

I. Background

Mary Kesterson is a poignant and haunting example of what happens when CalPERS fails to timely administer the retirement system correctly and fails to timely pay benefits. She and her husband were in their seventies and lived independently together. Her husband had worked for years to earn the right for CalPERS to provide financial support to his wife after his death. Mrs. Kesterson's husband worked in public service for the Beverly Hills Fire Department and was a retired member of CalPERS. (*Motion For Class Certification, Corrected Second Decl of Kesterson.*, pg. 2:14-15.)

When her husband died in September 2011, Mary was entitled to receive a death benefit, a survivor continuance, and an ongoing benefit from CalPERS. The death benefit was due immediately and the ongoing warrants were due in the next warrant cycle. She was over seventy years old and reliant on CalPERS' timely payment of the allowance and benefits to meet her immediate needs and obligations. As an independent woman now living alone, she had rent, bills, and other pressing obligations that would be paid from the monies that CalPERS owed her.

However, CalPERS did not pay immediately or in the next warrant. Within a month of her husband's, by October 14, 2011, Mary had informed CalPERS of his death and filed all information necessary for CalPERS to pay her the death benefits and survivor continuance on schedule. (*Id.*, pg. 2:15-17.) However, CalPERS still did not pay Kesterson. As CalPERS delayed, Mary's main sources of income dried up, compounding the adjustments and uncertainties that arose after Mr. Kesterson passed away. CalPERS did not timely respond to her requests, placing her in significant and unnecessary uncertainty. In fact, CalPERS did not pay Kesterson anything for six months until April 16, 2012. (*Id.*, pg. 2:18:20.) Only after 6 months,

did CalPERS pay the appropriate money. Even then, CalPERS did not pay interest on the monies from the date that the payment fell due. (*Id.*, pg. 2:21-23.)

Mary Kesterson was entitled to timely financial support from CalPERS upon her husband's death. CalPERS failed to provide it.

The main "legal" issue in this case is CalPERS generally does not pay interest on the late payment of death, service, and disability benefits. (*Motion For Class Certification, Jensen, Decl.*, ¶¶31, 36, 81-85.) But the motivating reason to force CalPERS to provide interest is to stimulate CalPERS to administer the retirement system to pay benefits timely and fully so that people that rely on CalPERS do not suffer significant life crises caused by CalPERS' denial of the financial support that they have earned and are entitled to. Financial support that allows them to pay their bills and to live their lives.

Without a remedy such as interest to force CalPERS to pay attention to and to fulfill its existing obligation to administer the retirement system in the members' and beneficiaries' favor to assure timely payment, there is no impetus or incentive for CalPERS to pay on time.

CalPERS' payment of interest is a small legal disadvantage that recognizes the late payment.

However, CalPERS suffers no harm¹ from being forced to timely pay or pay interest. In fact, CalPERS earns significant investment returns on the monies that it holds. Paradoxically, CalPERS gains an advantage from delay and therefore has a little incentive to fix the problems causing its systemic delays. In Public Records Act request, CalPERS has identified hundreds of

¹ Associated with these reasons, the Legislature has provided for additional penalties on certain benefits if CalPERS delays egregiously, and CalPERS sometimes but not often pays "penalty interest" benefit under *Government Code* section 21499 . However, it does not pay *Civil Code* interest. (*Corrected Second Kesterson Declaration*, pg. 2:24:28.)

thousands of CalPERS members and beneficiaries that it made late payments to without paying interest.

In March 2013, Mary Kesterson became a named Plaintiff in the proposed class action (case no. BC 502628) against CalPERS pending in Los Angeles Superior Court that seeks interest on late or held funds. Plaintiffs estimate the proposed class exceeds 100,000 individuals.

In April 2015, CalPERS filed a notice that it intended to make rules on the payment of interest. In this proposed regulation, CalPERS seeks to provide itself the right to delay, and to retain the investment returns it earns on the money, even though CalPERS is required to pay interest under the *Civil Code* and long-settled case law such as *Olson v. Cory* (1983) 35 Cal.3d 390 and *Flethez v. San Bernardino Cnty. Employees Ret. Ass'n* (2015) 236 Cal.App.4th 65. The law requires the payment of interest, so it appears that CalPERS seeks to change the law through this regulation, to unburden itself of the little leverage that members and beneficiaries have to force CalPERS to timely pay.

II. Introduction to Written Comments on Proposed Regulation

We submit this written statement and the attachments 1 through 22 into the record of the rulemaking proceeding regarding proposed regulation 2 CCR 555.5. (*Govt. Code*, §11349.1.)² We submit this in addition to our request for a public hearing previously made. We request that CalPERS consider this as "relevant matter presented to it" before adopting, amending, or repealing a regulation. (*Govt. Code*, §11346.8(a).) We may also file this with the Office of Administrative Law or Secretary of State, as appropriate.

² We also file this as an "interested person" petitioning CalPERS to reject or repeal the proposed regulation. This petition states (1) the substance or nature of the regulation, amendment, or repeal requested, (2) the reason for the request, and (3) a reference to the agency's authority to take the requested action. (*Govt. Code*, §11340.6.)

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We request that CalPERS provide responses to the matters raised in this submission as it indicated that it would in its *Notice of Addition of Documents in the Rulemaking File*. We also request the right to reply to CalPERS' responses.

Since there is a class action pending which prompted CalPERS to start this rulemaking process, we assert all of the named Plaintiffs and the 100,000 or so proposed class members as interested persons in this matter. (Exhibits 1-22, See files on disk.) A class certification motion was filed June 15, 2015. (Exhibit 21.)

As far as "interested persons", CalPERS has previously identified approximately 700,000 persons in Public Records Act responses to whom CalPERS paid late or lump sum payments. This regulation may affect or void their existing property right to interest. We lodge with CalPERS a computer disc (a written comment) containing the names of approximately 700,000 persons that CalPERS has identified as having received lump sum payments without the payment of interest.

By filing a Government Claim, the *Complaint*, and the *First Amended Complaint* (Exhibit 20), the named Plaintiffs and the proposed class members have claims that have vested into property rights prior to the start of this rulemaking process.

In these written comments, we address the specified standards, including necessity, authority, clarity, consistency, reference, and nonduplication. (*Govt. Code*, §11349.1(a) and (b).)

Under the substantive law regarding interest on delayed benefits and payments, including under the *Civil Code* section 3287, the proposed regulation 555.5 fails the standard for necessity, authority, clarity, consistency, reference, and nonduplication. (*Ibid.*)

Under the procedural and substantive law regarding class actions and recovery for non-represented parties, including under *Code of Civil Procedure* section 382, the proposed

regulation 555.5 fails the standard for necessity, authority, clarity, consistency, reference, and nonduplication. (*Ibid.*)

A. Background of Challenge to Regulation

The authority of an administrative agency to adopt rules and regulations extends to the adoption of such reasonable rules and regulations as are deemed necessary to the due and efficient exercise of the powers expressly granted. (*Martinez v. Combs* (2010) 49 Cal.4th 35, as modified, June 9, 2010.) No adopted regulation is valid or effective unless it is consistent and not in conflict with the governing statutes and reasonably necessary to effectuate the purpose of the statutes. (*Govt. Code*, §11342.2). In particular, while an agency may be invested with quasi-legislative power to adopt regulations, it has no discretion to promulgate regulations that are inconsistent with the governing statutes. (*Batt v. City and County of San Francisco* (2010) 184 Cal.App.4th 163; 2 Cal. Jur. 3d, *Administrative Law*, §228.)

An administrative agency has only such quasi-legislative power as the enabling statute or ordinance confers on it. Therefore, the scope and extent of the legislative or rulemaking power of an administrative agency depends on the statutes or ordinances conferring its power and ultimately on the construction and interpretation of those statutes and ordinances by the courts. (*Knudsen Creamery Co. of Cal. v. Brock* (1951) 37 Cal.2d 485.) Quasi-legislative power may be conferred in broad terms. (*Sandstrom v. California Horse Racing Bd.* (1948) 31 Cal.2d 401.) But with respect to particular administrative agencies, statutes often expressly confer power to make such rules and regulations as may be necessary. (*Nortel Networks Inc. v. State Bd. of Equalization* (2011) 191 Cal.App.4th 1259; *Whitcomb Hotel v. California Employment Commission* (1944) 24 Cal.2d 753.) The regulations are limited to carrying out the provisions of the statute. (*Southern Cal. Gas Co. v. South Coast Air Quality Management Dist.* (2011) 200

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Cal.App.4th 251, as modified, Nov. 15, 2011, and as modified on denial of reh'g, Nov. 22, 2011, and review denied, Jan. 18, 2012; 2 Cal. Jur. 3d, *Administrative Law*, §233.)

A regulation is ordinarily invalid unless it falls within the scope of authority conferred on the agency by statute. (*Govt. Code*, §11342.1.)

Administrative regulations that alter or amend the enabling statute or enlarge or impair its scope are void, and it is the court's obligation to strike down those regulations. While the absence of a specific statutory authorization for a regulation does not mean the regulation necessarily exceeds statutory authority, the agency action must nevertheless be based on at least an implied delegation of power. (*Diageo-Guinness USA, Inc. v. State Bd. of Equalization* (2012) 205 Cal.App.4th 907.) However, regulations adopted under implied powers are subject to more stringent tests as to reasonableness than regulations adopted under express statutory authority. (*Ex parte Chin Yan* (1882) 60 Cal. 78.)

As described below, the proposed regulation fails the necessity, authority, clarity, consistency, reference, and nonduplication standards. (*Govt. Code*, §11349.1(a) and (b).)

For example, the proposed regulation is inconsistent with existing law³ and in conflict with *Civil Code* section 3287, *Code of Civil Procedure* section 382, case law, and without any specific statute in Public Employees' Retirement Law (PERL) supporting it. (*Govt. Code*, §11342.2.) The regulation is inconsistent with the PERL because CalPERS has existing duties to pay on time and in full, which the regulation will impair by allowing late payments without interest.

³ *Nortel Networks v. Board of Equalization* (2011) 191 C.A.4th 1259, 1276 [Board of Equalization sales and use tax regulation that excluded from definition of technology transfer agreement prewritten computer programs that were subject to copyright or patent was inconsistent with governing tax exemption statute, and thus was invalid].

The regulation is also unconstitutional as it impairs contract rights and impairs vested rights. CalPERS seeks to apply the proposed regulation retroactively to void or to alter pending class-wide claims, and to do so even before the regulation is adopted. This in itself would be unconstitutional and contrary to law. (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 268-69, 114 S.Ct. 1483, 1499, 128 L.Ed.2d 229.)

B. Regulation is Invalid

Legally, from *Olson v. Cory, supra* to *Flethez v. San Bernardino Cnty. Employees Ret. Ass'n, supra*, the case law is clear that (i) Plaintiffs' right to funds mature on specific dates and (ii) *Civil Code* interest is owed if the retirement system fails to make full payment when the obligation thereafter falls due (usually within 30 days).

CalPERS' proposed Regulation 555.5 would be redundant of the *Civil Code* **if** the regulation provided the same or similar relief. The courts have previously found that such a regulation or provision for interest "... would be redundant, as the Legislature provided elsewhere, and generally, in *Civil Code section 3287* [], for the recovery of interest from a debtor...." (*Austin v. Bd. of Ret.* (1989) 209 Cal.App.3d 1528, 1532.)

However, CalPERS' proposed Regulation 555.5 is inconsistent with the *Civil Code* as it wrongly attempts to grant CalPERS additional "reasonable administrative processing time" after the benefits have matured and become payable. Fundamentally changing property rights, CalPERS' regulation delays the date of the maturity to avoid paying interest and to avoid the consequences of CalPERS' violations of its duties to promptly administer and to pay the funds. At the same time, CalPERS earns significant investment returns on Plaintiffs' withheld funds. (*Motion For Class Certification, Exhibit 2.*)

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Further, CalPERS has no right or authority to promulgate regulations revising the effect of the *Civil Code*, the *Code of Civil Procedure*, or case law. CalPERS' "legislative" authority is limited to clarifying matters in the PERL. The Constitution, PERL and regulations explicitly require CalPERS to administer the retirement system and pay benefits promptly. The PERL does not provide interest for late payments. The *Civil Code* already does. *Code of Civil Procedure* 382 provides for class wide relief, which CalPERS seeks to limit under the regulation. Because the regulation leaves no reasonably efficient remedy to enforce the proposed class members' rights and their property rights to interest itself are affected, the regulation should be held invalid as an impairment of a substantive right. (See *Lane v. Wilson* (1939) 307 U.S. 268, 59 S.Ct. 872, 876, 83 L.Ed. 1281, 1283; 7 Witkin, Summary 10th (2005), *Const Law*, §631, p. 1029.)

CalPERS' proposed regulation is beyond the scope of the authority delegated to CalPERS and inconsistent with law. *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11 clarifies that CalPERS' regulations must be within the authority of the PERL. CalPERS does not have authority to create a new "interest" benefit by regulation contrary to the *Civil Code*. CalPERS does not have authority to exempt itself from class actions under *Code of Civil Procedure* 382 or otherwise. CalPERS' proposed regulation violates the separation of powers and infringes on Legislature's power and the Court's jurisdiction.

The regulation is also unconstitutional as it functions to delay the date of maturity of the matured pension property, retroactively, to a date after CalPERS chooses to review the information. When the maturity of the pension payment is delayed, including so that no interest is owed, the pension rights are impaired unconstitutionally under both the federal and state constitutions as an "impairment of contract" and an impairment of a vested right.

Under the Due Process Clause of the 14th Amendment of the Federal Constitution and California Constitution and state property law, retroactive legislation is invalid if it impairs property rights. Retrospective application is unconstitutional, if it deprives a person of a vested right without due process of law. (*Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122.) The Plaintiffs and the proposed class members have already obtained mature property rights in their claims to interest. CalPERS has sought a stay in the class action litigation, in order to promulgate this regulation 555.5 to "change the landscape" of the vested payment that it already owes.

III. Background of Existing Law on Benefits, Maturity, Late Payment, Interest

A. Vesting of Pension Benefits, Eligibility Established

A public employee's pension constitutes an element of compensation and a vested contractual right to pension benefits accrues upon acceptance of employment. (*County of Orange v. Assoc. of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21.)

Public employment gives rise to certain obligations, including pension rights, which are protected by the contract clauses of the United States and California Constitutions. Thus, public employees' retirement rights are contractual and are vested in the sense that the lawmakers' power to alter them after they have been earned is quite limited. By entering public service, an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer. (49 Cal. Jur. 3d, *Pensions and Retirement Systems*. §23.)

A public employee who serves under a pension or retirement law acquires a vested contractual right to a substantial pension, which arises before the happening of the contingency that makes the pension payable. (*Pearson v. Los Angeles County* (1957) 49 Cal.2d 523; *Wallace v. City of Fresno* (1954) 42 Cal.2d 180; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848.) The

right vests on acceptance of the employment. (*Olson v. Cory, supra; Kern v. City of Long Beach, supra* [an employee's compulsory contributions were not required until sometime after the date of his employment]; *Dryden v. Board of Pension Com'rs of City of Los Angeles* (1936) 6 Cal.2d 575; *In re Retirement Cases* (2003) 110 Cal.App.4th 426; *Creighton v. Regents of University of California* (1997) 58 Cal.App.4th 237; *Claypool v. Wilson* (1992), 4 Cal.App.4th 646, reh'g denied and opinion modified, Apr. 13, 1992; *Phillis v. City of Santa Barbara* (1964) 229 Cal.App.2d 45.)

This principle applies with equal force to disability pensions and accords the disability pensioner state and federal constitutional protection against impairment of contractual pension rights. (*Gatewood v. Board of Retirement* (1985) 175 Cal.App.3d 311; 49 Cal. Jur. 3d, *Pensions and Retirement Systems*, §24.)

Plaintiffs become entitled to a pension when they fulfill the terms of the employment or other contract. (*Skaggs v. City of Los Angeles* (1954) 43 Cal.2d 497, 503.) Plaintiffs acquires a vested contractual right that **arises before** the happening of the contingency that makes a pension payable.⁴ (*Pearson v. Los Angeles County* (1957) 49 Cal.2d 523.)⁵ Plaintiffs fully vested in a right to timely payment.

⁴ Moreover, where a public employee becomes entitled to a pension after serving the aggregate time required by the statute, his or her subsequent removal from employment cannot operate to forfeit a previously earned pension, unless the employee specifically renounces the pension right. (*Skaggs v. City of Los Angeles, supra.*)

⁵ The time of vesting of the employee's pension rights is a matter separate and distinct from the time of vesting of the rights of those entitled to a pension on the employee's death. (*Cassery v. City of Oakland* (1936) 6 Cal.2d 64.) The spouse or child of a public employee does not acquire a vested interest in a pension until it becomes payable to the spouse or child. It becomes completely vested on the happening of the contingency, and may not be impaired by subsequent action of the public body. (*Packer v. Bd of Retirement of Los Angeles County Peace Officers' Retir. Sys* (1950) 35 Cal.2d 212; *Vero v. Sacramento City Emp. Retirement Sys* (1940) 41 Cal.App.2d 482.)

B. Vesting of Pension Benefits

During employment, pension contributions create an underlying monetary obligation in CalPERS to the member. Based in work, Plaintiffs vest in a specific pension amount typically based on compensation earnable, years of service, and age/benefit factors. All information necessary to calculate the amount of the pension benefits was established during employment. (*Govt Code*, §§20221, 20225; 2 *CCR*, §§565, *et seq.*)

C. Fully Matured

Plaintiffs established the amount and timing of the entitlement prior to the time the funds were due.

The right to retirement benefits vests when an employee acquires an irrevocable interest in a fund created by the employee's contributions, or the contributions of the employer, or both. The vesting of retirement benefits must be distinguished from the maturing of the benefits. Maturing occurs only after the conditions precedent to payment of the benefits have taken place or are within the employee's control. (*In re Marriage of Fithian* (1094) 10 Cal.3d 592 [disapproved of on other grounds by *In re Marriage of Brown* (1976) 15 Cal.3d 838 and disapproved of on other grounds by *McCarty v. McCarty* (1981) 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589].) Under a pension plan providing for a retirement pension after a designated age with specified years of service, an employee is entitled to retire with pension when he or she reaches the designated age and has the specified years of service.

No contingency within the employee's control was unresolved at the time of first payment. When the Plaintiff satisfies the language of the statute, a duty to grant the pension exists. (*French v. Cook* (1916) 173 Cal. 126; *Kinney v. Sacramento City Emp. Retirement System* (1947) 77 Cal.App.2d 779.) For purposes of disability or death pensions, the right to payment

accrues on the happening of an event. (*Carr v. Fire Commission of City and County of San Francisco* (1938) 30 Cal.App.2d 208.) The amount of the pension is fixed at the time of retirement or the happening of any other contingency on which it is made payable. Plaintiffs should not be penalized when CalPERS fails to process the information or timely pay. On retirement, all Plaintiffs obtained a matured right to full payment of their allowance.

D. Maturing of Service Benefits

Service benefits fully mature when the member meets the age and years of service requirements and a files a retirement application.

A benefit "matures after the conditions precedent to the payment of the benefits have taken place or the benefits are otherwise within the control of the employee." (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, fn. 3.)

Eligibility to service retirement is not a contested matter. There is no quasi-judicial process to determine eligibility for service retirement. Once matured upon filing for service retirement, CalPERS' obligation to pay falls due in the first warrant after the selected service retirement date.

E. CalPERS Admits Delayed Payment of Matured Service Benefit

CalPERS admits that it delays, accumulates, holds or underpays service benefits "which sometime cause payments of service retirement benefits to be made after the right to payment of those benefits has accrued." (CalPERS' *Responses to Request for Admissions* ("RFAs") [Attached as Exhibit 22], no. 5, pg. 5:16-17.) CalPERS admits that it makes lump sum payment to members for all service retirement benefits due to member "that have not previously been paid". (RFAs, no. 6, pg. 6:21-22.) When making lump sum payments or refunds, CalPERS acknowledges that the funds already matured. In making an aggregated or refund payment,

CalPERS mandatorily recognized that the reason it initially withheld funds could not be "sustained" and recognized its obligation to pay the funds as of the dates they accrued." (*Mass v. Board of Education* (1964) 61 Cal.2d 612, 625; *San Diego Cnty. Deputy Sheriffs Assn. v. San Diego Cnty. Sheriffs Dep't* (1998) 68 Cal.App.4th 1084, 1095.) Since benefits are like salary:

When Commission subsequently reverses the initial disciplinary action, it effectively determines that the employee's vested property interests were wrongfully withheld by the initial disciplinary action. This administrative decision, unlike the decision of the ALJ in *AFL*, is not a decision giving rise to entitlement to benefits in the first instance but is instead a decision that salary was wrongfully withheld.

(*San Diego Cnty. Deputy Sheriffs Assn., supra*, at 095.)

F. No Authority to Delay After Right Matured

If CalPERS owes a matured obligation and fails to pay it on time, the funds are wrongfully withheld. (*Civ Code*, §3287(a).) No case law 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 benefits. (RFAs, no. 7, pg. 7:22-23.)

G. Processing Contested IDR and Disability Benefits

Industrial disability retirement ("IDR") and "ordinary" disability are contested matters. An individual must prove his eligibility and substantiate his disability to CalPERS or the employer in a quasi-judicial process. (*Flethez v. San Bernardino Cnty. Employees Ret. Ass'n, supra*, at 71.) The individual's eligibility to IDR or ordinary disability payments does not vest and mature until proven.

H. Reasonable Processing Only Allowed in Time Before Contested Disability Cases Are Determined.

Disabled Plaintiffs do not seek interest on delays before eligibility to IDR or ordinary disability was been established. In cases where eligibility is contested (like unemployment insurance or disability), the quasi-judicial process to determine eligibility involves some inherent minimal delay. (*San Diego Cnty. Deputy Sheriffs Assn., supra*, at 1094-1095.)

Prior to determining eligibility, the inherent administrative delays did not cause wrongful withholding (that would allow interest) because the individual had not yet established his right to the funds. (*American Federation of Labor v. Unemployment Ins. Appeals Bd. ("AFL")* (1996) 13 Cal.4th 1017, 1037; *San Diego Cnty. Deputy Sheriffs Assn., supra*, at 1095.) Before proof, the right is merely inchoate and there is no underlying monetary obligation. (*Weber v. Bd. of Retirement of LA Cnty Retirement Assn* (1998) 62 Cal.App.4th 1440, 1451; *AFL, supra*, at 1023.)

In this case, plaintiffs do not seek interest for the period before eligibility determination.

I. Maturing of Disability and IDR

In this case, CalPERS or the employer has already determined that all of the disabled Plaintiffs are eligible and entitled to ordinary disability or IDR and each has obtained a matured right to payment.

"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."
[Quoting *Weber, supra*.]

(*Flethez, supra*, at 74.)

Once the disability is determined, CalPERS must pay the IDR or ordinary disability when the next payment falls due. Contested benefits are due to be paid promptly only starting the date

that a claimant has established benefit eligibility. (*San Diego Cnty. Deputy Sheriffs Assn., supra*, at 1089; *Weber, supra*, at 1451; *Flethez, supra*, at 76.)

J. CalPERS Fails to Pay Matured Disability and IDR Payments When Due

CalPERS admits that sometimes fails to pay the disability benefit when due. (RFAs, no. 9, pg. 9:21-22.) Indeed, CalPERS' stated formal practice is not to pay the disability payment until 120 days later. (*Motion For Certification, Exhibit 3.*) If CalPERS delays payment of IDR and ordinary disability benefits, it owes interest. However, CalPERS admits that it "generally does not pay interest" on lump sum payment of disability benefits. (RFAs, no. 10, pg. 10:22-23.)

K. Vesting and Maturing of Death Beneficiary Interests

For death and other contingent beneficiaries, rights vest on designation, although contingent on survival. (2 CCR, §582.) For death beneficiaries and survivor benefits, the benefits fully mature on the occurrence of the contingent event (i.e. death). The benefits become payable immediately (although subject to the beneficiary providing the proof of death and identification of survivor.) CalPERS fails to pay interest on late death benefits. (*Motion For Certification, Jensen Decl.* ¶31, 81-85.)

L. Vesting and Maturing of Other Interests

For contracted or elected benefits, including health reimbursement, the vesting date occurs (for the purpose of interest) on the "effective date of the member's election" or the time the payment falls due. (2 CCR, §575.2(d).) CalPERS fails to pay interest on delayed, withheld, or late contract benefits or reimbursements. (*Motion For Certification Heinz Decl.*)

M. Right To Refund

At times, CalPERS wrongly accepts funds that it fails to quickly return. Often, CalPERS wrongly determined that it could accept the funds, but later determines that it cannot accept the

funds or denies the benefit. CalPERS typically subsequently pays Plaintiffs an aggregated "lump sum", but fails to credit or pay interest. (RFAs, pg. 1-15.) CalPERS owes interest from the time that it wrongly accepted the funds until the time of refund.

N. Duty to Pay

CalPERS had a duty to timely and fully pay the vested and matured benefit. Pursuant to Article XVI, section 17(a), of the California *Constitution*, CalPERS and its board "shall ... have sole and exclusive responsibility to *administer the system* in a manner that will assure prompt delivery of benefits" to participants. (*Westly v. California Public Employees' Retirement System Bd. of Administration* (2003) 105 Cal.App.4th 1095, 1110, italics in original.)

O. Wrongful Withholding

CalPERS had an obligation to fully pay. CalPERS failed to pay the fully vested matured benefit or fund when due. Wrongful withholding requires showing of failure to pay or to deliver money when obligated to do so. (*Ross v. Old Republic Ins. Co.* (Colo. App. 2006) 134 P.3d 505, 512.)

P. Distinguishing the PERL from the Unemployment Insurance Code

CalPERS has an underlying financial obligation to Plaintiffs. Under the PERL, benefits vest during employment and mature on the filing of a retirement application. Unlike under the administrative scheme of the *Unemployment Insurance Code*, Plaintiffs are already eligible for benefits at the time of first payment. In this case, CalPERS recognized that Plaintiffs were initially entitled to a benefit, but wrongfully underpaid or withheld funds from Plaintiffs. CalPERS later paid higher benefits and accumulated or aggregated the prior underpayments into a lump sum or other payment transfer.

IV. Failure to Pay Interest

A. CalPERS Fails to Pay Interest

When CalPERS fails to fully pay matured obligations in full at the time that payment falls due, CalPERS owes interest. (*Civil Code*, §§1915, 3281, 3287-3289.) However, CalPERS practice is "generally" not to pay interest. (RFAs, pg. 1-15.)

B. Well Established: CalPERS is Required to Pay Interest On Late Payments

Plaintiffs seek interest and recovery of damages, including the loss of use of their money or the interest that they could have earned on the funds if timely paid. (*Civil Code*, §§1915, 3281, 3287-3289.)

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, supra*, at 402, italics added; *Flethez, supra*, at 72-73.) *Civil Code* interest is the highest.

C. Plaintiffs Satisfy Civil Code Section 3287

Plaintiffs satisfy the requirement of *Civil Code* section 3287(a) to require CalPERS to pay them interest because (1) CalPERS owes them an underlying monetary obligation, (2) individuals suffer damages by CalPERS' delay which are certain or capable of being made certain by calculation, and (3) individuals acquired eligibility to a right to funds that vested on a particular day. (*Flethez, supra*, at 72-73.) Section 3287(a) allows individuals to recover prejudgment interest based on a general underlying monetary obligation, including the obligation of a governmental entity." (*AFL, supra*, at 1030; *Flethez, supra*, at 72.)

In the case of statutory obligations that were withheld, the Supreme 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.*" (*Tripp v. Swoap* (1976) 17 Cal.3d 671, 685, italics added; see also *Flethez, supra*, at 74.) *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]." (*Tripp, supra*, at 678.) 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, supra*, at 683; see also *Flethez, supra*, at 74.)

D. Interest on Underpaid or Delayed Benefits or Funds

Under Section 3287(a), a person is entitled to interest when he recovers damages and the right vested on a certain day. (*Goldfarb v. Civil Service Com.* (1990) 225 Cal.App.3d 633.)

Goldfarb relied heavily on *Mass v. Board of Education* (1964) 61 Cal.2d 612 at 625:

The Civil Code 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. Each salary payment in the instant case accrued on a date certain. *Unless the suspension [i.e. underpayment] itself can be sustained and the board thus relieved of any obligation whatsoever, the salary payments became vested as of the dates they accrued.* If plaintiff had not been wrongfully suspended [i.e. underpaid], he would have obtained the benefit of the moneys paid as of those dates; he has thus lost the natural growth and productivity of the withheld salary in the form of interest. (Italics added.)

Analogously to *Goldfarb*,⁶ Plaintiffs are entitled to interest on each installment of pension from the date it was due. (*Goldfarb, supra*, at 636.)

⁶ In *Goldfarb*, the government agency attempted to distinguish *Mass* by arguing the *Mass* plaintiff obtained a court order for reinstatement and backpay plus interest in contrast to the

E. Plaintiffs Are entitled to Civil Code §3287(a) Damages

Plaintiffs have pled and are entitled to interest damages pursuant to various legal authorities, including *Civil Code* section 3287. Plaintiffs seek the highest rate of interest rate under the Constitution, the *Civil Code*, the PERL, and other authority. Plaintiffs acknowledge that they are not entitled to double recovery of interest under several different statutes.

Civil Code section 3287 provides 7%. For contracts, *Civil Code* section 3289 provides 10%. The PERL requires CalPERS to credit interest at 6%. Therefore, Plaintiffs would be entitled to the higher interest allowed, which is provided under the *Civil Code*.

F. Damages Resulting from Failure to Timely Pay

Plaintiffs were damaged by CalPERS' failure to timely pay the funds in full. Amounts recoverable as wrongfully withheld payments of salary or pensions are damages within the meaning of these provisions. (*Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 262–263; *Benson v. City of Los Angeles* (1963) 60 Cal.2d 355, 365–366; *Tripp v. Swoap, supra*, at 681–683.) Interest is recoverable on each salary or pension payment from the date it fell due. (*Mass v. Board of Education, supra*, at 624–625; *Olson v. Cory, supra*, at 402.)

G. Actual Payment.

CalPERS later paid the benefits in full. When CalPERS subsequently reverses the initial lower payment and pays an accumulation of the underpaid benefit, CalPERS effectively determines that the employee's vested property interests were underpaid and wrongfully withheld. The payment of the lump sum is not a decision giving rise to entitlement to benefits in

Goldfarb plaintiff who sought a court order for only interest. *Goldfarb* rejected the argument because it could discern no reason to deny interest on backpay when the demotion was reversed in an administrative proceeding rather than in a later mandamus court proceeding. In other words, the Plaintiffs were entitled to interest *without regard to procedural or venue issues*.

the first instance. Instead, it is a recognition that the pension was wrongfully withheld, and, thus, interest should be paid on the underpaid monies.⁷ (*Civil Code*, §3287; *San Diego County Deputy Sheriffs Assn. v. San Diego County Sheriffs Dept.* (1998) 68 Cal.App.4th 1084.)

V. CalPERS' Existing Constitutional Duties to Pay Promptly

A. CalPERS' Duties

CalPERS owes Plaintiffs duties⁸ to timely process information, to correctly calculate a benefit and contributions at any time, and to promptly pay benefits. A retirement board's duty to its participants and their beneficiaries take precedence over any other duty. (Cal. Const., art. XVI, §17.) CalPERS owes monetary and fiduciary obligations⁹ to each participant starting from CalPERS' receipt of the first contribution, election, interest, or deposit in a participant's name. Pursuant to Article XVI, section 17(a), of the California Constitution, CalPERS and its board have the "responsibility to *administer the system* in a manner that will assure prompt delivery of

⁷ CalPERS only paid the lump sum because the payments had previously vested. It cannot make a gift of funds. If the funds had not been wrongfully withheld, Plaintiffs would have obtained the benefit of the monies paid as of those dates; they have "thus lost the natural growth and productivity of the withheld salary in the form of interest". (*San Diego County Deputy Sheriffs Assn., supra*, at 1087.)

⁸ As a constitutional trust and fiduciary, CalPERS has an ongoing duty to stay informed, communicate with participants, request the correct contributions, audit employers, resolve 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.*)

⁹ CalPERS owes Plaintiffs duties to calculate and pay the funds correctly and timely. CalPERS is required to seek information, stay informed, correct errors, review documents, keep records, and maintain accounts to compute at "any time" the contributions of members and contributions of the employers. (See e.g., *Govt Code*, §§20120, *et seq.*) CalPERS requires employers to submit payroll information and pay contributions within 30 days of the pay period. (2 CCR, §§565, 565.1.) CalPERS requires employers to immediately inform CalPERS of a 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.)

benefits" to participants. (*Westly v. California Public Employees' Retirement System Bd. of Administration* (2003) 105 Cal.App.4th 1095, 1110, italics in original.)

As a constitutional trust and fiduciary, CalPERS has an ongoing duty to stay informed, communicate with participants, request the correct contributions, audit employers, resolve ambiguities, timely process information, keep the participants informed during employment, and promptly deliver benefits and related services. (*Cal. Const.* art. XVI, § 17; *Government Code*, §§20150, *et seq.*; 2 *CCR*, §§565, *et seq.*)

CalPERS owes Plaintiffs duties to calculate and pay the funds correctly and timely. CalPERS has ongoing statutory duties to seek out information, stay informed, correct errors, review documents, keep records, and maintain accounts as necessary to compute at "any time" the contributions of members and the contributions of the employers. (See e.g., *Govt. Code*, §§20221, 20225.) CalPERS requires employers to submit payroll information and pay member and employer contributions within 30 days of the pay period. (2 *CCR*, §§565, 565.1.) CalPERS is empowered to audit all employer documents "to determine the correctness of retirement benefits". (*Gov't Code* § 20222.5, 20465, 20965)

If there are errors, CalPERS is required to notify the employer who must correct them within 60 days. (2 *CCR* 565.1). CalPERS charges interest if employers pay contributions late. (2 *CCR*, §565.2.)¹⁰

¹⁰ CalPERS can also fine an employer \$200 or more for each failure to timely file correct payroll or contributions reports. 2 *CCR* 565.3. CalPERS can grant an extension of time to file payroll or contributions reports if the employer requests and extension within 10 days of the due date of the report. 2 *CCR* 565.4. An employer's failure to pay within 30 days of the notice is deemed acceptance. 2 *CCR* 565.5.

B. CalPERS Fails to Pay Full Amount When Matured Obligation Falls Due

In breach of its existing duties, CalPERS' policies, procedures, decisions, or other acts, oversights or omissions cause CalPERS to wrongfully withhold, underpay, hold, or delay payment. (RFAs, pg. 1-15.) As evidenced by its attempting to enact proposed Regulation 555.5 and other acts, CalPERS often fails to stay informed, often fails to seek or request information, often fails to administer the benefits timely, often fails to stay up to date, and often fails to promptly pay. (*Motion For Certification, Exhibits 2, 4.*)

C. No Additional Reasonable Processing Time After Maturation

CalPERS does not (and *cannot*) cite any case law allowing a reasonable processing period after eligibility is established. It does not exist. Once eligibility is established, the right matures and payment is due in the next warrant or payment period. No further time is allowed (without paying interest). CalPERS must pay interest when the matured right is not timely paid (i.e. "wrongfully withheld"), (*Olson v. Cory, supra.*)

CalPERS mischaracterizes the case law to confuse the "time" (1) when the potential recipient is required to prove entitlement with (2) the time after the right is proven. (*Weber, supra; Flethez, supra.*) *Weber* and *Flethez* refer to two different time periods: (1) the time to conduct an inquiry and determination of a contested claims and (2) the time after the right is proven but before it is paid. Both cases hold that interest is not owed before the right is proven. Both also hold that interest definitely *is* owed as soon as the contested case is proven. Plaintiffs in the proposed class only assert claims for interest in the time period after the right has matured. Under all case law, CalPERS owes interest when it delays paying a matured benefit.

D. CalPERS Earns Investments

CalPERS earns significant investment returns on the Plaintiffs' monies that CalPERS holds in trust for them. (*Motion For Class Certification, Exhibit 5.*) 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 14.35%. (*Motion For Class Certification, Exhibit 6, pg. 5.*) When CalPERS delays payment, Plaintiffs are entitled to accretion or growth.

VI. Penalty Benefit Under Section 21499

A. Penalty Benefits and Interest

As far as penalties, *Government Code* section 21499 provides a penalty benefit that would be in addition to any interest owed under the *Civil Code*. Although the case law regarding the difference between penalties and interest is more developed in the workers compensation case law, a statute providing for the assessment of a penalty when payment of benefits has been unreasonably delayed or refused applies to virtually all types of benefits provided by the workers' compensation laws, including temporary and permanent disability indemnity, interest on an award, amounts awarded as reimbursement for self-procured medical costs, and medical-legal costs. (See Labor Code, §5814; *DuBois v. Workers' Comp. Appeals Bd.*, (1993) 5 Cal.4th 382.) As to the *Labor Code* section 4650(d) strict liability penalty for untimely payment of temporary or permanent disability, see 65A Cal. Jur. 3d, *Work Injury Compensation*, §678.

VII. Civil Code Section 3287

A. Civil Code §§3287(a) and 3289 Damages Can Only Be Awarded by a Court of Law

Civil Code sections 3287(a) and 3289 apply to judicial actions. This is made clear by the fact that Section 3287 is found in Division 1, Part 4, Title 2, Chapter 2 of the *Civil Code* under "Damages as Interest", and the term "damages" is defined in Chapter 1, "Damages in General",

where Section 3283 describes them as damages awarded "in a judicial proceeding". Under the statute, *courts* have awarded prejudgment interest following successful judicial action, including mandamus, and including *wrongfully withheld* benefits. (See *Tripp v. Swoap* (1976) 17 Cal.3d 671, 681, and *Aguilar v. Unemp. Ins. App. Bd.* (1990) 223 Cal.App.3d 239, 246.) CalPERS also breached contracts with Plaintiffs entitling them to interest under Section 3289.

B. Neither CalPERS Nor OAH Have Authority to Award Civil Code §3287(a)

Damages

CalPERS and the OAH have declined authority to award prejudgment or postjudgement interest in an administrative process. Typically, courts of law have such authority. (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* ("AFL") (1996) 13 Cal.4th 1017, 1023.)

Administrative agencies have only the powers conferred on them, either expressly or by implication. CalPERS is governed by the PERL. (*Government Code*, §20002.) The powers of public agencies are derived from the statutes that create them and define their functions. (*Kaiser Foundation Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4th 1018.) An administrative agency cannot enlarge or exceed the scope of authority that has been statutorily delegated to it (*Western States Petroleum Ass'n v. Department of Health Services* (2002) 99 Cal.App.4th 999.)

Accordingly, an agency's adjudicative jurisdiction must be pursuant to legislative authorization (*Hardin Oldsmobile v. New Motor Vehicle Bd.* (1997) 52 Cal.App.4th 585; *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194), which must be conveyed expressly and unequivocally (*Campos v. Anderson* (1997) 57 Cal.App.4th 784).

Because CalPERS (and the OAH) have no authority to award interest under the *Civil Code*, the administrative process offers no possibility of satisfying, or even adjudicating, such claims. As CalPERS admits it lacks jurisdiction to hear the *Civil Code* interest claims, none of

the Plaintiffs' (or the class members) interest claims had to be presented or exhausted in CalPERS' administrative process.

Plaintiffs additionally pled that exhaustion of administrative remedies was excused or unavailable because under current judicial precedent, no class action and no unrepresented party claims are allowed to be heard in CalPERS' administrative process. (See *Rose v. City of Hayward*.)

Instead, CalPERS tries to create the proposed regulation 555.5 that purports to provide an administrative remedy but which in fact reinvents the provisions of the *Civil Code* inconsistently and unfavorably and then applies it for a reduced period of time when interest under the *Civil Code* may otherwise apply to allow recovery.

C. No Available or Adequate Administrative Remedy: Excused, Futile, Inappropriate

An agency's administrative authority is not coextensive with a court's. An agency's authority is limited by the scope of the statutory scheme giving rise to the particular agency's powers.

AFL evaluated an administrative scheme in which claimants could not argue that their benefits were wrongfully withheld until the administrative process was completed; "[u]ntil then, no wrongful withholding of benefits or delay attributable to the administrative process occurs." (*AFL, supra*, 13 Cal.4th at p. 1037.) Only the entity charged with subsequently reviewing that decision—the superior court in a mandamus action—may then award interest for the delayed disbursement if the court determines the benefits were wrongfully withheld. *Goldfarb*, however, evaluated an administrative scheme in which the wrongful action and withholding of payment was the triggering event for commencing the administrative review process. (*San Diego County Deputy Sheriffs Assn., supra*, at 1095.)

Under a CalPERS administrative process interpreting the PERL, the function of CalPERS or an Administrative Law Judge is to calculate the pension benefits. Pension benefits are not calculated based on wrongdoing or delay. The only provision in the PERL allowing for a

calculation of a delay is Section 21499, which is an additional benefit provision (not interest) granting an increase at the greater of 6% of the CalPERS net earnings (which has been as large as 20.5% in the last few years, significantly higher than the highest interest rate allowed under law).

On the other hand, CalPERS admits that it delays paying and wrongfully withholds vested benefits. Plaintiffs' pension benefits vest during employment, mature at retirement or other contingency,¹¹ and a Plaintiff's right to be paid the pension benefits matures to become payable at the next warrant. As matters of law in service retirements, there is no eligibility determination, no inherent delays in the system. Because like welfare benefits, pension benefits

"...are a monetary obligation of the state subject to determination by reference to fixed payment schedules and become due when an applicant has established eligibility, the court found they accrue interest under Civil Code section 3287. (*Tripp v. Swoap, supra*, 17 Cal.3d at pp. 682–683.) Like *Mass*, the holding in *Tripp v. Swoap* has been relied upon in a number of contexts to support an award of interest. (*Aguilar v. Unemployment Ins. Appeals Bd., supra*, at 243.)

An interest award under *Civil Code Section 3287* for the delay the agency caused by wrongfully withholding benefits is appropriate. (*Tripp v. Swoap, supra*, at 684.) Interest was recoverable under the *Civil Code* because (1) pension benefits are an established monetary obligation; (2) the right to payment vested once the claimant established eligibility; and (3) the claimant could enforce the obligation by a court action. (*Aguilar v. Unemployment Ins. Appeals Bd., supra* at 241.) With or without a mandamus action, "under *Tripp v. Swoap* the superior court was empowered to order the agency to pay interest." (*Aguilar v. Unemployed Ins. Appeals Bd., supra*, at p. 246, fn. 4.)

¹¹ CalPERS owes Plaintiffs a financial obligation prior to full maturation, including as CalPERS received contributions during employment.

VIII. Challenge to Proposed Regulation 2 CCR 555.5

A. Background of Proposed Regulation

Procedurally, Plaintiffs filed a class action seeking interest March 8, 2013.

CalPERS demurred but the court failed to sustain it on September 10, 2014.

CalPERS filed a rule making proposal in April 2015.

Plaintiffs filed a class certification motion on June 15, 2015. (Exhibit 21.)

B. No Authority

The criteria for regulatory validity set out in *Government Code* section 11342.2 requires judicial construction of the claimed source of the agency's rulemaking authority. (*Cnty. of Santa Cruz v. State Bd. of Forestry* (1998) 64 Cal.App.4th 826, 834.) CalPERS has failed to reasonably interpret the legislative mandate.' [Citation.]" (*Credit Ins. Gen. Agents Assn. v. Payne* (1976) 16 Cal.3d 651, 657; *Cnty. of Santa Cruz v. State Bd. of Forestry, supra* at 834.)

Even under the broadest of statutory mandates, an administrative agency may not use its authority to alter, enlarge, subvert, or impair the act being administered. (See, e.g., *Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379, 1389; *Cnty. of Santa Cruz v. State Bd. of Forestry, supra*, at 837.)

CalPERS' expertise and delegated authority lies in the PERL. CalPERS expertise does not extend to interpreting the *Civil Code's* interest provisions, or to interpreting case law. The courts are far better suited and able to interpret the claims in this case.

Especially as CalPERS uses the proposed regulation to seek a stay litigation of *Civil Code* interest provisions in this case, CalPERS' proposed Regulation 555.5 clearly attempts to revise when the obligation to pay funds matures and when interest is payable. These are matters already comprehensively addressed under the *Civil Code* and related case law.

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Revising the effect of the *Civil Code* and established case law does not lay within the lawmaking authority delegated to CalPERS by the Legislature. The regulation is inconsistent with CalPERS' constitutional and statutory duties to promptly administer the system and pay benefits. (*Yamaha Corp. of Am., supra*, at 10-11.) The regulation is not "within the scope of the authority conferred" on CalPERS and (2) is not "reasonably necessary to effectuate the purpose of the statute" as there is no statute providing for interest on late payments in the PERL. (*Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 65; see also *Yamaha Corp. of Am., supra*, at 10-11.)

In the "penalty Interest" benefit section of *Government Code* section 21499, the PERL speaks very explicitly and in exclusive terms, about the types of situations which qualify for the agency to provide new monies associated with CalPERS late payment of payments administratively, and in an administrative process (as compared to damages for delay awarded in the court under *Civil Code* section 3287. (*Cnty. of Santa Cruz v. State Bd. of Forestry, supra*, at 837.)

Courts have struck down the Board's administrative creation of new right or new exemption because "[w]hen the Legislature has so directly and in such detail dealt with the subject of what [the Board] may do regarding" only provided for "penalty interest" benefit under *section 21499*, ..., we cannot agree ... [the Board has] the authority to materially broaden those ... by regulation." (*Environmental Protection Information Center v. Dept. of Forestry and Fire Protection* (1996) 43 Cal.App.4th 1011, 1023; *Cnty. of Santa Cruz v. State Bd. of Forestry, supra*, at 837.)

Without statutory authority to award interest, especially as the *Civil Code* already provides for interest, CalPERS lacks "Authority" and lacks a provision of law, which permits or

obligates the agency to adopt, amend, or repeal a regulation. (*Gov't Code*, §11349.)

Because there is no statutory authority in the PERL that would provide for interest as it already exists in *Civil Code* section 3287, the proposed regulation is ordinarily invalid it does not falls within the scope of authority conferred on the agency by statute. (*Govt. Code*, §11349; see 7 *Summary* (10th), *Constitutional Law*, §166 et seq.; 9 Witkin, *Cal. Proc.* 5th (2008), *Admin Proc*, §37, p. 1148.) A regulation adopted pursuant to statutory authority, express or implied, is not valid or effective "unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (*Govt. Code*, §11342.2; 9 Witkin, *Cal. Proc.* 5th (2008), *Admin Proc*, §37, p. 1148.)

C. Lacks Consistency

The regulations lacks "consistency" which means that it fails to be in harmony with, and is in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law. (*Gov't Code*, §11349.)

CalPERS has existing duties to stay informed. It should not need additional processing time. Statutory and regulatory duties require CalPERS as the administrator to timely process information, to correctly calculate a benefit and contributions at any time, and to promptly pay benefits. A retirement board's duty to its participants and their beneficiaries take precedence over any other duty. (*Cal. Const.*, art. XVI, §17.) CalPERS owes monetary and fiduciary obligations to each participant starting from CalPERS' receipt of the first contribution, election, interest, or deposit in a participant's name. Pursuant to Article XVI, section 17(a), of the California Constitution, CalPERS and its board have the "responsibility to *administer the system* in a manner that will assure prompt delivery of benefits" to participants. (*Westly v. California Public Employees' Retir. Sys. Bd. of Admin.* (2003) 105 Cal.App.4th 1095, 1110, italics in original.)

CalPERS has ongoing statutory duties to seek out information, stay informed, correct errors, review documents, keep records, and maintain accounts as necessary to compute at "any time" the contributions of members and the contributions of the employers. (See e.g., (*Govt. Code*, §§20221, 20225.) CalPERS requires employers to submit payroll information and pay member and employer contributions within 30 days of the pay period. (2 *CCR*, §§565, 565.1.) Employers must immediately inform CalPERS of a change in a participants' status during employment, such as a promotion. (*Govt. Code*, §20221.) CalPERS is empowered to audit all employer documents "to determine the correctness of retirement benefits". (*Gov't Code* §§20222.5, 20465, 20965)

Plaintiffs obtain immediate legal rights to the payment of their benefits and funds once they mature. The law of when a right matures into an obligation to pay is well-established and clear. A benefit "matures after the conditions precedent to the payment of the benefits have taken place or the benefits are otherwise within the control of the employee." (*Retired Employees Assn. of Orange County, Inc. County of Orange* (2011) 52 Cal.4th 1171, fn. 3.) Under a pension plan providing for a retirement pension after a designated age with specified years of service, an employee is entitled to retire with pension when he or she reaches the designated age and has the specified years of service. (See 49 Cal.Jur.3d, *Pensions and Retirement Systems*, §3.) The service benefit fully mature when the member meets the age and years of service requirement and a files a retirement application. Eligibility to service retirement is not a contested matter.

D. Lacks Consistency: Service Retirement Benefits

Service benefit rights are established only during employment. After maturing of the payment, CalPERS admits that it fails to timely pay benefits, and then pays a lump sum that aggregates the prior underpayments. (*RFAs*, pp. 1-15, *Motion For Certification, Exhibit 1*.) In

making an aggregated or refund payment, CalPERS mandatorily recognized that the reason it initially withheld funds could not be "sustained" and recognized its obligation to pay the funds as of the dates they accrued." (*Mass v. Board of Education* (1964) 61 Cal.2d 612, 625.) In the context of withheld salary, the Fourth Appellate District found:

When Commission subsequently reverses the initial disciplinary action, it effectively determines that the employee's vested property interests were wrongfully withheld by the initial disciplinary action. This administrative decision, unlike the decision of the ALJ in *AFL*, is not a decision giving rise to entitlement to benefits in the first instance but is instead a decision that salary was wrongfully withheld.

(*San Diego Cnty. Deputy Sheriffs Assn. v. San Diego Cnty. Sheriffs Dep't* (1998) 68 Cal.App.4th 1084, 1095.)

E. Lacks Consistency: Disability Retirement Benefits

Industrial disability retirement (IDR) and "ordinary" disability benefits are contested matters where the individual must prove his entitlement in a quasi-judicial process. The burden of proof is on the member applying for disability retirement benefits. (*Flethez, supra*, at 71.) All putative class members in this case that are entitled to IDR or disability benefits have already proven eligibility that was accepted by CalPERS or the employer's governing board. An individual's right to IDR and disability benefits matures upon the determination by CalPERS or the employer board that the individual is disabled.

"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." [Citation omitted.]

(*Flethez, supra*, at 74, italics in original.)

Once the eligibility determination is made, the right to benefits vests immediately, effective retroactively."

(*Ibid.*)

Disability and IDR benefits are due to be paid promptly starting the date that a claimant has established benefit eligibility. (*San Diego Cnty. Deputy Sheriffs Assn, supra*, at 1089; *Weber v. Board of Retirement of Los Angeles County Employees Retirement Ass'n* (1998) 62 Cal.App.4th 1440, 1451; *Flethez, supra*, at 76.) However, CalPERS fails to promptly and timely pay the vested disability benefits. CalPERS indicates that its common practice is to pay within 120 days.

F. Lacks Consistency: Death Beneficiary Interests

For death and other contingent beneficiaries, rights vest on designation, although contingent on survival. (2 CCR, §582.) For death beneficiaries and survivor benefits, the benefits vest first and then mature on the event (i.e. death), with the beneficiary required to provide proof of death and identification of survivor.

G. Lacks Consistency: Other Interests

For contracted or elected benefits, vesting occurs (for the purpose of interest) on the "effective date of the member's election". (2 CCR, §575.2(d).) Maturing occurs on specified events and specifically ascertainable dates.

H. Lacks Consistency: Right to Refund

At times, CalPERS wrongly determined that it could accept the funds (e.g. for purchase of prior or optional additional service credit), but later determines that it cannot accept the funds or denies the benefit. CalPERS typically subsequently pays Plaintiffs an aggregated "lump sum" or refund, but fails to credit or pay interest. (RFAs, pp. 1-15, *Motion For Certification, Exhibit 1.*) CalPERS owes interest from the first day that it wrongly accepted the funds until the time of refund or payment.

I. Lacks Consistency with Existing Case Law About Interest

Plaintiffs seek interest and recovery of damages, including the loss of use of their money or the interest that they could have earned on the funds if timely paid. (*Civil Code*, §§1915, 3281, 3287-3289.) CalPERS owes interest, including on funds that were wrongly withheld, and other damages, including those resulting from the loss of use of Plaintiffs' untimely disbursed funds.

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)]. 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.)

(*Flethez, supra*, at 72-73.)

J. The Proposed Regulation is Inconsistent with Civil Code Section 3287(a)

Plaintiffs satisfy the requirement of *Civil Code* section 3287(a) to require CalPERS to pay them interest because (1) CalPERS owes them an underlying monetary obligation, (2) individual suffer damages by CalPERS delay which are certain or capable of being made certain by calculation, and (3) individual acquired eligibility to a right to funds that vested on a particular day. (*Flethez, supra*, at 72-73.) "Section 3287(a) allows individuals to recover prejudgment interest based on a general underlying monetary obligation, including the obligation of a governmental entity." (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1030; see also *Flethez, supra*, at 72.)

K. Lacks Consistency: No Extra "Reasonable Administrative Processing Time"

Contrary to existing law, CalPERS' arguments about establishing regulatory standards for "reasonable administrative processing time" are similar to the losing arguments in *Mass v. Bd. of Ed. Of San Francisco Unified Sch Dist.* (1964) 61 Cal.2d 612:

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The board argues that interest only accrues from the date when the board bore the legal duty to reinstate plaintiff because until that time the 'right to recover' did not 'vest' in him (*Civ. Code, s 3287*) and until then he was legally suspended. The Civil Code 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. Each salary payment in the instant case accrued on a date certain. Unless the suspension itself can be sustained and the board thus relieved of any obligation whatsoever, the salary payments became vested as of the dates they accrued. If plaintiff had not been wrongfully suspended, he would have obtained the benefit of the moneys paid as of those dates; he has thus lost the natural growth and productivity of the withheld salary in the form of interest. (*Mass, supra, at 625.*)

CalPERS misstates long-standing case law to invent legal support for "reasonable administrative processing time" for the time period after a benefit matures. Under existing law, processing time only applies to the time before or while eligibility is contested.

In cases where eligibility is contested (like unemployment insurance or disability), the quasi-judicial process to determine eligibility involves some inherent minimal delay. (*San Diego Cnty. Deputy Sheriffs Assn., supra, at 1094-95.*) During the quasi-judicial administrative process to determine eligibility, the inherent administrative delays did not cause wrongful withholding (that would allow interest) because the individual had not yet established his right to the funds. (*American Federation of Labor, supra, at 1037; San Diego Cnty. Deputy Sheriffs Assn., supra, at 1095.*) Before proof, the right is merely inchoate and there is no underlying monetary obligation. (*Weber, supra, at 1451; American Federation of Labor, supra, at 1023.*) No interest is owed before the right vests.

In this case, none of the Plaintiffs seeks interest for any delay *prior* to the determination. Plaintiffs seek interest only on CalPERS' late payments *after* Plaintiffs' rights have matured.

CalPERS does not (and *cannot*) cite any case law allowing a reasonable processing period after eligibility is established. It does not exist. Once eligibility is established, the right

matures and payment is due in the next warrant or payment period. No further time is allowed (without paying interest). CalPERS must pay interest when the matured right is not timely paid (i.e. "wrongfully withheld"), (*Olson v. Cory, supra.*)

Instead, CalPERS mischaracterizes the cases to confuse the "time" (1) when the potential recipient is required to prove entitlement with (2) the time after the right is proven. (*Weber, supra; Flethez, supra.*) *Weber* and *Flethez* refer to two different time periods: (1) the time to conduct an inquiry and determination of a contested claims and (2) the time after the right is proven but before it is paid. Both cases hold that interest is not owed before the right is proven. Both also hold that interest definitely *is* owed as soon as the contested case is proven. The regulation is inconsistent with the law. Plaintiffs in the proposed class only assert claims for interest in the time period after the right has matured. Under all of the case law, CalPERS owes interest when it delays paying a matured benefit.

L. Lacks Consistency: Retroactive

CalPERS seeks to apply the proposed regulation retroactively to pending class-wide claims, and to do so even before the regulation is adopted. This in itself would be contrary to law. "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective....." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 268-69, 114 S.Ct. 1483, 1499, 128 L.Ed.2d 229.) Under the Due Process Clause of the 14th Amendment of the Federal Constitution and California Constitution and state property law, retroactive legislation is invalid if it impairs property rights. (*In Re Marriage of Buol* (1985) 39 Cal.3d 751.) The regulation says nothing about retroactive

application. If it is applied prospectively, then it should have no effect whatsoever on the existing putative class claims at least up to the time of enactment.

M. Lacks Consistency: Inconsistent with Civil Code Interest Provision

Regulation 555.5 is inconsistent with *Civil Code* Interest provision that already apply:

- Regulation 555.5 only covers claims within 3 years of the date they received the principal or lump-sum payment on which they claim interest. In the *Kesterson et al* matter, class representatives, however, filed Government Claims on July 10, 2010, covering claims going back nearly four years to July 10, 2009 (and possibly, longer, if Plaintiffs' delayed accrual claim is upheld). Regulation 555.5 could outright bar the claims of as much as 25% or more of the putative class.
- Regulation 555.5 only covers potential interest payments to members and beneficiaries. It would bar interest paid to individuals who are told they can establish membership, make contributions, and later have the decision revoked by CalPERS and the money returned months or years later (e.g. Plaintiff Walter) or to individuals seeking interest on wrongly withheld reimbursements under CalPERS-run medical insurance plans (e.g. Plaintiff Heinz.)
- Regulation 555.5 creates an additional "reasonable administrative processing time" that suspends and delays the date when the obligation is due to be paid. However, *Olson et al* hold says "amounts recoverable as wrongfully withheld payments of salary or pensions are damages within the meaning of [*Civ. Code* §3287(a)]" and "[i]nterest is recoverable on each salary or pension payment *from the date it fell due*. (*Olson, supra*, at 402, emphasis added.)

- Regulation 555.5 grants CalPERS an undefined "processing time" to (i) review and verify information CalPERS should already have, or (ii) to get information it should already have had. (*Gov. Code* §20221, §20225.)
- Regulation 555.5 says, "no interest shall accrue during the time it takes to make ... final eligibility determinations" and uses publicly available pay schedules (*CCR*, §570.5) as an example, ignoring that pay schedules apply to service retirement.
- Even after all these delays, Regulation 555.5 then grants CalPERS an *additional* 90 days before it has to request a payment warrant or be subject to paying interest.

IX. Unconstitutional

A. Regulation Impairs Contract Rights and Impairs Vested Rights, Retroactive

The right to retirement benefits vests when an employee acquires an irrevocable interest in a fund created by the employee's contributions, or the contributions of the employer, or both. The vesting of retirement benefits must be distinguished from the maturing of the benefits.

Maturing occurs only after the conditions precedent to payment of the benefits have taken place or are within the employee's control. (*In re Marriage of Fithian, supra.*)

A retrospective or retroactive statute is one that operates on matters that occurred, or on rights, obligations, and conditions that existed, before the time of its enactment (*Aetna Cas. & Sur. Co. v. Industrial Acc. Commission*, 30 Cal. 2d 388, 182 P.2d 159 (1947), giving them an effect different from that which they had under the previously existing law (*Bear Val. Mut. Water Co. v. San Bernardino County* (1966) 242 Cal.App.2d 68; 13 Cal. Jur. 3d, *Constitutional Law*, §388.)

Here the regulation works to delay the date of maturity of the payment, retroactively, to a date after CalPERS chooses to review the information. When the maturity of the pension

payment is delayed, including so that no interest is owed, the pension rights are impaired unconstitutionally under both under the "impairment of contract" and impairment of a vested right.

The regulation is retroactive in effect, as it seeks to address interest payable within the last three years, and CalPERS has sought a stay of the pending class action in order to apply the regulation against the named class representative and the proposed class members.

A retrospective law is invalid, however, if it conflicts with constitutional protections, such as impairs the *obligation of a contract* or (c) deprives a person of a *vested right* or substantially impairs that right, thereby denying *due process*. (*Roberts v. Wehmeyer* (1923) 191 Cal. 601, 612.)

B. Regulation Impairs Obligation of Contract

Pensions are protected under the contract clause. Public employment gives rise to certain obligations, including pension rights, which are protected by the contract clauses of the United States and California Constitutions. (*California Ass'n of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371 [referring to *Cal. Const. Art. I, § 9* and *U.S. Const. Art. I, § 10*].) Thus, public employees' retirement rights are contractual and are vested in the sense that the lawmakers' power to alter them after they have been earned is quite limited. (*California Ass'n of Professional Scientists v. Schwarzenegger, supra; In re Retirement Cases, supra.*) By entering public service, an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer. (49 Cal. Jur. 3d, *Pensions and Retirement Systems*, §23.)

A public employee who serves under a pension or retirement law acquires a vested contractual right to a substantial pension, which arises before the happening of the contingency

that makes the pension payable; the right vests on acceptance of the employment. (*Pearson v. Los Angeles County, supra; Wallace v. City of Fresno, supra; Kern v. City of Long Beach, supra;* 49 Cal. Jur. 3d, *Pensions and Retirement Systems*, §24.)

Both the federal and state constitutions prohibit legislation that impairs the obligation of a contract. The state constitution declares that a law impairing the obligation of contracts may not be passed. (*Cal. Const., art. I, § 9.*) and the Federal Constitution similarly provides that no state may pass any law impairing the obligation of contracts. (*U.S. Const. Art. I, § 10, cl. 1.*) The clause of the United States Constitution prohibiting the impairment of contracts is, by its terms, a limitation on the states and not on Congress. (*Thorpe v. Housing Authority of City of Durham* (1969) 393 U.S. 268, 89 S. Ct. 518, 21 L. Ed. 2d 474 (1969); 13 Cal. Jur. 3d, *Constitutional Law*, §395.)

Strict scrutiny is the standard for reviewing public contract impairments, requiring the state to show a compelling interest for the impairment.

C. Claims Are Vested

'[A] right is vested when it has been so far perfected that it cannot be taken away by statute.' (See *Hochman: The Supreme Court and the Constitutionality of Retroactive Legislation* (1960), 73 Harvard Law Review 692, 696, 698.) It is said in *Miller v. McKenna*, 23 Cal.2d 774, 783, 147 P.2d 531, 536: [A] vested right, as that term is used in relation to constitutional guaranties, implies an interest which it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice. The question of what constitutes such a right is confided to the courts.' (*Flournoy v. State* (1964) 230 Cal.App.2d 520, 531.)

Plaintiffs' case and claims in *Kesterson, et al* have already survived CalPERS' demurrer,

so the case is properly before the Superior Court.

The courts have addressed unconstitutional statutes many times: a retroactive statute purporting to command a mandatory dismissal of action pending five years (*Code Civ.Proc.*, §583) could not constitutionally be applied to cut off a statutory tax refund action. Also in *Wexler v. City of Los Angeles* (1952), 110 Cal.App.2d 740, (hearing by Supreme Court denied), a wrongful death action brought under the Public Liability Act (and therefore doubly dependent upon statute), it was held that a statutory amendment requiring that the natural father, although divorced, be joined as a plaintiff to a wrongful death action could not apply to a cause of action accrued when the statute was enacted since 'it is not within the power of the Legislature to impair such vested right'—that such would be a violation of due process. (*Flournoy v. State, supra.*)

D. Removal of All Remedies for Class Members

The severity of the impairment of contract measures the height of the hurdle that the challenged state legislation must clear to withstand a constitutional challenge. *Hall v. Butte Home Health, Inc.*, 60 Cal. App. 4th 308, 70 Cal. Rptr. 2d 246 (3d Dist. 1997).

The removal of all, or substantially all, of an individual's remedies for enforcing a right would have the same practical effect as destroying the right itself. 'Remedies are the life of rights.' (See Bryant Smith, op. cit. p. 242, quoting Justice Bradley in *Campbell v. Holt*, 115 U.S. 620, 631, 6 S.Ct. 209, 29 L.Ed. 483.) *Flournoy v. State*, 230 Cal. App. 2d 520, 533, 41 Cal. Rptr. 190, 198 (Ct. App. 1964).

Here, the Regulation destroys the proposed class members' remedies in the Kesterson et al. class action.

X. Procedurally, Proposed Regulation 555.5 is Inconsistent with Class Action Law under Code of Civil Procedure Section 382 and *Rose v. City of Hayward*

A. Background of Inconsistency About Class Claims

As it attempts to change the law regarding class actions against CalPERS, the proposed regulation 555.5 is unnecessary, lacks authority, clarity, consistency, reference and nonduplication.

B. CalPERS' Administrative Process Cannot Adjudicate Class Actions (see *infra*)

CalPERS cannot administratively adjudicate class actions. (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926.) *Rose* explains in detail that the Administrative Procedures Act ("APA", *Government Code*, §§13400, *et seq.*), violates due process for unrepresented parties. *Rose* has been cited favorably as to allow class actions against retirement boards, including in the consolidation of 8 class actions against 20 retirement boards operating under the CERL. (*In re Retirement Cases, supra.*)

C. No Authority to Limit Effect of Code of Civil Procedure, Section 382; CalPERS Cannot by Regulation Limit Class Actions Against It

CalPERS does not have authority to exempt itself from the Code of Civil Procedure 382 especially by regulation.

D. Class Claims Are Legitimate

The procedural status of class actions under the *Code of Civil Procedure* and the subject matter of the *Civil Code* interest controversy lies outside the administrative agency's jurisdiction, or, when the administrative agency cannot grant an adequate remedy, exhaustion is not required. (*Lopez v. Civil Service Com., supra*, at 312.)

CalPERS creation of the proposed regulation cannot convert a class action for Civil Code interest damages claim into an individual administrative matter (especially for the purposes of trying to defeat recovery to a "Class") because the regulation is expressly inconsistent with the *Civil Code* provisions and the *Code of Civil Procedure* provisions, over which CalPERS has no jurisdiction.

In addition, as far as the proposed regulation being an attempt to change the law to prevent class actions against CalPERS, the regulation is inconsistent with existing case law interpreting *Code of Civil Procedure* 382.

Specifically, in *Rose v. City of Hayward*, the courts have held that CalPERS cannot provide class wide relief administratively and that plaintiffs need not have exhausted their administrative remedies because the PERS system of remedial administrative relief "clearly contemplate[d] *individualized* treatment of claims for retirement benefits rather than class actions." (*Rose v. City of Hayward, supra*, at 935, emphasis added.)

Unrepresented parties are still not allowed to benefit under CalPERS administrative process. CalPERS has no duty to search out or find parties who may benefit. (*Govt. Code*, §§21553-54, 21631, *et seq.*, 21691.)

Plaintiffs and the unrepresented parties' claims are exempt from CalPERS administrative process. For that dispositive proposition, *Rose v. City of Hayward* remains binding precedent that this Court must follow.

XI. Class Action Litigation

A. Factual Background

On March 8, 2013, a proposed class filed a lawsuit entitled Kesterson et al v. CalPERS seeking interest on late paid funds held by CalPERS. In discovery, CalPERS admits (1) delaying

payment of benefits "after they have accrued" and (2) "generally" not paying interest. (RFAs, pp 4-14.)

On June 25, 2015, Plaintiffs Mary Kesterson ("Kesterson"), the Honorable Marcel Poché, retired, ("Poché"), Michael Gilmore ("Gilmore"), The Estate of Robert Seymore ("Seymore"), Gerald Dominguez ("Dominguez"), Jeffrey Walter ("Walter"), Brad Heinz ("Heinz"), and James Steed ("Steed"), (collectively "Plaintiffs") filed a motion for the certification of the plaintiff class of CalPERS members, beneficiaries and other individuals (hereafter collectively "participants") who seek the payment of **interest** on funds, monies, benefits, or contributions (hereafter "funds") that are or were on deposit with, administered by, held by, delayed, or wrongfully withheld (hereafter "held") by the California Public Employees' Retirement System, the CalPERS Board of Administration, or CalPERS administered systems¹² (collectively "CalPERS").

B. Legal Background of Class Action

The common legal issue is that interest is generally required when pensions, benefits, or other payments are withheld or untimely paid. "Amounts recoverable as wrongfully withheld payments of salary or pensions are damages within the meaning" of *Civil Code* section 3287(a). (*Olson v. Cory, supra* (1983) 35 Cal.3d 390, 402 [judges and judicial pensioners sought interest on salary and pension increases untimely paid].) The *Civil Code* provides the highest damages.

The legal and factual scenario shared by all class members is that (i) each individual acquired vested and fully matured rights to payments in determinable amounts from CalPERS that fell due on specific dates, however (ii) CalPERS failed to pay the funds when the obligation fell due. (iii) CalPERS acknowledged owing the funds, and made lump sum payments or

¹² CalPERS administers the Judges' Retirement Systems (JRSI and JRSII), the now-closed Legislators' Retirement System (LRS), medical and health benefit reimbursement funds (PERSCare and other PPO or self-funded "insurance"), and other funds.

refunds. However, (iv) CalPERS failed to pay interest on the withheld, held, or delayed funds.

Factually, it is undisputed that CalPERS delayed payment. CalPERS admits that it "sometimes causes payment" of service and disability benefits "to be made after the right to payment of those benefits has accrued". (RFAs, pg. 5-15.) It is undisputed that CalPERS withheld funds and later paid aggregated amounts (or refunds). It is undisputed that the funds were owed as CalPERS has already paid them. CalPERS admits that it makes "lump sum payments to members 'for all service or disability benefits' due members that have not previously been paid." (*Ibid.*) It is undisputed that CalPERS did not pay interest. CalPERS admits that it "generally does not pay interest on those lump sum payments." (*Ibid.*)

CalPERS had fiduciary, statutory, and other duties to timely acquire information and to administer the system to promptly pay benefits and related services to participants. CalPERS earns significant investment returns on the Plaintiffs' monies that CalPERS holds.

The proposed class consists of in excess of 100,000 individuals with funds held by CalPERS at any time since July 12, 2011, one year prior to the filing of claims with the Victims Compensation and Government Claims Board. (*Motion For Class Certification*, Exhibits 9, 10 and 11; *Jensen Decl.*, ¶90-93.) Plaintiffs assert delayed accrual.¹³

Plaintiffs also seeks to certify a subclass of individuals¹⁴ who are entitled to payment of an additional "penalty interest" benefit under *Government Code* section 21499.¹⁵

¹³ The discovery rule indefinitely delays accrual of a cause of action until the plaintiff discovers or reasonably has cause to discover the facts constituting it. (*Samuels v. Mix* (1999) 22 Cal.4th 1.) Plaintiffs reserve the right to assert delayed accrual to expand the term and scope of 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.

¹⁴ 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.

C. **Regulation is Inconsistent with Code of Civil Procedure 382.**

All Proposed Class Members Are Subject to CalPERS' Common Policy and Practice to Fail to Pay Interest on Withheld, Held, or Delayed Payments. All proposed class members suffer from CalPERS common practice of paying or refunding funds late and without adding interest. (*Motion For Class Certification, Jensen Decl.* ¶5-7, 8.) The below are organized by type of benefit but they are all in the same class.

i. **Death Benefits** – Individuals with matured death benefits that CalPERS paid late and without interest are members of the class. Mary Kesterson is a representative example. Mrs. Kesterson's husband was a retired member of CalPERS. (*Motion For Certification, Corrected Second Decl.*, pg. 2:14-15.) Her husband died in September 2011 and the benefit matured. (*Ibid.*) By October 14, 2011, Kesterson had informed CalPERS and filed all information necessary to pay the death benefits and survivor continuance. (*Id.*, pg. 2:15-17.) However, CalPERS did not pay Kesterson anything for six months until April 16, 2012. (*Id.*, pg. 2:18:20.) CalPERS did not pay interest. (*Id.*, pg. 2:21-23.) CalPERS also owes a correct "penalty interest" benefit under *Government Code* section 21499 in addition to *Civil Code* interest. (*Id.*, pg. 2:24:28.) CalPERS generally does not pay interest on late death benefits. (*Motion For Certification, Jensen Decl.*, ¶¶31, 36, 81-85.)

ii. **IDR and Ordinary Disability** – All individuals with matured disability benefits that CalPERS paid late and without interest are in the class. Gerald Dominguez

¹⁵ As set forth below, the class definition in the *Complaint* includes all participants with funds on deposit. In the event the Court concludes that these individuals are not similarly situated and commonly affected by defendant's practices, Plaintiffs request the right to bring a motion for leave file a to a Second Amended Complaint, including to clarify the included class members.

and Brad Heinz are representative examples. Mr. Dominguez was approved for IDR on or about December 6, 2012, effective August 6, 2012. (*Motion For Certification, Dominguez Decl.*, pg. 2:22-23.) CalPERS failed to pay him the disability until April 1, 2013. (*Id.*, pg 2:27-28.) CalPERS paid Dominguez a lump sum of \$55,000 of which \$35,000 was repaid to the employer. (*Id.*, pg. 2:27-3:3.) CalPERS did not pay interest. (*Id.*, pg. 5:7.)

CalPERS approved Plaintiff Brad Heinz for "ordinary disability" on April 25, 2013. (*Motion For Certification, Heinz Decl.*, pg. 3:22-4:6.) CalPERS failed to pay Heinz the disability until November 1, 2013. (*Id.*, pg. 4:6-5:17.) CalPERS underpaid \$1,730.70 each month from May 2013 to November 2013. (*Ibid.*) CalPERS owes interest on the \$1,730.70 each month from the date it fell due. (*Ibid.*) For a description of the methodology to calculate interest, see *Motion For Certification, Exhibit 7*. Regarding disability benefits, CalPERS admits that it delays, accumulates, holds, or underpays disability benefits or causes the "disability retirement benefits to be made after the right to payment of those benefits has accrued". (RFAs, no. 8, pg. 8:16-17.) CalPERS admits that it accumulates and makes lump sum payments of the delayed held or underpaid disability benefits for benefits "that have not previously been paid". (RFAs, no. 9, pg. 9:21-22.) CalPERS admits that it "generally does not pay interest" on lump sum payment of disability benefits. (RFAs, No. 10, pg. 10:22-23.)

iii. Refunds – All individuals that had refunds paid late by CalPERS without interest are members of the class. CalPERS admits that it generally does not pay interest on the funds that it returns to members. (RFAs, no. 11, pg. 11:19-20.) Retired Appellate Justice Marcel Poché, City Attorney Jeff Walter, and Brad Heinz are representative

examples. CalPERS/JRS wrongly withheld 8% of Judge Poché's salary as sitting judge from June 2002 to August 2014. (*Motion For Certification, Poché Decl.*, pg. 2:2-3:17.) CalPERS/JRS wrongly withheld \$133,573.26. (*Id.*, pg. 2:15-21.) CalPERS/JRS failed to refund the money until December 2014. (*Id.*, pg. 2:17-18.) When it refunded the \$133,573.26, CalPERS/JRS did not pay interest. (*Id.*, pg. 2:18-21.)

CalPERS determined that Mr. Walter was entitled to purchase 27.1 years of service credit as City Attorney for the City of Cotati. (*Motion For Certification, Walter Decl.*, pg. 2:7-12.) Walter deposited \$469,005.25 with CalPERS on July 2008. (*Ibid.*) In June 2009, CalPERS changed its determination and denied the benefit. (*Id.*, pg. 2:13-14.) Three and a half years after deposit, on December 22, 2011, CalPERS returned \$469,005.25 in Walter's funds to Walter without interest. (*Id.*, pg. 2:16-17.) CalPERS did not pay interest. (*Ibid.*)

Mr. Heinz was entitled to timely reimbursement of health expenses from CalPERS. (*Motion For Certification, Heinz Decl.*, pg. 2:22-3:20.) However, CalPERS delayed paying reimbursement and failed to accrue or add interest. (*Ibid.*)

iv. Service – All individuals with matured service benefits that CalPERS paid late and without interest are in the class. CalPERS admits a common result and a common practice that it delays, accumulates, holds or underpays service benefits "which sometimes cause payments of service retirement benefit to be made after the right to payment of those benefits has accrued". (RFAs, no. 5, pg. 5:16-17.)

As a representative example, Michael Gilmore was entitled to payment of service benefits on February 1, 2009. (*Motion For Certification, Gilmore Decl.*, pg. 2:22.) With his years of service, Gilmore qualified as service pending disability so his allowance was

calculated on his service allowance with the first fifty percent tax-free when he qualified for IDR. CalPERS initially paid Gilmore \$11,995.22 a month. (*Id.*, pg. 2:22-23.)

CalPERS failed to pay the correct allowance for amount for 39 months until April 1, 2012. (*Id.*, pg. 2:28-3:3.) On April 1, 2012, CalPERS paid Gilmore approximately \$36,000 in retroactive lump sum payment. (*Id.*, pg. 3:3.) CalPERS did not pay interest. (*Id.*, pg. 3:1-5.)

CalPERS admits that it makes lump sum payments to members for all service retirement benefits due to members "that have not previously been paid". (RFAs, no. 6, pg. 6:21-22.) CalPERS admits that CalPERS "generally does not pay interest" with accumulated or lump sum payments. (RFAs, no. 7, pg. 7:22-23.)

v. **Community Property** – All individuals with matured community property that CalPERS paid late and without interest are in the class. CalPERS admits that when CalPERS holds funds during a division of community property, CalPERS generally does not add interest. (RFAs, no. 13, pg. 13:17-21.) For example, CalPERS' community property section withheld \$1,500 a month from James Steed from July 2009 to October 2009 and then another \$1687.62 a month from June 1, 2013 to April 1, 2014 without crediting Mr. Steed interest. (*Motion For Certification, Steed Decl*, pg. 2:18-3:9.)

vi. **Sick Leave, IRC 415(b) and Other Adjustments** – All individuals that had the payment of funds delayed by CalPERS associated with sick leave, vacation pay or other adjustments but were not paid or credited with interest are in the class. CalPERS admits that when CalPERS owes fund or benefits associate with sick leave, vacation pay, adjustment under IRC 415 (b), or other adjustments, CalPERS generally does not pay interest. (RFAs, no. 14, pg. 14:18-20, no. 15, pg. 15:16-19.)

vii. **Subclass Penalty Benefits Under Section 21499.** When CalPERS delays payment of certain benefits more than 45 days after the last document received, CalPERS must pay individuals in a subclass an added "penalty interest" benefit under *Government Code* section 21499 in addition to interest required under the *Civil Code*. Individual not paid interest and Section 21499 "penalty" benefits form a subclass. CalPERS often fails to pay either or incorrectly calculates the penalty benefit, using the incorrect rate and time period. (*Motion For Certification, Corrected Second Decl. of Kesterson*, pg. 2:24-28.) In every case where "penalty interest" benefit is paid, CalPERS also owes *Civil Code* interest but has failed to pay it. (*Motion For Certification, Exhibit 12; Jensen Decl.*, ¶ 8, 31, 40-43, 81-85.)

viii. **"System Delay" and Other Delays by CalPERS** – Although the scope of CalPERS' delay, obligation to timely pay, and its failure to pay interest is in sharp debate, CalPERS admits in its *Revised Initial Statement of Reasons for Regulation 555.5* that "from time to time benefits are underpaid due to a system delay". (*Motion For Certification, Exhibit 4*, pg. 1.) It is CalPERS' current practice to pay no interest on those delays. (*Id.*, pg. 1-8.)

XII. All Requirements for Class Certification Are Met

Class certification is authorized when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it impracticable to bring them all before the court." (*Code of Civ. Proc.*, §382.) Certification is appropriate when the party seeking certification has demonstrated the existence of an ascertainable class and a well-defined community of interest among the class members. (*Richmond*, 29 Cal.3d at 470 see also *Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 704.)

Ascertainability issues concern (1) the class definition, (2) the size of the class, and (3) the means of identifying class members. (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) The existence of a community of interest turns on whether common questions of law and fact are sufficiently pervasive to permit adjudication in a class action rather than in a multiplicity of separate mini-trials. This requirement is satisfied if (1) there are predominant questions of law or fact common to the class, (2) the plaintiffs' claims are typical of those of the class, and (3) the plaintiff is an adequate representative. (*Richmond v. Dart Indus.* (1981) 29 Cal. 3d 462, 470.)

Courts have repeatedly certified classes requesting interest under *Civil Code* section 3287 regarding pension benefits or other statutory claims. (See *Olson v. Cory, supra*; *Weber, supra*.)

Although *Code of Civil Procedure* section 382 does not provide a procedural framework to determine class certification, *Civil Code* section 1750, *et seq.* ("CLRA") does: "(b) The court **shall** permit the suit to be maintained on behalf of all members of the Represented class if all of the following conditions exist: (1) It is impracticable to bring all members of the class before the court; (2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members; (3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class; (4) The representative plaintiffs will fairly and adequately protect the interests of the class. (*Civ. Code*, §1881(b), emphasis added; see also *Civil Serv. Employees Ins. Co. v. Superior Court* (1978) 22 Cal. 3d 362, 376; *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 820.)

Class certification merely presents a procedural question that is not conditional upon a showing that the class claims are likely to succeed on the merits. (*Linder v. Thrifty Oil. Co.* (2002) 23 Cal. 4th 429, 439-40.) Because California public policy strongly encourages use of the

class action device, any doubts about whether to certify a class should be resolved in favor of certification. (*Richmond, supra*, at 473-75; *La Sala, supra*, at 883; *Vasques, supra*, at 807.)

A. The Proposed Class is Ascertainable

Plaintiff seeks certification of the following class:

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

The above defined class includes but is not limited to 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 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 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 not enrolled in CalPERS 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 who received lump sum or accumulated funds, benefits, return of contributions, or other 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 have earned a vested right to funds, benefits, allowances, credits, or payments

from CalPERS, where interest is owed, but CalPERS failed to timely pay the funds and does not add or pay an increase or addition for interest.

The above-defined class includes but is not limited to participants to whom CalPERS failed to timely pay funds, or delayed payments in excess of 45 days, making CalPERS liable for "penalties", including pursuant to *Government Code* section 21499. (*Motion For Certification*, pg. 28:22-30:5.)

Plaintiff also seeks certification of the following subclass:

The above-defined class includes but is not limited to participants to whom CalPERS failed to timely pay funds, or delayed payments in excess of 45 days, making CalPERS liable for "penalties", including pursuant to *Government Code* section 21499. (*Motion For Certification*, pg. 30:1-5.)

These definitions, along with CalPERS' records, precisely and objectively identify class members, so that each may receive individual notice of this action. "Class members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal.App. 3d 926, 932.) Here, the members of the proposed class are easily and readily ascertainable from CalPERS records.

B. Plaintiffs Satisfy the Community of Interest Requirement

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. (*Motion For Certification Jensen Decl.*, ¶ 73-78.)

C. Central Issues of Law and Fact Common to All Class Members Predominate Over Individual Issues

The "common questions" requirement asks whether the issues which may be jointly tried, "are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and the litigants." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.) Thus, class certification should be granted where:

[T]he issues which [are] common among the class members would be the principal issues in any individual action, both in terms of time to be expended on their proof and of their importance, and that if a class suit were not permitted, a multiplicity of legal actions dealing with identical basic issues would be required in order to permit recovery by each [class member].
(*Vasquez, supra*, at 810.)

Common factual and legal issues¹⁶ predominate in this action because CalPERS' uniform admitted practices of improperly denying interest, under *Civil Code* 3287 or other law, on the payment of withheld or held funds or other matured rights are discrete and common to all. (*Motion For Class Certification, Corrected Second Kesterson Decl.*, pg. 2:4-3:5; *Poché Decl.*, 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; *Heinz Decl.*, pg. 5:21-6:6; and *Steed Decl.*, pg. 3:10-22.)

To the extent any individual questions exist they concern the amount of interest, **not** liability. (*Motion For Class Certification, Jensen Decl.*, ¶ 94.) Differing amounts of damages¹⁷ do **not** preclude class certification. (*Employment Dev. Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266.)

¹⁶ Predominance does not require that each and every issue be identical for each and every class member. (*Collins v. Rocha, supra*, at 238.) Class certification is appropriate even if certain members of the class were not injured. (*Rosack v. Volvo of Am. Corp.* (1982) 131 Cal.App.3d 741, 753-54.)

¹⁷ 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.)

CalPERS' irrelevant arguments focus on the time leading up to maturity and ignore the law about maturation. CalPERS' legal arguments are defeated by *Civil Code* section 3287(a) and the *Olson v. Cory* and *Flethez* case law.

The need to calculate damages in a remedial phase does not prevent the certification. Once liability is established, the Court can easily fashion a common, mathematically precise methodology to calculate interest owed administratively using data largely supplied from CalPERS' records, database, and information. (See Calculation Methodology, *Motion For Certification, Exhibit 7; Jensen Decl.*, ¶ 10, 12, 17, 88.) CalPERS should have all of the necessary information in its own database or those of the employers about dates, amounts, payments, and funds of each class member. CalPERS *already* produced spreadsheets that pulled the key elements of this data for thousands of putative class members. (*Motion For Certification, Exhibits 9, 10 and 11.*) Since CalPERS has fiduciary duties to maintain complete records, if specific information is incomplete, then information can be estimated with an inference from the known data to shift the burden to CalPERS to disprove the amounts claimed. (See *Hernandez v. Mendoza* (1988)199 Cal.App.3d 721, 727.) In any event, the appropriate method to determine class members' damages "need not be resolved until the class-wide issues have been determined." (*B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1354.)

The issue on class certification is whether issues predominant sufficiently to make class treatment the preferred method. (See *Rose v. Hayward, supra*, at 922.) In assessing commonality, class members' claims or circumstances do not have to be identical. (*Los Angeles Fire & Police Protective League v. City of Los Angeles* (1972) 23 Cal.App.3d 67, 73-74 in overtime wage class action, the fact that there were 19 different subgroups of employees did not preclude finding that

common issues predominated].)¹⁸

This case involves the narrowly defined legal issue of whether interest is payable as applied to several narrow, well-defined factual scenarios and a defined group of participants with records and information maintained, available, or ascertainable from the mostly computerized records of CalPERS. Numerous facts are common to each plaintiff. (*Motion For Class Certification, Corrected Second Kesterson Decl.*, pg. 2:4-3:5; *Poché Decl.*, 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; *Heinz Decl.*, pg. 5:21-6:6; and *Steed Decl.*, pg. 3:10-22.)

Both an ascertainable class and a well-defined community of interest among the class members exists sufficiently to certify the proposed class and subclass.

D. Plaintiffs' Claims Are Typical of Those of the Putative Class Members

To satisfy the typicality requirement, California law requires that a named plaintiff's interest and claim in the action be significantly similar" to that of the other class members. (See *Daniels v. Centennial Group, Inc.* (1993) 16 Cal.App.4th 467, 473; *B.W.I., supra*, at 1347.)¹⁹ Each of the representative Plaintiffs' claim is typical as it arises from the same event, practice, or course of conduct that gives rise to the claims of other class members on the same legal theory. (*Motion For Class Certification, Corrected Second Kesterson Decl.*, pg. 2:4-3:5; *Poché Decl.*, 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; *Heinz Decl.*, pg. 5:21-6:6; and *Steed Decl.*, pg. 3:10-22.) In asserting their own claims, Plaintiffs will necessarily establish the elements of the claims of other members.

¹⁸ A common nucleus of operative fact is usually enough to satisfy the commonality requirement." (*Rosario v. Livaditis* (7th Cir. 1992) 963 F.2d 1013, 1017-1018.)

¹⁹ The typicality requirement concerns the proposed representative's claims as they relate to the defendants' conduct and activities. (*Classen v. Weller* (1983) 145 Cal.App. 3d 27, 46.)

Each of the named Plaintiffs does "not have a conflict of interest antagonistic to the other class members. (*McGhee v. Bank of Am.* (1976) 60 Cal.App. 3d 442, 450; *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46.) (*Motion For Class Certification, Corrected Second Kesterson Decl.*, pg. 2:4-3:5; *Poché Decl.*, 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; *Heinz Decl.*, pg. 5:21-6:6; and *Steed Decl.*, pg. 3:10-22.)

E. Plaintiffs Will Fairly and Adequately Represent the Class

"Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are no antagonistic to the interest of the class." (*McGhee v. Bank of Am.*, *supra*, at 450.) Both requirements are met here. Plaintiffs' counsel is experienced in pension related litigation, has prior class action litigation experience, and well qualified to prosecute this action. (*Motion For Certification, Jensen Decl.*, ¶ 73-78, 95-97.)

Additionally, each Plaintiff has no conflicts with the class. (*Motion For Class Certification, Corrected Second Kesterson Decl.*, pg. 2:4-3:5; *Poché Decl.*, 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; *Heinz Decl.*, pg. 5:21-6:6; and *Steed Decl.*, pg. 3:10-22.) Each Plaintiff has a strong interest in establishing liability and obtaining reimbursement from defendants.²⁰ (*Richmond, supra*, at 471-76.) Plaintiffs are able and willing to prosecute these cases and to protect the interest of the class. (*Motion For Class Certification, Corrected Second Kesterson Decl.*, pg. 2:4-3:5; *Poché Decl.*,

²⁰ 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 situation or interest among class members...should not bar suit." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App. 4th 224, 238 (citations omitted).

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; *Heinz Decl.*, pg. 5:21-6:6; and *Steed Decl.*, pg. 3:10-22.)

F. The Proposed Class Is So Numerous That Joining All Would Be Impracticable

The proposed class is estimated to consist of more than 100,000 class members. (*Motion For Certification, Exhibits 9, 10 and 11; Jensen Decl.*, ¶ 34, 90-93.) It is therefore sufficiently numerous that it would be impracticable to bring them all before this Court. (*Rose v. City of Haywood, supra*, at 934.)

All of the requirements are met for certification. The relative resources available to litigate an individual action against the wealthy CalPERS are grossly disparate. Class treatment of Plaintiffs' claims is substantially beneficial to the litigants and the Court.

G. Subsequent Remedial Legislation, Settlement or Action Does Not Moot Class Claims

An action brought on behalf of a class does not become moot, despite the loss of a "personal stake" in the merits of the litigation by a proposed class representative. (*U.S. Parole Comm'n v. Geraghty* (1980) 445 U.S. 388, 400.)

By attributing a legal status in the case or controversy to unnamed class members apart from that of the class representative, *id.* at 399 & n. 8, 95 S.Ct. 553, *Sosna* suggests that in a proposed class action the non-named class members have an unyielding interest that could precede the moment of class certification—the premise appearing to be that any live Article III interest a class may or may not have in a case is or is not present from its inception. The Court explained:

There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend

upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Id. at 399–402 & n. 11, 95 S.Ct. 553. *Sosna* is not dispositive of this case because it concerned a certified class; however, *Sosna* apparently acknowledges that the personal stake of the indivisible class may inhere prior to a definitive ruling on class certification.

Shortly after *Sosna*, the Court extended its rationale to the pre-certification context in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). In *Gerstein*, plaintiffs challenged a Florida statute permitting pretrial detention by information without a preliminary determination of probable cause. *Id.* at 105–07, 95 S.Ct. 854. It was unclear from the record whether the plaintiffs' pretrial detention had terminated while the certification motion was pending. *Id.* at 111 n. 11, 95 S.Ct. 854. However, the Court did not dismiss the case as moot, reasoning that "it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted," and, therefore, the Court determined, plaintiffs' claims were within the exception articulated in *Sosna* regardless of their status at the moment of certification. *Id.* at 110 n. 11, 95 S.Ct. 854.

Since *Sosna* and *Gerstein*, the Court has further elaborated on the scope of the class action exception to mootness. In the same day, the Court held that an offer of judgment to a named plaintiff made while a certification motion is pending will not moot the action, *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980), and that a named plaintiff released from prison while a certification motion is pending may appeal a denial of class certification despite the mootness of his individual claim, *1246 U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). A comparison of *Roper* and *Geraghty* highlights the emerging rule.

In *Roper*, a proposed class of credit card holders brought suit challenging certain finance charges as usurious. The district court denied class certification, and the bank tendered to each named plaintiff the maximum amount that each could have recovered, including interest and costs. 445 U.S. at 329–30, 100 S.Ct. 1166. The plaintiffs declined to accept the tender and made a counteroffer of judgment, attempting to reserve the right to appeal the adverse class certification ruling. The bank declined the counteroffer. *Id.* Nevertheless, the district court entered judgment in the plaintiffs' favor based upon the defendants' offer of judgment, over plaintiffs' objection, and dismissed the action. *Id.*

The Supreme Court held that the named plaintiffs could appeal the denial of class certification. In determining whether there still existed a justiciable case or controversy, the *Roper* Court relied on the costs spreading functions of Rule 23 and the named plaintiffs' continued interest in the procedural rights appurtenant to representing a class—for example, the interest in sharing attorney expenses with the class—to determine that a putative class representative retains an individual

interest in appealing the denial of class certification. *Id.* at 338 n. 9, 100 S.Ct. 1166. Also determinative in this holding was the plaintiffs' rejection of the settlement offer. The court advised, "The factual context in which this question arises is important. At no time did the named plaintiffs accept the tender in settlement of the case; instead, judgment was entered in their favor by the court without their consent and the case was dismissed over their continued objections. Neither the rejected tender nor the dismissal of the action over plaintiffs' objections mooted the plaintiffs' claim on the merits so long as they retained an economic interest in class certification." *Id.* at 332–33, 100 S.Ct. 1166.

(*Lucero v. Bureau of Collection Recovery, Inc.*, supra, at 1245-46.)

Additionally, a long line of cases establish the principal that reform in the face of litigation does not render a class action case moot.

XIII. Proposed Regulation 555.5 Fails to Satisfy the Requirements of Government Code

Section 11349

A. Lacks Reference

The regulation is without "reference" means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation. (*Gov't Code*, §11349.) The necessity standard, on the other hand, requires demonstration that the record contains "substantial evidence [of] the need for a regulation to effectuate the purpose of the statute ... that the regulation implements." (*Id.*, subd. (a); *California Forestry Ass'n v. California Fish & Game Comm'n* (2007) 156 Cal.App.4th 1535, 1553.)

B. Lacks Clarity

The regulation lacks (c) "clarity" means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them. (*Gov't Code*, §11349.)

C. Is Duplicative

The regulation fails to be "nonduplicative." (*Gov't Code*, §11349.) "Nonduplication" means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation, which is overlapped or duplicated by the proposed regulation, and justify any overlap or duplication. This standard is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity standard in paragraph (3) of subdivision (a) of Section 11349.1. This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation. (*Gov't Code*, §11349.)

The nonduplication standard requires identification of "any state or federal statute or regulation" to check for "overlap[] or duplicat[ion] by the proposed regulation." (*Govt. Code*, §11349, subd. (f); *California Forestry Ass'n v. California Fish & Game Comm'n, supra.*)

D. Duplicative No Need For a Specific Interest Regulation

As noted earlier, the courts have previously rejected arguments similar to CalPERS' arguments about the alleged need for a regulation governing payment of interest to cover the claims made by Plaintiffs. The *Austin* court found that such a regulation or provision for interest "... would be redundant, as the Legislature provided elsewhere, and generally, in *Civil Code section 3287* [], for the recovery of interest from a debtor..." (*Austin v. Bd. of Ret.* (1989) 209 Cal.App.3d 1528, 1532, cited with approval in *Goldfarb v. Civil Serv. Com.* (1990) 225 Cal.App.3d 633, 637.)

In *Olson v. Cory*, the court found that it would be anomalous to hold that legislation voluntarily promulgated by the debtor itself constitutes a "law" by which the debtor is "prevented" from fulfilling its overriding obligations. (*Olson v. Cory, supra*, at 404.)

E. Duplicative No Need For a Class Limitation Exemption Against CalPERS

As noted earlier, the courts have previously rejected arguments similar to CalPERS arguments against class treatment of benefits claims in *Rose v City of Hayward*.,

In *Olson v. Cory*, the court found that it would be anomalous to hold that legislation voluntarily promulgated by the debtor itself constitutes a "law" by which the debtor is "prevented" from fulfilling its overriding obligations. (*Olson v. Cory, supra*, at 404.)

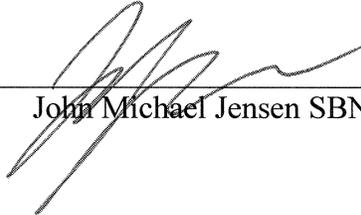
XIV. Conclusion

Based on the foregoing, the regulation is inappropriate.

Respectfully submitted,

Dated: June 19, 2015

By: _____


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