statutes  
361XII Submission to Popular Vote  
361XII(B) Initiative  
361k1760 Construction and operation of initiated statutes  
(Formerly 361k325)

When construing initiative enactments, a court is directed to look to the language of the enactment first, giving the words their usual and ordinary meaning; only if the statutory language is susceptible of more than one reasonable interpretation does the court resort to extrinsic evidence to determine the intent of the voters.

1 Cases that cite this headnote

<sup>[9]</sup> **Officers and Public Employees**  
Pensions and Benefits

283 Officers and Public Employees  
283IIIRights, Powers, Duties, and Liabilities  
283k93 Compensation and Fees  
283k101.5 Pensions and Benefits  
283k101.5(1) In general

“Plenary authority” granted by the State Constitution to the Board of Administration for the California Public Employees’ Retirement System (CalPERS) is limited to actuarial services and to the protection and delivery of the assets, benefits, and services for which the Board has a fiduciary responsibility. West’s Ann.Cal. Const. Art. 16, § 17.

4 Cases that cite this headnote

<sup>[10]</sup> **Officers and Public Employees**  
Compensation and Fees  
**Officers and Public Employees**  
Pensions and Benefits

283 Officers and Public Employees  
283IIIRights, Powers, Duties, and Liabilities  
283k93 Compensation and Fees  
283k94 In general  
283 Officers and Public Employees  
283IIIRights, Powers, Duties, and Liabilities  
283k93 Compensation and Fees  
283k101.5 Pensions and Benefits  
283k101.5(1) In general

The voter intent behind initiative which amended State Constitution to give the Board of Administration for the California Public Employees’ Retirement System (CalPERS) “plenary authority” over “administration of the system” was to give the Board the authority to administer the investments, payments, and other services of CalPERS, but not the compensation of the Board or the Board’s employees. West’s Ann.Cal. Const. Art. 16, § 17.

2 Cases that cite this headnote

<sup>[11]</sup> **Officers and Public Employees**  
Offices, employments or appointments affected

283 Officers and Public Employees  
283I Appointment, Qualification, and Tenure  
283(B) Appointment  
283k11 Restrictions of Civil Service Laws or Rules  
283k11.1 Offices, employments or appointments affected

Board of Administration for the California Public Employees’ Retirement System (CalPERS) did not have authority, under state constitutional provision granting it “plenary authority” over “administration of the system,” to classify its portfolio managers as exempt from civil service; constitutional provision was intended to protect pension funds from interference by Governor or Legislature, not to reach civil service classifications. West’s Ann.Cal. Const. Art. 7, §§ 1, 4; Art. 16, § 17.

Cases that cite this headnote

<sup>[12]</sup> **Officers and Public Employees**  
Pensions and Benefits

283Officers and Public Employees  
283IIIRights, Powers, Duties, and Liabilities  
283k93Compensation and Fees  
283k101.5Pensions and Benefits  
283k101.5(1)In general

Purpose of constitutional amendments granting the Board of Administration for the California Public Employees' Retirement System (CalPERS) "plenary authority" over "administration of the system" is to protect pension funds from interference by the Governor or the Legislature. West's Ann.Cal. Const. Art. 16, § 17.

3 Cases that cite this headnote

briefing regarding Controller's declaratory judgment cause of action alleging that CalPERS's classification of portfolio managers as employees exempt from civil service violated state constitutional provision concerning exemption from civil service, although issue allegedly was not proposed or briefed by either party, because cause of action was based upon issue thoroughly briefed by both parties, namely, the nature and scope of CalPERS's plenary authority over administration of retirement system. West's Ann.Cal. Const. Art. 7, § 4; Art. 16, § 17; West's Ann.Cal.Gov. Code § 68081.

6 Cases that cite this headnote

<sup>[13]</sup> **Appeal and Error**  
In action tried by court or referee

30Appeal and Error  
30XVIIIDetermination and Disposition of Cause  
30XVII(D)Reversal  
30k1176Directing Judgment in Lower Court  
30k1176(4)In action tried by court or referee

Court of Appeal may direct trial court to enter judgment where facts are undisputed and proper judgment is apparent from the record as a matter of law. West's Ann.Cal.C.C.P. § 43.

Cases that cite this headnote

<sup>[15]</sup> **Declaratory Judgment**  
Motions in general

118ADeclaratory Judgment  
118AIIIProceedings  
118AIII(D)Pleading  
118Ak326Motions in general

Motion for judgment on the pleadings was appropriate method to resolve State Controller's claims for declaratory and injunctive relief, which challenged authority of the Board of Administration for the California Public Employees' Retirement System (CalPERS) to exempt its employees from civil service, to bypass the Controller's duty to issue warrants for the pay of employees, and to issue stipends, salaries, and other payments in excess of amounts permitted by statute; Controller's complaint raised an issue that was purely a question of law, and there was no need to evaluate reasonableness of Board's actions. West's Ann.Cal. Const. Art. 16, § 17.

1 Cases that cite this headnote

<sup>[14]</sup> **Declaratory Judgment**  
Appeal and Error

118ADeclaratory Judgment  
118AIIIProceedings  
118AIII(H)Appeal and Error  
118Ak392Appeal and Error  
118Ak392.1In general

Court of Appeal was not required to give state Controller and Board of Administration for the California Public Employees' Retirement System (CalPERS) opportunity for supplemental

<sup>[16]</sup> **Pleading**  
Judgment on Pleadings

302Pleading  
302XVIMotions

302k342 Judgment on Pleadings  
302k343 In general

A motion for judgment on the pleadings is analogous to a general demurrer.

Cases that cite this headnote

[17] **Officers and Public Employees**  
☞ Pensions and Benefits

283 Officers and Public Employees  
283 III Rights, Powers, Duties, and Liabilities  
283k93 Compensation and Fees  
283k101.5 Pensions and Benefits  
283k101.5(1) In general

State constitutional provision granting the Board of Administration for the California Public Employees' Retirement System (CalPERS) "plenary authority" over the "administration of the system" did not impliedly repeal statutes concerning authority of the State Controller and Department of Personnel Administration (DPA) or the statutes limiting the pay of the Board's members for attending meetings and limiting reimbursement amounts for Board members; payment of Board staff according to civil service laws, payment of members under reimbursement limits, and payment of release time reimbursements under existing allowable amounts did not prevent realization of objectives behind the constitutional provision. West's Ann.Cal. Const. Art. 16, § 17; West's Ann.Cal.Gov.Code §§ 1153, 12470, 19816, 19820(a), 19825, 19826, 20091, 20092.

1 Cases that cite this headnote

[18] **Officers and Public Employees**  
☞ Allowance and recovery of compensation  
**Officers and Public Employees**  
☞ Pensions and Benefits

283 Officers and Public Employees  
283 III Rights, Powers, Duties, and Liabilities  
283k93 Compensation and Fees  
283k101 Allowance and recovery of compensation  
283 Officers and Public Employees

283 III Rights, Powers, Duties, and Liabilities  
283k93 Compensation and Fees  
283k101.5 Pensions and Benefits  
283k101.5(1) In general

Funds of the California Public Employees' Retirement System (CalPERS) are state funds, and thus approval by the Department of Personnel Administration (DPA) and a warrant from the State Controller are required before the funds can be paid out as salaries for employees of CalPERS, even though State Constitution grants Board plenary authority over the investment and management of PERS funds. West's Ann.Cal. Const. Art. 16, § 17; West's Ann.Cal.Gov.Code § 12320.

Cases that cite this headnote

[19] **States**  
☞ Funds and contributions

360 States  
360 II Government and Officers  
360k56 Compensation of Officers, Agents and Employees  
360k64.1 Retirement and Incidental Benefits  
360k64.1(4) Funds and contributions

Retirement benefits are contractual obligations of the state and if the California Public Employees' Retirement System (CalPERS) fund is insufficient to pay the benefits owed to state employees, the state is obligated to pay the money to pensioners from other sources.

Cases that cite this headnote

[20] **Estoppel**  
☞ Particular state officers, agencies or proceedings  
**States**  
☞ Time to sue, limitations, and laches

156 Estoppel  
156 III Equitable Estoppel  
156 III(A) Nature and Essentials in General  
156k62 Estoppel Against Public, Government, or Public Officers

156k62.2States and United States  
156k62.2(2)Particular state officers, agencies or proceedings  
360States  
360VIActions  
360k201Time to sue, limitations, and laches

State Controller was not precluded, under either doctrines of waiver or laches, from challenging practices of the Board of Administration for the California Public Employees' Retirement System (CalPERS) in exceeding statutory limits for travel reimbursements and "release time" reimbursements for Board members and employees, although Controller had authorized "release time" and travel reimbursements prior to initiation of its lawsuit for declaratory and injunctive relief; acts complained of were in the nature of ongoing wrongs, and neither laches nor waiver could bar claim that future payments would be unlawful. West's Ann.Cal.Gov.Code §§ 19820, 20092.

Cases that cite this headnote

118AIII(G)Judgment  
118Ak385Declaratory relief

Portion of judgment declaring that Board of Administration for the California Public Employees' Retirement System (CalPERS) was subject to specified statutes concerning authority of the State Controller and Department of Personnel Administration (DPA) or the statutes limiting the pay of the Board's members for attending meetings and limiting reimbursement amounts for Board members was necessary to judgment and, thus, would not be stricken, where State Controller had specifically requested a judicial declaration that State Constitution did not authorize Board's disregard of state law and regulations, and provision at issue provided reasoning for injunction that followed. West's Ann.Cal. Const. Art. 16, § 17; West's Ann.Cal.Gov.Code §§ 1153, 12470, 19816, 19820(a), 19825, 19826, 20091, 20092.

Cases that cite this headnote

[21]

**Estoppel**

Estoppel Against Public, Government, or Public Officers

156Estoppel  
156IIIEquitable Estoppel  
156III(A)Nature and Essentials in General  
156k62Estoppel Against Public, Government, or Public Officers  
156k62.1In general

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.

Cases that cite this headnote

**Attorneys and Law Firms**

**\*\*152 \*1098** Remcho, Johansen & Purcell, Joseph Remcho, Robin B. Johansen, James C. Harrison, San Francisco, & Miguel Marquez; Strumwasser & Woocher, Fredric D. Woocher, and Michael J. Strumwasser, Santa Monica, for Plaintiff and Appellant.

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Kathy M. Katano-Lee, Oakland, for Alameda County Employees' Retirement Association; Steefel, Levitt & Weiss, Harvey L. Leiderman, San Francisco, Ashley K. Dunning for Board of Retirement of Orange County Employees' Retirement System; **\*1099** Christopher W. Waddell for California State Teachers' Retirement System as Amici Curiae on behalf of Defendants, Appellants and Respondents.

**Opinion**

BLEASE, Acting P.J.

[22]

**Declaratory Judgment**

Declaratory relief

118ADeclaratory Judgment  
118AIIIProceedings

At issue is the meaning of the provision of article XVI, section 17 of the California Constitution (Art. XVI, § 17), that grants the Board of Administration (the Board) of the California Public Employees' Retirement System (CalPERS) "plenary authority ... for ... administration of the system...."

Art. XVI, § 17 provides in pertinent 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 fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following:...."

**\*\*153** The state Controller,<sup>1</sup> challenges the Board's<sup>2</sup> assertion of plenary authority to exempt its employees from civil service, to bypass the Controller's duty to issue warrants for the pay of employees, and to issue stipends, salaries, and other payments in excess of the amounts permitted by the Government Code.<sup>3</sup>

The trial court granted the Controller's motion for judgment on the pleadings on all but the sixth cause of action, which challenges the Board's authority to exempt its portfolio managers from the civil service provisions of the California Constitution.

We will affirm the judgment with the exception that, unlike the trial court, we find the Controller has standing to raise the sixth cause of action because the Controller has the right to issue warrants and audit payments to ensure an expenditure is authorized by law.

The primary purposes of Art. XVI, § 17 are to grant retirement boards the sole and exclusive power over the management and investment **\*1100** of public pension funds and to ensure that the assets of public pension systems are used to provide benefits and services to participants efficiently and promptly. The authority claimed by the Board is not within these purposes.<sup>4</sup>

We conclude the Board does not have plenary authority to evade the law that limits the pay of the Board and its employees, that specifies the employees exempt from civil service, and that authorizes the Controller to issue warrants and audit their legality.

## FACTUAL AND PROCEDURAL BACKGROUND

The voters enacted the challenged provision as an amendment to Article XVI, section 17, in 1992. The backdrop against which the amendment was enacted involved actions by the Governor and Legislature to balance the state budget by limiting or delaying the state's employer contributions to CalPERS.

For example, in 1982 legislation was enacted to bar the state from making a contribution for a portion of that year and to require the shortfall to be made up from the CalPERS reserve against deficiencies. (*Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 655, 6 Cal.Rptr.2d 77.) Until 1990, the state paid employer contributions on a monthly basis. (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1119, 61 Cal.Rptr.2d 207.) In 1990, the Legislature changed the payment schedule from monthly to quarterly. In 1991, the Legislature temporarily changed the payment schedule from quarterly to semiannually. In 1992 legislation "changed the schedule to 'semiannually, six months in arrears.' Legislation in 1993 changed the schedule to 'annually, 12 months in arrears.'" (*Id.* at p. 1117, 61 Cal.Rptr.2d 207.) In 1991, legislation was passed to repeal statutes providing for cost of living benefits to retirees, and to use these funds to meet the state's employer contribution requirement. **\*\*154** (*Claypool v. Wilson, supra*, at pp. 657-658, 6 Cal.Rptr.2d 77.) Also in 1991, legislation was passed transferring the actuarial function to the Governor. (*Id.* at p. 658, 6 Cal.Rptr.2d 77.)

Under the "California Pension Protection Act of 1992 (enacted by passage of Proposition 162)," Art. XVI, § 17, was amended to grant retirement boards' "plenary authority and fiduciary responsibility for **\*1101** investment of moneys and administration of the system...."<sup>6</sup> The amendment is subject to the subdivisions which follow and the law, as **\*1102** enacted, to a statement of "Purpose and Intent"<sup>7</sup> and **\*\*155** to "Findings and Declarations."<sup>8</sup>

Claiming plenary authority under Art. XVI, § 17, the Board engaged in a series of administrative actions that conflict with constitutional and statutory authority.

**\*1103** Contrary to article VII, section 4 of the California Constitution, which limits the employees exempt from civil service to one deputy or employee selected by the Board, and contrary to section 20208, which classifies personnel with investment expertise as civil service employees, the Board exempted at least 10 portfolio

managers from civil service. Contrary to article XVI, section 7, and the uniform payroll provisions of section 12470, the Board issued its own warrants for the pay of its portfolio managers. Contrary to section 20091, which limits the compensation of Board members for attendance at Board meetings to \$100, the Board increased the compensation to \$400 per meeting. Contrary to section 19820, subdivision (a), which limits travel reimbursements for Board members and employees, as determined by the Department of Personnel Administration (DPA), the Board adopted an expense reimbursement policy that exceeded its amounts. Contrary to section 20092, which limits the amount the Board may reimburse a member's employing agency (known as "release time" reimbursements) to 25 percent of the member's **\*\*156** annual compensation, the Board increased the reimbursement rates beyond 25 percent.

Article VII, section 1 of the California Constitution provides that every employee of the state is a civil service employee, unless exempted. Section 4 exempts one deputy or employee selected by each board or commission. Contrary to these provisions, and section 20208, the Board classified at least 10 portfolio managers as exempt from the civil service system. Contrary to section 19826, which directs the DPA to establish salary ranges for civil service classifications, the Board set the salaries for its portfolio managers at an amount in excess of that approved by the DPA.

Finally, in order to pay its portfolio managers increased salaries in the face of the DPA's and the Controller's refusals to process the increases, the Board developed its own payroll system by which it paid the managers directly from the retirement system trust funds. This action was contrary to article XVI, section 7 of the California Constitution, which provides the Controller must issue all warrants for money drawn from the state treasury, and section 12470, which directs the Controller to operate a uniform payroll system for all state agencies.

The Controller filed this declaratory and injunctive relief action. The Board demurred to the sixth cause of action which challenged the Board's exemption of its portfolio managers from civil service on the ground the Controller has no standing to raise the issue. The trial court sustained the Board's demurrer to the sixth cause of action without leave to amend. The Controller cross-appeals from the judgment of the trial court that dismisses this cause of action.

**\*1104** The Controller moved for judgment on the pleadings on the remaining causes of action. The trial court granted the motion and entered judgment in the

Controller's favor. The trial court's ruling states in part that "the existing case law and the background materials, particularly the ballot arguments, clearly indicate that the voters had intended to stop the raiding of the pension funds, not to grant the defendants unlimited authority to ignore state laws governing state employees."

This appeal followed.<sup>9</sup>

## DISCUSSION

### I

#### Standing to Raise the Sixth Cause of Action

<sup>[1]</sup> We first consider the Controller's standing to raise the issues tendered in the sixth cause of action.

#### A. The Issues

In the sixth cause of action the Controller alleges the Board's classification of 10 portfolio managers as employees exempt from civil service, violates article VII, section 4 of the Constitution and the state civil service laws (§ 18500 et seq.).

The complaint requests a declaration of the Controller's rights and duties without being subject to liability. The Controller asserts liability could attach for failing to superintend the fiscal concerns of the state, failing to audit disbursements from the treasury for correctness and legality (§ 12410), failing to ensure warrants for payment are authorized by law (art. XVI, § 7, § 12470), failing to audit all claims before drawing a warrant (§ 925.6, subd. (a)), failing to abolish vacant civil service positions (§ 12439), and failing to verify that payments of salary to civil servants are proper (§ 19764).

The trial court ruled the Controller had no standing to assert the sixth cause of **\*\*157** action because the Controller's authority is limited to the fiscal governance of the state and no facts were alleged sufficient to establish authority over the civil service classification of the Board's employees. We disagree.

### \*1105 B. Allegations of Fact

The Controller alleged the Board voted to reclassify its portfolio managers as employees exempt from civil service, increase their salaries in excess of the salary range set by the DPA, and pay them directly from the retirement fund in the state treasury without approval by the DPA or the Controller.<sup>10</sup>

The Board's action arose in the following way. The DPA refused to approve the Board's increase in salaries and refused to issue a pay letter to the Controller. In response CalPERS delivered its own pay letter to the Controller, requesting an increase in the salary range for the portfolio managers on the basis it had plenary authority under Art. XVI, § 17 to take this action. The Controller refused to honor the pay letter because it was not approved by the DPA. CalPERS then informed the Controller it had developed its own payroll system and would directly pay the salaries of portfolio managers from the retirement fund in excess of those authorized by their civil service classification.

### C. The Controller's Litigation Authority

Section 11180 provides, "The head of each department may ... prosecute actions concerning: (a) All matters relating to the business activities and subjects under the jurisdiction of the department [and] (b) Violations of any law or rule or order of the department."

The Office of State Controller is a state department and the Controller is the head of the department. (§ 12405.) The thrust of the present action, including the sixth cause of action, concerns the Controller's authority to issue warrants for the pay of state employees, to audit and determine the legality of any claim regarding such pay, including exemption from the civil service laws, and to oversee the uniform payroll system established pursuant to section 12470.

The Constitution provides: "Money may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn \*1106 warrant." (Cal. Const., art. XVI, § 7.) The state treasury contains the Public Employees' Retirement Fund to which state public retirement money must be credited. (§ 20170.) Accordingly, money may be drawn on the retirement fund only by a warrant issued by the Controller.

The statutory jurisdiction of the Controller is set forth in Articles 2 through 5 of Title 2, Division 3, Part 2, Chapter

5 of the Government Code (§ 12410 et seq.). These articles vest the Controller with the responsibility to audit and make payments from the state treasury and to operate a uniform state payroll system for all state agencies.

The Controller is required to audit all claims against the state and all claims for the disbursement of any state money for their correctness, and to determine whether \*\*158 the law supports payment. (§ 12410.)<sup>11</sup> The Controller must abolish civil service positions that are vacant for six consecutive months. (§ 12439.) The Controller must operate a uniform state payroll system for all state agencies, except the University of California and the California State Fair. (§ 12470.)<sup>12</sup> The Public Retirement System is an agency of the state and subject to section 12470 because it is a unit of the State and Consumer Services Agency. (§§ 20002, 12800, 12804.)

<sup>12</sup> <sup>13</sup> "That the Controller has the power, indeed the duty, to ensure that the decisions of an agency that affect expenditures are within the fundamental jurisdiction of the agency is clear." (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1335, 26 Cal.Rptr.2d 666.) "[W]ith respect to the Controller's duties the Legislature has specifically provided that 'a warrant shall not be drawn unless authorized by law....' (§ 12440.) An attempt by an administrative agency to exercise control over matters which the Legislature has not seen fit to delegate to it is not authorized by law and in such case the agency's actions can have no force or effect." (*Ibid.*)

There is no question the Controller has authority to prevent the payment of persons employed by state agencies in violation of the civil service system. In both \*1107 *Stockburger v. Riley* (1937) 21 Cal.App.2d 165, 68 P.2d 741,<sup>13</sup> and *State Compensation Insurance Fund v. Riley* (1937) 9 Cal.2d 126, 69 P.2d 985, the courts upheld the Controller's refusal to pay independent contractors because they were not within the civil service. In *Treu v. Kirkwood* (1954) 42 Cal.2d 602, 268 P.2d 482, the court upheld the Controller's refusal to pay overtime to an employee exempt from civil service.

Normally, the Controller asserts authority over the civil service system by refusing to authorize payment to the person employed in violation of the civil service laws. The Controller's authority to enforce these laws is no less, however, when a state agency attempts to do indirectly what it cannot do directly.

The issue tendered is whether a state agency may bypass the Controller's authority to issue warrants and audit and pay the employees of the state through a uniform payroll system by claiming the employees are not civil service

employees and by setting up its own payroll system. The Controller asks the courts to determine the responsibilities intrinsic to his authority to issue and audit employee payments.

By bringing this action in declaratory relief, the Controller seeks not to infringe on the jurisdiction of the DPA to enforce the civil service statutes, but to enforce the Controller's authority to audit the disbursement of any state money for its legality and correctness.

The Board cites *Tirapelle v. Davis, supra*, as authority for the argument the Controller has no standing to challenge the classification of a state employee as a civil service employee. The Board misreads *Tirapelle*.

*Tirapelle* concerned a mandate proceeding to review the Controller's refusal to \*\*159 implement salary reductions established by the DPA for employees exempt from civil service. As appropriate to a mandate proceeding, the court held the Controller has both ministerial and discretionary authority. The Controller has ministerial authority when the amount of an expenditure is set by law or entrusted to the discretion of another agency. (20 Cal.App.4th at p. 1329, 26 Cal.Rptr.2d 666.) The Controller has discretionary authority when the facts must be determined as necessary to establish the validity of a claim. (*ibid.*)

*Tirapelle* held the Controller had ministerial authority over an award of salary because the "power of approval and the administration of salaries of \*1108 exempt employees" was vested in the DPA. (*Id.* at p. 1339, 26 Cal.Rptr.2d 666.) Since the Controller could point to no law authorizing the payment of higher salaries, it was not authorized to fix those salaries at a higher level. (*Id.* at p. 1332, 26 Cal.Rptr.2d 666.)

However, *Tirapelle* also said, "Our decision is without prejudice to the right of the Controller, in the exercise of his statutory duties ... to determine whether the DPA lacked fundamental authority with respect to any specific salary claim." (20 Cal.App.4th at p. 1341, 26 Cal.Rptr.2d 666.) The court thus recognized the Controller's right to determine whether the DPA has authority to set the salary ranges for civil service employees and, incident to that determination, the right to determine whether the Board may exempt its employees from the civil service provisions of the state constitution. (§ 19826.)

In the present case, there is no law that grants the Board the right to set the salaries of its portfolio managers except for its interpretation of Art. XVI, § 17, the very provision at issue in this case. Rather, the Board is

directed by statute to classify its employees who possess investment expertise as civil service employees. It may contract outside of state service only for "necessary investment expertise" upon the approval of the DPA, if the expertise "is not available within existing civil service classifications...." (§ 20208.) The portfolio managers are employees who possess investment expertise and for that reason are within the civil service.

This action, including the sixth cause of action, is fundamentally about the Controller's right to determine whether the Board's actions comply with the law. Just as there was no question the Controller would have had standing to litigate the Controller's authority and the DPA's authority in *Tirapelle*, had it initiated the action, there is no question the Controller has standing to litigate the authority of the Board to exempt its employees from civil service, to bypass the Controller's authority to issue warrants and otherwise to exempt its actions from the Controller's review of the legality of any payment from the Treasury.

<sup>141</sup> The complaint sought declaratory relief to resolve the disputed issue whether the CalPERS employees are within the civil service. A declaratory judgment properly may be sought as a prophylactic measure to resolve a dispute. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 898, 123 Cal.Rptr.2d 432, 51 P.3d 297.) That includes the civil service status of the Board's portfolio managers.

The trial court erred in sustaining the Board's demurrer to the Controller's sixth cause of action.

\*1109 II

#### The Plenary Authority of the Board

<sup>151</sup> The Board claims the "plenary authority" that Art. XVI, § 17 grants it over the "administration of the system" includes the exclusive power to set the salaries of its employees, to determine their civil service status, to determine the amount to reimburse its members and its members' employers, and to pay its employees without a warrant from or the review of the Controller. We disagree.

\*\*160 A.

### Conflict with Statutes

The Board claims Art. XVI, § 17 conflicts with and, as the paramount law, supercedes statutes that inter alia authorize the DPA to adopt classes and salary ranges for each position within state civil service (§ 18800), that limit the pay of the Board's members for attending meetings (§ 20091), and that limit the amount a Board member's employing agency may be reimbursed for the time each member spends carrying out his or her duties as a Board member (§ 20092). The claim presents a question of constitutional law involving the construction of Art. XVI, § 17.

<sup>[6] [7]</sup> The rules of statutory construction are the same for initiative enactments as for legislative enactments. (*Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 622, 111 Cal.Rptr.2d 918.) The goal is to determine and effectuate voter intent. (*Ibid.*) To do this we interpret the phrase "administration of the system" in Art. XVI, § 17, within the context of the subsequent conditions and the statement of purposes and intent and findings which are a part of its enactment.

<sup>[8]</sup> We are directed to look to the language of the enactment first, giving the words their usual and ordinary meaning. (*Williams v. Superior Court, supra*, at p. 623, 111 Cal.Rptr.2d 918.) Only if the statutory language is susceptible of more than one reasonable interpretation do we resort to extrinsic evidence to determine the intent of the voters. (*Ibid.*) We start with the language of Art. XVI, § 17. The Board is granted "plenary authority" over the "administration of the system" in the initial paragraph of the amendments to Art. XVI, § 17. (See fn. 6, *ante.*) The paragraph is made "subject to all" of the subdivisions that follow. The subdivisions serve to limit and define the authority and responsibility granted in the initial paragraph.

\*1110 In Article XVI, section 17, subdivision (a), the analogous phrase "administer the system" appears. It provides the board "shall ... 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." (Italics added.) It is preceded by a provision granting to the Board "the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system...." In this context, the "plenary authority" that is granted over the "administration of the system" goes to the management of the assets and their delivery to members and beneficiaries of the system, not the remuneration of those who administer it.

By contrast, Article XVI, section 17, subdivision (f)

concerns the powers of the Board. It provides the Legislature may not modify the "number, terms, and method of selection or removal of members of the retirement board...." It says nothing about the remuneration of the Board or its employees. The retirement board also is given exclusive power over actuarial services in subdivision (e). "The retirement board of a public pension or retirement system ... shall have the sole and exclusive power to provide for actuarial services...." The remaining subdivisions concern the Board's discharge of its duty to efficiently manage its assets and to provide benefits to its members.

<sup>[9]</sup> Thus, with regard to administration of the system, the Board's authority is limited to actuarial services and to the protection and delivery of the assets, benefits, and services for which the Board has a fiduciary responsibility. No such power is given over the administration of the matters at issue here.

The initiative by which the amendments to Art. XVI, § 17 were enacted contains a statement of purpose and intent and declarations and findings. (See fns. 6, 7 & 8, *ante.*)

The express "purpose and intent" of the amendments to Art. XVI, § 17, as set \*\*161 forth in Section 3 of the initiative (fn. 7, *ante*), is to "give the sole and exclusive power over the management and investment of public pension *funds* to the retirement board's selected or appointed for that purpose, to strictly limit the Legislature's power over such *funds*, and to prohibit the Governor or any executive or legislative body of any political subdivision of this state from tampering with public pension *funds*." (Italics added.) (See fn. 7, *ante.*)

The remaining declarations of purpose reinforce the intent of the measure to protect pension *funds* by giving pension boards the authority to administer the funds without interference. Thus, the measure expresses the intent to "protect pension funds," to protect against tax increases that would result \*1111 "if state and local politicians are permitted to divert public pension funds" and to "ensure that the assets of public pension systems are used exclusively for the purpose of ... providing benefits and services to the participants of these systems...." (See fn. 7, *ante.*)

Similarly, five of the eight "[f]indings and [d]eclarations," set forth in Section Two of the initiative fn. 8, *ante*, are concerned with the specter of the political looting of pension funds. (See fn. 8, *ante.*) The three remaining findings concern the selection of a retirement board encroachment on the fiduciary powers, and infringement on the actuarial function. Art. XVI, § 17 specifically

addresses two of the these matters. (Art. XVI, § 17, subds.(e) and (f).)

In keeping with the foregoing, the thrust of the ballot arguments in favor of Art. XVI, § 17 is to prevent the Legislature from “raiding” pension funds. The ballot pamphlet summary states the measure grants the “boards of public employee retirement systems sole authority over investments and administration, including actuarial services.” (Ballot Pamp., Gen. Elec., *supra*, Summary of Prop. 162, p. 6.) The summary argument in favor states that Art. XVI, § 17 would “stop politicians from raiding the pensions of ... public employees.” (Ballot Pamp., Gen. Elec., *supra*, argument in favor of Prop. 162, p. 6.) The claims address the means by which the Legislature on previous occasions had altered its contributions to the retirement system.

The full argument in favor of the initiative warns that politicians would continue to raid the pension funds of retirees unless Art. XVI, § 17 was passed. It complains it was “not right” to allow politicians to “balance their budgets on the backs of seniors and retirees.” The argument makes no mention of the scope of a retirement board’s administrative authority.

The ballot argument against Art. XVI, § 17 claims the Controller has blocked the pay increase of a “bureaucrat,” but would not have the authority to “stop other outrageous salary hikes if Proposition 162 [became] law.” The rebuttal argument states the proposition’s opponents are “trying to mislead the voters.” “The central purpose of this measure is to STOP POLITICIANS FROM USING PUBLIC PENSION FUNDS TO BAIL THEM OUT WHEN THEY FAIL TO KEEP GOVERNMENT SPENDING UNDER CONTROL.” (Orig.emphasis.)

The legislative analyst gives slightly more attention to the issue of a retirement board’s administrative authority under Art. XVI, § 17. It \*1112 recognizes that prior to Art. XVI, § 17, the Constitution specified the general authority of the Board over public pension systems and that within these limits the Legislature could change the administrative functions of public pension systems. Two examples which are given are legislation removing the actuarial function from the Board and placing it under a state actuary appointed by the Governor and confirmed by the Legislature, and legislation allowing the use of CalPERS assets to offset employer contribution costs. Both of these examples \*\*162 relate to administration of the CalPERS assets, not to the administration of personnel matters.

The analyst also states that Art. XVI, § 17 would give

“the board of each public pension system complete authority for administration of the system’s *assets* and for the actuarial function.” (Emphasis added.) The analysis also states Art. XVI, § 17 could have some fiscal impact because it would reduce oversight of the administration of assets. The analysis makes no mention of the administration of anything else.

[10] Thus, the voter intent, evidenced by the published ballot materials, is that Art. XVI, § 17 would give the Board the authority to administer the investments, payments, and other services of CalPERS, but not the compensation of the Board or the Board’s employees.

*Corcoran v. Contra Costa County Employees Retirement Bd.* (1997) 60 Cal.App.4th 89, 70 Cal.Rptr.2d 385 (*Corcoran*), cited by the Board, is inapposite. At issue was whether the Contra Costa County Employees Retirement Board was an agency governed by the county board of supervisors. It arose because the board of supervisors adopted a resolution applying a multiple-tier retirement scheme to “ ‘all officers and employees of all agencies of which this Board [the county board of supervisors] is the governing body.’ ” (*Id.* at p. 91, 70 Cal.Rptr.2d 385.) The court held the county board of supervisors was not the “governing body” of the retirement board, but expressly recognized the employees of the retirement board were part of the civil service system. (*Id.* at p. 94, 70 Cal.Rptr.2d 385.) The court found the employees’ civil service status was immaterial to the resolution of the issue before it because the retirement board appointed, promoted, and discharged its employees and officers. (*Id.* at pp. 94–95, 70 Cal.Rptr.2d 385.)

The issue here is not whether some other entity is the governing body of the Board but whether the Board’s authority over the administration of the system is in conflict with the laws governing state civil service and payment of expenses. *Corcoran, supra*, did not address this issue. (See *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2, 39 Cal.Rptr. 377, 393 P.2d 689, [“an opinion is not authority for a proposition not therein considered”].)

\*1113 Nor are we persuaded by the Board’s argument that Art. XVI, § 17’s prefatory phrase “[n]otwithstanding any other provisions of law or this Constitution to the contrary” expresses the voters’ intended to have Art. XVI, § 17 control over the other provisions of law at issue in this case. The phrase applies only to laws that are “to the contrary.” We have concluded the powers the voters intend to give the Board do not include the exclusive and unfettered authority over payments made to and on behalf of its members and employees.

**B.**

**Civil Service**

As noted, Article VII, section 1 of the California Constitution provides that every officer and employee of the state is included in the civil service system, unless exempted. Section 4 exempts one deputy or employee for each board or commission.

<sup>[11]</sup> The Board claims it has plenary authority under Art. XVI, § 17 to classify its portfolio managers as exempt from civil service. If we accept the Board's position that the civil service law does not apply to it, there is no logical reason why the Board would not have plenary authority over the classification and salary of all of its employees who are not otherwise exempt. It does not.

<sup>[12]</sup> <sup>[13]</sup> <sup>[14]</sup> As discussed above, the purpose of the amendments to Article XVI, § 17 is to protect pension funds from interference by the Governor or the Legislature and there is nothing in it from which **\*\*163** it could be inferred that it reaches civil service classifications.<sup>14</sup>

**\*1114 III**

**Judgment on the Pleadings**

<sup>[15]</sup> The Board argues it was entitled to make a factual showing in the trial court that it was impossible to comply with its fiduciary duties under Art. XVI, § 17, if it followed the constitutional and statutory provisions and regulations at issue.

As noted, subdivision (a), provides the assets of the retirement system are trust funds that shall be used for providing benefits to participants and for defraying the reasonable expenses of administering the system. This provision predated and is not a part of the amendments to Art. XVI, § 17. Prior to this case it had not been thought that this provision limited the powers of the Legislature to set the terms of reasonableness.

Notwithstanding, the Board claims the provision as a limitation upon the Legislature's authority to adopt rules

which limit the pay of the Board and its employees. Accordingly, the Board reasons the trial court should have considered evidence in order to evaluate the reasonableness of the Board's administrative expenditures for itself and its employees.

The Board claims that "as a factual matter, limiting the expenditures at issue to the levels prescribed by statute or regulation would have made it *impossible* for the Board to comply with its fiduciary duties under Section 17." It presents its challenge as an "as applied" challenge requiring the trial court to consider the specific factual circumstances involved.

The Board's analysis is incorrect. It has confused the measure of its power with the reasonableness of its exercise of the power. The rule is first, the application of the rule is second. While Art. XVI, § 17 imposes fiduciary duties upon the Board to provide benefits to participants and their beneficiaries and to minimize the risk of loss and maximize the rate of return, it is obvious these duties must be performed by the Board and its employees within the **\*\*164** applicable law. There was no need for the Board to present evidence of the reasonableness of its decisions with respect to the exercise of a power it does not have.

<sup>[16]</sup> A motion for judgment on the pleadings is analogous to a general demurrer. **\*1115** (*Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 198, 51 Cal.Rptr.2d 622.) To this end we assume the Board could have proven all of the allegations in its answer. (*Ibid*; *Pacific Union Club v. Commercial Union Assur. Co.* (1910) 12 Cal.App. 503, 506, 107 P. 728.) The trial court assumed the Board concluded it was obligated to make the decisions it made in order to comply with its constitutional mandate, just as we assume these facts for purposes of appeal.

The issue here is not whether the Board makes a facial or as applied challenge to those statutes it claims are in conflict with Art. XVI, § 17. The issue is whether the complaint raises an issue that can be resolved as a matter of law. (*In re Guardianship of Olivia J.* (2000) 84 Cal.App.4th 1146, 1155, 101 Cal.Rptr.2d 364; *Magna Development Co. v. Reed* (1964) 228 Cal.App.2d 230, 234, 39 Cal.Rptr. 284; *Estate of Marler* (1957) 148 Cal.App.2d 30, 33-34, 306 P.2d 105.)

The trial court was called upon to interpret Art. XVI, § 17. This is purely a question of law. (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 619, 113 Cal.Rptr.2d 309; *Clemente v. Amundson* (1998) 60 Cal.App.4th 1094, 1102, 70 Cal.Rptr.2d 645.) For reasons

stated above, the trial court properly resolved the matter on the Controller's motion for judgment on the pleadings.

<sup>[17]</sup> Citing *Hustedt v. Workers' Compensation Appeals Bd.* (1981) 30 Cal.3d 329, 343, 178 Cal.Rptr. 801, 636 P.2d 1139,<sup>15</sup> the Board argues that application of the statutes and other provisions at issue would make it impossible to realize the objectives of Art. XVI, § 17; thus Art. XVI, § 17 repealed those provisions insofar as necessary. The board does not state precisely what objectives could not be realized if it followed the constitutional and statutory law, only that it could not then meet its "fiduciary obligations."

As we read Art. XVI, § 17, its objectives are to protect the pension fund and to ensure it is used for providing benefits and services to participants. The payment of Board staff according to existing civil service laws, the payment of members under existing reimbursement limits, and \*1116 payment of release time reimbursements under existing allowable amounts do not prohibit the realization of these objectives.

#### IV

##### CalPERS Funds are State Funds

<sup>[18]</sup> The Board claims that even without Art. XVI, § 17, it has the statutory authority to pay its portfolio managers whatever salaries it deems appropriate. It relies upon section 19825, which states in part:

"Notwithstanding any other provision of law, whenever any state agency is authorized by special or general statute to fix the salary or compensation of an employee or officer, which salary is payable \*\*165 in whole or in part out of state funds, the salary is subject only to the approval of the department [the DPA] before it becomes effective and payable, except as provided in subdivision (b). The Legislature may expressly provide that approval of the department is not required."

The Board claims its portfolio managers are not paid from state funds, but from CalPERS assets. Citing *Valdes v.*

*Cory* (1983) 139 Cal.App.3d 773, 782, 189 Cal.Rptr. 212, the Board argues these assets are trust funds, not state funds. It claims that once the state makes contributions to the CalPERS fund, it gives up any ownership or power of disposition over the fund for purposes of section 19825.

Whatever else the CalPERS fund may be, section 12320 makes clear it is also state money. It provides that "[b]onds, and other securities or investments belonging to the state, except those of the Public Employees' Retirement System and the State Teachers' Retirement System, shall be received by the Treasurer and kept in the vaults of the State Treasury..." If the CalPERS investments are not investments belonging to the state, there would be no need to except them from the operation of section 12320.

<sup>[19]</sup> Moreover, as the Controller points out, retirement benefits are contractual obligations of the state and if the CalPERS fund is insufficient to pay the benefits owed to state employees, the state is obligated to pay the money to pensioners from other sources. (*Valdes v. Cory, supra*, 139 Cal.App.3d at pp. 783-784, 189 Cal.Rptr. 212.) Therefore, the state has a valid reason to ensure that payments from the fund to employees meet the requirements of state law.

The trial court ruled that CalPERS is a part of the state, and because section 16305.2 provides that "[a]ll money in the possession of or collected by any state agency or department ... is ... state money," the CalPERS \*1117 fund is a state fund. The Board argues the "state funds" exception in section 19825 would become meaningless if it included all "money in the possession of or collected by" a state agency or department as provided by section 16305.2. We disagree.

The phrase in section 19825, "which salary is payable in whole or in part out of state funds," is not an exception at all, but simply a recognition the state has no control over salaries it does not fund. We can conceive, and the Legislature could no doubt as well, that an employee could be paid directly from federal or county funds, and that such an employee's salary would not depend on the approval of the DPA.

However, in this case we have money originating from the state's general fund and being held as money "belonging to the state." Notwithstanding the fact the Board has been given plenary authority over the investment and management of the money, it is state money that is at issue, and DPA's approval and the Controller's warrant are necessary before it can be paid out as salaries.

The Board claims the provision of section 20098 that provides in pertinent part that “[t]he board shall appoint and *fix* the compensation of ... other necessary employees” gives the Board the ability to fix the compensation of the portfolio managers. (Italics added.) This argument fails to recognize the operation of section 19825, which applies in cases where an employee’s compensation is fixed by an agency of the state. It provides that “ whenever any state agency is authorized by special or general statute to fix the salary or compensation of an employee or officer,” the salary or compensation is subject to the approval of the DPA.

**\*\*166 V**

#### **Affirmative Defenses**

<sup>[20]</sup> The Board argues we should reverse the judgment as to the issues of reimbursement for “release time” and travel expenses because it raised affirmative defenses of laches and waiver that could not properly be disposed of on the pleadings.

The facts it claims support these affirmative defenses are: (1) the Controller authorized “release time” payments between 1995 and the initiation of this suit; and (2) the Controller authorized reimbursement of travel expenses in excess of the amounts allowed by statute from 1999 to the initiation of this suit.

**\*1118** The Board’s answer alleged merely: “Plaintiff’s claims are barred in whole or in part by the doctrine of waiver,” and “Plaintiff’s causes of action, or some of them, are barred by the doctrine of laches because plaintiff unreasonably delayed bringing suit, causing defendants to reasonably rely on the status quo.”

These affirmative defenses consist of legal conclusions that could survive neither a demurrer nor a motion for judgment on the pleadings. (*Mack v. State Bar of California* (2001) 92 Cal.App.4th 957, 961, 112 Cal.Rptr.2d 341; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384, 282 Cal.Rptr. 508; *Wienke v. Smith* (1918) 179 Cal. 220, 225, 176 P. 42.)

There could be no laches or waiver from the facts the Board asserts in support of its defenses. Just because the Controller has paid reimbursements in the past is not a waiver of the right to refuse to do so in the future if the

action is in violation of the law. There can be no laches as to plaintiff’s suit for declaratory and injunctive relief over the claims for which payment has been refused. The acts complained of here are in the nature of ongoing wrongs. (See *California Trout, Inc., v. State Water Resources Board* (1989) 207 Cal.App.3d 585, 631, 255 Cal.Rptr. 184.) The Board cannot assert that because the Controller raised no legal objection to past violations of the law, the office is forever precluded from bringing an action to prevent future violations of those laws. There can be no laches or waiver where the claim is that future payments would be unlawful.

<sup>[21]</sup> Finally, “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.” (*County of San Diego v. California Water & Tel. Co.* (1947) 30 Cal.2d 817, 826, 186 P.2d 124.) The Controller has brought this action in the official capacity as controller of the State of California, representing the interests of the citizens of the state. The Controller seeks to enforce provisions of the civil service laws and the Public Employees Retirement Law.

The civil service laws were passed to limit corruption and to promote efficiency and economy in state government. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 182, 172 Cal.Rptr. 487, 624 P.2d 1215.) The purpose of the Public Employees Retirement Law is to promote economy and efficiency in government service. (§ 20001.) Both of these schemes are intended to protect the public fisc, thereby protecting the interests of the state’s taxing citizens.

We will not recognize equitable defenses where the plaintiff in an official capacity seeks equitable relief on behalf of the citizens of this state.

**\*1119 VI**

#### **Modification of Judgment**

The Board claims the judgment of the trial court is overbroad and should be **\*\*167** modified by striking paragraphs 2 and 3(f). We shall strike paragraph 3(f) and part of paragraph 2 as unnecessary to the judgment.

The Controller’s complaint requested injunctive and declaratory relief. The trial court declared in paragraph 2

of the judgment that defendants were subject to Government Code sections 1153, 12470, 19816, 19820, subdivision (a), 19825, 19826, 20091, and 20092, as well as the restrictions of article III, section 3.5 of the California Constitution. The trial court also permanently enjoined defendants from acting in such a manner as to violate these statutory and constitutional provisions in paragraph 3 of the judgment.

[22] Paragraph 2 of the judgment provides: "The Court FURTHER DECLARES that defendants are subject to Government Code sections 1153, 12470, 19816, 19820(a), 19825, 19826, 20091 and 20092; and defendants are subject to the restrictions of article III, section 3.5 of the California Constitution." The Board claims paragraph 2 is unnecessary because paragraph 3 relies on the same statutes and provisions to enjoin the Board from acting in the complained-of manner.

Paragraph 2, with one exception, to be addressed *post*, is not unnecessary to the opinion. Paragraph 2 is a direct response to the Controller's seventh cause of action that requested "a judicial determination and declaration that defendant's actions to disregard applicable state law and regulations are not authorized by article XVI, section 17 of the California Constitution. Such a declaration is necessary and appropriate at this time so that [the Controller] may ascertain [his] rights and duties without being subjected to liability for violations of article VII, section 1, and article XVI, section 6 of the California Constitution, Government Code sections 1153, 12470, 19820(a), 20091, 20092, and title 2, section 599.619 of the California Code of Regulations."

Paragraph 2 is thus a specific determination of the allegations in the Controller's seventh cause of action. It also provides the reasoning for the injunction that follows. It is not unnecessary to the judgment.

However, we shall grant the Board's request to strike paragraph 3(f) of the judgment and that portion of paragraph 2 that states, "and defendants are subject to the restrictions of article III, section 3.5 of the California Constitution." Article III, section 3.5 provides that an

administrative agency has no \*1120 power "[t]o declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; [or] ... [t]o declare a statute unconstitutional[.]"

We strike this part of the judgment not because it was unnecessary to the trial court's judgment. It was in fact a separate and independent ground for the judgment. However, because we hold the statutes at issue are not made unconstitutional by Art. XVI, § 17, we need not decide whether the Board must obtain an appellate court ruling on the constitutionality of the statutes at issue. These portions of the judgment are therefore no longer necessary, as the issue is moot.

#### DISPOSITION<sup>6</sup>

The order sustaining the demurrer is overruled and the trial court is directed to enter judgment in favor of the Controller on the sixth cause of action.

\*\*168 The judgment is modified by striking paragraph 3(f) and by deleting the following language from paragraph 2: "; and defendants are subject to the restrictions of article III, section 3.5 of the California Constitution".

In all other respects the judgment is affirmed and our previously issued stay is vacated.

We concur: SIMS and ROBIE, JJ.

#### Parallel Citations

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#### Footnotes

\* Kennard, J., and Moreno, J., dissented.

1 By reason of an election held in November 2002, as of January 1, 2003, Kathleen Connell was replaced as Controller by Steve Westly.

2 Also named as defendants were James E. Burton, the Chief Executive Officer of CalPERS, and three members of the Board, Robert F. Carlson, Mike Quevedo, Jr., and William B. Rosenberg. We shall refer to them collectively as the Board.

3 A reference to a section is to the Government Code unless otherwise designated or apparent from the context.

4 We have no occasion to consider the application of Art. XVI, § 17 to any other issue.

5 Art. XVI, § 17 applies not only to the Board but also to other retirement boards in the state.

6 The amendment adds in pertinent part, in italics, as follows:

*"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:*

*(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.*

*(c) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims.*

*(d) The members of the retirement board of a public pension or retirement system shall diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly not prudent to do so.*

*(e) The retirement board of a public pension or retirement system, consistent with the exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system.*

*(f) With regard to the retirement board of a public pension or retirement system which includes in its composition elected employee members, the number, terms, and method of selection or removal of members of the retirement board which were required by law or otherwise in effect on July 1, 1991, shall not be changed, amended, or modified by the Legislature unless the change, amendment, or modification enacted by the Legislature is ratified by a majority vote of the electors of the jurisdiction in which the participants of the system are or were, prior to retirement, employed.*

*(g) The Legislature may by statute continue to prohibit certain investments by a retirement board where it is in the public interest to do so, and provided that the prohibition satisfies the standards of fiduciary care and loyalty required of a retirement board pursuant to this section.*

*(h) As used in this section, the term 'retirement board' shall mean the board of administration, board of trustees, board of directors, or other governing body or board of a public employees' pension or retirement system; provided, however, that the term 'retirement board' shall not be interpreted to mean or include a governing body or board created after July 1, 1991 which does not administer pension or retirement benefits, or the elected legislative body of a jurisdiction which employs participants in a public employees' pension or retirement system." (Cal. Const., art. XVI, § 17; see also Ballot Pamp., Gen. Elec. (Nov. 3, 1992) text of Prop. 162, pp. 70–71 (Ballot Pamphlet).)*

7 In pertinent part, the declaration of purpose is as follows:

"Section Three. Purpose and Intent. The People of the State of California hereby declare that their purpose and intent in enacting this measure is as follows:

(a) To protect pension funds so that retirees and employees will continue to be able to enjoy a basic level of dignity and security in their retirement years.

(b) To give voters the right to approve changes in the composition of retirement boards containing elected retirees or employee members.

(c) To protect the taxpayers of this state against future tax increases which will be required if state and local politicians are permitted to divert public pension funds to other uses.

(d) To ensure that the assets of public pension systems are used exclusively for the purpose of efficiently and promptly providing benefits and services to participants of these systems, and not for other purposes.

(e) To give the sole and exclusive power over the management and investment of public pension funds to the retirement boards elected or appointed for that purpose, to strictly limit the Legislature's power over such funds, and to prohibit the Governor or any executive or legislative body of any political subdivision of this state from tampering with public pension funds.

(f) To ensure that all actuarial determinations necessary to safeguard the competency of public pension funds are made under the sole and exclusive direction of the responsible retirement boards.

(g) To affirm the legal principle that a retirement board's duty to its participants and their beneficiaries takes precedence over any other duty." (See Historical Notes, 3 West's Ann. Const. (1996 ed.) foll. art. XVI, § 17, p. 114.)

8 In pertinent part, the findings provide:

"Section Two. Findings and Declarations. The People of the State of California hereby find and declare as follows:

(c) "Politicians have undermined the dignity and security of all citizens who depend on pension benefits for their retirement by repeatedly raiding their pension funds.

(d) Political meddling has driven the federal Social Security system to the brink of bankruptcy. To protect the financial security of retired Californians, politicians must be prevented from meddling in or looting pension funds.

(e) Raids by politicians on public pension funds will burden taxpayers with massive tax increases in the future.

(f) To protect pension systems, retirement board trustees must be free from political meddling and intimidation.

(g) The integrity of our public pension systems demands that safeguards be instituted to prevent political 'packing' of retirement boards, and encroachment upon the sole and exclusive fiduciary powers or infringement upon the actuarial duties of those retirement boards.

(h) In order to protect pension benefits and to avoid the prospect of higher taxes the People must act now to shield the pension funds of this state from abuse, plunder and political corruption." (See Historical Notes, 3 West's Ann. Const. (1996 ed.) foll. art. XVI, § 17, p. 114.)

9 Appellants filed a petition for writ of supersedeas which we treated as a motion for stay pending appeal, and on that basis granted the motion.

10 DPA establishes salary ranges for each class of civil service positions and administers salaries of exempt employees. (Respectively §§ 19826, 19816.) In *Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1146, 2 Cal.Rptr.2d 558, (*Lowe*) this court said the DPA has "exclusive jurisdiction to classify positions in the state civil service." CalPERS argues this prevents the Controller from challenging its expenditures because the Controller has no authority to classify employees as civil service. We disagree.

*Lowe* concerns the classification of positions within the civil service, not the right to a determination whether positions are civil service positions. (See *Stockton v. Department of Employment* (1944) 25 Cal.2d 264, 272, [153 P.2d 741], upon which *Lowe* relies.)

11 Section 12410 provides in pertinent part: "The Controller shall superintend the fiscal concerns of the state. The Controller shall audit all claims against the state, and may audit the disbursement of any state money, for correctness, legality, and for sufficient provisions of law for payment."

In Part V of the Discussion we consider the Board's claim the retirement fund is not "state money."

12 Section 12470 provides in pertinent part that "the Controller shall install and operate a uniform state payroll system for all state agencies except the California Exposition and State Fair and the University of California."

13 Overruled on other grounds in *California State Employees' Assn. v. State of California* (1988) 199 Cal.App.3d 840, 851, 245 Cal.Rptr. 232.

14 In a petition for rehearing, the Board argues that we improperly decided the merits of the Controller's sixth cause of action because we decided an issue that had not been addressed by the trial court and had not been proposed or briefed by any party to the appeal in violation of Government Code section 68081. We disagree.

As to the Board's first argument, this court has the power pursuant to Code of Civil Procedure section 43 to "determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case." Pursuant to this section we may direct the trial court to enter judgment where the facts are undisputed, as here, and the proper judgment is apparent from the record as a matter of law. (*Conley v. Matthes* (1997) 56 Cal.App.4th 1453, 1459, fn. 7, 66 Cal.Rptr.2d 518; *Continental Cas. Co. v. Phoenix Constr. Co.* (1956) 46 Cal.2d 423, 440, 296 P.2d 801.)

As to the second argument, Government Code section 68081 directs that before we may render a decision "based

upon an issue which was not proposed or briefed by any party to the proceeding" we must afford the parties an opportunity for supplemental briefing. There is no need to do so in this case because the sixth cause of action is based upon an issue thoroughly briefed by both parties, the nature and scope of the "plenary authority" over the "administration of the system" granted the Board by Article XVI, section 17. Implicit in our determination that such authority is limited to the investments, payments to beneficiaries, and similar services of CalPERS, is the determination that Article XVI, section 17 does not overrule the state's civil service laws, including article VII, section 1.

15 *Hustedt* held the objectives of article XIV, section 4 (to enact a complete package of workers' compensation, to provide for the resolution of any disputes arising under such legislation by an administrative agency which exercised all "requisite" governmental functions, and to resolve disputes arising under such legislation "expeditiously, inexpensively, and without incumbrance") did not require the Worker's Compensation Appeals Board to have the power to suspend or remove attorneys from practice before the board. Therefore, article XIV, section 4 did not effect an implied repeal of the separation of powers doctrine embodied in article III, section 3. (*Id.* at p. 344, 178 Cal.Rptr. 801, 636 P.2d 1139.)

16 The parties' requests for judicial notice are denied.



**County of Orange v. Association of Orange County Deputy Sheriffs**  
Court of Appeal, Second District, Division 1, California. | January 26, 2011 | 192 Cal.App.4th 21  
| 121 Cal.Rptr.3d

# County of Orange v. Association of Orange County Deputy Sheriffs

Court of Appeal, Second District, Division 1, California. | January 26, 2011 | 192 Cal.App.4th 21 | 121 Cal.Rptr.3d 151

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## Outline

Synopsis  
West Headnotes  
Attorneys and Law Firms  
Opinion  
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of San Francisco, Cal.App. 1 Dist., March 27, 2015

192 Cal.App.4th 21

Court of Appeal, Second District, Division 1,  
California.

COUNTY OF ORANGE, Plaintiff and Appellant,  
v.

ASSOCIATION OF ORANGE COUNTY DEPUTY  
SHERIFFS et al., Defendants and Respondents.

No. B218660. | Jan. 26, 2011. | Review Denied April  
13, 2011.

**Synopsis**

**Background:** County brought action against county employees' retirement system board and public safety employees' union for declaratory and injunctive relief challenging the constitutionality of the formula used to calculate the union's pension credits. The Superior Court, Los Angeles County, No. BC389758, Helen I. Bendix, J., granted judgment on pleadings without leave to amend. County appealed.

**Holdings:** The Court of Appeal, Johnson, J., held that:

[1] unfunded actuarial accrued liability (UAAL) created by enhanced pension formula did not violate municipal debt limitation, and

[2] retroactive application of pension formula to current employees' past service did not violate constitutional prohibition against granting extra compensation for services already rendered.

Affirmed.

West Headnotes (18)

- [1] **Municipal Corporations**  
Limitation of Amount  
**States**  
Limitation of amount of indebtedness or expenditure

- 268Municipal Corporations
- 268XIIIIFiscal Matters
- 268XIII(A)Power to Incur Indebtedness and Expenditures
- 268k862Limitation of Amount
- 268k863In general
- 360States
- 360IVFiscal Management, Public Debt, and Securities
- 360k115Limitation of amount of indebtedness or expenditure

The constitutional debt limitation provision applicable at the state level is similar to and construed in tandem with the state constitution's municipal debt limitation. West's Ann.Cal. Const. Art. 16, §§ 1, 18(a).

1 Cases that cite this headnote

- [2] **Courts**  
Previous Decisions as Controlling or as Precedents

- 106Courts
- 106IIEstablishment, Organization, and Procedure
- 106II(G)Rules of Decision
- 106k88Previous Decisions as Controlling or as Precedents
- 106k89In general

An Attorney General opinion is not binding on the Court of Appeal, but it is entitled to considerable weight.

1 Cases that cite this headnote

- [3] **Courts**  
Previous Decisions as Controlling or as Precedents

- 106Courts
- 106IIEstablishment, Organization, and Procedure
- 106II(G)Rules of Decision
- 106k88Previous Decisions as Controlling or as Precedents
- 106k89In general

A court's reliance on Attorney General opinions is particularly appropriate where no clear case authority exists, and the factual context of the opinions is closely parallel to that under review.

California Constitution's municipal debt limitation are not directed to sit in post hoc judgment of the wisdom of a municipality's income and revenue estimates. West's Ann.Cal. Const. Art. 16, § 18(a).

1 Cases that cite this headnote

Cases that cite this headnote

[4]

**Counties**

Debits and expenditures subject to limitations

- 104Counties
- 104VIIIIFiscal Management, Public Debt, and Securities
- 104k150Limitation of Amount of Indebtedness
- 104k150(2)Debts and expenditures subject to limitations

An estimated \$100 million unfunded actuarial accrued liability (UAAL) incurred by county in applying enhanced pension benefit formula retroactively to county employees' past service did not violate the California Constitution's municipal debt limitation, even if it exceeded the county's available unappropriated funds for the year, since the UAAL was only an actuarial estimate projecting the impact of a change in the benefit plan, rather than a legally enforceable obligation measured at the time of the county's resolution approving the increase in benefits. West's Ann.Cal. Const. Art. 16, § 18(a).

See Cal. Jur. 3d, Municipalities, §§ 565, 571; Cal. Jur. 3d, Public Securities and Obligations, § 14.

Cases that cite this headnote

[5]

**Municipal Corporations**

Limitation of Amount

- 268Municipal Corporations
- 268XIIIFiscal Matters
- 268XIII(A)Power to Incur Indebtedness and Expenditures
- 268k862Limitation of Amount
- 268k863In general

Courts examining a potential violation of the

[6]

**States**

Constitutional restrictions

- 360States
- 360IIGovernment and Officers
- 360k56Compensation of Officers, Agents and Employees
- 360k60.1Additional Compensation and Perquisites
- 360k60.1(2)Constitutional restrictions

Primary purpose of the state constitution's prohibition against granting extra compensation for services already rendered was to prevent the Legislature from enacting "private statutes" in recognition of individual claims. West's Ann.Cal. Const. Art. 4, § 17.

1 Cases that cite this headnote

[7]

**States**

Constitutional restrictions

- 360States
- 360IIGovernment and Officers
- 360k56Compensation of Officers, Agents and Employees
- 360k60.1Additional Compensation and Perquisites
- 360k60.1(2)Constitutional restrictions

The state constitution's prohibition against granting extra compensation for services already rendered denies to the Legislature the right to make direct appropriations to individuals from general considerations of charity or gratitude, or because of some supposed moral obligation. West's Ann.Cal. Const. Art. 4, § 17.

Cases that cite this headnote

[8] **Constitutional Law**  
⚡ Compensation and benefits  
**Officers and Public Employees**  
⚡ Pensions and Benefits

92Constitutional Law  
92XXIVested Rights  
92k2643Public Employees and Officials  
92k2645Compensation and benefits  
283Officers and Public Employees  
283IIIRights, Powers, Duties, and Liabilities  
283k93Compensation and Fees  
283k101.5Pensions and Benefits  
283k101.5(1)In general

A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment.

2 Cases that cite this headnote

[9] **Constitutional Law**  
⚡ Existence and extent of impairment in general

92Constitutional Law  
92XXIIObligation of Contract  
92XXII(B)Contracts with Governmental Entities  
92XXII(B)2Particular Issues and Applications  
92k2721Public Employees and Officials  
92k2725Pensions and Retirement Plans  
92k2725(3)Existence and extent of impairment in general

A public employee's contractual right to pension benefits may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity.

1 Cases that cite this headnote

[10] **Officers and Public Employees**  
⚡ Pensions and Benefits

283Officers and Public Employees  
283IIIRights, Powers, Duties, and Liabilities  
283k93Compensation and Fees  
283k101.5Pensions and Benefits

283k101.5(1)In general

Before retirement, a public employee does not have any absolute right to fixed or specific benefits, but only to a substantial or reasonable pension.

Cases that cite this headnote

[11] **Officers and Public Employees**  
⚡ Pensions and Benefits

283Officers and Public Employees  
283IIIRights, Powers, Duties, and Liabilities  
283k93Compensation and Fees  
283k101.5Pensions and Benefits  
283k101.5(1)In general

Pension laws are to be liberally construed to protect pensioners and their dependents from economic insecurity.

1 Cases that cite this headnote

[12] **Constitutional Law**  
⚡ Pensions and Retirement Plans  
**Officers and Public Employees**  
⚡ Pensions and Benefits

92Constitutional Law  
92XXIIObligation of Contract  
92XXII(B)Contracts with Governmental Entities  
92XXII(B)2Particular Issues and Applications  
92k2721Public Employees and Officials  
92k2725Pensions and Retirement Plans  
92k2725(1)In general  
283Officers and Public Employees  
283IIIRights, Powers, Duties, and Liabilities  
283k93Compensation and Fees  
283k101.5Pensions and Benefits  
283k101.5(1)In general

Unlike other terms of public employment, which are wholly a matter of statute, pension rights are obligations protected by the contract clause of the federal and state Constitutions. U.S.C.A. Const. Art. 1, § 10, cl. 1; West's Ann.Cal. Const. Art. 1, § 9.

1 Cases that cite this headnote

<sup>[13]</sup> **Officers and Public Employees**

☛Pensions and Benefits

283Officers and Public Employees  
283IIIRights, Powers, Duties, and Liabilities  
283k93Compensation and Fees  
283k101.5Pensions and Benefits  
283k101.5(1)In general

A government entity may make reasonable modifications and changes to a public employee's vested pension benefits before the pension becomes payable.

2 Cases that cite this headnote

<sup>[14]</sup> **Officers and Public Employees**

☛Pensions and Benefits

283Officers and Public Employees  
283IIIRights, Powers, Duties, and Liabilities  
283k93Compensation and Fees  
283k101.5Pensions and Benefits  
283k101.5(1)In general

Any subsequent modification to public employees' vested pension rights must be reasonable based on the facts of each case, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.

1 Cases that cite this headnote

<sup>[15]</sup> **Officers and Public Employees**

☛Pensions and Benefits

283Officers and Public Employees  
283IIIRights, Powers, Duties, and Liabilities  
283k93Compensation and Fees  
283k101.5Pensions and Benefits  
283k101.5(1)In general

The saving of public employer money is not an illicit purpose for modification of public employees' vested pension rights, if changes in the pension program are accompanied by comparable new advantages to the employee.

1 Cases that cite this headnote

<sup>[16]</sup> **Officers and Public Employees**

☛Pensions and Benefits

283Officers and Public Employees  
283IIIRights, Powers, Duties, and Liabilities  
283k93Compensation and Fees  
283k101.5Pensions and Benefits  
283k101.5(1)In general

A public employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure.

Cases that cite this headnote

<sup>[17]</sup> **Counties**

☛Pensions and benefits

104Counties  
104IIIOfficers and Agents  
104k68Compensation  
104k69.2Pensions and benefits

County's retroactive application of enhanced pension benefit formula to current county employees' past service did not violate the California Constitution's prohibition against granting extra compensation for services already rendered, since the enhancement did not provide the employees with additional compensation while they worked for county, and the increased benefits were not "extra compensation." West's Ann.Cal. Const. Art. 11, § 10(a); West's Ann.Cal.Gov.Code § 31678.2.

Cases that cite this headnote

[18]

## Counties

☛ Pensions and benefits

104 Counties  
104 III Officers and Agents  
104k68 Compensation  
104k69.2 Pensions and benefits

County's limitation of enhanced pension benefit formula to county employees who had not retired before a date six months after the adoption of the resolution authorizing the enhanced benefit formula was in compliance with the County Employees Retirement Law (CERL) provision that past service pension benefit increases "shall only be applicable to members who retire on or after the effective date of the resolution." West's Ann.Cal.Gov.Code § 31678.2(c).

Cases that cite this headnote

## Attorneys and Law Firms

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## Opinion

JOHNSON, J.

**\*28** In 2008, the County of Orange (Orange County or the County) sued the board of the County's retirement plan, claiming that an enhanced retirement formula for prior years of service adopted in 2001 by the County Board of Supervisors violated the California Constitution. The County now appeals from the trial court's grant of motions for judgment on the pleadings and entry of judgment in favor of the Association of Orange County Deputy Sheriffs and the Board of Retirement of the Orange County Employees' Retirement System. We conclude that the past service portion of the enhanced retirement formula does not violate the Constitution, and we affirm.

## BACKGROUND

### I. The Orange County retirement system

The Orange County Employees' Retirement System (OCERS) is a public employees' retirement trust fund, an independent entity that administers the County's retirement system. OCERS is governed by the County Employees Retirement Law of 1937 (CERL). (Gov.Code, §§ 31450, 31468, subd. (1)(1).) Orange County employees, including law enforcement (safety **\*29** members), receive retirement and other benefits under

CERL, which vests the management and funding of the retirement system in a board of retirement (OCERS Board). (§§ 31558, 31520.)

**\*\*155** The County funds its retirement benefits through employee and employer contributions, and the retirement system investment earnings; the retirement fund is overseen by the OCERS Board. (§§ 31453.5, 31587.) These annual contributions are intended to fund the retirement benefits earned in the year the contributions are made. (§§ 31620 et seq., 31639 et seq.) The amount of the contributions is set based upon a normal contribution rate, which is a percentage of compensation required to fund the retirement benefits allocated to the current year of service being worked by county employees. Any shortfall between the normal cost and the actual amount determined to be necessary to fund future benefits (an amount based on actual experience) is made up through increases in employer contributions, and is amortized over a period of up to thirty years. (§ 31453.5.)

The benefits that an employee receives upon retirement are calculated according to a statutory formula that takes into account the employee's final compensation,<sup>2</sup> the number of credited years of service the employee had with the County, and a statutory multiplier. CERL provides for a variety of possible formulas for safety members. These include what is commonly called the "2% at 50" formula, which means two percent of final compensation, multiplied by the number of service years, for employees retiring at the age of 50. (§ 31664.) Section 31664.1, enacted in 2000, provides for an "additional pension for safety members," commonly called the "3% at 50" formula, which similarly means three percent of final compensation, multiplied by the number of service years, for employees retiring at the age of 50. (§ 31664.1, subd. (b).)

## II. December 2001 vote: 3% at 50

The Association of Orange County Deputy Sheriffs (AOCDS) is the exclusive representative of Orange County deputy sheriffs, sergeants, and investigators for the district attorney's office, all of whom are safety members entitled to OCERS retirement benefits. (§§ 31469.3, 31470, 31470.2.) In May 2001, AOCDS's 1999 memorandum of understanding, reached after collective bargaining with the County and set to expire in October 2002, provided that AOCDS members were entitled to retirement under the 2% at 50 **\*30** formula.<sup>3</sup> In May 2001, AOCDS formally asked the County to restructure the retirement terms to the enhanced 3% at 50 formula. After negotiations, in October 2001 the County negotiators and AOCDS representatives signed a tentative agreement to

amend the AOCDS contract to adopt the 3% at 50 formula for members retiring on or after June 28, 2002. AOCDS agreed that its members would contribute 1.78 percent of their base salary for fifteen months, toward part of the cost of increased payouts under the increased formula. The agreement extended the AOCDS contract for an additional year, to October 2003.

On December 4, 2001, the County Board of Supervisors unanimously approved the amended AOCDS contract. The board voted to adopt Resolution No. 01-410, which authorized the 3% at 50 formula for AOCDS members, effective June 28, 2002. The accompanying memorandum of understanding between the County and AOCDS **\*\*156** provided that the increased retirement formula would apply to "all years of service," including those years served before the date of the resolution. This portion of the new retirement formula was authorized by section 31678.2, subdivision (a), enacted in 2000, which provides that the board of supervisors could, by resolution, make the benefit formula "applicable to service credit earned on and after the date specified in the resolution, which date may be earlier than the date the resolution is adopted." Pursuant to section 31678.2, subdivision (c), members who had already retired before June 28, 2002 did not receive any increase in pension benefits.

The County had secured an actuarial report in November 2000, which analyzed (among other options) the financial impact of adopting the 3% at 50 formula for all years of service, both past and future. The analysis estimated that the increase in the County's "actuarial accrued liability" for the benefit enhancement for past service was between \$99 and \$100 million.

The board of supervisors approved and renewed the 3% at 50 formula in subsequent contracts with AOCDS in 2003, 2005, and 2007.

On January 29, 2008, however, the County had a change of heart. The board of supervisors unanimously voted to approve Resolution No. 08-005, which stated that the past service portion of the 3% at 50 formula (applying **\*31** the enhanced benefit formula to past years of service), as adopted in 2001 by the board of supervisors then in office, "was unconstitutional at the time of its adoption and remains unconstitutional today." The board cited a September 2007 actuarial analysis<sup>4</sup> which concluded that the past service portion of the increased retirement benefit totaled \$187 million. The resolution authorized the County's attorneys to "seek to obtain a declaration of unconstitutionality and an injunction against OCERS prohibiting it from paying out any benefit increases arising from Board Resolution 01-410 and based on years

of service rendered before June 28, 2002, the effective date of that Resolution.” The resolution also provided that the County would not seek to recover any amounts already paid out to retirees under the enhanced benefit formula.

### III. The County’s lawsuit

On February 1, 2008, the County filed the initial complaint in this action in Orange County Superior Court, naming as the sole defendant the OCERS Board. OCERS filed a motion to transfer venue to Los Angeles County and AOCDS intervened by stipulation. The case was transferred to Los Angeles Superior Court in April 2008. Following a demurrer by OCERS, on July 23, 2008 the County filed a first amended complaint adding AOCDS as a defendant.

The first amended complaint alleged in its first cause of action that the 2001 action by the prior board of supervisors adopting the past service portion of the enhanced 3% at 50 retirement formula violated the California Constitution’s municipal debt limitation in article XVI, section 18, subdivision (a), because without voter approval, the resolution created an immediately incurred and legally enforceable debt or liability of more than \$99 million, which exceeded the County’s available unappropriated funds for the year. The second cause of action alleged that the past service portion also violated article XI, section 10 of the California Constitution, which prohibits the payment of extra compensation to public employees, because \*\*157 the retroactive portion “grants extra compensation to public employees ‘after service has been rendered.’ ” The complaint requested declaratory and injunctive relief, including an injunction to prevent the County from commencing or continuing to pay the past service portion of the enhanced benefits to retired AOCDS members.

\*32 In January 2009, AOCDS filed a motion for judgment on the pleadings, in which OCERS joined. In an order filed February 27, 2009, the trial court granted AOCDS’s motion, allowing the County leave to amend the municipal debt limitation cause of action “to the extent the County can allege that its liability for that portion of the 3% at 50 pension benefit attributable to past service as of 6/28/02 caused its indebtedness to exceed revenue in any given year since 6/28/02.” The order granted the motion without leave to amend on the cause of action alleging extra compensation, concluding “the extra compensation clause does not apply to pension benefits.”

The County filed a second amended complaint in April 2009, limited to the municipal debt limitation cause of

action. AOCDS, joined by OCERS, filed a motion to strike the new pleading on the ground that it exceeded the limitation imposed by the trial court in its order granting the demurrer. The trial court construed the motion to strike as a motion for judgment on the pleadings, and in an order filed May 22, 2009, the court granted the motion without leave to amend.

The County appeals from the judgment filed July 15, 2009.

## DISCUSSION

In reviewing the trial court’s grant of the motions for judgment on the pleadings under Code of Civil Procedure section 438, subdivision (b)(1), we apply the same rules governing the review of an order sustaining a general demurrer. (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146, 44 Cal.Rptr.2d 441, 900 P.2d 690.) A defendant’s motion for judgment on the pleadings should be granted if, under the facts as alleged in the pleading or subject to judicial notice, the complaint fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).) We accept the complaint’s properly pleaded factual allegations as true and give them a liberal construction. (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 166, 59 Cal.Rptr.3d 142, 158 P.3d 718; *Boblitt v. Boblitt* (2010) 190 Cal.App.4th 603, 606, fn. 2, 118 Cal.Rptr.3d 788.) We do not accept as true “any contentions, deductions or conclusions of fact or law contained therein.” (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298, 38 Cal.Rptr.3d 316.) We review de novo, and “are required to render our independent judgment on whether a cause of action has been stated” (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1401, 45 Cal.Rptr.3d 525), without regard for the trial court’s reasons for granting the motion. (*Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1448, 37 Cal.Rptr.2d 790.)

### \*33 I. The municipal debt limitation

Article XVI, section 18, subdivision (a) of the California Constitution provides: “No county ... shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose....” This municipal debt limitation means “the legislative body may not encumber the general funds of the city beyond the year’s income without first

obtaining the consent of two **\*\*158** thirds of the electorate.’ [Citation.]” (*Starr v. City and County of San Francisco* (1977) 72 Cal.App.3d 164, 175, 140 Cal.Rptr. 73.) This “establish[ed] the ‘pay as you go’ principle as a cardinal rule of municipal finance.” (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 776, 87 Cal.Rptr. 839, 471 P.2d 487, vacated on other grounds, *Mihaly v. Westbrook* (1971) 403 U.S. 915, 91 S.Ct. 2224, 29 L.Ed.2d 692.) “Each year’s income and revenue must pay each year’s indebtedness and liability, and no indebtedness or liability incurred in one year shall be paid out of the income or revenue of any future year. The taxpayers of [counties] are thus protected against the improvident creation of inordinate debts, which may be charged against them and their property in ever increasing volume from year to year.” (*McBean v. City of Fresno* (1896) 112 Cal. 159, 164, 44 P. 358.)

The County’s second amended complaint alleges that in 2001, when the board of supervisors approved the past service portion of the enhanced 3% at 50 retirement formula for AOCDS members, the board created a “\$100 million long-term liability (that has since grown to approximately \$187 million)...” The County alleges that the board’s action violated article XVI, section 18, subdivision (a), which it characterizes as a “ ‘balanced budget’ requirement,” because the \$100 million was an immediately enforceable debt incurred in a year in which the County’s unappropriated revenue (for fiscal year 2002) totaled less than \$99 million, and the County did not hold the required election to obtain voter approval.

AOCDS rejoins that the \$100 million amount which the County on this appeal characterizes as a “debt” is not an “ ‘indebtedness’ or ‘liability’ ” within the meaning of article XVI, section 18, subdivision (a). Instead, it is an actuarial calculation of what the County’s obligations are likely to be in the future for the past service portion of the 3% at 50 retirement formula for AOCDS members. As an actuarial projection, the \$100 million did not belong on the liability side of the County’s balance sheet in the 2002 fiscal year, and it thus escapes the application of the municipal debt limitation.

To evaluate the parties’ arguments, we must explain in some detail what the \$100 million figure represents.

#### **\*34 A. Unfunded Actuarial Accrued Liability calculations**

The OCERS Board, which has “plenary authority and fiduciary responsibility for ... administration of the [retirement] system ... [¶][and] 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,” also has “the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system.” (Cal. Const., art. XVI, § 17, subsd. (a), (e).) The OCERS Board is required to conduct regular actuarial evaluations to determine the employer and employee contributions necessary to fund the retirement benefits of county employees, and to “determine the extent to which prior assumptions must be changed.”<sup>5</sup> (*In re Retirement **\*\*159** Cases* (2003) 110 Cal.App.4th 426, 459–460, 1 Cal.Rptr.3d 790.) The OCERS Board commissioned an actuarial analysis in November 2000 of the proposed changes to the AOCDS pension benefits. The 2000 actuarial analysis produced the \$100 million estimate (educated and justified estimate, but estimate nonetheless) that the County now claims was a debt exceeding the County’s 2002 annual income, and therefore triggered the municipal debt limitation’s requirement of a two-thirds vote of the public.

That \$100 million figure was an estimated “unfunded actuarial accrued liability” or UAAL, predicting the *unfunded* cost of the retroactive portion of the proposed 3% at 50 retirement formula. This UAAL was not projected in earlier actuarial valuations which did not contemplate the enhancement of the AOCDS retirement formula to 3% at 50. “ ‘Unfunded accrued actuarial liability’ is the difference between actuarial accrued liability and the valuation assets in a fund.” (*Bandt v. Board of Retirement* (2006) 136 Cal.App.4th 140, 147, fn. 3, 38 Cal.Rptr.3d 544.) “ ‘Most retirement systems have [UAAL]. They arise each time new benefits are added and each time an actuarial loss is realized... [UAAL] does not represent a debt that is payable today.’ ” (*Id.* at p. 157, 38 Cal.Rptr.3d 544.)

**\*35** The County’s 2007 Comprehensive Annual Financial Report explains the assumptions underlying the OCERS UAAL: “The UAAL for OCERS is an estimate based on a series of assumptions that operate on demographic data of OCERS’ membership. This process is necessary to determine, as of the date of the calculation, how sufficient the assets in OCERS are to fund the accrued costs attributable to active, vested[,] terminated and retired employees. This determination of underfunding rests on actuarial assumptions regarding expected return on invested assets, the assumed future pay increases for current employees, assumed rates of disability, the assumed retirement ages of active employees, the assumed marital status at retirement, the post-employment life expectancies of retirees and beneficiaries, salary increases, contributions to OCERS, inflation, and other factors.” Given the multiple assumptions about the future

involved in calculating the OCERS UAAL (investment returns, pay increases, marital status at retirement, retiree and beneficiary life expectancies, salary increases, contribution rates, and inflation), it is clear that the UAAL is a highly variable amount, which may or may not prove accurate depending upon actual future events and experience.

An unfunded liability such as a UAAL will affect the contribution rate of an employer such as the County. (*In re Retirement Cases*, *supra*, 110 Cal.App.4th at pp. 459–460, 1 Cal.Rptr.3d 790.) In projecting the cost of funding the benefits provided to OCERS members, OCERS uses a method described in section 31453.5, which (as explained by OCERS) divides the likely cost of future benefits between the “normal cost” (the employer contributions required to fund the benefits allocated to the current year of service) and the UAAL (the shortfall between the past years’ projected normal cost and the actual past experience of the retirement system), which is to be \*\*160 amortized over thirty years.<sup>6</sup> Section 31453.5 authorizes but does not require OCERS to use this method, providing “the board *may* determine county or district contributions” (italics added) by dividing the cost into normal cost and UAAL. OCERS therefore is not mandated to calculate a UAAL in projecting what the County’s future contribution rate will need to be to fund the past service portion of the 3% at 50 formula for AOCDS members. OCERS could employ another method to predict the County’s future contributions.

### B. 1982 Attorney General opinion

<sup>[1]</sup> Article XVI, section 1 of the California Constitution, the debt limitation provision applicable at the state level, is similar to and construed in tandem with the municipal debt limitation in issue here, \*36 article XVI, section 18, subdivision (a). (*Dean v. Kuchel* (1950) 35 Cal.2d 444, 446, 218 P.2d 521; *State ex rel. Pension Obligation Bond Com. v. All Persons Interested etc.* (2007) 152 Cal.App.4th 1386, 1397–1401, 62 Cal.Rptr.3d 364, 67 Ops.Cal.Atty.Gen. 349, 351 (1984).) In 1982, the Attorney General concluded that the state retirement system’s “unfunded liability” did not violate the state debt limitation provision. The Attorney General explained that “[d]etermining how much income to the [state] Fund is necessary to pay all benefits as they become due is the business of actuaries. Actuaries predict the future financial operation of an insurance or retirement system by making certain assumptions regarding the variables in the system.” (65 Ops.Cal.Atty.Gen. 571, 572 (1982).)

The state Public Employees’ Retirement System (PERS) actuarial balance sheet showed an “unfunded actuarial

liability” above the state debt limitation amount. The Attorney General concluded: “The actuarial term ‘unfunded liability’ fails to qualify as a legally enforceable obligation of any kind. As previously noted the very existence of such an ‘unfunded liability’ depends upon the making of an actuarial evaluation and the use of an evaluation method which utilizes the concept of an ‘unfunded liability.’ Further the amount of such an ‘unfunded liability’ in the actuarial evaluation of a pension system will depend upon how that term is defined for the particular valuation method employed. Finally the amount of such an ‘unfunded liability,’ however defined for the method used, depends upon many assumptions made regarding future events such as size of work force, benefits, inflation, earnings on investments, etc. In other words an ‘unfunded liability’ is simply a projection made by actuaries based upon assumptions regarding future events. No basis for any legally enforceable obligation arises until the events occur and when they do the amount of liability will be based on actual experience rather than the projections.” (65 Ops.Cal.Atty.Gen., *supra*, at p. 574, italics added.) Such calculations did not result in a legally binding debt or liability, but instead provided “useful guidance in determining the contributions necessary to fund a pension system.” (*Ibid.*)

<sup>[2]</sup> <sup>[3]</sup> <sup>[4]</sup> We acknowledge that the Attorney General opinion is not binding, but it is entitled to considerable weight. \*\*161 (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1087, fn. 17, 103 Cal.Rptr.3d 767, 222 P.3d 214.) “Reliance on Attorney General opinions is particularly appropriate where, as here, no clear case authority exists, and the factual context of the opinions is closely parallel to that under review.” (*Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655, 662–663, 99 Cal.Rptr.2d 897.) There is no clear case authority on this issue, and the 1982 opinion has a similar factual context involving the state’s analogous debt limitation provision. We find the analysis in the 1982 opinion persuasive, and that analysis supports the conclusion that a UAAL such as the \$100 million cited by the County in this case is an actuarial estimate projecting the impact of a change in a benefit plan, rather \*37 than a legally enforceable obligation measured at the time of the County’s 2001 resolution approving the 3% at 50 formula.

### C. The County’s arguments

The County argues that pension obligations are incurred for the purposes of the debt limitation provision at the time of an award of pension benefits, citing *Carman v. Alvord* (1982) 31 Cal.3d 318, 182 Cal.Rptr. 506, 644 P.2d 192. In *Carman*, a taxpayer argued that article XIII of the California Constitution (Proposition 13) prohibited a tax

levied to meet a city's annual payment obligation to PERS. In determining that the city's 1978–1979 payment to PERS was “indebtedness as traditionally understood,” the Court emphasized: “The term “indebtedness” has no rigid or fixed meaning, but rather must be construed in every case in accord with its context.’ [Citations.] It can include all financial obligations arising from contract [citation], and it encompasses ‘obligations which are yet to become due as [well as] those which are already matured.’ ” (*Id.* at pp. 326–327, 182 Cal.Rptr. 506, 644 P.2d 192.) This unexceptional statement does not control our case, which does not involve an annual payment to OCERS but rather a projection of what the past service portion of the enhanced benefit may cost the County, subject to all the variables inherent in projecting cost over time. In the context of this case, the actuarial projection is not “indebtedness as traditionally understood.” (*Id.* at p. 327, 182 Cal.Rptr. 506, 644 P.2d 192.) An unfunded liability such as a UAAL is not created at the time of the award of enhanced benefits, but occurs over years “and may have been avoided entirely if, for example, the retirement fund experienced better than expected investment returns....” (*City of San Diego v. San Diego City Employees’ Retirement System* (2010) 186 Cal.App.4th 69, 83, 111 Cal.Rptr.3d 418.)

None of the other debt-limitation cases cited by the County involves a factual situation similar to this case. (See *Chester v. Carmichael* (1921) 187 Cal. 287, 201 P. 925 [installment contract to purchase land for a county park]; *Mahoney v. City and County of San Francisco* (1927) 201 Cal. 248, 257 P. 49 [same]; *Garrett v. Swanton* (1932) 216 Cal. 220, 13 P.2d 725 [installment contract to purchase a water pumping plant], overruled in *City of Oxnard v. Dale* (1955) 45 Cal.2d 729, 737, 290 P.2d 859; *In re City and County of San Francisco* (1925) 195 Cal. 426, 233 P. 965 [conditional purchase of land for city marina]; *City of Saratoga v. Huff* (1972) 24 Cal.App.3d 978, 101 Cal.Rptr. 32 [\$2 million in special assessment bonds payable over 10–year period].) In each case, the obligation to repay the indebtedness was spread over years, but the total amount owed was not in question. Here, the County committed to paying increased benefits over time when it approved the enhanced benefit \*38 for AOCDS members, but the UAAL is not a certain total for which the County is immediately liable.<sup>7</sup>

\*\*162 The County also cites an Attorney General opinion from 2005, which states: “A retroactive improvement in retirement benefits not only requires an increase in the city’s future retirement contributions, but also creates a ‘past service liability,’ or debt to the retirement fund, which must be paid.” (88 Ops.Cal.Atty.Gen. 165, 167 (2005).) That may be true as far as it goes, but the 2005

opinion did not address the municipal debt limitation and is not inconsistent with the earlier 1982 Attorney General opinion. The Attorney General in 1982 approvingly quoted an article in the state retirement system newsletter, which explained: “‘[T]he “past service liability” and the “unfunded liability” are a function of the actuarial methods and assumptions used to fund a pension plan.... [¶][T]he “liabilities” are not owed by the plan. They are primarily a function of the methods and assumptions used by the actuary to fund the plan.’ ” (65 Ops.Cal.Atty.Gen., *supra*, at pp. 572–573, fn. 2.)<sup>8</sup>

\*39 Nor do existing accounting standards support a conclusion that the UAAL was a legally enforceable obligation when the board of supervisors voted to adopt the enhanced benefit formula in 2001. As the amicus brief in support of the County from the Accounting Professionals explains, the Government Accounting Standards Board (GASB) recognizes a pension “liability” as the difference between the government employer’s annual pension cost and the employer’s actual contributions to the pension plan. The GASB requires the “unfunded accrued benefit obligation” to be \*\*163 disclosed in notes to the financial statement, rather than reported on the balance sheet as a liability. (GASB, *Financial Reporting for Defined Benefit Pension Plans and Note Disclosures for Defined Contribution Plans*, Statement No. 25 (1994) and GASB, *Accounting for Pension by State and Local Governmental Employees*, Statement No. 27 (1994).)<sup>9</sup> While some pension liabilities must be reported on the balance sheet, the UAAL in this case is not one of them.

<sup>151</sup> The County emphasizes its current difficult financial situation and the “ruinous fiscal irresponsibility” of the prior board of supervisors. Imprudence, however, is not unconstitutional. “Courts examining a potential violation of the Debt Limit are not directed to sit in *post hoc* judgment of the *wisdom* of a municipality’s income and revenue estimates.” (*In re County of Orange, supra*, 31 F.Supp.2d at p. 776.)

We affirm the trial court’s grant of judgment on the pleadings on the municipal debt limitation cause of action in the second amended complaint.

## II. The prohibition against extra compensation

Article XI, section 10, subdivision (a) of the California Constitution provides: “A local government body may not grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part....” The County alleged in

its first amended complaint that the board of supervisors' approval of the past service portion of the 3% at 50 benefit enhancement granted extra compensation to AOCDS members employed by the County on June 28, 2002 (the effective date of the resolution) for services they had already rendered to the County, and this violated Article XI, section 10.

[6] [7] \*40 "Early decisions interpreting the extra compensation clause demonstrate that its framers had a particular, narrow objective in mind.... The primary purpose of the prohibition ... was to prevent the Legislature from enacting 'private statutes' in recognition of 'individual claims.'... [T]he provision 'denied to the Legislature the right to make direct appropriations to individuals from general considerations of charity or gratitude, or because of some supposed moral obligation....'" (*Jarvis v. Cory* (1980) 28 Cal.3d 562, 577, 170 Cal.Rptr. 11, 620 P.2d 598.) The prohibition on extra compensation does not apply to every grant of additional compensation for work already performed. In *Jarvis v. Cory*, a bill granting additional compensation to state employees for work performed during the fiscal year prior to the enactment of the statute did confer retroactive compensation. (*Id.* at p. 569, 170 Cal.Rptr. 11, 620 P.2d 598.) Nevertheless, the Supreme Court concluded that "the extra compensation clause is not offended when state employees receive retroactive salary adjustments for periods during which they worked with justifiable uncertainty regarding their salary levels." (*Id.* at p. 579, 170 Cal.Rptr. 11, 620 P.2d 598.)<sup>10</sup> The retroactive compensation \*\*164 served several public purposes, including the legislature's finding that it was necessary "to ensure the continued recruitment and retention of qualified and competent state employees." (*Id.* at p. 578, fn. 10, 170 Cal.Rptr. 11, 620 P.2d 598; *Theroux v. State* (1984) 152 Cal.App.3d 1, 6, 199 Cal.Rptr. 264.)

Similarly, the Third Appellate District held that pay adjustments made retroactive to the start of a county's fiscal year were not unconstitutional as a gift of public money<sup>11</sup> or as extra compensation, where an employee association and the county met and conferred to establish salary levels after the date of expiration of a salary ordinance. (*San Joaquin County Employees' Association, Inc. v. County of San Joaquin* (1974) 39 Cal.App.3d 83, 88, 113 Cal.Rptr. 912 (*San Joaquin* ).) "[I]n the area of employment, public agencies must compete, and if to so compete they grant benefits to employees for past services, they are not making a gift of public money but are taking self-serving steps to further the governmental agency's self-interest in recruiting the most competent employees in a highly competitive market." (*Id.* at pp. 87-88, 113 Cal.Rptr. 912.)

Under very different circumstances, courts have found unconstitutional extra compensation taking a variety of forms: retroactive pay for overtime already worked (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 27, 157 Cal.Rptr. 706, 598 P.2d 866; *Martin v. Henderson* (1953) 40 Cal.2d 583, 590-591, 255 P.2d 416), lump sum payment for accumulated unused vacation not authorized when work was performed \*41 (*Seymour v. Christiansen* (1991) 235 Cal.App.3d 1168, 1178-1179, 1 Cal.Rptr.2d 257), and retroactive payment for overtime or work on holidays (*Jarvis v. Henderson* (1953) 40 Cal.2d 600, 607, 255 P.2d 426). Courts have also invalidated pension benefits which did not vest because they were conferred by mistake. (*Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 871-872, 5 Cal.Rptr.3d 634 [no vested right to safety member pension when employees were erroneously classified as safety members]; *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 585-586, 108 Cal.Rptr. 293 [same; "correction of an erroneous classification cannot be equated to a modification or alteration of earned pension rights"].) No court, however, has found that changes to pension benefits awarded for past service to employees with already vested pension rights are unconstitutional extra compensation.

#### A. Vested pension rights

[8] [9] [10] "A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity. [Citation.]" (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863, 148 Cal.Rptr. 158, 582 P.2d 614.) Before retirement, the employee does not have "any absolute right to fixed or specific benefits, but only to a 'substantial or reasonable pension.'" (*Ibid.*)

[11] [12] [13] [14] [15] [16] "[P]ension laws are to be liberally construed to protect pensioners and their dependents from economic insecurity. \*\*165 [Citation.] Unlike other terms of public employment, which are wholly a matter of statute, pension rights are obligations protected by the contract clause of the federal and state Constitutions. [Citations.]... [¶] ... As the Supreme Court notes, 'upon acceptance of public employment [one] acquire[s] a vested right to a pension based on the system then in effect.' [Citation.]" (*United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1102, 259 Cal.Rptr. 65, quoting *Miller v. State of California* (1977) 18 Cal.3d 808, 817, 135 Cal.Rptr. 386, 557 P.2d 970 (*Miller* ).) Nevertheless, "pension rights are

not immutable.” (*Miller, supra*, 18 Cal.3d at p. 816, 135 Cal.Rptr. 386, 557 P.2d 970.) A government entity may make “ ‘reasonable modifications and changes before the pension becomes payable....’ ” (*Ibid.*) Any subsequent modification to vested pension rights must be reasonable based on the facts of each case, and “ ‘changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.’ ” (*Ibid.*) “The saving of public employer money is not an illicit purpose if changes in the pension program are accompanied by comparable new advantages to the employee.” (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1145, 61 Cal.Rptr.2d 207.) Therefore, “[a]n employee’s contractual pension expectations are \*42 measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee’s subsequent tenure.” (*Betts v. Board of Administration, supra*, 21 Cal.3d at p. 866, 148 Cal.Rptr. 158, 582 P.2d 614; *United Firefighters of Los Angeles City v. City of Los Angeles, supra*, 210 Cal.App.3d at p. 1102, fn. 3, 259 Cal.Rptr. 65; *Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598, 1606, 15 Cal.Rptr.2d 91.)

<sup>117</sup> The County argues, however, that the general rule that current employees have a vested right to increases in pension benefits conferred during employment does not govern this case. Although 3% of 50 is an enhanced pension benefit conferred during the tenure of AOCDS employees working for the County on June 28, 2002, the County argues that the new benefit formula did not vest as to service before that date, because the past service portion of the enhanced benefit is prohibited extra compensation. Case law stands in the County’s way.

## B. Extra compensation and pensions

### 1. *Sweesy*

In *Sweesy v. L.A. etc. Retirement Board* (1941) 17 Cal.2d 356, 110 P.2d 37 (*Sweesy*), the widow of a police officer who retired in 1935 and had died in 1939, applied for a widow’s pension that had been authorized by legislation in 1937, after her husband had retired but before he died. The legislation specifically provided “that its provisions shall be retroactive as to the past service of any member who shall be entitled to the benefits ‘contained herein.’ ” (*Id.* at p. 359, 110 P.2d 37.) The retirement board argued that the amendment should only apply prospectively, to surviving widows of pensioners who were in active service at the time of the adoption of the legislation, because otherwise it would be unconstitutional as a gift of

public money.<sup>12</sup> The board also argued that the retroactivity \*\*166 provision referred only to the past service of members on active duty at the time of the amendment, as distinguished from members who had already retired. (*Ibid.*)

The Supreme Court observed: “ ‘A pension is a gratuity only where it is granted for services previously rendered which at the time they were rendered gave rise to no legal obligation.... But where, as here, services are rendered under a pension statute, the pension provisions become a part of \*43 the contemplated compensation for those services and so in a sense a part of the contract of employment itself.’ ” (*Id.* at pp. 359–360, 110 P.2d 37.) The court concluded that it was “the settled law of this state that unless the contrary intention plainly appears persons having a pensionable status are entitled to receive any increase of benefits which may be provided.” (*Id.* at p. 360, 110 P.2d 37.) The police officer’s “pension rights vested at the time he was retired from service;”<sup>13</sup> he “had a status as a pensioner at the time of the adoption of the amendment ... [whose] provisions were made expressly retroactive so as to include past service of any member entitled to the benefits ‘contained herein.’ Unquestionably [he] was a member entitled to the benefits of the system. No distinction is made by the legislature between members in active duty on full pay and those on retirement, in so far as the retroactive provisions are concerned, and no distinction may here be drawn on that basis. Therefore, the provisions must be held to apply to members who had a vested as well as to those [such as the widow] who merely had an inchoate right to members’ pension benefits at the time of the adoption of the amendment.” (*Id.* at p. 361, 110 P.2d 37.)

The Supreme Court also rejected the contention that the retroactive benefit was additional compensation: “The problem cannot be solved merely by stating as a proposition that a provision will not be upheld which purports to grant a pension after the completion of the services for which the pension is contemplated as additional compensation. The law is well settled that additional benefits may constitutionally be provided for members of the system who have acquired a pensionable status.... There is some language in the decisions which refers to pension benefits as additional or increased compensation for services performed and to be performed. [Citations.] But that designation may not be strictly accurate in every case. As in this case, the members of the system make contributions to the pension fund, even though contributions may also come from public funds. Such systems are usually founded on actuarial calculations. Therefore, the question of what benefits would be warranted by either the individual or

mass contributions to the fund is for the legislative body, and not for the pension board or the courts, whose respective functions in such cases are to administer and interpret the provisions of the law as written.” (*Id.* at pp. 361–362, 110 P.2d 37.) The court added that “the provision for pension to members’ widows benefits all members, whether on active or retired duty; but as to any prospective grantee of the pension it is an inchoate right which \*\*167 may be taken away at any time \*44 before it becomes vested in her [the widow].” (*Id.* at p. 362, 110 P.2d 37.) “[I]ncreased benefits to one already having a pensionable status are constitutional and economically appropriate.” (*Id.* at p. 363, 110 P.2d 37.)

In *Sweesy, supra*, 17 Cal.2d 356, 110 P.2d 37, the Supreme Court approved the retroactive application of an increased pension benefit to the widow of a police officer who had retired before the amendment authorizing the additional benefit was enacted. Although the police officer had already retired, the legislature had not distinguished between retired and active members, and the court declined to draw any distinction between those active members on full pay and those in retirement.

## 2. Nelson

In *Nelson v. City of Los Angeles* (1971) 21 Cal.App.3d 916, 98 Cal.Rptr. 892 (*Nelson*), the petitioners were a member of the police department who had retired in 1947 and the widow of a member who died while employed in 1948. Both were receiving pensions from the city in 1971, when the city adopted a charter amendment increasing the minimum pension payable and raising the annual cost of living increases from two to three percent. (*Id.* at p. 917, 98 Cal.Rptr. 892.) The “narrow issue” was “is an increase in pension benefits payable to a city pensioner extra compensation or an extra allowance prohibited by article XI, section 10? We conclude that it is not.” (*Id.* at p. 918, 98 Cal.Rptr. 892.)

“[A]n increase in benefits to persons occupying a pensionable status is not to be treated as the payment of ‘extra compensation or allowance,’ as those terms are used in the proscription of article XI, section 10.” (*Nelson, supra*, 21 Cal.App.3d at p. 918, 98 Cal.Rptr. 892.) Quoting *Sweesy, supra*, 17 Cal.2d 356, 110 P.2d 37 for its holding that such an increase was not a gift of public funds and *Jorgensen v. Cranston* (1962) 211 Cal.App.2d 292, 295, 27 Cal.Rptr. 297 (disapproved on other grounds in *Olson v. Cory* (1983) 35 Cal.3d 390, 406, 197 Cal.Rptr. 843, 673 P.2d 720) for the rule that a similar increase was not extra compensation, the court

concluded: “Uniform precedent thus leads us to the conclusion that the increases in pension benefits granted to persons in a pensionable status<sup>14</sup> by the 1971 amendments to the Los Angeles City Charter are not proscribed by California Constitution, article XI, section 10.” (*Nelson, supra*, 21 Cal.App.3d at pp. 919–920, 98 Cal.Rptr. 892.)

## \*45 3. American River

In *American River Fire Protection Dist. v. Brennan* (1997) 58 Cal.App.4th 20, 67 Cal.Rptr.2d 660 (*American River*), the district sued to recover payments it had made to firefighters upon retirement for portions of accrued but unused sick leave. Before November 1, 1988, the memorandum of understanding between the district and the firefighters’ union provided that upon retirement, accrued but unused sick leave would convert to additional service credit. Effective November 1, 1988, the \*\*168 memorandum provided that employees had the option to elect to receive pay for up to one-half of unused sick leave; the remainder would become service credit upon retirement. (*Id.* at p. 22, 67 Cal.Rptr.2d 660.) After several firefighters retired and were paid by the district for sick leave accrued before November 1988, counsel for the district opined that the sick leave buy-out program was unconstitutional as applied to any sick leave accrued before the November 1, 1988 effective date of the program. Although the district conceded that the intent of the negotiators was that the sick-leave buyout be retroactive, the district asked the firefighters to repay the amounts paid for their accrued sick leave, and indicated that it would file a legal action if they did not comply. (*Id.* at pp. 22–23, 67 Cal.Rptr.2d 660.) The district did file a complaint, and the trial court granted summary adjudication, finding that the payments for sick leave accrued before November 1, 1988 were unconstitutional. (*Id.* at p. 24, 67 Cal.Rptr.2d 660.)

The court of appeal noted, “[e]arly decisions interpreting the extra compensation clause found its framers had a narrow intention to prohibit government appropriations motivated by charity or gratitude,” responding to legislative abuses in enacting private statutes to address individual claims. (*American River, supra*, 58 Cal.App.4th at p. 24, 67 Cal.Rptr.2d 660 [citing *Jarvis v. Cory, supra*, 28 Cal.3d at p. 577, 170 Cal.Rptr. 11, 620 P.2d 598].) In this case, the sick leave was a negotiated benefit, and public agencies had to compete with private employers who offered not only salaries but sick leave, vacations, and other benefits. (*Id.* at pp. 24–25, 67 Cal.Rptr.2d 660 [citing and quoting *San Joaquin, supra*,

39 Cal.App.3d at pp. 87–88, 113 Cal.Rptr. 912].) The court discussed the cases cited above regarding retroactive compensation for overtime and vacation time, which the district considered dispositive, and pointed out that although sick leave “as such” was a benefit that provided compensation during employment, “upon retirement unused sick leave became a component in calculating the employee’s pension benefit.” (*Id.* at p. 27, 67 Cal.Rptr.2d 660.) “The sick leave buyout provision applied only to retiring firefighters. It continued the long-standing policy of granting additional benefits at retirement to firefighters with accrued sick leave. There was no right to a cash payment for unused sick leave simply upon separation from service. This limited application shows the sick leave buyout was not extra compensation; it added an alternative to established pension benefits and perhaps an incentive to retire.” (*Ibid.*)

\*46 In a paragraph with direct application to this case, the court stated: “The District acknowledges that the extra compensation clause does not apply to pension benefits. ‘If this creates an anomaly in the law, it is one sanctioned by the California Supreme Court.’ (*United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1105 [259 Cal.Rptr. 65].) The right to pension benefits vests upon the acceptance of employment. (*Miller, supra*, 18 Cal.3d at p. 815 [135 Cal.Rptr. 386, 557 P.2d 970].) An increase in pension benefits even after retirement is not extra compensation as that term is used in article XI, section 10 of the California Constitution. (*Nelson v. City of Los Angeles* (1971) 21 Cal.App.3d 916, 918 [98 Cal.Rptr. 892].)” (*American River, supra*, 58 Cal.App.4th at pp. 27–28, 67 Cal.Rptr.2d 660.) After describing the facts in *Nelson*, the court quoted the opinion: “[A]n increase in pension benefits payable to a retired public employee or his widow on pensionable status is paid as the result of rights incident to that status and not as a matter of increased compensation or allowance.” [Citation.] [¶] Here, rather \*\*169 than increasing the pension benefit, the buyout program provided an alternative that would result in increased benefits upon retirement for some firefighters. This increased benefit is payable due to their status at retirement, not as extra compensation for work already performed.” (*Id.* at p. 28, 67 Cal.Rptr.2d 660.)

The *American River* court rejected the district’s argument that permitting the retroactive buyout would “eviscerate” the prohibition against extra compensation and “lead to rampant abuses in pension programs.” (*American River, supra*, 58 Cal.App.4th at p. 28, 67 Cal.Rptr.2d 660.) The firefighters always received some benefit (increased service credit) from unused sick leave upon retirement,

and therefore there was a prior authorization for this type of benefit, which resulted in increased benefits upon retirement for some employees. “[T]he extra compensation clause retains its vitality to preclude granting new benefits retroactively for services previously rendered.” (*Ibid.*) The enhanced sick leave policy “merely substituted a cash benefit at retirement for an increased pension, [and] did not result in extra compensation prohibited by article XI, section 10, subdivision (a) of the California Constitution.” (*Ibid.*)

#### 4. Application to this case

We describe the preceding cases in detail because they show the progression of the law in this area. We continue the progression, and conclude that the past service portion of the 3% at 50 enhanced pension benefit formula for AOCDS members is not unconstitutional extra compensation.

The pension rights of AOCDS members employed on June 28, 2002 vested when they accepted public employment. (*Miller, supra*, 18 Cal.3d at p. 817, 135 Cal.Rptr. 386, 557 P.2d 970.) The vested rights are not immutable. (*Id.* at p. 816, 135 Cal.Rptr. 386, 557 P.2d 970.) The County may make reasonable changes to a pension plan before the pension becomes \*47 payable, so long as any disadvantages to the employees are accompanied by comparable new advantages. (*Ibid.*) The AOCDS members’ contractual pension expectations include not only those benefits in effect when they accepted employment, but also those conferred during their tenure. (*Betts v. Board of Administration, supra*, 21 Cal.3d at p. 866, 148 Cal.Rptr. 158, 582 P.2d 614.) Therefore, when the County Board of Supervisors approved the increase to 3% at 50 to take effect on June 28, 2002, the vested rights of AOCDS members employed on that date included the enhanced pension benefit formula, which was conferred during their employment.

The resolution adopting 3% at 50 specifically provided that the enhancement applied to all years of service, including years worked before June 28, 2002. This retroactive application also became part of the contract of employment of all AOCDS members. (*Sweesy, supra*, 17 Cal.2d at pp. 359–360, 110 P.2d 37.) The increased benefits were not extra compensation. (*Id.* at p. 363, 110 P.2d 37; *Nelson, supra*, 21 Cal.App.3d at p. 918, 98 Cal.Rptr. 892.) The 3% at 50 enhancement did not provide AOCDS members with additional compensation while they worked for the County. Rather, it would become part of the calculation of the employees’ pension

benefits upon retirement. (*American River*, *supra*, 58 Cal.App.4th at p. 27, 67 Cal.Rptr.2d 660.) The 3% at 50 resulted in increased benefits upon retirement, but was not additional compensation. (*Id.* at p. 28, 67 Cal.Rptr.2d 660.) Instead, it altered the prior pension benefits and perhaps provided an incentive to retire. (*Id.* at p. 27, 67 Cal.Rptr.2d 660.)

**\*\*170** The County argues that *Sweesy* and *Nelson* are not applicable because those cases involved retroactive benefits awarded to already retired employees rather than active employees. (Under section 31678.2, subdivision (c), the past service portion of the enhanced benefit formula in issue in this case did not apply to AOCDS members who had already retired.) Although the County argues that there is a “clear distinction between retirees and current employees,” that distinction is one the Supreme Court in *Sweesy* declined to draw. The retirement board argued that the new widow’s pension benefit applied not to retirees but only to current employees, but the court noted that the legislation did not draw a distinction between members in active duty and retired members, “and no distinction may here be drawn on that basis.” (*Sweesy*, *supra*, 17 Cal.2d at p. 361, 110 P.2d 37.) Given that the right to pension benefits vests at the time of employment, the current employees in this case are in a similar situation to the retired employees in *Sweesy* and *Nelson*. In *Nelson*, the petitioners were retired employees, but the city argued that the charter amendment increasing pension benefits applied only to those persons not yet retired on the date of the amendment. (*Nelson*, *supra*, 21 Cal.App.3d at p. 918, 98 Cal.Rptr. 892.) Although the County argues that **\*48** article XI, section 10 of the California Constitution only mentions “public employees,” not retirees, *Nelson* did not hesitate to apply that section to retired public employees.<sup>15</sup>

The County further argues that the statement in *American River*, *supra*, 58 Cal.App.4th at p. 27, 67 Cal.Rptr.2d 660 that “the extra compensation clause does not apply to pension benefits” is dictum. We do not depend upon that general statement, however, but upon a careful analysis of the facts and law in *Sweesy*, *Nelson*, and *American River*. That analysis leads us to the conclusion that the first amended complaint in this case does not state a claim that the past service portion of the 3% at 50 formula violates the extra compensation clause. We affirm the trial court’s grant of judgment on the pleadings on the extra compensation cause of action in the first amended complaint.

### C. Section 31678.2

Section 31678.2, subdivision (a) of CERL, the County

Employees Retirement Law, specifically authorizes past service pension benefit increases, providing “a board of supervisors ... may, by resolution adopted by majority vote, make any section of this chapter prescribing a formula for calculation of retirement benefits applicable to service credit earned on and after the date specified in the resolution, which date may be earlier than the date the resolution is offered.” Subdivision (c) provides that such a benefit for past service “shall only be applicable to members who retire on or after the effective date of the resolution described in subdivision (a).” “Before 2000, the Legislature expressly prohibited a county from providing increased pension benefits on a retroactive basis. (§ 31678.) However, in 2000, the Legislature adopted a broad exception to this rule, specifically providing counties with the option of applying an improved benefit formula in a retroactive manner.” **\*\*171** (*San Diego County Employees Retirement Assn. v. County of San Diego* (2007) 151 Cal.App.4th 1163, 1175, 60 Cal.Rptr.3d 601.) “The statute does, however, contain an express limitation that counties may not offer the retroactive benefit to employees who retired before the effective date of the resolution.” (*Id.* at p. 1176, 60 Cal.Rptr.3d 601.)

<sup>1181</sup> The County Board of Supervisors adopted Resolution No. 01–410 in December 2001, authorizing the 3% at 50 formula for “all years of service” by AOCDS members employed by the County on June 28, 2002. The resolution complies with the statute: a majority (unanimous) vote of the board of supervisors made the enhanced formula applicable to all years of service, **\*49** as authorized by section 31678.2, subdivision (a) (“the date specified in the resolution ... may be earlier than the date the resolution is adopted.”) The limitation of the enhanced benefit formula to employees who had not retired before June 28, 2002, was in compliance with section 31678.2, subdivision (c), which provides: “This section shall only be applicable to members who retire on or after the effective date of the resolution described in subdivision (a).” The County Board of Supervisors in 2001 did precisely what section 31678.2 authorizes.

The County’s present argument—that applying increases in pension benefits for current employees to their past service violates the extra compensation clause—necessarily also contemplates that section 31678.2 authorizes unconstitutional actions by a board of supervisors or governing body. The County ignores the obvious implications of its extra compensation argument, neglecting to address the constitutionality of section 31678.2 in its reply brief, although the brief by respondent OCERS discusses the section at length. The County continues its silence on the issue in its response to

the amicus brief from the California Public Employees' Retirement System (CALPERS), which points out that the County fails to acknowledge the implications of its arguments for statutes which allow increased pension benefits for state employees to be applied to prior years of service.<sup>16</sup>

Our conclusion that applying the 3% at 50 formula to past service does not violate article XI, section 10's prohibition of extra compensation makes it unnecessary for us to address the constitutionality of section 31678.2, or the other, wider implications of the County's argument. Nevertheless, we note that this case involved the collective bargaining process, in which AOCDS bargained with the County for the past service application of the 3% at 50 formula. "The legislative history underlying section 31678.2 ... show[s] that the supporters of this legislation were seeking to provide counties with 'maximum local control' ' in determining the appropriate retirement formula and to require the counties to engage in collective bargaining on the retroactive benefit issue. [Citations.] These objectives are consistent with a conclusion that the Legislature intended to provide the counties with broad discretion in deciding the manner in which to apply this optional retroactive benefit." (*San Diego County Employees Retirement Assn. v. County of*

*San Diego, supra*, 151 Cal.App.4th at p. 1176, 60 Cal.Rptr.3d 601.) The County exercised its discretion, as authorized by the statute, when after collective bargaining the board of supervisors approved the resolution authorizing 3% at 50 for all years of service for AOCDS members employed on June 28, 2002.

**\*\*172 \*50 DISPOSITION**

The judgment is affirmed. Respondents are awarded their costs on appeal.

We concur: MALLANO, P.J., and CHANEY, J.

**Parallel Citations**

192 Cal.App.4th 21, 11 Cal. Daily Op. Serv. 1183, 2011 Daily Journal D.A.R. 1466

**Footnotes**

- 1 Unless otherwise specified, all subsequent statutory references are to the Government Code.
- 2 An employee's "final compensation" is the highest annual compensation the employee earns while in active service, based on one year or the average of three years. (§§ 31462, 31462.1.)
- 3 The AOCDS contract required the County to pay all employee contributions that AOCDS members would otherwise pay.
- 4 In 2007, OCERS had retained an actuarial consulting firm to evaluate the impact of the past service portion (pre-June 28, 2002) of the increase in the pension benefit formula.
- 5 Section 31453, subdivision (a) provides: "An actuarial valuation shall be made within one year after the date on which any system established under this chapter becomes effective, and thereafter at intervals not to exceed three years. The valuation shall be conducted under the supervision of an actuary and shall cover the mortality, service, and compensation experience of the members and beneficiaries, and shall evaluate the assets and liabilities of the retirement fund. Upon the basis of the investigation, valuation, and recommendation of the actuary, the board shall ... recommend to the board of supervisors the changes in the rates of interest, in the rates of contributions of members, and in county and district appropriations as are necessary." Section 7507, subdivision (b)(1) requires that a local legislative body "when considering changes in retirement benefits ... shall secure the services of an actuary to provide a statement of the actuarial impact upon future annual costs, including normal cost and any additional accrued liability, before authorizing changes in public retirement plan benefits...."
- 6 "The Board's power to amortize the fund's UAAL over a 30-year period ... allows the County to grant an increase in benefits and to pay for the increased cost of the benefits over time as the associated pension obligations become due." (*Bandt v. Board of Retirement, supra*, 136 Cal.App.4th at pp. 158-159, 38 Cal.Rptr.3d 544.)
- 7 In *Starr v. City and County of San Francisco, supra*, 72 Cal.App.3d 164, 140 Cal.Rptr. 73, the city financed a community center with a repayment agreement which, in addition to payments out of a special fund, required the city to

make a lump-sum payment five years later out of the general fund. The city conceded that the potential lump sum indebtedness was \$14.1 million, but the court noted that the actual amount was "of unknown proportions." (*Id.* at pp. 170, 176, 140 Cal.Rptr. 73.) This agreement to make a lump sum final payment violated the requirement that an installment contract is valid only if the yearly payment is within the city's income and is supported by consideration in that year. (*Id.* at p. 172, 140 Cal.Rptr. 73). The UAAL in this case is not a liability which the county has expressly agreed to pay in a lump sum in a future year.

The County also cites *In re County of Orange* (C.D.Cal.1998) 31 F.Supp.2d 768, in which a federal district court concluded that "reverse repo transactions" were not transactions or loans for the purpose of the debt limitation provision. (*Id.* at p. 775.) The court emphasized, "The validity of a transaction, whether it creates indebtedness or liabilities, is measured at the time the transaction is entered into. [Citations.] [¶] ... [¶] The Court looks to the economic substance of the transaction to determine whether excess indebtedness or a liability has been incurred. [Citation.]" (*Id.* at pp. 776-777.)

8 The full quoted text of the article in the 1982 opinion bears repeating: "Over the years, the term "unfunded liability" has created considerable confusion for the readers of actuarial reports. The confusion arises when the term is thought of in the same manner as accounting liabilities. That is, the connotation was that the money was "owed" by the plan or somehow the plan was deficient. The truth of the matter is that the "past service liability" and the "unfunded liability" are a function of the actuarial methods and assumptions used to fund a pension plan.

"The actuarial profession has been called upon on numerous occasions to explain these "liabilities"; however, the confusion continues to exist. In an attempt to clarify these values, the actuaries at PERS have adopted new terminology which, hopefully, will help resolve the question. In lieu of the previous term, the terms "actuarial liability" and "unfunded actuarial liability" [UAAL] will be used. These terms distinguish the liabilities presented from accounting liabilities. Remember, the "liabilities" are not owed by the plan. They are primarily a function of the methods and assumptions used by the actuary to fund the plan." (65 Ops.Cal.Atty.Gen. 571, *supra*, pp. 572-573, fn. 2.)

9 The Accounting Professionals also state that they agree with invited comments which support changing the GASB rules to require reporting the " 'unfunded accrued benefit obligation ... on the face of the financial statements to measure the annual cost of pension benefits earned and the demands on future cash flows.' " This is simply a *suggested* change to *future* accounting standards, however, and does not support a conclusion that the board's action in 2001 created a liability under the then-existing standards.

10 Those salary levels had been rendered uncertain by events surrounding the enactment of Proposition 13, which events included alterations in state employees' salary levels and uncertainty about possible salary freezes. (*Jarvis v. Cory*, *supra*, 28 Cal.3d at pp. 574-576, 170 Cal.Rptr. 11, 620 P.2d 598.)

11 The County's first amended complaint did not contain an allegation that the retroactive portion of the 3% at 50 formula was a gift of public money in violation of article XVI, section 6 of the Constitution.

12 When *Sweesy*, *supra*, 17 Cal.2d 356, 110 P.2d 37 was decided in 1941, the California Constitution did not prohibit extra compensation to public employees; the "public employee" language in article XI, section 10, subdivision (a) was added in 1970. (*Longshore v. County of Ventura*, *supra*, 25 Cal.3d at p. 23, 157 Cal.Rptr. 706, 598 P.2d 866.) Gifts of public money violate California Constitution article XVI, section 6. (*Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 207, 56 Cal.Rptr.2d 732.)

13 The Supreme Court later noted, in a case discussing *Sweesy*, *supra*, 17 Cal.2d 356, 110 P.2d 37, that as to employees "[i]nsofar as the *time* of vesting is concerned, there is little reason to make a distinction between the periods before and after the pension payments are due," and an employee "has actually earned some pension rights as soon as he has performed substantial services for his employer." (*Kem v. City of Long Beach* (1947) 29 Cal.2d 848, 855, 179 P.2d 799.)

14 "The words 'pensionable status' although not precisely defined ... in *Sweesy* [, *supra*, 17 Cal.2d 356, 110 P.2d 37] ... were intended by the courts using this language to encompass the expectation in the public officer or employee and his spouse that if the former (the 'breadwinner') continues faithfully in his governmental position until his death or eligible retirement, his widow upon his death will receive not only the pension benefits then provided by the retirement system but any benefits which the Legislature, in its discretion, may thereafter provide to then active judges for the benefit of *their* spouses, in view of changing conditions and circumstances in the economic world." (*Jorgensen v. Cranston*, *supra*, 211 Cal.App.2d at p. 298, 27 Cal.Rptr. 297.)

15 We also note that the County's argument that the past service portion of the enhancement is extra compensation would logically seem to apply with more force to employees who had already retired on June 28, 2002. In any event,

section 31678.2, subdivision (c) provides that the statute does not apply to employees retired at the time of a resolution changing the retirement formula.

- 16 CALPERS points to numerous legislative authorizations allowing pension benefits to be calculated based on state employees' past service, and concludes "including prior years of public service to calculate benefits has been a fundament[al] part of public employees' pension benefits for at least the past 97 years."

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**§ 3287. Interest on damages; right to recover; time from which interest runs; interest rate**  
West's Annotated California Codes | Civil Code | Effective: January 1, 2014

## § 3287. Interest on damages; right to recover; time from which interest runs; interest rate

West's Annotated California Codes | Civil Code | Effective: January 1, 2014

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West's Annotated California Codes
Civil Code (Refs & Annos)
Division 4. General Provisions (Refs & Annos)
Part 1. Relief
Title 2. Compensatory Relief
Chapter 1. Damages in General
Article 2. Interest as Damages

West's Ann.Cal.Civ.Code § 3287

§ 3287. Interest on damages; right to recover; time from which interest runs; interest rate

Effective: January 1, 2014

Currentness

(a) A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.

(b) Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed.

(c) Unless another statute provides a different interest rate, in a tax or fee claim against a public entity that results in a judgment against the public entity, interest shall accrue at a rate equal to the weekly average one year constant maturity United States Treasury yield, but shall not exceed 7 percent per annum. That rate shall control until the judgment becomes enforceable under Section 965.5 or 970.1 of the Government Code, at which time interest shall accrue at an annual rate equal to the weekly average one year constant maturity United States Treasury yield at the time of the judgment plus 2 percent, but shall not exceed 7 percent per annum.

**Credits**

(Enacted in 1872. Amended by Stats.1955, c. 1477, p. 2689, § 1; Stats.1959, c. 1735, p. 4186, § 1; Stats.1967, c. 1230, p. 2997, § 1; Stats.2013, c. 424 (A.B.748), § 1.)

Notes of Decisions (732)

§ 3287. Interest on damages; right to recover; time from which..., CA CIVIL § 3287

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West's Ann. Cal. Civ. Code § 3287, CA CIVIL § 3287  
Current with urgency legislation through Ch. 4 of 2015 Reg.Sess.

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**Flethez v. San Bernardino County Employees Retirement Association**  
Court of Appeal, Fourth District, Division 1, California. | April 22, 2015 | 236 Cal.App.4th 65 |  
186 Cal.Rptr.3d 276

# Flethez v. San Bernardino County Employees Retirement Association

Court of Appeal, Fourth District, Division 1, California. | April 22, 2015 | 236 Cal.App.4th 65 | 186 Cal.Rptr.3d 276

## Document Details

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## Outline

Synopsis  
West Headnotes  
Attorneys and Law Firms  
Opinion  
Parallel Citations

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236 Cal.App.4th 65  
Court of Appeal,  
Fourth District, Division 1, California.

Frank FLETHEZ, Plaintiff and Respondent,  
v.  
SAN BERNARDINO COUNTY EMPLOYEES  
RETIREMENT ASSOCIATION, Defendant and  
Appellant.

Do66959 | Filed April 22, 2015

**Synopsis**

**Background:** Former county employee filed a petition for writ of mandamus seeking retroactive disability retirement. The Superior Court, San Bernardino County, No. CIVDS1212542, David Cohn, J., granted petition and awarded prejudgment interest. County employees' retirement association appealed.

**[Holding:]** The Court of Appeal, McDonald, J., held that trial court could not award prejudgment interest on retroactive disability benefits for a period before employee proved his right to the benefits.

Affirmed in part, reversed in part, and remanded for further proceedings.

West Headnotes (7)

<sup>[1]</sup> **Counties**  
Pensions and benefits

104Counties  
104IIIOfficers and Agents  
104k68Compensation  
104k69.2Pensions and benefits

The burden of proof is on a county employees' retirement association member applying for disability retirement benefits to show he or she is permanently incapacitated as a result of performing his or her job duties. Cal. Gov't Code §§ 31724, 31725.

Cases that cite this headnote

<sup>[2]</sup> **Counties**  
Pensions and benefits

104Counties  
104IIIOfficers and Agents  
104k68Compensation  
104k69.2Pensions and benefits

A county retirement board is required to administer the retirement system in a manner to best provide benefits to the participants of the plan; it cannot fulfill this mandate unless it investigates applications and pays benefits only to those members who are eligible for them. Cal. Gov't Code §§ 31725, 31725.7, 31725.8.

Cases that cite this headnote

<sup>[3]</sup> **Counties**  
Pensions and benefits

104Counties  
104IIIOfficers and Agents  
104k68Compensation  
104k69.2Pensions and benefits

A county retirement board, not the employer, has the constitutional and statutory duty to manage the retirement fund and to determine whether the fund is obligated to pay benefits to any particular applicant. Cal. Gov't Code §§ 31725, 31725.7, 31725.8.

Cases that cite this headnote

<sup>[4]</sup> **Interest**  
Labor relations and employment

219Interest  
219IIITime and Computation  
219k39Time from Which Interest Runs in General  
219k39(2.5)Prejudgment Interest in General

219k39(2.40)Labor relations and employment

Amounts recoverable as wrongfully withheld payments of salary or pensions are "damages" within meaning of statute providing that every person who is entitled to recover damages certain, or capable of being made certain by calculation, and right to recover which is vested in him upon a particular date, is entitled also to recover interest thereon from that day, and interest is recoverable on each salary or pension payment from date it fell due. Cal. Civ. Code § 3287(a).

Cases that cite this headnote

219k39(2.5)Prejudgment Interest in General  
219k39(2.40)Labor relations and employment

Trial court could not award former county employee prejudgment interest on his retroactive disability benefits for a period after his last day of receiving regular compensation but before he proved his right to recover retroactive disability retirement payments, since during that period payment of the benefits was not yet due and employee's right to recover those payments was not yet vested. Cal. Civ. Code § 3287(a); Cal. Gov't Code §§ 31721(a), 31724.

Cases that cite this headnote

[5]

**Interest**

☛ Labor relations and employment

219Interest  
219IIITime and Computation  
219k39Time from Which Interest Runs in General  
219k39(2.5)Prejudgment Interest in General  
219k39(2.40)Labor relations and employment

To recover interest under statute providing that every person who is entitled to recover damages certain, or capable of being made certain by calculation, and right to recover which is vested in the person upon a particular date, is entitled also to recover interest thereon from that day in a mandamus action to recover disability retirement benefits from a county employees' retirement association, the claimant must show: (1) an underlying monetary obligation, (2) damages which are certain or capable of being made certain by calculation, and (3) a right to recovery that vests on a particular day. Cal. Civ. Code § 3287(a).

Cases that cite this headnote

[7]

**Counties**

☛ Pensions and benefits

104Counties  
104IIIOfficers and Agents  
104k68Compensation  
104k69.2Pensions and benefits

Under County Employees Retirement Law (CERL), it is not until the retiring member establishes his or her entitlement to retroactive benefit payments that the right to such payments becomes vested; prior to such proof, the retiring member's right to such retroactive benefit payments is merely inchoate. Cal. Civ. Code § 3287(a); Cal. Gov't Code § 31724.

See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 888 et seq.

Cases that cite this headnote

**\*\*277 APPEAL** from a judgment of the Superior Court of San Bernardino County, David Cohn, Judge. Affirmed in part; reversed in part and remanded for further proceedings.(Super. Ct. No. CIVDS1212542)

**Attorneys and Law Firms**

Arias & Lockwood and Christopher D. Lockwood, for Defendant and Appellant.

[6]

**Interest**

☛ Labor relations and employment

219Interest  
219IIITime and Computation  
219k39Time from Which Interest Runs in General

Faunce, Singer & Oatman, Mark Ellis Singer and Edward L. Faunce, for Plaintiff and Respondent.

### Opinion

McDONALD, J.

\*68 On February 1, 2000, following his last day of work as an employee of San Bernardino County (County), Frank Flethez underwent surgery for a work-related spinal injury he suffered in 1998. In 2008, he filed an application with the San Bernardino County Employees Retirement Association (SBCERA) for work-related disability retirements benefits. SBCERA granted his request for disability benefits, beginning as of 2008, but did not grant him retroactive benefits for the period before the date of his application. Flethez filed a petition for writ of mandamus seeking retroactive disability retirement benefits beginning July 15, 2000. The trial court issued a judgment granting his petition and awarding him Civil Code section 3287, subdivision (a),<sup>1</sup> (§ 3287(a)) prejudgment interest on the retroactive benefits to which the judgment provided he was entitled. On appeal, SBCERA contends the trial court erred by awarding Flethez section 3287(a) prejudgment interest on his retroactive benefits beginning July 15, 2000, because SBCERA could not have granted those benefits until he filed an application for disability retirement and submitted evidence showing his entitlement to those benefits in 2008. Based on our interpretation of section 3287(a) and consideration of relevant case law and the facts in this case as discussed below, we conclude the trial court erred by awarding Flethez prejudgment interest on his retroactive disability benefits before payments of those benefits were due and before his right to recover those payments became vested under section 3287(a).

### \*69 FACTUAL AND PROCEDURAL BACKGROUND

In 1990, Flethez became an employee of County. He worked as an equipment operator from 1991 until 2000. In 1998, he was injured while performing his job duties. After his last day of work on January 28, 2000, he underwent spinal surgery for that 1998 injury. He underwent additional surgeries in 2001 and 2002 and received physical therapy through 2004.

\*\*278 On June 12, 2008, Flethez filed an application with SBCERA for disability retirements benefits, but it was rejected for omission of a signed medical records

authorization. On July 16, 2009, he filed a complete application, including a signed medical records authorization and a supporting physician's report. On August 5, 2010, based on its staff's recommendation, SBCERA granted Flethez's application for disability retirement benefits, effective as of the date of his initial application in 2008. Flethez requested a formal administrative hearing limited to the issue of the appropriate starting date for his retirement benefits. On December 15, 2011, the administrative hearing was held and the hearing officer subsequently issued proposed findings of fact, conclusions of law, and a recommended decision. On October 4, 2012, SBCERA adopted the hearing officer's proposed decision and maintained the effective date of June 12, 2008, for the beginning of Flethez's disability retirement benefits.

Flethez filed the instant petition for writ of mandamus pursuant to Code of Civil Procedure section 1094.5, seeking a writ ordering SBCERA to set aside its decision and grant him service-connected disability retirement benefits effective as of July 15, 2000, with interest at the legal rate on all retroactive amounts. On November 21, 2013, the trial court entered a judgment granting Flethez's petition, stating that a peremptory writ of mandate had been issued by the court commanding SBCERA to grant him service-connected disability retirement benefits retroactive to July 15, 2000, the day after the last day he received regular compensation pursuant to Government Code section 31724. The judgment also ordered "payment of interest at the legal rate on all retroactive amounts. Those interest payments total \$132,865.37." SBCERA timely filed a notice of appeal "limited to the issue of interest."

### DISCUSSION

#### I

#### *Standard of Review*

The interpretation of a statute is a question of law that an appellate court determines de novo independently of the trial court's interpretation. (\*70 *Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 531, 85 Cal.Rptr.2d 257, 976 P.2d 808; *Riehl v. Hauck* (2014) 224 Cal.App.4th 695, 699, 168 Cal.Rptr.3d 795.) Furthermore, the application of a statute to undisputed facts is also reviewed de novo. (*Aryeh v. Canon Business*

*Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191, 151 Cal.Rptr.3d 827, 292 P.3d 871; *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765, 123 Cal.Rptr.3d 562.)

“The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] ‘In determining intent, we look first to the language of the statute, giving effect to its “plain meaning.” ’ [Citations.] Although we may properly rely on extrinsic aids, we should first turn to the words of the statute to determine the intent of the Legislature. [Citation.] Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.” (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562, 7 Cal.Rptr.2d 531, 828 P.2d 672.)

## II

### *Disability Retirement Benefits for County Employees under CERL*

The retirement benefits for county employees are generally set forth in the \*\*279 County Employees Retirement Law of 1937 (Gov. Code, §§ 31450 et seq.) (CERL). County employees may be entitled to disability retirement benefits regardless of their age if they have become permanently incapacitated as a result of injury or disease substantially arising out of and in the course of their employment. (Gov. Code, §§ 31720, 31720.1.)

To obtain disability retirement benefits, a county employee (or his or her employer, the retirement board, or another person on his or her behalf) must file an application for disability retirement benefits. (Gov. Code, § 31721, subd. (a) [“A member may be retired for disability upon the application of the member...”].) An application for disability retirement benefits “shall be made while the member [i.e., employee who is part of a county retirement system] is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while, from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties.” (Gov. Code, § 31722.) The county retirement board [e.g., SBCERA]

“may require such proof, including a medical examination at the \*71 expense of the member, as it deems necessary or the board upon its own motion may order a medical examination to determine the existence of the disability.” (Gov. Code, § 31723.)

<sup>111</sup>Importantly for this case, Government Code section 31724 provides:

“If the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his [or her] duties in the service, it shall retire him [or her] effective on the expiration date of any leave of absence with compensation to which he [or she] shall become entitled ... or effective on the occasion of the member’s consent to retirement prior to the expiration of such leave of absence with compensation. His [or her] *disability retirement allowance shall be effective as of the date such application is filed with the board*, but not earlier than the day following the last day for which he [or she] received regular compensation....

“*When it has been demonstrated to the satisfaction of the board that the filing of the member’s application was delayed by administrative oversight or by inability to ascertain the permanency of the member’s incapacity until after the date following the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed.*” (Italics added.)

The retirement board shall determine whether the member is permanently incapacitated for the performance of his or her job duties. (Gov. Code, § 31725.) The burden of proof is on the member applying for disability retirement benefits to show he or she is permanently incapacitated as a result of performing his or her job duties. (*Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30, 46, 37 Cal.Rptr.2d 860; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1337, 263 Cal.Rptr. 224; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691, 133 Cal.Rptr. 154.)

<sup>121</sup> <sup>121</sup>“Board members ‘are entrusted by statute with the exclusive authority to determine the factual issues whether a member is permanently incapacitated for duty [citation] and whether the disability is service connected [citation].’ [Citation.] The Board is therefore required to administer \*\*280 the retirement system ‘in a manner to best provide benefits to the participants of the plan.’ [Citations.] It cannot fulfill this mandate unless it investigates applications and pays benefits only to those members who are eligible for them. [Citations.] ... [¶] ...

The Board, not the employer, has the constitutional and statutory duty to manage the retirement fund and to determine whether the fund is obligated to pay benefits to any particular applicant.” (*McIntyre v. Santa Barbara County Employees’ Retirement System* (2001) 91 Cal.App.4th 730, 734–735, 110 Cal.Rptr.2d 565.)

\*72 III

### ***Prejudgment Interest on Flethez’s Retroactive Disability Retirement Benefit***

SBCERA contends the trial court erred by awarding Flethez section 3287(a) prejudgment interest from July 15, 2000, on his retroactive disability retirement benefits because SBCERA could not have granted those benefits until he filed an application for disability retirement and submitted evidence showing his entitlement to those benefits. It asserts prejudgment interest could not apply to retroactive benefits before payments of those benefits were due and before Flethez’s right to recover those payments became vested under section 3287(a), which SBCERA contends did not occur until December 15, 2011, the date of the administrative hearing at which disability benefits to Flethez were denied.

A

Section 3287(a) provides:

“A person who is *entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt...*” (Italics added.)

“There is scant pertinent legislative history, but [section 3287(a) ‘s] meaning is clear. Section 3287(a) allows parties to recover prejudgment interest in damage actions based on a general underlying monetary obligation, including the obligation of a governmental entity determined by way of mandamus.” (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1030, 56 Cal.Rptr.2d 109, 920 P.2d 1314 (*AFL*)).

<sup>[4]</sup>In the context of employees’ salary and benefits, “[a]mounts recoverable as *wrongfully withheld payments of salary or pensions* are damages within the meaning of [section 3287(a) ]. [Citations.] *Interest is recoverable on each salary or pension payment from the date it fell due.*” (*Olson v. Cory* (1983) 35 Cal.3d 390, 402, 197 Cal.Rptr. 843, 673 P.2d 720, italics added.) “[P]ursuant to [section 3287(a) ], courts have awarded prejudgment interest on a trial court judgment following a successful administrative mandamus action to recover *wrongfully withheld* benefits. [Citations.] Interest may be awarded in the mandamus action because the requirements for the additional award of interest are met once the court determines the Board wrongfully denied benefits.” (*AFL, supra*, 13 Cal.4th at p. 1022, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

<sup>[5]</sup> “[T]o recover section 3287(a) interest in the mandamus action, the claimant must show: (1) an underlying monetary obligation, (2) damages which are \*73 certain or capable of being made certain by calculation, and (3) a right to recovery that vests on a particular day. [Citation.] The rationale for the mandamus interest award \*\*281 is that a claimant who is wrongfully denied unemployment insurance [or other] benefits by the Board must receive compensation for the egregious *delay* in receiving benefits caused by the necessity of filing a mandamus action challenging the Board’s denial.” (*AFL, supra*, 13 Cal.4th at p. 1022, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) In the context of unemployment benefits, the California Supreme Court in *AFL* reasoned that the Employment Development Department (EDD) “has no underlying monetary obligation to the claimant until it determines the claimant is eligible for the benefits. [Citation.] Once eligibility has been determined, *the right to receive benefits vests on the first day of the claimant’s entitlement, and the EDD must promptly pay benefits due, regardless of any appeal taken.* [Citations.] Hence, *a ‘wrongful withholding’ of benefits, and the corresponding delay in receiving benefits, cannot have legal significance entitling the claimant to prejudgment interest until the Board makes its final decision that the claimant is not entitled to the benefits.*” (*Id.* at p. 1023, 56 Cal.Rptr.2d 109, 920 P.2d 1314, italics added.) *AFL* alternatively explained: “*Benefits ... are due promptly only after a claimant has established benefit eligibility.* [Citation.] ... The delays inherent in this system [for determining eligibility for unemployment benefits] are not, however, tantamount to a ‘wrongful withholding’ of benefits giving rise to a right to section 3287(a) prejudgment interest...” (*Id.* at p. 1026, 56 Cal.Rptr.2d 109, 920 P.2d 1314, italics added.) However, if the EDD denies eligibility, the employee may file a petition for writ of administrative mandate in the trial court. (*Ibid.*) If the court then exercises its independent judgment and finds the EDD

“has *wrongfully withheld* benefits, ‘a claimant has met all requirements of the act, and all contingencies have taken place under its terms, [the claimant] then has a statutory right to a fixed or definitely ascertainable sum of money. [Citations.] [Citation.] At this point, the claimant has met the requirements of section 3287(a), and may seek prejudgment interest on the mandamus judgment for the delay caused by the [EDD] Board’s wrongful denial of benefits.’” (*AFL, supra*, 13 Cal.4th at p. 1027, 56 Cal.Rptr.2d 109, 920 P.2d 1314; cf. *Currie v. Workers’ Comp. Appeals Bd.* (2001) 24 Cal.4th 1109, 1118–1119, 104 Cal.Rptr.2d 392, 17 P.3d 749 [§ 3287(a) prejudgment interest must be awarded by WCAB on retroactive wages from the date employee should have been reinstated and paid those wages for employer’s violation of Lab. Code, § 132a].) In *San Diego County Deputy Sheriffs Assn. v. San Diego County Civil Service Com.* (1998) 68 Cal.App.4th 1084, 1094, 80 Cal.Rptr.2d 712, we observed: “The central theme of *AFL* ... is that [prejudgment] interest is not available absent \*74 an agency decision or action which has resulted in *wrongful withholding of, and corresponding delay in receiving, benefits* to which the claimant is entitled.” (Italics added.)

In *Tripp v. Swoap* (1976) 17 Cal.3d 671, 131 Cal.Rptr. 789, 552 P.2d 749 (*Tripp*), the California Supreme Court held that if the Director of the former Department of Social Welfare wrongfully denies a claimant’s application for welfare disability benefits, the claimant may file a petition for writ of administrative mandamus for an order directing the Director to pay the \*\*282 claimant benefits retroactively from the date of his or her application. (*Id.* at pp. 675–676, 131 Cal.Rptr. 789, 552 P.2d 749.) In the circumstances of that case, *Tripp* concluded “the effective date of [the claimant’s] entitlement to benefits” was the “first day of the month following the date of application [for benefits].” (*Id.* at p. 678, 131 Cal.Rptr. 789, 552 P.2d 749.) Citing section 3287(a) ‘s language, *Tripp* stated: “[F]or purposes of ordering retroactive payments, the right to receive benefits vests in the recipient on the first date of his [or her] entitlement.” (*Tripp*, at p. 683, 131 Cal.Rptr. 789, 552 P.2d 749.) *Tripp* concluded the claimant was entitled to prejudgment interest on benefits wrongfully withheld from the claimant based on section 3287(a) ‘s language and the delay caused by the claimant’s need to vindicate his or her entitlement to benefits. (*Id.* at pp. 683, 685, 131 Cal.Rptr. 789, 552 P.2d 749.) The court held: “[W]here a recipient of welfare benefits is adjudged entitled to retroactive payment of benefits pursuant to the statutory obligation of the state, such recipient is entitled to an award of prejudgment interest at the legal rate *from the time each payment becomes due.*” (*Id.* at p. 685, 131 Cal.Rptr. 789, 552 P.2d 749, italics added.) Interpreting *Tripp*, *AFL* subsequently

stated that *Tripp* held “interest awarded in mandamus actions *vests on the date the claimant was entitled to receive payment* of unemployment insurance [benefits].” (*AFL, supra*, 13 Cal.4th at p. 1034, 56 Cal.Rptr.2d 109, 920 P.2d 1314, italics added.)

In *Weber v. Board of Retirement* (1998) 62 Cal.App.4th 1440, 73 Cal.Rptr.2d 769 (*Weber*), the court addressed the question of whether administrative agencies (e.g., retirement boards) have the authority “to award interest on benefits which have *not been denied*, but ... represent the period before the Board made the eligibility determination, and ... are designed to bring the disbursements current.” (*Id.* at p. 1445, 73 Cal.Rptr.2d 769.) *Weber* stated: “*The event which triggers retirement and the right to allowance payments is the disability determination by the Board. Until that time, the member is not retired, and [the retirement system] has no monetary obligation to that member.*” (*Id.* at p. 1448, 73 Cal.Rptr.2d 769, italics added.) “[O]nce disability is demonstrated to the Board’s satisfaction, the member’s right to receive benefits vests retroactively to the date the application was filed.” (*Id.* at p. 1449, 73 Cal.Rptr.2d 769.) Alternatively stated, “[Government Code section 31724] provides that once the eligibility determination is made, the right to benefits vests immediately, effective retroactively.” (*Id.* at p. 1451.) *Weber* explained:

“[T]he member seeking [disability retirement] benefits must apply [citation], and carries the burden [citation] of demonstrating, to the Board’s satisfaction [citation], his or her eligibility for \*75 the benefits. [Citation.] *Until the member makes the necessary showing of eligibility, his or her right is merely inchoate.*” (*Weber, supra*, 62 Cal.App.4th at p. 1451, 73 Cal.Rptr.2d 769, italics added.)

*Weber* concluded neither the CERL nor section 3287(a) authorized an administrative award of prejudgment interest. (*Weber, supra*, at p. 1452, 73 Cal.Rptr.2d 769.)

In *Austin v. Board of Retirement* (1989) 209 Cal.App.3d 1528, 258 Cal.Rptr. 106 (*Austin*), the court addressed the question of whether the trial court erred by finding an employee was entitled to interest from the last day of service on the retroactive portion of his award of disability retirement benefits. (*Id.* at pp. 1530–1531, 258 Cal.Rptr. 106.) In that case, the employee applied for disability retirement benefits in 1985, which application was initially denied, and, following an administrative

hearing, the retirement board denied his **\*\*283** application in 1987 on finding he was not disabled. (*Id.* at p. 1531, 258 Cal.Rptr. 106.) In 1988, the trial court granted the employee's petition for writ of mandate and issued a writ directing the retirement board to grant him disability retirement benefits retroactive to his last day of service with interest at the legal rate on the amount of the pension that was retroactive (i.e., presumably for payments for the period from 1985 through 1988). (*Ibid.*) *Austin* initially concluded the statutory scheme governing disability pension benefits did not preclude recovery of section 3287(a) interest on "damages awarded as prejudgment benefits *from the date such benefits became due.*" (*Austin*, at p. 1533, 258 Cal.Rptr. 106, italics added.) The court stated: "[Section 3287(a)] requires vesting, however, only in order to fix with sufficient certainty the time when the obligation accrues so that *interest should not be awarded on an amount before it is due.*" (*Id.* at p. 1533, 258 Cal.Rptr. 106, quoting *Mass v. Board of Education* (1964) 61 Cal.2d 612, 625, 39 Cal.Rptr. 739, 394 P.2d 579, italics added.) Accordingly, *Austin* rejected the retirement board's argument that section 3287(a) interest could not accrue on the amount of retroactive benefits for the period prior to its completion of the administrative process in deciding the employee's application. (*Austin*, at pp. 1532–1534, 258 Cal.Rptr. 106.) The court reasoned: "If [the employee] had not been wrongfully denied disability retirement benefits, he would have obtained the benefits of the moneys paid as of the date of accrual of each payment." (*Id.* at p. 1534, 258 Cal.Rptr. 106.) Therefore, *Austin* affirmed the judgment awarding the employee section 3287(a) prejudgment interest. (*Austin*, at p. 1536, 258 Cal.Rptr. 106.)

## B

<sup>161</sup> [7] Based on our interpretation of the language of section 3287(a) and that statute's apparent underlying legislative intent, we conclude an award of section 3287(a) prejudgment interest cannot, and should not, be made for retroactive disability retirement benefit payments for the period prior to the date those payments became due. Section 3287(a) provides: "A person who is *entitled to recover damages certain*, or capable of being made certain by calculation, *and the right to recover which is vested in the person upon a \*76 particular day, is entitled also to recover interest thereon from that day....*" (Italics added.) Paraphrasing that statute, we conclude, in the context of disability retirement benefits, a retiring member is entitled to recover section 3287(a) prejudgment interest on a court award of disability retirement benefits from the day on which his or her right

to recover those benefit payments became vested. However, it is important to distinguish between the retroactive date from which benefits are awarded and the date on which the retiring member becomes entitled to recover those retroactive benefit payments. It is not until the retiring member establishes his or her entitlement to retroactive benefit payments that the right to such payments becomes vested. Prior to such proof, the retiring member's right to such retroactive benefit payments is merely inchoate. (*Weber, supra*, 62 Cal.App.4th at p. 1451, 73 Cal.Rptr.2d 769.) Furthermore, until the retiring member proves his or her right to recover retroactive disability retirement payments, there is *no underlying monetary obligation* (i.e., damages) on which to award section 3287(a) prejudgment interest. (Cf. *AFL, supra*, 13 Cal.4th at p. 1023, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) It is only on the date that a retiring member proves entitlement to retroactive benefit payments that those payments become due **\*\*284** and the right to recover those payments becomes vested within the meaning of section 3287(a). (*Olson v. Cory, supra*, 35 Cal.3d at p. 402, 197 Cal.Rptr. 843, 673 P.2d 720 [regarding salary and pension payments]; *Weber*, at p. 1451, 73 Cal.Rptr.2d 769 [regarding disability retirement benefits]; cf. *AFL*, at pp. 1023, 1026, 56 Cal.Rptr.2d 109, 920 P.2d 1314 [regarding unemployment benefits]; *Tripp, supra*, 17 Cal.3d at pp. 683, 685, 131 Cal.Rptr. 789, 552 P.2d 749 [regarding welfare disability benefits]; *Mass v. Board of Education, supra*, 61 Cal.2d at p. 625, 39 Cal.Rptr. 739, 394 P.2d 579 [§ 3287(a) interest should not be awarded on an amount before it is due].)

In the context of disability retirement benefits under the CERL, a retiring member generally is not entitled to payment of disability retirement benefits until such time he or she files an application for such benefits. (Gov. Code, § 31721, subd. (a) ["A member may be retired for disability upon the application of the member..."].) Furthermore, the burden of proof is on the retiring member to show he or she is permanently incapacitated and that such incapacity substantially was the result of performing his or her job duties. (Gov. Code, §§ 31723, 31725; *Masters v. San Bernardino County Employees Retirement Assn., supra*, 32 Cal.App.4th at p. 46, 37 Cal.Rptr.2d 860; *Glover v. Board of Retirement, supra*, 214 Cal.App.3d at p. 1337, 263 Cal.Rptr. 224; *Harmon v. Board of Retirement, supra*, 62 Cal.App.3d at p. 691, 133 Cal.Rptr. 154.) The retirement board has the constitutional and statutory duty to manage the retirement fund and, in so doing, to determine whether the fund is obligated to pay benefits to any particular applicant. (*McIntyre v. Santa Barbara County Employees' Retirement System, supra*, 91 Cal.App.4th at pp. 734–735, 110 Cal.Rptr.2d 565.) Until such time as the retiring

member submits an application for disability retirement benefits and submits proof that he or she is permanently incapacitated substantially as a result of performing his or her job duties, the retirement board has no obligation to pay \*77 such benefits to that member. Therefore, a retiring member has no "vested" right to recover disability retirement benefit payments, whether retroactive or prospective, and thus no "damages," or underlying monetary obligation, within the meaning of section 3287(a) until such time as he or she files an application for such benefit payments and proves entitlement thereto. It is only on that particular day section 3287(a) interest begins to accrue on benefit payments that are then due.

Our interpretation of section 3287(a) in this context is supported by its apparent underlying legislative intent, implicitly recognized by the California Supreme Court. In both *Tripp* and *AFL*, the court explained section 3287(a) prejudgment interest was intended to compensate the claimant for the *delay* in receiving payment of benefits caused by the *wrongful* denial or withholding of those benefits. (*Tripp, supra*, 17 Cal.3d at pp. 683, 685, 131 Cal.Rptr. 789, 552 P.2d 749; *AFL, supra*, 13 Cal.4th at pp. 1022–1023, 1027, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) The California Supreme Court stated: "The rationale for the [section 3287(a)] mandamus interest award is that a claimant who is wrongfully denied unemployment insurance [or other] benefits by the Board must receive compensation for the egregious *delay* in receiving benefits caused by the necessity of filing a mandamus action challenging the Board's denial." (*AFL*, at p. 1022, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) Absent any wrongful denial or wrongful withholding of benefits and the delay in receiving benefit payments caused thereby (e.g., by requiring the retiring member to file a petition for writ of mandate to obtain such benefit payments), there is no justification \*\*285 for an award of section 3287(a) prejudgment interest. Until such time a retiring member has filed an application for disability retirement benefits and proves entitlement thereto, the retirement board has neither wrongfully withheld payment of those benefits nor caused any delay in the member's receipt of those payments and therefore no section 3287(a) prejudgment interest should accrue on any retroactive benefits ultimately awarded to the member attributable to the time period before that application and proof.

### C

Applying our interpretation of section 3287(a) to the undisputed facts in this case, we conclude, as SBCERA

asserts, the trial court erred by awarding Flethez section 3287(a) prejudgment interest on those retroactive disability benefit payments attributable to the period before he filed his application for, and proved his entitlement to, the disability benefits. To the extent *Austin, supra*, 209 Cal.App.3d 1528, 258 Cal.Rptr. 106, held to the contrary as Flethez asserts, we disagree with, and decline to follow, its holding.<sup>3</sup> Although the trial court in this case properly found, and SBCERA does not contest on \*78 appeal, Flethez was entitled to retroactive disability retirement benefits from the day following the last day he received regular compensation (i.e., July 15, 2000), it erred by awarding him section 3287(a) interest on those retroactive benefit payments attributable to the period from July 15, 2000, through the time he applied for, and proved his right to receive, such payments.<sup>4</sup> However, based on the record on appeal, we cannot conclude with certainty on what date Flethez, in fact, established his right to receive retroactive disability retirement benefit payments pursuant to Government Code section 31724. SBCERA asserts that date was December 15, 2011, the date of the administrative hearing. However, the parties' briefing and evidence in the record cited on that issue is insufficient for us to make that factual finding on appeal. On remand the court is directed to conduct further proceedings to determine that question of fact and then award Flethez the appropriate amount of section 3287(a) prejudgment interest from that date.

### DISPOSITION

The judgment is reversed to the extent it awarded Flethez section 3287(a) prejudgment interest on all retroactive disability retirement benefits. In all other respects, the judgment is affirmed. The matter is remanded for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

WE CONCUR:

NARES, Acting P.J.

McINTYRE, J.

### Parallel Citations

236 Cal.App.4th 65, 15 Cal. Daily Op. Serv. 3880

Footnotes

- 1 All statutory references are to the Civil Code unless otherwise specified.
- 2 *AFL* concluded that because “only a court may award prejudgment interest on its judgment following a mandamus action to recover benefits wrongfully withheld by Board,” administrative law judges do not have statutory authority to award interest on awards of retroactive unemployment insurance benefit payments. (*AFL, supra*, 13 Cal.4th at p. 1043, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)
- 3 It is not clear from the opinion in *Austin* when the retiring member filed his application for, and proved his entitlement to, disability retirement benefits. If, in fact, his last day of service was on or after June 11, 1985, and he met his burden to prove his right to benefits on the date he filed his application (i.e., June 11, 1985), then the result in *Austin* is entirely consistent with our interpretation. (*Austin, supra*, 209 Cal.App.3d at pp. 1530–1531, 1536, 258 Cal.Rptr. 106.)
- 4 In resolving this appeal on this ground, we need not, and do not, address SBCERA’s alternative contention that section 3287(a) prejudgment interest does not accrue during such time as Flethez’s acts, or inactions (i.e., his prolonged delay in filing his application and proving his entitlement to benefits), “prevented” it from paying his retroactive disability retirement payments, or its “debt,” within the meaning of section 3287(a).



ORIGINAL FILED

SEP 16 2013

LOS ANGELES  
SUPERIOR COURT

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8 The Estate of Robert Seymore, Gerald  
9 Dominguez, Jeffrey Walter, Brad Heinz,  
10 Christopher Cervelli and James Steed,  
11 individually and on behalf of a class of  
12 others similarly situated

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 FOR THE COUNTY OF LOS ANGELES

12 MARY KESTERSON, an individual;  
13 MARCEL POCHÉ, an individual; MICHAEL  
14 GILMORE, an individual; THE ESTATE OF  
15 ROBERT SEYMORE (by his Personal  
16 Representative); GERALD DOMINGUEZ, an  
17 individual; JEFFREY WALTER, an  
18 individual; BRAD HEINZ, an individual;  
19 CHRISTOPHER CERVELLI, an individual;  
20 JAMES STEED, an individual; and on behalf  
21 of a class of others similarly situated,

19 Plaintiffs,

20 vs.

21 CALIFORNIA PUBLIC EMPLOYEES'  
22 RETIREMENT SYSTEM (CalPERS),  
23 BOARD OF ADMINISTRATION OF  
24 CALIFORNIA PUBLIC EMPLOYEES'  
25 RETIREMENT SYSTEM,

25 Defendants.

Case No.: BC 502628

CLASS ACTION

(Assigned for all purposes to the Hon. John Shepard Wiley, Department 311)

FIRST AMENDED COMPLAINT FOR:

- (1) DAMAGES;
- (2) INTEREST;
- (3) VIOLATION OF CONSTITUTIONAL AND STATUTORY DUTIES;
- (4) CONSTITUTIONAL AND STATUTORY INTEREST;
- (5) SECTION 21499 PENALTIES;
- (6) BREACH OF CONTRACT;
- (7) EQUITABLE RELIEF;
- (8) INJUNCTIVE AND PROSPECTIVE RELIEF;
- (9) ACCOUNTING;
- (10) CONSTITUTIONAL IMPAIRMENT OF CONTRACT;
- (11) ATTORNEYS' FEES;
- (12) COSTS AND OTHER RELIEF; AND
- (13) EXTRAORDINARY RELIEF

Trial Date: None  
Complaint Filed: March 8, 2013

1 Mary Kesterson ("Kesterson"), the Honorable Marcel Poché, retired, ("Poché"), Michael  
2 Gilmore ("Gilmore"), The Estate of Robert Seymore ("Seymore"), Gerald Dominguez  
3 ("Dominguez"), Jeffrey Walter ("Walter"), Brad Heinz ("Heinz"), Christopher Cervelli  
4 ("Cervelli"), and James Steed ("Steed"), on their own behalf and on behalf of all other similarly  
5 situated individuals (collectively the "Plaintiffs" or proposed class), allege as follows:

6 **OVERVIEW**

7 1. Plaintiffs are enrollees, beneficiaries, and other individuals (hereafter collectively  
8 "participants") who seek the payment of **interest** on funds, monies, benefits, or contributions  
9 (hereafter "funds") that are or were on deposit with, administered by, held by, delayed, or  
10 wrongfully withheld (hereafter "held") by the California Public Employees' Retirement System,  
11 the CalPERS Board of Administration, or CalPERS administered systems<sup>1</sup> ( collectively  
12 "CalPERS").

13 2. Participants established rights or eligibility to the funds prior to the time that the  
14 first payment was due. Participants' rights vested and became payable on specific ascertainable  
15 dates. CalPERS, however, failed to pay participants the funds due until some point after those  
16 ascertainable dates. CalPERS owes interest to participants from the first day that such payment  
17 fell due until the time of payment.

18 3. Plaintiffs are injured where CalPERS holds their funds but does not credit or pay  
19 interest or an accretion, including in three circumstances:

20 a) Firstly, in many circumstances, CalPERS holds, delays paying or  
21 wrongfully withholds Plaintiffs' funds. CalPERS typically subsequently pays Plaintiffs an  
22 aggregated "lump sum", but fails to credit or pay interest. Plaintiffs seek interest,  
23 accretion, and damages under the *Civil Code*, Constitution, case law, and statute,  
24 including for the loss of the use of funds or the interest that they could have earned.

25 b) Secondly, in many circumstances, CalPERS holds Plaintiffs' funds on

26  
27 <sup>1</sup> CalPERS administers the Judges' Retirement Systems (JRSI and JRSII), the closed  
28 Legislators' Retirement System (LRS), medical and health benefit reimbursement funds  
(PERScare and other PPO or self-funded "insurance"), and other funds.

1 deposit for months or years without crediting interest. CalPERS fails to pay or credit  
2 interest on the funds on deposit contrary to the Public Employees Retirement Law  
3 ("PERL", *Government Code*, §§20000, *et seq.*), the *Civil Code*, the Constitution, and  
4 other authority.

5 c) Thirdly, when CalPERS delays so long that it is required to award a  
6 "penalty" under *Government Code* section 21499, CalPERS often fails to pay or  
7 incorrectly calculates the penalty benefit, using the incorrect rate and time period.

8 4. The interest rate owed to Plaintiffs is the greater of the rate required by the  
9 Constitution, the *Civil Code*, the PERL, and other authority.

10 5. CalPERS' underlying monetary and fiduciary obligation to a participant started  
11 upon CalPERS' receipt of the first contribution or deposit in a participant's name. As a  
12 constitutional trust and fiduciary, CalPERS must account for a participant's contributions, invest  
13 the funds, segregate the funds, administer the system for the benefit of the participant, promptly  
14 deliver benefits, and keep the participant fully informed of his or her current and future benefits  
15 as he/she works, prior to the time of payment of funds.

16 6. For example, pursuant to Article XVI, section 17(a), of the California  
17 Constitution, CalPERS and its board "shall ... have sole and exclusive responsibility to  
18 *administer the system* in a manner that will assure prompt delivery of benefits" to participants.  
19 (*Westly v. California Public Employees' Retirement System Bd. of Administration* (2003) 105  
20 Cal.App.4th 1095, 1110, italics in original.)

21 7. The Court is expressly and implicitly required to add, accrue, credit or award  
22 (hereafter "pay") **interest** or accretion pursuant to:

- 23 (i) the *Civil Code*, including sections 1955, 3281, 3287 and 3289;  
24 (ii) the California Constitution, including Art. XV, §1-17 and Art. XVI,  
25 §17(a);  
26 (iii) case law, including *Olson v. Cory* (1983) 35 Cal.3d 390, 402 where  
27 interest was required under *Civil Code* section 3287(a) when judicial  
28 pensioners were not timely paid;

- (iv) the PERL, including *Government Code* sections 20059, 20178, 20734, 20737, 20775, 20776, and 21535, as well as 20221 and 20225;
- (v) the interest provisions in the *California Code of Regulations*, including 2 *CCR* sections 575.1(d)-(f) and 575.2, that are implicitly reciprocal;
- (vi) the timing requirements in 2 *CCR* sections 565, *et seq.* and
- (vii) other statutes, regulations, and common law.

8. CalPERS is expressly and implicitly authorized to add, accrue, credit or pay (hereafter "pay") interest or accretion pursuant to:

- (viii) the California Constitution, including art. XV, §1-17 and art. XVI, §17(a);
- (ix) the PERL, including *Government Code* sections 20059, 20178, 20734, 20737, 20775, 20776, and 21535<sup>2</sup> as well as 20221 and 20225;
- (x) the interest provisions in the *California Code of Regulations*, including 2 *CCR* sections 575.1(d)-(f) and 575.2, that are implicitly reciprocal; and
- (xi) the timing requirements in 2 *CCR* sections 565, *et seq.*

9. CalPERS earns significant investment returns on the Plaintiffs' monies that CalPERS holds in trust for them. **Exhibit 1.** In the 20 years from 1992 to 2012, CalPERS' cumulative investment return was 7.7% percent each year. In the year to July 2013, CalPERS earned 12.5%. When CalPERS delays payment, Plaintiffs are entitled to accretion or growth.

10. CalPERS fails to pay interest or credit accretion on a variety of held, delayed or withheld funds or benefits, including but not limited to:

- (i) contributions;
- (ii) death benefits;
- (iii) ongoing or survivor continuance benefits;
- (iv) "group life insurance" or similar benefits;
- (v) service allowances or benefits;
- (vi) industrial disability allowances or benefits;

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<sup>2</sup>The Court and CalPERS can also correct the amount of "penalty" arising from *Government Code* section 21499.

- 1 (vii) "regular" or "ordinary" disability allowances or benefits;  
2 (viii) funds divided or accounted for pursuant to a legal separation, community  
3 property, or marriage dissolution;  
4 (ix) voluntary contributions, including to buy benefits;  
5 (x) refunds, including funds that CalPERS holds but subsequently refunds or  
6 returns;  
7 (xi) funds arising from contracts or settlement agreements or breaches thereof,  
8 including optional benefit elections;  
9 (xii) funds arising from benefit adjustments under collective bargaining, statute,  
10 contract, or otherwise;  
11 (xiii) Replacement Benefit Plan funds, or those funds that exceed 415(b) limits  
12 or per 2 CCR sections 589, *et seq*;  
13 (xiv) funds held, reimbursed or paid late associated with expenses, fees, costs,  
14 "out of network", or other expenditures by participants for health or  
15 medical care, including reimbursement under CalPERS' PERS Choice and  
16 PERSCare "preferred provider" ("PPO") health insurance plans, or other  
17 similar arrangements;  
18 (xv) aggregated, accumulated or "lump sum" payments of funds, whether  
19 service, disability, death, or other funds;  
20 (xvi) other funds that a participant has on deposit with, administered by, held  
21 by, or owed from CalPERS.

22 11. **Length of Delay.** CalPERS often holds or delays paying participants for months  
23 or years. As an illustration, CalPERS paid death benefits to 459,337 participants since 2000. As  
24 an average of these 459,337 death benefits, CalPERS held, withheld or delayed paying funds an  
25 *average* 275 days after the principal's death.

26 12. **Elements.** Plaintiffs have established their rights:

27 a) **Vesting Date.** The right to interest vests on CalPERS' receipt of funds  
28 associated with a participant. Service retirement benefits fully vest on a Member's

1 retirement. For contracted or elected benefits, the vesting date occurs (for the purpose of  
2 interest) on the "effective date of the member's election". (2 CCR, §575.2(d).) For  
3 beneficiaries, rights vest on designation, although contingent on survival. (2 CCR, §582.)  
4 For some other benefits, the Legislature determined that a transfer or continuation of  
5 other benefits vests when CalPERS first receives the information to process the benefit.  
6 (For example, see *Government Code*, §21499.)

7 b) **Holding of Funds After Vesting.** CalPERS held or withheld the vested  
8 funds. Funds that CalPERS holds or delays paying after vesting are entitled to interest.

9 c) **"Wrongful" Acts Not Required.** Under the PERL, contract law, trust  
10 law, the Constitution and other authority, Plaintiffs' right to interest arises as a result of  
11 CalPERS holding Plaintiff's funds, contributions, or vested rights, including that  
12 CalPERS earned returns on those funds. Plaintiffs do not need to allege or prove that  
13 CalPERS acted "wrongfully".

14 d) **CalPERS' Wrongful Acts and "Damages"**. However, under the  
15 wrongful acts or "damages" theory, Plaintiffs also allege (and will prove) that CalPERS  
16 also wrongfully delayed, wrongfully withheld, or wrongfully failed to timely pay their  
17 funds, benefits, or rights.

18 e) **45 Day Delay is "Wrongful", Penalized.** The Legislature established an  
19 implicit threshold that 45 days' delay (*at the latest*) in payment of benefits is so wrongful  
20 that it is penalized. (*Government Code*, §21499.)

21 13. **CalPERS' Wrongs, Delays, Errors, Policies, Procedures and Practices That**  
22 **Cause Delays, Underpayment, Withholding.** CalPERS' policies, procedures, decisions, or  
23 other acts, or omissions also cause CalPERS to wrongfully withhold, underpay, hold, or delay  
24 payment, including giving rise to the participants' right to interest and damages. These include  
25 but are not limited to:

26 14. **Breach of Constitutional Duties: CalPERS Failure to Prioritize Its Members'**  
27 **Interest.** The California Constitution requires "prompt delivery of benefits" to participants.  
28 Violating its constitutional duties, CalPERS fails to prioritize the timely or "prompt" payment.

1 (Cal. Const. art. XVI, § 17.) CalPERS' delayed payment breaches this specific duty and causes  
2 CalPERS to be liable for interest.

3 15. **CalPERS' Policies, Practices and Procedures to Delay Review of**  
4 **Information, Delayed Payment of Service Retirement.** CalPERS' obligation to timely review  
5 information and promptly pay benefits is express and implied through the PERL and regulations.  
6 For example, statutes require CalPERS to review information in a timely manner so that it can  
7 correctly calculate a participant's service benefit at "any time". (See e.g., *Government Code*,  
8 §§20221, 20225.) Employers are required to immediately inform CalPERS of a change in the  
9 participants' status during employment, such as a promotion. (*Government Code*, §20221.)  
10 Employers are required to submit payroll information and pay member and employer  
11 contributions within 30 days of the pay period. (2 CCR, §§565, 565.1.) CalPERS charges interest  
12 if employers pay contributions late. (2 CCR, §565.2.) Overall, during a participant's employment,  
13 CalPERS is bound to timely receive contributions, biweekly payroll, and other information  
14 providing the pay rate, special compensation, service period, and other information needed to  
15 account for and correctly calculate the service retirement<sup>3</sup> at the time of retirement.

16 16. Instead, CalPERS has wrongfully acted or failed to act, including:

17 a) CalPERS has undertaken a policy or practice to delay payment and delay  
18 review of information until after the member's retirement.

19 b) In some cases, CalPERS has breached its regulations that require  
20 employers to timely provide correct information.

21 c) Because of these and other wrongful policies, CalPERS often pays the  
22 participant no allowance or a reduced allowance at the date that the obligation falls due,  
23 and underpays or delays paying the funds.

24 d) For example, CalPERS' units responsible for "Compensation Review",

25 <sup>3</sup> Disability retirement is slightly different from service retirement. Disability retirement  
26 eligibility is established on a determination that the individual is incapacitated for the  
27 performance of his or her job. CalPERS receives all information necessary to correctly calculate  
28 a participant's disability benefit and begin paying the retirement benefit as soon as the disability  
determination is made. Plaintiffs seek interest only on delays after eligibility is established.

1 Death Benefit, and Community Property often delay reviewing information and withhold  
2 full payment without interest.

3 17. **CalPERS' Breach of its Fiduciary Duties to Account For and Segregate**

4 **Contributions Causes Delay, Damages, Interest.** CalPERS' constitutional and fiduciary duties  
5 inform its statutory duties. As a fiduciary obligated to timely account for information and to  
6 correctly segregate contributions in participants' accounts, CalPERS has an ongoing duty to stay  
7 informed, communicate with participants, request the correct contributions, audit employers,  
8 resolve ambiguities, timely process information, and keep the participants informed. (Cal. Const.  
9 art. XVI, § 17; *Government Code*, §§20150, *et seq.*; 2 *CCR*, §§565, *et seq.*)

10 18. However, CalPERS fails to timely and accurately stay informed, fails to keep the  
11 participant informed in a timely manner, fails to account for funds and contributions as they are  
12 received, and fails to timely request or review information.

13 a) **Accounting.** CalPERS' failure to timely account and segregate funds  
14 causes payment to participants to be delayed.

15 b) **Failure to Adequately Audit Units.** CalPERS fails to audit its own units  
16 appropriately, leading to delayed and incorrect payments.

17 c) **Delayed Application of Information.** CalPERS' failure to timely enter  
18 and apply information to the participants' account delays payment.

19 d) **Example: CalPERS Failure to Timely Input Collective Bargaining,**  
20 **Contract Amendments and Other Information.** Even though required to input them  
21 within 30 days, CalPERS at times delays entering information about changes in  
22 participants' contracted benefits into its computerized database, delaying payment of the  
23 increased benefit to participants. (2 *CCR*, §566.)

24 19. **CalPERS' Breach of its Fiduciary Duty to Accurately Inform Plaintiffs**

25 **Causes Delays.** As a fiduciary, CalPERS is required to timely and accurately inform  
26 participants. (Cal. Const. art. XVI, §17; *Government Code*, §§20150, *et seq.*; 20221, 20225; 2  
27 *CCR*, §§565, *et seq.*) CalPERS fails to seek and provide information in a timely manner.

28 20. For example, as a policy, CalPERS requires participants to file an application for

1 service retirement ninety (90) days before the participants' selected retirement date. Within that  
2 90 days CalPERS has sufficient time to review and to resolve issues prior to retirement.

3 However, CalPERS fails to timely request information and fails to timely inform participants or  
4 employers of information that CalPERS seeks. As a result, CalPERS delays payment of funds.

5 21. **Breach of Duty of Loyalty, Wrongful Delay, Damages Arising From Delay.**

6 a) **Self Interest; Financial Incentives to CalPERS Employees.** CalPERS is  
7 believed to offer financial incentives to its management or senior level employees that are  
8 in part associated with meeting deadlines. A counter-intuitive result is that certain  
9 projects may have been "rolled out" containing a higher degree of errors or problems that  
10 contribute to delays in payment to participants.

11 b) **Financial Incentives to Third Parties or Contractors.** CalPERS is  
12 believed to offer financial incentives to third parties or contractors that are in part  
13 associated with meeting deadlines. For example, there are one or more liquidated  
14 damages clauses in CalPERS' contracts with computer providers, including such as with  
15 Accenture, that may immunize or reduce the contractors' liability for financial  
16 responsibility for delays. **Exhibit 2.** A counter-intuitive result is that certain projects may  
17 have been "rolled out" containing a higher degree of errors or problems that cause or  
18 contribute to delays in payment to participants.

19 22. **CalPERS' Failure to Oversee.** CalPERS fails to oversee its staff and its  
20 contractors to assure timely processing of information and timely payment of funds to  
21 participants.

22 a) **Backlog.** CalPERS' failure to address the backlog of cases causes delay.

23 b) **Erroneous Deployment of Staff and Resources.** CalPERS failed to  
24 adequately staff or direct resources to the timely processing or calculating of benefits, or  
25 funds, which causes delays in payment of funds to participants.

26 23. **CalPERS' Erroneous and Delayed Computer, Information Processing.**

27 CalPERS' delayed or erroneously implemented computer, database, software, or information  
28 processing in turn delayed payment to participants.



1           30.     CalPERS on average has delayed paying the death benefit until two hundred and  
2 seventy five (275) days after death, and one hundred and three (103) days after CalPERS has  
3 received "the last document" that it requested.

4           31.     CalPERS has not paid or credited any interest on these funds.

5           32.     In the context of held death benefits,<sup>4</sup> CalPERS holds or wrongfully withholds  
6 and failed to pay interest on:

7               a)     One time death benefits – from the time that the benefit vested, or the  
8 time when the payment fell due or payable.

9               b)     Pro-rata post-death allowance – from the time that the benefit vested, or  
10 the time when the payment fell due or payable.

11              c)     Survivor continuance – from the time that the benefit vested, or the time  
12 when the payment fell due or payable.

13              d)     Lump sum -- from the time that the individual components of the  
14 aggregated benefit vested, or the time when each payment fell due or payable.

15              e)     Ongoing benefits -- from the time that the individual components of the  
16 aggregated benefit vested, or the time when each payment fell due or payable.

17              f)     Beneficiary allowance – from the time that the individual components of  
18 the aggregated benefit vested, or the time when each payment fell due or payable.

19           33.     In certain death benefit cases, the identity or priority of the beneficiary is  
20 uncertain or contested. CalPERS requests information. The beneficiary must provide information  
21 prior to payment. If CalPERS wrongfully withholds the money after the beneficiary has been  
22 determined, CalPERS owes interest, including from the date that CalPERS received "the last  
23 document" containing information to ascertain the beneficiary and calculate the benefit.

24           34.     Wrongful Delays in Payment of Death Benefits. CalPERS is responsible for  
25 CalPERS' delays, errors, and omissions in processing and paying death benefits. CalPERS fails  
26 to timely communicate with potential beneficiaries, fails to timely request additional

27           <sup>4</sup> CalPERS uses the terminology "one time death benefit", "ongoing benefit", and "lump  
28 sum", making it difficult to ascertain whether payment of interest and "penalty" are due.

1 information, fails to review information timely, fails to credit the correct amount of funds over  
2 the correct period, to the date of payment.

3 **Kesterson Example**

4 35. **Kesterson: Delayed Death Benefit Example**. Mary Kesterson's case is  
5 illustrative of CalPERS (i) holding funds in trust, (ii) wrongfully delaying payment, (iii) failing  
6 to pay interest; and (iv) failing to credit the appropriate "penalty" under Section 21499:

7 (a) Ms. Kesterson's husband worked for the Beverly Hills Fire Department.  
8 During his employment, he designated his wife as beneficiary of one-time and ongoing  
9 death benefits. Mr. Kesterson died in September 2011. Mrs. Kesterson's priority and  
10 identity as beneficiary was uncontested. Mrs. Kesterson was entitled to receive the  
11 benefit immediately. Mrs. Kesterson timely informed CalPERS of her husband's death.  
12 Mrs. Kesterson timely provided documentation to CalPERS to verify her status.

13 (b) Although Mrs. Kesterson is the spouse of Mr. Kesterson and  
14 unequivocally identified as the beneficiary of his death benefit, CalPERS delayed making  
15 payments to Mrs. Kesterson for more than six (6) months. CalPERS did not pay Mrs.  
16 Kesterson any death benefits until April 16, 2012.

17 (c) CalPERS failed to credit interest for the first period of delay.

18 (d) CalPERS failed to add or accrue the correct "penalty" under Section  
19 21499.

20 (e) CalPERS held the difference in Kesterson's pension, and wrongfully  
21 denied timely payment, causing her damages and a claim for interest.

22 **Penalty Benefits**

23 36. **Section 21499 "Penalty" Benefit**. CalPERS is required to pay a "penalty" under  
24 *Government Code* section 21499 when CalPERS delays paying a benefit 45 or more days after  
25 receiving all of the information necessary to identify the beneficiary.

26 37. The "penalty" arises from the PERL. The "penalty" is assessed against CalPERS  
27 at the greater rate of (i) six percent (6%) and/or (ii) CalPERS' "net earnings rate (including  
28 capital gains and losses)" for funds that held more than 45 days.

1           38.    Usury Laws Support Section 21499 is a Benefit, Not Interest. Usury laws and  
2 the California constitution set a ceiling on the interest rate that the Legislature cannot exceed.  
3 (*Civil Code*, §1916-1; *Cal.Const.*, art. XV, §1.) The "net earnings rate" can and does exceed the  
4 limits on interest rates, so Section 21499 cannot be "interest" and must be a penalty under the  
5 PERL.

6           39.    Failure to Pay Penalty. From about 2000 to 2013, CalPERS failed to pay a  
7 penalty to at least 13,180 Members on \$25,563,735 in death benefits paid more than 45 days late  
8 (after all information received).<sup>5</sup> **Exhibit 3.** CalPERS also did not pay interest.

9           40.    CalPERS' Incorrect Calculation of Penalty: Example: "One Time" Death  
10 **Benefit.** Assuming that "one-time" death benefits vested at a particular moment (and do not  
11 aggregate a series of payments), CalPERS miscalculated the penalty on at least \$6,689,215 of the  
12 "one time" death benefits between 2010 and 2013. **Exhibit 4.**

13           41.    In 2010, CalPERS failed to pay interest or "penalty" on 739 "one time" death  
14 benefits paid more than 45 days. **Exhibit 5.** In 2011, CalPERS has failed to pay interest or

15 \_\_\_\_\_  
16           <sup>5</sup> Pursuant to a Public Records Act (PRA) request, CalPERS supplied counsel for  
17 Plaintiffs with electronic Excel spreadsheet data for 459,337 "death benefit" recipients. **Exhibits**  
18 **3 through 7** were prepared by counsel for Plaintiffs and sort portions of the data into the  
19 following subsets:

- 20           • **Exhibit 3** is a list of all death benefit recipients from 2000 through 2013 who  
21 received no penalty funds on one time ("ONE"), ongoing ("ONG") or lump sum ("LUM")  
22 death benefit payments, even though the payments were made more than 45 days after all  
23 data was received by CalPERS.
- 24           • **Exhibit 4** is a list of all death benefit recipients from 2010 through 2103 who  
25 received no penalty payments or incorrectly calculated penalty payments on one time  
26 death benefits. (The data in Exhibit 4 partially overlaps that in Exhibit 3, but also  
27 includes recipients where the penalty payments were incorrectly calculated.)
- 28           • **Exhibit 5** is a list of all one time death benefit recipients in 2010 who received no  
penalty payments, even though the death benefits were paid more than 45 days late. (This  
is a subset of Exhibit 3 and extracts data for 2010 only.)
- **Exhibit 6** is a list of all one time death benefit recipients in 2011 who received no  
penalty payments, even though the death benefits were paid more than 45 days late. (This  
is a subset of Exhibit 3 and extracts data for 2011 only.)
- **Exhibit 7** is a list of all one time death benefit recipients in 2012 who received no  
penalty payments, even though the death benefits were paid more than 45 days late. (This  
data for 2012 only.)

1 "penalty" on 432 "one time" death benefits paid more than 45 days late. **Exhibit 6.** In 2012,  
2 CalPERS has failed to pay interest or "penalty" on 197 "one time" benefits paid more than 45  
3 days late. **Exhibit 7.**

4 42. CalPERS also owes interest under the *Civil Code* and Constitution as well,  
5 including because a 45-day delay, qualifying as a penalty, must by definition be "wrongful".

6 **CalPERS' Inappropriate Administrative**  
7 **"Action" in Kesterson**

8 43. **Kesterson: CalPERS' Administrative Review After Court Assumed**  
9 **Jurisdiction.** Subsequent to the filing of the Complaint and while this Court retained exclusive  
10 jurisdiction over this matter, CalPERS selectively undertook an administrative process on its  
11 own accord, without the knowledge, consent, or agreement of Mrs. Kesterson or her counsel.  
12 Starting in 2013, CalPERS reviewed the claims in the Complaint and sought to resolve it.

13 a) Recognizing that it failed to pay the correct "penalty" under *Government*  
14 *Code* section 21499, CalPERS electronically transferred an additional \$236 into Mrs.  
15 Kesterson's bank account. **Exhibit 8.** After the fact, CalPERS notified her of CalPERS'  
16 administrative determination.

17 b) However, CalPERS (1) did not credit or pay interest; (2) did not credit the  
18 correct amount of "penalty" over the time as required under Section 21499; (3) did not  
19 pay attorney fees; and (4) did not wholly address the claims.

20 c) Upon learning of CalPERS' administrative action, Mrs. Kesterson rejected  
21 the additional payment as insufficient and incorrect. She returned the \$236 by check, and  
22 informed CalPERS that she rejected its offer and preserved all rights to proceed in this  
23 Court. **Exhibit 9.**

24 44. **Form of Action.** Kesterson, et al. reject that CalPERS has any authority or  
25 jurisdiction to administratively review or resolve the matters in the Complaint or in this First  
26 Amended Complaint.

27 45. To the extent that CalPERS has attempted to assert administrative jurisdiction or  
28 authority, Kesterson, et al. seek judicial review of that (albeit illegal) administrative action,

1 additionally construing the Complaint and this First Amended Complaint to the extent necessary  
2 as a *Petition for Writ of Administrative Mandamus* under *Code of Civil Procedure* sections 1094,  
3 *et seq.*, and/or a *Petition for Writ of Mandate* under *Code of Civil Procedure* section 1085, or  
4 other extraordinary relief, if needed and only to the extent needed.

5 46. **CalPERS Did Not Correct Other Death Beneficiaries.** Although CalPERS sent  
6 funds putatively "correcting" the underpayment of the "penalty" to Ms. Kesterson, CalPERS did  
7 not pay interest or a "penalty" to other participants in the similar situation as Kesterson. See, for  
8 example, the spreadsheets for 2011 and 2012, the same period that Kesterson was due interest  
9 and the penalty benefit. **Exhibits 6 and 7.**

#### 10 **Service Retirements**

11 47. **Interest on Service Retirement Benefits.** CalPERS delays, holds or underpays  
12 service benefits. CalPERS also wrongfully withholds service retirements, causing damage.  
13 Sometime later, CalPERS often makes a delayed payment or an accumulated "lump sum"  
14 payment. CalPERS fails to credit interest.

15 48. Retirement benefits vest and accrue during employment. Plaintiffs fully vest at  
16 retirement. All information necessary for CalPERS to calculate the participant's service  
17 retirement benefits have been established, typically during employment. (*Government Code*,  
18 §§20221, 20225; 2 *CCR*, §§565, *et seq.*) The employer transmits the information during  
19 employment and the information is received by CalPERS prior to retirement. As a policy,  
20 CalPERS encourages or requires individuals to file an application for service retirement ninety  
21 (90) days prior to the selected retirement date. Participants vest on the first day of contributions  
22 or on the filing of a retirement application. After the date of retirement, payment falls due  
23 periodically thereafter at identifiable dates in identifiable amounts.

24 49. However, CalPERS regularly holds or fails to timely pay part of participants'  
25 service retirements, with some significant number of participants' benefits delayed many months  
26 or even years, causing damages and liability for interest.

27 50. CalPERS often wrongfully withholds and delays paying participants their full and  
28 correct benefits each period.

1           51.     Although we have submitted Public Records Act requests to ascertain and  
2 describe the number and amount of delays, CalPERS has refused to provide them.

3           52.     Michael Gilmore's case is illustrative of CalPERS (i) holding funds; (ii) delaying  
4 funds; (iii) damaging him; (iv) wrongfully withholding funds; and (v) failing to pay or credit  
5 interest:

6           (a)     Gilmore worked as a police officer for the Beverly Hills Police  
7 Department. Gilmore vested in a pension based on his highest final compensation and  
8 special compensation earned during his employment. The employer and Member timely  
9 reported information to CalPERS during the Member's employment. CalPERS received  
10 the information, including about Gilmore's employment, compensation, special  
11 compensation and other information prior to retirement. Likely, CalPERS did not review  
12 it or implement in a timely manner.

13           (b)     Gilmore filed an application and fully vested on December 27, 2008, with  
14 approximately 31 years of CalPERS service credit. No new rights arose after Gilmore had  
15 retired.

16           (c)     CalPERS acknowledged eligibility for a service retirement, but started  
17 paying Gilmore reduced funds in December 2008. CalPERS initially paid Gilmore a  
18 reduced monthly pension allowance based upon a reduced "final compensation".  
19 CalPERS held the rest of the benefit that fell due each month, causing damage and a  
20 claim for interest. Wrongfully delaying, CalPERS conducted an informal administrative  
21 review after Gilmore's retirement, even though information and rights had previously  
22 been established.

23           (d)     Approximately a year after Gilmore's retirement, CalPERS determined  
24 informally that it had been underpaying Gilmore. CalPERS sent Gilmore a check for  
25 approximately \$9,000 of accumulated "lump sum" underpayment. The payment reflected  
26 that CalPERS had held and wrongfully delayed the funds. CalPERS did not pay interest.

27           (e)     In or about March 2011, CalPERS undertook another informal  
28 administrative review, again wrongfully recalculated Gilmore's pension and determined

1 that it had been *overpaying* Gilmore. CalPERS demanded that Gilmore repay \$6,000.  
2 Gilmore disputed CalPERS' conclusions. CalPERS required Gilmore repay the alleged  
3 "overpayments" over 18 months.

4 (f) CalPERS' policy dictates that participants should pay interest to CalPERS  
5 on the "unpaid balance of the amount payable" for the period from the "effective date of  
6 the member's election through the completion of payments" when a participant makes  
7 installment payments or re-payments to CalPERS. (2 CCR, §575.2.) To be fair after  
8 considering the bargaining power and fiduciary duties, this regulation should be  
9 construed reciprocally to cause CalPERS to owe interest when it owes funds.

10 (g) In February 2012, CalPERS switched course again and notified Gilmore  
11 that he had not been overpaid and was actually underpaid. After wrongfully withholding  
12 and holding the funds, CalPERS sent Gilmore a check for approximately \$37,000 in  
13 accumulated "lump sum" funds. CalPERS did not pay Gilmore interest (or a "penalty"  
14 benefit).

#### 15 Disability Retirements

16 53. IDR: Interest on Industrial Disability Retirement (IDR) Benefits. CalPERS  
17 fails to pay interest when it delays, holds or wrongfully underpays an industrial disability  
18 retirement (IDR) benefit, damaging the affected participant.

19 54. Fire fighters, police officers, and other safety employees are entitled to industrial  
20 disability retirements if they are injured on the job. For industrial disability retirements,  
21 participants establish eligibility on first employment and fully vest at the time of disability  
22 determination.<sup>6</sup> For "local" safety employees, the local entity makes the IDR disability  
23 determination that is forwarded to CalPERS. For "state" safety employees, CalPERS makes the  
24 IDR disability determination.

25  
26 <sup>6</sup> Participants in this lawsuit have established eligibility. With respect to IDR or "regular"  
27 or "ordinary" disability, participants are not seeking interest for delayed payments in any period  
28 before a participant's eligibility for the disability is determined. However, CalPERS owes interest  
(and "penalty" benefit) on funds that its delays or holds after eligibility is established.

1           55.     After determination, payment falls due periodically thereafter at identifiable dates  
2 in identifiable amounts. Plaintiffs are entitled to timely receive full payment of all of their  
3 periodic or lump sum benefit. All of the disabled participants have established eligibility for  
4 disability.

5           56.     Other than the determination, all information necessary for CalPERS to calculate  
6 the participant's disability retirement benefits accrued during employment and should have been  
7 received by CalPERS prior to the date first disability payment was due.

8           57.     After receiving the eligibility determination, CalPERS holds and wrongfully  
9 withholds IDR funds, without paying interest, causing damage. Although the illustrations apply  
10 to public agency employers, they also apply to state employers. Robert Seymore's and Gerald  
11 Dominguez's cases are illustrative:

12           **Robert Seymore (Deceased, Represented by Estate):**

13           (a)     Seymore worked as a police officer for the Bay Area Rapid Transit system  
14 ("BART") until about March 22, 2011.

15           (b)     Seymore was forced to retire on industrial disability retirement (IDR). An  
16 application for IDR benefits was timely filed. Seymore's eligibility for disability was  
17 established. The eligibility determination was forwarded to CalPERS. Seymore began to  
18 receive IDR retirement benefits from CalPERS in March 2011, however at an incorrectly  
19 reduced rate. CalPERS held and wrongfully delayed paying the higher rate.

20           (c)     CalPERS held the difference in Seymore's pension, and wrongfully denied  
21 timely payment causing damage and a claim for interest.

22           (d)     On May 30, 2012, 15 months after Seymore's retirement, CalPERS  
23 determined that it had been underpaying Seymore. On July 1, 2012, CalPERS paid him  
24 \$2,599.52 in accumulated funds. CalPERS did not pay Seymore interest.

25           (e)     Payment of benefits shall be retroactive to the effective date of retirement.  
26 (See *Government Code* section 21416.)

27           (f)     Mr. Seymore died after his claim vested, and after the filing of this action.  
28 Three minor children survive him. Mr. Seymore is represented by the personal

1 representative(s) for his three minor children. They seek to continue the claim.

2 **Gerald Dominguez:**

3 (g) Dominguez worked as a police officer for BART until August 2012.

4 (h) Dominguez was forced to retire on IDR. An application for IDR benefits  
5 was timely filed. His disability eligibility was established. It was forwarded to CalPERS.  
6 Dominguez was industrially retired effective August 2012. CalPERS failed to timely pay  
7 him his whole benefits, and held or wrongfully withheld the funds.

8 (i) CalPERS held the difference in Dominguez's funds, and wrongfully  
9 denied timely payment causing damage and a claim for interest.

10 (j) CalPERS delaying paying Dominguez his first IDR pension check until  
11 May 2013. No interest was paid on the accrued retroactive benefits (that were due since  
12 the date of his eligibility was established).

13 58. **Interest Owed on "Regular" or "Ordinary" Disability.** "Regular" or  
14 "ordinary" disability payments are also entitled to interest if CalPERS holds, wrongfully  
15 withholds, or delays payment. CalPERS fails to pay interest when it delays, holds or underpays a  
16 "regular" or "ordinary" disability benefit.

17 59. CalPERS members are entitled to "regular" or "ordinary" disability if they are  
18 determined incapacitated for performance of their job but are not eligible for IDR. It fully vests  
19 at the time of eligibility determination. After eligibility is established, payment falls due  
20 periodically thereafter at identifiable dates in identifiable amounts. Plaintiffs are entitled to  
21 timely receive full payment of all of their periodic or lump sum benefit.

22 60. Other than the disability determination, all information necessary for CalPERS to  
23 calculate the participant's disability retirement benefits should have been received by CalPERS  
24 prior to determination.

25 61. Brad Heinz's case is illustrative:

26 a) Heinz worked as an attorney for the State of California. He timely filed an  
27 application for ordinary disability. His disability eligibility was established. CalPERS  
28 received the determination.



1 Cotati employment.<sup>7</sup> Three and one-half years after deposit, CalPERS returned the  
2 \$469,005.25 on or about December 22, 2011 without interest.<sup>8</sup>

3 (c) CalPERS held Walter's funds, and wrongfully denied timely crediting or  
4 paying interest causing damage.

5 66. **Interest on Return of Partial Contributions.** Participants make contributions or  
6 buy additional service credits in different forms, including prior military time, additional  
7 retirement service credit, and prior service credit. CalPERS accepts and holds the funds in trust.

8 67. However, after holding the funds, CalPERS often later either (1) grants benefit  
9 after a delay but without crediting interest; or (2) denies the application for benefits and refunds  
10 the funds, without interest; or (3) sometimes returns part of the funds and rejects all or part of the  
11 application for additional benefits (including service credit purchases), refunding the money  
12 without interest or increase. CalPERS also wrongfully delays reviewing information, and  
13 wrongly delays paying and holds the funds.

14 68. Chris Cervelli's case is illustrative:

15 (a) While Cervelli was employed by the State Employment Development  
16 Department (EDD), he received permission from CalPERS to deposit funds to purchase  
17  
18

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19 <sup>7</sup> CalPERS originally advised Walter that he was eligible for CalPERS membership  
20 through his employment as the City Attorney for Cotati. In reliance on CalPERS' representations  
21 to this effect, Walter made the payments to CalPERS referenced *supra*. CalPERS later reversed  
22 itself and denied Walter's retirement application based on his employment with Cotati. Although  
23 Walter appealed CalPERS' determination, he later withdrew his challenge, expressly reserving  
24 all rights to assert eligibility for membership in or to membership in CalPERS through his  
25 employment as the City Attorney (or other official or employee) with another CalPERS-covered  
26 employer. Thus, wherever in this First Amended Complaint, reference is made to Walter not  
27 being a CalPERS Member, or being ineligible for such membership, such only refers and is  
28 strictly limited to his claim for CalPERS membership as a City Attorney for Cotati, and in no  
way is to be deemed or construed as an admission that he is not a CalPERS Member or is  
ineligible for such membership though his employment as a City Attorney, or other public  
official or employee with any other CalPERS-covered employer.

<sup>8</sup> As examples, under *Government Code* sections 20178 or 21499, CalPERS owes Walter  
at least 6 percent interest on the \$469,005.25, which exceeds \$100,000. At the higher interest  
rates under the *Civil Code*, CalPERS owes Walter interest in excess of \$200,000.

1 prior service credit<sup>9</sup>.

2 (b) In January 2001, Cervelli contracted to purchase 3.035 years of CETA  
3 time in installment payments. He agreed to pay CalPERS approximately \$6,000.

4 (c) In 2009, eight (8) years after contracting with CalPERS to purchase the  
5 CETA service credit (and three (3) years after Cervelli retired), CalPERS decided that  
6 Cervelli was *not* eligible to purchase the service credit. CalPERS held the funds in trust  
7 (for Cervelli as a member) but failed to credit interest. CalPERS wrongfully acted,  
8 including delaying 8 years. Thereafter, CalPERS reduced his pension.

9 (d) CalPERS held Cervelli's funds, and wrongfully denied crediting or paying  
10 interest, causing damage.

11 (e) **Cervelli Administrative Process Included Interest Claim.** Cervelli  
12 asserted an administrative claim for benefits and interest. After a three-year  
13 administrative process in which Cervelli challenged CalPERS' determination and in the  
14 alternative requested interest on the contributions for the 8 years of CalPERS holding his  
15 funds, an Administrative Law Judge ruled against Cervelli, denied him the right to  
16 purchase the credit, and ruled that CalPERS has no legal authority or power in the  
17 administrative process to award interest.

18 (f) **CalPERS' Final Decision in Cervelli: CalPERS Has No Power to Hear**  
19 **Interest Claims, No Authority to Award Interest.** The ALJ ruled that the  
20 administrative process was not the proper forum or jurisdiction to seek interest. Since the  
21 ALJ rejected the interest claim jurisdictionally, no administrative process was available  
22 or required. When it adopted the Proposed Decision as its own, CalPERS disclaimed the  
23 ability to adjudicate interest claims in the OAH. (See *Infra* re discussion of futility,  
24 exhaustion of the administrative process). **Exhibit 10.**

25  
26  
27 <sup>9</sup> Cervelli deposited funds with CalPERS to purchase service credit for the time he  
28 worked with the City and County of San Francisco while being paid with funds from the federal  
Comprehensive Employment and Training Act ("CETA") program.

**Delays in (i) First Payment;  
and (ii) During Administrative Review**

69. **Interest on Delayed, Underpaid "First" Payment.** CalPERS holds or wrongfully delays many participants' first pension payment. Participants are entitled to interest. The sums withheld or underpaid in the "first" payments are often accumulated and paid subsequently, but without interest.

70. **Interest on Funds Held or Wrongfully Delayed During Administrative Review.** CalPERS holds Plaintiffs' funds and/or wrongfully withholds and delays payment during the pendency of an administrative review. CalPERS fails to pay interest, including when:

(a) **Benefit Granted After Initial Denial in Administrative Review.** CalPERS receives contributions or funds from participants as they work in a "CalPERS covered" employment position. Prior to or at retirement, participants have fully established the facts of their CalPERS eligibility and benefit entitlements. The information has been provided to CalPERS during employment, including associated with contributions deposited. However, at retirement or other vesting date, CalPERS initially held or wrongfully failed to pay part of participants' benefit. In an informal or formal administrative process or review, CalPERS delays or challenged the amount of the benefit or information. CalPERS eventually increased the benefit, often paying a lump sum, but failed to credit or pay interest, including for the period of the administrative review or holding.

(b) **Benefit Partly Denied After Administrative Review.** After retirement or vesting date, CalPERS' delays or challenged part of the benefit, which was later denied in part. After holding and delaying the funds, CalPERS failed to pay interest on the amount granted and returned the "denied" contributions or funds, without interest.

(c) **Denial After Administrative Review, Return of Funds.** CalPERS accepted funds from some participants, but later determined that the participant was not entitled to some or all of the benefits. After holding the funds for some extended period of time and delaying, CalPERS refunded the contributions without interest.

**Delayed Division of Community Property**

1  
2       71.     **Interest on Funds Held While CalPERS Administers Legal Separation,**  
3 **Dissolution of Marriage, Division of Community Property, Domestic Relations Order.**

4 CalPERS is required to approve divisions of pension property in marital dissolutions and  
5 separations. The Family Law court process hears the facts and divides the property.

6       72.     Both the Member and spouse may obtain separate rights, including through a  
7 separation of accounts. Non-Members are treated the same as Members in a dissolution.  
8 (*Government Code*, §21290.)

9       73.     The process often ends in a domestic relations order (DRO or QDRO).  
10 Participants' eligibility and rights are finalized upon the acceptance by CalPERS of the domestic  
11 relations order or similar document approved by the Court.

12       74.     CalPERS administers the division of community property (including during a  
13 legal separation, divorce, or dissolution of marriage). CalPERS is responsible for completing the  
14 division of benefits.

15       75.     However, after the QDRO or DRO is signed and approved by the court, CalPERS  
16 often delays payment or wrongfully withholds the funds. Often CalPERS delay in administering  
17 the benefits (that have already been determined by the Family Court) and denies payment for  
18 months, or longer. CalPERS holds funds in trust.

19       76.     **CalPERS Delaying or Withholding Community Property Funds That Are**  
20 **Already Determined by the Court.**

21           (a)     Separation of Accounts Delayed. If the Member is eligible to retire and the  
22 non-Member has provided a valid DRO/QDRO, CalPERS must timely split the Member's  
23 account into Member and non-Member accounts.

24           (b)     Often after a division of property, CalPERS delays, holds, or fails to  
25 timely separate the accounts for active and inactive Members (Members not yet retired)  
26 from the accounts for non-Members.

27           (c)     CalPERS is often late in establishing the "new" account so that a non-  
28 Member (or Member) is delayed in receiving funds. CalPERS holds and wrongfully

1 delays payment. CalPERS does not pay interest on the held or unpaid funds.

2 (d) CalPERS' Administration of Division of Property Delayed. CalPERS often  
3 delays the calculation and payment of retirement benefits after dissolution. CalPERS  
4 holds and fails to pay the held or unpaid funds, and fails to pay or credit interest.

5 (e) Refund. CalPERS delays paying refunds. Non-Members who request a  
6 refund of contributions are not properly credited with all interest on held or unpaid funds.

7 (f) Uncontested Matters: Trust, Joinder, Processing Dissolution. At times  
8 CalPERS places monies in a "trust" even after accepting a QDRO or DRO that describes  
9 a community property settlement approved by the courts.

10 (g) Delay in Resolving Contested Matters. For example, if a Member is  
11 retired and receiving benefit, the ex-spouse may file a joinder or indication of property  
12 interest with CalPERS. CalPERS withholds or retains part of the benefit payable pursuant  
13 to the filing. A retiree may receive 1/2 of the monthly benefits. CalPERS retains or holds  
14 the other half in a "trust" or similar account, including until CalPERS completes  
15 processing the information or resolution of a dispute. At the conclusion of the processing,  
16 CalPERS sends the retiree or the former spouse their respective shares without interest.

17 77. James Steed's case is illustrative:

18 a) Steed was employed in a correctional facility. During the course of his  
19 employment, he obtained a divorce and his former spouse was awarded community  
20 property interest in his vested retirement benefits as of the effective date of separation.

21 b) CalPERS holds community property for Mr. Steed but fails to credit or  
22 accrue interest. CalPERS holds or held Steed's funds, and wrongfully denied timely  
23 crediting or paying interest, causing damage.

#### 24 Other Delayed Benefits

25 78. Adjustments. CalPERS holds, wrongfully delays and owes interest on  
26 adjustments, accretions, or accumulated benefits, such as those related to sick leave, but fails to  
27 pay interest of the affected participant.

28 79. Replacement Benefit Plan and Other 415(b) Excess Funds. Typically paid

1 quarterly, retirement allowances which exceed the limit imposed by Internal Revenue Code  
2 Section 415(b) are held, wrongfully delayed, and failed to be timely paid by CalPERS, which  
3 owes interest on the funds. CalPERS has cited computer issues as the reason for the delayed  
4 payment. **Exhibit 11.**

5       80.     **Contracts, Collective Bargaining, Settlements.** Participants accrue and vest in  
6 increased benefits under contract. CalPERS fails to timely input into its computer the benefit  
7 increases, contract enhancements, or other terms that have accrued or vested in participants.  
8 CalPERS holds or wrongfully withholds the increased funds to participants' funds, and then  
9 subsequently fail to pay or credit interest on the accumulated but delayed funds.

10       81.     For example, in 2001, CalPERS settled an age discrimination claim brought by  
11 the United States Equal Employment Opportunity Commission (EEOC) where CalPERS agreed  
12 to pay interest on accumulated withheld benefits starting in July 2000. It is believed that most of  
13 the benefits were timely paid. However, CalPERS may have failed to pay interest as required by  
14 the material terms of the settlement to some of the 1700 retired state and local safety officers that  
15 were involved in the two hundred and fifty million dollar settlement. **Exhibits 12 and 13.**

16       82.     **Reimbursement of Medical or Health Expenses.** CalPERS delays reimbursing  
17 funds that participants paid for expenses, fees, costs, "out of network", or other health or medical  
18 care expenditures, including under PERS Choice and PERSCare, CalPERS' "preferred provider"  
19 ("PPO") health insurance plans, or other similar arrangement. CalPERS holds and wrongfully  
20 delays paying the reimbursements.

21       83.     Reimbursement is part of the PPO program, which is self-funded within  
22 CalPERS' fiduciary responsibility, although administered by a medical or health plan. CalPERS  
23 is responsible for timely reimbursement.

24       84.     **Interest on Member Contributions, Before and After Retirement.** Before the  
25 Member retires or vests, CalPERS typically annually credits 6% interest on "member  
26 contributions" that are held within CalPERS' controlled accounts.

27       85.     After the Member retires or vests, CalPERS typically does not credit any interest  
28 on monies that are held for the Member within CalPERS' controlled accounts. CalPERS does not

1 credit interest on monies or funds that are due and payable, but not yet paid, after retirement.

2 **Held Funds**

3 86. **Held Funds.** CalPERS (and the funds that it administers) hold funds but fails to  
4 credit interest.

5 87. **Justice Marcel Poché Example.** Retired Appellate Court Justice Marcel Poché  
6 was an appellate justice of the First District Court of Appeals for 22 years. He retired for two  
7 years. After he had fully vested and funded his JRS pension, he was appointed to serve as a full  
8 time Superior Court judge without reinstating into JRS. He received both his judicial salary and  
9 his JRS pension based on his highest salary as an appellate justice. He is no longer acting as a  
10 judicial officer in any capacity.

11 88. However, JRS withheld 8% of his salary as a Superior Court judge. Justice Poché  
12 filed a *Petition for Writ of Mandate* in Los Angeles Superior Court to seek relief to return the 8%  
13 of contributions for his 10 years of subsequent service as a Superior Court judge. (Los Angeles  
14 Superior Court case no. BS144837.) As a representative in this proposed class action, Justice  
15 Poché (ret.) represents claims for interest on funds that CalPERS (or the JRS retirement system  
16 that it administers) hold without crediting interest.

17 89. **Breach and Violation.** By its failure to timely pay, its holding, and its delay or  
18 withholding of funds, CalPERS breached (i) its duties (ii) the statutes, and (iii) the express and  
19 implied contract to timely pay participants the whole amount due.

20 90. CalPERS' express and implied contracts with participants incorporate the  
21 obligation to pay interest, under contract, the Civil Code, the PERL, and other authority. By  
22 failing to pay interest, CalPERS impairs and breaches the express and implied contract.

23 91. **Underlying Facts Not in Dispute.** The facts underlying the amount of the funds,  
24 timing of the deposits or payments, the information supplied and when it was supplied, the  
25 character of the monies and the information necessary to determine the benefit are largely not in  
26 dispute. The underlying individual factual matters are contained in CalPERS' own records, able  
27 to be calculated with reasonable particularity from CalPERS' own records, have been resolved in  
28 separate hearings or cases, or are similarly available in an administrative or ministerial manner.

1 As a fiduciary, CalPERS is required to separate and to maintain accounts from which reliable  
2 information should be available. CalPERS breaches its fiduciary duty when it fails to maintain  
3 accounts and keep beneficiaries up to date on the information required or received.

4 92. **Entitled to Highest Interest Rate Under Law.** All Plaintiffs are entitled to the  
5 highest interest rate available under law. Many class members are entitled to interest under  
6 multiple authorities. They may elect their remedy or statute at the time of trial if necessary.  
7 Interest generally is not cumulative under multiple statutes or causes of action, but the "penalty"  
8 benefit may be in addition to statutory and constitutional interest.

9 93. For illustration and not limitation, Mary Kesterson is entitled to the greater of: (1)  
10 interest pursuant to the California *Constitution*, Art. XV, §1; and (2) interest on vested monies  
11 owed; (3) to interest or damages pursuant to *Civil Code* sections 1955 and 3281, 3287-3289,  
12 *Code of Civil Procedure* sections 695.010, *et seq.*; and (4) prejudgment and postjudgment  
13 interest.

14 94. Additionally, she is entitled to the "contract" benefits, including under the PERL  
15 with (i) interest at 6% pursuant to *Government Code* section 20178; (ii) interest under  
16 *Government Code* sections 20059 or 20775 or 20776; (iii) interest on death benefits pursuant to  
17 *Government Code* section 21535; (iv) and the "penalty" in *Government Code* section 21499.

#### 18 **THE PARTIES**

19 95. **Proposed Class.** Plaintiffs have or had funds, contributions, or benefits accrued,  
20 owed, or on deposit with CalPERS.

21 96. The class for whose benefit this action is being prosecuted is identified as follows:

22 All individuals who had or have funds, credits, monies, benefits,  
23 contributions, or assets (hereafter "funds") that are or were on deposit with, held  
24 by, entrusted to, or under the control of CalPERS, including during which time  
25 CalPERS failed to timely pay the funds (or refund the contributions) and failed to  
26 accrue, credit or pay interest on said funds.

27 The above defined class includes but is not limited to CalPERS enrollees  
28 who have or had funds on deposit with, held by, entrusted to, or under the control

1 of CalPERS, including during which time CalPERS failed to timely pay the funds  
2 and failed to accrue, credit or pay interest on said funds, including for the period  
3 where payment of funds is wrongfully delayed, unpaid or held, (including those  
4 CalPERS enrollees who received lump sum or accumulated funds, benefits or  
5 payments from CalPERS) and upon the return, refund, or payment of said funds,  
6 CalPERS has refused and/or failed to pay, increase, accrue interest on those funds  
7 to the recipient.

8 The above defined class includes but is not limited to beneficiaries of  
9 CalPERS enrollees who have or had funds on deposit with, held by, entrusted to,  
10 or under the control of CalPERS, including during which time CalPERS failed to  
11 timely pay the funds and failed to accrue, credit or pay interest on said funds,  
12 including for the period where payment of funds is wrongfully delayed, unpaid or  
13 held, (including those beneficiaries of CalPERS enrollees who received lump sum  
14 or accumulated funds, benefits or payments from CalPERS) and upon the return,  
15 refund, or payment of said funds, CalPERS has refused and/or failed to pay,  
16 increase, accrue interest on those funds to the recipient.

17 The above defined class includes, but is not limited to, individuals who are  
18 not enrolled in CalPERS who have or had funds on deposit with, held by,  
19 entrusted to, or under the control of CalPERS, including during which time  
20 CalPERS failed to timely pay the funds and failed to accrue, credit or pay interest  
21 on said funds, including for the period where payment of funds is wrongfully  
22 delayed, unpaid or held, (including those who received lump sum or accumulated  
23 funds, benefits, return of contributions, or other payments from CalPERS) and  
24 upon the return, refund, or payment of said funds, CalPERS has refused and/or  
25 failed to pay, increase, accrue interest on those funds to the recipient.

26 The above defined class includes but is not limited to individuals who  
27 have earned a vested right to funds, benefits, allowances, credits, or payments  
28 from CalPERS, where interest is owed, but CalPERS failed to timely pay the

1 funds and does not add or pay an increase or addition for interest.

2 The above defined class includes but is not limited to participants to whom  
3 CalPERS failed to timely pay funds, or delayed payments in excess of 45 days,  
4 making CalPERS liable for "penalties", including pursuant to *Government Code*  
5 section 21499.

6 97. All members of this class have been or will be substantially and adversely  
7 affected by violations of law alleged herein and have a beneficial interest in the relief sought.

8 98. No subclasses are required. In the alternative, if the Court finds that penalties  
9 lacks commonality with interest, it can divide the class into (1) those owed interest and penalties;  
10 (2) those owed interest and (3) those owed penalties, including under Section 21499.

11 99. **CalPERS (Board & Agency).** CalPERS is a public retirement association  
12 authorized by Article XVI, Section 17, of the California *Constitution* and subject to the PERL.  
13 The assets of a public pension or retirement system are trust funds and shall be held for the  
14 exclusive purposes of providing benefits to participants in the pension or retirement system and  
15 their beneficiaries. (Cal. Const., art. XVI, §17.)

16 100. Authority over CalPERS' operations, formulation of its policy and practice, and  
17 approval and ratification of its actions vests in the Board of Administration of CalPERS.  
18 (*Government Code*, §§20120, *et seq.*) The members of the retirement board of a public pension  
19 or retirement system shall discharge their duties with respect to the system solely in the interest  
20 of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries,  
21 minimizing employer contributions thereto, and defraying reasonable expenses of administering  
22 the system. (Cal. Const., art. XVI, §17.)

23 101. CalPERS is responsible for crediting interest, paying interest, holding, investing,  
24 accounting for funds and interest under the Public Employees Retirement Law (PERL) and as a  
25 fiduciary, and otherwise managing the funds collected from the State, state agencies, local  
26 agencies, contracting entities, and pension system participants. (*Government Code*, §§20120, *et*  
27 *seq.*) CalPERS is responsible for administering the payment of benefits in a timely manner,  
28 accepting and processing information in a timely manner, and timely disbursing funds.

1 (Government Code, §§20120, et seq.)

2 102. CalPERS is required to place the Members' interest, including the timely payment  
3 of benefits, foremost. A retirement board's duty to its participants and their beneficiaries take  
4 precedence over any other duty. (Cal. Const., art. XVI, §17.) CalPERS is responsible for the  
5 delayed, unpaid or withheld payment. (Government Code, §§20120, et seq.) It is responsible for  
6 crediting and paying interest on funds held or associated with the Retirement Fund, pursuant to  
7 statute, the Constitution, and the other authority. See infra.

8 103. "[A]ccumulated employee-employer contributions are to be '... held for the benefit  
9 of members ....' (Stats. 1931, Ch. 700, § 56; see also §§ 20758-20759.1.) ... Section 20200  
10 further declares that the PERS fund '... is a trust fund created, and administered ... solely for the  
11 benefit of the members and retired members of the system and their survivors and beneficiaries.'  
12 (Stats. 1978, ch. 231, § 1.)" (Valdes v. Cory (1983) 139 Cal.App.3d 773, 782.) The retirement  
13 system itself is not a beneficiary of the trust relationship and should not receive any of the  
14 monies contributed by or held in trust for the individuals.

15 104. **Additional Defendants.** Plaintiffs assert the right to name additional defendants.  
16 Plaintiffs assert the right to bring claims against these additional defendants, although CalPERS  
17 likely remains principally liable for the acts, omissions, delays, and failure to timely pay funds  
18 and interest, as it is the responsible entity.

19 105. **Other Parties Not Necessary.** Neither the State of California nor contracting  
20 agencies are necessary parties to this action. Any failure to pay interest is the responsibility and  
21 liability of CalPERS as administrator of the retirement fund or as a fiduciary. (Cal. Const., art.  
22 XVI, §17; Government Code, §§20120, et seq.)

### 23 **CLASS ACTION ALLEGATIONS**

24 106. **Held Funds, Failure to Timely Pay, Wrongfully Withheld Funds, Failure to**  
25 **Credit or to Pay Interest.** CalPERS must timely pay funds and must credit and pay interest on  
26 funds that it holds. Putative class members are or will be substantially and adversely affected by  
27 CalPERS' unlawful policy and practice of (i) holding funds without crediting interest; (ii) failing  
28 to timely pay funds; (iii) wrongfully withholding funds; (iv) failing to credit or pay interest; and

1 (v) failing to account for funds such that they accrue interest. CalPERS also fails to correctly pay  
2 penalties, including under Section 21499.

3 107. **Ascertainable Class**. Members of the putative class are readily identified from  
4 files and computer databases maintained by CalPERS.<sup>10</sup> The litigation of the questions of fact  
5 and law involved in this action will resolve the rights of all members of the class and hence will  
6 have a binding effect on all class members.

7 108. **Numerosity**. The class is numerous and joinder of all class members is  
8 impracticable due to the large number of people with similar claims, the existence of complex  
9 issues resulting in the high cost of separate, individualized litigation in comparison to the amount  
10 of monetary recovery for individual class members. In addition, class members who are still  
11 employed may be reluctant to join in a lawsuit out of concern that it may negatively affect their  
12 continued employment.

13 109. CalPERS has 1.6 million active and retired Members, as well as numerous  
14 beneficiaries of deceased Members. Participants include CalPERS Members, beneficiaries,  
15 individuals, and others for whom CalPERS holds funds.

16 110. **Community of Interest**. The proposed class has a well-defined shared  
17 community of interest in the questions of law and fact to be litigated. Common questions of law  
18 and fact predominate in the liability issues, relief issues and anticipated affirmative defenses. For  
19 example, a large issue concerns CalPERS' failure to pay interest. A related large concern relates  
20 to CalPERS' failure to pay penalties. The same or similar facts underlie both legal theories of  
21 interest and penalties.

22 111. The named Plaintiffs have claims typical of the class members.

23 112. The named Plaintiffs can fairly and adequately represent and protect the interests  
24 of the class. There is no conflict between their interests and the interests of other class members.

25  
26 <sup>10</sup> For example, a database search for checks that CalPERS issued that include more than  
27 one allowance payment will indicate that a lump sum payment has been made. As another  
28 example, CalPERS has specific units devoted to death benefits, dissolutions, and compensation  
review.

1 This action is not collusive. The named Plaintiffs and their counsel have the necessary resources  
2 to litigate this action. Counsel has the experience and ability required to prosecute this case as a  
3 class action.

4 113. **Superiority of Class Adjudication.** The certification of a class in this action is  
5 superior to the litigation of a multitude of cases by individual members of the putative class.  
6 Class adjudication will conserve judicial resources and will avoid the possibility of inconsistent  
7 rulings. Moreover, there are class members who are unlikely to join or bring an action due to,  
8 among other reasons, their inability to afford the prosecution of separate, individual actions.

9 114. For example, it is expected that many Plaintiffs have suffered the loss of interest  
10 in an amount that is likely less than one thousand dollars (\$1,000.00).

11 115. The cases are impractical to litigate effectively as individual matters against  
12 CalPERS or its outside counsel, as the common legal issues are complex and require significant  
13 briefing and research. Individual cases cannot support the amount of novel legal work needed to  
14 resolve these matters. Finally, equity dictates that all persons who stand to benefit from the relief  
15 sought herein should be subject to the lawsuit and hence subject to an order spreading the costs  
16 of litigation among the class members in relationship to the benefits received.

17 116. It is unknown how many class members exist.

18 117. **Superiority of Class Action to Agency Determination.** CalPERS as a state  
19 agency is not empowered to adjudicate or resolve the rights of individuals that are not before the  
20 agency. A class or representative action is the only way that the class members can get relief.

### 21 **TRIAL COURT JURISDICTION AND VENUE**

22 118. **Trial Court Jurisdiction.** Jurisdiction is proper in the Superior Court of Los  
23 Angeles County. (*Code of Civil Procedure*, §410.10.) The amount in question is greater than  
24 \$25,000. This Court has personal jurisdiction over CalPERS as a California state agency  
25 headquartered in California. A substantial amount of the wrongdoing alleged in this *First*  
26 *Amended Complaint* occurred in Los Angeles County. CalPERS also maintains a regional office  
27 in Glendale, CA, specifically to serve Los Angeles County.

28 119. **Venue.** Venue is proper in the County of Los Angeles. Many of the proposed

1 class members reside in Los Angeles County. It is the county where the obligation of payment of  
2 pension allowances or other benefits is to be performed. (*Code of Civil Procedure*, §395(a).) Los  
3 Angeles is also the proper venue as this action seeks the recovery of a penalty or forfeiture.  
4 (*Code of Civil Procedure*, §393.) Los Angeles is also the proper venue as this action is against  
5 the Board of Administration of CalPERS which is appointed to execute statutory and fiduciary  
6 duties. (*Code of Civil Procedure*, §393.)

7 **PROCEDURAL BACKGROUND ISSUES**

8 120. **No Prior Administrative, Legal, or Equitable Action Required.** Plaintiffs have  
9 suffered statutory violations, injury and/or damages, and therefore have standing in this action to  
10 secure interest in an action before the Superior Court. CalPERS has legal, fiduciary, statutory,  
11 and constitutional duties, including a legal duty to timely pay funds (and to credit interest), a  
12 duty that it has breached. (*Goldfarb v. Civil Service Com* (1990) 225 Cal.App.3d 633; *Civil*  
13 *Code*, §§3281, *et seq.*; *Austin v. Board* (1989) 209 Cal.App.3d 1528, 1532.)

14 121. Plaintiffs do not have to file a legal, equitable or administrative action prior to this  
15 action. Representative Plaintiffs have filed Government Claims Act ("GCA") forms, timely, but  
16 under protest.

17 122. **Agencies Have No Jurisdiction to Grant Relief Requested in this First**  
18 **Amended Complaint, No Authority or Jurisdiction to Award Interest Under the Civil Code.**

19 Plaintiffs seek interest under the *Civil Code* for the delayed payment of vested benefits or funds.  
20 The agency has no administrative jurisdiction to adjudicate cases that request interest or relief  
21 under the *Civil Code*; therefore, there is no administrative process to exhaust.

22 123. Plaintiffs do not have to exhaust CalPERS' inadequate, excused, futile, exhausted,  
23 or unavailable administrative process. All of the entitlement or eligibility for benefits was  
24 established prior to the date that first payment was required. CalPERS withheld and delayed  
25 payment of the vested funds.

26 124. **No "Wrongfully Denied" Requirement, in Section 3287(a) or PERL.**  
27 CalPERS owes interest on the funds that it holds, including in trust. Eligibility was established.  
28 CalPERS delayed paying funds on the ascertainable dates that they were due to participants.

1 Funds or a benefit does not have to be wrongfully denied or wrongfully withheld in order to  
2 accrue interest, including under the PERL, other statutes or as damages under *Civil Code* section  
3 3287(a).

4 125. **Delay is Not Excuse, Frustrates Purpose of Constitution and PERL.** The  
5 Constitution, statutes, and the contracts require CalPERS to timely pay funds and benefits. The  
6 PERL is intended to provide benefits after one is no longer actively working. A delay in  
7 providing the benefits, no matter how short, frustrates the purpose of the PERL.

8 126. **No Hearing, No Formal Process in Many Cases, CalPERS "Correction".**  
9 Typically, the participants' eligibility and rights were fully established before the date of  
10 retirement or vesting. As consistent with its fiduciary obligation and receipt of contributions for  
11 participants, CalPERS received or should have requested information during the employment to  
12 resolve any informational issues.

13 127. However, CalPERS delayed, held, or wrongfully withheld payment for one or  
14 more periods. CalPERS later corrected its errors.

15 128. CalPERS paid many of the Plaintiffs a lump sum or other adjustment in a final  
16 decision that resulted from an informal administrative review or process. CalPERS chose not to  
17 proceed by an evidentiary hearing. No record, findings, or formal process resulted. No  
18 opportunity or requirement to file a *Petition for Writ of Administrative Mandamus* arose. As it is  
19 fundamentally a legal issue, this proposed class action is the appropriate venue, jurisdiction,  
20 process and means to resolve the interest issue.

21 129. **CalPERS' Administrative Process of Kesterson.** After the filing of the  
22 Complaint, CalPERS undertook an administrative process under its own initiative without  
23 consent or the knowledge or participation of Kesterson or her counsel. CalPERS conducted an  
24 administrative review of Kesterson's situation and determined that it had failed to pay Kesterson  
25 additional funds for the "penalty" benefit under Section 21499.

26 130. However, even in its review, CalPERS erred. CalPERS failed to award the correct  
27 amount of the "penalty" benefit, and failed to pay the other individuals who are similarly situated  
28 to Kesterson.

1 131. Regarding the calculation and payment of "One Time" Death Benefits ("ONE")  
 2 only:

Year	Number of ONE records where CalPERS delayed Releasing Payment more than 45 Days after Last Doc Received	Number of ONE records where Penalty is less than 6% (calculated using only 5.5%)	Percentage of ONE records clearly below the statutory rate of 6% (calculated using only 5.5%)	Dollar amount of ONE claims that did not receive at least the statutory rate	Number of ONE records for which the annualized penalty interest rate is 0%	Percentage of ONE records greater than 45 days at 0% PTI	Dollar amount of ONE claims at 0% PTI
To July 9, 2013	574	168	29.27%	\$ 884,438	70	12.20%	\$ 368,526
2012	2,292	599	26.13%	\$ 3,474,698	196	8.55%	\$ 444,633
2011	1,004	482	48.01%	\$ 906,425	438	43.63%	\$ 693,273
2010	1,401	901	64.31%	\$ 1,423,654	738	52.68%	\$ 805,918
				\$ 6,689,215			\$ 2,312,350
			<b>Total</b>			<b>Total</b>	

19 132. In putative resolution of the claims in the Complaint, CalPERS transferred money  
 20 to Kesterson's bank account in an attempt to correct the underpayment of "penalty" benefit under  
 21 Section 21499. Kesterson did not know or consent to CalPERS administrative jurisdiction.  
 22 Kesterson rejected the money. She returned the \$236 in funds by check to CalPERS.

23 133. Kesterson rejects CalPERS' administrative jurisdiction, authority, and other  
 24 efforts. In the Kesterson administrative process, CalPERS attempted to resolve and extinguish  
 25 her claims.

26 134. However, although Kesterson has rejected CalPERS' attempted payment of  
 27 additional funds, CalPERS conducted an (albeit illegal) administrative review with a final  
 28 payment, satisfying any exhaustion requirements for the "penalty" benefits for all of the class.

1           135.    **Form of Action, Pleading.** Plaintiffs assert that CalPERS has no right to attempt  
2 to grab jurisdiction from this Court. Plaintiffs reject CalPERS' authority and jurisdiction.  
3 Plaintiffs do not consent to CalPERS' actions, authority, or jurisdiction.

4           136.    However, only to the limited extent necessary to address any procedural issues or  
5 irregularities arising from CalPERS' intrusion on the judicial process, Plaintiffs reserve all rights  
6 (and without prejudice) to have the Court also consider this First Amended Complaint to be a  
7 *Petition for Writ* under *Code of Civil Procedure* section 1085 or a *Petition for Writ of*  
8 *Administrative Mandamus* under *Code of Civil Procedure* section 1094.5 to consider or review  
9 CalPERS' actions on these issues.

10           137.    CalPERS could not and did not resolve the issues, including as it could not  
11 resolve the interest requested for under the *Civil Code* and California Constitution, or pay  
12 attorney fees in its administrative process.

13           138.    **Cervelli's Administrative Process.** Cervelli undertook a formal administrative  
14 process against CalPERS in a contested hearing before an ALJ. CalPERS formally pled that  
15 there were no grounds on which it could award interest. The ALJ accepted CalPERS' reasoning.  
16 The CalPERS Board adopted the Proposed Decision and its finding that CalPERS had no  
17 authority to award interest. **Exhibit 10.** As such, CalPERS has determined that it has no  
18 jurisdiction to hold an administrative hearing that can award interest. The administrative process  
19 has been fulfilled or excused.

20           139.    **Exhaustion Not Required, But At Least One Class Member Did Exhaust.**  
21 Cervelli undertook an administrative hearing process that sought interest. The ALJ ruled that  
22 CalPERS does not owe interest and that there are no provision in the Administrative Procedures  
23 Act ("APA", *Government Code*, §§11340, *et seq.*) for an ALJ to award interest, including in the  
24 *Code of Civil Procedure*. **Exhibit 10.** The CalPERS Board adopted the ALJ's determination on  
25 April 18, 2013. Cervelli exhausted his administrative remedies, for himself and others. No writ  
26 review was necessary or appropriate.

27           140.    A class action claim for interest was filed within six (6) months of CalPERS'  
28 Board's rejection, such that Cervelli is deemed to have timely filed a GCA claim at that time.

1 Only one class member is needed to exhaust, if exhaustion is required. The same class member  
2 does not need to file both a GCA claim and an administrative claim.

3 141. Further, CalPERS has conducted a formal contested OAH administrative review  
4 and adopted a final decision denying its jurisdiction to provide interest, thereby satisfying any  
5 administrative exhaustion requirements.

6 142. **Procedural Issues Arising From Cervelli's Presentation of Interest Claim to**  
7 **CalPERS, the OAH or Administrative Process.** If there were any administrative remedies or  
8 process required, Cervelli exhausted the remedies for the class. He does not need to file a  
9 Government Claims Act claim to be one of the class representatives in this action.

10 a) Four (4) Government Claims Act filings were timely presented to the  
11 Victim Compensation and Government Claims Board ("VCGCB"), as class action claims  
12 for interest on delayed payment for funds, within six (6) months of the CalPERS' Board's  
13 rejection of Cervelli's claim. As Cervelli is deemed to be included in the class of persons  
14 who timely filed a VCGCB claim, Cervelli is also deemed to have timely filed a GCA  
15 claim at that time.

16 b) If a statute of limitations question arises, Cervelli has presented his claim  
17 for interest in the administrative process, thus providing him and all of the members of  
18 the class with the benefit of the CalPERS administrative requirement that no statute of  
19 limitation applies when CalPERS owes a member money. (*Government Code* sections  
20 21060, 21064.) Cervelli's presentation to CalPERS allows all of the proposed class  
21 members to benefit from CalPERS' ongoing obligation to correct all errors over the  
22 lifetime of a member or beneficiary, with no time bar.

23 c) Cervelli's presentation to CalPERS also provides the proposed class with  
24 the benefit of CalPERS' ongoing duty to correct that is not reduced by the application of  
25 the filing deadlines under the VCGCB or Government Claims Act cutoffs.

26 143. **Cervelli's Administrative Process Not Required, No Jurisdiction for Interest**  
27 **in OAH, No Writ Necessary.** No *Petition for Writ of Administrative Mandamus* was required in  
28 Cervelli's claim for interest on his refunded contributions because CalPERS did not and could

1 not exercise any jurisdiction. CalPERS disclaimed jurisdiction over all matters related to interest.

2 144. **Administrative Remedy is Inadequate, Unavailable, Excused, and Futile.** The  
3 administrative remedy is inadequate and unavailable.

4 a) **Inadequate.** CalPERS has adopted the APA which fails to provide the due  
5 process protections required in a class action where absent parties are represented.

6 CalPERS and the APA have no authority, process, or procedures for dealing with class  
7 actions. (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926.)

8 b) **CalPERS' Administrative Process Cannot Adjudicate Class Claims.**

9 CalPERS' exclusive hearing process under *Government Code* sections 11500-11529  
10 restricts hearings, claims and relief to those made by one or more named person(s).

11 (*Government Code*, §11500(c).)

12 c) Plaintiffs as a class are not required to exhaust administrative remedies,  
13 which do not exist in any case. CalPERS' administrative process cannot adjudicate class  
14 claims or claims on behalf of unrepresented parties. (*Rose v. City of Hayward, supra.*)

15 d) **Futile.** The process is futile because CalPERS has already rejected the  
16 interest claim and disclaimed authority to award interest. **Exhibit 10.** CalPERS has  
17 announced its position on the claim, thus any further presentation is futile.

18 e) **Unavailable.** As the awarding of interest is solely within the purview of a  
19 court of law, CalPERS and the OAH do not have authority to award pre-judgment or  
20 post-judgment interest in an administrative process. (*American Federation of Labor v.*  
21 *Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4<sup>th</sup> 1017, 1023.)

22 145. **In Prior Cases, CalPERS Paid or Credited Interest.** See attached decision by  
23 ALJ Sarli, **Exhibit 14.** Plaintiffs' constitutional, equal protection and due process rights are  
24 implicated by CalPERS' failure to fairly and objectively credit or pay interest.

25 **Government Claim Presentation of Class Claims**

26 146. Under protest and with a reservation of rights, Kesterson, Gilmore, Seymore and  
27 Walter, individually and in a representational capacity for all others in the class identified herein,  
28 each filed a Government Claim with the VCGCB and paid the \$25 filing fee on or about July 13,

1 2012.

2 147. By letter dated September 28, 2012, the VCGCB notified counsel for Kesterson,  
3 Gilmore, Seymore and Walter that the VCGCB rejected their claims at its hearing on September  
4 20, 2012.

5 148. Although the requirement to present is in controversy, a single class  
6 representative may comply with the purported presentation requirements to maintain a class  
7 action. (*City of San Jose v. Superior Court (Lands Unlimited)* (1974) 12 Cal.3d 447, 457.)

8 149. **No Consent to Government Claims Act Statute of Limitations.** Although  
9 Kesterson, Gilmore, Seymore and Walter filed claims with the VCGCB and paid the required  
10 filing fee, they have done so under protest and with a reservation of rights. They do not consent  
11 to the presentation deadlines of the VCGCB nor consent to VCGCB jurisdiction.

12 150. **Exemption or Excuse from Government Claim Presentation.** Plaintiffs are  
13 exempt from VCGCB presentation because, among other reasons:

14 a) CalPERS has a functionally equivalent claims process with no statute of  
15 limitations. process (*Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4<sup>th</sup>  
16 1139, 1153.)

17 b) Breach of contract claims do not have to be presented (or have in  
18 substance been presented), because the contracts incorporate the PERL and *Government*  
19 *Code* section 20164(b)(2). The Office of Administrative Hearings ("OAH") process does  
20 not allow for class wide relief. Breach of contract claims are exempt under *Government*  
21 *Code* section 905(f). (*Blue v. Los Angeles Unified School Dist.* (1994) 26 Cal.App.4<sup>th</sup>  
22 Supp. 12.)

23 c) The OAH process does not allow for assessment of damages or attorney  
24 fees.

25 d) *Government Code* sections 905.2(b)(1) and 905.2(b)(4) exempt this claim  
26 from VCGCB or GCA presentation.

27 e) CalPERS acts as a bailee. Interest withheld by a bailee does not require a  
28 Government Claims Act filing (*Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113.)

1 f) Constitutional causes of action do not have to be presented (or have in  
2 substance been presented) to the VCGCB or GCA because an administrative agency has  
3 no jurisdiction to hear constitutional issues or declare a statute constitutional or  
4 unconstitutional.

5 g) Cervelli's claim presentation allowed the class to benefit from CalPERS'  
6 duties to not assert a time bar, *Government Code* sections 20160, 20164.

7 h) CalPERS' consideration of the Kesterson claim shows that CalPERS  
8 attempted to assert administrative jurisdiction that is outside the VCGCB.

9 151. **Delayed Accrual.** The discovery of the harm and the cause of the harm was  
10 delayed. Plaintiffs sought information from CalPERS, but CalPERS failed to disclose that it will  
11 not pay or credit interest. No facts provided notice that interest was unpaid. As far as the unpaid  
12 or underpaid "penalty" benefit arising from Section 21499, no facts show or provide notice that  
13 the "penalty" benefit was underpaid or over the wrong period.

14 152. Plaintiffs could not discover the cause, reasons, and mechanisms behind  
15 CalPERS' practices, or to immediately detect or comprehend the fact or existence of CalPERS'  
16 failure to pay interest. CalPERS' erroneous practices were only recently discovered or  
17 discoverable. The discovery rule indefinitely delays accrual of a cause of action until the plaintiff  
18 discovers or reasonably has cause to discover the facts constituting it. (*Samuels v. Mix* (1999) 22  
19 Cal.4<sup>th</sup> 1.)

20 153. CalPERS provided Plaintiffs no facts to put them on notice of the fact that it  
21 would not pay interest, or would pay an improper amount of interest, on delayed or withheld  
22 payments of funds. Delayed payment of the funds does not put Plaintiffs on notice of the failure  
23 to pay or credit interest.

24 154. CalPERS also provided Plaintiffs no facts to put them on notice of the fact that it  
25 would not pay "penalty" benefits pursuant to *Government Code* section 21499, or would pay an  
26 improper amount of "penalty" benefit, on delayed or withheld payments of funds. Delayed  
27 payment of the funds does not put Plaintiffs on notice of the failure to pay or credit the "penalty"  
28 benefit.



1 assessed at a rate of 7 percent per annum. (Cal. Const., art. XV, §1.; *Code of Civil Procedure*,  
2 §685.010 *Government Code*, §970.1.)

3 161. **Interest Payable in Disputed Pension Cases.** Interest is generally required when  
4 pensions, benefits, or other payments are withheld or untimely paid. "Amounts recoverable as  
5 wrongfully withheld payments of salary or pensions are damages within the meaning" of *Civil*  
6 *Code* section 3287(a). (*Olson v. Cory* (1983) 35 Cal.3d 390, 402 [judges and judicial pensioners  
7 sought interest on salary and pension increases untimely paid]; see *Cortez v. Purolator Air*  
8 *Filtration Products Co* (2000) 23 Cal.4<sup>th</sup> 163, 174-175.)

9 **GENERAL INTEREST LAW**

10 162. **Deposit, Monthly, At Time of Payment, Distribution.** The PERL and *Civil*  
11 *Code* require vesting only in order to fix with sufficient certainty the time when the obligation  
12 accrues so that interest will be awarded on each amount when it is due. Typically Plaintiffs  
13 established eligibility prior to or at the date of filing an application for service retirement or other  
14 vesting date or threshold. Other participants established eligibility at ascertainable dates that  
15 predate the first delayed payment. Each payment due each class member accrued on a date  
16 certain. The payments vested on the accrual date. If CalPERS had not wrongfully denied each  
17 Plaintiff or proposed class member the funds at the time due on those dates, he or she would not  
18 have lost the natural productivity and growth of the withheld funds in the form of interest.

19 163. **Information Available or Known About Eligibility, Vesting, Dates.** For each  
20 Plaintiff and proposed class member, the dates are known or ascertainable when eligibility is  
21 established, when the funds were deposited, contributed, paid or distributed, when eligibility for  
22 the funds was established, as well as the date(s) when payment fell due. For example, for each  
23 Plaintiff and proposed class member, the date that (i) information was provided to CalPERS is  
24 known, (ii) when first contribution or deposit was made is known, (iii) when the timing and  
25 amount of payment due are known, (iv) the salary and contributions history, (v) the years of  
26 service, (vi) the dates of retirement; (vii) the applicable pension formula, and (viii) other relevant  
27 or necessary data.

28 164. If information or dates are not known, they are discoverable, ascertainable, or



1 withheld benefits defeats the legislative intent to allow retirement without hardship.

2 169. **Public Employees' Retirement Law.** The PERL expressly and implicitly  
3 requires CalPERS to credit and pay interest, including pursuant to *Government Code* sections  
4 20059, 20178, 20775, 20776, and 21535.

5 170. "Regular interest" means interest at the annual interest rate for purposes of  
6 crediting of interest, compounded annually. (*Government Code*, §20059.)

7 171. CalPERS must pay interest at 6 percent on Member contributions and "retired  
8 member reserves". (*Government Code*, §20178.)

9 172. CalPERS owes increased interest on death benefits. (*Government Code*, §21535.)

10 173. CalPERS is required to credit regular interest to individual accounts on Member  
11 contributions paid to CalPERS. (*Government Code*, §20775.)

12 174. Contributions returned require that CalPERS pay interest. (*Government Code*,  
13 §§20734, 20737.)

14 175. CalPERS assumes interest rates in its actuarial tables, mortality, service and other  
15 tables. (*Government Code*, §20132.)

16 176. As an analogy, CalPERS requires Members to pay interest when they purchase  
17 prior or optional service credit. (*Government Code*, §20151; 2 CCR §575.1.)

18 177. When CalPERS pays death benefits, interest paid with respect to contributions  
19 and service credit prior to the Member's death is credited to his or her account. (*Government*  
20 *Code*, §20776.)

21 178. Upon the legal separation or dissolution of marriage of a Member, the non-  
22 member former spouse may be awarded or acquire property rights, including to a separate  
23 account representing a portion of the Member's service and/or contributions. (*Government Code*,  
24 §21290.) Interest accrues on said separate account.

25 179. Under the *California Code of Regulations*, CalPERS requires a member to pay  
26 interest on monies outstanding, which explicitly and implicitly dictates reciprocally that  
27 CalPERS owes interest when its owes funds. (2 CCR, §§575.1, 575.2.)

28 180. **"Penalty" Applicable to All "Lump Sum" Payments.** CalPERS owes a

1 "penalty" on accumulated or lump sum benefits that are withheld for more than 45 days.  
2 (*Government Code*, §21499.)

3 181. The penalty applies to all preretirement or postretirement lump-sum payments of  
4 benefits including death benefits, service allowances, disability allowances, and other  
5 accumulations or aggregations.

6 **Government Code § 21499. Payment Time Limitation; Interest Due**

7 (a) Notwithstanding Section 21498, when either an initial payment of a  
8 preretirement or postretirement death allowance or a preretirement or  
9 postretirement lump-sum benefit is payable in an amount of ten dollars (\$10) or  
10 more, it shall be authorized to the Controller within 45 days of receipt by this  
11 system of all the necessary information, including the return of warrants issued or  
12 any overpayment outstanding after the date of the death of the annuitant.

13 (b) If any payment is not made within that time limitation, the payment shall  
14 also include interest at the greater of the interest crediting rate specified in Section  
15 20178 or the net earnings rate (including capital gains and losses) in effect at the  
16 time the payment is made, for time following the expiration of that time  
17 limitation.

18 (c) The system shall submit, annually, as part of the report required by Section  
19 20237, to the Legislature and the Governor a summary of the experience of the  
20 system in making payments pursuant to subdivision (b).  
21 (*Government Code*, §21499.)

22 182. The 45-day standard in Section 21499 also serves to identify which payment is  
23 "wrongful" and penalized.

24 183. **Statute Requiring CalPERS to Report to Legislature Indicates Legislature**  
25 **Intended "Lump Sum" Benefit To Include All Payments On Account of Pension, Death,**  
26 **Disability, or Withdrawal of Contributions.** CalPERS must report to the Legislature the  
27 payment of a lump sum under Section 21499 as part of its quarterly report. (*Government Code*,  
28 §20235.) The reporting requirement requires that CalPERS report:

(b)(2) All benefits paid by the system to members of the contracting agency and  
their survivors and beneficiaries, including payments on account of pension,  
death, and disability benefits, and withdrawals of contributions. The benefits shall  
be reported as the total monthly allowances paid to retirees, survivors, and  
beneficiaries; the amount of total refunds paid; and the amount of any other **lump  
sums paid** (emphasis added).  
(*Government Code*, §20235(b)(2).)

1           184. **Penalty Applies to All Lump Sums; In the PERL, the Statutory Term "Lump**  
2 **Sum" is Referred To In Many Places.** Section 21499 penalties apply to the late payment of all  
3 lump sums, which include aggregation of service, disability, or other benefits or funds.

4           185. For example, "Lump sum" is referenced in *Government Code* section 21507.  
5 Lump sum is also defined to mean an increased monthly allowance, including for accumulated  
6 cost of living adjustments. (*Government Code*, §21337.1.) Lump sum is referred with regard to  
7 service credit. (*Government Code*, §21050.) Lump sum also refers to accumulated sick leave or  
8 vacation pay. Lump sum is also used in the context of service credit. (*Government Code*,  
9 §20903.5.) The PERL also refers to the payment of contributions as lump sums regarding service  
10 credit purchases. (*Government Code*, §20776.) Elections to receive service credit are also  
11 referred to as lump sums. (*Government Code*, §21032.) Accumulated service or disability  
12 allowances are also referred to as lump sums. (*Government Code*, §21465.) Special death  
13 benefits are referred to as lump sums. (*Government Code*, §21543.) Optional settlements include  
14 the term lump sum. (*Government Code*, §21548.) Contributions in a lump sum for service credit  
15 is explicit. (*Government Code*, §§21033, 21010, 21051, 21073.5, 21073.1.) Compensation  
16 earnable refers to the concept of a lump sum. (*Government Code*, §20636.) Amounts separated  
17 regarding dissolution of marriage are also considered lump sums. (*Government Code*, §21454.)  
18 Optional settlements use the lump sum term. (*Government Code*, §21461.) Lump sums for  
19 unused sick leave pay were discussed in *Rose v City of Hayward, supra*.

20           186. **Presumption Against Forfeiture.** CalPERS cannot seize or forfeit interest or  
21 part of the benefit due. The presumption is against forfeiture: "After a member has qualified as to  
22 service and disability for retirement for disability, or as to age and service for retirement for  
23 service, nothing shall deprive him or her of the right to a retirement allowance as determined  
24 under this part." (*Government Code*, §21259.)

25           187. In the absence of a valid provision enacted prior to eligibility for retirement which  
26 provides for forfeiture, once a person who has undertaken public employment becomes eligible  
27 for retirement, his or her right to a pension is not destroyed. (*Willin v. Commission On Judicial*  
28 *Qualifications* (1973) 10 Cal.3d 451; *Pearson v. Los Angeles County* (1957) 49 Cal.2d 523.)

1 188. **No Specific Government Code or PERL Statute Required.** The absence of a  
2 specific statute authorizing interest on retroactive benefits does not mean that the rights are  
3 excluded. (See *Austin v. Board of Retirement, supra*; *Tripp v. Swoap* (1976) 17 Cal.3d 671  
4 (overruled on other grounds).) There is no affirmative bar to interest.

5 189. **Interest Payment by Fiduciary.** A fiduciary who disclaims the trust must pay  
6 interest at the rate of 7 percent. As a bailee, CalPERS must pay interest even on monies that it  
7 has held on behalf of non-Members.

8 190. **Interest Is Recoverable Even When Not Specifically Authorized by Statute**  
9 **Underlying Claims.** "[P]re-judgment interest may be awarded under (Civ.C. § 3287) even if it is  
10 not specifically authorized by the statute underlying the plaintiff's claims." (*County of Solano v.*  
11 *Lionsgate Corp.* (2005) 126 Cal.App.4<sup>th</sup> 741, 752.)

## 12 **INTEREST RATE**

### 13 **A. Rate of Interest**

14 191. **Interest Rate.** The interest rate depends on the nature of the claim on which the  
15 judgment is based.

16 192. **Statutory Interest Rates.** The PERL sections specify, refer to or incorporate  
17 interest rates.

18 193. **Prejudgment Interest Rate.** Prejudgment interest rate is 10 percent per annum  
19 from the date of the breach (for contracts entered into after 1985; 7 percent for earlier contracts).  
20 (*Civil Code*, §3289; *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4<sup>th</sup> 1107,  
21 1131-1132; Cal. Const., art. XV, §1.)

22 194. **Postjudgment Interest.** Postjudgment interest against a local public entity can be  
23 assessed at a rate of 7 percent per annum. (Cal. Const., art. XV, §1.) Otherwise, postjudgment  
24 interest can be payable at 10 percent. (See also *Code of Civil Procedure*, §685.010; *Government*  
25 *Code*, §§970, *et seq.*)

26 195. **Interest Rate on Breach of Contract.** Prejudgment interest rate is 10 percent per  
27 annum from the date of the breach (for contracts entered into after 1985; 7 percent for earlier  
28 contracts). (*Civil Code*, §3289.) Whether a contract claim is liquidated or unliquidated,

1 prejudgment interest may be recovered from a state or public entity.

2       196. **Rate of Prejudgment Interest in Breach of Contract.** *Civil Code* section 3289  
3 specifies that the applicable interest rate for prejudgment interest in breach of contract cases is 10  
4 percent. Public entities are not excepted; Section 3289 replaces the default rate in the California  
5 Constitution when the Legislature has not set another rate. Section 3289 necessarily applies to  
6 these entities absent an express legislative exemption. (*Teachers' Retirement Bd. v. Genest*  
7 (2007) 154 Cal.App.4th 1012.)

8       197. **Non-Contractual Claims.** Where interest is awarded on tort and other non-  
9 contractual claims, the rate is 7 percent per annum from the date the claim arose. (See Cal.  
10 Const., art. XV, §1; *Children's Hosp. & Med. Ctr. v. Bonta* (2002) 97 Cal.App.4th 740, 775  
11 [Medi-Cal reimbursement]; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1585 [fraud  
12 claim].)

13 **B. California Constitution**

14       198. **Rate of Interest in Constitution.** Interest against a local public entity can be  
15 assessed at a rate of 7 percent per annum. (Cal. Const., Art. XV, §1 [the constitutional provision  
16 authorizing the legislature to set the rate of interest on judgments permits recovery of interest  
17 against the state].)

18       199. **Interest Available on Unpaid Interest; Continues to Accrue.** At common law,  
19 the proceeds of an investment are an accretion or increment to the principal earning it, and unless  
20 lawfully separated therefrom becomes a part thereof. (*Pomona City School Dist. v. Payne* (1935)  
21 9 Cal.App.2d 510, 516.) Since proceeds, including interest and dividends, become part of the  
22 principal, they are subject to the same restrictions. (See *65 Ops. Cal. Atty. Gen. 588* (1982).)

23 **CONTRACT CLAIMS**

24       200. Interest is also due pursuant to CalPERS' contracts and the breach of implied and  
25 express contracts, see *infra*.

26       201. The timely payment of funds is a material provision of the contract between  
27 participants and CalPERS. CalPERS breached the contract by its delay in payment to  
28 participants. Some of the terms of the contract include the provision in the *Civil Code*, the

1 Constitution, and the PERL.

2       202. **Breach of Contract.** As a result of employment or other contracts or agreements,  
3 Plaintiffs entered into one or more express or implied contracts with CalPERS which require  
4 CalPERS to pay funds timely and pay interest on monies, benefits, allowances, or contributions  
5 on deposit or held by CalPERS, including without limitation, election, membership, purchase,  
6 and other written or implied pension contracts.

7       203. CalPERS fails to timely pay funds and fails to pay interest on held funds as  
8 required by the express or implied agreement, contract, or public policy.

9       204. **Implied and Express Pension Contracts.** CalPERS fails to disclose that it will  
10 not pay interest.

11       205. The implied and express contracts are contained in CalPERS documents,  
12 publications and forms provided by CalPERS to participants, including documents and forms  
13 that CalPERS requires said participants to complete, sign, and enter into. True and correct of the  
14 documents including the terms of the implied and express contracts include many of the  
15 CalPERS documents, publications and forms are attached hereto collectively as including, *inter*  
16 *alia*, Member Benefit publications for Local Miscellaneous (**Exhibit 15**), Local Safety (**Exhibit**  
17 **16**), State Miscellaneous and State Industrial (**Exhibit 17**), State Safety (**Exhibit 18**), School  
18 (**Exhibit 19**), National Guard (**Exhibit 20**), and Alternative Retirement Program Members  
19 (**Exhibit 21**); CalPERS Guide to Community Property (**Exhibit 22**), model Domestic Relations  
20 Orders (**Exhibit 23**), and guide to completing a non-Member service retirement application and  
21 the application itself (**Exhibit 24**); CalPERS guides to completing service retirement, industrial  
22 disability retirement and non-industrial disability retirement applications and the applications  
23 themselves (**Exhibits 25 and 26**); Guide to Your CalPERS Service Credit Purchase Options and  
24 the forms to elect such purchases therein (**Exhibit 27**); Retired Member Death Benefits  
25 publication (**Exhibit 28**); beneficiary designation forms (**Exhibit 29**) and publication re  
26 changing beneficiary designation and retirement options after retirement (**Exhibit 30**); exemplars  
27 of Election to Purchase ARSC and Election to Purchase Service Credit (for purchase of prior  
28 military service) contracts (**Exhibits 31 and 32**); and excerpts from an exemplar of a CalPERS

1 "preferred provider" PPO health insurance plan booklet that discuss reimbursements to plan  
2 members who obtain medical care from non-preferred providers (**Exhibit 33**).

3 206. Other CalPERS documents, publications and forms include the predecessor and  
4 successor versions of the documents, publications and forms listed above, as well as other  
5 documents CalPERS has provided or required Plaintiffs to sign in connection with receipt of  
6 funds held by CalPERS. Other documents include CalPERS' electronic website tests or  
7 calculators.

8 207. CalPERS breaches the written or implied pension contracts by failing to timely  
9 pay funds and failing to pay or accrue interest on funds it holds. Any ambiguous and uncertain  
10 language should be strictly construed against CalPERS. (*Government Code*, §§20178, 20017,  
11 20014; *Cal. Const.*, art. 15, §1; *Civil Code*, §§3287 and/or 3289.)

12 208. **CalPERS Admission of Delays**. Although not clearly disclosed, CalPERS admits  
13 that it delays processing death benefits, service credit purchases and elections, tier conversions  
14 and adjustments to retirement benefits. **Exhibit 34**.

15 209. **Unconscionable**. Death benefits, retirement allowances, and disability allowances  
16 are essential services. CalPERS is the mandatory provider of service and disability pensions for  
17 the Plaintiffs. Procedurally, CalPERS has vastly superior knowledge and bargaining power  
18 which results in the absence of meaningful choice for Plaintiffs. CalPERS' failure to pay interest  
19 and seizure of the interest are oppressive as it imposes harsh and oppressive conditions or  
20 forfeiture on Plaintiffs. CalPERS' failure to pay interest surprises Plaintiffs. CalPERS' seizures of  
21 Plaintiffs' interest frustrates the purpose of the PERL. In essence, CalPERS uses its superior  
22 bargaining position to reduce its expenses by failing to pay interest, for itself and its contracting  
23 agencies. Plaintiffs were surprised when they learned that CalPERS would not pay interest.

24 210. **CalPERS' Breach by Failure to Timely Pay Funds**. CalPERS' breach of the  
25 contracts, resulting in a reduction of benefits and/or failure to pay or seizure of Plaintiffs'  
26 interest, is illegal and void as contrary to public policy, law, and statute. (*Civil Code*, §§1595,  
27 1599 and 1608.)

28 211. While CalPERS made implied or written representations, the final executed

1 written contracts, including the contracts of employment incorporating the terms of the PERL,  
2 are the basis of the breach of contract action where there are written contracts. (*Code of Civil*  
3 *Procedure* §430.10(g).)

4 212. Plaintiffs transferred funds to CalPERS based on CalPERS' promise to pay  
5 benefits and interest, including consistent with the PERL and Constitution.

6 213. CalPERS accepted Plaintiffs' funds knowing that Plaintiffs believed that they  
7 would receive the correct benefit and interest, timely paid.

8 214. Plaintiffs have fully performed all conditions, covenants, and promises required  
9 on their part.

10 215. CalPERS failed to perform. CalPERS breached the agreements when CalPERS  
11 fails to timely pay funds when due. CalPERS breached the agreements when it failed to accrue or  
12 to pay interest. CalPERS may have also breached the agreement at inception when CalPERS  
13 failed to disclose that it would not accrue or pay interest. On Plaintiffs' first day of entitlement to  
14 interest from CalPERS, and continuing thereafter, CalPERS breached the agreement by failing to  
15 accrue or pay interest. The discovery of the harm and the cause of the harm was delayed and  
16 only first occurred much later, and only recently. CalPERS' failure to perform as required was  
17 unjustified and unexcused and clearly in breach of CalPERS' promise to perform.

18 216. CalPERS' breach and nonpayment proximately and directly caused damage and  
19 loss to Plaintiffs, including delayed payment and loss of some or all of the value of (i) the  
20 benefit, and (ii) interest. The interest or damages, in an amount to be proven, are clearly  
21 ascertainable in their amount, nature and origin. Plaintiffs seek in damages or compensation an  
22 amount which will compensate Plaintiffs for all the detriment proximately caused by CalPERS,  
23 or which, in the ordinary course of things, would be likely to result from CalPERS' breach. (*Civil*  
24 *Code*, §§3300 and 1692.)

25 217. For Plaintiffs that are not yet in receipt of funds, CalPERS has repudiated material  
26 terms of the express or implied contract in an anticipatory breach. Plaintiffs seek prospective  
27 relief and a change in CalPERS' policies to require CalPERS to pay interest.

28 218. CalPERS' contracts breach the implied covenant of good faith and fair dealing,

1 (ii) are unenforceable as material terms are hidden, (iii) are illegal as contrary to the authorizing  
2 statutes, (iv) violate public policy inherent in the disability and retirement statutes, and the  
3 California Constitution, (v) disappoint the reasonable expectations of the Plaintiffs, (vi) breach  
4 CalPERS' fiduciary duties, and (vii) are fraudulent.

5 219. Plaintiffs' "consent" to the contracts insofar as they relieved CalPERS of the  
6 obligation of timely paying funds and/or obligation of crediting interest was given by mistake,  
7 fraud or undue influence by CalPERS. (*Civil Code*, §§1565-1584 and 1689(b) (1).) Plaintiffs  
8 suffered a material "mistake of fact" and/or "mistake of law" to the extent the contract relieves  
9 CalPERS of paying interest. (*Civil Code*, §§1576-8.) The mistake (about no interest) concerns a  
10 basic assumption upon which the contract was made; the mistake has a material effect on the  
11 agreed exchange of performances under the contract that is adverse to Plaintiffs; the Plaintiffs  
12 did not bear the risk of the mistake; and the effect of the mistake is such that enforcement of the  
13 contract would be unconscionable. A mistake of law exists because the Plaintiffs misunderstood  
14 the law at the time of contracting and CalPERS knows the "correct" law but does not rectify the  
15 other party's misunderstanding. (*Civil Code*, §1578.)

16 220. Plaintiffs seek any and all relief that is necessary to adjust the equities between  
17 the parties and ensure restoration to the pre-contract status quo with regard to interest. (*Civil*  
18 *Code*, §1692.)

19 **ELIGIBILITY ESTABLISHED FOR ALL PARTICIPANTS**

20 221. Participants typically establish eligibility upon first employment in a CalPERS  
21 covered job. CalPERS owes fiduciary duties from acceptance of the first contribution.  
22 Participants often increase their vested entitlement for funds or benefits as part of their ongoing  
23 work in "CalPERS covered employment". Participants' eligibility typically completely vests on  
24 filing a retirement or other vesting application or document. Benefits cannot be changed after  
25 retirement or full vesting (especially without providing a comparable advantage).

26 222. Contributions or funds are typically transferred to CalPERS in trust for the  
27 participant at periodic periods during each year of employment. CalPERS receives increased  
28 funds (typically from the employer) periodically thereafter based upon ascertainable variables

1 such as (i) the time that the participant worked for the employer (and the service credit awarded  
2 for said service), (ii) the terms of CalPERS coverage offered by the employer (including any  
3 increases in benefits earned during employment through contract changes or collective  
4 bargaining agreements), (iii) the salary earned at different points during the employment, (iv) the  
5 employee and employer contributions made to CalPERS attributable to the salary, and (v) other  
6 matters.

7 223. CalPERS has a duty to make sure that the vesting occurs correctly "at any time".  
8 The employer has a statutory and legal obligation to *timely* report these facts, information, and  
9 related variables to CalPERS, including during the course of the Member's employment.

10 CalPERS has a duty to inquire and audit employers to assure that they timely provide the correct  
11 information and contributions. CalPERS has a duty to charge employers interest for certain  
12 delays. CalPERS has a duty to inform participants on matters related to their benefits, including  
13 if CalPERS has timely received information about their funds.

14 224. For certain contracted, death, or other benefits, participants typically establish  
15 eligibility at the time of election, or as a result of being named as rights holder or beneficiary.  
16 The participants' rights to such funds (i.e., benefits after the Member's death) vest upon election,  
17 designation, or fully vest upon some contingency, (i.e., are established prior to the time that the  
18 performance falls due), and become payable thereafter.

19 225. Other participants typically establish eligibility as a result of contributing funds  
20 that CalPERS accepts in trust and holds. Participants become eligible for payment of interest  
21 immediately upon CalPERS' receipt and holding of funds.

#### 22 ATTORNEY FEES

23 226. Common Fund, Contract, Percentage of Recovery, Substantial Benefit,  
24 Private Attorney General. Plaintiffs have given CalPERS an opportunity to settle the matter  
25 before filing suit. CalPERS refused.

26 227. Plaintiffs have signed contracts to pay attorney fees in order to prosecute this  
27 action. Plaintiffs as class representatives have agreed to request the court to grant the attorney  
28 fees under any and all theories of recovery.

1           228. Plaintiffs first seek the court to order CalPERS to pay all of the attorney fees in  
2 the highest amount available to the attorneys under the various theories, statutes, or authorities  
3 set forth in this Complaint.

4           229. While there are multiple grounds for attorney fee awards, Plaintiffs seek the  
5 benefit of the highest applicable or cumulative award. Plaintiffs seek attorney fees and costs,  
6 including causing CalPERS to pay Plaintiffs' attorney fees and costs, under one or more of (i) by  
7 contract with named representatives for the class; (ii) as a percentage of recovery of all the  
8 benefits or advantage conferred to or on all members of the class; (iii) under statutes, (iv) the  
9 common fund doctrine, (v) substantial benefit doctrine (vi) private attorney general doctrine,  
10 (vii) doctrine of equitable apportionment of attorney fees, and (viii) all other theories of  
11 recovery, including those listed directly below.

12           230. Plaintiffs also seek an award of attorney fees and costs, including as levied against  
13 CalPERS, as the higher amount that is awardable as provided by one or more of the following:  
14 the contract between the parties, as conferring a substantial benefit on a class, as enforcement of  
15 an important right or statute, under statute, as affecting the public interest, as an inherent cost of  
16 litigation, under the percentage method, as a benefit to the class of the action, and otherwise.

17           231. Plaintiffs also seek attorney fees as damages, including consequential damages  
18 suffered by Plaintiffs for having to litigate this action.

19           232. Additionally, Plaintiffs seeks attorney fees under statute, including *Code of Civil*  
20 *Procedure* sections 1021 and 1021.5, *et seq.*, *Government Code* section 800, and *Labor Code*  
21 *sections 218.5, et seq.*

22           233. Under the common fund or equitable doctrine, Plaintiffs also seek crediting of  
23 interest that will result in a common fund of traceable property from which attorney fees may be  
24 paid, where identifiable beneficiaries must pay fees in a quantifiable amount, including as  
25 percentages of the benefits arising from the litigation. If interest is credited but an actual fund  
26 from which to pay fees has not been created, Plaintiffs seek an award of attorney fees from the  
27 interest credited or other monies or advantage provided to each class member, included attorney  
28 fees as deducted prorated as a percentage from the interest credited to each participant.



1 **THIRD CAUSE OF ACTION**

2 **(For Violation of Constitutional and Statutory Duties)**

3 241. Plaintiffs hereby incorporate and restate all allegations set out above as though set  
4 forth in full herein.

5 242. The Constitution and statutes provide for prompt payment of benefits and for  
6 interest, including as detailed above.

7 243. Plaintiffs and the proposed class are intended to benefit from the rights to prompt  
8 payment of interest created in statute and the Constitution.

9 244. In violation of Plaintiffs' constitutional, statutory and other beneficial rights,  
10 CalPERS is failing and has refused to timely pay benefits and to pay interest to Plaintiffs.

11 245. In violation of Plaintiffs' constitutional, statutory and other beneficial rights,  
12 CalPERS is failing to construe the PERL, the Constitution, and *Civil Code* statutes in a manner  
13 favorable to the beneficiaries.

14 246. In violation of Plaintiffs' constitutional, statutory and statutory and other  
15 beneficial rights to be treated equally as beneficiaries, CalPERS is construing these statutes in a  
16 manner that favors one class of beneficiaries over another class, or otherwise interpreting these  
17 statutes in its own favor and in favor of the State of California or the contracting entities, rather  
18 than in favor of the beneficiaries.

19 247. In violation of constitutional, statutory and other fiduciary duties, CalPERS is  
20 failing to timely inform Plaintiffs that CalPERS accounts for the funds without adding, accruing,  
21 crediting, or paying interest.

22 248. In violation of giving meaning to the plain language of the statutes, CalPERS is  
23 interpreting the statutes to omit words, failing to give plain meaning to words, rendering sections  
24 superfluous, adding language that does not exist, inserting conditions that do not exist, failing to  
25 put the words in context, or failing to provide the benefits described in statute.

26 249. In violation of interpreting statutes so that the PERL is harmonized, CalPERS is  
27 interpreting the statutory scheme so that aspects of the PERL are in conflict, ignored, or  
28 meaningless, with the result that the PERL is not being read as a harmonious whole, with its

1 separate parts being interpreted within their broader statutory context in a manner that furthers  
2 statutory purpose.

3 250. In violation of its duty to construe the details of an act in conformity with its  
4 dominating general purpose, CalPERS is denying the benefit of prompt payment and interest to  
5 Members, beneficiaries and those with funds on deposit with it.

6 251. In violation of its duties to interpret the statutes so that their objects may be  
7 obtained, CalPERS is interpreting the statutes to deny the very substance of parts of the statutes.

8 252. In violation of its duties to interpret the statutes to avoid constitutional doubts,  
9 CalPERS construes these statutes so that the results violate Due Process, Equal Protection,  
10 constitutional fiduciary duties, and other constitutional rights (incorporating herein the causes of  
11 action below).

12 253. In violation of the statutory rule that the "law abhors a forfeiture" and that  
13 forfeiture and seizure laws are to be narrowly construed, CalPERS interprets the statutes to  
14 generate a forfeiture or seizure of interest when the statutes do not support or authorize that  
15 power.

16 254. In violation of the duty to avoid absurd results, CalPERS is misinterpreting the  
17 statutes to deny prompt payment and interest.

18 255. In violation of the duty not to repeal statutes by implication, CalPERS is, in  
19 effect, selectively repealing the statutes and denying the benefits.

20 256. In violation of the duty to harmonize the statutory scheme, CalPERS is failing to  
21 give full force and effect to (i) the constitutional duty of prompt payment, (ii) the PERL interest  
22 sections, and (iii) the *Civil Code*.

23 257. In violation of the duty to give effect to the more specific legislation that provides  
24 for interest, CalPERS is ignoring the more specific statute.

25 258. In violation of its duty to act according to statute, CalPERS is arbitrarily and  
26 capriciously interpreting the statutes, including in its own favor.

27 259. In violation of its duty to interpret the statute according to legislative intent,  
28 CalPERS is interpreting the interest statutes to negate them.



1 Member former spouse may be awarded or acquire property rights, including to a separate  
2 account representing a portion of the Member's service and/or contributions. (*Government Code*,  
3 §21290.) Interest accrues on said separate account.

4 274. CalPERS must pay interest pursuant to the California *Constitution*, Art. XV,  
5 Section 1, and Art. XVI, Section 17(a).

6 275. In violation of its constitutional, statutory, regulatory, and other fiduciary duties,  
7 CalPERS has failed and is failing to pay interest to Plaintiffs and the proposed class.

8 **FIFTH CAUSE OF ACTION**

9 **(Section 21499 Penalties)**

10 276. Plaintiffs hereby incorporate and restate all allegations set out above as though set  
11 forth in full herein.

12 277. The Constitution, fiduciary duties and the statutes require prompt payment and  
13 provide for penalties for CalPERS delayed payments, including as detailed above.

14 278. Plaintiffs and the proposed class are intended to benefit from the rights to timely,  
15 "prompt payment", accounting, and penalties created in statute and constitution.

16 279. In violation of Plaintiffs' constitutional, statutory and other beneficial rights,  
17 CalPERS is failing and has refused to credit or to pay penalties to Plaintiffs.

18 280. In violation of Plaintiffs' constitutional, statutory and other beneficial rights,  
19 CalPERS is failing to construe the penalty statutes in a manner favorable to the beneficiaries.

20 281. CalPERS should be assessed penalties at the greater of 6 percent or the "net  
21 earnings rate" on accumulated or lump sum benefits, whether accumulated service, disability, or  
22 death benefits, that are withheld for more than 45 days. (*Government Code*, §21499.)

23 282. CalPERS owes penalties on all lump sum benefits paid, whether service,  
24 disability or death benefits. (*Government Code*, §21499.)

25 **SIXTH CAUSE OF ACTION**

26 **(For Breach of Contract)**

27 283. Plaintiffs hereby incorporate and restate all allegations set out above as though set  
28 forth in full herein.





1 relevant informational material, that CalPERS will not credit or pay interest on delayed, held or  
2 withheld benefits, if the Court finds that the statutes do not that of CalPERS.

3 **NINTH CAUSE OF ACTION**

4 **(For An Accounting)**

5 300. Plaintiffs hereby incorporate and restate all allegations set out above as though set  
6 forth in full herein.

7 301. Since it first failed to pay interest when required by statute, and continuing up  
8 through the present, CalPERS has improperly obtained funds from Plaintiffs through the use of  
9 unlawful conduct, including as described in the paragraphs of this First Amended Complaint.

10 302. CalPERS has received money, interest, benefits, gains, or advantages as a result  
11 of its improper conduct, at Plaintiffs' expense, and some or all of that money is rightfully due  
12 Plaintiffs.

13 303. The amount that CalPERS has received money, interest, benefits, gains, or  
14 advantages as a result of its improper conduct in denying interest should be readily ascertainable,  
15 known, or calculable from records, documents, database, or information held or maintained by  
16 CalPERS.

17 304. However, as CalPERS refuses to comply, or raises issues that explicitly or  
18 implicitly implicate or involve CalPERS accounting practices or procedures, then Plaintiffs are  
19 entitled to a full accounting.

20 **TENTH CAUSE OF ACTION**

21 **(For Constitutional Impairment of Contract)**

22 305. Plaintiffs hereby incorporate and restate all allegations set out above as though set  
23 forth in full herein.

24 306. The contract clauses of the federal and state Constitutions limit the power of a  
25 state to modify its own contracts with other parties, as well as contracts between other parties.  
26 (*Allen v. Board of Administration* (1983) 34 Cal.3d 114, 119; *Valdes v. Cory, supra*, at 783;  
27 *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109.)

28 307. The common law, the Constitution, the *Civil Code*, and the PERL require

1 CalPERS to promptly and timely pay benefits and to pay interest. If CalPERS asserts that its  
2 regulation, interpretation of law, or its contracts limit its obligation to timely pay benefits and  
3 pay interest, then the regulation, interpretation of law, or its contracts impair Plaintiffs' vested  
4 rights (to the extent the contract relieves CalPERS of paying interest).

5 308. The constitutional prohibition against contract impairment demands that contracts  
6 be enforced according to their just and reasonable purport. Although not permitting a  
7 construction which permits contract repudiation or destruction, the impairment provision does  
8 not prevent laws which restrict a party to the gains reasonably to be expected from the contract.  
9 (*California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 510-11; *Board of Administration*  
10 *v. Wilson, supra*, 1130-31.)

### 11 ELEVENTH CAUSE OF ACTION

#### 12 (Attorneys' Fees)

13 309. Plaintiffs hereby incorporate and restate all allegations set out above as though set  
14 forth in full herein.

15 310. Plaintiffs seek attorneys' fees, including payable from CalPERS, including under  
16 contract, as a percentage of the recovery, under *Code of Civil Procedure* section 1021.5,  
17 common fund theory, substantial benefit equitable doctrine, statute, and other relevant sections  
18 or doctrines.

19 311. In the alternative, Plaintiffs seek attorneys' fees from the monies, interest,  
20 advantage or other benefits awarded to class members with such fees in an amount provided  
21 under contract, as a percentage of the recovery, under *Code of Civil Procedure* section 1021.5,  
22 common fund theory, substantial benefit equitable doctrine, statute, and other relevant sections  
23 or doctrines.

### 24 TWELFTH CAUSE OF ACTION

#### 25 (Costs and Other Relief)

26 312. Plaintiffs hereby incorporate and restate all allegations set out above as though set  
27 forth in full herein.

28 313. Plaintiffs are entitled to costs, interest and prejudgment interest. (*Civil Code*,

1 §§3287(a) and 3288.)

2 314. Plaintiffs seek an order awarding prospective relief.

3 315. Plaintiffs seek an order awarding attorney's fees and costs.

4 316. Plaintiffs seek such other relief as the Court deems just and proper.

5 **THIRTEENTH CAUSE OF ACTION**

6 **(Extraordinary Relief)**

7 317. Plaintiffs hereby incorporate and restate all allegations set out above as though set  
8 forth in full herein.

9 318. Additionally, and to the extent required, Plaintiffs seek such other extraordinary  
10 relief, including writ relief, as may be proper, required or just to resolve the matters in this case.

11  
12 **PRAYER FOR RELIEF**

13 *Wherefore, Plaintiffs pray for a judgment against Defendants, the California Public*  
14 *Employees' Retirement System and the Board of Administration of the California Public*  
15 *Employees' Retirement System, as follows:*

16 1. Find that CalPERS (i) has violated Plaintiffs' statutory and constitutional rights,  
17 (ii) violated statutory duties owed to Plaintiffs, (iii) failed to correctly interpret the statutes for  
18 Plaintiffs' benefit, (iv) failed to comport with the California Constitution and *Civil Code*, (v)  
19 failed to timely pay benefits and correctly credit or pay interest as described or enumerated  
20 herein and above;

21 2. Award interest to Plaintiffs as described above, including interest from the earliest  
22 time applicable (including date of deposit, original due date, payment, or contribution) pursuant  
23 to the highest interest provision applicable:

- 24 a) in the Public Employees' Retirement Law, starting with *Government Code*
- 25 sections 20000, *et seq.*;
- 26 b) in the *Civil Code*;
- 27 c) under the California Constitution;
- 28 d) under the regulations;

- e) under contract;
- f) under common law;
- g) or other applicable authority for interest;

3. Award or correct awards of statutory or other penalties, including under *Government Code* section 21499;

4. Alternatively, award damages, consequential damages, or other relief in the amount to make Plaintiffs whole, including damages under the *Civil Code* as described above, including pursuant to Section 3281(a), to Plaintiffs, including interest from the earliest time applicable (including date of deposit, original due date, payment, or contribution) pursuant to the highest interest provision applicable;

5. Alternatively order CalPERS to pay a lump sum sufficient to make Plaintiffs whole for any prior period of unpaid interest;

6. Alternatively, award contract damages, consequential damages, or other relief in the amount to make Plaintiffs whole, including under the breach of implied, express, or written contract cause of action, including for loss of use of funds;

7. Provide prospective relief, including requiring CalPERS to provide Members, beneficiaries and other persons similarly situated with interest in the future;

8. Order an accounting of all monies that Plaintiffs and class members or their employers have paid into or contributed to CalPERS or related funds that have not earned interest;

9. Order a constructive trust of all monies associated with unpaid interest that Plaintiffs and the class members have paid into, contributed to, or should have accrued from CalPERS or related retirement funds;

10. Award attorneys' fees under contract, as a percent of the recovery, the substantial benefit, common fund, private attorney general or other theory, including from CalPERS directly, in addition to any sums that CalPERS directly or indirectly provides or transfers as interest, restitution, damages, relief, prospective relief, or other recovery;

11. Award attorneys' fees from Plaintiffs and the proposed class members prorated, as

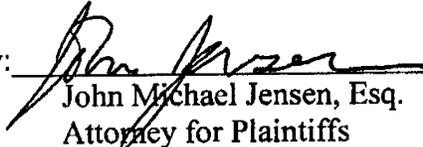
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provided under contract, as a percent of the recovery, the substantial benefit, common fund,  
private attorney general or other theory;

12. Award costs, and other relief as is appropriate, including from CalPERS directly,  
in addition to any sums that CalPERS directly or indirectly provides or transfers as interest,  
restitution, damages, relief, prospective relief, or other recovery; and

13. Award any and all extraordinary, additional and further relief as the Court may  
deem proper.

Dated: September 16, 2013

By:   
John Michael Jensen, Esq.  
Attorney for Plaintiffs



JUN 15 2015

Sherri R. Carter, Executive Officer/Clerk

By MED, Deputy

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7 Hon. Marcel Poché (ret.), Michael Gilmore,  
8 The Estate of Robert Seymore, Gerald  
9 Dominguez, Jeffrey Walter, Brad Heinz,  
10 and James Steed, individually and on behalf of  
11 a class of others similarly situated

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF LOS ANGELES

10 MARY KESTERSON, an individual;  
11 MARCEL POCHÉ, an individual; MICHAEL  
12 GILMORE, an individual; THE ESTATE OF  
13 ROBERT SEYMORE (by his Personal  
14 Representative); GERALD DOMINGUEZ, an  
15 individual; JEFFREY WALTER, an  
16 individual; BRAD HEINZ, an individual;  
17 JAMES STEED, an individual; and on behalf  
18 of a class of others similarly situated,

17 Plaintiffs,

18 vs.

19 CALIFORNIA PUBLIC EMPLOYEES'  
20 RETIREMENT SYSTEM (CalPERS),  
21 BOARD OF ADMINISTRATION OF  
22 CALIFORNIA PUBLIC EMPLOYEES'  
23 RETIREMENT SYSTEM,

23 Defendants.

Case No.: BC 502628

**CLASS ACTION**

(Assigned for all purposes to the Hon. John  
Shepard Wiley, Department 311)

**NOTICE OF MOTION AND MOTION  
FOR CLASS CERTIFICATION,  
MEMORANDUM OF POINTS AND  
AUTHORITIES,**

**FIRST AND CORRECTED SECOND  
DECLARATIONS OF MARY  
KESTERSON, FIRST AND SECOND  
DECLARATIONS OF HON. MARCEL  
POCHE (Ret), DECLARATION OF  
MICHAEL GILMORE, DECLARATION  
OF GERALD DOMINGUEZ,  
DECLARATION OF BRAD HEINZ,  
DECLARATION OF JAMES STEED,  
DECLARATION OF PERSONAL  
REPRESENTATIVE OF THE ESTATE  
OF ROBERT SEYMORE,  
DECLARATION OF ATTORNEY JOHN  
JENSEN**

Date: August 14, 2015

Time: 2:00 pm

Place: Department 311

Trial Date: None

Complaint Filed: March 8, 2013

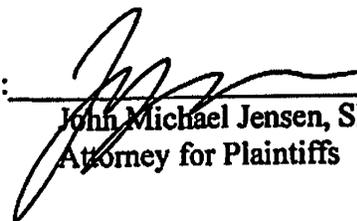
1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 YOU ARE HEREBY NOTIFIED THAT on August 14, 2015, at 2:00 pm before the Hon.  
3 John Shepard Wiley in Department No. 311 of this Court, located at 600 South Commonwealth  
4 Avenue, Los Angeles, CA 90005 Plaintiffs Mary Kesterson ("Kesterson"), the Honorable Marcel  
5 Poché, retired, ("Poché"), Michael Gilmore ("Gilmore"), The Estate of Robert Seymore  
6 ("Seymore"), Gerald Dominguez ("Dominguez"), Jeffrey Walter ("Walter"), Brad Heinz  
7 ("Heinz"), and James Steed ("Steed"), (collectively "Plaintiffs") will move the Court pursuant to  
8 *Code Civ. Proc., § 382 and Cal. Rules of Court, rule 3.764* to certify the above-captioned action  
9 as a class action, to certify the persons described in Plaintiffs' complaint as the plaintiff class,  
10 and to certify the individual plaintiffs named above as representatives of the plaintiff class and  
11 their counsel of record as counsel for the plaintiff class. The motion will be made on the grounds  
12 that: the claimants are so numerous it is impracticable to bring all of the members of the class  
13 before the Court; the questions of law or fact common to the claimants are substantially similar  
14 and predominate over the questions affecting the individual claimants; the claims of the  
15 representative Plaintiffs named above are typical of the claims or defenses of all claimants, the  
16 representative Plaintiffs named above will fairly and adequately protect the interests of the class.

17 The motion will be based on this notice, the attached points and authorities; the attached  
18 First and Corrected Second Declarations of Mary Kesterson ("Kesterson"), First and Second  
19 Declarations of the Honorable Marcel Poché, retired, ("Poché"), Declaration of Michael Gilmore  
20 ("Gilmore"), Declaration of Ms. Seymore Shell, Personal Representative of The Estate of Robert  
21 Seymore ("Seymore"), Declaration of Gerald Dominguez ("Dominguez"), Declaration of Jeffrey  
22 Walter ("Walter"), Declaration of Brad Heinz ("Heinz"), and Declaration of James Steed  
23 ("Steed"), and Declaration of Attorney John Michael Jensen; the concurrently filed Request for  
24 Judicial Notice; and the exhibits attached to the Notice of Lodging; and the complete file and  
25 records of this case.

26  
27 Dated: June 15, 2015

By: \_\_\_\_\_

  
John Michael Jensen, SBN 176813  
Attorney for Plaintiffs



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1 This action seeks interest on delayed payments. Plaintiffs demonstrate below that this  
2 action, and the proposed class, meet all of the requirements under *Code of Civil Procedure*, §382  
3 and *Cal. Rules of Court*, Rule 3.764 for class certification.

4 I. INTRODUCTION

5 Plaintiffs Mary Kesterson ("Kesterson"), the Honorable Marcel Poché, retired,  
6 ("Poché"), Michael Gilmore ("Gilmore"), The Estate of Robert Seymore ("Seymore"), Gerald  
7 Dominguez ("Dominguez"), Jeffrey Walter ("Walter"), Brad Heinz ("Heinz"), and James Steed  
8 ("Steed"), (collectively "Plaintiffs") bring this motion seeking the certification of the plaintiff  
9 class of CalPERS members, beneficiaries and other individuals (hereafter collectively  
10 "participants") who seek the payment of interest on funds, monies, benefits, or contributions  
11 (hereafter "funds") that are or were on deposit with, administered by, held by, delayed, or  
12 wrongfully withheld (hereafter "held") by the California Public Employees' Retirement System,  
13 the CalPERS Board of Administration, or CalPERS administered systems<sup>1</sup> (collectively  
14 "CalPERS"). See *Declarations of Plaintiffs*, attached.

15 The common legal issue is that interest is generally required when pensions, benefits, or  
16 other payments are withheld or untimely paid. "Amounts recoverable as wrongfully withheld  
17 payments of salary or pensions are damages within the meaning" of *Civil Code* section 3287(a).  
18 (*Olson v. Cory* (1983) 35 Cal.3d 390, 402 [judges and judicial pensioners sought interest on  
19 salary and pension increases untimely paid].) The *Civil Code* provides the highest damages.

20 The legal and factual scenario shared by all class members is that (i) each individual  
21 acquired vested and fully matured rights to payments in determinable amounts from CalPERS  
22 that fell due on specific dates, however (ii) CalPERS failed to pay the funds when the obligation  
23 fell due. (iii) CalPERS acknowledged owing the funds, and made lump sum payments or  
24 refunds. However, (iv) CalPERS failed to pay interest on the withheld, held, or delayed funds.

25 Factually, it is undisputed that CalPERS delayed payment. CalPERS admits that it

26  
27 <sup>1</sup> CalPERS administers the Judges' Retirement Systems (JRSI and JRSII), the now-closed  
28 Legislators' Retirement System (LRS), medical and health benefit reimbursement funds  
(PERSCare and other PPO or self-funded "insurance"), and other funds.

1 "sometimes causes payment" of service and disability benefits "to be made after the right to  
2 payment of those benefits has accrued". (CalPERS' *Responses to Request for Admissions, Set*  
3 *One* ("RFAs") pg. 5-15, attached hereto as Exhibit 1.) It is undisputed that CalPERS withheld  
4 funds and later paid aggregated amounts (or refunds). It is undisputed that the funds were owed  
5 as CalPERS has already paid them. CalPERS admits that it makes "lump sum payments to  
6 members 'for all service or disability benefits' due members that have not previously been paid."  
7 (*Ibid.*) It is undisputed that CalPERS did not pay interest. CalPERS admits that it "generally does  
8 not pay interest on those lump sum payments." (*Ibid.*)

9 CalPERS had fiduciary, statutory, and other duties to timely acquire information and to  
10 administer the system to promptly pay benefits and related services to participants. CalPERS  
11 earns significant investment returns on the Plaintiffs' monies that CalPERS holds.

12 In matters not directly on point, CalPERS admits the existence of common legal and  
13 factual issues when CalPERS delays and fails to pay interest; however, CalPERS' proposed  
14 Regulation 555.5 allowing CalPERS additional "reasonable administrative processing time" after  
15 the right to payment matures reduces the Plaintiffs' damages, is directly contrary to the *Civil*  
16 *Code*, and fail to address the class claims.<sup>2</sup> (Exhibit 2.)

17 The proposed class consists of in excess of 100,000 individuals with funds held by  
18 CalPERS at any time since July 12, 2011, one year prior to the filing of claims with the Victims  
19 Compensation and Government Claims Board. (Exhibits 9, 10 and 11; *Jensen Decl.*, ¶90-93.)  
20 Plaintiffs assert delayed accrual.<sup>3</sup>

21 Plaintiffs also seeks to certify a subclass of individuals<sup>4</sup> who are entitled to payment of an

---

22  
23 <sup>2</sup> CalPERS' proposed Regulation 555.5 fails to provide class-wide relief on the pending  
24 claims. See *Plaintiffs Opposition to CalPERS' Motion to Stay*, incorporated in full herein.

25 <sup>3</sup> The discovery rule indefinitely delays accrual of a cause of action until the plaintiff  
26 discovers or reasonably has cause to discover the facts constituting it. (*Samuels v. Mix* (1999) 22  
27 Cal.4<sup>th</sup> 1.) Plaintiffs reserve the right to assert delayed accrual to expand the term and scope of  
28 those affected, including by time. As CalPERS owes ongoing fiduciary duties to participants,  
delayed accrual of breach of fiduciary duties means that the GCA time limits would not apply.

<sup>4</sup> CalPERS' payment of the "penalty interest" benefit under *Gov. Code* section 21499 is  
required when CalPERS fails to pay a death or other benefit within 45 days after CalPERS has  
received the information necessary to calculate the benefit.

1 additional "penalty interest" benefit under Government Code Section 21499.<sup>5</sup>

2 *Whether* the proposed class members were entitled to interest is not the issue in this  
3 motion. The question is whether there are uniform policies or practices as to these issues that  
4 commonly affect the class members. At this threshold, *the mere existence of* CalPERS' proposed  
5 regulation admits CalPERS uniform policies or practices, so class classification is appropriate.  
6 Since it is undisputed that CalPERS did not timely pay the full benefits or amount when due, and  
7 withheld monies without paying interest, class classification is appropriate.

## 8 **II. LEGAL BASIS FOR CLASS WIDE CLAIMS**

### 9 **A. Nature of Claim and Factual Overview**<sup>6</sup>

10 **Vesting of Pension Benefits.** During employment, pension contributions create an  
11 underlying monetary obligation in CalPERS to the member. Based in work, Plaintiffs vest in a  
12 specific pension amount typically based on compensation earnable, years of service, and  
13 age/benefit factors. All information necessary to calculate the amount of the pension benefits was  
14 established during employment. (*Govt Code*, §§20221, 20225; 2 *CCR*, §§565, *et seq.*)

15 **Maturing of Pension Benefits.** On retirement, all Plaintiffs obtained a matured right to  
16 full payment of their allowance. A benefit "matures after the conditions precedent to  
17 the payment of the benefits have taken place or the benefits are otherwise within the control of  
18 the employee." (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52  
19 Cal.4th 1171, fn. 3.) Under a pension plan providing for a retirement pension after a designated  
20 age with specified years of service, an employee is entitled to retire with pension when he or she

---

21 <sup>5</sup> As set forth below, the class definition in the *Complaint* includes all participants with  
22 funds on deposit. In the event the Court concludes that these individuals are not similarly situated  
23 and commonly affected by defendant's practices, Plaintiffs request the right to bring a motion for  
24 leave file a to a Second Amended Complaint, including to clarify the included class members.

25 <sup>6</sup> Typically, class certification decisions are made by reference to the pleadings and  
26 declaration from attorneys representing the plaintiff class, (*Richmond v. Dart Indus., Inc.* (1981)  
27 29 Cal.3d 462, 478.) The complaint's allegations are assumed to be correct for certification  
28 purposes. (*La Sala v. American Sav. & Loan Ass'n* (1971) 5 Cal.3d 864, 869; *Budget Fin. Plan v.*  
*Superior Court* (1973) 34 Cal.App.3d 794, 798.) "[A]t the certification stage the court is not to  
examine the merits of the case...." (*Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d. 411,  
418.) While Plaintiffs do not attempt to prove the merits of their case here, they do cite evidence  
further supporting the predominance of common issues.

1 reaches the designated age and has the specified years of service. (See 49 Cal. Jur. 3d, *Pensions*  
2 *and Retirement Systems*, §3.)

3 **Maturing of Service Benefits.** Service benefits fully mature when the member meets the  
4 age and years of service requirements and a files a retirement application. Eligibility to service  
5 retirement is not a contested matter. There is no quasi-judicial process to determine eligibility for  
6 service retirement. Once matured upon filing for retirement, CalPERS' obligation to pay falls due  
7 in the first warrant after the selected service retirement date.

8 **CalPERS Admits Delayed Payment of Matured Service Benefit.** CalPERS admits that  
9 it delays, accumulates, holds or underpays service benefits "which sometime cause payments of  
10 service retirement benefits to be made after the right to payment of those benefits has accrued."  
11 (RFAs, no. 5, pg. 5:16-17.) CalPERS admits that it makes lump sum payment to members for all  
12 service retirement benefits due to member "that have not previously been paid". (RFAs, no. 6,  
13 pg. 6:21-22.) When making lump sum payments or refunds, CalPERS acknowledges that the  
14 funds already matured. In making an aggregated or refund payment, CalPERS mandatorily  
15 recognized that the reason it initially withheld funds could not be "sustained" and recognized its  
16 obligation to pay the funds as of the dates they accrued." (*Mass v. Board of Education* (1964) 61  
17 Cal.2d 612, 625; *San Diego Cnty. Deputy Sheriffs Assn. v. San Diego Cnty. Sheriffs Dep't* (1998)  
18 68 Cal.App.4th 1084, 1095.) Since benefits are like salary:

19 When Commission subsequently reverses the initial disciplinary action, it  
20 effectively determines that the employee's vested property interests were  
21 wrongfully withheld by the initial disciplinary action. This administrative decision,  
22 unlike the decision of the ALJ in *AFL*, is not a decision giving rise to entitlement  
23 to benefits in the first instance but is instead a decision that salary was wrongfully  
24 withheld.

25 (*San Diego Cnty. Deputy Sheriffs Assn., supra*, at 095.)

26 **No Authority to Delay After Right Matured.** If CalPERS owes a matured obligation  
27 and fails to pay it on time, the funds are wrongfully withheld. (*Civ Code*, §3287(a).) No case law  
28 provides for "reasonable administrative processing time" after a benefit is vested and matured. If  
the benefits is matured but not timely paid, then interest is owed. However CalPERS admits that  
CalPERS "generally does not pay interest" with accumulated or lump sum payments of service

1 benefits. (RFAs, no. 7, pg. 7:22-23.)

2 **Processing Contested IDR and Disability Benefits.** Industrial disability retirement  
3 ("IDR") and "ordinary" disability are contested matters. An individual must prove his eligibility  
4 and substantiate his disability to CalPERS or the employer in a quasi-judicial process. (*Flethez v.*  
5 *San Bernardino Cnty. Employees Ret. Ass'n* (2015) 236 Cal.App.4th 65, 71.) The individual's  
6 eligibility to IDR or ordinary disability payments does not vest and mature until proven.

7 **Reasonable Processing Only Allowed in Time Before Contested Disability Cases Are**  
8 **Determined.** Disabled Plaintiffs do not seek interest on delays before eligibility to IDR or  
9 ordinary disability was been established. In cases where eligibility is contested (like  
10 unemployment insurance or disability), the quasi-judicial process to determine eligibility  
11 involves some inherent minimal delay. (*San Diego Cnty. Deputy Sheriffs Assn., supra*, at 1094-  
12 1095.) Prior to determining eligibility, the inherent administrative delays did not cause wrongful  
13 withholding (that would allow interest) because the individual had not yet established his right to  
14 the funds. (*American Federation of Labor v. Unemployment Ins. Appeals Bd. ("AFL")* (1996) 13  
15 Cal.4th 1017, 1037; *San Diego Cnty. Deputy Sheriffs Assn., supra*, at 1095.) Before proof, the  
16 right is merely inchoate and there is no underlying monetary obligation. (*Weber v. Bd. of*  
17 *Retirement of LA Cnty Retirement Assn* (1998) 62 Cal.App.4th 1440, 1451; *AFL, supra*, at 1023.)

18 In this case, plaintiffs do not seek interest for the period before eligibility determination.

19 **Maturing of Disability and IDR.** In this case, CalPERS or the employer has already  
20 determined that all of the disabled Plaintiffs are eligible and entitled to ordinary disability or IDR  
21 and each has obtained a matured right to payment.

22 "The event which triggers retirement and the right to allowance payments is the disability  
23 determination by the Board. Until that time, the member is not retired, and [the  
24 retirement system] has no monetary obligation to that member." [Quoting *Weber, supra.*]  
(*Flethez, supra*, at 74.)

25 Once the disability is determined, CalPERS must pay the IDR or ordinary disability when  
26 the next payment falls due. Contested benefits are due to be paid promptly only starting the date  
27 that a claimant has established benefit eligibility. (*San Diego Cnty. Deputy Sheriffs Assn., supra*,  
28 at 1089; *Weber, supra*, at 1451; *Flethez, supra*, at 76.)

1           **CalPERS Fails to Pay Matured Disability and IDR Payments When Due.** CalPERS  
2 admits that sometimes fails to pay the disability benefit when due. (RFAs, no. 9, pg. 9:21-22.)  
3 Indeed, CalPERS' stated formal practice is not to pay the disability payment until 120 days later.  
4 (Exhibit 3.) If CalPERS delays payment of IDR and ordinary disability benefits, it owes interest.  
5 However, CalPERS admits that it "generally does not pay interest" on lump sum payment of  
6 disability benefits. (RFAs, no. 10, pg. 10:22-23.)

7           **Vesting and Maturing of Death Beneficiary Interests.** For death and other contingent  
8 beneficiaries, rights vest on designation, although contingent on survival. (2 CCR, §582.) For  
9 death beneficiaries and survivor benefits, the benefits fully mature on the occurrence of the  
10 contingent event (i.e. death). The benefits become payable immediately (although subject to the  
11 beneficiary providing the proof of death and identification of survivor.) CalPERS fails to pay  
12 interest on late death benefits. (*Kesterson Decl.*; *Jensen Decl.* ¶31, 81-85.)

13           **Vesting and Maturing of Other Interests.** For contracted or elected benefits, including  
14 health reimbursement, the vesting date occurs (for the purpose of interest) on the "effective date  
15 of the member's election" or the time the payment falls due. (2 CCR, §575.2(d).) CalPERS fails  
16 to pay interest on delayed, withheld, or late contract benefits or reimbursements. (*Heinz Decl.*)

17           **Right To Refund.** At times, CalPERS wrongly accepts funds that it fails to quickly  
18 return. Often, CalPERS wrongly determined that it could accept the funds, but later determines  
19 that it cannot accept the funds or denies the benefit. CalPERS typically subsequently pays  
20 Plaintiffs an aggregated "lump sum", but fails to credit or pay interest. (RFAs, pg. 1-15.)  
21 CalPERS owes interest from the time that it wrongly accepted the funds until the time of refund.

22           **CalPERS Fails to Pay Interest.** When CalPERS fails to fully pay matured obligations in  
23 full at the time that payment falls due, CalPERS owes interest. (*Civil Code*, §§1915, 3281, 3287-  
24 3289.) However, CalPERS practice is "generally" not to pay interest. (RFAs, pg. 1-15.)

25           **Well Established: CalPERS is Required to Pay Interest On Late Payments.** Plaintiffs  
26 seek interest and recovery of damages, including the loss of use of their money or the interest  
27 that they could have earned on the funds if timely paid. (*Civil Code*, §§1915, 3281, 3287-3289.)

28           In the context of employees' salary and benefits, "[a]mounts recoverable as *wrongfully*

1 withheld payments of salary or pensions are damages within the meaning of [section 3287(a) ].  
2 [Citations.] *Interest is recoverable on each salary or pension payment from the date it fell due.*"  
3 (*Olson v. Cory, supra*, at 402, italics added; *Flethez, supra*, at 72-73.) *Civil Code* interest is the  
4 highest.

5 **Plaintiffs Satisfy Civil Code Section 3287.** Plaintiffs satisfy the requirement of *Civil*  
6 *Code* section 3287(a) to require CalPERS to pay them interest because (1) CalPERS owes them  
7 an underlying monetary obligation, (2) individuals suffer damages by CalPERS' delay which are  
8 certain or capable of being made certain by calculation, and (3) individuals acquired eligibility to  
9 a right to funds that vested on a particular day. (*Flethez, supra*, at 72-73.) Section 3287(a) allows  
10 individuals to recover prejudgment interest based on a general underlying monetary obligation,  
11 including the obligation of a governmental entity." (*AFL, supra*, at 1030; *Flethez, supra*, at 72.)

12 In the case of statutory obligations that were withheld, the Supreme Court held: "[W]here  
13 a recipient of welfare benefits is adjudged entitled to retroactive payment of benefits pursuant to  
14 the statutory obligation of the state, such recipient is entitled to an award of prejudgment interest  
15 at the legal rate *from the time each payment becomes due.*" (*Tripp v. Swoap* (1976) 17 Cal.3d  
16 671, 685, italics added; see also *Flethez, supra*, at 74.) *Tripp* concluded "the effective date of [the  
17 claimant's] entitlement to benefits" was the "first day of the month following the date of  
18 application [for benefits]." (*Tripp, supra*, at 678.) Citing section 3287(a)'s language, *Tripp*  
19 stated: "[F]or purposes of ordering retroactive payments, the right to receive benefits vests in the  
20 recipient on the first date of his [or her] entitlement." (*Tripp, supra*, at 683; see also *Flethez,*  
21 *supra*, at 74.)

22 **CalPERS Duties.** CalPERS owes Plaintiffs duties<sup>7</sup> to timely process information, to  
23 correctly calculate a benefit and contributions at any time, and to promptly pay benefits. A  
24 retirement board's duty to its participants and their beneficiaries take precedence over any other

25 \_\_\_\_\_  
26 <sup>7</sup> As a constitutional trust and fiduciary, CalPERS has an ongoing duty to stay informed,  
27 communicate with participants, request the correct contributions, audit employers, resolve  
28 ambiguities, timely process information, keep the participants informed during employment, and  
promptly deliver benefits and related services. (Cal. Const. art. XVI, § 17; *Govt Code*, §§20150,  
*et seq.*; 2 *CCR*, §§565, *et seq.*)

1 duty. (Cal. Const., art. XVI, §17.) CalPERS owes monetary and fiduciary obligations<sup>8</sup> to each  
2 participant starting from CalPERS' receipt of the first contribution, election, interest, or deposit  
3 in a participant's name. Pursuant to Article XVI, section 17(a), of the California Constitution,  
4 CalPERS and its board have the "responsibility to *administer the system* in a manner that will  
5 assure prompt delivery of benefits" to participants. (*Westly v. California Public Employees'*  
6 *Retirement System Bd. of Administration* (2003) 105 Cal.App.4th 1095, 1110, italics in original.)

7 **CalPERS Fails to Pay Full Amount When Matured Obligation Falls Due.** CalPERS'  
8 policies, procedures, decisions, or other acts, oversights or omissions cause CalPERS to  
9 wrongfully withhold, underpay, hold, or delay payment. (RFAs, pg. 1-15.) As evidenced by its  
10 attempting to enact proposed Regulation 555.5 and other acts, CalPERS often fails to stay  
11 informed, often fails to seek or request information, often fails to administer the benefits timely,  
12 often fails to stay up to date, and often fails to promptly pay. (Exhibits 2, 4.)

13 **No Additional Reasonable Processing Time After Maturation.** CalPERS does not  
14 (and *cannot*) cite any case law allowing a reasonable processing period after eligibility is  
15 established. It does not exist. Once eligibility is established, the right matures and payment is due  
16 in the next warrant or payment period. No further time is allowed (without paying interest).  
17 CalPERS must pay interest when the matured right is not timely paid (i.e. "wrongfully  
18 withheld"), (*Olson v. Cory, supra.*)

19 CalPERS mischaracterizes the case case law to confuse the "time" (1) when the potential  
20 recipient is required to prove entitlement with (2) the time after the right is proven. (*Weber,*  
21 *supra; Flethez, supra.*) *Weber* and *Flethez* refer to two different time periods: (1) the time to

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22 <sup>8</sup> CalPERS owes Plaintiffs duties to calculate and pay the funds correctly and timely.  
23 CalPERS is required to seek information, stay informed, correct errors, review documents, keep  
24 records, and maintain accounts to compute at "any time" the contributions of members and  
25 contributions of the employers. (See e.g., *Govt Code*, §§20120, *et seq.*) CalPERS requires  
26 employers to submit payroll information and pay contributions within 30 days of the pay period.  
27 (2 CCR, §§565, 565.1.) CalPERS requires employers to immediately inform CalPERS of a  
28 change in a participants' status. (*Govt Code*, §20221.) CalPERS requires employer to correct  
errors within 60 days. 2 CCR 565.1. CalPERS charges employers interest if they pay  
contributions late. (2 CCR, §565.2.) Members and beneficiaries are not required to pay the direct  
or indirect costs of system's administration. (*Gov't Code*, § 20536, 2 CCR, §565.2.)

1 conduct an inquiry and determination of a contested claims and (2) the time after the right is  
2 proven but before it is paid. Both cases hold that interest is not owed before the right is proven.  
3 Both also hold that interest definitely *is* owed as soon as the contested case is proven. Plaintiffs  
4 in the proposed class only assert claims for interest in the time period after the right has matured.  
5 Under all case law, CalPERS owes interest when it delays paying a matured benefit.

6 **Judicial Proceedings Are Not Required.** In *Goldfarb* and *San Diego Cnyt Dept.*  
7 *Sheriffs*, the courts found no reason interest should be denied because plaintiff was vindicated in  
8 an administrative proceeding and did not have to contest his demotion in court. (*Goldfarb v.*  
9 *Civil Serv. Com.* (1990) 225 Cal.App.3d 633, 636; *San Diego Cnty. Deputy Sheriffs Assn., supra*,  
10 *at* 1096.) This action supports a judgment for interest since it involves recovery upon a general  
11 underlying monetary obligation. (*Mass, supra*, at 626.) Furthermore, the board incurs liability for  
12 breach of its contractual monetary obligation. (*Benson v. City of Los Angeles* (1963) 60 Cal.2d  
13 355; *Mass, supra*, at 626.)

14 **Additional Authority for Interest.** In all of these cases and others where CalPERS has  
15 held or withheld funds improperly, CalPERS owes interest or accretion to Plaintiffs at the greater  
16 of the applicable rate pursuant to: (i) the *Civil Code*, including sections 1955, 3281, 3287 and  
17 3289; (ii) the California Constitution, including art. XV, §1-17 and art. XVI, §17(a); (iii) case  
18 law, including *Olson v. Cory, supra*, at 402 where interest was required under *Civil Code* section  
19 3287(a) when judicial pensioners were not timely paid; and (iv) other statutes, regulations, and  
20 common law.

21 **CalPERS Earns Investments.** CalPERS earns significant investment returns on the  
22 Plaintiffs' monies that CalPERS holds in trust for them. (Exhibit 5.) In the 20 years from 1992 to  
23 2012, CalPERS' cumulative investment return was 7.7% percent each year. In the year to July  
24 2013, CalPERS earned 14.35%. (Exhibit 6, pg. 5.) When CalPERS delays payment, Plaintiffs are  
25 entitled to accretion or growth.

26 **All Proposed Class Members Are Subject to CalPERS' Common Policy and**  
27 **Practice to Fail to Pay Interest on Withheld, Held, or Delayed Payments.** All proposed class  
28 members suffer from CalPERS common practice of paying or refunding funds late and without

1 adding interest. (*Jensen Decl.* ¶5-7, 8.) The below are organized by type of benefit but they are  
2 all in the same class.

3 Death Benefits – Individuals with matured death benefits that CalPERS paid late and  
4 without interest are members of the class. Mary Kesterson is a representative example. Mrs.  
5 Kesterson's husband was a retired member of CalPERS. (*Corrected Second Kesterson Decl.*, pg.  
6 2:14-15.) Her husband died in September 2011 and the benefit matured. (*Ibid.*) By October 14,  
7 2011, Kesterson had informed CalPERS and filed all information necessary to pay the death  
8 benefits and survivor continuance. (*Id.*, pg. 2:15-17.) However, CalPERS did not pay Kesterson  
9 anything for six months until April 16, 2012. (*Id.*, pg. 2:18:20.) CalPERS did not pay interest.  
10 (*Id.*, pg. 2:21-23.) CalPERS also owes a correct "penalty interest" benefit under *Government*  
11 *Code* section 21499 in addition to *Civil Code* interest. (*Id.*, pg. 2:24:28.) CalPERS generally does  
12 not pay interest on late death benefits. (*Jensen Decl.*, ¶¶31, 36, 81-85.)

13 IDR and Ordinary Disability – All individuals with matured disability benefits that  
14 CalPERS paid late and without interest are in the class. Gerald Dominguez and Brad Heinz are  
15 representative examples. Mr. Dominguez was approved for IDR on or about December 6, 2012,  
16 effective August 6, 2012. (*Dominguez Decl.*, pg. 2:22-23.) CalPERS failed to pay him the  
17 disability until April 1, 2013. (*Id.*, pg. 2:27-28.) CalPERS paid Dominguez a lump sum of  
18 \$55,000 of which \$35,000 was repaid to the employer. (*Id.*, pg. 2:27-3:3.) CalPERS did not pay  
19 interest. (*Id.*, pg. 5:7.)

20 CalPERS approved Plaintiff Brad Heinz for "ordinary disability" on April 25, 2013.  
21 (*Heinz Decl.*, pg. 3:22-4:6.) CalPERS failed to pay Heinz the disability until November 1, 2013.  
22 (*Id.*, pg. 4:6-5:17.) CalPERS underpaid \$1,730.70 each month from May 2013 to November  
23 2013. (*Ibid.*) CalPERS owes interest on the \$1,730.70 each month from the date it fell due.  
24 (*Ibid.*) For a description of the methodology to calculate interest, see Exhibit 7. Regarding  
25 disability benefits, CalPERS admits that it delays, accumulates, holds, or underpays disability  
26 benefits or causes the "disability retirement benefits to be made after the right to payment of  
27 those benefits has accrued". (RFAs, no. 8, pg. 8:16-17.) CalPERS admits that it accumulates and  
28 makes lump sum payments of the delayed held or underpaid disability benefits for benefits "that

1 have not previously been paid". (RFAs, no. 9, pg. 9:21-22.) CalPERS admits that it "generally  
2 does not pay interest" on lump sum payment of disability benefits. (RFAs, No. 10, pg. 10:22-23.)

3 Refunds – All individuals that had refunds paid late by CalPERS without interest are  
4 members of the class. CalPERS admits that it generally does not pay interest on the funds that it  
5 returns to members. (RFAs, no. 11, pg. 11:19-20.) Retired Appellate Justice Marcel Poché, City  
6 Attorney Jeff Walter, and Brad Heinz are representative examples. CalPERS/JRS wrongly  
7 withheld 8% of Judge Poché's salary as sitting judge from June 2002 to August 2014. (*Poché*  
8 *Decl.*, pg. 2:2-3:17.) CalPERS/JRS wrongly withheld \$133,573.26. (*Id.*, pg. 2:15-21.)  
9 CalPERS/JRS failed to refund the money until December 2014. (*Id.*, pg. 2:17-18.) When it  
10 refunded the \$133,573.26, CalPERS/JRS did not pay interest. (*Id.*, pg. 2:18-21.)

11 CalPERS determined that Mr. Walter was entitled to purchase 27.1 years of service credit  
12 as City Attorney for the City of Cotati. (*Walter Decl.*, pg. 2:7-12.) Walter deposited \$469,005.25  
13 with CalPERS on July 2008. (*Ibid.*) In June 2009, CalPERS changed its determination and  
14 denied the benefit. (*Id.*, pg. 2:13-14.) Three and a half years after deposit, on December 22, 2011,  
15 CalPERS returned \$469,005.25 in Walter's funds to Walter without interest. (*Id.*, pg. 2:16-17.)  
16 CalPERS did not pay interest. (*Ibid.*)

17 Mr. Heinz was entitled to timely reimbursement of health expenses from CalPERS.  
18 (*Heinz Decl.*, pg. 2:22-3:20.) However, CalPERS delayed paying reimbursement and failed to  
19 accrue or add interest. (*Ibid.*)

20 Service – All individuals with matured service benefits that CalPERS paid late and  
21 without interest are in the class. CalPERS admits a common result and a common practice that it  
22 delays, accumulates, holds or underpays service benefits "which sometimes cause payments of  
23 service retirement benefit to be made after the right to payment of those benefits has accrued".  
24 (RFAs, no. 5, pg. 5:16-17.)

25 As a representative example, Michael Gilmore was entitled to payment of service  
26 benefits on February 1, 2009. (*Gilmore Decl.*, pg. 2:22.) With his years of service, Gilmore  
27 qualified as service pending disability so his allowance was calculated on his service allowance  
28 with the first fifty percent tax-free when he qualified for IDR. CalPERS initially paid Gilmore

1 \$11,995.22 a month. (*Id.*, pg. 2:22-23.) CalPERS failed to pay the correct allowance for amount  
2 for 39 months until April 1, 2012. (*Id.*, pg. 2:28-3:3.) On April 1, 2012, CalPERS paid Gilmore  
3 approximately \$36,000 in retroactive lump sum payment. (*Id.*, pg. 3:3.) CalPERS did not pay  
4 interest. (*Id.*, pg. 3:1-5.)

5 CalPERS admits that it makes lump sum payments to members for all service retirement  
6 benefits due to members "that have not previously been paid". (RFAs, no. 6, pg. 6:21-22.)

7 CalPERS admits that CalPERS "generally does not pay interest" with accumulated or lump sum  
8 payments. (RFAs, no. 7, pg. 7:22-23.)

9 Community Property – All individuals with matured community property that CalPERS  
10 paid late and without interest are in the class. CalPERS admits that when CalPERS holds funds  
11 during a division of community property, CalPERS generally does not add interest. (RFAs, no.  
12 13, pg. 13:17-21.) For example, CalPERS' community property section withheld \$1,500 a month  
13 from James Steed from July 2009 to October 2009 and then another \$1687.62 a month from June  
14 1, 2013 to April 1, 2014 without crediting Mr. Steed interest. (*Steed Decl.*, pg. 2:18-3:9.)

15 Sick Leave, IRC 415(b) and Other Adjustments – All individuals that had the payment of  
16 funds delayed by CalPERS associated with sick leave, vacation pay or other adjustments but  
17 were not paid or credited with interest are in the class. CalPERS admits that when CalPERS  
18 owes fund or benefits associate with sick leave, vacation pay, adjustment under IRC 415 (b), or  
19 other adjustments, CalPERS generally does not pay interest. (RFAs, no. 14, pg. 14:18-20, no. 15,  
20 pg. 15:16-19.)

21 Subclass Penalty Benefits Under Section 21499. When CalPERS delays payment of  
22 certain benefits more than 45 days after the last document received, CalPERS must pay  
23 individuals in a subclass an added "penalty interest" benefit under *Government Code* section  
24 21499 in addition to interest required under the *Civil Code*. Individual not paid interest and  
25 Section 21499 "penalty" benefits form a subclass. CalPERS often fails to pay either or  
26 incorrectly calculates the penalty benefit, using the incorrect rate and time period. (*Corrected*  
27 *Second Decl. of Kesterson*, pg. 2:24-28.) In every case where "penalty interest" benefit is paid,  
28 CalPERS also owes *Civil Code* interest but has failed to pay it. (Exhibit 12; *Jensen Decl.*, ¶ 8, 31,

1 40-43, 81-85.)

2 "System Delay" and Other Delays by CalPERS – Although the scope of CalPERS' delay,  
3 obligation to timely pay, and its failure to pay interest is in sharp debate, CalPERS admits in its  
4 *Revised Initial Statement of Reasons for Regulation 555.5* that "from time to time benefits are  
5 underpaid due to a system delay". (Exhibit 4, pg. 1.) It is CalPERS' current practice to pay no  
6 interest on those delays. (*Id.*, pg. 1-8.)

7 Class certification. Although the Court is not to resolve the merits of the dispute in  
8 determining the propriety of class certification, it must understand the nature and extent of the  
9 class sought to be certified. (*General Tel. Co. v. Falcon* (1982) 457 U.S. 147, 160 ("[S]ometimes  
10 it may be necessary for the court to probe behind the pleadings before coming to rest on the  
11 certification question.")) It is for that reason Plaintiffs cite to the record here: to show that there  
12 are issues common to all proposed class members, and to demonstrate that they are provable on a  
13 class-wide basis through common evidence. Most importantly, for purposes of class certification,  
14 Plaintiffs' claims present predominant *common issues*, involving class-wide *common evidence*  
15 that, if proven, will establish plaintiff's claims through a class-wide *common adjudication*.

16 **B. Following a Class-Wide Determination Regarding The Impropriety of CalPERS'**  
17 **Failure to Pay Interest, The Damages of the Class Members Can Be Addressed**  
18 **Administratively in a Remedial Proceeding**

19 Once the *Civil Code* liability issue has been adjudicated on a class-wide basis, the matter can  
20 proceed to a remedial stage to assess the amount owed in interest to each individual. This will be  
21 a relatively simple mathematical procedure that can be addressed in a number of ways. (See  
22 Calculation Methodology attached as Exhibit 7 based on the *Declaration of Heinz*, pg. 3:2-4:15;  
23 *Jensen Decl.*, ¶ 10, 12, 17, 88.)

24 Existing Spreadsheets Identify Many Class Members, Payments and Dates of Payments.  
25 In Public Records Act responses that are included in discovery in this matter, CalPERS has  
26 produced spreadsheets that demonstrate (1) the uniform policy of delayed payments with no  
27 interest paid and (2) the identity of many class members. (See Exhibits 9, 10 and 11; *Jensen*  
28 *Decl.*, ¶ 15, 34, 80, 82, 83.) For example, the retirement dates are well known. The dates when

1 the obligation fell due thereafter are known or ascertainable (and common to the class). The date  
2 of the accumulated aggregated or lump sum payment is known. (*Jensen Decl.*, ¶ 14, 15, 34, 79,  
3 80, 82, 83.) No individual hearings are necessary as CalPERS has already acknowledged that the  
4 money is owed by making lump sum payments or refunds. No historic facts that refer to  
5 documentation or records are disputed. A third-party claims administrator could review the  
6 claims using the criteria the CalPERS has available.

7 **III. ALL REQUIREMENTS FOR CLASS CERTIFICATION ARE MET**

8 Class certification is authorized when "the question is one of a common or general  
9 interest, of many persons, or when the parties are numerous, and it impracticable to bring them  
10 all before the court." (*Code of Civ. Proc.*, §382.) Certification is appropriate when the party  
11 seeking certification has demonstrated the existence of an ascertainable class and a well-defined  
12 community of interest among the class members. (*Richmond*, 29 Cal.3d at 470 see also *Daar v.*  
13 *Yellow Cab Co.* (1967) 67 Cal. 2d 695, 704.)

14 Ascertainability issues concern (1) the class definition, (2) the size of the class, and (3)  
15 the means of identifying class members. (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) The  
16 existence of a community of interest turns on whether common questions of law and fact are  
17 sufficiently pervasive to permit adjudication in a class action rather than in a multiplicity of  
18 separate mini-trials. This requirement is satisfied if (1) there are predominant questions of law or  
19 fact common to the class, (2) the plaintiffs' claims are typical of those of the class, and (3) the  
20 plaintiff is an adequate representative. (*Richmond v. Dart Indus.* (1981) 29 Cal. 3d 462, 470.)

21 Courts have repeatedly certified classes requesting interest under *Civil Code* section 3287  
22 regarding pension benefits or other statutory claims. (See *Olson v. Cory, supra; Weber, supra.*)

23 Although *Code of Civil Procedure* section 382 does not provide a procedural framework  
24 to determine class certification, *Civil Code* section 1750, *et seq.* ("CLRA") does: "(b) The court  
25 shall permit the suit to be maintained on behalf of all members of the Represented class if all of  
26 the following conditions exist: (1) It is impracticable to bring all members of the class before the  
27 court; (2) The questions of law or fact common to the class are substantially similar and  
28 predominate over the questions affecting the individual members; (3) The claims or defenses of

1 the representative plaintiffs are typical of the claims or defenses of the class; (4) The  
2 representative plaintiffs will fairly and adequately protect the interests of the class. (*Civ. Code*,  
3 §1881(b), *emphass added*; see also *Civil Serv. Employees Ins. Co. v. Superior Court* (1978) 22  
4 Cal. 3d 362, 376; *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 820.)

5 Class certification merely presents a procedural question that is not conditional upon a  
6 showing that the class claims are likely to succeed on the merits. (*Linder v. Thrifty Oil. Co.*  
7 (2002) 23 Cal. 4<sup>th</sup> 429, 439-40.) At this stage, Plaintiffs are not required to prove their case (*id.* at  
8 438-39), but rather simply demonstrate that the matter is suitable for resolution on a class wide  
9 basis. (*id.* at 443). Because California public policy strongly encourages use of the class action  
10 device, any doubts about whether to certify a class should be resolved in favor of certification.  
11 (*Richmond, supra*, at 473-75; *La Sala, supra*, at 883; *Vasques, supra*, at 807.)

12 **A. The Proposed Class is Ascertainable**

13 Plaintiff seeks certification of the following class:

14 All individuals who had or have funds, credits, monies, benefits,  
15 contributions, or assets (hereafter "funds") that are or were on deposit with, held  
16 by, entrusted to, or under the control of CalPERS, including during which time  
17 CalPERS failed to timely pay the funds (or refund the contributions) and failed to  
18 accrue, credit or pay interest on said funds.

19 The above defined class includes but is not limited to CalPERS enrollees  
20 who have or had funds on deposit with, held by, entrusted to, or under the control  
21 of CalPERS, including during which time CalPERS failed to timely pay the funds  
22 and failed to accrue, credit or pay interest on said funds, including for the period  
23 where payment of funds is wrongfully delayed, unpaid or held, (including those  
24 CalPERS enrollees who received lump sum or accumulated funds, benefits or  
25 payments from CalPERS) and upon the return, refund, or payment of said funds,  
26 CalPERS has refused and/or failed to pay, increase, accrue interest on those funds  
27 to the recipient.

28 The above defined class includes but is not limited to beneficiaries of  
CalPERS enrollees who have or had funds on deposit with, held by, entrusted to,  
or under the control of CalPERS, including during which time CalPERS failed to  
timely pay the funds and failed to accrue, credit or pay interest on said funds,  
including for the period where payment of funds is wrongfully delayed, unpaid or  
held, (including those beneficiaries of CalPERS enrollees who received lump sum  
or accumulated funds, benefits or payments from CalPERS) and upon the return,  
refund, or payment of said funds, CalPERS has refused and/or failed to pay,  
increase, accrue interest on those funds to the recipient.

The above defined class includes, but is not limited to, individuals who are

1 not enrolled in CalPERS who have or had funds on deposit with, held by,  
2 entrusted to, or under the control of CalPERS, including during which time  
3 CalPERS failed to timely pay the funds and failed to accrue, credit or pay interest  
4 on said funds, including for the period where payment of funds is wrongfully  
5 delayed, unpaid or held, (including those who received lump sum or accumulated  
6 funds, benefits, return of contributions, or other payments from CalPERS) and  
7 upon the return, refund, or payment of said funds, CalPERS has refused and/or  
8 failed to pay, increase, accrue interest on those funds to the recipient.

9 The above defined class includes but is not limited to individuals who  
10 have earned a vested right to funds, benefits, allowances, credits, or payments  
11 from CalPERS, where interest is owed, but CalPERS failed to timely pay the  
12 funds and does not add or pay an increase or addition for interest.

13 The above defined class includes but is not limited to participants to whom  
14 CalPERS failed to timely pay funds, or delayed payments in excess of 45 days,  
15 making CalPERS liable for "penalties", including pursuant to *Government Code*  
16 section 21499. (*First Amended Complaint*, pg. 28:22-30:5.)

17 Plaintiff also seeks certification of the following subclass:

18 The above defined class includes but is not limited to participants to whom  
19 CalPERS failed to timely pay funds, or delayed payments in excess of 45 days,  
20 making CalPERS liable for "penalties", including pursuant to *Government Code*  
21 section 21499. (*First Amended Complaint*, pg. 30:1-5.)

22 These definitions, along with CalPERS' records, precisely and objectively identifies class  
23 members, so that each may receive individual notice of this action. "Class members are  
24 'ascertainable' where they may be readily identified without unreasonable expense or time by  
25 reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal.App. 3d 926, 932.) Here,  
26 the members of the proposed class are easily and readily ascertainable from CalPERS records.

27 **B. Plaintiffs Satisfy the Community of Interest Requirement**

28 A sufficient "community of interest" to permit adjudication in a class action (rather than  
separate mini-trials) is satisfied because (1) common questions of law or fact predominant in the  
class, (2) each Plaintiffs' claim is typical, and (3) each Plaintiff is an adequate representative.  
(*Richmond, supra*, at 462.) Counsel is competent, with sufficient resources, and experienced in  
litigating this type of pension claim, and is experienced in other class actions. (*Jensen Decl.*, ¶  
73-78.)

1. **Central Issues of Law and Fact Common to All Class Members Predominate  
Over Individual Issues.**

1 The "common questions" requirement asks whether the issues which may be jointly tried,  
2 "are so numerous or substantial that the maintenance of a class action would be advantageous to  
3 the judicial process and the litigants." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.) Thus, class  
4 certification should be granted where:

5 [T]he issues which [are] common among the class members would be the principal issues  
6 in any individual action, both in terms of time to be expended on their proof and of their  
7 importance, and that if a class suit were not permitted, a multiplicity of legal actions  
8 dealing with identical basic issues would be required in order to permit recovery by each  
9 [class member].

10 (*Vasquez, supra*, at 810.)

11 Common factual and legal issues<sup>9</sup> predominate in this action because CalPERS' uniform  
12 admitted practices of improperly denying interest, under *Civil Code* 3287 or other law, on the  
13 payment of withheld or held funds or other matured rights are discrete and common to all.  
14 *Corrected Second Kesterson Decl.*, pg. 2:4-3:5; *Poché Decl.*, pg. 2:1-3:17; *Gilmore Decl.* pg.  
15 2:5-3:6; *Dominguez Decl.*, pg. 2:17-3:7; *Walter Decl.*, pg. 2:5-17; *Heinz Decl.*, pg. 5:21-6:6; and  
16 *Steed Decl.*, pg. 3:10-22.)

17 To the extent any individual questions exist they concern the amount of interest, not  
18 liability. (*Jensen Decl.*, ¶ 94.) Differing amounts of damages<sup>10</sup> do not preclude class  
19 certification. (*Employment Dev. Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266.)

20 CalPERS' irrelevant arguments focus on the time leading up to maturity and ignore the  
21 law about maturation. CalPERS' legal arguments are defeated by *Civil Code* section 3287(a) and  
22 the *Olson v. Cory* and *Flethez* case law.

23 The need to calculate damages in a remedial phase does not prevent the certification.  
24 Once liability is established, the Court can easily fashion a common, mathematically precise  
25 methodology to calculate interest owed administratively using data largely supplied from

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26 <sup>9</sup> Predominance does not require that each and every issue be identical for each and  
27 every class member. (*Collins v. Rocha, supra*, at 238.) Class certification is appropriate even if  
28 certain members of the class were not injured. (*Rosack v. Volvo of Am. Corp.* (1982) 131  
Cal.App.3d 741, 753-54.)

<sup>10</sup> That "each class member will be required in some manner to establish his individual  
damages, this circumstance does not preclude the maintenance of the suit as a class action."  
(*Vasquez, supra*, at 815, footnote omitted.)

1 CalPERS' records, database, and information. (See Calculation Methodology, Exhibit 7; *Jensen*  
2 *Decl.*, ¶ 10, 12, 17, 88.) CalPERS should have all of the necessary information in its own  
3 database or those of the employers about dates, amounts, payments, and funds of each class  
4 member. CalPERS *already* produced spreadsheets that pulled the key elements of this data for  
5 thousands of putative class members. (Exhibits 9, 10 and 11.) Since CalPERS has fiduciary  
6 duties to maintain complete records, if specific information is incomplete, then information can  
7 be estimated with an inference from the known data to shift the burden to CalPERS to disprove  
8 the amounts claimed. (See *Hernandez v. Mendoza* (1988)199 Cal.App.3d 721, 727.) In any  
9 event, the appropriate method to determine class members' damages "need not be resolved until  
10 the class-wide issues have been determined." (*B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*  
11 (1987) 191 Cal.App.3d 1341, 1354.)

12 The issue on class certification is whether issues predominant sufficiently to make class  
13 treatment the preferred method. (See *Rose v. Hayward, supra*, at 922.) In assessing commonality,  
14 class members' claims or circumstances do not have to be identical. (*Los Angeles Fire & Police*  
15 *Protective League v. City of Los Angeles* (1972) 23 Cal.App.3d 67, 73-74 in overtime wage class  
16 action, the fact that there were 19 different subgroups of employees did not preclude finding that  
17 common issues predominated].)<sup>11</sup>

18 This case involves the narrowly defined legal issue of whether interest is payable as  
19 applied to several narrow, well-defined factual scenarios and a defined group of participants with  
20 records and information maintained, available, or ascertainable from the mostly computerized  
21 records of CalPERS. Numerous facts are common to each plaintiff. (*Corrected Second Kesterson*  
22 *Decl.*, pg. 2:4-3:5; *Poché Decl.*, pg. 2:1-3:17; *Gilmore Decl.* pg. 2:5-3:6; *Dominguez Decl.*, pg.  
23 2:17-3:7; *Walter Decl.*, pg. 2:5-17; *Heinz Decl.*, pg. 5:21-6:6; and *Steed Decl.*, pg. 3:10-22.)

24 Both an ascertainable class and a well-defined community of interest among the class  
25 members exists sufficiently to certify the proposed class and subclass.

## 26 **2. Plaintiffs' Claims Are Typical of Those of the Putative Class Members**

27  
28 <sup>11</sup> A common nucleus of operative fact is usually enough to satisfy the commonality requirement." (*Rosario v. Livaditis* (7<sup>th</sup> Cir. 1992) 963 F.2d 1013, 1017-1018.)

1 To satisfy the typicality requirement, California law requires that a named plaintiff's  
2 interest and claim in the action be significantly similar" to that of the other class members. (See  
3 *Daniels v. Centennial Group, Inc.* (1993) 16 Cal.App.4<sup>th</sup> 467, 473; *B.W.I., supra*, at 1347.)<sup>12</sup>  
4 Each of the representative Plaintiffs' claim is typical as it arises from the same event, practice, or  
5 course of conduct that gives rise to the claims of other class members on the same legal theory.  
6 (*Corrected Second Kesterson Decl.*, pg. 2:4-3:5; *Poché Decl.*, pg. 2:1-3:17; *Gilmore Decl.* pg.  
7 2:5-3:6; *Dominguez Decl.*, pg. 2:17-3:7; *Walter Decl.*, pg. 2:5-17; *Heinz Decl.*, pg. 5:21-6:6; and  
8 *Steed Decl.*, pg. 3:10-22.) In asserting their own claims, Plaintiffs will necessarily establish the  
9 elements of the claims of other members.

10 Each of the named Plaintiffs does "not have a conflict of interest antagonistic to the other  
11 class members. (*McGhee v. Bank of Am.* (1976) 60 Cal.App. 3d 442, 450; *Classen v. Weller*  
12 (1983) 145 Cal.App.3d 27, 46.) (*Corrected Second Kesterson Decl.*, pg. 2:4-3:5; *Poché Decl.*,  
13 pg. 2:1-3:17; *Gilmore Decl.* pg. 2:5-3:6; *Dominguez Decl.*, pg. 2:17-3:7; *Walter Decl.*, pg. 2:5-17;  
14 *Heinz Decl.*, pg. 5:21-6:6; and *Steed Decl.*, pg. 3:10-22.)

15 **3. Plaintiffs Will Fairly and Adequately Represent the Class**

16 "Adequacy of representation depends on whether the plaintiff's attorney is qualified to  
17 conduct the proposed litigation and the plaintiff's interests are no antagonistic to the interest of  
18 the class." (*McGhee v. Bank of Am., supra*, at 450.) Both requirements are met here. Plaintiffs'  
19 counsel is experienced in pension related litigation, has prior class action litigation experience,  
20 and well qualified to prosecute this action. (*Jensen Decl.*, ¶ 73-78, 95-97.)

21 Additionally, each Plaintiff has no conflicts with the class. (*Corrected Second Kesterson*  
22 *Decl.*, pg. 2:4-3:5; *Poché Decl.*, pg. 2:1-3:17; *Gilmore Decl.* pg. 2:5-3:6; *Dominguez Decl.*, pg.  
23 2:17-3:7; *Walter Decl.*, pg. 2:5-17; *Heinz Decl.*, pg. 5:21-6:6; and *Steed Decl.*, pg. 3:10-22.) Each  
24 plaintiff has a strong interest in establishing liability and obtaining reimbursement from  
25 defendants.<sup>13</sup> (*Richmond, supra*, at 471-76.) Plaintiffs are able and willing to prosecute these

26 <sup>12</sup> The typicality requirement concerns the proposed representative's claims as they relate  
27 to the defendants' conduct and activities. (*Classen v. Weller* (1983) 145 Cal.App. 3d 27, 46.)

28 <sup>13</sup> Only conflicts that are "irreconcilable" can defeat adequacy. (*Nat'l Solar Equip.*  
*Owners' Ass'n v. Grunman Corp.* (1991) 235 Cal.App. 3d 1273, 1286.) "Most differences in

1 cases and to protect the interest of the class. (*Corrected Second Kesterson Decl.*, pg. 2:4-3:5;  
2 *Poché Decl.*, pg. 2:1-3:17; *Gilmore Decl.* pg. 2:5-3:6; *Dominguez Decl.*, pg. 2:17-3:7; *Walter*  
3 *Decl.*, pg. 2:5-17; *Heinz Decl.*, pg. 5:21-6:6; and *Steed Decl.*, pg. 3:10-22.)

4 4. **The Proposed Class Is So Numerous That Joining All Would Be**  
5 **Impracticable**

6 The proposed class is estimated to consist of more than 100,000 class members. (Exhibits  
7 9, 10 and 11; *Jensen Decl.*, ¶ 34, 90-93.) It is therefore sufficiently numerous that it would be  
8 impracticable to bring them all before this Court. (*Rose v. City of Haywood, supra*, at 934.)

9 All of the requirements are met for certification. The relative resources available to litigate  
10 an individual action against the wealthy CalPERS are grossly disparate. Class treatment of  
11 Plaintiffs' claims is substantially beneficial to the litigants and the Court.

12 **IV. CONCLUSION**

13 Based on the foregoing, Plaintiffs respectfully request that the Court issue an order  
14 granting certification of the class and subclasses as described above.

15 Respectfully submitted,

16  
17  
18 Dated: June 15, 2015

19 By:   
20 John Michael Jensen SBN 176813  
21 Counsel for Plaintiffs

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24  
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26  
27 situation or interest among class members...should not bar suit." (*Wershba v. Apple Computer,*  
28 *Inc.* (2001) 91 Cal.App. 4<sup>th</sup> 224, 238 (citations omitted).



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Employees' Retirement System and Its Board of  
Administration

9 ***Exempt From Filing Fees: Gov't Code §6103***

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 FOR THE COUNTY OF LOS ANGELES – CENTRAL CIVIL WEST COURTHOUSE  
12

13 MARY KESTERSON, *et al.*, and on behalf of a  
14 class of others similarly situated,

15 Plaintiffs,

16 vs.

17 CALIFORNIA PUBLIC EMPLOYEES'  
18 RETIREMENT SYSTEM (CalPERS),  
BOARD OF ADMINISTRATION OF  
19 CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM,

20 Defendants.  
21

Case No. : BC502628

**CALPERS' RESPONSE TO PLAINTIFFS'  
FIRST SET OF DOCUMENT DEMANDS**

Honorable John Wiley, Jr.

Compl. Filed: March 8, 2013

22  
23 PROPOUNDING PARTY: Plaintiffs

24 RESPONDING PARTY: California Public Employees' Retirement System

25 SET NO. : One  
26  
27  
28

GENERAL OBJECTIONS

1  
2 CalPERS makes the following General Objections and incorporates each of them in its  
3 specific responses to each of Plaintiffs' Demands:

4 1. CalPERS objects to all Demands to the extent they seek information and/or  
5 documents protected from disclosure by the attorney-client privilege or attorney work product  
6 doctrine, or are matters that are otherwise protected from disclosure by a privilege. Such privileged  
7 information and/or documents will not be intentionally provided and any inadvertent disclosure  
8 thereof should not be deemed a waiver of any privilege.

9 2. CalPERS objects to all Demands to the extent they seek confidential information  
10 and/or documents subject to statutory or common law limitations on disclosure. In particular,  
11 CalPERS objects to all Demands to the extent that they seek confidential information or documents  
12 regarding CalPERS members other than Plaintiffs.

13 3. CalPERS objects to all Demands to the extent they attempt to impose on CalPERS  
14 any obligations or requirements that exceed those imposed by the California Code of Civil  
15 Procedure.

16 4. CalPERS objects to all Demands on the grounds that they are vague and ambiguous,  
17 compound, overly broad and unduly burdensome, in that (a) CalPERS has hundreds of thousands of  
18 members and beneficiaries who have received payments from CalPERS and who have different facts  
19 and circumstances, and (b) CalPERS has thousands of employees who may have documents in their  
20 individual files (including, but not limited to their e-mail files) that could be responsive to one or  
21 more of Plaintiffs' Demands. Pursuant to Code of Civil Procedure section 2031.210(d), CalPERS  
22 provides notice that it has not and will not search the individual files (electronic or hard copy) of all  
23 of its employees and will not search the individual files (electronic or hard copy) pertaining to  
24 individual CalPERS members. Rather, CalPERS has conducted a reasonably diligent search for  
25 responsive documents that are in the nature of policies, forms, internal training or instructional  
26 materials, handbooks, Circular Letters, statistical analyses and materials provided to the CalPERS  
27 Board.

28

1           5.       CalPERS objects to all Demands on the grounds that, in the aggregate, Plaintiff's  
2 discovery in this matter has been overly broad, unduly burdensome and oppressive. Plaintiffs and  
3 their counsel have served over three hundred separate Document Demands and public records act  
4 requests. Each demand/request is typically very lengthy and typically incorporates several lengthy  
5 definitions. Plaintiffs and their counsel have asked for the same materials many different times  
6 using slightly different phrasing. This process is oppressive and unwarranted.

7           Subject to and without waiving the foregoing General Objections and incorporating all of  
8 them in each of the Responses hereafter, CalPERS responds as follows:

9                       **RESPONSES TO REQUESTS FOR INSPECTION OF DOCUMENTS**

10 **REQUEST FOR INSPECTION NO. 1:**

11           Any and all reports, algorithms, flowcharts, analyses, memoranda, letters, or other  
12 **document(s) in your** possession or under your control, referring or relating to **delay** arising from or  
13 associated with the **previous CalPERS computer systems** or those systems' specifications.

14 **RESPONSE TO REQUEST NO. 1:**

15           Subject to the General Objections, CalPERS has conducted a diligent search for documents  
16 that are responsive to this request in connection with its prior responses to the numerous public  
17 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
18 soon will produce all non-privileged responsive documents in its possession, custody or control that  
19 can be located with reasonably diligent efforts.

20 **REQUEST FOR INSPECTION NO. 2:**

21           Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
22 **document(s) in your** possession or under your control, referring or relating to **error** arising from or  
23 associated with the **previous CalPERS computer systems** or those systems' specifications.

24 **RESPONSE TO REQUEST NO. 2:**

25           CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
26 calculated to lead to the discovery of admissible evidence.

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1 **REQUEST FOR INSPECTION NO. 3:**

2 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s)** in your possession or under your control, referring or relating to **Accenture's** reviews  
4 or analyses of the **previous CalPERS computer systems** or those systems' specifications.

5 **RESPONSE TO REQUEST NO. 3:**

6 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
7 calculated to lead to the discovery of admissible evidence.

8 **REQUEST FOR INSPECTION NO. 4:**

9 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
10 **document(s)** in your possession or under your control, referring or relating to **Accenture's** reviews  
11 or analyses of the **previous CalPERS computer systems** for the purpose or with the result of  
12 identifying the causes of or reasons for any delay.

13 **RESPONSE TO REQUEST NO. 4:**

14 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
15 that are responsive to this request in connection with its prior responses to the numerous public  
16 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
17 soon will produce all non-privileged responsive documents in its possession, custody or control that  
18 can be located with reasonably diligent efforts.

19 **REQUEST FOR INSPECTION NO. 5:**

20 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
21 **document(s)** in your possession or under your control, referring or relating to **Accenture's** reviews  
22 or analyses of the **previous CalPERS computer systems** for the purpose or with the result of  
23 identifying **delay** associated with **CalPERS'** policy, procedure, processing, analysis, or evaluation  
24 of information related to pension benefits to be provided to **Members** or **beneficiaries**.

25 **RESPONSE TO REQUEST NO. 5:**

26 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
27 that are responsive to this request in connection with its prior responses to the numerous public  
28 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or

1 soon will produce all non-privileged responsive documents in its possession, custody or control that  
2 can be located with reasonably diligent efforts.

3 **REQUEST FOR INSPECTION NO. 6:**

4 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
5 **document(s) in your** possession or under your control, referring or relating to **Accenture's** reviews  
6 or analyses of the **previous CalPERS computer systems** for the purpose or with the result of  
7 identifying **delay** concerning **CalPERS'** policy, procedure, processing, calculations, transmission, or  
8 payment of pension benefits to be provided to **Members** or **beneficiaries**.

9 **RESPONSE TO REQUEST NO. 6:**

10 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
11 that are responsive to this request in connection with its prior responses to the numerous public  
12 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
13 soon will produce all non-privileged responsive documents in its possession, custody or control that  
14 can be located with reasonably diligent efforts.

15 **REQUEST FOR INSPECTION NO. 7:**

16 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
17 **document(s) in your** possession or under your control, referring or relating to **Accenture's** reviews  
18 or analyses of the **previous CalPERS computer systems** for the purpose or with the result of  
19 identifying **delay** concerning when **CalPERS** processed, provided or paid pension benefits to  
20 **Members** or **beneficiaries**.

21 **RESPONSE TO REQUEST NO. 7:**

22 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
23 that are responsive to this request in connection with its prior responses to the numerous public  
24 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
25 soon will produce all non-privileged responsive documents in its possession, custody or control that  
26 can be located with reasonably diligent efforts.

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1 **REQUEST FOR INSPECTION NO. 8:**

2 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s)** in your possession or under your control, referring or relating to **Accenture's** reviews  
4 or analyses of the **previous CalPERS computer systems** for the purpose or with the result of  
5 identifying the cause or reason for **delay** affecting or impacting the time of **CalPERS'** payment,  
6 processing, or provision of pension benefits to **Members** or **beneficiaries**.

7 **RESPONSE TO REQUEST NO. 8:**

8 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
9 that are responsive to this request in connection with its prior responses to the numerous public  
10 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
11 soon will produce all non-privileged responsive documents in its possession, custody or control that  
12 can be located with reasonably diligent efforts.

13 **REQUEST FOR INSPECTION NO. 9:**

14 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
15 **document(s)** in your possession or under your control, referring or relating to **Accenture's** reviews  
16 or analyses of the **previous CalPERS computer systems** for the purpose or with the result of  
17 identifying the number of **delays** that occurred per year in 2000, 2001, 2002, 2003, 2004, 2005,  
18 2006, 2007, 2008, 2009, 2010, 2011 and 2012.

19 **RESPONSE TO REQUEST NO. 9:**

20 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
21 that are responsive to this request in connection with its prior responses to the numerous public  
22 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
23 soon will produce all non-privileged responsive documents in its possession, custody or control that  
24 can be located with reasonably diligent efforts.

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1 **REQUEST FOR INSPECTION NO. 10:**

2 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s)** in your possession or under your control, referring or relating to **Accenture's** reviews  
4 or analyses of the **previous CalPERS computer systems** for the purpose or with the result of  
5 identifying the type of benefit and nature of transaction effected by **delays** that occurred per year in  
6 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012.

7 **RESPONSE TO REQUEST NO. 10:**

8 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
9 that are responsive to this request in connection with its prior responses to the numerous public  
10 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
11 soon will produce all non-privileged responsive documents in its possession, custody or control that  
12 can be located with reasonably diligent efforts.

13 **REQUEST FOR INSPECTION NO. 11:**

14 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
15 **document(s)** in your possession or under your control, referring or relating to **Accenture's** reviews  
16 or analyses of the **previous CalPERS computer systems** for the purpose or with the result of  
17 identifying the timing (i.e., the month and year or other period of time) of **delays** that occurred in the  
18 years 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012.

19 **RESPONSE TO REQUEST NO. 11:**

20 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
21 that are responsive to this request in connection with its prior responses to the numerous public  
22 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
23 soon will produce all non-privileged responsive documents in its possession, custody or control that  
24 can be located with reasonably diligent efforts.

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1 **REQUEST FOR INSPECTION NO. 12:**

2 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s)** in your possession or under your control, referring or relating to **Accenture's** reviews  
4 or analyses of the **previous CalPERS computer systems** for the purpose or with the result of  
5 identifying the rate of **error** in processing, information storage, or other computer systems or  
6 processes that occurred in the years 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009,  
7 2010, 2011 and 2012.

8 **RESPONSE TO REQUEST NO. 12:**

9 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
10 calculated to lead to the discovery of admissible evidence.

11 **REQUEST FOR INSPECTION NO. 13:**

12 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
13 **document(s)** in your possession or under your control, referring or relating to **Accenture's** reviews  
14 or analyses of the **previous CalPERS computer systems** for the purpose or with the result of  
15 identifying the cause of or reason for the rate of **error** in processing, information storage, or other  
16 computer systems or processes that occurred in the years 2000, 2001, 2002, 2003, 2004, 2005, 2006,  
17 2007, 2008, 2009, 2010, 2011 and 2012.

18 **RESPONSE TO REQUEST NO. 13:**

19 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
20 calculated to lead to the discovery of admissible evidence.

21 **REQUEST FOR INSPECTION NO. 14:**

22 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
23 **document(s)** in your possession or under your control, which evaluate or analyze any problems in  
24 the **previous CalPERS computer systems** that caused or contributed to **delay**.

25 **RESPONSE TO REQUEST NO. 14:**

26 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
27 that are responsive to this request in connection with its prior responses to the numerous public  
28 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or

1 soon will produce all non-privileged responsive documents in its possession, custody or control that  
2 can be located with reasonably diligent efforts.

3 **REQUEST FOR INSPECTION NO. 15:**

4 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
5 **document(s) in your** possession or under your control, which evaluate or analyze CalPERS' policy,  
6 processes or procedures that caused or contributed to **delay in the previous CalPERS computer**  
7 **systems.**

8 **RESPONSE TO REQUEST NO. 15:**

9 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
10 that are responsive to this request in connection with its prior responses to the numerous public  
11 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
12 soon will produce all non-privileged responsive documents in its possession, custody or control that  
13 can be located with reasonably diligent efforts.

14 **REQUEST FOR INSPECTION NO. 16:**

15 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
16 **document(s) in your** possession or under **your** control, which evaluate or analyze any process,  
17 policy, or procedure for collecting data in the **previous CalPERS computer systems.**

18 **RESPONSE TO REQUEST NO. 16:**

19 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
20 calculated to lead to the discovery of admissible evidence.

21 **REQUEST FOR INSPECTION NO. 17:**

22 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
23 **document(s) in your** possession or under **your** control, which evaluate or analyze any process,  
24 policy, or procedure for entering information in the **previous CalPERS computer systems.**

25 **RESPONSE TO REQUEST NO. 17:**

26 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
27 calculated to lead to the discovery of admissible evidence.

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1 **REQUEST FOR INSPECTION NO. 18:**

2 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s) in your possession or under your control, which evaluate or analyze any process,**  
4 **policy, or procedure for verifying information in the previous CalPERS computer systems.**

5 **RESPONSE TO REQUEST NO. 18:**

6 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
7 calculated to lead to the discovery of admissible evidence.

8 **REQUEST FOR INSPECTION NO. 19:**

9 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
10 **document(s) in your possession or under your control, which evaluate or analyze any process,**  
11 **policy, or procedure for flagging or identifying potentially erroneous, nonconforming, or**  
12 **questionable information in the previous CalPERS computer systems.**

13 **RESPONSE TO REQUEST NO. 19:**

14 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
15 calculated to lead to the discovery of admissible evidence.

16 **REQUEST FOR INSPECTION NO. 20:**

17 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters, or other  
18 **document(s) in your possession or under your control, referring or relating to delay arising from or**  
19 **associated with the new CalPERS computer systems or those systems' specifications.**

20 **RESPONSE TO REQUEST NO. 20:**

21 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
22 that are responsive to this request in connection with its prior responses to the numerous public  
23 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
24 soon will produce all non-privileged responsive documents in its possession, custody or control that  
25 can be located with reasonably diligent efforts.

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1 **REQUEST FOR INSPECTION NO. 21:**

2 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s)** in your possession or under your control, referring or relating to **error** arising from or  
4 associated with the **new CalPERS computer systems** or those systems' specifications.

5 **RESPONSE TO REQUEST NO. 21:**

6 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
7 calculated to lead to the discovery of admissible evidence.

8 **REQUEST FOR INSPECTION NO. 22:**

9 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
10 **document(s)** in your possession or under your control, referring or relating to **Accenture's** reviews  
11 or analyses of the **new CalPERS computer systems** or those systems' specifications.

12 **RESPONSE TO REQUEST NO. 22:**

13 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
14 calculated to lead to the discovery of admissible evidence.

15 **REQUEST FOR INSPECTION NO. 23:**

16 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
17 **document(s)** in your possession or under your control, referring or relating to **Accenture's** reviews  
18 or analyses of the **new CalPERS computer systems** for the purpose or with the result of identifying  
19 the causes of or reasons for any **delay**.

20 **RESPONSE TO REQUEST NO. 23:**

21 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
22 that are responsive to this request in connection with its prior responses to the numerous public  
23 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
24 soon will produce all non-privileged responsive documents in its possession, custody or control that  
25 can be located with reasonably diligent efforts.

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1 **REQUEST FOR INSPECTION NO. 24:**

2 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s)** in your possession or under your control, referring or relating to **Accenture's** reviews  
4 or analyses of the **new CalPERS computer systems** for the purpose or with the result of identifying  
5 **delay** associated with **CalPERS'** policy, procedure, processing, analysis, or evaluation of  
6 information related to pension benefits to be provided to **Members** or **beneficiaries**.

7 **RESPONSE TO REQUEST NO. 24:**

8 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
9 that are responsive to this request in connection with its prior responses to the numerous public  
10 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
11 soon will produce all non-privileged responsive documents in its possession, custody or control that  
12 can be located with reasonably diligent efforts.

13 **REQUEST FOR INSPECTION NO. 25:**

14 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
15 **document(s)** in your possession or under your control, referring or relating to **Accenture's** reviews  
16 or analyses of the **new CalPERS computer systems** for the purpose or with the result of identifying  
17 **delay** concerning **CalPERS'** policy, procedure, processing, calculations, transmission, or payment  
18 of pension benefits to be provided to **Members** or **beneficiaries**.

19 **RESPONSE TO REQUEST NO. 25:**

20 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
21 that are responsive to this request in connection with its prior responses to the numerous public  
22 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
23 soon will produce all non-privileged responsive documents in its possession, custody or control that  
24 can be located with reasonably diligent efforts.

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1 **REQUEST FOR INSPECTION NO. 26:**

2 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s) in your possession or under your control, referring or relating to Accenture's reviews**  
4 **or analyses of the new CalPERS computer systems for the purpose or with the result of identifying**  
5 **delay concerning when CalPERS processed, provided or paid pension benefits to Members or**  
6 **beneficiaries.**

7 **RESPONSE TO REQUEST NO. 26:**

8 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
9 that are responsive to this request in connection with its prior responses to the numerous public  
10 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
11 soon will produce all non-privileged responsive documents in its possession, custody or control that  
12 can be located with reasonably diligent efforts.

13 **REQUEST FOR INSPECTION NO. 27:**

14 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
15 **document(s) in your possession or under your control, referring or relating to Accenture's reviews**  
16 **or analyses of the new CalPERS computer systems for the purpose or with the result of identifying**  
17 **the cause or reason for delay affecting or impacting the time of CalPERS' payment, processing, or**  
18 **provision of pension benefits to Members or beneficiaries.**

19 **RESPONSE TO REQUEST NO. 27:**

20 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
21 that are responsive to this request in connection with its prior responses to the numerous public  
22 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
23 soon will produce all non-privileged responsive documents in its possession, custody or control that  
24 can be located with reasonably diligent efforts.

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1 **REQUEST FOR INSPECTION NO. 28:**

2 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s) in your possession or under your control, referring or relating to Accenture's reviews**  
4 **or analyses of the new CalPERS computer systems for the purpose or with the result of identifying**  
5 **the number of delays that occurred per year in 2011, 2012, 2013 and 2014.**

6 **RESPONSE TO REQUEST NO. 28:**

7 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
8 that are responsive to this request in connection with its prior responses to the numerous public  
9 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
10 soon will produce all non-privileged responsive documents in its possession, custody or control that  
11 can be located with reasonably diligent efforts.

12 **REQUEST FOR INSPECTION NO. 29:**

13 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
14 **document(s) in your possession or under your control, referring or relating to Accenture's reviews**  
15 **or analyses of the new CalPERS computer systems for the purpose or with the result of identifying**  
16 **the type of benefit and nature of transaction effected by delays that occurred per year in 2011, 2012,**  
17 **2013 and 2014.**

18 **RESPONSE TO REQUEST NO. 29:**

19 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
20 that are responsive to this request in connection with its prior responses to the numerous public  
21 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
22 soon will produce all non-privileged responsive documents in its possession, custody or control that  
23 can be located with reasonably diligent efforts.

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1 **REQUEST FOR INSPECTION NO. 30:**

2 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s)** in **your** possession or under **your** control, referring or relating to **Accenture's** reviews  
4 or analyses of the **new CalPERS computer systems** for the purpose or with the result of identifying  
5 the timing (i.e., the month and year or other period of time) of **delays** that occurred in the years  
6 2011, 2012, 2013 and 2014.

7 **RESPONSE TO REQUEST NO. 30:**

8 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
9 that are responsive to this request in connection with its prior responses to the numerous public  
10 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
11 soon will produce all non-privileged responsive documents in its possession, custody or control that  
12 can be located with reasonably diligent efforts.

13 **REQUEST FOR INSPECTION NO. 31:**

14 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
15 **document(s)** in **your** possession or under **your** control, referring or relating to **Accenture's** reviews  
16 or analyses of the **new CalPERS computer systems** for the purpose or with the result of identifying  
17 the rate of **error** in processing, information storage, or other computer systems or processes that  
18 occurred in the years 2011, 2012, 2013 and 2014.

19 **RESPONSE TO REQUEST NO. 31:**

20 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
21 calculated to lead to the discovery of admissible evidence.  
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1 **REQUEST FOR INSPECTION NO. 32:**

2 Any and all reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s) in your possession or under your control, referring or relating to Accenture's reviews**  
4 **or analyses of the new CalPERS computer systems for the purpose or with the result of identifying**  
5 **the cause of or reason for the rate of error in processing, information storage, or other computer**  
6 **systems or processes that occurred in the years 2011, 2012, 2013 and 2014.**

7 **RESPONSE TO REQUEST NO. 32:**

8 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
9 calculated to lead to the discovery of admissible evidence.

10 **REQUEST FOR INSPECTION NO. 33:**

11 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
12 **document(s) in your possession or under your control, which evaluate or analyze any problems in**  
13 **the new CalPERS computer systems that caused or contributed to delay.**

14 **RESPONSE TO REQUEST NO. 33;**

15 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
16 that are responsive to this request in connection with its prior responses to the numerous public  
17 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
18 soon will produce all non-privileged responsive documents in its possession, custody or control that  
19 can be located with reasonably diligent efforts.

20 **REQUEST FOR INSPECTION NO. 34:**

21 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
22 **document(s) in your possession or under your control, which evaluate or analyze CalPERS' policy,**  
23 **processes or procedures that caused or contributed to delay in the new CalPERS computer**  
24 **systems.**

25 **RESPONSE TO REQUEST NO. 34:**

26 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
27 that are responsive to this request in connection with its prior responses to the numerous public  
28 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or

1 soon will produce all non-privileged responsive documents in its possession, custody or control that  
2 can be located with reasonably diligent efforts.

3 **REQUEST FOR INSPECTION NO. 35:**

4 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
5 **document(s) in your possession or under your control, which evaluate or analyze any process,**  
6 **policy, or procedure for collecting data in the new CalPERS computer systems.**

7 **RESPONSE TO REQUEST NO. 35:**

8 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
9 calculated to lead to the discovery of admissible evidence.

10 **REQUEST FOR INSPECTION NO. 36:**

11 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
12 **document(s) in your possession or under your control, which evaluate or analyze any process,**  
13 **policy, or procedure for entering information in the new CalPERS computer systems.**

14 **RESPONSE TO REQUEST NO. 36:**

15 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
16 calculated to lead to the discovery of admissible evidence.

17 **REQUEST FOR INSPECTION NO. 37:**

18 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
19 **document(s) in your possession or under your control, which evaluate or analyze any process,**  
20 **policy, or procedure for verifying information in the new CalPERS computer systems.**

21 **RESPONSE TO REQUEST NO. 37:**

22 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
23 calculated to lead to the discovery of admissible evidence.

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1 **REQUEST FOR INSPECTION NO. 38:**

2 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s)** in **your** possession or under **your** control, which evaluate or analyze any process,  
4 policy, or procedure for flagging or identifying potentially erroneous, nonconforming, or  
5 questionable information in the **new CalPERS computer systems**.

6 **RESPONSE TO REQUEST NO. 38:**

7 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
8 calculated to lead to the discovery of admissible evidence.

9 **REQUEST FOR INSPECTION NO. 39:**

10 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
11 **document(s)** in **your** possession or under **your** control, which evaluate or analyze the status of  
12 **Accenture's** efforts to provide, build, design, implement, revise, or install **the new CalPERS**  
13 **computer systems**.

14 **RESPONSE TO REQUEST NO. 39:**

15 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
16 calculated to lead to the discovery of admissible evidence.

17 **REQUEST FOR INSPECTION NO. 40:**

18 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
19 **document(s)** in **your** possession or under **your** control, which evaluate or analyze any problems in  
20 **the new CalPERS computer systems** that caused or contributed to **delays**.

21 **RESPONSE TO REQUEST NO. 40:**

22 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
23 that are responsive to this request in connection with its prior responses to the numerous public  
24 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
25 soon will produce all non-privileged responsive documents in its possession, custody or control that  
26 can be located with reasonably diligent efforts.

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1 **REQUEST FOR INSPECTION NO. 41:**

2 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s) in your possession or under your control**, which evaluate or analyze CalPERS' policy,  
4 processes or procedures that contributed to or caused **delays in the new CalPERS computer**  
5 **systems.**

6 **RESPONSE TO REQUEST NO. 41:**

7 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
8 that are responsive to this request in connection with its prior responses to the numerous public  
9 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
10 soon will produce all non-privileged responsive documents in its possession, custody or control that  
11 can be located with reasonably diligent efforts.

12 **REQUEST FOR INSPECTION NO. 42:**

13 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
14 **document(s) in your possession or under your control**, which evaluate or analyze any process,  
15 policy, or procedure for collecting data in the **new CalPERS computer systems.**

16 **RESPONSE TO REQUEST NO. 42:**

17 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
18 calculated to lead to the discovery of admissible evidence.

19 **REQUEST FOR INSPECTION NO. 43:**

20 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
21 **document(s) in your possession or under your control**, which evaluate or analyze any process,  
22 policy, or procedure for entering information in the **new CalPERS computer systems.**

23 **RESPONSE TO REQUEST NO. 43:**

24 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
25 calculated to lead to the discovery of admissible evidence.

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1 **REQUEST FOR INSPECTION NO. 44:**

2 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s) in your possession or under your control, which evaluate or analyze any process,**  
4 **policy, or procedure for verifying information in the new CalPERS computer systems.**

5 **RESPONSE TO REQUEST NO. 44:**

6 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
7 calculated to lead to the discovery of admissible evidence.

8 **REQUEST FOR INSPECTION NO. 45:**

9 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
10 **document(s) in your possession or under your control, which evaluate or analyze any problems in**  
11 **the new CalPERS computer systems that caused or contributed to delay.**

12 **RESPONSE TO REQUEST NO. 45:**

13 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
14 that are responsive to this request in connection with its prior responses to the numerous public  
15 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
16 soon will produce all non-privileged responsive documents in its possession, custody or control that  
17 can be located with reasonably diligent efforts.

18 **REQUEST FOR INSPECTION NO. 46:**

19 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
20 **documents in your possession or under your control, which evaluate or analyze CalPERS'**  
21 **processes or procedures that caused or contributed to delays in information processing by the new**  
22 **CalPERS computer systems.**

23 **RESPONSE TO REQUEST NO. 46:**

24 Subject to the General Objections, CalPERS has conducted a diligent search for documents  
25 that are responsive to this request in connection with its prior responses to the numerous public  
26 records act requests that were made by Plaintiffs' counsel. CalPERS either has already produced or  
27 soon will produce all non-privileged responsive documents in its possession, custody or control that  
28 can be located with reasonably diligent efforts.

1 **REQUEST FOR INSPECTION NO. 47:**

2 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
3 **document(s)** in **your** possession or under **your** control, which evaluate or analyze whether **your**  
4 efforts to provide, build, design or install the **new CalPERS computer systems** were on schedule to  
5 meet projected deadlines or goals set forth in the **Accenture-CalPERS contracts**.

6 **RESPONSE TO REQUEST NO. 47:**

7 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
8 calculated to lead to the discovery of admissible evidence.

9 **REQUEST FOR INSPECTION NO. 48:**

10 Any and all status reports, algorithms, flowcharts, analyses, memoranda, letters or other  
11 **document(s)** in **your** possession or under **your** control, which evaluate or analyze the reasons why  
12 **your** efforts to provide, build, design or install the **new CalPERS computer systems** were not on  
13 schedule to meet projected deadlines or goals set forth in the **Accenture-CalPERS contracts**.

14 **RESPONSE TO REQUEST NO. 48:**

15 CalPERS objects to this request as overly broad, unduly burdensome and not reasonably  
16 calculated to lead to the discovery of admissible evidence.

17 Dated: December 24, 2014

REED SMITH LLP

18 By \_\_\_\_\_

19 Jeffrey R. Eieger  
20 Attorney for Defendant  
California Public Employees' Retirement System

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**VERIFICATION**

I, Anthony Suine, am the Chief of the Benefit Services Division of the California Public Employees' Retirement System ("CalPERS"), Defendant in this action, and I am authorized to make this Verification on its behalf.

I have read the forgoing Defendant CalPERS' Response to Plaintiffs' First Set of Document Demands and I know its contents.

I declare under penalty of perjury under the laws of the State of California that I am informed and believe that the matters stated in that document are true and correct, and that I executed this verification on December 19, 2014, at Sacramento, California.

  
\_\_\_\_\_  
Anthony Suine, Chief  
Benefit Services Division